VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP382/2015

CATCHWORDS

RETAIL TENANCIES: Sections 52 and 54 of the *Retail Tenancies Act 2003;* Capital costs – defined; Reimbursement of outgoings paid by landlord - whether GST payable by tenant on invoices remitted by the landlord – application of GST Act – *Goods and Services Tax Determination GSTD 2000/10*; Interest – whether interest on arrears payable.

APPLICANTS	Atlantis Investing Pty Ltd (ACN 112 050 521)
RESPONDENT	Pami Investments Pty Ltd (ACN 005 243 925)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	10 November 2015
LAST DATE FOR FILING WRITTEN SUBMISSIONS	1 December 2015
DATE OF ORDER	4 December 2015
CITATION	Atlantis Investing Pty Ltd v Pami Investments Pty Ltd (Building and Property) [2015] VCAT 1926

ORDER

1. By consent, the Respondent must prepare all future invoices rendered to the Applicant in respect of rent and outgoings in a form which substantially accords with the principles and disclosure requirements of applicable accounting standards (in force from time to time) made by the *Australian Accounting Standards Board.*
2. By consent, the Respondent must attach to all invoices rendered to the Applicant, copies of any supply invoice from which the Respondent seeks reimbursement from the Applicant.
3. I find and declare that the cost of the insurances procured by the Respondent in respect of the period April 2015 to April 2016 are reasonable.
4. I find and declare that the Respondent's obligation to provide a *Robot coupe processor* or similar as part of its installations under the lease between the parties has not been abrogated.

5. The Respondent must pay the Applicant $4,519.77 on the Applicant's claim.

6. Subject to Order 8 of these orders, I find and declare that the amount of outgoings to be paid by the Applicant to the Respondent as at 25 October 2015 was $30,194.10.

7. For the avoidance of any doubt, Order 6 does not take into account any payments made by the Applicant to the Respondent after 25 October 2015.

8. Liberty is given to the Respondent to apply for an order that Order 6 be set aside pending further submissions and/or evidence as to whether the Applicant has paid:

   (a) the first, second and third instalment of municipal rates for the financial year 2013-2014; and

   (b) all of the Respondent's invoice dated 11 November 2013 in respect of a charge made by *South East Water*.

   Such liberty to be exercised on or before **18 December 2015**, by advising the Principal Registrar and the Applicant in writing that the Respondent wishes to exercise its right to contest that the aforementioned payments have been made.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr M Facey, director
For the Respondent	Mr PW Lithgow of counsel

REASONS

INTRODUCTION

1. The Applicant (**'the Tenant'**) conducts and operates a reception centre from premises located in Elsternwick (**'the Premises'**), which it leases from the Respondent (**'the Landlord'**) pursuant to a six year lease commencing on 1 September 2005 (**'the Lease'**). The Lease contains two further terms of six and three years respectively, the first of which was renewed on 1 January 2012.

2. Disputes have arisen between the parties concerning various matters connected with the Premises and each of the parties' respective obligations under the Lease. The disputes were unable to be resolved through mediation conducted under the auspices of the Small Business Commissioner and as a result, proceedings have been issued in this Tribunal by both parties. Initially, the Tenant raised 12 matters in its originating application, under the heading *VCAT Orders Sought*. Some of those matters have now been resolved or discontinued, with the result that the Tenant now only prosecutes five distinct matters. These matters are summarised as follows:

   (a) That the Landlord provides accurate tax invoices which accord with proper accounting practice, substantially in accordance with s 47(5)(a) of the *Retail Leases Act 2003*.

   (b) That the Landlord reimburse the Tenant in respect of the cost to repair air-conditioning and associated equipment paid for by the Tenant in the amount of $3,012.50.

   (c) That the Landlord be ordered to replace a dilapidated section of the southern boundary paling fence of the Premises.

   (d) That the Landlord be ordered to take out building and contents insurance as nominated by the Tenant.

   (e) That the Landlord reimburse the Tenant in respect of compensation which the Landlord received following a theft of certain of the Landlord's installations, being a food processor and meat slicer, in the amount of $8,922.27.

3. The Landlord counterclaims against the Tenant in respect of arrears of outgoings which it alleges amount to $36,752.15, as of 25 October 2015.

THE TENANT'S CLAIM

Issue 1: Tax invoices

4. The Tenant contends that any confusion leading to the Landlord's counterclaim for outgoings in arrears arises partly because it has failed to adequately particularise invoices sent to the Tenant during the tenancy. Mr

Facey, director of the Tenant, submitted that the invoices remitted by the Landlord were confusing and it was difficult to discern whether previous payments had been recognised by the Landlord or not. As a consequence, he accepted that the Tenant may be in arrears but was unable to say to what extent. Consequently, the Tenant seeks an order that the Landlord provide all future invoices in accordance with *the principles and disclosure requirements of applicable accounting standards (in force from time to time) made by the Australian Accounting Standards Board*. The wording of the orders sought mirror s 47 of the *Retail Leases Act 2003* (**'the RLA'**).

5. Although the orders sought by the Tenant relate to each and every invoice to be rendered by the Landlord to the Tenant, rather than a *Statement of Outgoings*, as contemplated under s 47 of the RLA, the Landlord, has, through its counsel Mr Lithgow, agreed to an order reflecting the relief sought. Mr Lithgow further consented to an order being made that copies of all source invoices be attached to invoices generated by the Landlord. Accordingly, orders will be made to that effect.

Issue 2: Reimbursement of the cost to repair air-conditioning

6. In paragraph 8 of the Tenant's attachment to its originating application, it seeks an order that the Landlord reimburse it in respect of *electrical, plumbing and other structural building related expenses owing by the Landlord under the Lease since the Lease was transferred on 31 July 2010 as per invoices set out in Annexure F*. That claim was modified during the course of the hearing, such that the amount claimed was limited to only the cost of replacing a compressor and repairing a broken pipe of one of the air-conditioning units servicing the Premises.

7. Mr Facey said that the total cost of that work was $3,012.50, which has been paid by the Tenant. An invoice dated 31 January 2011 was produced in support of the Tenant's claim. However, that invoice is in the amount of $3,700. Although it describes the work of replacing the compressor and repairing the broken pipe, it also includes servicing other air-conditioning units connected to the Premises. Regrettably, the invoice does not distinguish the cost of replacing the compressor and repairing the broken pipe from the other work described in that invoice.

