VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.BP779/2015

CATCHWORDS

RETAIL TENANCY DISPUTE: application of *Retail Leases Act 2003* (RLA); legality of termination of lease; estoppel alleged; breach of implied term of lease alleged; unconscionable conduct by landlord alleged; ss 19, 46, 54, 77 of RLA considered; tenant's monetary claims dismissed; landlord's counterclaim for damages allowed in part.

APPLICANT	Australian Asset Consulting Pty Ltd (ACN 600 957 659)
RESPONDENT	Staples Super Pty Ltd as trustee for Staples Investments Superannuation (ACN 089 717 046)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATES OF HEARING	22 February 2016, 23 February 2016, 3 June 2016 and 7 June 2016
DATE OF RECEIPT OF APPLICANT'S FINAL SUBMISSIONS	14 June 2016
DATE OF RECEIPT OF RESPONDENT'S FINAL SUBMISSIONS	14 June 2016
DATE OF ORDER	3 November 2016
CITATION	Australian Asset Consulting Pty Ltd v Staples Super Pty Ltd (Building and Property) [2016] VCAT 1726

ORDERS

1 Pursuant to s 124(1) of the *Victorian Civil and Administrative Tribunal Act 1998*, I declare that the lease is a lease of *retail premises* within the meaning of the *Retail Leases Act 2003*.

2 The Applicant's claim against the Respondent is otherwise dismissed.

3 Pursuant to s 124 (1) of the *Victorian Civil and Administrative Tribunal Act 1998*, I declare that the lease was validly terminated.

4 The Applicant must pay to the Respondent damages in the sum of $3,853.20.

5 The Applicant must pay to the Respondent damages in the nature of interest of $422.37.

6 The Respondent's counterclaim is otherwise dismissed.

7 The Respondent has liberty to apply for costs.

MEMBER C EDQUIST

APPEARANCES:

For Applicant:	Mr W Short, director
For Respondent:	Mr J Foster, of Counsel on 22 February 2016, 23 February 2016, 3 June 2016. Mr Cloak, solicitor, on 7 June 2016.
For the Second Respondent to Counterclaim:	Mr W Short, in person

REASONS

INTRODUCTION

1 Staples Super Pty Ltd (Staples) owns a property at 52 Freight Drive, Somerton, Victoria ('the property'). On about 28 August 2014, Staples entered into a lease ('the lease') over the property with Australian Asset Consulting Pty Ltd (AAC).

2 Disputes developed between the parties and AAC issued this proceeding on 17 June 2015. AAC sought orders including an injunction restraining Staples from re-entering the property or otherwise forfeiting the lease pursuant to a notice issued on 5 June 2015 under s 146 of the *Property Law Act 1958* ('PLA'). AAC also sought a declaration the lease was governed by the *Retail Leases Act 2003* ('RLA'), a declaration that AAC was not liable to contribute to any outgoings under the lease, and a permanent order restraining Staples from manufacturing and storing pesticide or animal control products where such manufacture or storage constituted a nuisance or breach of AAC's quiet enjoyment. An interim injunction restraining Staples from re-entering was granted by the Tribunal on 19 June 2015. The hearing of the injunction application was initially fixed for 4 August 2015 but was adjourned and ultimately superseded. Mr Wade Short had been made a party to the proceeding as the second respondent by counterclaim on 11 December 2015. At a directions hearing on 2 February 2016, an application made by AAC to join Animal Control Technologies (Australia) Pty Ltd was dismissed. However, the Tribunal ordered that AAC's claim be amended to include a claim of $3,200 as reimbursement of alleged overpayment of electricity charges.

BP1254/2015

3 On 24 September 2015, AAC sought a permanent injunction in a separate proceeding (BP1254/2015), restraining Staples from re-entering the property or otherwise forfeiting the lease pursuant to a PLA s 146 notice dated 10 September 2015. Unlike the s 146 notice issued on 5 June 2015, which asserted that rent, interest and outgoings were outstanding, the September s 146 notice alleged that AAC was in breach of the covenant contained in clause 1(s) of the lease to observe and comply with all provisions and requirements of all Acts, rules, regulations, and by-laws so far as they relate to the building and the premises or their use. AAC also sought a declaration that the lease was a retail lease for the purposes of the RLA. The application for an injunction was dismissed by the Tribunal on 24 September 2015, but the application for a declaration that the lease came under the RLA was not determined.

Re-entry

4 By letter dated 28 September 2015, Staples' lawyers advised that Staples had exercised its right of re-entry and taken possession of the premises and that the lease had been 'absolutely determined'.

Proceeding BP1301/2015

5 Because AAC remained in possession of the premises, Staples issued its own proceeding (BP1301/2015) on 30 September 2015 seeking an order that AAC provide vacant possession of the property, and pay Staples' costs on an indemnity basis. This proceeding was heard on 9 October 2015. The Tribunal declared that AAC had vacated the premises and that Staples had exclusive possession. The Tribunal did not determine whether the re-entry was lawful, and ordered that Staples' application for costs should be heard and determined together with this proceeding.

The hearing

6 The hearing of this proceeding came on before me on 22 February 2016. AAC was represented by Mr Wade Short, its director. He gave evidence on behalf of AAC, but also called a number of other witnesses. Staples was represented by Mr Justin Foster of Counsel. Mr Staples gave evidence on behalf of his company.

7 At the start of the hearing, Hume City Council intervened, seeking to have a summons which had been issued to one of its employees quashed, and also seeking leave for the council to be joined as a party to the proceeding so that the council could claim its costs. Both these applications were dismissed.

8 The hearing continued over four days: 22 February and 23 February, 3 June and 7 June 2016. Orders were then made for the filing of written submissions, which were received on 15 June 2016.

Background to AAC's claim

9 In its Further Amended Points of Claim dated 30 October 2015, AAC alleges:

(a) trading as Square Feet Commercial, it entered into the lease on 28 August 2014;
(b) the lease commenced on 18 September 2014 with an initial term of 19 months. It had an option for an additional term of 24 months;
(c) by notice of re-entry dated 28 September 2015, Staples determined the lease;
(d) the notice of re-entry stated that AAC was in breach of the lease by reason of operating a retail business without a planning permit.

AAC's claims

10 AAC alleges:

(a) Staples is prevented from asserting any breach of lease by reason of having granted a lease of part of the property to AAC for use in connection with the provision of real estate services, and having subsequently objected to the issuing of a town planning permit to

AAC in response to an application by AAC for a town planning permit; and accordingly, the determination by Staples was unlawful.

(b) Further, and in the alternative, AAC says that Staple's conduct in determining the lease was conduct in trade or commerce which was unconscionable within the meaning of section 20 of the 'Competition and Consumer Act 2010' (sic).

(c) AAC has suffered loss and damage because:
  (i) It had to enter into another lease of different premises;
  (ii) It lost a chance of obtaining the optional term of 24 months under the lease; and
  (iii) It incurred relocation costs and associated expenses.

(d) AAC is not obliged to pay outgoings under the lease pursuant to section 46(4) of the RLA as Staples did not provide AAC with an estimate of outgoings in breach of the RLA.

(e) Because Staples allowed Animal Control Technology (Australia) Pty Ltd (ACN 137868449) ('ACTA'), a company of which a director of Staples, Mr Linton Staples, is also a director, to store and manufacture pesticide and animal control products in part of the property, Staples has breached its covenant to provide quiet enjoyment to AAC, and is liable to compensate AAC for breach of that covenant.

Orders sought by AAC

11 AAC seeks the following orders:

(a) a declaration that the lease is a retail premises lease for the purposes of the RLA;
(b) a declaration that it is not liable to contribute to any outgoings under the lease; and an order restraining Staples from recovering any outgoings in respect of the lease;
(c) damages in respect of the termination of the lease;
(d) damages in respect of the breach of its quiet enjoyment of the lease; and
(e) (pursuant to the amendment of its claim allowed on 2 February 2016), an order for $3,200 as reimbursement for alleged overpayment of electricity charges.

Staples' counterclaim

12 Staples' claim, as set out in its amended points of counterclaim dated 8 December 2015, is that AAC, through Mr Short, made representations that were misleading and deceptive in order to procure the lease; alternatively, that AAC breached the lease in a number of respects. Staples says:

(a) in or about July 2014, AAC represented to Staples that it, trading as Square Feet Commercial, would lease part of the property in order to conduct a commercial real estate services business;
(b) the terms of the lease would be the same as an offer and acceptance of lease made between National Asset Consulting Pty Ltd trading as NAI Harcourts ('NAC') and Staples dated 4 April 2014 ('the NAC offer to lease'), and a lease dated 11 June 2014 entered into between NAC and Staples ('the NAC lease');
(c) the use of the property was not for a retail purpose or use;
(d) the use of the property was permitted within an Industrial 1 Zone in accordance with the Hume City Council planning scheme;
(e) in leasing the property, AAC would observe and comply with all provisions and requirements of all laws, rules, regulations and by-laws so far as they relate to the property and/or its use (collectively the Representations);
(f) in reliance on the Representations, Staples entered into the lease with AAC;
(g) the Representations were misleading and deceptive, or likely to mislead or deceive in breach of s 18 of the *Australian Consumer Law* ('ACL'), insofar as:
    (i) AAC intended to use the property for the provision of real estate services to retail customers;
    (ii) the lease was not on the same terms as the NAC offer to lease or the NAC lease;
    (iii) in leasing the property, AAC conducted a real estate service business for retail customers; and
    (iv) the lease of the property was contrary to the *Planning and Environment Act 1987*, as the property was within 'Industrial Zone 1';
(h) but for the Representations, Staples would not have entered into the lease;
(i) further and alternatively, AAC breached the lease in a number of respects;
(j) AAC is liable to Staples for rent and outgoings itemised in several unpaid invoices, and is also liable to Staples in respect of certain expenses incurred in terminating the lease, or arising from the termination.

