VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.BP1521/2015

CATCHWORDS

RETAIL LEASE; licence or lease; *Retail Leases Act 2003* (RLA) ss 7, 16, 17, 34, 46, 47, 48, 54, 60 and 77; breach of lease; measure of damages; set-off of landlord's entitlements.

APPLICANT	Wendy Benaych
RESPONDENT	Telcanti Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATES OF HEARING	17 March 2016, 18 March 2016 and 20 June 2016
DATE FOR FILING FURTHER MATERIALS AND SUBMISSIONS BY APPLICANT	24 June 2016
DATE FOR FILING RESPONSE SUBMISSIONS BY APPLICANT	1 July 2016
DATE OF ORDER	23 November 2016
CITATION	Benaych v Telcanti Pty Ltd (Building and Property) [2016] VCAT 1947

ORDERS

1 Pursuant to s 124 of the *Victorian Civil and Administrative Tribunal Act 1998* I declare that:

(a) the applicant, Wendy Benaych, and the respondent, Telcanti Pty Ltd, entered into a lease of *retail premises* under the *Retail Leases Act 2003* in or about August 2014;

(b) the respondent repudiated the lease by unlawfully locking the applicant out on or about 1 October 2015;

(c) the respondent is liable to the applicant for damages assessed at $5,410.00;

(d) Telcanti is entitled to set off against its liability to Ms Benaych the sum of $8,141.50;

(e) the award of damages the applicant is entitled to from the respondent is accordingly $NIL; and

(f) as the respondent has no counterclaim on foot, it is not entitled to any award of damages.

2 The applicant's claim is otherwise dismissed.

3 Liberty is granted to the parties to apply for costs within 60 days, but the parties are reminded that costs are governed by s 92 of the *Retail Leases Act 2003*.

MEMBER C EDQUIST

APPEARANCES:

For the Applicant:	Ms W Benaych in person
For the Respondent:	Mr K O'Donnell, director

REASONS

INTRODUCTION

1 In Main South Road, Drouin, Victoria, stands the Old Butter Factory. Part of the building ('the premises') were operated by the applicant, Wendy Benaych, between February 2014 and 1 October 2015 as a restaurant/café known as Le Renard Roux (The Red Fox).

2 Ms Benaych was in possession of the premises under an arrangement made with the respondent, Telcanti Pty Ltd ('Telcanti'). Whether that arrangement amounted to a lease is a central issue in the proceeding.

3 On or about 1 October 2015, Telcanti unilaterally locked Ms Benaych out of the premises. She came to the Tribunal on 23 November 2015 and obtained an order for return of the keys, and an injunction restraining Telcanti from entering into possession of the premises until further order of the Tribunal. On 14 December 2015, the injunction was revoked, but Ms Benaych was given a reasonable opportunity to remove her possessions from the premises by 29 January 2016.

The issues to be determined

4 At the hearing on 14 December 2015, Senior Member Lothian made a number of findings. One of these was that she was satisfied that there was a genuine question to be tried between the parties concerning whether there is, or was, a lease to Ms Benaych. Another issue was whether the lease has been breached by either Ms Benaych or Telcanti, and if the lease had been breached, what are the consequences of the breach? These remain as the headline issues to be determined following the hearing.

The hearing

5 The hearing began on 17 March 2016 and continued on 18 March 2016. As the hearing was not concluded on the second day, it was adjourned part heard to 20 June 2016. It finished on that day. On each day of the hearing Ms Benaych appeared in person. She called one other witness. Mr Ken O'Donnell appeared on behalf of Telcanti in his capacity as a director, and gave evidence on behalf of the company and called witnesses. At the conclusion of the hearing on 20 June 2016 Ms Benaych was given leave to file limited materials, and submissions about, them by 24 June 2016. She availed herself of this opportunity. Telcanti was given leave to file response submissions by 1 July 2016, and duly did so.

The respective positions of the parties

6 Regarding the dispute about the status and the terms of the lease, Ms Benaych says that there is an oral lease, but that its terms are substantially

to be found in an earlier written, but un-executed, lease of the premises.[1] The earlier lease had been prepared by Telcanti's lawyer in early 2013 when Ms Benaych was conducting a restaurant/café business at the premises known as Au Lapin Noir (The Black Rabbit) with her then business partner Sue Kiernan. Ms Benaych says the details concerning the rental and the term of the oral lease were agreed in April 2014, but that a written lease was not provided by Telcanti, although Mr O'Donnell had agreed to provide a written lease.

7 Ms Benaych alleges that Telcanti was required to provide access to the premises and was required to maintain the general condition of the building, including the adjoining rooms, theatres, and the heating and cooling, for the purpose of conducting a business that would go on to become a saleable asset.

8 Ms Benaych says that Telcanti breached the lease in a number of ways. In particular, Telcanti did not provide quiet enjoyment of the premises and acted in an unconscionable manner. Ms Benaych seeks damages of $112,388.90 from Telcanti.

9 Telcanti says that Ms Benaych breached the 'informal arrangement' between them by failing to pay the rent due and that this breach was accepted as repudiation of the lease when Telcanti re-took possession of the premises on 1 October 2015. Telcanti denies that it is indebted to Ms Benaych, and says that it is owed rent of $53,450.00 plus outgoings of $4,000.00, a total of $57,450.00. Telcanti is not pursuing a counterclaim, but seeks to set off its entitlements against Ms Benaych's claim.

Ms Benaych's evidence about the first lease

10 The evidence presented by Ms Benaych regarding her entry into the initial lease is as follows:

(a) She started business at the Old Butter Factory in December 2012 with her then business partner Sue Kiernan.
(b) She and Ms Kiernan paid rent of $400.00 a week to Telcanti as landlord.
(c) The draft lease was not entirely satisfactory, and Ms Kiernan made some changes to it. In particular, she changed the identity of the landlord from Margaret Lillie O'Donnell to Telcanti, and suggested the tenant should not be Wendy Olsen (a former name of Ms Benaych) and Sue Kiernan but Lapin Noir Pty Ltd. She also added a notation that the area being leased should be made explicit in a plan.
(d) Before an amended lease was produced, Ms Benaych and Ms Kiernan broke up their business relationship. In order to resolve the basis upon which the split up was to occur there was a mediation on or about 11

[1] Exhibit A1.

November 2013. It was agreed that assets that had been bought by Ms Benaych and Ms Kiernan together would be sold to pay off debts incurred by the business, but Ms Benaych and Ms Kiernan were to be entitled to keep their own property.

(e) However, in order to achieve a settlement with the landlord, Ms Benaych handed over to Telcanti a refrigerator and a bar in order to settle the landlord's claim for arrears in rent. Mr O'Donnell agreed that this action settled Telcanti's claim for rent under the first lease.

(f) There was a short break in Ms Benaych's occupation of the premises following the termination of the first lease.

Ms Benaych's re-entry into The Old Butter Factory

11 Ms Benaych gave evidence that:

(a) In about early December 2013, she was feeling at a loss, as everything she had worked for was dissolving.

(b) She spoke to Mr O'Donnell by phone and it was agreed that she could open up another business in the premises. However, rather than the business being downstairs in the restaurant area, it would be in the gallery on the upper level, facing Main South Road. The new business would be operating under a new name, Le Renard Roux or The Red Fox.

(c) Mr O'Donnell wanted an assurance that there would be no legal issues, and Ms Benaych checked with her lawyer. The lawyer confirmed that there would not be an issue, as the new business did not involve Ms Kiernan, and would be operating under a new name.

(d) She took possession of the gallery in December 2013. She borrowed money to buy a coffee machine, and sold tea and coffee in the gallery space.

(e) She said that Mr O'Donnell and his sister-in-law, Mrs Margaret O'Donnell, visited the gallery. They were not happy with the way it had been set up, as they preferred the gallery space to be open to allow access to the small theatre which took up most of the area on the top floor of the building. It was agreed that she should move the business downstairs into the restaurant area.

(f) She spent the early days of the New Year getting ready for the opening of her new restaurant/café. It was opened on 9 February 2014. She remembers the date because it coincided with Drouin's Ficifolia Festival.

(g) In order to conduct the restaurant/café, she needed a liquor licence. The old restaurant, Au Lapin Noir, had a licence. She understood that, following the mediation with Ms Kiernan, the licence was to be transferred into her name. However, this did not occur. In fact, the licence was cancelled. When she came to understand what had happened, Ms Benaych began the process of obtaining a new liquor licence in the first week of January 2014.

(h) One of the requirements of the Liquor Licensing Commission was that she produce a lease for the premises. She could not do this, and instead, obtained a statutory declaration from Mr O'Donnell, sworn on 28 July 2014 that she had "permission to occupy the premises for the purposes of conducting her business 'Le Renard Roux'".[2]

(i) She and Mr O'Donnell had discussions about the rent to be paid. Ms Benaych told Mr O'Donnell she could not afford the $400.00 a week that she and Ms Kiernan had been paying under the lease for the Lapin Noir. She says rent of $300.00 per week was agreed.

(j) Regarding the term of the lease, Ms Benaych says she insisted on a three year term with two three-year options, resulting in a nine year term. She says that Mr O'Donnell wanted a shorter period but she would not agree to this because of the investment she would be making in the business.

(k) Ms Benaych says the terms of the lease were to be substantially the same as the first lease prepared by Telcanti's lawyer in connection with Au Lapin Noir. Ms Benaych marked up that document with a number of changes, including the following:
    (i) she identified herself, trading as Le Renard Roux (The Red Fox), as the tenant;
    (ii) she defined the term as '3x3x3 years'; and
    (iii) an amendment to the proposed treatment of outgoings to the effect that she would pay $2,000.00 for water, sewerage, telephone and other services and utilities, but gas and electricity would be metered separately.

(l) Ms Benaych agreed in the hearing that her right to exclusive possession of the restaurant area was modified in two ways. These were raised by Mr O'Donnell during the hearing. The first was that she agreed that Mr O'Donnell had the right, at any time that the restaurant was not occupied, to enter and to turn on the lights to the upstairs gallery, which were operated from within the restaurant. The second was that Mr O'Donnell had a right at any time to enter the restaurant area to use the toilet. These permissions were personal to Mr O'Donnell.

Was there a lease?

12 Ms Benaych contends that the existence of the lease is evidenced by these facts:

(a) after she vacated the premises, she was re-granted possession in early 2014 in order to establish a new restaurant;

(b) Telcanti, in or about August 2014, provided bank account details to her so that she could begin paying rent; and

(c) she started paying rent from August 2014.