8. Nevertheless, Mr Facey submitted that he was able to isolate the cost of that other work, by reference to a more recent invoice, which only related to the cost of servicing the other air-conditioning units. In particular, he produced an invoice dated 11 April 2014 in the amount of $687.50, which only describes the servicing of air-conditioning units. He said that amount should be deducted from the gross amount of the 31 January 2011 invoice to arrive at a net figure which was then solely attributable to what he referred to as the 'capital works'.

9. Mr Facey submitted that the Tenant is entitled to be reimbursed for the cost of this work because it relates to capital works, rather than maintenance or other outgoings which form part of the Tenant's obligations under the Lease. He made reference to s 41 of the RLA, which states, in part:

> 41. Capital costs not recoverable
>
> (1) Subject to sub-section (2), a provision in a retail premises lease is void to the extent that it requires the tenant to pay an amount in respect of the capital costs of –
>
> (a) the building in which the retail premises are located; or
>
> …
>
> (d) Plant in a building referred to in paragraph (a) or (b).
>
> (2) Sub-section (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.

10. Clause 6.2 (a) of the Lease states:

> (a) **Maintenance and repair**
>
> Subject to clause 6.2(b), the lessee must carry out all necessary maintenance and repairs to keep the Demised Premises in their condition as at the Commencement Date. The Lessee acknowledges that the Demised Premises were in good condition at that time.
>
> (b) **Lessee's excluded obligations**
>
> The Lessee is not required to carry out work that is:
>
> (i) required due to fair wear and tear;
>
> (ii) covered by the Lessor's insurance, except if cover is refused or is insufficient because of a Lessee's Act; or
>
> (iii) structural work, except if required due to a Lessee's Act.

11. Mr Lithgow submitted that the air-conditioning unit was working at the time the Lease was entered into. He said that the work simply related to repair work and on that basis, the provisions of the Lease imposed an obligation on the Tenant to bear the burden of that repair work.

12. In my view, repair of an existing air-conditioning unit is not a capital cost. It does not increase the equity in that equipment but rather, makes good a fault in the equipment to render it operational again. By contrast, a capital cost is a one-time expense incurred in the purchase or upgrading of the equipment, rather than components of that equipment, which have fallen

into disrepair. I do not consider that s 41 of the RLA operates in this particular situation.

13. Having said that, I am of the view that s 52 of the RLA specifically covers this situation. It states:

> **52. Landlord's liability for repairs**
>
> (1) A retail premises lease is taken to provide as set out in this section.
>
> (2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into –
>
> (a) the structure of, and fixtures in, the retail premises; and
>
> (b) plant and equipment at the retail premises; and …
>
> (3) However, the landlord is not responsible for maintaining those things if –
>
> (a) the need for the repair arises out of misuse by the tenant; or
>
> (b) the tenant is entitled or required to remove the thing at the end of the lease.
>
> (4) The tenant may arrange for urgent repairs (for which the landlord is responsible under this section or under the terms and conditions of the lease) to be carried out to those things if –
>
> (a) the repairs are necessary to fix or remedy a fault or damage that has or causes a substantial effect on or to the tenants business at the premises; and
>
> (b) the tenant is unable to get the landlord or the landlord agent to carry out the repairs despite having taken reasonable steps to arrange for the landlord or agent to do so.
>
> (5) If the tenant carries out those repairs –
>
> (a) the tenant must give the landlord written notice of the repairs and the cost within 14 days after the repairs are carried out; and
>
> (b) the landlord is liable to reimburse the tenant for the reasonable cost of the repairs and may not recover that cost or any part of it as an outgoing.

14. Mr Facey gave evidence that the remedial work was necessary in order to allow the retail business to properly function and as a consequence, necessitated urgent action on the Tenant's part. I further understand that notwithstanding the date that the work was carried out, a timely demand was made by the Tenant for reimbursement but was not answered

favourably. Accordingly, I am satisfied that the requirements under s 52(4) and (5) of the RLA have been met and as a consequence, the Landlord is liable to reimburse the Tenant for that repair work. I further accept that the reasonable cost of that work is $3,012.50, having regard to the two invoices produced by Mr Facey.

15. Accordingly, I will order that the Landlord reimburse the Tenant in the amount of $3,012.50.

Issue 3: Repair of southern fence

16. Mr Facey said that the southern paling fence of the Premises was unstable and leaning outwards. He produced photographs in support of his evidence. Mr Facey submitted that repair or replacement of the southern fence is capital works and therefore an expense for which the Landlord is liable.

17. Mr Lithgow submitted that the repair of the southern fence, if required, was a matter for which the Tenant was responsible. He again referred to Clause 6.2 of the Lease in support of that argument.

18. As I have already indicated, maintaining the demised Premises in a condition consistent with the condition of the Premises when the retail premises lease was entered into, is an obligation that falls on the Landlord's shoulders. Having said that, however, the comparator in assessing the condition of the Premises to their current state is the date when the Lease was first entered into.[1]

19. In the present case, the Lease was entered into on 1 September 2005. Regrettably, there is no evidence as to what the condition of the fence was at that time or whether it has fallen into disrepair during the currency of the Lease.

20. In the present case, the Tenant simply contends that the paling fence is in need of repair. However, how long that situation has existed is unknown. In the absence of any evidence indicating that the fence has fallen into disrepair during the currency of the Lease, I am unable to find that s 52 of the RLA operates in this case. To do so would require me to speculate rather than base my findings on evidence. Consequently, this aspect of the Tenant's claim is dismissed.

Issue 4: Insurance premium

21. Under Clause 8.3 of the Lease, the Landlord is required to effect building insurance. That clause states:

> The Lessor shall insure and keep insured in its name the Demised Premises and all structures, erections, fixtures, fittings, plant and machinery thereon or therein (but excluding all of the Lessee's fixtures,

[1] *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2015] VSC 515 at [55].

fittings, plant, equipment, furnishings and other chattels, for theft full replacement and reinstatement value against loss and damage caused by fire, fusion, explosion, lightning, storm, tempest, war, civil commotion, riot, strikes, malicious damage, earthquake, impact by all vehicles, aircraft and objects dropped from aircraft, internal water and flood.