Orders sought by Staples in this proceeding

13 Staples seeks the following orders:

(a) a declaration that the lease was void ab initio pursuant to s 243 of the ACL, alternatively, an order pursuant to s 243(c) of the ACL terminating the lease, (also expressed in the prayer for relief as an order 'rescinding' the lease);

(b) an order for rectification of the lease so that it embodies the agreement made between the parties and in particular includes Wade Short as guarantor and provides for the calculation of the electricity outgoing on a pro rata basis;
(c) a declaration that the lease was validly terminated;
(d) damages (separately particularised as totalling $55,058.25);
(e) costs;
(f) interest pursuant to statute.

Order sought by Staples in proceeding BP1301/2015

14 In BP1301/2015, Staples seeks its costs on an indemnity basis.

Is the lease a lease of retail premises for the purposes of the RLA?

15 AAC contends in its written submissions that it operated a real estate agency from the premises and sold professional services by retail to the public, and the lease was therefore covered by the RLA. Although in his evidence Mr Staples had said the lease was a commercial lease, it was conceded by Staples in its written submissions that the lease was retail. Accordingly, I find that the lease is a lease of retail premises for the purposes of the RLA.

Was the lease legally terminated?

16 The issue of whether the lease was legally terminated by Staples is a live one, as it was not determined by the Tribunal at the hearing of BP1301/2015 on 9 October 2015.

17 AAC's argument is, as noted, that Staples is 'prevented' from asserting any breach of the lease by reason of having granted a lease to AAC for use in connection with real estate services, and having subsequently objected to the issuing of a town planning permit to AAC when AAC applied for a permit, and the determination by Staples was accordingly unlawful.

18 Against this, Staples contends that the termination of the lease in reliance upon the 10 September s 146 notice was lawful because the lease provided that the lessee was not to use, or permit the property to be used, for any illegal purpose without the prior written consent of the lessor.

Mr Staples' evidence regarding the termination

19 The circumstances in which the lease came to be terminated were examined in proceeding BP1301of 2015 in which Staples sought an order that AAC provide vacant possession of the property. In support of this application, Mr Staples swore an affidavit on 30 September 2015 in which he relevantly deposed as follows:

(a) The property is located within the precinct of the Hume City Council and is contained within the council's Industrial 1 Zone.
(b) On or about 24 April 2015, Staples received a letter from Hume City Council addressed to AAC, but copied to Staples, advising that the

property was being used for commercial property leasing, in breach of the planning laws, and a planning permit application would need to be made.

(c) On 21 May 2015 Mr Staples instructed a letter be sent by his company's solicitors to AAC advising it that it was in breach of the planning laws by operating a retail business in an Industrial 1 Zone. The letter requested that AAC comply with the council's requirements, and reiterated that Staples did not permit AAC's use of the property for retail purposes. Proceedings to recover possession were threatened unless evidence of compliance with the council's requirements was provided.

(d) On 21 May 2015 Mr Staples also instructed his company's solicitors to send a letter to the council confirming its position regarding the use of the property.

(e) On 1 June 2015 Mr Staples instructed that a letter be sent to the council advising that Staples would not consent to an application for change of use of the property by AAC.

(f) In June 2015 Staples was provided with a copy of AAC's planning permit application number 18767 ('the permit application').

(g) On 27 August 2015 Mr Staples, on behalf of his company, sent to the council an objection to AAC's planning permit application ('the objection').

(h) As AAC continued to carry on retail activities without a planning permit in breach of the planning laws, on 10 September 2015 Mr Staples instructed his company's solicitors to serve a s 146 notice.

(i) On 15 September 2015 Mr Staples received a copy of a letter from AAC's solicitors requesting that Staples withdraw the September s 146 notice, and advising that the council had permitted AAC to use the property while its planning permit application was on foot.

(j) On 24 September 2015, Mr Staples received a telephone call from Mr Henry Dong of the council advising that the council had not permitted AAC to use the premises while its planning permit application was on foot.

(k) Furthermore, Mr Staples had not received any correspondence from the council advising that AAC was entitled to continue to carry on its business activities at the property.

(l) On 24 September 2015 Member Kincaid made in order dismissing an application by AAC for an injunction restraining Staples from re-entering the property or otherwise forfeiting the lease.

(m) On the evening of 24 September 2015, shortly after Member Kincaid made orders in BP1254/2015, Staples received a copy of a letter dated 24 September 2015 from AAC to the council advising that AAC had closed its office to the public until its planning permit application had been determined, and that all retail activities had been suspended.

(n) On Friday, 25 September 2015 Mr Staples attended at the premises and found that vehicles which he believed to be owned by AAC's

director, Mr Short, and other staff of that company, were parked in the car park spaces at the property and that AAC had continued to carry on its business activities. AAC had put a notice on the door stating that the office space was closed to the public.

(o) On Monday 28 September 2015 Mr Staples again attended at the property and found vehicles which he believed to be owned by Mr Short, and his associate Mr Soultas, parked there. He believed AAC 'was carrying on its business activities with its front door closed.'

(p) As Mr Staples had not received any notification from the council that AAC was able to continue to conduct retail activities at the property until its permit application was decided upon, and as AAC continued to carry on its business activities at the premises in breach of the September s 146 Notice and the lease, Mr Staples elected to exercise his company's right pursuant to the lease to re-enter the premises.

(q) Mr Staples engaged 'two security guards to accompany two locksmiths from Gain Entry Locksmiths to change the locks and re-enter the Property.'

(r) Mr Staples instructed his company's lawyers to send a letter to AAC on 28 September 2015 advising that his company was exercising its right of re-entry. The letter stated:

> As our client has entered into possession of the premises the lease has been absolutely determined.

20 Staples' attempt to re-enter the premises was not successful on 28 September 2015 in the sense that AAC remained in possession of the premises. Mr Staples deposed in his affidavit of 30 September 2015 that he remained at the property after his locksmiths had left, and saw AAC's own locksmith attend the property later in the evening and replace the locks which had just been removed.

21 At some point after 30 September 2015, AAC vacated the property. At the hearing of Staples' application on 9 October 2015 in BP1301/2015 for an order for possession, Mr Short told Senior Member Walker that he had vacated, and had returned the keys.

Staples' contentions regarding the lawfulness of the termination of the lease

22 In support of its argument that the termination of the lease in reliance upon the September s 146 notice was lawful because the lease provided that the lessee was not to use, or permit the property to be used, for any illegal purpose without the prior written consent of the lessor, Staples refers to the council's notice addressed to it and to AAC dated 24 April 2015 which stated that:

(a) AAC's use of the premises was for commercial property leasing, asset management, sales and consulting, and, under the Hume Planning Scheme, the use would be defined as 'Retail';

(b) the premises were in an Industrial 1 Zone, and the use would require a planning permit; and
(c) both AAC and Staples are liable for any enforcement action undertaken.

23 Staples also refers to the application made by AAC on 4 June 2015 to the council for a planning permit, notes that the application was not granted within 60 days, and that no application to the Tribunal for a review of that failure was made.

24 Furthermore, Staples says that the issue as to whether AAC was in breach of permitted use of the premises, by operating a retail business, was determined at the injunction hearing on 24 September 2015 before Member Kincaid, who refused AAC the injunction it sought. Staples said that Member Kincaid's reasons included:

(a) no-one should be permitted to continue to trade in breach of the provisions of the *Planning and Environment Act 1987*; and
(b) Staples could potentially be subject to criminal prosecution if it permitted AAC to continue to carry on its business at the premises.

25 The evidence of AAC's witnesses, Jim Soultas, Anthony Cannizzarro and Wade Short was that, after 24 September 2015, when the injunction was refused, up to 28 September 2015, they continued to work as usual although the door was closed, and they were not meeting clients at the premises.

26 Staples contends that simply by closing the door, putting up a sign, and not meeting clients at the property, did not mean that AAC ceased to conduct its retail activities.

AAC's estoppel argument

27 In its written submissions, AAC developed the contention that Staples was 'prevented' from arguing that the lease was breached into an estoppel argument. Specifically, it contended that Staples 'is estopped from invoking a breach of lease' on the basis of Mr Staples having undertaken certain actions. These were:

(a) refusing to sign the planning permit application;
(b) writing to the council on three occasions stating his refusal to consent to the town planning permit application for retail use;
(c) contacting the neighbouring tenancies and discussing the need to file objections to the planning permit application;
(d) demanding that AAC comply with the council's requirement to lodge a full and comprehensive planning permit application.

28 AAC did not address any of the formal requirements for the establishment of an estoppel. This may have been because it was not legally represented. As it was not legally represented, it is appropriate that the Tribunal should address the legal underpinning of the doctrine of estoppel in order to accord AAC procedural fairness.

The doctrine of estoppel

29 In *Sidhu v Van Dyke*,[1] French CJ, Kiefel, Bell and Keane JJ began their joint judgment with this observation:

> In *The Commonwealth v Verwayen*,[2] Mason CJ described estoppel as "a label which covers a complex array of rules spanning various categories." His Honour went on to say of "titles such as promissory estoppel, proprietary estoppel and estoppel by acquiescence" that they are all "intended to serve the same fundamental purpose, namely 'protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted".