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[2] Exhibit A4.

Telcanti's position regarding the lease

13 Telcanti's position regarding the existence of a lease is not easy to identify. In the 'Conclusion' set out in its defence,[3] Telcanti says:

> If Telcanti has failed to meet his obligations under the *Retail Leases Act* 2003, monetary penalties may apply, but the failure to adhere to the obligations set under that Act do not make the retail premises lease, or in this case, the verbal agreement, illegal, invalid or unenforceable.

14 Telcanti's position is consistent with s 16 of the *Retail Leases Act 2003* ('the RLA'), which provides:

> **Lease must be in writing and signed**
>
> (1) A landlord or tenant must not enter into a retail premises lease that is not in writing and signed by all of the parties to it.
>
> 10 penalty units.
>
> (2) A failure to comply with this section does not make the retail premises lease illegal, invalid or unenforceable.

15 From the passage quoted from Telcanti's defence above, it might be inferred that Telcanti's position is that there was a lease, but that it was an oral lease. However, during the hearing, Mr O'Donnell confirmed that he considered there was an informal arrangement which fell short of a lease.

16 Telcanti articulates its position in this way in its points of defence and in its points of counterclaim:[4]

(a) In about June 2013, Ms Benaych and her former business partner were given a draft lease for their consideration. That lease was not accepted, but was returned with handwritten comments on it after some months.

(b) In or about late October 2013, Ms Benaych's business partner left the partnership.

(c) Mr O'Donnell cannot recall Ms Benaych requesting a formal lease arrangement. In the defence he states:

> … after providing the draft lease, there were no further requests for a formal lease and the arrangement was that of an informal agreement.[5]

(d) Mr O'Donnell also said that he does not recall being asked by Ms Benaych to get his lawyer to draft a fresh lease. Mr O'Donnell says the informal agreement between the parties was deemed adequate. In particular, he says Ms Benaych:

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3 Filed on 8 December 2015.
4 Filed on 23 February 2016.
5 Counterclaim, paragraph 5.2.

> … was very happy with the informal arrangement that was in place particularly as it gave her enormous flexibility in so far as paying or not paying the rent.[6]

(e) However, Mr O'Donnell does recall a conversation in which he said Ms Benaych could have a formal lease when she produced references and started paying the rent on time.[7]

(f) Mr O'Donnell denies requesting that Ms Benaych open a gallery at the premises, but says he encouraged her to do so when she suggested the idea. He also says he did not request Ms Benaych to open a restaurant/café downstairs in the premises, but allowed her to do so when she requested this.

(g) Mr O'Donnell expressly disputes that he approached Ms Benaych to discuss rent and lease terms and in particular suggested $300.00 a week. He says that the initial draft lease set the rent at $400.00 per week, and that it was Ms Benaych who approached him and said she could not pay that amount of rent to start with and that it was then agreed that the rent would be $300.00 per week until Ms Benaych was able to 'get on her feet'.

(h) Mr O'Donnell also says:

(i) he denies receiving any cash payments from Ms Benaych;[8]

(ii) rent was paid into Telcanti's bank account, and no receipts were issued;

(iii) he provided access to the premises and maintained the general condition of the building, including the adjoining rooms, theatres, and heating and cooling;

(iv) that utility bills were supplied;

(v) adjustments regarding contribution were to be made between Ms Benaych and Mr Barry Monks.

Finding regarding the existence of a lease

17 I consider the following factors are relevant to the issue of whether the arrangement between Ms Benaych and Telcanti amount to a lease:

(a) When Ms Benaych had possession of an area in the Old Butter Factory with her business partner, Sue Kiernan, between late 2012 and October 2013, Telcanti's lawyer was instructed to prepare a formal written lease.

(b) Ms Benaych took possession of the same area in early 2014 and undertook works necessary to rebadge the old Au Lapin Noir restaurant/café as Le Renard Roux.

(c) No explanation was put forward on behalf of Telcanti as to why the occupation of the demised area from late 2012 through to October

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6 Defence, paragraph 3.3.

7 Counterclaim, paragraph 4.3.

8 Defence, paragraph 4.5 (However, in the hearing, it was put to Mr O'Donnell that $150 was once paid in cash, and he agreed this was the case.)

2013 for the purpose of running a restaurant/café warranted the benefit of a formal lease, whereas possession of the same part of the premises by Ms Benaych for an identical purpose did not also warrant a proper lease.

(d) Ms Benaych negotiated with Mr O'Donnell, on behalf of Telcanti, the rental and the term of the lease for Le Renard Roux, and there was a clear identification of the demised area.

(e) The written lease prepared for Au Lapin Noir by Telcanti's lawyer created a workable set of conditions as between landlord and tenant.

(f) Ms Benaych contends that the written terms of the first lease prepared for the Au Lapin Noir were satisfactory, save for a limited number of changes which she marked up or flagged on the document. It is Ms Benaych's contention that the provisions of this draft lease, subject to being altered in the manner suggested or flagged on the document, and subject to two terms subsequently agreed regarding permitted access for Mr O'Donnell, were to govern her new relationship with Telcanti regarding Le Renard Roux.

(g) The two terms later agreed between Ms Benaych and Mr O'Donnell were exceptions to Ms Benaych's right of exclusive possession of the premises. They were constituted by a standing permission for Mr O'Donnell to enter the restaurant area to turn on the lights upstairs, and a licence personal to him to use the toilet which was accessed through the restaurant area.

18 I accept Ms Benaych's evidence that the draft lease prepared for Au Lapin Noir, subject to it being amended in the manner outlined by her, set out the terms of the lease which ought to have been engrossed and executed by the parties for Le Renard Roux. I accordingly make a finding to this effect.

19 The arrangement under which Ms Benaych took possession of the restaurant area downstairs in the Old Butter Factory in order to establish Le Renard Roux prior to its opening in February 2014 may have been informal. However, the informality to did not arise from uncertainty about the terms of the arrangement.

20 Ms Benaych took possession of the premises early in 2014. However, she did not begin to pay rent when she went into possession, and I find that she did not do so under a lease. At this point I consider that she had a mere licence to occupy the area in which she had established Le Renard Roux.

21 I note this finding is consistent with Mr O'Donnell's evidence that he did not want to give a formal lease to Ms Benaych until such time as she was in a position to pay the required rent on time. He deposed "no one in their right mind would grant a lease when the rent was not being paid".

22 I note further that this finding is consistent with the statement contained in Ms Benaych's points of claim that in May 2014 "I requested a written lease again and was rejected". The inference can be drawn that at this point Ms Benaych was well aware that she did not occupy the premises under a lease.

23 I consider that the position changed when Ms Benaych obtained Telcanti's bank details and commenced paying rent in August 2014. At this point the terms of the lease had been agreed, even though they had not been completely reduced to writing and executed by the parties. I consider that the commencement of the payment of rent formalised Ms Benaych's possession. I find that from this point a lease commenced.

Application of the *Retail Leases Act 2003*

24 Section 4 of the RLA defines *retail premises* as:

> … premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—
>
> 1. the sale or hire of goods by retail or the retail provision of services…

25 As the premises were used by Ms Benaych to conduct a restaurant/café, I find that the lease, when it came into existence, was a lease of *retail premises* as defined in the RLA.

When did the lease come into existence?

26 The finding that the RLA applies to the leased premises provides the answer as to when the lease came into operation, because s 7 of the RLA provides:

> **When retail premises lease is entered into or assigned**
>
> For the purposes of this Act, a retail premises lease is entered into or assigned when—
>
> (a) under the lease or assignment, the tenant enters into possession of the premises with the consent of the landlord; or
>
> (b) under the lease or assignment, the tenant begins to pay rent for the premises; or
>
> (c) the lease or assignment has been signed by all of the parties to it—
>
> whichever first occurs.

27 If Ms Benaych had taken possession of the retail premises under a lease, it would follow from s 7(a) of the RLA, that, once she entered into possession with the consent of Telcanti (given through Mr O'Donnell), the lease would have been deemed to have been entered into. However, as I have found above that Ms Benaych did not take possession under a lease, but under a mere licence to occupy the area in which she had established Le Renard

Roux,[9] s 7(a) does not apply. I have also found that the commencement of the payment of rent formalised Ms Benaych's possession, and that it was from this point that a lease commenced.[10] This finding is consistent with s 7 (b) of the RLA.

28 On the basis of these findings, pursuant to s 124 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) I declare that Ms Benaych and Telcanti entered into a lease of *retail premises* under the *RLA* in or about August 2014.

The claim under s 16 of the RLA

29 Ms Benaych alleged a breach of s 16 of the RLA at the hearing, asserting that the parties entered into a retail premises lease that was not in writing and was not signed by all the parties.

30 I agree that Ms Benaych was entitled to have that lease put in writing and signed by the landlord, pursuant to s 16 of the RLA. The failure of Telcanti to reduce the lease to writing and to sign it was potentially an offence for the purposes of s 16(1) of the RLA. I make no finding about that, because the Tribunal is not concerned with offences under the RLA. I note, however, that the failure to comply with s 16(1) does not make the retail premises lease illegal, invalid or unenforceable, by virtue of the operation of s 16(2). I find that the lease made by Ms Benaych with Telcanti was legal, valid and enforceable.

Ms Benaych's allegations regarding breach of the lease

31 In summary, Ms Benaych asserts that there have been breaches of the lease in respect of the landlord's obligations regarding:

(a) the provision of access to and the maintenance of the premises;
(b) outgoings;
(c) quiet enjoyment.

32 Ms Benaych also asserts that there have been unconscionable acts on behalf of the landlord.

Obligation to provide access to and maintain the premises

33 The first allegation is that there was a breach of the landlord's obligation to maintain the premises. The particulars of this allegation are:

> The respondent (Telcanti) was required to provide access to the premises and was required to maintain the general conditions of the building, including the adjoining rooms, theatres, heating and cooling, conductive to providing quiet enjoyment of the premises for the

[9] Paragraph 20 above
[10] Paragraph 23 above.