22. Clause 5.1 of the Lease further provides:

> The Lessee covenants and agrees with the Lessor that the Lessee shall:
>
> (a) …
>
> (d) reimburse to the Lessor within seven (7) days of demand by the Lessor, all premiums and any other cost of insurance taken out by the Lessor for or in respect of the Demised Premises including fire insurance extended to include damage by fusion, explosion, lightning, storm, tempest, war, civil commotion, riots, strikes, malicious damage, earthquake, impact by all vehicles, aircraft and objects dropped from aircraft, internal water and flood for the full reinstatement or replacement value of all buildings, structures, erections and fixtures, plant and machinery upon, in or at the Demised Premises, break-down insurance in respect of machinery upon, in or at the Demised Premises, insurance against breakage of glass at the Demised Premises, public risk insurance effected by the Lessor on behalf of itself and the Lessee, insurance under the Accident Compensation Act, 1985 and statutory liability insurance in respect of… [emphasis added]

23. In the present case, the Landlord has, historically, effected insurance in accordance with its obligations under the Lease and has sought reimbursement from the Tenant in respect of premiums paid by it. However, according to the Tenant, it did not receive notice from the Landlord that the Landlord had effected insurance for the period May 2015 to April 2016 by the date that the insurance for the preceding year had expired; namely, 30 April 2015. Consequently, the Tenant procured its own building, public liability and machinery breakdown insurance through a different insurance broker to that which had previously been engaged by the Landlord. The Tenant contends that the insurance which it procured matched the policy and cover of indemnity which the Landlord had procured for the preceding year.

24. Maurice Guerrieri, the son of the director of the Landlord, gave evidence that he was responsible for administering the Landlord's affairs, including arranging for insurance and the like. He said that the Tenant's account of what had transpired was incorrect. In particular, he recounted that the Landlord had renewed its insurance policy on 17 April 2015. Documents were tendered in evidence verifying that that was the case. He further gave evidence that copies of the insurance policy schedule, together with an invoice generated by the Landlord, for reimbursement of the insurance costs

was emailed to the Tenant in or around that date. This is disputed by Mr Facey, who said that he had not received any confirmation from the Landlord that the 2014-2015 insurance had been renewed, prior to its expiry date.

25. Ultimately, the Tenant cancelled the insurance policy that it had procured, once it discovered that the Landlord had, in fact, obtained insurance. However, a dispute arose in relation to the cost of the insurance procured by the Landlord. In particular, the Tenant contends that the cost of the insurance policy procured by the Landlord is excessive, when compared to the policy of insurance previously procured by the Tenant. According to the Tenant, the two policies of insurance provide the same level of indemnity. Therefore it contends that it is unreasonable for the Landlord to procure a more costly policy of insurance at the expense of the Tenant.

26. The Landlord contends that the two policies of insurance are not the same. The critical difference between the two policies relates to the level of cover for machinery breakdown. According to the Landlord, the insurance policy procured by it has an unlimited level of indemnity for the breakdown of plant and equipment. Mr Guerrieri gave evidence that this was a specific requirement of the Landlord because the potential cost of plant and equipment breaking down could be significant. He recounted that on one occasion, air-conditioning equipment broke down, which cost approximately $30,000 to make good. He said this was covered by the insurance policy effected at that time and as a result, the Landlord was substantially indemnified for that cost. According to Mr Guerrieri, the policy of insurance which the Tenant had procured limited indemnity for machinery breakdown to $15,000. He said this was not sufficient to meet the Landlord's needs or what was required under the Lease.

27. The Tenant disputed that the insurance policy procured by the Landlord had unlimited indemnity in respect of machinery breakdown. He pointed to the *Coverage Summary* schedule of the *Business Pack* insurance policy, procured by the Landlord, which stated that machinery breakdown was not covered.

28. In response, Mr Guerreri explained that the aggregate level of insurance cover was comprised in separate policies, one of which specifically related to machinery breakdown. A copy of that policy, including the *Coverage Summary* schedule was tendered in evidence. It disclosed that the limit of liability in respect of equipment breakdown was $4,650,000. In fact, the aggregate indemnity provided by the various policies procured by the Landlord and tended in evidence are:

    (a) Business Pack, which insured the building for $3,881,250 and the contents for $428,490, as well as providing indemnity for theft up to $30,000 and replacement of glass and signs (unlimited). The cost of that policy was $10,510.

(b) Upgrade to the Business Pack, which increased the level of insurance for the building to $4,200,000 and the contents to $450,000. The cost of that upgrade was $556.16.

(c) Public liability insurance, which provided indemnity up to $20,000,000. The cost of the insurance was $1,440.

(d) Machinery breakdown insurance, which provided indemnity for breakdown of plant and equipment up to $4,650,000, in addition to other coverage. The cost of that insurance was $3,090.

29. Therefore, the total cost of the insurance policies effected by the Landlord was $15,596.16. According to the Tenant, the gross amount of the insurance policies effected by the Landlord is approximately $7,000 more than the insurance policy which the Tenant was able to procure. Regrettably, a copy of the insurance policy which the Tenant had procured (and then cancelled) was not tendered in evidence. Therefore, I am unable to compare the level of cover between the two policies. However, it is not disputed that the policy which the Tenant had procured limited coverage for machinery breakdown to $15,000, compared with the $4,650,000 coverage provided under the insurance policy procured by the Landlord. In my view, that fact alone distinguishes the two policies.

30. In weighing the evidence before me, I am of the opinion that the insurance policies procured by the Landlord are reasonable and within the terms of the Lease.

31. Consequently, insofar as the Tenant seeks an order that the Landlord procure an alternative policy of insurance, that claim or relief sought is dismissed and refused.

Issue 5: Reimbursement of insurance payout for machinery theft

32. Mr Facey gave evidence that in October 2010, the Premises were broken into twice. On the first occasion, a meat slicer and food processor was stolen. Both these items of machinery were described under the Lease to be part of the Landlord's installations. The meat slicer was fundamental to the business operations of the Tenant. Consequently, Mr Facey could not wait for the insurer to replace those items and he was forced to purchase a meat slicer at a cost of $1,240 at the Tenant's own cost. He said that the replacement meat slicer was comparable to the meat slicer that was stolen. Regrettably, the Premises were subsequently broken into again and the replacement meat slicer stolen. Given the urgency of the situation, he was again forced to replace that meat slicer. However, on this occasion, he was able purchase a replacement meat slicer for $740, at the Tenant's cost. That meat slicer is still used by the Tenant in its day-to-day business operations.