30 This is a case where AAC is asserting it was entitled to rely on a certain state of affairs existing, namely, that its lease with Staples lawfully provided for the use of the demised premises as 'real estate services'. On this basis, it can be seen that AAC is relying on an estoppel in pais. In *Waltons Stores (Interstate) Ltd v Maher*,[3] Brennan J said of an estoppel of this type [at 12]:

> The nature of an estoppel in pais is well established in this country. A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to: *Craine v. Colonial Mutual Fire Insurance Co. Ltd.* (affirmed on other grounds by the Privy Council - 31 CLR 27, at p 38); *Thompson v. Palmer*; *Newbon v. City Mutual Life Assurance Society Ltd*.; *Grundt v. Great Boulder Pty. Gold Mines Ltd*. [Citations omitted]

31 In *Thompson v Palmer,* Dixon J, said:

> The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment.[4]

32 Precisely because the object of estoppel is to prevent an unjust changing of position, I consider AAC's argument based on estoppel is misconceived. The reality is that Staples terminated the lease on 28 September 2015. Whether or not Staples changed its position about the legality of AAC's use of the premises, it is impossible for the Tribunal now to make an order restraining Staples from terminating the lease on the basis of an estoppel.

33 Even if this were not the case, I am not satisfied that AAC could have established an estoppel in any event, because I do not consider that any

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1 [2014] HCA 19.
2 (1990) 170 CLR 394 at 409.
3 (1988) 164 CLR 387.
4 (1933) 49 CLR 507 at 547.

change of position by Staples caused AAC any detriment. Mr Staples deposed that when he initially agreed to lease the office space he made it clear to Mr Short that the property was in an Industrial Zone. I accept that, as his evidence accords with the zoning. Mr Staples also deposed that Mr Short did not raise the fact that the business was a retail business. I accept this evidence because the lease that Mr Short's company NAC proposed was not a retail lease, but a commercial lease. Mr Staples also gave evidence that he did not appreciate that in carrying on a real estate business Mr Short would be conducting a retail business for the purposes of the RLA. I accept this evidence also. The term of the lease was stated in both NAC's offer to lease and in the NAC lease itself as two years, rather than five years, as required by s 21 of the RLA. Also, no outgoings statement was issued by Staples nor asked for by Mr Short, as one might have expected if the parties had an appreciation that the RLA was to be engaged. In all these circumstances I am satisfied that the parties did not discuss the creation of a lease which would be covered by the RLA. Mr Staples deposed that he first realised the RLA might apply was when this was asserted by AAC's lawyers. I accept this, evidence, as it is consistent with the fact that AAC's lawyers raised the application of the RLA in a letter dated 10 March 2015.[5]

34 Here, the reality is that AAC was largely the author of its own misfortune. Mr Staples did not prepare the lease, nor did his company engage either a lawyer or a real estate agent to act on his company's behalf and prepare the lease.

35 The evidence is that the lease was prepared by AAC, that is to say under Mr Short's supervision, and the lease specified a use which was inconsistent with the zoning of the area in which the demised property was located. Mr Short is a professional commercial real estate agent, and as such either was aware, or should have been aware, of the property's Industrial 1 Zoning, because of his knowledge of the businesses carried on in the area by Mr Staples and others. I consider that it was AAC's decision to open a retail business in an area zoned Industrial that caused its loss, not any alteration of position on the part of Staples.

Was the termination of the lease unlawful?

36 As previously noted, Staples says the issue as to whether AAC was in breach of the permitted use of the premises under the lease by operating a retail business was determined by Member Kincaid at the injunction hearing on 24 September 2015. No transcript of that hearing was made available to the Tribunal for the purposes of the hearing of the present proceeding, but, in my view, the fact that Member Kincaid dismissed AAC's application for an injunction restraining Staples from re-entering the property or otherwise forfeiting the lease pursuant to the September s 146 notice is consistent with, and only with, the proposition that Member

5 Tribunal Book, tab 37.

Kincaid concluded that AAC was in breach of the lease because the use of the property for retail purposes was not a permitted use. It follows that Member Kincaid's decision established that the lease could be lawfully terminated on this basis.

37 The lease was terminated on the express ground that, in breach of the September s 146 notice, AAC continued to conduct retail activities at the property following Member Kincaid's ruling, even though it did not have the requisite planning permit from the council.

38 When he was being cross-examined by Counsel for Staples, Mr Short deposed that Member Kincaid had said that AAC did not have to vacate, but he had to cease trading. I accept that there is a distinction to be drawn between occupying premises under a lease, and trading from those premises. The question that arises accordingly is whether, as a matter of fact, AAC continued to conduct retail activities at the property after Member Kincaid had determined that using the property for retail purposes was not permitted under the lease because of the zoning.

39 Mr Short deposed that after Member Kincaid made his decision on 24 September 2015 the property was not used for retail purposes. He put a sign on the door telling members of the public they could not enter. He sent it this sign to Mr Dong at the council on 24 September 2015.[6] Reference to this letter indicates that Mr Short advised Mr Dong:

> We advise that we have closed our office to the public as of the date herein until such time as the planning application is determined by Council. All retail activities have been suspended until such time as the planning permit is determined.

40 However, Mr Short conceded that he, Mr Cannizarro and Mr Soultas continued to attend at the property to conduct business. He agreed that he and his staff made business-related phone calls including setting up future meetings. However, he denied that they were preparing leases. He agreed that on Friday, 25 September 2016 he was in the office between 11.00am to 4.00pm, and on the following Monday was in the office for seven hours. When pressed by Counsel for Staples to say what he was doing, he said he could not recall, and offered to look at his phone. When it was put to him that 'it was business as usual', he emphatically denied this.

41 Although I must accept that in circumstances where Mr Short and his colleagues were not seeing clients at the property they were not conducting 'business as usual', I am not satisfied AAC ceased to operate a retail business. AAC conducted a real estate business. The essence of such a business is the provision of professional real estate services to the public for financial reward. I find that this falls within the concept of 'retail provision of services; for the purposes of the definition of retail premises contained in s 4 of the RLA. In the days in question after 24 September 2015, Mr Short and both the current employees of AAC attended work. Neither of the

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6 Tribunal Book, tab 54.

employees, Mr Cannizarro or Mr Soultas, were laid off or suspended or took holidays. Although Mr Short denied that leases were prepared during the days in question, he could not say what work was done other than on the telephone. It was conceded that telephone conversations took place including conversations relating to future meetings. Such telephone conversation must have been with clients or potential clients. There is an inescapable inference that those calls related to the conduct of the real estate business. The upshot is that although I accept that Mr Short and his colleagues did not meet with clients at the property, he and his colleagues did communicate with clients from the property. In these circumstances, I find that AAC continued to carry on a retail business from the property. Accordingly, it was carrying on a business in breach of the applicable zoning.

42 This finding means that AAC's claim for damages for unlawful termination of the lease must fail.

AAC's alternative claims for damages

43 Given that an action based on wrongful termination is not available to AAC an issue to be considered is whether AAC has an action for damages against Staples on any basis arising out of breach of the lease.

44 Such an action, if established, might still be brought because s 19 of the RLA provides that the termination of a lease in accordance with the Act does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the lease before the date of termination, except by agreement of the parties, or provided by the Act following the determination of a dispute.

45 Three potential bases for an award of damages are raised impliedly or expressly in AAC's submissions, namely:

(a) breach of an implied term in the lease to co-operate with AAC;
(b) unconscionable conduct;
(c) breach of Staples' covenant to provide quiet enjoyment to AAC.

Breach of implied term in the lease

46 Although AAC did not put its argument in these terms, it appears that AAC is relying on the general principle that a party to a contract must act in a manner which is consistent with the terms of the contract they have entered into, and must not take a step which makes it impossible for the other party to perform their bargain. As noted, AAC was not legally represented at the hearing. If it had been represented, I consider that it is likely that the argument would have been expressly put by its lawyers, because in their letter to Staples lawyers dated 15 September 2015, they said:

> It is trite law that the party cannot be required to perform a contract where its performance is frustrated by the counterparty.

47 A classical articulation of this principle is to be found in the judgment of Lord Blackburn in *Mackay v Dick*, who said:

> As a general rule… when in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of a contract is that each agrees to do all that is necessary on his part for the carrying out of that thing, though there may be no express words to that effect.[7]

48 There is no doubt the principle extends to leases. As Griffiths CJ said in *O'Keefe v Williams*:[8]

> Every contract between subject and subject involves an obligation, implied if not expressed, that neither party shall do anything to destroy the efficiency of the bargain which he has made. The implied covenant or agreement for quiet enjoyment in the case of a demise of land is merely an instance of the application of this rule.

49 As there is, in my view, no reason to question why such a term should not be implied into the lease, I find that such a term is to be implied ('the *Mackay v Dick* implied term').

50 The question then becomes: has there been a breach of the *Mackay v Dick* implied term? I am not satisfied that there has been. The key point, in my view, is that it was not Staples which initially impeached AAC's use of the purposes for retail purposes. It was a third party, namely, the council.

51 When the council became involved by notifying AAC that use of the property was in breach of the planning scheme, Staples insisted that AAC make an application for an amendment to the planning scheme. This action was a natural response to the situation created by the council's notice. It was not inconsistent with Staples' obligations under the lease. On the contrary, it is an act consistent with Staples' obligations to its tenant.

52 Once AAC had lodged its town planning application, the question arose: did Staples have an obligation under the *Mackay v Dick* implied term not to oppose AAC's application for a planning permit?

53 I am not satisfied that such an obligation arose. I consider the relevant factors are:

(a) Mr Staples says that he intended to lease the office part of the property to NAC, and subsequently Square Feet Commercial in its place, under a commercial lease. He says he did not realise he would be entering into a lease which might be characterised as a retail lease.

(b) When Mr Staples agreed to lease the office precinct of the property to NAC, he made it plain that they would be sharing the property with another tenant, and that the other tenant would be carrying out an industrial function, namely, the manufacture of animal bait. Mr

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7 (1881) 6 App Cas 251 at p 263.

8 (1910) 11 CLR 171.

Staples says that this is demonstrated by the fact that NAC, later AAC trading as Square Feet Commercial, was obliged to share the burden of paying for electricity.