> purpose of conducting business that would go on to become a saleable asset.[11] (sic)

34 Telcanti denies each of the allegations made by Ms Benaych. In respect of the alleged breach of the obligations to provide access to and maintain the premises, Telcanti says that the state of the building is as it was when first inspected by Ms Benaych. Furthermore, it says:

> [Telcanti] did provide access to premises and did maintain the general conditions of the building, including the adjoining rooms, theatres, heating and cooling, conducive to providing quiet enjoyment of the premises.[12]

Discussion

35 I am not satisfied that the evidence supports the assertion that Telcanti breached its obligation to provide access to the premises. Ms Benaych's own evidence establishes that access was provided from early 2014.

36 There is contested evidence as to whether Telcanti breached the related obligation to maintain premises, which I do not propose to canvass having regard to the conclusions expressed below regarding other breaches of the lease.

Outgoings

37 The next set of allegations relate to breaches of the lease relating to outgoings. In particular, in the Points of Claim it is alleged:

> They were required to provide a lease, disclosure statement and SBCV brochure.
>
> It was the duty of the landlord to supply the utility bills to be paid with adjustments made for the usage of utilities by the landlord's other tenant at the premises as well as other users of the utilities at the premises as there was no separate metering.[13]

38 Later in her points of claim, in support of an allegation that Telcanti acted unconscionably, Ms Benaych elaborates on the complaints regarding outgoings as follows:

> Not supplying utility bills payment until they were at the "Disconnection notice" stage [and supplying bills] which did not contain relevant details such as average usage or connection charges.
>
> Not changing the name of the utility bills to our business name (Instead they are still in the name of the late Mrs Margaret O'Donnell).

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11 Points of Claim, paragraph 5.1.
12 Defence, paragraph 5.1.
13 Points of Claim, paragraphs 5.2 and 5.4.

> The unfair expectation that the business be liable to pay for all the utility bills despite having a full-time residential tenant (Barry Monks) living in the larger theatre apartment as well is the use of electricity and gas by theatre production clients throughout the business tenancy and refusing to discuss the matter to come to some agreement.
>
> The unfair expectation for the business to collect the agreed contribution from Barry Monks ($100 per month towards gas electricity) despite his refusal to pay this money.[14]

39 Mr O'Donnell says the utility accounts remained in the name of the late Mrs Margaret O'Donnell as her deceased estate had not yet been finalised. Furthermore, he says Ms Benaych never raised the issue of changing the name into the business account.[15]

40 Telcanti says that it supplied utility bills, and adjustments regarding contributions were to be made between Ms Benaych and Mr Monks. The defence pleaded:

> It was never expected that [Ms Benaych] would pay all of the utility bills and apportionment to the tenant, Barry Monks, was informally made. [Mr O'Donnell] suggested to Mr Monks that he should arrange between himself and [Ms Benaych] to contribute 10% of the utility bills. Mr Monks agreed that this would be a fair contribution as it would, in reality, far exceed his actual usage. This agreement was executed on two occasions.[16] (sic)

Discussion – outgoings

41 Telcanti's obligations regarding outgoings are implied by the RLA. For instance, 17 of the RLA provides as follows:

> **Landlord's disclosure statement**
>
> (1) At least 7 days before entering into a retail premises lease, the landlord must give the tenant—
>
> (a) a disclosure statement in the form prescribed by the regulations (but the layout of the statement need not be the same as the prescribed disclosure statement); and
>
> (b) a copy of the proposed lease in writing.

42 Mr O'Donnell, at the hearing, indicated he was not aware of the provision. He relied on the defence that there was no lease.

43 Ms Benaych said there has been a breach of s 17 because no disclosure statement was given. However, she did not contend that she had issued a

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14 Points of Claim, paragraphs 6.13, 6.14 and 6.15.
15 Defence, paragraph 6.5.
16 Defence, paragraph 6.6.

notice pursuant to s 17(2), and accordingly any right she might have had under s 17(3) to withhold rent did not arise.

44 However, another obligation imposed upon Telcanti by the RLA arises under s 47, which relevantly provides:

> **Statement of outgoings**
>
> (1) A retail premises lease is taken to provide as set out in this section.
> (2) The landlord must prepare a written statement that details all expenditure by the landlord, in each of the landlord's accounting periods during the term of the lease, on account of outgoings to which the tenant is liable to contribute.
> (3) The landlord must—
> (a) make the statement available to the tenant at least once in relation to expenditure during each of the landlord's accounting periods during the term of the lease; and
> (b) give the tenant the statement within 3 months after the end of the accounting period to which it relates.
> (4) The outgoings statement may relate to more than one tenant as long as each tenant to which it relates can ascertain from the statement the details relevant to the tenant.

45 Section 47 of the RLA must be read in conjunction with s 48, which establishes a mechanism for adjustment to take place between the landlord and the tenant to take account of any underpayment or overpayment by the tenant in respect of outgoings during the relevant landlord's accounting period. Section 48(3) provides:

> (3) The adjustment is to take place—
>
> (a) within one month after the landlord gives the tenant the outgoings statement under section 47 for the period; or
> (b) within 4 months after the end of the period—
>
> whichever is earlier.

46 The basis of the adjustment is set out in s 48(4) which provides:

> (4) The adjustment is to be calculated on the basis of the difference between—
>
> (a) the total amount of outgoings in respect of which the tenant contributed (that is, the estimated total expenditure by the landlord on outgoings during the period); and
>
> (b) the total actual expenditure by the landlord in respect of those outgoings during the period, but taking into account only expenditure properly and reasonably incurred by the landlord in the payment of those outgoings.

47 Telcanti did not provide a statement of outgoings to Ms Benaych as required by s 47 of the RLA. Ordinarily, where there has been a breach of s 47, the landlord will not be able to require the tenant to make an adjustment in relation to outgoings. However, at the hearing Ms Benaych acknowledged her obligation arising under the lease to pay $2,000.00 per annum for water, sewer, telephone and other services as well as paying gas and electricity on a consumption basis. We return to this topic below.[17]

Quiet enjoyment

48 The next set of alleged breaches relate to the landlord's covenant of quiet enjoyment. Ms Benaych pleads:

> It was expected that the landlord respect the tenant's rights and not grant entry onto the business premises by people other than those approved by the tenants and to request this in writing.[18]

49 Later, in connection with the allegation of unconscionable conduct on the part of the landlord, Ms Benaych refers to:

> Unfair treatment by changing the locks with no notice given whether verbally or in writing.
>
> Repeated unlawful entry into the business premises throughout the term of the tenancy for various reasons with no verbal or written notice.
>
> Unlawful entrance entry into the business premises by Ken's tenant Barry Monks and friend, with keys given to him by Ken O'Donnell to "Look around" with no notice (verbal or written) or permission given by Derek or myself. When confronted, Barry reacted violently and was threatening.
>
> Unlawful entry given to others by Ken O'Donnell to others to remove items form the business premises. Subsequently there are missing items form the premises, a scroll saw, Samsung Galaxy tablet, and a box of business paperwork. There are possibly other items missing…[19] (sic)

50 In respect of the allegations concerning breach of the covenant of quiet enjoyment, Telcanti says:

> In relation to the allegation of [Telcanti's] "repeated unlawful entry into the business premises throughout the term of the tenancy…" [Telcanti] states of the relationship between [Mr O'Donnell] and [Ms Benaych] was cordial at all times (until recently) and any entry to the building was made for lawful purposes, usually maintenance of other parts of the building. [Ms Benaych] only occupied a small area of the total building.

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17 See paragraphs 172-178 below.
18 Points of Claim, paragraph 5.5.
19 Points of Claim, paragraphs 6.2, 6.5, 6.6 and 6.7.

> [Mr O'Donnell] has no control over the actions of Mr Barry Monks, and cannot be held accountable for his alleged actions or behaviour.
>
> [Mr O'Donnell] vehemently denies giving access to the building to anybody and vehemently denies allowing anybody to remove items from the business premises. Any missing items should be reported to the police for investigation. [Mr O'Donnell] has no knowledge of any items removed from the business premises. [Mr O'Donnell] is not a thief.[20]

Discussion - covenant of quiet enjoyment?

51 There was an express provision requiring Telcanti to take all reasonable steps to ensure that the tenant have quiet enjoyment of the premises in the draft lease which was prepared by Telcanti's lawyer in relation to the Au Lapin Noir tenancy.[21] As I have accepted Ms Benaych's contention, and made a finding to the effect, that the provisions of the old Au Lapin Noir draft lease, with agreed amendments (which did not affect the covenant of quiet enjoyment), were to govern her new relationship with Telcanti regarding Le Renard Roux,[22] I find that there was an express obligation upon the landlord to take all reasonable steps to ensure the tenant had quiet enjoyment of the premises.

52 If there had been no express term, then I consider that Ms Benaych could have relied on an implied landlord's covenant of quiet enjoyment in any event.[23]

53 There is contested evidence regarding some of the specific allegations made by Ms Benaych as examples of breach of the covenant of quiet enjoyment on the part of the landlord.

54 One of these allegations is that Telcanti allowed Mr Monks (and on one occasion Mr Monks and a friend), access to the demised premises, and that Telcanti gave access to others to remove items from the business including a Samsung Tablet, a scroll saw and a box containing business papers.

55 Mr O'Donnell disputes the proposition that he allowed Mr Monks to roam all over the Old Butter Factory, including into the downstairs restaurant area. On the basis of Mr O'Donnell's evidence that he told Mr Monks he was not to go into the restaurant area, I do not think that Ms Benaych can sustain her contention that Mr Monks had a licence to enter the restaurant area at will.

56 With respect to the theft of items from the building belonging to Ms Benaych, it is clear that Telcanti is not to be held responsible for the theft of

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20 Defence, sub-paragraphs 6.2, 6.3 and 6.4 respectively.
21 Draft lease, general condition 7.
22 Paragraph 18 above.
23 See *Australian Tenancy Practice and Precedents*, LexisNexis, Volume 1, Chapter 27 [27 05].

the Samsung Tablet, as Ms Benaych conceded that her eight-year-old daughter took it home.

57 The scroll saw appears to have been taken by an unknown third party, but as it was taken from a room outside the restaurant area, if Telcanti has liability for its disappearance, it is not liability arising out of breach of the lease, but possibly liability arising out of Telcanti's capacity as a bailee. The Tribunal was not addressed on this issue at the hearing, and in these circumstances I will not make a finding regarding Telcanti's liability as a bailee. However, I do find that the taking of the scroll saw did *not* constitute a breach of the covenant of quiet enjoyment.