33. The Tenant contends that it has expended a total of $1,980 in replacing the Landlord's installations, of which it says that it has only been reimbursed $472.73. It claims the difference, being $1,507.27. It also claims that the Landlord should either provide a food processor or alternatively, pay the Tenant $2,695, being the cost of a *Robot Coupe Processor*, which is the type of food processor listed under Schedule 2 of the Lease and Schedule 2 of the *Transfer of Lease*,[2] under the heading *Lessor's Chattels, fittings, fixtures, plant and equipment*.

34. The Landlord tendered a copy of its counterpart *Transfer of Lease*. On page 4 of Schedule 2, the reference to *Electric Slicer* and *Robot coupe processor* have been crossed out and the words *BURGLARY 15-10-2010 (STOLEN)* handwritten next to those entries. According to the Landlord, it received approximately $10,000 from its insurer in respect of the theft of those items. However, given that the Tenant had already replaced the meat slicer, there was no obligation for it to provide another meat slicer. Mr Guerrieri gave evidence that Mr Facey had told him that he did not need the food processor and would rather have the insurance payout so that he could use the money for shelving. Mr Guerrieri did not agree to that proposal. Accordingly, as it presently stands, the Landlord has not supplied a meat slicer or food processor, albeit that the Tenant has supplied its own meat slicer. Mr Guerrieri conceded that the Landlord had unilaterally crossed out the reference to the *Electric Slicer* and the *Robot coupe processor* following that conversation with Mr Facey and that this was done because the Landlord *did not want to be caught if the lease was transferred*.

35. Mr Guerrieri also conceded that only $472.73 was reimbursed in respect of the theft of the first meat slicer. He said that was all that the insurer was prepared to do. He tendered a letter from *John Smith Insurance Group*, the insurance broker, which set out the reasons for the sum reimbursed:

> I write in reference to the settlement on the above claims, which your insurers finalised on 29 September 2011. The settlement consisted of three cheques, in payment of two meat slicers, one food processor and repairs to locks at the premises.
>
> These amounts were paid less the GST and two policy excesses of $200 each.
>
> Fortunately, we were able to get the insurers to agree to pay for one of the slicers, despite it being the property of Mark Facey. It would therefore appear that you should be reimbursing Mark Facey $472.73, which is the $740 replacement cost, less the policy excess and GST. He will then be able to claim back the $7.27 on his next GST claim.

36. In my view, the approach taken by the Landlord is inconsistent with its obligations under the Lease. In particular, the Lease requires it to provide a food processor and a meat slicer. In the absence of any agreement varying

[2] The *Transfer of Lease* is dated 29 July 2010, and documents the transfer of the Lease to the Tenant after the business was purchased by it from the previous tenant.

the terms of the Lease, those obligations exist despite the fact that the Tenant has purchased a replacement meat slicer.

37. In the present case, I accept that an agreement was reached between the parties that the second meat slicer purchased by the Tenant was to stand as the replacement meat slicer forming part of the Landlord's chattels, fittings, fixtures, plant and equipment listed under Schedule 2. I further accept the evidence of Mr Facey that the Tenant's business would have been significantly compromised without use of a meat slicer and that it was reasonable for him to have replaced the meat slicer so as to mitigate any business disruption.

38. Section 54 of the RLA states, in part:

> (2) The landlord is liable to pay to the tenant reasonable compensation for loss or damage (other than nominal damage) suffered by the tenant because the landlord or a person acting on the landlord's behalf –
>
> (a) …
>
> (d) fails to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenants trading at the retail premises; or
>
> (e) fails to rectify as soon as practicable –
>
> (i) any breakdown of plant equipment that is not under the tenant's care or maintenance; or…

39. As I have already indicated, the provision of a meat slicer and food processor are obligations imposed on the Landlord under the Lease. The risk, if those chattels are damaged or stolen, in the absence of any fault on the part of the Tenant, rests with the Landlord. It had the obligation to immediately replace those chattels. Indeed, it procured insurance to indemnify it for any loss arising out of damage or theft of those chattels. In my view, it was not open for the Landlord to unilaterally purport to amend the Lease by removing those chattels from the *Schedule 2*. I am not satisfied that there was any agreement to do that. Moreover, I am of the opinion that under s 54 of the RLA, the Tenant is entitled to be reimbursed for its out-of-pocket expenses in having to replace the Landlord's installations at its cost so as to minimise any business disruption. The mere fact that the Landlord was required to pay an excess on its insurance policy is beside the point. In particular, I am of the view that the Landlord has no right to reduce the amount that would otherwise be payable to the Tenant pursuant to s 54 the RLA, merely because of that fact.

40. Having regard to the fact that the parties have agreed that the second meat slicer purchased by the Tenant is to stand as the replacement meat slicer, the Landlord's obligation to provide that chattel has been discharged. However, the full cost of that meat slicer and the earlier meat slicer also stolen, is to be reimbursed to the Tenant. Moreover, the obligation to

provide a *Robot coupe processor*, as part of the Landlord's chattels under *Schedule 2* remains.

41. Accordingly, I will order that the Landlord reimburse the Tenant $1,507.27, being its out-of-pocket expenses in replacing the Landlord's meat slicers and further declare that the Landlord's obligation to provide a *Robot coupe processor* or similar for use by the Tenant in the Premises has not been discharged.

LANDLORD'S COUNTERCLAIM

42. The Landlord contends that the arrears in payment of outgoings up to and including 25 October 2015 amounts to $36,663.78, excluding interest. As I understand the Tenant's submissions, it acknowledges that there may be some outgoings in arrears, however, is unable to say to what extent because of confusion which exists over the way in which the Landlord has rendered its invoices.

43. The Landlord relies upon the evidence of Mr Maurice Guerrieri. In accordance with orders made by the Tribunal, Mr Guerrieri prepared an affidavit setting out his evidence in chief. Attached to that affidavit is a schedule, also prepared by him. That schedule lists all of the Landlord-Tenant invoices which the Landlord contends remain unpaid or partly unpaid. In addition, all of the original source invoices, from which the Landlord-Tenant invoices are derived, are also exhibited to Mr Guerrieri's affidavit.