(c) Mr Short, when giving evidence, agreed that he was told that the other tenant would be carrying on an ant bait making business, although he said he did not know that the process involved drying fish meal.

(d) As contended by Mr Staples, the use by AAC of the office space proved to be inconsistent with the industrial use by the other tenant, and that this conflict could only be resolved by one tenant leaving.

(e) Had it supported AAC's application for an amendment to the planning scheme so as to facilitate the conduct of a retail business, Staples would have jeopardised the industrial business being carried on by the other tenant. Mr Staples said he also would have jeopardised his own business. He deposed that his business was required to be in an industrial zone.

(f) The lease was prepared by AAC, and the lease specified a use which was inconsistent with the zoning of the area in which the demised property was located.

54 Because Mr Staples would have been acting in a manner inconsistent with the interests of another tenant, and his own business interests, if his company had supported AAC with its application for a zoning amendment, Mr Staples is not to be criticised for making the election not to support, indeed to oppose, AAC's town planning application. Any obligation it might otherwise have had not to oppose AAC's town planning application was negated by its obligation to co-operate with the tenant in occupation of the factory area of 52 Freight Drive.

55 For these reasons, I find that there has been no breach of the *Mackay v Dick* implied term.

56 Lest I am in error in making this finding, I note that, even if a breach of the *Mackay v Dick* implied term could be established, I consider that AAC would have trouble establishing any loss flowed from Staples' objection to its town planning application. Mr Dong, of the council, gave evidence that AAC had the right to have reviewed the council's failure to deal with its town planning application if it was not dealt with within 60 days. Mr Dong explained that the 60 days would be suspended if a request for information was made, but as there had been no request for information made, the time ran continuously from the date the application had been submitted. This meant that the right to seek a review arose on 4 August 2015.

57 It is relevant to note that Staples' objection to the town planning application was made on 27 August 2015, that is to say, some days after the right to review arose. The objection from Mr Cunningham's business, Water Technologies, was made on 20 August 2015. Thus, AAC would not be able to establish that any objection caused the failure of AAC's town planning application. The process was not determined by the time the objections had been made, and AAC had taken no step to press its application by insisting

on a review. Furthermore, as was noted in AAC's submissions dated 14 June 2016, at the date of those submissions, the town planning application remained on foot and had not been decided.

Unconscionable conduct

58 In its amended points of claim, AAC says that Staples' conduct in determining the lease was conduct in trade or commerce which was unconscionable conduct 'within the meaning of section 20 of the *Competition and Consumer Act 2010*'.

59 The prohibition against the person in trade or commerce engaging in conduct that is unconscionable, within the meaning of the unwritten law from time to time, is to be found in s 20(1) of the ACL. The ACL is itself schedule 2 of the *Competition and Consumer Act 2010* (Cth).

60 AAC does not provide any particulars in its amended points of claim as to what features of Staples' conduct is said to be unconscionable. Nor is any guidance given in the final submissions. As AAC is not legally represented, it falls to the Tribunal to assess the claim on the relevant legal principles. As it has been found that the RLA applies to the lease, a claim made under s 77 of the RLA, which deals with unconscionable conduct of a landlord, must also be considered.

61 AAC is not relying upon the statutory prohibition of unconscionable conduct in connection with goods or services contained within s 21 of the ACL. Accordingly, it is necessary to have regard to the equitable principles surrounding 'unconscionable conduct'. One of the leading Australian cases on the topic is *Commonwealth Bank of Australia v Amadio*.[9] In that case, Mr and Mrs Amadio, who were Italian immigrants with a limited command of English, sought to rely on the doctrine of unconscionable conduct in order to be relieved of the consequences of having signed a mortgage in favour of the bank to support their son. Justices Mason, Wilson and Deane JJ constituted the majority that held the Amadios suffered from a special disadvantage vis-a-vis the bank which made it unconscionable for the bank to rely on the guarantee.

62 Guidance as to the nature of unconscionable conduct can be found in the judgment of Mason J where he said, at [2]:

> 2. Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of "unconscionable conduct" is usually taken to refer

[9] (1983) 151 CLR 447.

> to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage ...

63 Mason J went on to say, at [3]:

> Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.

64 Reference can also be made to the judgment of Deane J who said, at [12]:

> The jurisdiction of courts of equity to relieve against unconscionable dealing … is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.

65 The most recent High Court authority on unconscionable conduct is *Kakavas v Crown Melbourne Ltd*.[10] The Court, comprising French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ, said:

> 14. The decisions of this Court, in which claims for relief from unconscionable conduct have been litigated, illustrate the necessity for close consideration of the facts of each case in order to determine whether a claim to relief has been established …
>
> 15 In advancing a claim based on the principle expounded by Mason J in *Amadio,* the appellant relies upon the standards of personal conduct compendiously described as the conscience of equity …
>
> …
>
> 18 The invocation of the conscience of equity requires "a scrutiny of the exact relations established between the parties" to determine "the real justice of the case". Where an appeal is made by a plaintiff to the standards of equity embodied in the *Amadio* principle, the task of the courts is to determine whether the whole course of dealing between the parties has been such that, as between the parties, responsibility for the plaintiff's loss

[10] [2013] HCA 25.

> should be ascribed to unconscientious conduct on the part of the defendant. In *Louth v Diprose*, Deane J explained the basis on which the conscience of equity is engaged to apply the Amadio principle: "The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimisation." (Citations omitted)

66 There is nothing arising from a close consideration of the facts of this case to justify the Tribunal determining that (to paraphrase) *Kakavas*, the whole course of dealing between the parties has been such that, as between the parties, responsibility for AAC's loss should be ascribed to unconscientious conduct on the part of Staples. In particular, it cannot be said that Mr Staples had any superior position or bargaining power which he could use to the detriment of AAC. AAC suffered no special disability, nor was it in some special situation of disadvantage.

67 On the contrary, I consider that it is Staples which might argue that it was a party under a disability, because Mr Short had specialised professional knowledge of the real estate industry, and experience in the drafting of leases, particularly when compared to Mr Staples, whose professional expertise lay elsewhere.

68 In the circumstances, I find that AAC has not made out the claim of unconscionable conduct. Moreover, I consider AAC could not have done so even if it had particularised its allegation.

Unconscionable conduct under the RLA

69 As I have found that the lease is a lease of retail premises and is subject to the RLA, and as AAC has asserted that Staples acted in an unconscionable manner, it is appropriate that I address the provision relating to unconscionable conduct of a landlord which is to be found in the RLA.

70 The relevant section in the RLA is s 77, which relevantly provides:

> **77 Unconscionable conduct of a landlord**
>
> (1) A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) Without limiting the matters to which the Tribunal may have regard for the purpose of determining whether a landlord has contravened subsection (1), the Tribunal may have regard to—
>
> (a) the relative strengths of the bargaining positions of the landlord and tenant; and
>
> (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the landlord's legitimate interests; and

(c) whether the tenant was able to understand any documents relating to the lease; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the tenant or a person acting on the tenant's behalf by the landlord or a person acting on the landlord's behalf in relation to the lease, for example—

  (i) concerning trading on Sundays or days that are public holidays where the premises are located; or

  (ii) to agree to a lease term of less than the minimum period provided by section 21; and

(e) the amount for which, and the circumstances under which, the tenant could have acquired an identical or equivalent lease from a person other than the landlord; and

(f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the tenant acted on the reasonable belief that the landlord would comply with that code; and

(i) the extent to which the landlord unreasonably failed to disclose to the tenant—

  (i) any intended conduct of the landlord that might affect the tenant's interests; and

  (ii) any risks to the tenant arising from the landlord's intended conduct that are risks that the landlord should have foreseen would not be apparent to the tenant; and

(j) the extent to which the landlord was willing to negotiate the terms and conditions of any lease with the tenant; and

(k) the extent to which the landlord acted in good faith; and

(l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and

(m) the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and

(n) the extent to which the landlord required the tenant to incur unreasonable fit out costs.

A claim under s 77(2) of the RLA?

71 If AAC had been legally represented at the hearing and had articulated a claim under s 77(2) of the RLA, it might have argued that there has been a breach of s 77(2)(f) on the basis that Staples' conduct towards it was not consistent with its conduct towards the other tenant of the building, ACTA.

72 However, if AAC had made such an argument it would have faced at least two hurdles. The first is that the transaction between AAC and Staples concerned a lease of premises in the office area at 52 Freight Drive which, because of AAC's use, were deemed to be retail premises. The transaction between Staples and ACTA on the other hand involved a lease that permitted ACTA to conduct its animal control product manufacturing business. The ACTA lease was not put into evidence, but it was not suggested by either party that this lease was not suitable for the use of the factory area at 52 Freight Drive for industrial purposes. The upshot is that the transactions were not similar. They are fundamentally different. AAC's retail use was inconsistent with the applicable Industrial 1 Zoning. ACTA's industrial use *was* consistent with the applicable zoning. It was the difference between the two transactions that forced Staples to make an election as to which of the conflicting uses of 52 Freight Drive it would continue to support. I accordingly find that no claim is made out under s 77(2)(f) of the RLA.

73 The only other potentially relevant provision in s 77(2), might, in my view, have been s 77(2)(i).

An action under s 77(2)(i) of the RLA?

74 AAC might have alleged that Staples engaged in conduct that was, in all the circumstances, unconscionable because it unreasonably failed to disclose to AAC its intended conduct concerning AAC's town planning application. The facts established by the evidence are that after the council wrote to AAC and to Staples advising that AAC was conducting a business in breach of the planning scheme, Staples advised AAC that it must make an application for an amendment to the scheme. Having given that advice, in AAC's view, Staples then set about sabotaging the application by lodging an objection to the application, and by encouraging two other parties to lodge objections.

