

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1292/2018

**CATCHWORDS**

*Retail Leases Act 2003* (Vic), Notice of Termination of Lease, whether tenant in breach, whether landlord entitled to possession, premises not fit for the permitted use following flooding, landlord's obligation to maintain premises, whether tenant entitled to reimbursement of rent and outgoings paid.

<b>APPLICANT</b>	Anthony Paul Brondolino
<b>FIRST RESPONDENT</b>	Surf Coast Smash Masters Pty Ltd
<b>SECOND RESPONDENT</b>	Belinda Louise Pitts
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member L. Forde
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	18 and 19 February 2019
<b>DATE OF ORDER</b>	12 April 2019
<b>CITATION</b>	Brondolino v Surf Coast Smash Masters Pty Ltd (Building and Property) [2019] VCAT 538

**ORDER**

- 1 Anthony Paul Brondolino's claim against Surf Coast Smash Masters Pty Ltd and Belinda Louise Pitts is dismissed.
- 2 Anthony Paul Brondolino must pay Surf Coast Smash Masters Pty Ltd \$37,196.39.
- 3 By **3 May 2019** the parties may apply on a question of costs but they are directed to the provisions of s92 of the *Retail Leases Act 2003* (Vic).

L. Forde  
**Senior Member**

**APPEARANCES:**

For Applicant	Mr A. Sandbach of counsel
For Respondents	Mr T. Sowden of counsel

## REASONS

### Introduction

- 1 The applicant, Anthony Paul Brondolino (**landlord**) leased premises at 184-186 Johnston Street, Collingwood in the State of Victoria, 3066 (**premises**) to the first respondent, Surf Coast Smash Masters Pty Ltd (**tenant**) to operate as a panel repair shop.
- 2 The second respondent, Belinda Louise Pitts (**guarantor**) guaranteed the tenant's obligations under the lease agreement dated 14 August 2013 (**lease**).
- 3 The landlord claims that the tenant breached the lease in several ways including failing to pay rent and outgoings. The landlord issued a notice of termination dated 20 July 2018.
- 4 The landlord seeks orders that the tenant vacate the premises and that the tenant and guarantor pay \$127,000 outstanding under the lease and damages for mesne profits and costs.
- 5 The tenant denies the landlord's right to terminate. The tenant and guarantor have counterclaimed on the basis that the premises were not fit for the permitted use following storm damage between November 2017 and 18 June 2018. The landlord does not admit storm damage to the roof and says any roof damage was caused by the tenant installing flues without consent.
- 6 The tenant seeks compensation for loss and damage consequent upon the landlord's failure to rectify a defect in the premises and an order for reimbursement for rent and outgoings paid for the period it was unable to occupy the premises totalling \$37,196.39. Alternatively, the tenant seeks damages for breach of contract. While the counterclaim is said to be filed on behalf of both respondents, it is unclear what claim the guarantor is making in the counterclaim.

### Hearing, witnesses and written submissions

- 7 The hearing took place on 18 and 19 February 2019. A tribunal book was produced, and references are made to documents in the tribunal book in the footnotes to these reasons.
- 8 Mr Brondolino and Mr Angelo Christodoulakis, property manager, gave evidence on behalf of the landlord. Mr Dean Millburn, roofer and his father, Mr Robert Millburn, plumber were summonsed to appear by the landlord.
- 9 Mr David Deike and Mr R Saunders of SPI Property Inspections gave evidence on behalf of the tenant and guarantor. Mr Deike is married to the guarantor and gave evidence that he with his wife controlled and owned the business operated by the tenant as well as six other panel beating businesses.

- 10 At the end of the hearing I made orders that the parties file submissions by 5 March 2019 and any submissions in reply by 7 March 2019.
- 11 Neither party complied with my orders. The tenant filed submissions on 15 March 2019. At the time of providing these reasons no submissions have been filed by the landlord nor any request for an extension of time made by the landlord.

### **Background facts**

- 12 The parties agree that:
  - a The [Retail Leases Act 2003](#) (Vic) (**RLA**) applies to the premises;
  - b The lease was for a five-year term commencing 3 July 2013. The tenant exercised an option for a further term;
  - c The landlord increased the monthly rent for the further term from \$5,919.49 plus GST to \$20,416.66 plus GST. The tenant disputed the rent increase and the rent review process under the lease applies;
  - d From 1 July 2015, the guarantor has been the sole director and shareholder of the tenant;
  - e The landlord replaced the roof of the premises in June 2018;
  - f The landlord issued a Notice to Remedy Breach of Lease dated 19 June 2018;
  - g The landlord issued a Notice of Termination of lease dated 20 July 2018;
  - h The tenant remains in possession; and
  - i The landlord claims to be entitled to possession.
- 13 The Notice to Remedy Breach of Lease dated 19 June 2018 claimed \$14,780.44 was outstanding from the tenant and listed the following matters as breaches of lease by the tenant:
  - a Transferred the lease or sublet the premises to another person without the consent of the landlord and/or given up possession of the premises, sharing occupancy of the premises and/or entry into an arrangement that gives a person the right to enter into occupation of the premises;
  - b Failed to carry on the business of the permitted use efficiently and/or keep the premises open during the business hours which are normal for the permitted use;
  - c Failed to pay rent for May and June 2018 being \$12,868.44 inclusive of GST;
  - d Failed to pay fire equipment services totalling \$322.03 (this ground was later abandoned);
  - e Caused flues to be installed without landlord consent and without council permit, the latter being retrospectively issued, and caused

debris from the flue installation to be left in the skillion section of the roof. Damages of \$1,002 for the replacement of the rear section of roofing because of debris from the flue installation being left on the roof; and