44. Under the terms of the Lease, many of the outgoings payable by the Tenant relate to expenses incurred by the Landlord for which it seeks reimbursement, rather than an outgoing that is to be paid directly by the Tenant. For example, where an outgoing expense is levied, such as municipal rates, the Landlord will generate its own Landlord-Tenant invoice, which will include the cost to the Landlord in having to pay for those municipal rates. Those Landlord-Tenant invoices include GST. For example, the municipal rate notice dated 24 July 2015 required payment of $1,631.10. No GST was payable on that supply invoice because municipal rates are an Australian tax for the purposes of Division 81 of the GST Act[3] and therefore, not consideration for a supply that the local authority makes to the property owner.

45. However, the Landlord generated a Landlord-Tenant invoice which comprises the cost of paying that municipal rate notice plus GST, thereby increasing the cost to the Tenant to $1,794.21. The same methodology has been applied to other outgoings, such as municipal water rates, insurance premiums and the like. As I understand the defence raised by the Tenant, it

[3] *A New Tax System (Goods and Services Tax) Act 1999*.

contends that GST should not be paid or at the very least the amount of GST sought is incorrect.

46. What follows are my observations and findings in relation to the amounts claimed by the Landlord and listed in the schedule prepared by Mr Guerrieri.

GST on rates

47. All of the municipal and water authority rates have been treated in a similar fashion by the Landlord. To that end, a Landlord-Tenant invoice has been prepared by the Landlord which includes the amount payable on the rate notice plus GST. GST has been added to the Landlord-Tenant invoice even though the rate notice itself did not comprise any element of GST, nor was there any obligation to pay GST on rates levied by the municipal council or water authority pursuant to the GST Act.

48. In my view, the methodology adopted by the Landlord is consistent with the Australian Taxation Office's ruling: *Goods and Services Tax Determination GSTD 2000/10* (consolidated on 24 April 2013). Under that ruling, it is immaterial whether the supply to the Landlord is not subject to GST. If a tenant reimburses a landlord for such an expense, the transaction is categorised as a taxable supply which attracts GST. In other words, it is part of the consideration for the supply of the demised premises.

49. Paragraph 8 of *GSTD 2000/10* states:

> 8. Payment by the landlord of local council rates, land tax or other charges may not be subject to GST because of the operation of Division 81. If the tenant is required under the terms of the lease to reimburse the landlord's expenditure of an Australian tax or an Australian fee or charge under Division 81 of the GST Act, this is not the payment of an Australian tax or an Australian fee or charge by the tenant. Division 81 of the GST Act does not apply to the tenant's reimbursement of the rates, land tax or other charges.

50. Therefore, I find that the Landlord's treatment of adding GST to Landlord-Tenant invoices for reimbursement of municipal and water rates is in accordance with the relevant *Goods and Services Tax Determination* and valid. It does not matter that the original supply invoice did not attract GST.

GST on insurance reimbursement invoices

51. The situation is less clear in relation to invoices rendered by the Landlord for reimbursement of insurance premiums paid by it. Mr Guerrieri said that the Landlord paid GST on supply invoices rendered by its insurance broker but only in relation to the insurance premiums and the broker's fee but not on the stamp duty, which was also payable under the transaction. He said that when he prepared the Landlord-Tenant invoices for reimbursement of

insurance costs, he did not add GST to the aggregate amount of the insurance supply invoices, as was the case with reimbursement of rate notices. Instead, he calculated GST on the aggregate sum of the original source invoice, excluding the GST component, and then added back that GST amount to the total of the insurance supply invoices.

52. Mr Guerrieri's methodology is best explained by way of an example. The first entry in the schedule exhibited to his affidavit relates to insurance for the period 2012 to 2013. The schedule states that the total cost to the Landlord for insurance over that period was $19,585.06, inclusive of GST.[4] That amount is the aggregate sum of a number of supply invoices from the Landlord's insurance broker, each dealing with one component of the insurance cover provided. For example, one invoice related to insurance cover for *building and contents*, while another invoice related to insurance cover for *machinery breakdown*, etcetera. However, GST was only added to supply items, such as insurance premiums and broker's fees but not on stamp duty.

53. The aggregate amount of those invoices, before GST was added, was $17,951.81. In preparing the Landlord-Tenant invoice, the Landlord calculated GST on that pre-GST amount ($1,790.60[5]), which it then added to the total cost it was charged for the insurance ($19,585.06), to generate a Landlord-Tenant invoice amount of $21,375.66.

54. It appears that the methodology adopted by Mr Guerrieri is loosely based on the *GSTD 2000/10* referred to above, save that it fails to take into account any input tax credit in favour of the Landlord. In particular, that *Tax Determination* provides a number of working examples in order to assist businesses in calculating their GST liability. *Example 3* of that *Tax Determination* resembles the methodology adopted by the Landlord. It states:

> ***Example 3 – lease allows GST to be recovered from tenant***
>
> *19. On 1 July 2000 Kathleen leases commercial premises to Bob. The consideration under the lease agreement consists of $1,000 base rent per month plus reimbursement of Kathleen's expenses relating to the premises including insurance, electricity, cleaning and maintenance. Under the agreement Kathleen can recoup from Bob any GST payable by her in relation to the lease.*
>
> *20. Kathleen pays a contractor $220 for cleaning and maintenance during July. This includes $20 GST. She claims an input tax credit for the $20. Kathleen provides a tax invoice (via her managing agent) to Bob for $1,320. This amount is made up of $1,000 base rent, $200 outgoings and $120 GST.*

[4] See table in paragraph 57 below.
[5] There is a slight mathematical error in the Landlord's calculation as a result of failing to take into account a credit given on those invoices for the cancellation of one component of the insurance cover.