58 Ms Benaych says a box containing business papers was taken from under the bar, where it was kept, after she was locked out of the premises on 1 October 2015. The argument seems to be that Telcanti must have given someone access to the bar, and this action constituted a breach of the covenant of quiet enjoyment. In the absence of any evidence that Telcanti actually gave someone access to the bar, I am not prepared to make a finding of breach of the covenant of quiet enjoyment on this particular basis.

59 However, it is not necessary for Ms Benaych to make out this claim to establish a breach of the landlord's obligation to her to provide quiet enjoyment of the leased premises. This is because the mere fact that the landlord locked her out by changing the locks to the front door of the building in her absence on 1 October 2015 is itself the best possible example of a breach of the obligation to provide quiet enjoyment, if the action was unlawful.

60 The relevant enquiry accordingly becomes: was the changing of the locks a lawful act on the part of the landlord?

Was the re-entry and changing of the locks unlawful?

61 Regarding the lockout, Mr O'Donnell said that as Ms Benaych failed to pay the agreed rent, this led to Telcanti attempting on several occasions to contact her. Ms Benaych refused to accept any contact. He wanted Ms Benaych to leave the building as a result of her conduct and her failure to pay rent on time, and in full.[24] He changed the locks of the building hoping to bring the matter to a head.[25] Mr O'Donnell agreed at the hearing that no notice had been given to Ms Benaych of the intended lockout. He proceeded to change the locks without notice on the advice of his lawyer and his real estate agent Mr Williamson.

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[24] Defence, paragraph 6.11.
[25] Defence, paragraph 6.1.

62 The right of re-entry or forfeiture under any proviso in a lease or otherwise arising by operation of law for a breach of any covenant or condition of a lease is governed by s 146 of the *Property Law Act 1958* ('the PLA'). Section 146(1) provides in effect that the landlord must serve on the tenant a notice:

(a) specifying the breach complained of; and
(b) if the breach is capable of remedy, requiring the tenant to remedy the breach; and
(c) in any case, requiring the tenant to make compensation in money for the breach.

63 An important qualification to s 146(1) of the PLA is that the requirement to give a notice does not apply in the case of re-entry or forfeiture in the case of non-payment of rent, by reason of the operation of s 146(12).

64 The upshot is that Telcanti was not required by s 146 to give a notice to Ms Benaych of its intention to retake possession of the premises by reason of non-payment of rent only.

65 It remains to consider whether Telcanti was required to give such a notice by reason of a provision in the lease itself.

66 I have already found that the provisions of the draft lease prepared in relation to Au Lapin Noir governed the relationship between Ms Benaych and Telcanti, save where they were expressly agreed to be amended.[26] This is a key finding, because special condition 14 of the draft lease provides as follows:

> If default shall at any time be made by [Ms Benaych] in the payment of rent when due to [Telcanti] as herein provided, and if said default shall continue for fifteen (15) days after written notice thereof shall have been given to [Ms Benaych] by [Telcanti] …, [Telcanti] may declare the term of this lease ended and terminated by giving [Ms Benaych] written notice of such intention, and if possession of the Leased Premises is not surrendered, [Telcanti] may re-enter said premises.

67 It is clear that special condition 14 has the effect of imposing on Telcanti an obligation, in the event that rent is outstanding, to give a 15 day warning notice to Ms Benaych of its intention to terminate the lease.

68 However, it is important to note that special condition 14 goes on to say:

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[26] Paragraph 18 above.

> [Telcanti] shall have, in addition to the remedy above provided, any other right or remedy available to [Telcanti] on account of any default [of Ms Benaych], either in law or equity.

69 The question arises: does this proviso to special condition 14 entitle Telcanti to ignore the notice provision contained in special condition 14 and to rely on its right under s 146 of the PLA to re-enter without notice in the case of non-payment of rent? In my view, it does not. The proviso is, in my view, to be interpreted as assisting the landlord because it indicates that the rights of termination created by special condition 14 are not exhaustive, and are to be read as being *additional to, but not in replacement of*, any other rights of the landlord. This is the only way that the proviso can be read which is consistent with the whole of special condition 14. The proviso is not to be read so as to eliminate the tenant's right to a 15 day notice which the earlier words in special condition 14 have created.

70 I accordingly find that special condition 14 mandated that Telcanti had to give Ms Benaych 15 days' notice of its intention to terminate the lease and re-enter the premises on the basis of non-payment of rent, and that the giving of this notice was a requirement over any notice required (or more accurately, not required) by s 146 of the PLA.

71 I further find that in failing to give such notice, Telcanti breached the lease when it locked Ms Benaych out.

72 Accordingly, pursuant to s 124 of the VCAT Act 1998 I declare that Telcanti repudiated the lease by unlawfully locking the applicant out on or about 1 October 2015.

The landlord acted unconscionably

73 A number of claims regarding unconscionable conduct on the part of the landlord are made by Ms Benaych. For instance, she says in her points of claim:

> It was expected that the landlord act in a manner that was not unconscionable and recognise the same rights afforded to any retail tenant.[27]

74 This was followed in section 6 of the points of claim by a number of allegations. Some have been set out above as allegations relating to outgoings, or breach of the covenant of quiet enjoyment. Other allegations of unconscionable conduct include these:

> Demanding payment for the disputed utility bills in return for being offered a day to remove personal and business related items.

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[27] Points of Claim, paragraph 5.8.

> Threatening to keep the items on the premises unless a complaint was withdrawn (to the local police in regards to the behaviour of Ken O'Donnell's other tenant Barry Monks.)
>
> Allowing Barry Monks to remove and destroy the business signage from the front of the building.
>
> Reneging on the period of time that was rent-free in the premises, and claiming it is arrears now that the relationship has soured.
>
> Reneging on the mutual agreement of $300 per week for rent now the relationship has soured, instead claiming $500 a week was expected.
>
> Not supplying any details to me so that rent could be paid until several requests had been made by me.
>
> Not supplying and rent receipts for payments made by bank or via bank deposit despite requests.
>
> Unwillingness to finalise the lease, despite terms being verbally discussed and agreed upon.
>
> Delaying the initial sale of the business by not supplying a lease, drafted lease or by supplying a written statement outlining the willingness to grant a lease to the prospective new business owner/tenant.
>
> Refusing to allow the sale of the business after initially agreeing to allow a sale to occur (verbally) on the condition that he be allowed to interview the prospective buyers face-to-face.
>
> I have been discriminated against in regards to treatment of the other premises tenant Barry Monks who is allowed to live in the Theatre apartment rent-free in return for "caretaking" duties. …
>
> The landlord failed to disclose his intentions (until after the locks had been changed) to give the building, including the leased business premises, to the council so that it could be used by the community as an arts precinct. …
>
> The failed disclosure has led to me not being able to complete a sale for the business, leaving the business with a debt owing to the real estate agent who was managing the sale, with several buyers signing confidentiality agreements and extensive advertising.[28]

75 Ms Benaych did not refer to unconscionable conduct under s 77 of the RLA, in her pleading. If she had not raised this provision at the hearing, it would have have been necessary to have regard to the equitable principles surrounding 'unconscionable conduct' in order to assess the claim. However, at the hearing, Ms Benaych made it clear she was relying on s 77 of the RLA, which relates to unconscionable conduct of a landlord. Specifically, she said she was relying on three subsections, namely, ss 77(2)(h), (i) and (j). Section 77 relevantly provides:

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[28] See Points of Claim, paragraphs 6.1 - 6.24.

(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.

Note

Section 78 deals with unconscionable conduct by a tenant.

(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—

…

(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

…

Alleged breach of s 77(2)(h)

76 Ms Benaych said that s 77(2)(h) was breached because she believed that Telcanti would comply with regulations made under the *Health Act* and comply with the requirements of the liquor licence which was issued to the business.

77 One of the requirements of the liquor licence, according to Ms Benaych, was that she hold a lease. Ms Benaych also said the regulations made under the *Health Act* were relevant because a room adjoining the rented premises was full of vermin, and smelt. She deposed that an officer of the Shire of Baw Baw Health Department, Ms Robin Duffy, told her that the liquor licence would be revoked if someone got sick.

Alleged breach of s 77(2)(i)

78 Ms Benaych also says that clause 77(2)(i) is enlivened because Telcanti did not disclose its intended conduct in respect of these events:

(a) the lockout which occurred on 1 October 2015;

(b) the sale to Council;
(c) the fact that Barry Monks would be entitled to reside at The Old Butter Factory; and
(d) the fact that Barry Monks would have access to all areas of the building including the demised premises.

79 Mr O'Donnell's evidence regarding the lockout, as noted above, was that he changed the locks after taking advice.[29] It seems that he thought it was legitimate for him to bring matters to a head by locking the tenant out. The key point for present purposes is that he did so without giving any notice to Ms Benaych.

80 Regarding the disposition of the building to the council, Mr O'Donnell said there was no sale, but a gift to the council. He conceded the gift was not discussed with Ms Benaych. Ms Benaych, at the hearing, agreed she could not establish a link between the gift and the failure of the sale.

81 Telcanti, in its defence, said its intention to donate the building and property for ongoing entertainment and beneficial purposes would not have had a negative impact on Ms Benaych's business had she paid her rent on time and in full. The intention to donate the building to a trust would have enhanced Ms Benaych's business opportunities.[30]

82 Regarding Mr Monks, Mr O'Donnell said the fact that he was allowed to reside within the building had nothing to do with Ms Benaych. And he said it was not correct to say that Mr Monks could go anywhere in the building. He asserted Mr Monks only went into the premises occupied by Ms Benaych on one occasion.

Alleged breach of s 77(2)(j)

83 Ms Benaych also alleged that there has been breach of s 77(2)(j) because Telcanti was not prepared to execute the lease. This affected her ability to borrow from the CBA. This in turn affected her ability to carry out improvements and to advertise. As noted, she said the terms of the liquor licence were breached, because it was a condition of the issue of a liquor licence that there be a lease. Finally, the failure to sign the lease prevented a sale of the business.

Telcanti's response

84 As to the sale of Ms Benaych's business, Telcanti says it had no control over whether or not it was sold, and denies delaying any sale of the business by not supplying the lease.[31]

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29 Paragraph 57 above.
30 Defence, paragraph 6.10.
31 Defence, paragraph 6.7.