- f A \$250 excess was paid by the landlord to settle the claim for remedial work to the roof.
- 14 Included in the “How to Remedy the Breach of Lease” section of the notice was a requirement that the tenant sever its professional relationship with Melbourne Repair Centre. While the notice does not specifically state this, the implication is that the tenant has allowed a third party being Melbourne Repair Centre to operate from the premises in breach of the lease.
  - 15 The tenant claims it was unable to use the premises from 19 November 2017 to 18 June 2018 due to a structural defect in the roof. The tenant claims there was a storm on 19 November 2017 which caused roof damage and flooding in the premises. Temporary repairs were carried out and the roof replaced in June 2018. The tenant says the premises were not watertight until the new roof was in place and the premises were unsafe due to asbestos from the old roof.
  - 16 The tenant claims the Notice of Termination was void as it was not in breach of the lease. The tenant further claims that the landlord continued to accept rent after the Notice of Termination thereby waiving its right to rely on the notice.
  - 17 The issues to be decided are
    - a Has the tenant breached the lease?
    - b If the tenant breached the lease, is the landlord entitled to possession of the premises?
    - c Is the landlord entitled to compensation from the tenant?
    - d Is the landlord entitled to compensation from the guarantor?
    - e Is the tenant entitled to compensation from the landlord?

### **Landlord’s Evidence**

- 18 Mr Brondolino gave the following evidence:
  - a The premises were watertight at the start of the lease in 2013;
  - b The tenant allowed another business to operate from the premises without his consent. Proof of this is that an internet search on 24 September 2018 of “Smash Masters Panel Beater”, the tenant’s trading name does not show the tenant’s business operating from the premises;
  - c The lease was transferred by the tenant to David and Sandra Gavelan in 2014 without his consent. After his consent was refused, the tenant

remained in occupation of the premises and the transfer did not proceed;

- d The roof of the premises was damaged in November 2017. He disputes there was a significant storm on or about 19 November 2017;
- e He arranged for Dean Millburn, a roofer, to look at the roof on 23 November 2017;
- f In December 2017, he attended the premises with Mr Dean Milburn. The premises were closed. He went onto the roof with Mr Millburn. He saw holes in the roof and remnants in areas where the tenant had installed flues in 2015. The room under the skillion roof had flooded. There were about 20 holes scattered over the roof and pieces of asbestos from the roof. Mr Millburn put a piece of asbestos back into a hole in the roof where “it had been punched out”;
- g The tenant installed flues on the roof in 2015 without permission. Somebody cut into the asbestos roof;
- h He was aware of asbestos issues with the premises after the roof was damaged. He notified his insurer on about 23 November 2017. WorkSafe issued an Improvement Notice on 11 January 2018 relating to identifying asbestos and having an asbestos register for the premises. He arranged for Azcor Consultants to carry out an asbestos materials risk assessment;
- i Azcor Consultants issued an asbestos removal certificate on 19 December 2017 following make safe works.<sup>1</sup> They prepared an asbestos register in February 2018;
- j His insurers covered the cost of make safe repairs for the premises including making the premises water tight. He had to pay an excess of \$250 on the policy and claims this from the tenant;
- k He agreed in cross examination when taken to an email<sup>2</sup> from the tenant’s solicitor to the agent dated 15 February 2018 that by reason of the storm on 19 November 2017 “the premises were no longer waterproof and accordingly could not be used as a panel shop.” (The words quoted are from the email);
- l He agreed with the contents of an email from Rohan Saunders of SPI Property Inspections to the tenant’s solicitors dated 31 May 2018<sup>3</sup> where it read in part “I am of the professional opinion that the current condition of the roof...is not fit for the trading purpose of the current tenants, being motor vehicle smash repairs;”
- m He organised a replacement roof in June 2018. He denied the old roof was unsafe. He accepts the tenant had to vacate when the roof was

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<sup>1</sup> TB938

<sup>2</sup> TB323

<sup>3</sup> TB 354

replaced. He knew he would have to replace the asbestos roof but said it could have lasted another few years;