55. As indicated above, what differs between *Example 3* above and the methodology adopted by Mr Guerrieri is that no allowance has been made for any input tax credits claimed by the Landlord. In my view, that results in double counting GST. For example, if the invoice in *Example 3* above was re-calculated using Mr Guerrieri's methodology, rather than adopting the methodology set out in the *Tax Determination*, the tax invoice that *Kathleen* provides to *Bob* would be $1,342, rather than $1,320, calculated as follows:

> Original supply invoice excluding GST ($200) plus rent GST = $220, plus rent $1,000 = Landlord-Tenant invoice of $1,220, to which GST is added = $1,342

56. There is no evidence that the Landlord is not registered for GST. Given that the annual rent under the Lease substantially exceeds the income threshold turnover of $75,000 per annum before a business is required to be registered for GST, it is reasonable to infer that it is registered for GST. Therefore, there is no reason why the Landlord would not adopt the methodology set out in *Example 3* above, when generating its Landlord-Tenant invoices. In my view, the Landlord has erred in not adopting that methodology. I now turn to consider each of the Landlord-Tenant invoices for reimbursement of insurance premiums.

Insurance 2012-2013

57. Turning again to the first entry in the schedule, the total amount of insurance paid by the Landlord was $19,585.06 inclusive of GST. This amount is the aggregate sum of a number of invoices rendered by the Landlord's insurance broker (including one credit invoice), which reflect different aspects of insurance cover. Details of those invoices are set out in the table below.

Description	Amount (excl GST)	GST	Total paid by Landlord	Landlord-Tenant invoice (excl GST)
Building & contents insurance premium	11,213.23	1,291.52	12,504.23	11,213.23
Fire service levy	1,701.98	N/A	1,701.98	1,701.98
Stamp duty	1,420.67	N/A	1,420.67	1,420.67
Broker fee	1,506	150.60	1,656.60	1,506
Machinery breakdown insurance premium	600	60	660	600
Stamp duty	66	N/A	66	66
Machinery breakdown insurance premium upgrade	1,664.64	166.46	1,831.10	1,664.64
Stamp duty	183.11	N/A	183.11	183.11
Broker fee	105.26	10.53	106.79	105.26
Credit adjustment of insurance premium	(458.63)	(45.86)	(504.49)	(458.63)

Description	Amount (excl GST)	GST	Total paid by Landlord	Landlord-Tenant invoice (excl GST)
Credit adjustment of stamp duty	(50.45)	N/A	(50.45)	(50.45)
TOTAL	**$17,951.81**	**$1,633.25**	**19,585.06**	**$17,951.81**

58. As the table above illustrates, the aggregate amount of GST paid by the Landlord in respect of those insurance invoices was $1,633.25. However, the total amount of the Landlord-Tenant invoice was $21,375.66, of which $1,790.60 represented GST. If I adopt the methodology used in *Example 3* of *GSTD 2000/10*, the figure charged to the Tenant should have been $19,746.99, calculated as follows:

> $17,951.81 (being the amount paid by the Landlord, excluding GST) plus GST on that amount of $1,795.18 = $19,746.99.

59. As I have already indicated, the methodology adopted by the Landlord does not accord with *GSTD 2000/10*. Therefore, I find that the correct amount that should have been charged to the Tenant is $19,746.99, as calculated above. According to the schedule, $19,585.06 has been paid, leaving a shortfall of $161.93.

Insurance 2014-2015

60. The documents exhibited to Mr Guerrieri's affidavit relating to the Landlord-Tenant invoice dated 1 July 2014 comprise all of the payments made by the Landlord for insurance cover over the period 2014 to 2015. The total amount paid by the Landlord, inclusive of GST, was $14,670. Of that amount, the Landlord paid $1,228.99 in GST.[6] Consequently, the aggregate sum of the source invoices for insurance over that period, excluding GST, is $13,441.01.

61. In the schedule prepared by Mr Guerrieri, the Landlord has invoiced the Tenant $16,014.10 in respect of insurance expenses over that period.[7] This amount was calculated using the Landlord's methodology described above. In particular, GST was calculated on the net cost of the source invoices – excluding GST – which amounted to $1,344.10, which sum was then re-added to the aggregate GST inclusive cost to the Landlord for insurance over that period ($14,670), making a total of $16,014.10.

62. However, using the methodology set out in *Example 3* above, the amount of the Landlord-Tenant invoice for reimbursement of insurance costs over that period should have been $13,441.01 plus GST, making a total of $14,785.11, calculated as follows:

[6] As was the case with the cost of insurance for the period 2012-2013, GST was not payable on stamp duty.

[7] The Landlord-Tenant invoice dated 1 July 2014 claims $16,021.89. It is not clear why there is a slight difference between the actual invoice and the schedule.

$13,441.01 (being the amount paid by the Landlord, excluding GST) plus GST on that amount of $1,344.10 = $14,785.11

63. Adopting the methodology set out in *Example 3* above results in the Landlord being required to account to the Australian Taxation Office for GST in the amount of $1,344.10 (the amount of GST paid by the Tenant pursuant to the Landlord-Tenant invoice). However, the Landlord would receive an input tax credit of $1,229.17 in relation to the GST it paid on the source invoices remitted by its insurance broker. When receipts and accounts are set off against each other, the result is that the Landlord is fully compensated for its expenditure. The following table illustrates this point:

Landlord pays		**Landlord receives**	
Description	**Amount**	**Description**	**Amount**
Cost of insurance	14,670.18	Payment by tenant	14,785.11
GST to account to ATO on supply to Tenant	1,344.10	Input tax credit for purchases	1,229.17
Total	**16,014.18**	**Total**	**16,014.18**

64. As I have indicated above, the correct amount of that Landlord-Tenant invoice should have been $14,785.11. The Landlord contends that $11,800 has been paid by the Tenant in respect of that Landlord-Tenant invoice. Therefore, I find that the shortfall in payment of that Landlord-Tenant invoice is $2,985.11.

Insurance 2015-2016

65. The aggregate sum of insurance costs incurred by the Landlord for the period 30 April 2015 to 30 April 2016 is $15,596.16. Of that amount, $1,378.78 represents the GST paid by the Landlord. This is the amount of the input tax credit that the Landlord is entitled to. Therefore, the net cost of the insurance, excluding GST, is $14,217.38.

66. Using the methodology set out in *Example 3* above, the amount of the Landlord-Tenant invoice for reimbursement of the cost of insurance cover over that period should have been $14,217.38 plus GST, making a total of $15,639.12. However, the Landlord-Tenant invoice dated 11 May 2015 claims $17,032.30. Again, the methodology adopted by the Landlord fails to take into account the input tax credit that the Landlord is entitled to offset against the GST payable to the Australian Tax Office.