Discussion regarding alleged unconscionable conduct

85 The allegations of unconscionable conduct on behalf of Telcanti absorbed significant time at the hearing. Some of the allegations are clearly not made out. A claim in this category is that relating to the disposition of the building to the council. A less straight forward claim is that Telcanti allegedly did not comply with the requirements of the liquor licence. As Ms Benaych applied for a liquor licence with Mr O'Donnell's consent, it is reasonable that she believed that she had her landlord's support, and that a lease would be granted. The failure by Telcanti to finalise and execute a lease in these circumstances may have amounted to a breach of s 77(2)(h), but in order for me to make an adverse finding against the landlord I would have to be satisfied that there had been a breach of the requirements of an industry code, as contemplated by the subsection. I consider that this is far from clear.

86 In the interests of brevity I will not discuss all the allegations of unconscionability in-depth, as it is not necessary for me to do so. I have already found that the lease was unlawfully terminated. Because the lease was unlawfully terminated, Telcanti is exposed to Ms Benaych for damages. It matters not whether the damages flow from the claim for unlawful termination of the lease, or from unconscionable conduct. For instance, if I were to find that in changing the locks without notice, Telcanti had acted unconscionably, this finding would not displace the finding made that changing the locks, without giving a 15 day notice as required by the lease, was unlawful.

Section 54 of the RLA

87 Ms Benaych said she also relied on s 54 of the RLA, which provides that a tenant is to be compensated by the landlord for loss or damage suffered by the tenant where the landlord has substantially inhibited the tenant's access to the premises. Ms Benaych contends that because she was locked out, she could not continue trading.

88 Just as it is not necessary to discuss in detail the allegations of unconscionability, it is not necessary to discuss a breach of s 54 of the RLA, because of the finding I have already made that the lockout by Telcanti was unlawful. In respect of any breach, measure of damages will be the same.

Repudiation of the lease

89 I consider that the failure of Telcanti to reduce the lease to writing and to sign it amounted to a repudiation of the lease. However, Ms Benaych did not rely on this repudiation in order to bring the lease to an end. On the contrary, she clearly intended, until she was locked out, to persist with the lease.

90 The unlawful re-entry occurred on 1 October 2015. Ms Benaych became aware of the re-entry on or about 2 October 2015 when she received a telephone call from a friend Jennifer Joy Thompson who had provided a statutory declaration to the effect that she had seen Mr O'Donnell changing the locks of the front door of the top-level art gallery of "The Red Fox Café" on 1 October 2015.[32]

91 Even after she was locked out, Ms Benaych initially, at least, did not assert that the lease had been repudiated. When she initiated this proceeding on 19 November 2015, she sought an injunction to have the keys returned so that she could retrieve personal items and items belonging to other people, and also sought an injunction to prevent the landlord from re-entering the premises. In her application she said:

> The business inventory may remain until further matters have been through mediation and resolution with the VSBC.

92 When giving evidence at the hearing, she explained that she did not have the working capital to re-open the restaurant. In particular, she said she did not have the money required to re-stock the kitchen. Furthermore, she became aware that the signs had been removed, and in the process of removal had been damaged, and they could not be re-hung. She says she could not afford to have the signs remade, even if it had been feasible to get them remade prior to Christmas. She also said that her reputation had been damaged by the lockout.

93 She clearly accepted the repudiation of the lease only when she served the points of claim dated 29 November 2015, in which she sought substantial damages in respect of her inability to sell the business, lost earnings, lost investment in terms of money and time and damage to the reputation of Le Renard Roux.

94 In her points of claim, Ms Benaych says:

> I seek damages to the value of $250,000 (Two hundred and fifty thousand dollars) this is made up from the losses involved with the business sale and the damages sought by the advertising real estate agent. Loss of income that would have been made over the period of being locked out and subsequent time period that the business remains closed due to this ongoing dispute and damaged signage. Loss of bookings that had been made. Loss of potential future income and losses associated with the effort put into building a business that has been damaged by the landlord's actions. This figure also includes an amount as compensation for the stress and anguish that I continue to suffer from this immense loss.

95 I consider that the reference to loss of potential future income and losses associated with the effort put into building up the business are consistent

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[32] Exhibit A7.

with, and only consistent with, the termination of the lease. They are also consistent with the statement she made elsewhere in the points of claim that she no longer wished to reside in the same town as statements made by Mr O'Donnell 'to various people, has tarnished my reputation with the community and the surrounding area'.[33] (sic)

96 Accordingly, I find that Ms Benaych, when she served the points of claim dated 29 November 2015, advised Telcanti that she was accepting that the lease had been terminated, and that she was holding Telcanti liable for damages.

97 At common law, Ms Benaych is entitled to that measure of damages which would put her in the same position as if the lease had not been breached by Telcanti. It remains necessary to determine what that measure of damages is.

DAMAGES

98 The damages sought by Ms Benaych are set out in the summary at the end of the particulars of loss and damage filed at the Tribunal on 12 February 2016, and subsequently sent to Telcanti's lawyer. The damages claimed are as follows:

Business sale cost	65,000.00
Commission owed to Hayes Real Estate	6,000.00
Online presence value	1,419.00
Loss of earnings for October, November and December	26,998.00
Signage (replacement value)	1,810.00
Printed advertising	350.00
Maps	550.00
Eftpos fees	120.00
Stolen scroll saw, replacement value (including blade)	2,008.80
Jewellery on lay-by (two pairs at $27 each)	54.00
Debts unable to be paid from loss of trading -	
Telstra	685.00
Personal debts – Sutherland Studios Ms Benaych's father	1,200.00 500.00
Business credit card	5,644.10
TOTAL	**$112,338.90**

Summary of Telcanti's defence to the claim for damages

99 In its defence, Telcanti denied liability for damages. It says Ms Benaych's claim for loss of income is 'erroneous'. In particular, it says:

[33] Points of Claim, sub-paragraph 6.27.

> [Ms Benaych] has not traded for several months, even prior to being locked out of [Telcanti's] building. [She] has traded in Jindivick for several months at a new business venture.[34]

100 Furthermore, it contends:

(a) that most improvements made to the business premises were made by Ms Benaych's previous business partner;[35]
(b) the claim for damages is fallacious because it is not quantified nor verified.[36]
(c) it is Ms Benaych who is indebted to Telcanti for unpaid rent and loss of income.[37] In particular, no rent has been paid since 13 August 2015.[38]

101 In support of the defence, Mr O'Donnell deposed at the hearing that Ms Benaych's losses flowed from her failure to pay rent, and not from his actions. He also denied exercising undue influence over Ms Benaych. He reiterated the contention that the damages claimed had not been substantiated.

102 It is accordingly necessary to review the evidence given by Ms Benaych in relation to each of her claims in turn.

The claim for loss of the sale of the business: $65,000

103 The claim for loss of the sale of the business is Ms Benaych's most significant claim in financial terms. She pleads in her points of claim that she intended to sell the business. It is not pleaded that she suffered substantial loss on the basis that she was merely prevented from carrying on the business. This is perhaps not surprising, because a particular feature of the case is that Ms Benaych herself appeared to place little value on the business on the basis of the trading figures she put into evidence. At the hearing she deposed that the business would have been worth more had her accountant put together a statement of income and expenses.

104 In her points of claim, Ms Benaych makes two specific claims about the sale of the business. First, she says the sale was delayed because Telcanti did not supply either a lease or a written statement outlining its willingness to grant a lease to the prospective new owner. She also says that Telcanti failed to allow the sale of the business.

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34 Defence, paragraph 6.12.
35 Defence, paragraph 7.1.
36 Defence, paragraph 7.2.
37 Defence, paragraph 7.2.
38 Defence, paragraph 7.3.

105 Ms Benaych gave evidence that she entered into an exclusive authority for the sale of the business with Hayes Real Estate. In this connection she tendered a REIV Exclusive Authority: Sale of Business, executed on 17 July 2015. This showed an authorised price of $65,000.00 and commission of $6,000.00 including GST.[39]

106 Ms Benaych tendered advertisements for the sale of other businesses in Drouin. They included an advertisement for the sale of a takeaway food business (including a two-bedroom house), at a price of $155,500.00, and a separate advertisement for the sale of a takeaway food/convenience store for $159,000.00.[40]

107 Ms Benaych, in her particulars of loss and damage, explained that she arrived at the figure for the value of the business of $65,000.00, despite that figure being less than half the cost of the other café's for sale in town, as her business only had a year's worth of uninterrupted trade, the lease was not written, and finance was not available for working capital and advertising. As noted, she also acknowledged her accountant had not prepared the books.

108 In her particulars of loss and damage, she said the main value in the business was the artwork, the inventory, "the bookwork" (by which she clearly was referring to the trading records), and potential. It also had goodwill. She said:

> The café was quirky, offbeat, whimsical and inspirational to so many. It had a bohemian atmosphere with painted tables, murals, doors, chandelier, hand blown glass basins and antiques, there was not a dull corner in the premises. The kitchen and dish area even had murals. People would gasp upon entering, as there was nothing like it in town.

109 Ms Benaych apparently valued the business at over $65,000.00. She said the business inventory was worth $30,000.00, and the artwork $20,000.00 and the murals she had painted $30,000.00.[41] It is to be noted that these figures total $70,000.00. It is also to be noted that no value is attributed to turnover.

110 As to the asking price, she explained:

> I reduced the final amount to $65K as I was wanting a quick sale due to health reasons.[42]

111 Ms Benaych called the principal of Hayes Real Estate, Mr Brett Hayes as a witness. He gave evidence by telephone on 20 June 2016. His evidence

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39 Exhibit A11.
40 Exhibit A12.
41 Particulars of loss and damage, paragraph 29.
42 Particulars of loss and damage, paragraph 29.

was to the effect that the price of $65,000.00 was "OK". He said the price was based on comparable sales in Gippsland, and took into account the location, the uniqueness of the business, and its potential. He deposed that Ms Benaych did not prepare "a s 32 statement", and that he never received the necessary documentation. He also said there were some prospective buyers for the business, thereby confirming the evidence which had previously been given by Ms Benaych. At the time he gave his evidence by telephone, Mr Hayes did not have his file with him, and he could not name the number of potential purchasers, nor give their names. He said he could do so if he was given the opportunity. He said he had passed on the details to Terry Williamson.

112 At the conclusion of the hearing on 20 June 2016, Ms Benaych was given leave to file any correspondence received from Mr Hayes, together with any submissions relating to that correspondence.