75 However, in making this claim, I consider that AAC would stumble at the hurdle of causation. I consider that even if Staples' conduct in lodging its own objection to AAC's town planning application, and in encouraging two other parties to lodge objections, was unconscionable in circumstances where Staples had openly encouraged AAC to lodge the application, AAC has not demonstrated that it was those objections which caused its town planning application to fail. On the contrary, as noted, the planning application had not been decided as of 14 June 2016. I find that this fact would be fatal to any claim made by AAC under s 77(2)(i) of the RLA. I accordingly find no claim under s 77(2)(i) of the RLA has been established.

Did Staples breach its covenant to provide quiet enjoyment to AAC?

76 AAC asserts that Staples breached its covenant to provide quiet enjoyment to AAC because strong chemical odours were present within the premises let to AAC. The matters relied on by AAC in support of this claim are as follows:

(a) the factory section of the premises at 52 Freight Drive was leased to ACTA;
(b) ACTA was a company owned and controlled by the sole director of Staples, Mr Staples;
(c) Mr Staples gave evidence that ACTA stored and manufactured animal chemical control pesticides at the property;
(d) Mr Staples and Mr Hall (of ACTA) gave evidence that the ant bait product produced by ACTA was made with fish meal and had an odour;
(e) Mr Short, Mr Cannizaro, Mr Soultas (who work for AAC) and Ms Prendergast (of the EPA) all gave evidence that a strong rotten fish odour was present within the property.

77 AAC submits that the odour caused a breach of its quiet enjoyment of its lease.

Discussion

78 In assessing this claim, the starting point must be a consideration of the covenant for quiet enjoyment set out in the lease itself. It is contained in clause 2(a) and reads:

> THE LESSOR COVENANTS AND AGREES with the Lessee as follows:
>
> …
>
> The Lessee paying the rental reserved and performing and observing the Lessee's covenants and agreements contained in this Lease may peaceably hold and enjoy the Premises during the Term without any disturbance or interruption from the Lessor or any person lawfully claiming by, through or under the Lessor.

79 The effect of the landlord's covenant for quiet enjoyment is to protect the tenant against substantial interference with the possession and enjoyment of the leased premises.

80 Some actions by a landlord outside the demised premises may constitute a breach of the covenant. Examples are demolition works, or the installation of an air-conditioning system which operates at a noise level which interferes with the business of the tenant. The authors of Australian Tenancy Practice and Precedents say:

> Generally breach of a covenant for quiet enjoyment is not established merely by proof that the user of premises adjoining the leased premises which are retained in the possession of the landlord has

made the leased premises less fit for the purpose for which they were let.

81 Even if it is assumed for the purposes of argument that the use of the balance of the premises at 52 Freight Drive by ACTA might conceivably justify a claim for breach of the covenant for quiet enjoyment, I consider that AAC faces several hurdles in making out its claim.

The evidence

82 Ms Prendergast of the EPA gave evidence on the first day of the hearing. She identified the EPA Inspection Report relating to an inspection at 46-50 Freight Drive, Somerton, on 18 August 2015 as the report she had prepared following her inspection. Reference to that report indicates that Ms Prendergast made the following observations:

> 2.2 Observed no odours when entering the premises from Freight Drive.
>
> 2.3 Was informed by a site representative the company was in a legal dispute with the tenants of offices at 52 Freight Drive over odour from manufacturing in the rear of the factory 52 Freight Drive by ACTA; that the machine is not run every day and that it is used to manufacture ant bait and that fish meal is a raw material that is odorous.
>
> 2.4 Observed a fishy odour approximately. 1-2 m before entering the factory 52 Freight Drive and that the entrance roller door was fully open …
>
> 2.5 Observed production records that showed that the machinery produces ant bait and runs for a few days and then is not run for up to a month …
>
> 2.6 Observed strong fishy odour from fish meal in buckets next to the machine and was informed by a site representative that this was one of the ingredients used to manufacture ant bait.

83 Ms Prendergast deposed that she had not issued any compliance notice. Reference to her report confirmed this was so. This determination by the independent body responsible for environmental protection in Victoria does not support of AAC's case.

84 In these circumstances, there is a question as to whether the smell in the premises was of such a degree that it constituted a breach of the covenant for quiet enjoyment.

85 Furthermore, in the light of Ms Prendergast's note that she 'saw production records that showed that the machinery produces ant bait and runs for a few days and then is not run for up to a month …', there is an issue as to the extent of the problem in temporal terms.

86 Although Mr Cannizarro gave evidence that when the plant was running there was a smell of 'rotten fish' which made him feel nauseous, and agreed under cross-examination that he felt like vomiting and became light-headed,

he agreed he did not vomit, and he did not say that he was forced to go home because of the smell.

87 A WorkSafe Victoria report prepared by Mr James Doulis was tendered by consent. Mr Doulis did not think the smell created an OHS issue.

88 Mr Soultas gave evidence that the fish smell was quote 'unbearable', and said that he went to the doctor about it. However, he could not recall how often he went, or what medicine was prescribed by the doctor. Although he initially said the machine was running every day, he retracted this under cross-examination and said it was being used every day for two months. He agreed a vent had been installed by ACTA to improve the situation.

89 Mr Short also referred to the smell, and noted Mr Soultas had been upset about it.

90 Direct evidence about the operation of ACTA's manufacturing plant was given by Benjamin James Hall, who works as a product controller with the company. His evidence was that manufacturing started on 8 August 2014, and continued with a small production run on 1 September 2014 and another on 2 September 2014, followed by another small production run on 3 October 2014. Mr Hall deposed that the ventilation system was installed on 24 October 2014 or thereabouts. His evidence was that no employee of ACTA complained about the smell.

Discussion

91 Relevant to AAC's claim that Staples breached its covenant of quiet enjoyment is the question of whether AAC's business was materially interfered with. Although Mr Soultas, in particular, gave evidence about how he was affected by the smell, and went to the doctor about it, he did not say he missed substantial periods of work because of it. Nor did Mr Cannizarro say that he missed work because of the smell. Furthermore, there is no evidence from any of AAC's three employees (including Mr Short), that the flow of customers to AAC's premises was affected by the smell. Accordingly, I find that AAC has not established that there was material interference with its business as a result of the conduct by ACTA of its pest control product manufacturing business.

92 There is another relevant factor, namely, the reasonableness of Staples' actions. Mr Short was well aware of the nature of Mr Staples' business in general. For instance, he gave evidence that when he took instructions from Mr Staples regarding the leasing of the property at 55 Metrolink Drive, he was told that there were bales and bales on pallets of animal control technology products stored there.

93 When the tenant who had been the occupier of the rear of 52 Freight Drive moved to 55 Freight Drive, Mr Staples moved ACTA's business to 52 Freight Drive and the materials stored at 55 Metrolink Drive were transferred there.

94 It is to be noted that the lease was executed by AAC on 26 August 2014. By this time, ACTA was already in occupation of the factory at 52 Freight Drive, as is evidenced by Mr Hall's statement that the first production run was on 8 August 2014.

95 As AAC, through Mr Short, had knowledge of these matters, AAC cannot say that it was not aware that it might be affected by smell or noise arising from the manufacture of pest control products in the factory. It signed the first lease on the basis that ACTA was in occupation, even though its predecessor NAC may have taken possession of the office area at 52 Freight Drive at a time when ACTA was not in possession.

96 In these circumstances, I find that AAC has not established that there has been a breach by Staples of its covenant for quiet enjoyment.

The statutory claim under s 54 of the RLA

97 Section 54(1) of the RLA provides that a retail premises lease is taken to provide as set out in the section. Section 54(2) then relevantly provides:

> (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) …
>
> (b) unreasonably takes action that substantially inhibits or alters the flow of customers to the retail premises; or
>
> (c) unreasonably takes action that causes significant disruption to the tenant's trading at the retail premises; or
>
> (d) fails to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises; or …
>
> (e) (i) …
>
> (ii) …
>
> (f) …

98 AAC did not refer to s 54 of the RLA at the hearing or in its submissions, but, as AAC is not a party represented by a professional advocate, I consider that it is appropriate that I should make reference to this provision, as it provides a statutory remedy to which AAC might well have relied had it had the benefit of legal representation.

99 It would not have been too late for AAC to have made a claim under s 54 of the RLA. Although s 54(3) requires the tenant must give the landlord written notice of the loss or damage as soon as practicable after it is suffered, the section goes on to say that a failure to do this does not affect any right of the tenant to compensation.

100 The following points may be made about the potential application of s 54(2) of the RLA. Firstly, compensation is not available if the tenant has suffered only nominal damage. This means that, in order to obtain compensation, AAC will have to demonstrate it has sustained more than nominal damage. This of itself might prove fatal to any claim for compensation, because there was no evidence Mr Short nor any of his employees took time off work because of the smell.

101 Secondly, there is no prospect of a claim under s 54(2)(a), as access to AAC's premises was not impeded. Nor is s 54(2)(e) engaged as there has been no breakdown of plant or equipment, nor is there any defect in the building. Furthermore, s 54(2)(f) cannot be relied on by AAC, as cleaning is not an issue. The upshot is that only s 54(2)(b), (c) or (d) might potentially be in issue.

102 In order to win an award of compensation under s 54(2)(b) of the RLA, AAC will have to demonstrate that the landlord or its agent had unreasonably taken action that substantially inhibited or altered the flow of customers to the retail premises.

103 I consider that any claim for compensation made under s 54(2)(b) would fail because there was no evidence that fewer customers came to the premises than might otherwise have been the case, or that business was otherwise interfered with.

104 In order to claim successfully under s 54(2)(c), AAC would have to demonstrate that the landlord or its agent had unreasonably taken action that caused significant disruption to the tenant's trading at the premises.