67. Using the methodology set out in *Example 3* above, the Landlord is, ultimately, reimbursed for the whole of its expenditure, while the Tenant,

ultimately, pays $14,217.38.[8] This calculation is illustrated in the following table:

Description	**Amount**	
	Landlord	**Tenant**
Cost of insurances (incl. GST)	($15,596.16)	($15,639.12)
Input tax credits	1,378.78	$1,421.74
Payment by Tenant to Landlord	$15,639.12	n/a
GST to account on supply to Tenant	($1,421.74)	n/a
Total	**Nil**	**$14,217.38**

68. By contrast, using the Landlord's methodology, the Landlord initially pays $15,596.16 to its insurance broker, of which it is then entitled to an input tax credit of $1,378.78. The Landlord then receives $17,032.30 from the Tenant, pursuant to its Landlord-Tenant invoice dated 11 May 2015. From this receipt, it must account to the Australian Tax Office for $1,703.23, being the GST payable by the Tenant on that invoice. That would result in the Landlord being left with $1,111.69 in hand. This example demonstrates how the methodology adopted by the Landlord is flawed, in that it results in the Landlord receiving a windfall after GST payments and input tax credits are taken into account.

69. According to the Landlord's schedule, the Tenant has not paid anything towards insurance for the period 2015 to 2016. I find that the Tenant is liable in the amount of $15,639.12, inclusive of GST for that outgoing.

Claim for pipe repair

70. The Landlord's schedule further claims $330 in respect of a gas pipe repair. The claim is made in the Landlord-Tenant invoice dated 13 January 2014 and is described as follows:

Amount claimed for pipe repair	$300
10% GST	$30
Total	$330

71. A copy of an invoice from *Elders Gas Services* dated 21 October 2013 was tendered in evidence by the Tenant. It describes the work as replacing an undersized ½" copper gas pipe to the fryer with a ¾" copper pipe. That invoice is made out to the Tenant. There is no evidence before me that the Landlord has ever paid that invoice. Indeed, the description of this item in the Landlord-Tenant invoice seems to indicate that the Landlord is seeking reimbursement for any claim that the Tenant makes for having to pay that expense itself.

[8] After it receives an input tax credit.

72. Mr Facey submitted that the expense relates to capital works. I accept that proposition. Replacing undersized pipework is not what I consider maintenance of the existing plant and equipment. It is upgrading that plant and equipment, which ultimately benefits the Landlord upon reversion of the leasehold. Therefore, I find that this claim is dismissed.

Final reconciliation of outgoings

Accounts

73. The *Summary of Items Outstanding* part of the Landlord's schedule lists a number of invoices which relate to three groups of outgoings; namely, municipal rates, water rates and insurance cover. In that schedule, the Landlord sets out how much of each of the outgoings has been paid. Having considered the source documents in relation to municipal and water rate notices, and in light of my findings above, I find that the amount claimed in respect of municipal and water rates is correct.

74. In relation to reimbursement for the cost of insurance cover, the amounts claimed are, for the reasons set out above, incorrect. The correct amounts for the three periods; namely, 2012-2013, 2014-2015 and 2015-2016 are set out above.

Payments

75. In relation to the amounts said to have been paid by the Tenant, Mr Guerrieri gave evidence that he had extracted that information by reference to the Landlord's bank statements. Very little evidence was given by the Tenant to contradict Mr Guerrieri's records of payment. The schedules attached to his affidavit reference payments against accounts up to and including 25 October 2015. Although the schedule entitled *Summary of Items Outstanding* mentions receiving a payment of $25,361 on 30 October 2015; that payment has not been reconciled against individual invoices in any of the schedules prepared by him. Rather, that amount has been partly applied against *rent* and partly applied against *rates*, although it is unknown what outstanding invoices have been credited by that payment.

76. In my view, the dispute between the parties largely focuses on disputed invoices relating to outgoings up to and including 25 October 2015, which are listed in the Landlord's schedule. Accordingly, I consider that it is appropriate for me to reconcile the Landlord's accounts and receipts only up to 25 October 2015 but not beyond that date, given that I am unclear as to how monies received by the Landlord after that date have been disbursed.

77. On 1 December 2015 the Tenant filed written supplementary submissions. Although those supplementary written submissions largely deal with the question of whether the Landlord should be entitled to charge interest on outstanding amounts, they also join issue with two aspects of Mr Guerrieri's evidence - concerning payments by the Tenant:

(a) First, the Tenant submits that it has made payments after 25 October 2015. These payments comprise the payment made on 30 October 2015 in addition to another payment made shortly before the hearing of this proceeding. It says those payments have discharged many of the outstanding accounts listed in the Landlord's schedule. Although the Landlord concedes that a payment was made on 30 October 2015, it says that at the time of the hearing, it was unclear whether any further payment had been made. This uncertainty arises because apart from the payment made on 30 October 2015, no other payment had yet appeared as a credit in the Landlord's bank statement.

(b) Second, and if the payments made after 25 October 2015 are ignored for the purpose of determining what was owed up to that date, there are only two entries in the schedule which are in dispute. They are:

(i) Payment of the Landlord's invoice dated 11 November 2013 for *South East Water* charges. According to the Landlord, $173.17 remains outstanding. According to the Tenant, this has been fully paid.

(ii) Payment of first instalment of the municipal rates (**'Rates 1'**) for the period 2013-2014 in the amount of $1,725.08. The Tenant contends that $1,568.25 was paid on 27 September 2013 and the balance of $156.83 paid on 31 December 2013. It further contends that its payment on 31 December 2013 also included payment of the second instalment of municipal rates for 2013-2014 (**'Rates 2'**). Further, it says that it made a payment on 2 May 2014, which included payment of the third instalment of municipal rates for 2013-2014 (**'Rates 3'**). The Landlord does not acknowledge the Tenant's payment of 27 September 2013 in any of the schedules attached to the affidavit of Mr Guerrieri. Moreover, according to those schedules, the Tenant's payment made on 31 December 2013 was applied to discharge Rates 1 and the Tenant's payment made on 2 May 2014 was used to discharge Rates 2, leaving Rates 3 unpaid and owing.