113 In the event, Ms Benaych sent to the Tribunal and Telcanti on 21 June 2016 an email received from Cathy Hayes dated 20 June 2016 providing information that there had been enquiries from five buyers on the following dates: 20 July 2015; 4 August 2015; 17 October 2015; 18 October 2015 and 31 October 2015. No names were given, nor were any confidentiality agreements supplied, even though Ms Benaych had asserted that several buyers had signed them in her points of claim.[43]

114 Telcanti, in the submissions it filed in response to the new material sent in by Ms Benaych after the end of the hearing, made the point that no particulars of the "buyers" are given, and there is nothing to indicate that the "buyers" are more than internet browsers. I accept that contention, as it is self-evident.

115 Telcanti also contended that these potential "buyers" were not brought to its attention. I observe that this contention may be accurate, but overlooks the evidence given by Ms Benaych, which I accept, that Mr Williamson was to set up a meeting with Mr Hayes, but failed to do so. If a meeting between Mr Williamson and Mr Hayes had taken place, then the particulars of the "buyers", such as they were, could have been exchanged.

Approval of assignee of lease

116 However, the fact that there was to be a meeting between Mr Williamson and Mr Hayes highlights a fatal difficulty which Ms Benaych faces in making out her claim for damages arising from loss of the sale of the business. The need for such a meeting arose from the fact that Ms Benaych did not have an automatic right to have her landlord consent to an assignment of lease to an incoming purchaser of the business. She acknowledged this point in her points of claim, when, as an example of

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[43] Points of claim, paragraph 6.24.

unconscionable conduct on the part of the landlord, she asserted the landlord refused "to allow the sale of the business after initially agreeing to allow a sale to occur (verbally) on the condition that he be allowed to interview the prospective buyers face-to-face".

117 Ms Benaych did not seek to rely on s 60 of the RLA, which creates a presumption that a landlord must consent to the assignment of a retail lease unless one or more of four defined circumstances exist. If she had sought to rely on that section, it would have been open to Telcanti to point out that a basis upon which a landlord can withhold consent to an assignment, under s 60(1)(b), is where the landlord considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease. Telcanti could also have pointed to s 60(1)(c) of the RLA, which entitles the landlord to withhold consent to an assignment if the tenant has not complied with the reasonable assignment provisions of the lease. In this connection it is relevant to note that clause 8(a) of the lease drafted in connection with the Au Lapin Noir tenancy prohibited the tenant from assigning or subletting the premises without the written consent of the landlord.

118 The upshot is that it is clear that Ms Benaych, in effect, required Telcanti's permission to sell the business as she required Telcanti to approve the assignment of the lease.

119 I have found the draft Au Lapin Noir lease, subject to the amendments agreed, sets out the terms of the lease of Le Renard Roux.[44] Clause 8(a) of that draft lease gives the landlord an apparently unfettered power to veto an assignment of the lease. The unfettered nature of this discretion is, under s 94(1) of the RLA, void to the extent that it is contrary or inconsistent with anything in the Act. The result is that s 60(1) prevails over the lease.

120 Notwithstanding, Telcanti would have had a right of veto if the circumstances defined in s 60(1) of the RLA existed. Accordingly, in order to make out her claim for damages arising from loss of the sale of the business Ms Benaych would have had to demonstrate that she had suitable a buyer in the sense that they had sufficient financial resources and business experience to meet their proposed obligations under the lease. At the hearing Ms Benaych was not in a position to do this because she could not name any of the prospective buyers who had registered their interest with Mr Hayes. She did not retrieve the position even though she was given leave to send to the Tribunal correspondence received from Mr Hayes.

121 The inability of Ms Benaych to demonstrate that she had a suitable buyer for the business is fatal, and I find against her in connection with her claim for damages arising from the loss of a sale of the business. It matters not

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[44] Paragraph 18 above.

whether the claim is put on the basis that a sale was delayed because Telcanti did not execute a lease or a written statement outlining its willingness to grant a lease to the prospective buyer, or because Telcanti simply refused to agree to allow the sale of the business.

122 If I am wrong about the finding set out in the previous paragraph, I consider that Ms Benaych's claim for damages for loss of the sale of business is also flawed in terms of quantification.

The valuation of the business as a going concern

123 Telcanti, through Mr O'Donnell at the hearing, challenged the price claimed for the business by Ms Benaych.

124 The evidence of Mr Hayes was that because no "documentation" was available, negotiations could not be advanced with any purchaser. Because negotiations were not advanced, I observe that there can be no certainty that the price of $65,000.00 was achievable. However, the evidence is that, at the advertised price of $65,000.00, at least 5 parties contacted Hayes Real Estate.

125 Telcanti was given notice of this claim in November 2015, but Mr O'Donnell, on its behalf, came to the Tribunal with no expert evidence to rebut the claim that an appropriate sale price for the business was $65,000. However, he did make two significant submissions. Firstly, he said the artworks, in respect of which $20,000.00 had been claimed, were removable. The implication of course is that they could, and should, have been removed by Ms Benaych. His second point was that he challenged the valuation of the murals at $30,000.00.

126 When questioned about the murals by the Tribunal, Ms Benaych said that she had valued the murals on the basis that they took her 200 hours to complete, and that she applied rate as an artist of $150.00 per hour. When pressed by the Tribunal to produce invoices or advertisements confirming that this was her standard artist's rate, she could not do so. Ms Benaych was granted leave at the conclusion of the hearing on 20 June 2015 to file documentary evidence regarding her hourly rate as a commercial artist together with submissions relating to that material. She failed to do so. However, I draw no inference adverse to Ms Benaych from this failure. The issue of her hourly rate as a commercial artist is a peripheral one.

127 The murals clearly have some monetary value as part of the restaurant as a going concern, but this value is only one of the components which combined to give Le Renard Roux its worth as a business. The murals may be of artistic value, and may have emotional value to Ms Benaych, but they are of no financial value to her except as part of the restaurant. Being

murals, they cannot without some trouble, and presumably expense, be removed.

128 The murals would appear to have no value to Telcanti. It appears from Telcanti's response submissions (discussed below) that Telcanti proposes to have the murals removed.

129 Even if I was satisfied that at least one of the five potential purchasers would have been prepared to buy the business at some price – and I am not so satisfied – the selling price arrived at after negotiation must be the subject of speculation.

The claim for loss of earnings

130 In respect of the claim for loss of earnings for the last quarter of 2015, which is examined below, Ms Benaych asserted that she had made a profit $18,988.00 in the last quarter in the previous year. However, she could not produce a tax return to confirm this sum on the basis that it had not been prepared by her accountant.

131 Mr O'Donnell, at the hearing, attacked Ms Benaych's ability to run a restaurant, asserting that although she was a good cook, she was not a trained chef, and that essential parts of running a restaurant are minimising the time it takes for people to be served, and minimising waste.

132 The assessment of damages for the loss of opportunity to sell Ms Benaych's business accordingly presents these difficulties:

(a) The advertised price of $65,000 on the face of it appears to be cheap by reference to two other takeaway businesses for sale at the same time in Drouin.
(b) However, no evidence regarding the turnover or assets or goodwill of the other two advertised businesses was put forward, so the comparison cannot be taken beyond the superficial stage.
(c) Ms Benaych's asserts, and Mr O'Donnell does not deny, that Le Renard Roux was distinguished by interesting decor including murals and artistic objects.
(d) The restaurant, when it was operating, had a customer base. It is reasonable to assume that some value ought to be attached to goodwill. However, no expert evidence was put forward as to what the value of goodwill might be, or how it might be calculated.
(e) No audited figures or tax returns for the business were available to substantiate, in an objective way, the asserted profitability.
(f) Ms Benaych called no expert evidence regarding the valuation of the business based on an evaluation of the books, the goodwill, the inventory and the artwork.

(g) The only independent witness Ms Benaych called was Mr Hayes, the real estate agent, who gave evidence that he assessed the business on the basis of its location, the uniqueness, and its potential, but did not go into detail as to his methodology, nor give comparative evidence.
(h) Although Mr O'Donnell did not bring independent expert evidence regarding the valuation of the restaurant, he made an attack on the valuation of the murals at $30,000.00, he pointed out that the artwork was removable by Ms Benaych, and he legitimately questioned her ability to run a profitable restaurant because of her lack of training as a chef.

133 For all these reasons, I consider that Ms Benaych has not demonstrated that she has lost the opportunity to sell at a price of $65,000.00, or at any particular price. The evidence regarding valuation of her business, particularly in the absence of audited books of account or tax returns, is simply inconclusive.

Commission owed to Hayes Real Estate: $6,000.00

134 The next claim made by Ms Benaych is for damages of $6,000.00 in respect of the commission which she says is owed to Hayes Real Estate. No allowance will be made in respect of this claim because I am not satisfied that any commission is payable to Hayes Real Estate. In this connection, I note that the Exclusive Authority put into evidence,[45] provides that if the property *sold* for $65,000.00 then a commission of $6,000.00 including GST of $545.00 would be payable. It seems to me that the operative word is "sold". As Mr Hayes (or his trading entity) is not a party to this proceeding, it is not appropriate that I make a finding binding upon him regarding his entitlement to commission. This is because he has not been given the opportunity to give evidence and make submissions on the issue. However, because I am not satisfied that Ms Benaych has any liability to Mr Hayes (or his business entity) for any commission I find against her in respect of this aspect of her claim.

Online presence value: $1,419.00

135 Ms Benaych claims $1,419.00 damages for the loss of what she terms her 'online presence', which I understand to mean the profile her business had on Facebook, which she described as 'a valuable marketing tool'. The methodology she employed to value this alleged asset was to attribute a value of $1.00 to every 'hit' her business received on its website. I find against Ms Benaych in respect of this claim for several reasons. First of all, there is an argument about whether the 'online presence' of the business has a tangible value. I do not think this has been established by Ms Benaych. Furthermore, if 'online presence' is a tangible asset, there is a legal argument as to whether it is owned by Ms Benaych or Facebook. This was not argued at the hearing. The final point is that no justification for

45 Exhibit A11.

assigning a value of $1.00 to every 'hit' on the business's website was given by Ms Benaych. Taking all these matters together, I find against Ms Benaych in respect of this claim.

Loss of earnings for October, November and December: $26,998.00

136 Ms Benaych says that as a result of being unable to operate the business after the lockout she lost bookings in October, November and December 2015. Ms Benaych said that more than 40 customers had rung or emailed to make bookings. She asserted in her particulars of loss and damage that a fair calculation of loss was to say that she had lost a minimum of $18,988.00, which is the profit she said was made in the same period in the previous year. She specifically identified the following lost events:

(a) a wedding;
(b) an engagement party;
(c) a 50th birthday party; and
(d) a booking of 36 local teachers.