105 The party in occupation of the factory area at 52 Freight Drive was not Staples, but ACTA. In carrying out its manufacturing process, ACTA was seemingly acting on its own behalf. Mr Staples may have been a common director, but that fact alone did not make necessarily ACTA an agent of Staples.

106 However, even if it is assumed for the purposes of argument that the acts or omissions of ACTA can be attributed to Staples because Mr Staples was a common director, it can hardly be said that ACTA was acting unreasonably in carrying out its manufacturing process in the industrially zoned factory which it had leased.

107 For these reasons I find that no breach of s 54(2)(c) could be established by AAC.

108 Finally, I turn to s 54(2)(d), which is concerned with the landlord failing to take reasonable steps to prevent or stop significant disruption to the tenants trading at the premises. There is evidence that ACTA's staff left the front and rear doors of the factory open when the manufacturing process was underway if the weather allowed, and ACTA installed a vent in October 2014 to alleviate the smell problem. I consider that these steps were

reasonable steps for ACTA – and therefore Staples, if ACTA is the agent of Staples – to have taken, and hence there has been no breach of s 54(2)(d).

109 For all these reasons, I find I would not have been disposed to have made an award of compensation to AAC had AAC framed a claim under s 54 of the RLA.

Summary regarding the primary claim for damages

110 In summary, I have found there is no claim in respect of breach of the of the *Mackay v Dick* implied term, nor any unconscionable conduct under s 20 of the ACL, nor under s 77 of the RLA, nor breach of the covenant of quiet enjoyment, nor any parallel claim made under s 54 of the RLA, which renders Staples liable to an action for damages in respect of its conduct.

AAC's remaining claims for damages

111 Two monetary claims made by AAC, however, remain for consideration. The first of these relates to AAC's claim it is not obliged to pay outgoings under the lease pursuant to s 46(4) of the RLA. The second relates to re-imbursement of $3,200 allegedly overpaid by AAC for electricity.

The claim for reimbursement of outgoings paid under the lease

112 It follows from the finding that the lease applies to premises which are retail premises within the meaning of the RLA, that s 26 of the RLA applies. This section relevantly provides:

> **46 Estimate of outgoings**
>
> (1) A retail premises lease is taken to provide as set out in this section.
>
> (2) The landlord must give the tenant a written estimate of the outgoings to which the tenant is liable to contribute under the lease that itemises those outgoings.
>
> (3) The tenant must be given the estimate of outgoings—
>
> (a) before the lease is entered into; and
>
> (b) in respect of each of the landlord's accounting periods during the term of the lease, at least one month before the start of that period.

113 Mr Staples agreed when giving evidence that he did not initially provide any estimate of outgoings. This is hardly surprising as Mr Staples also gave evidence that he was not aware of the requirement to provide a disclosure statement. After all, he thought the lease was a commercial lease relating to property which was industrially zoned, not a lease of retail premises.

114 Mr Short's evidence is also that no estimate of outgoings was provided by Staples, at least not until a disclosure statement was issued on a without prejudice basis.

115 AAC's primary submission is that because Staples did not provide any estimate of outgoings it is not obliged to pay Staples any amount in respect of outgoings, by virtue of the operation of s 46(4) of the RLA. AAC acknowledges that a disclosure statement was issued on 26 May 2015, but says that because it was issued on a without prejudice basis 'it should be considered that no disclosure statement has been issued'. Its fall-back position is that it is responsible for outgoings only after the issue of the disclosure statement.

116 The letter dated 26 May 2015 covering the disclosure statement provided by Staples relevantly provides:

> Please find enclosed Landlord's Disclosure Statement in relation to the office space and 5 car park spaces AAC occupies at 52 Freight Drive, Somerton pursuant to a lease with Staples Super for execution by you.
>
> This disclosure statement is provided on an entirely without prejudice basis without any admission by the Landlord that the Lease is a Lease of retail premises.

117 The disclosure statement itself is endorsed with the following statement:

> THIS DISCLOSURE STATEMENT IS PROVIDED TO THE TENANT WITHOUT ANY ADMISSION BY THE LANDLORD THAT THE LEASE IS A LEASE OF RETAIL PREMISES
>
> THE LANDLORD OTHERWISE RESERVES ITS RIGHTS

118 In the circumstances, I consider that it is clear that it was the act of sending the disclosure statement which was without prejudice. Staples' intention was not to jeopardise its ability at a later time to argue that the lease was not a lease of retail premises.

119 Now that it has been determined by the Tribunal that the lease is a lease of retail premises, I find there is nothing to stop Staples relying on the disclosure statement that it sent on 15 May 2015 as a disclosure statement for the purposes of s 46 of the RLA.

120 AAC says the effect of s 46(4) of the RLA is that Staples is not entitled to the payment of outgoings.

121 Section 46(4) of the RLA provides:

> (4) The tenant is not liable to contribute to any outgoings of which an estimate is required to be given to the tenant as set out in this section until the tenant is given that estimate.

122 As I read s 46(4) of the RLA, a tenant is not liable to contribute to any outgoings until it has been given an estimate pursuant to s 46(2) in respect of those outgoings. I consider the inference to be drawn is that once the estimate has been provided, then the tenant is liable to contribute in respect of those outgoings.

123 I think that this observation provides the answer to AAC's claim for reimbursement of outgoings it has paid. Once AAC received an estimate of outgoings, it became liable to contribute to the outgoings referred to in the estimate. I accordingly find that AAC's claim for reimbursement of the outgoings it has paid fails.

The claim for reimbursement of electricity charged to the tenant

124 The claim is for $3,200. Staples says the claim must fail because, if any tenant overpaid for electricity, it was NAC, under the first lease, not AAC under the second. Staples contends, and I agree, that the point was conceded by Mr Short in cross-examination.

125 AAC sought to overcome this obvious flaw in its claim by asserting in its submissions that it had bought the creditors' ledger from NAC and became entitled to the debt owed from Staples to NAC. However, no evidence of Mr Short about this was referred to, and no document evidencing the purchase of the creditors' ledger was put in evidence. In the absence of any evidence as to this critical point, I find that AAC's claim for reimbursement of electricity fails.

AAC's claim for interest

126 As each of AAC's monetary claims has failed, it is not entitled to an award interest.

AAC's claim for costs of the proceeding

127 As AAC has failed on each of its claims, there is no basis for it to seek costs. The hurdle in the way of any claim for costs arising under s 92 of the RLA does not even have to be considered.

Staples' counterclaim

128 It will be recalled that Staples seeks these orders in respect of the lease:

(a) a declaration that the lease was void ab initio pursuant to section 243 of the ACL;
(b) alternatively, an order pursuant to section 243) of the ACL terminating the lease; or
(c) a declaration that the lease was validly terminated;
(d) an order for rectification of the lease so that it embodies the agreement made between the parties and in particular includes Wade Short as guarantor, and provides for the calculation of the electricity outgoings on a pro-rata basis;
(e) damages;
(f) costs;
(g) interest pursuant to statute.

The claim for a declaration that the lease has been terminated

129 It is convenient to start with this claim. AAC did not dispute that the lease was terminated by Staple's notice of re-entry dated 28 September 2015. It disputed that the termination was legal. As I have found above that the termination was legal, I am prepared to make a declaration to this effect.

The claim for a declaration that the lease was void ab initio pursuant to s 243 of the ACL

130 Section 243 of the ACL relevantly provides:

> **243 Kinds of orders that may be made**
>
> Without limiting [certain irrelevant sections] the orders that a court may make under any of those sections against a person (the respondent) include all or any of the following:
>
> (a) an order declaring the whole or any part of a contract made between the respondent and a person (the injured person) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract:
>
> (i) to be void; and
>
> (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made); …

131 The jurisdiction of the Tribunal to make an order under s 243 of the ACL (Victoria) was not queried by Mr Short, and for the purposes of argument I am prepared to assume that the Tribunal does have that jurisdiction. However, the possession by the Tribunal of power to make such an order under s 243 does not mean that such an order should be made. I consider there would be no utility in an order declaring that the lease was void ab initio because such an order would be of no utility, and is likely to produce confusion. The relevant considerations in my view are:

(a) the lease certainly came into existence;
(b) AAC entered into possession of the office space at 52 Freight Drive pursuant to the lease, and carried on its business from that address even after the date upon which the lease was terminated;
(c) AAC paid rent under the lease;
(d) the lease was validly terminated on 28 September 2015;
(e) AAC has vacated the property, and now carries on business elsewhere.

132 For these reasons, I dismiss Staples' application for a declaration under s 243 of the ACL (Victoria), that the lease was void ab initio.

The alternative claim for terminating the lease under s 243(c) of the ACL

133 AAC sought, as an alternative to a declaration that the lease was void ab initio, an order pursuant to s 243(c) of the ACL terminating the lease. This provision empowers the Tribunal to make an order 'refusing to enforce any or all of the provisions of such a contract or arrangement'.

134 Putting aside the threshold question of whether s 243(c) actually empowers the Tribunal to make an order terminating the lease, I am not disposed to make such an alternative order in any event. The reason for this is that it has been established that the lease has already been terminated. There is, accordingly, no lease to be terminated by an order of the Tribunal. It would be pointless for the Tribunal to make such an order, and any such order would lead to confusion, and perhaps cast doubt on the efficacy of the termination which has already been effected by Staples, and relied upon by both of the parties.

The claim for an order for rectification of the lease

135 Staples seeks an order that the lease should be rectified so that it embodies the agreement made between the parties as set out in the NAC offer to lease, and in particular includes:

(a) Mr Short would personally guarantee the obligations of AAC under the lease; and
(b) AAC would pay electricity outgoings on a pro rata basis.