78. The supplementary written submissions attached numerous documents, some of which were produced during the course of the hearing. There are a number of emails which corroborate the Tenant's submission as to what payment has been made and how it was applied against outstanding accounts. However, the supplementary written submissions are not evidence and as I have already indicated, the evidence given by the parties on this particular issue is limited and in the case of any payment being made on 27 September 2013, lacking.

79. In my view, further evidence is required before I can determine whether the payment made on 27 September 2013 was made and if so, how it was applied to discharge outstanding accounts. That said, I will proceed on the assumption that the payment was made but give the Landlord liberty to have the Proceeding returned before me if it maintains the view that the payment was either not made or was applied to pay for earlier accounts. In taking this approach, the Landlord is afforded time to consider the supplementary written submissions and accompanying documentation without losing its right to contest what is stated therein.

Conclusion on accounts and payments

80. As I have indicated above, I will proceed to determine what outgoings remain outstanding as at 25 October 2015, assuming that:

(a) the Landlord-Tenant invoice dated 11 November 2013 was fully paid, in so far as it related to charges levied by *South East Water*; and

(b) the Landlord-Tenant invoice dated 11 November 2013 was fully paid, in so far as it related to Rate 3.

81. Having regard to my findings set out above, I therefore conclude that the following amounts, excluding any claim for interest, was due and payable as of 25 October 2015.

Invoice date	**Description**	**Amount**	**Amount paid**	**Amount outstanding**
22/08/12	Insurance 2012-2013	$19,746.99	$19,585.06	$161.93
11/11/13	South East Water	$911.46	$911.46	0
11/11/13	City of Glen Eira Rates 3	$1,725.08	$1,725.08	0
21/1/14	South East Water	$1,386.83	0	$1,386.83
28/4/14	South East Water	$1,637.63	$1,593.63	$43.99
1/07/14	Insurance 2014-2015	$14,785.11	$11,800	$2,985.11
1/08/14	South East Water	$1,580.32	0	$1,580.32
1/11/14	South East Water	$1,453.43	0	$1,453.43
25/2/15	South East Water	$1,450.35	0	$1,450.35
25/2/15	City of Glen Eira Rates	$1,656.49	$1,505.90	$150.59
11/05/15	Insurance 2015-2016	$15,639.12	0	$15,639.12
1/08/15	South East Water	$1,963.67	0	$1,963.67

Invoice date	Description	Amount	Amount paid	Amount outstanding
25/10/15	South East Water	$1,584.55	0	$1,584.55
25/10/15	City of Glen Eira Rates	$1,794.21	0	$1,794.21
TOTALS		**$67,315.24**	**$37,121.13**	**$30,194.10**

82. For the avoidance of any doubt, my findings set out above are subject to the liberty afforded to the Landlord to advance further submissions or evidence dispelling the assumptions, upon which I have based my findings.

INTEREST

83. The Landlord claims interest on outstanding monies due in the amount of $5,881.90. Interest is claimed pursuant to Clause 7.2 of the Lease, which provides:

> Without prejudice to the rights, powers and remedies of the Lessor herein provided the Lessee shall pay to the Lessor interest at a rate equal to two (2) per centum per annum above the rate for the time being applicable pursuant to Section 2 of the Penalty Interest Rates Act 1983 on any monies due under this Lease from the Lessee to the Lessor on any account whatsoever remaining unpaid for seven (7) days after the due date of the payment of the monies in respect of which the interest is chargeable until payment in full of such monies (together with all interest thereon) and to be recoverable in like manner as rent in arrear.

84. A separate schedule has been prepared by Mr Guerrieri setting out how the interest amount has been calculated. That schedule details the date of the Landlord-Tenant invoice, the item invoiced, amount invoiced, amount paid and the date when payment was made. Interest is then calculated at a rate of 2% over the rate fixed under s 2 of the *Penalty Interest Rates Act 1983* on the outstanding amount and for the period unpaid.

85. Mr Guerrieri gave evidence that where a Landlord-Tenant invoice was short paid, he would apply so much of any subsequent payment against that outstanding invoice in order to discharge the debt.

86. However, it seems that the schedule prepared by Mr Guerrieri does not fully accord with that methodology. In particular, it appears that some receipts have not been applied against older debts. For example, the Landlord-Tenant invoice dated 11 November 2013 invoiced the Tenant for South East Water rates in the amount of $911.46. The schedule states that $738.29 of that invoice was paid on 31 December 2013. The schedule then claims interest on the sum of $911.46 for a period of 43 days and interest on the balance of $173.17 ongoing, even though there have been numerous other payments made by the Tenant since that date.

87. The situation becomes confusing because the Landlord-Tenant invoices fail to mention any short payment of previous Landlord-Tenant invoices, nor do they show how receipts have been applied against historical debts. Moreover, there is no evidence that the Landlord ever provided the Tenant with a statement to indicate what is owing in respect of the Landlord-Tenant invoices rendered during the applicable accounting period.

88. The Tenant has filed written submissions opposing the imposition of interest on the amount outstanding. In essence, it submits that interest should not be payable on overdue amounts because that situation arose partly because of the Landlord's failure to provide invoices which accorded with proper accounting standards.

89. The format of the Landlord-Tenant invoice is somewhat unorthodox and I accept that it would have been difficult to keep abreast of what was owing and what was not without being provided with a statement showing amounts outstanding. Moreover, the amounts claimed in respect of insurance have been erroneously calculated. No doubt this led to further confusion.

90. Having regard to the inconsistency in the way receipts have been applied against debts, coupled with the failure to prepare accounts and statements showing outstanding amounts, leads me to conclude that it would not be fair for the Landlord to rely upon Clause 7.2 of the Lease and claim interest in this particular case. My finding is reinforced by the fact that there is no evidence of the Landlord ever having complied with s 47 of the *Retail Leases Act 2003*, which requires a *landlord to prepare a written statement that details all expenditure by the landlord, in each of the landlord's accounting periods during the term of the lease on account of outgoings to which the tenant is liable to contribute*. In my view, complying with this provision may have alleviated the confusion which has arisen in respect of the payment of outgoings.

91. Accordingly, the Landlord's claim for interest is dismissed.

SENIOR MEMBER E. RIEGLER