The wedding

137 In respect of the wedding which had been booked for 8 December 2015 for the bottom theatre, Ms Benaych quantified the loss of earnings at $9,000.00. No distinction was drawn by Ms Benaych between gross takings and profit. No evidence was given by Ms Benaych as to her profit margin. In order to arrive at an assessment of damages, I must do the best I can in the circumstances. The evidence given by Ms Benaych that there were to be 40 guests at the wedding and that food was to be charged at $85.00 per head. The value of the food to have been served can therefore be calculated at $3,400.00. There was no evidence as to the cost of preparing and serving the food. The number of staff required for the function and their respective hourly rates was not identified. Accordingly the profit on the food cannot be calculated. However, it is fair to assume that Ms Benaych had costed the food so as to at least break even. If the total charge for the function was $9,000, and food was worth $3,400.00, the proposed charge for alcohol must have been $5,600.00, or $140.00 a head for 40 people. On any view, there must have been profit to be made on alcohol. If the cost of supplying and serving alcohol is assumed to be not more than $50.00 a head, which I consider to be a safe assumption, then the profit remaining would have been $3,600.00. I accordingly make a finding that Ms Benaych is entitled to damages of $3,600.00 in respect of the loss of the wedding.

The engagement party

138 Ms Benaych said that the engagement party was rescheduled from The Old Butter Factory to Mr Timbs's establishment at Jindivick. Mr Timbs was sworn in and confirmed this was the case. He said the takings were

$6,000.00. I find against Ms Benaych in respect of the particular function because:

(a) no details of the party were given so as to enable even a rudimentary assessment of profit to be made; and
(b) it was transferred to a business in which Ms Benaych had at least an indirect interest.

The 50th birthday party and the teachers' function

139 No particulars were provided in respect of the lost 50th birthday party, nor in respect of the teachers' function, and there is accordingly no evidence to base any findings of loss in respect of these events.

Takings

140 Ms Benaych did not produce her taxation returns to justify the assertion that the previous year's loss of earnings. However, she did tender[46] photocopies of handwritten notes indicating gross takings on various days in the last quarter of 2014:

(a) 1 October 2014, $90.40;
(b) 7 October 2014, $156.80;
(c) 15 October 2014, $150.90;
(d) 17 October 2014, $91.10;
(e) 2 November 2014, $152.80;
(f) 6 November 2014, $154.40;
(g) 13 November 2014, $195.50;
(h) 15 November 2014, $199.70;
(i) 20 November 2014, $169.80;
(j) 6 December 2014, $55.70;
(k) 9 December 2014, $79.70.

141 These notes were hard to read, and the basis of some of the calculations was unclear. Although figures were tabled for many other days, some of the dates were unclear, or the totals were not clear. In the absence of accounts prepared properly for taxation purposes, it is difficult to place reliance on these records.

142 Importantly, the handwritten notes include a summary sheet which lists the following totals:

(a) October $4,382.30;
(b) November $5,411.70;
(c) December $6,586.70.

46 Exhibit A22.

The total of these figures is $16,380.90. It is not clear whether this represents gross takings or net takings. Even if the figures represent profit, the claim by Ms Benaych that the profit of the business in the last quarter of the previous year was $18,988.00 is not made out.

143 In the absence of evidence to the contrary, it is appropriate to assume that the figures provided represent gross takings. It is doubtful that the figures represent profit figures, based on the examples of daily takings set out above, having regard to the cost of labour. As noted, no evidence was given by Ms Benaych as to her profit margin. In the absence of at least some evidence about staff numbers, and wages, and the cost of raw materials, I am unable to draw any conclusion as to the profit Ms Benaych would have made (if any) in the last quarter of 2015 had Le Renard Roux remained open.

Signage (replacement value): $1,810.00

144 Ms Benaych says that Telcanti should pay for the destruction of the signage of the business by Mr Monks. At the hearing, Mr O'Donnell challenged the argument that Mr Monks was his agent. Although Mr Monks may not have been Mr O'Donnell's agent in all respects, there was evidence that Mr Monks had a role in carrying out jobs for Mr O'Donnell around The Old Butter Factory. Relevantly, evidence was given that Mr Monks went up to the café operated by Ms Benaych's partner Mr Timbs in Jindivick in order to collect outgoings. Mr O'Donnell said that he did so on his own account. I do not accept that. Mr Monks interest in the outgoings was limited to paying 10% of them. I do not find it credible that Mr Monks would travel a considerable distance to recover outgoings on behalf of Telcanti without authority from Mr O'Donnell. I find that when Mr Monks destroyed the signage of Ms Benaych's business, he did so on behalf of Mr O'Donnell and therefore on behalf of Telcanti. I accordingly find that Telcanti is liable for the loss of the signs. It remains to deal with valuation of the claim.

145 The signs involved, according to Ms Benaych's particulars, were two large aluminium signs, the artwork on an A-frame and two banners. Ms Benaych gave evidence that it would have cost her $1,810.00 to have had the signs created had she wished to re-open the business.

146 Mr O'Donnell challenged the costing of $1,810.00. He said each of the large signs was painted on a marine plywood background surrounded by an aluminium frame of dimension 2400mm by 1200mm. He said each frame would cost about $30.00 at Bunnings. He did not provide a price for the marine plywood, but challenged the overall costing of $900.00 per sign.

147 While I understand Mr O'Donnell's evidence regarding the cost of materials involved in the construction of the large signs, he gave no evidence about the cost of the artwork.

148 I also note that when Mr Derek Timbs gave evidence, on behalf of Ms Benaych, he said that he had acquired an A-frame sign for $700.00 from a firm in Warragul. I accept, accordingly, that the costing of the A-frame sign was based on what Ms Benaych was quoted to replace it.

149 Ms Benaych at the hearing, said that each of the banners was printed on weatherproof vinyl, and cost $30.00 each. I find that she is entitled to an award of $60.00 in respect of the loss of the banners.

150 I find that she is entitled to a total award of $1,810.00 in respect of all the signs.

Printed advertising: $350.00 and Maps: $550.00

151 Ms Benaych says that she spent $350.00 printing advertisements for the business, and $550.00 printing maps. She seeks damages in respect of these costs, which total $900.00, as she says they have been thrown away. I find against Ms Benaych in respect of both these items. No details are given in respect of them. These are costs which must have been incurred prior to the lockout. As such, they are costs which were incurred in the course of running the business and were not themselves caused by Telcanti's actions. There is no evidence regarding the extent of advertisements used or maps issued prior to the lockout, and so I am unable to make a finding as to the extent to which the costs of producing the advertisements and maps were wasted.

Eftpos fees: $120.00

152 Ms Benaych made a claim for Eftpos fees incurred in relation to the business. I find against her in respect of this claim, as I consider it to be misconceived. The fees would have been incurred irrespective of Telcanti's breach of contract.

Stolen scroll saw, replacement value (including blade): $2,008.80

153 Ms Benaych makes a claim for the replacement of the scroll saw which she alleges was stolen from The Old Butter Factory after she was locked out. Ms Benaych says that the scroll saw was left by her father under a table upstairs. As the scroll saw was not even stored within the rented premises, any liability that Telcanti has may be in its capacity as a bailee, not as a landlord. Telcanti's liability as a bailee was not argued at the hearing, and I make no allowance in respect of this claim.

Jewellery on lay-by (two pairs at $27.00 each): $54.00

154 Ms Benaych also makes a claim for $54.00 in respect of the loss of two pairs of jewellery. No receipt for the jewellery was tendered in evidence. Accordingly, I am not satisfied that the claim is established on the balance of probabilities. I find against Ms Benaych in relation to this claim.

Miscellaneous expenses

155 Ms Benaych also claims damages in respect of a number of debts incurred by the business, including:

(a) Telstra – $685.00;
(b) Personal debts – Sutherland Studios – $1,200.00;
(c) Ms Benaych's father – $500.00;
(d) The business's credit card – $5,644.10.

156 I find against Ms Benaych in respect of these claims, as these debts had been incurred by the business. They are expenses that would have been incurred irrespective of Telcanti's conduct.

Summary of findings regarding damages made in favour of Ms Benaych

157 As a result of my findings set out above, I find that Ms Benaych is entitled to an award of damages of $5,410.00 comprising:

(a) $3,600.00 in respect of the wedding;[47] and
(b) $1,810.00 in respect of the destruction of the signage.[48]

158 Accordingly, pursuant to s 124 of the VCAT Act, I declare that Telcanti is liable to the Ms Benaych for damages assessed at $5,410.00.

Telcanti's counterclaim

159 In a document headed points of counterclaim dated 23 February 2016, Telcanti asserted that it had suffered loss of rent in the sum of $53,450.00 "over the relevant period of time of the agreement". It also asserted that it had suffered "further loss as a result of [Ms Benaych] failing to pay outgoings of $2,000.00 per annum as agreed, which equates to a sum in excess of $4000.00". Telcanti also asserted that it continued to suffer loss as a result of Ms Benaych's failure to collect her property, which meant that the industrial fridge/freezer needed to be left running, and that the premises could not be rented out until she removed her property.

160 When the points of counterclaim were filed, the Tribunal wrote to Telcanti's lawyers acknowledging receipt, and drawing attention to the fact that a filing fee of $575.30 would be payable as the amount claimed was less than $100,000.00.[49]

161 Telcanti's lawyers responded in these terms:

> As we are the respondents in this action are we required to pay the setting down fee? We were not going to claim anything-it's only that

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47 See paragraph 137 above.
48 See paragraph 150 above.
49 Tribunal's letter to Richard Davis Lawyers dated 11 March 2016.

> we have been dragged into this action that we file out counterclaim as ordered by the tribunal. Can you please clarify? [50] (sic)

162 The Tribunal relevantly responded as follows:

> The Tribunal refers to the orders dated 14 December 2015, in particular order 5, and advises that it states you "may" lodge a counterclaim by 26 February 2016. This is not a directive to file and serve a counterclaim, but a date by which you were to file and serve *if you intended to lodge a counterclaim.*
>
> As you have explained that you do **not** have a claim to make against the applicant, you may re-name your counterclaim document "particulars of defence".