136 AAC's defence is both factual and legal. The factual defence is that although both Tristan Russell and Wade Short were named as guarantors in the NAC offer to lease, the evidence of Mr Staples is that he agreed to a request by Mr Russell, that he not be a guarantor. Mr Short's evidence supports this. Mr Short said that his relationship with Mr Russell came to an end, and this is why Mr Russell asked Mr Staples to release him as guarantor.

137 The evidence of Mr Short and Mr Staples differs as to the release of Mr Short as guarantor. Mr Short gave evidence that he had a meeting with Mr Staples after Mr Russell had been released as a guarantor, and Mr Staples agreed that he would not be a guarantor either. This evidence is disputed by Mr Staples.

138 The legal defence put forward by Mr Short is that there is no guarantee in writing insofar as the AAC lease contains no signed guarantee, and there is a legal requirement that a guarantee must be in writing. Mr Short also says that the NAC lease contained no signed guarantee.

Mr Staples' evidence relevant to the rectification claim

139 The context for the negotiation of the NAC offer to lease is the subject of an affidavit sworn by Mr Staples on 16 July 2015 in this proceeding. Mr Staples deposed he had responded to an advertising pamphlet issued by

NAC in or about January 2014. Mr Staples stated that he met Mr Tristan Russell of NAC. The affidavit does not make it clear when Mr Staples met Mr Short.

140 Mr Staples 'eventually' engaged NAC as agent to draft a lease for the properties at 115 Metrolink Circuit, 45 Freight Drive and 55 Freight Drive.

141 In about February 2014, Mr Staples was advised by Tristan Russell that NAC wished to lease the office space at the property. Staples did not immediately agree to this, but ultimately did so in or about March 2014. In or about late March 2014, Mr Staples negotiated the terms of the lease with Mr Russell and Mr Short in a series of meetings which were held either at his office at 50 Freight Drive or at the property.

142 Mr Staples then deposed that he was sent the NAC offer to lease in early April 2014, and that he checked it to ensure its terms were the same as those he had discussed with Mr Short. He said that the terms were the same, save for the fact that the offer did not mention the car parking requirements, and these were then agreed in conversations. He executed the NAC offer to lease, and NAC began occupying the property on 4 April 2014.

143 According to Mr Staples, the next step was that, in or about June 2014, Mr Short attended at his office and provided him with a NAI Harcourt's lease titled 'Commercial Lease'. This is clearly the NAC lease. Mr Staples swore that he asked Mr Short if this lease was on the same terms as the NAC offer to lease which had been negotiated between the parties. He received verbal assurance from Mr Short that this was the case, and that he executed the NAC lease without reading it 'and relied on Short's representations and assurances'.

144 Mr Staples then deposed that between April 2014 and August 2014, NAC occupied the property pursuant to the terms of the NAC lease.

145 Mr Staples in his affidavit of 16 July 2016 then deposed that, in or about July 2014, Mr Short visited him and informed him that he wanted to go into business by himself, and break away from NAI Harcourts. Mr Staples deposes he agreed to enter into a fresh lease 'as long as we did so on the same terms as we have orally agreed earlier' as noted in the NAC offer to lease, which he understood to have been reflected in the NAC lease.

146 Mr Staples then deposed that, on or about 26 August 2014, Mr Short visited his office and advised him that he had established a new agency trading as Square Feet Commercial, and that he was the sole director of the company. Mr Short presented a copy of a new lease. Mr Staples deposed that he asked Mr Short whether this lease contained the same terms that had been agreed upon, and was assured that they did. He says that, based on Mr Short's representations and assurances, he executed this lease on 26 August 2014. This lease is 'the lease' which is the subject of this proceeding.

147 In his affidavit sworn on 16 July 2016, Mr Staples placed weight on the negotiations he conducted with Mr Short. He said:

> I trusted NAC with drafting the lease as Short represented to me that NAC was a franchisee of NAI Harcourts, a reputable estate agency, and that they were very experienced in commercial leasing matters and would charge no fee for preparing the lease. I relied on these representations. As NAC were a real estate agency I did not think it was necessary to engage an agent to manage the property.

Mr Short's evidence relevant to the rectification claim

148 Mr Short swore an affidavit in this proceeding on 17 June 2015. This affidavit throws more light on the context in which Mr Staples and Mr Short came to negotiate the NAC lease. In particular, Mr Short deposed that he was the sole director of NAC, which was incorporated on 28 March 2012. NAC was a real estate agency operating within the Harcourt's franchise. One of its clients was the trustee of the Staples Family Trust, and NAC managed some properties on behalf of that trustee. Mr Short confirmed that he had a discussion with Mr Staples in about late 2013 concerning the leasing out of 115 Metrolink Circuit. Mr Short deposed that he instructed Tristan Russell to call Mr Staples concerning the leasing of the office space at 52 Freight Drive to NAC, and that Mr Staples had been non-committal. He also said that Mr Staples asked NAC to draft a lease to another proposed tenant for his company, but also asked if Mr Short was still interested in leasing the office space. This led to NAC leasing the office space at 52 Freight Drive. Mr Short said that Mr Staples asked NAC to draft a formal lease, as the landlord was a superannuation fund. NAC did this, and Staples entered the lease, which began in April 2014.

149 Mr Short deposed that NAC had a dispute with its franchisor, which led to the end of its franchise agreement by August 2014. AAC was incorporated on 29 July 2014.

150 Mr Short deposed he told Mr Staples that he needed to change the lease at 52 Freight Drive 'for a new entity, but that the business and the people and all terms would stay the same'. He deposed that Mr Staples agreed to this.

151 Mr Short then said that AAC drafted the new lease between it and Staples, which was signed on 26 August 2014.

Discussion of Staples' rectification claim

152 In support of Staples' claim, Mr Staples gave evidence that he signed the AAC lease on the basis of representations from Mr Short that it conformed with the NAC offer to lease, and that the lease was identical to the previous NAC lease.

153 I consider that the evidence of Mr Staples that he signed the NAC lease without reading it means that Staples' claim regarding rectification of the lease regarding the guarantee must fail. The lease clearly does *not* contain a

signed guarantee. Indeed, it does not appear to even contain an unsigned guarantee. The drafting, accordingly, gives support to Mr Short's evidence that Mr Staples had agreed that he, as well is Mr Russell, was to be released from signing the guarantee. I find against Staples in respect of this particular claim for rectification.

154 It remains to deal with Staples' contention that the lease was meant to reflect an agreement that AAC would pay electricity outgoings on a pro rata basis. The claim was not addressed in Staples' written submissions, but there is no indication that this limb of the claim for rectification has been discarded. The basis of the argument for rectification appears to be that the NAC offer to lease provided that AAC would pay 20% of rates, taxes and other outgoings and charges, 100% of Council Rates, building insurance and water service, but that electricity would be charged by 'actual usage'.

155 The lease relevantly provides in its schedule at item 11 that electricity is to be apportioned on the basis listed in item 11 A. Reference to item 11 A indicates the proportion referred to is 20%, being the proportion that the lettable area of the premises bears to the lettable area of the building.

156 Mr Short's explanation, in his evidence, was that the reference to 'actual usage' for electricity contained in the NAC offer to lease assumed that there would be separate metering for the two tenancies.

157 Mr Short also deposed that when the lease was executed it superseded the NAC lease and the NAC offer to lease. His point, no doubt, is that the terms of the lease accurately reflect the ultimately agreed arrangements between the parties.

158 In the absence of compelling evidence from Mr Staples to the contrary, I find for AAC in respect of the second limb of Staples' rectification claim as well.

Staples' claim for damages

159 In its amended points of counterclaim Staples makes a claim for rent and outgoings detailed in the document attached as Annexure A.

160 The claim totals $82,855.25 inclusive of GST. The claim comprises a number of sub-claims, including barrister's fees of $10,400 and solicitor's fees of $60,367.86 and Tribunal filing and hearing fees, and transcript fees totalling $1,226.

161 Putting those claims aside, the costs claimed (exclusive of GST) are:

Cost of gaining re-entry -

(a) Gain Entry Locksmiths $1,509.09; and

(b) Manforce Protection Services (security guards) $400;

Costs associated with departure of AAC -

(c) Gate Opening Systems Pty Ltd in respect electronic entry $670;

(d) Wellspring Group (cleaners) $150;

(e) Air-conditioning repairs (Powerwide Electrical Services) $600;

Staples' invoices

(f) $1,693.18;

(g) $73.41;

(h) $2,210.38;

(i) $518.12.

Discussion

162 Mr Staples identified all but one of the invoices listed as (a)-(i) above at the hearing, and they were tendered.

163 Mr Staples deposed in his affidavit sworn in proceeding BP1301/2015, and gave evidence at the hearing in this proceeding, that he sent locksmiths to the site on 28 September 2015. The relevant invoice is from Gain Entry Locksmiths in the sum of $1,660 *inclusive* of GST. This sum comprised the following charges:

(a) $90 for two 570 cylinders;
(b) $90 for one lever and knob set;
(c) $1,240 in respect of four hours attendance each by two men (evidently at $155 per hour);
(d) $250 in respect of a call out fee.

164 AAC's position, as reflected in Mr Short's cross-examination of Mr Staples, is that this account was excessive. I agree. The change of locks could have been effected late at night, as suggested by Mr Short, by a single locksmith when no-one from AAC was in attendance. I find that a reasonable charge to allow is $740 comprising $180 for the cylinders and the lever and knob set, $310 for two hours attendance at $155 per hour, plus the callout fee of $250.

165 The charge imposed by Manforce Protection Services of $440 inclusive of GST related to the attendance for 4 hours of two guards at $55 inclusive of GST each per hour. This account was addressed to ACTA, but Mr Staples deposed it was paid by Staples. I find, however, that it should not be allowed, as the locks could have been changed out of hours without the presence of security.