163 In the event, Telcanti did not pay a filing fee on its counterclaim, and accordingly the Tribunal must treat its articulated counterclaim as a defence. This means, in effect, that the counterclaim, to the extent that it is established, can be set off against Ms Benaych's claim. However, no award of damages can be made in favour of Telcanti.

164 Telcanti claimed in the hearing the sums set out in a document filed on 23 June 2016, namely, $5,750.00 for unpaid rent, plus $1,499.99 in respect of outgoings in the nature of water, sewer and telephone for nine months (representing three quarters of the yearly payment due in respect of these items of $2,000.00), plus $1,768.33 in un-reimbursed electricity and gas bills.

The claim for rent

165 Mr O'Donnell gave evidence that at the hearing that over the course of 2015, rent totalling $5,050 was paid by Ms Benaych as follows:

15 January 2015	$600.00
23 January 2015	$300.00
28 January 2015	$300.00
4 February 2015	$300.00
10 February 2015	$300.00
20 February 2015	$300.00
27 February 2015	$300.00
6 March 2015	$300.00
12 March 2015	$600.00
24 March 2015	$300.00
8 May 2015	$600.00
12 May 2015	$300.00
3 July 2015	$150.00
20 July2015	$300.00

[50] Email from Richard Davis Lawyers to the Tribunal dated 11 March 2016.

31 August 2015 $100.00
September 2015 $NIL

166 Mr O'Donnell contended that Ms Benaych was obliged to pay $300.00 a week or $1,200.00 per month for nine months, a total of $10,800.00. He accordingly calculated Telcanti's loss of rent at $10,800.00 less $5,050.00 = $5,750.00.

167 At the hearing on 20 June 2016, Ms Benaych contested the payments made. She sought leave to file some bank statements she said she held but did not have with her at the hearing. That leave was granted.

168 On 21 June 2016, Ms Benaych submitted three bank statements from Bendigo Bank in respect of Telcanti's account covering the period 1 June 2014 through to 16 December 2014.

169 I consider that these accounts are irrelevant to Telcanti's rent claim, because Telcanti's claim, as pressed by Mr O'Donnell at the hearing, was limited to rent not paid in 2015. Although Telcanti in its so-called counterclaim alluded to lost rental payments of $53,450.00 "over the relevant period of time of the agreement" it did not press this claim at the hearing and did not present any evidence in relation to it.

170 The leave granted to Ms Benaych to file bank statements was expressly limited. The order was that she could file "bank statements discovered by the Respondent for the calendar year commencing 1 January 2015, together with any submissions relating to those statements." Accordingly, there was no leave to file bank statements for the 2014 calendar year. It would not be fair to Telcanti if I were to look at any 2014 bank statements in circumstances where they are not relevant to the case that Telcanti presented at the hearing.

171 The upshot, is that, having regard to the evidence presented by the parties concerning Telcanti's claim for rent of $5,750.00 in 2015, I find the claim is made out. Telcanti is entitled to an allowance against any award which otherwise might be made in favour of Ms Benaych, taking this figure into account.

The claim for outgoings other than gas and electricity

172 Ms Benaych said at the hearing that she relied on s 17 of the RLA, which has been referred to above.[51]

173 Ms Benaych acknowledged that in the copy of the lease tendered, the figure "$2000" had been marked above the relevant Item in the schedule (item 10), and square brackets had been placed around the words "gas and

[51] See paragraph 41.

electricity". Ms Benaych said that the payment of $2,000.00 covered water, sewer and telephone, and that electricity and gas were to be metered.

174 Mr O'Donnell agreed the $2,000.00 was to be paid for items other than gas and electricity, and these utilities were to be paid for separately. Accordingly, both Mr O'Donnell and Ms Benaych agreed that item 10 of the schedule, as amended, reflected the agreement reached between the parties.

175 The situation is accordingly one which falls under s 39 of the RLA. This relevantly provides:

> (1) The tenant under a retail premises lease is not liable to pay an amount to the landlord in respect of outgoings except in accordance with provisions of the lease that specify—
>
> (a) the outgoings that are to be regarded as recoverable; and
>
> (b) in a manner consistent with the regulations, how the amount of those outgoings will be determined and how they will be apportioned to the tenant; and
>
> (c) how those outgoings or any part of them may be recovered by the landlord from the tenant.

176 Ms Benaych also referred to s 46 of the RLA at the hearing. Section 46 provides that the landlord must give the tenant a written and itemised estimate of the outgoings for which the tenant is liable under the lease. Ms Benaych said that she was never given a disclosure statement under s 46, and was never given a bill to pay which was not overdue. However, she indicated that she did not rely on s 46(4) to avoid liability for outgoings. She acknowledged that she was to pay outgoings of $2,000.00.

177 Mr O'Donnell confirmed that $2,000.00 was the sum he was expecting for outgoings other than gas and electricity, but he conceded that this figure ought to be reduced to $1,500.00 because it applied for only nine months, having regard to the date of termination of the lease. This statement was inconsistent with the proposition put forward in the counterclaim, which was that outgoings of $2,000.00 were due for two years. Nonetheless, $2,000.00 is the figure that Mr O'Donnell confirmed he was seeking at the hearing.

Finding in respect of the claim for outgoings other than gas and electricity

178 On the basis of Mr O'Donnell's concession, I make a finding that Telcanti is entitled to a determination that reflects that Ms Benaych is liable to Telcanti for $1,500.00 in respect of outgoings other than gas and electricity.

The claim for outgoings in the nature of electricity and gas

179 Mr O'Donnell quantified this claim at the hearing in the sum of $1,768.33. It was said that accounts totalling this sum were paid by Telcanti. An

electricity account issued on 28 October 2015 due on 10 November 2015 in the sum of $673.64 was tendered.[52] A gas account initially billed on 19 October 2015 but due on 19 November 2015 was tendered in the sum of $1,094.69.[53] The sum of these two accounts is $1,768.33.

180 No account appears to have been taken of the alleged agreement by Mr Monks to contribute 10% to the electricity and gas accounts Mr O'Donnell's view is that it was Ms Benaych's responsibility to pay the whole of the accounts, and recover a contribution of 10% from Mr Monks.

181 That is not how the lease reads, in my view. The obligation of the tenant under the lease is to pay the pro rata share of the charges invoiced to the tenant. Ms Benaych had never been invoiced by Telcanti for her pro rata share of the electricity and gas charges. However, she has now seen an invoice for electricity in the sum of $633.64, and an invoice for gas in the sum of $1,094.69, and I find that she is liable to pay to Telcanti 90% of the total of those accounts, ie, 90% of $1,768.33, calculated as $1,591.50.

Declaration regarding Telcanti's counterclaim

182 Telcanti is entitled to a determination which reflects awards totalling $8,141.50 in respect of:

(a)	outstanding rent for 2015: $5,050.00	
(b)	outgoings in the nature of water, sewer and telephone:	$1,500.00
(c)	$1,500.00 outgoings in the nature of electricity and gas:	$1,591.50

183 Accordingly, pursuant to s 124 of the VCAT Act, I declare that Telcanti is entitled to set off against its liability to Ms Benaych the sum of $8,141.50.

Telcanti's further submissions

184 Because Ms Benaych had been granted leave at the conclusion of the hearing on 20 June 2016 to file correspondence received from Mr Hayes, bank statements discovered by Telcanti for the calendar year commencing 1 January 2015 and documentary evidence relating to her hourly rate as a commercial artist, together with any submissions relating to those materials, Telcanti was given leave to file "response submissions in relation to the above material" by 1 July 2016.

185 Submissions were received from Telcanti on 30 June 2016. They came in the form of a "final response submission" dated 28 June 2016 filed by Telcanti's lawyers.

186 In a number of respects the response submissions are not limited to a response to the further materials filed by Ms Benaych in accordance with

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52 Exhibit R3.
53 Exhibit R16.

the Tribunal's order of 20 June 2016. For instance, it is contended that in response to the Tribunal's order of 14 December 2015, Telcanti gave a key to Ms Benaych, but despite the Tribunal's order she has refused or neglected to clear out the premises. As a result, it is contended that Telcanti has suffered loss in respect of lost rent and outgoings between December 2015 and 28 June 2016 in the sum of $11,399.96, as the premises cannot be re-let. Telcanti also makes a claim that it will incur expense in removing the murals which have been painted on the walls of the premises.

187 Telcanti also makes other submissions as follows:

(a) if Telcanti has failed to meet its obligations under the RLA, monetary penalties may apply, but the failure to adhere to the requirements of the Act does not make "the lease, or in this case, the verbal agreement, legal, invalid or unenforceable";
(b) the informal agreement was made by consent;
(c) the informal nature of the agreement only became an issue when Mr O'Donnell attempted to enforce his right as landlord to receive rent on time;
(d) Telcanti suffered loss of rent in the sum of $53,450.00 "over the relevant period of time of the agreement" (presumably including the period between October 2013 and November 2014 for which it is alleged that no rent was paid, causing a loss of $22,799.92);
(e) Telcanti suffered further losses as a result of Ms Benaych's failure to pay outgoings of $2,000.00 per annum as agreed, which equates to a sum in excess of $4,000.00;
(f) Telcanti continues to suffer losses as a result of Ms Benaych's failure to collect her property, which means that the industrial fridge/freezer needs to be left running.

188 I consider that Telcanti's response submissions raise a number new claims including claims in relation to loss of rent and outgoings between December 2015 and 28 June 2016, and the expense to be incurred in removing the murals.

189 In so far as the response submissions address issues outside Telcanti's counterclaim as pressed at the hearing, they must be ignored. The hearing of Ms Benaych's claim and Telcanti's counterclaim has been concluded. Ms Benaych was given no notice of the new claims before the end of the hearing, and she will be denied procedural fairness if they are considered at this stage.

Conclusion

190 Ms Benaych is notionally entitled to an award of $5,410.00 against this. Telcanti is entitled to set off $8,141.50. The upshot is that Ms Benaych's entitlement is reduced to $NIL.

191 Ms Benaych received a waiver in respect of her application filing fee and accordingly there is no need to even consider an order for reimbursement of the filing fee.

192 I will grant liberty to the parties to apply for costs within 60 days, but remind the parties that costs are governed by s 92 of the RLA under which the default position is that each party is to bear their own costs. The Tribunal has discretion to award costs only if it is fair to do so where a party has conducted the proceeding in a vexatious way, alternatively the party refused to take part in or withdrew from mediation or other form of alternate dispute resolution under Part 10 of the RLA.

MEMBER C EDQUIST