166 The first invoice from Gate Opening Systems Pty Ltd (No.8590) dated 28 September 2015 for $176 inclusive of GST was in respect of an attendance at 52 Freight Drive to delete the previous code from the keypad and program a new code in accordance with Mr Staples' instructions. Mr Short asked Mr Staples in cross-examination why this had been charged to AAC. Mr Staples' answer was that there was an eviction. I accept Mr Staples' view, and I find this to be a reasonable charge arising upon termination of the lease, and allow it in full.

167 There was a second invoice from Gate Opening Systems Pty Ltd (No.8343) dated 15 October 2015 for $308 inclusive of GST that related to a service call to 52 Freight Drive to program an existing remote control, and also to supply two new remote control units. Mr Staples deposed that two remote controls were not returned by AAC. Mr Short said during his cross-examination of Mr Staples that AAC had not been given any remote controls, and had to obtain them from 'a locksmith'. He also said that two remote controls were handed to Ben Hall. Ultimately, Mr Staples said that he accepted Mr Short's word regarding the remote controls. I find on this basis that the invoice should stand insofar as it relates to the reprogramming only, and will allow recovery of $140 plus GST in respect of this particular item, as invoiced. The allowed recovery is accordingly $154.

168 A third invoice from Gate Opening Systems Pty Ltd was referred to in Annexure A but was not tendered. No allowance will be made in respect of it.

169 Wellspring Group Pty Ltd charged Staples $165 inclusive of GST in respect of cleaning. The work took place on 17 October 2015, which was ten days after AAC vacated the property. Mr Staples said that the toilets and benches were cleaned. I find that this charge is reasonable, and will allow the recovery of the account in full.

170 Powerwide Electrical Services Pty Ltd charged $660 inclusive of GST in respect of the supply and installation of three new air-conditioning circuits to existing wall air-conditioning units in the upstairs office. Circuits to the switchboard were terminated, and tested. The work was carried out on 28 October 2015, some three weeks after AAC had vacated. The justification for this charge given by Mr Staples was that Mr Short had installed two air-conditioners in the upstairs office and he was concerned that the circuits might be overloaded. However, Mr Staples, at the hearing, indicated that the invoice was not being relied on. On this basis, no allowance will be made in respect of it.

171 At the hearing, Mr Staples also identified a bundle of tax invoices which his company had rendered to ACC. They were tendered.

172 The first of these invoices (No.197A) was for $1,693.18 and comprised the following items (inclusive of GST):

(a) $668.41 for 20% electricity for the period 16 September 2015 (sic) - 21 February 2015;

(b) $108.26 in respect of 20% electricity for the period 22 February 2015 - 21 March 2015;

(c) $550.80 in respect of 20% insurance;

(d) $73.03 in respect of 20% brokers fee;

(e) $60.59 in respect of 20% insurance stamp duty;

(f) $83.67 in respect of 20% electricity for the period 22 March 2015 - 21 April 2015.

173 Mr Staples deposed that 20% of these charges were billed to AAC as this was what Mr Short had asked for. It is to be noted this was the percentage assigned to AAC at item 11 of the schedule to the lease in respect of rates, taxes, council rates, building insurance, water service, and electricity.

174 Mr Staples gave evidence that Ian Senior (who had identified himself when he gave evidence on 22 February 2016 as the chief financial officer of ACTA), had charged Staples $668.38 for electricity. The claim for this item was amended to this figure.

175 Mr Short asserted when cross-examining Mr Staples that AAC did not receive original electricity invoices to review. AAC, in its written submissions, relied on this issue, as well as Staples' refusal to provide a disclosure statement in accordance with the RLA, and Staples' failure to provide audited invoices for electricity charges as required by s 47(5) of the RLA.

176 Staples' response, in its submissions, is that AAC cannot rely on the failure of Staples to provide original source documentation as this issue was raised for the first time during the cross-examination of Mr Staples as a reason by AAC for non-payment of invoices. I do not accept this argument, as the evidence from both sides was that invoices for outgoings were regularly contested by AAC. In these circumstances, Staples can hardly have been taken by surprise by AAC's insistence at the hearing that it was entitled to sight the original electricity invoices which it was being asked to share. I find, on this basis, that AAC is not obliged to pay the demanded contribution to electricity charges in the sums of $668.38 and $83.67.

177 If I had not decided the issue of AAC's liability for electricity charges on this basis, then I would have done so on the basis of Staples' failure to insert a figure for electricity charges in the disclosure statement which it sent to AAC on 26 May 2015. Although I have already found that that disclosure statement can be relied on by Staples, the disclosure statement said that AAC's contribution to electricity was 'variable depending upon usage'. It did not say that AAC was liable for 20% of the electricity charged to another party in respect of the entire building. The inference is open that there was to be separate metering. In these circumstances, I do not think a proper estimate of the electricity outgoing has been given to AAC for the purposes of s 46(4) of the RLA, with the result that AAC is not liable to contribute in respect of this particular outgoing.

178 Mr Staples also deposed that ACTA charged Staples 20% of a building insurance premium of $2,753.98 invoiced by HWA Insurance Brokers. Reference to the insurer's invoice confirms that the base premium was for that amount. GST of $311.93 was added and then stamp duty of $302.94 and a broker's fee of $355.15 were charged, bringing the total invoice to $3,734.00.

179 In its written submissions, AAC contested its obligation to pay for insurance for 12 months, on the basis that the tenancy ended either on 28 September 2015 or 9 October 2015, depending on the legality of the termination. As the HWA invoice is expressed to cover the period 23 April 2015 - 23 April 2016, I accept the thrust of AAC's argument that it is not obliged to pay for insurance for a whole year. However, as AAC vacated the property on 9 October 2015, I consider that AAC should account to Staples in respect of its liability for the relevant insurance payments for the 24 weeks between 23 April 2015 and 9 October 2015.

180 AAC also raises Staples' failure to provide a disclosure statement. I have previously found that a valid disclosure statement was ultimately served by Staples. However, reference to that document indicates that the tenant's liability in respect of insurance was stated to be $627 per annum. I find that this is the figure which should be pro-rated for 24 weeks. I find accordingly that AAC's liability for insurance charges is $627 x 24/52 = $289.38.

181 Invoice No. 211 was for $73.41 and was expressed to be penalty interest for late payment of invoice 197A. Although reference to the lease at clause (w) confirms that the lessee must pay to the lessor on demand interest at a rate being the aggregate of 2% and the rate for the time being fixed under s 2 of the *Penalty Interest Rates Act 1983* on any rental or other moneys which are due and payable, Mr Staples confirmed at the hearing that penalty interest was now not claimed. Accordingly, no allowance will be made for this invoice.

182 The next Staples invoice claimed (No. 214), was for rent of $2,210.38, inclusive of GST, was charged as at 1 October 2015.

183 AAC, in its submissions, contends that the total rent claimed is not payable because one month's rent has been billed, and the rental has not been adjusted to the end of the tenancy. If the tenancy ended on 28 September 2015, no rental is payable. If it ended on 9 October 2015, rent for 9 days is conceded.

184 Although Staples gave notice of termination of the lease on 28 September 2015, and sought to re-enter on that day, the re-entry was resisted by AAC. AAC did not vacate until 9 October 2015. As AAC was still in possession as at the date that the rental invoice was raised, namely, 1 October 2015, I find the demand for rental was legally made by Staples. I find for Staples in respect of this invoice and allow recovery in full of the $2,210.38 billed.

185 The final Staples invoice (No. 214A), was dated 1 October 2015, and was for $518.12. It was expressed to relate to 20% of the Hume City Council September rate instalment of $1,776.60, and 20% of an electricity charge of $636.38.

186 In respect of the council rates, AAC says in its written submissions, rather confusingly, that they have been charged 'for an annual quarter'. Reference to the council rate notice for the year 1 July 2014 - 30 June 2015, which is

in the sum of $1,654, AAC suggests that Staples is seeking contribution to a full year's rates. I find that AAC is obliged to contribute 20% of the annual rates of $1,776.60 reduced to reflect the fact that AAC left the premises on 9 October 2015, ie, within the fourth month of the rate year. The relevant calculation is $1,776.60 x 20% x 4/12 = $118.44.

187 I find that AAC has no liability in respect of electricity outgoings for the reasons given above in respect of Staples invoice No197A. The total allowance for invoice No 214A is accordingly limited to $118.44.

Summary of damages awarded to Staples

188 In respect of the following invoices, I have awarded the following amounts:

(a) Gain Entry Locksmiths: $740;

(b) Manpower Protection Services: Nil;

(c) Gate Opening Systems: $176;

(d) Gate Opening Systems: $154;

(e) Gate Opening Systems: Nil;

(f) Wellspring Group: $165;

(g) Powerwide Electrical services: Nil;

(h) Staples (No. 197A): $289.38;

(i) Staples (No. 211): Nil;

(j) Staples (No. 214): $2,210.38;

(k) Staples (No. 214A): $118.44.

189 The total award to Staples in respect of its claim for damages is therefore $3,853.20.

Staples' claim for interest

190 Staples claimed interest pursuant to statute in its Amended Points of Claim. I find that it is entitled to interest calculated at the rate set from time to time pursuant to s 2 of the *Penalty Interest Rates Act 1983* for the period between the date of institution of its counterclaim, namely, 9 September 2015 and 3 November 2016. The relevant calculation is: $3,853.20 x 9.5 % per annum = $1.0009 per day x 422 days = $422.37.

Staples' claim for legal costs

191 In its written submissions, Staples seeks an order for costs on an indemnity basis. It refers to authorities including *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*. I consider AAC should be given an opportunity to address the claim for indemnity costs.

192 Staples will be given leave to apply in respect of costs. If an application for costs is made, a hearing will be fixed.

193 The Tribunal's decision about costs in BP1301/2015 will be delivered separately.

MEMBER C EDQUIST