- n He arranged for repairs to the roof in 2015 following leaks in April 2015;
- o He undertook a rent review after issuing the Notice to Terminate for the period from 1 July 2018 and determined the rent to be \$245,000 per annum. This was an increase from the previous year's rent of about \$60,000;
- p The tenant used the premises between November 2017 and June 2018. He knows this because the tenant was complaining to the agent about the roller door jamming and had materials in the premises;
- q He agreed that since 2015 the tenant was and remained in possession of the premises and that David Gavelan is running the business;
- r He accepts that Smash Masters Collingwood is operated by the tenant. When shown an invoice from Melbourne Collision Repair Centre with the address of the premises and the same ABN as Smash Masters Collingwood, he did not accept a connection between Melbourne Collision Repair, a trading name and the tenant;
- s After being shown estimates issued by Melbourne Collision Repair dated 14 November 2018, 15 November 2018, 16 November 2018, 19 November 2018, 20 November 2018, 21 November 2018, 22 November 2018, 15 January 2019, 24 January 2019, 25 January 2019 and 30 January 2019, which have photos of vehicles attached, he agreed that the photos were taken in the premises; and
- t The tenant has paid rent but not at the increased rent. The tenant is \$165,000 in arrears based on the increased rent. He accepts that the tenant is not responsible for paying the fire levy.

19 Mr Angelo Christodoulakis of Smyth Nelson Alexander gave the following evidence:

- a He is a licensed real estate agent and an employee of Smyth Nelson Alexander in Fitzroy. He manages the premises for the landlord;
- b The tenant is in arrears of \$158,709 which includes rental arrears based on the reviewed rent of \$245,000 per annum. If the new rental was not applied, the arrears are about \$4000 for outgoings;
- c In November 2017, the tenant contacted him reporting water damage following a storm. He saw leaks in the premises after a large storm;
- d The roof of the premises was vulnerable to leaking between November 2017 and June 2018. The tenant told him it could not operate and had sent workers home. The tenant would not pay for outgoings when it was not in possession;

- e In cross-examination he accepted that the tenant retained the keys between November 2017 and June 2018 and never said it was giving up possession. He drove past the premises a few times in this period and the business was not trading; and
  - f Other than from the landlord telling him, he was not aware of any change in the identity of the tenant or a formal transfer of lease.
- 20 Mr Dean Millburn was summonsed to appear by the landlord. He gave the following evidence:
- a He is a roofer with more than five years' experience;
  - b He attended the premises after the November 2017 flooding but does not recall the date; and
  - c He met the landlord at the premises. He went onto the roof. He cannot recall if the landlord went on the roof with him. The roof was an average asbestos roof aged about 50 years. In his words, the roof and box gutters "were stuffed" meaning past their use by date which he attributed to age. He told the landlord that the roof needed replacing.
- 21 Mr Robert Millburn was summonsed to appear by the landlord. He gave the following evidence:
- a He gave the landlord a quote to replace the roof in 2011. He may have done some patch up work to the roof after that time; and
  - b He does not recall going to the premises in 2017.

### **Tenant's evidence**

- 22 Mr David Deike's evidence can be summarised as follows:
- a He is the "managing director" of seven panel repair shops including the one operating from the premises. Each panel beating business is owned and operated by a separate company. He and his wife own the companies and their businesses. He attends all businesses on a weekly basis;
  - b The tenant's only asset is the business operating from the premises;
  - c David Gavelan became the manager of the business operated by the tenant in 2015;
  - d In 2015, he intended to franchise his shops. He approached shop managers offering profit shares or the sale of the business. David Gavelan wanted to buy the tenant's business. Deike discussed the possible sale with Mr Angelo Christodoulakis, the landlord's property manager. He had documents prepared to effect a transfer of lease and submitted the documents to the landlord for approval. The landlord rejected the transfer and no transfer of lease occurred. In anticipation of the transfer, Gavelan was appointed as a director of the tenant for 1

day on 1 July 2015. He was immediately removed as a director when consent to the transfer was not given;

- e In 2013 the premises were water tight;
- f In November 2017 he received a report from David Gavelan that equipment had been damaged by water following a storm. He attended the premises and spoke to the agent asking for repairs to be done. The business could not operate until the repairs were done as the premises were not water tight and there was asbestos debris from the roof. Staff and customers could not be exposed to asbestos, so the business ceased operating;
- g On 7 December 2017 he sent an email to the agent confirming that the tenant would not be operating and that he had been advised to stay away until the premises were deemed safe;<sup>4</sup>
- h WorkSafe inspected and deemed the premises uninhabitable. On 11 January 2018, WorkSafe issued improvement notices to the landlord;<sup>5</sup>
- i On 2 February 2018, he received an email from the agent attaching an asbestos report.<sup>6</sup> He cannot recall if that was the asbestos register or a clearance certificate for the premises;
- j The tenant made a business interruption claim on its insurer. The claim was rejected on 23 February 2018 due to the premises being in poor condition and not well maintained.<sup>7</sup> The Insured named on the letter rejecting the claim was Smash Master Collingwood & Melbourne Repair Centre;
- k Melbourne Repair Centre had been the name of a Moonee Ponds panel shop which was once owned by David Gavelan. Gavelan sold the Moonee Ponds business sometime between November 2017 and February 2018 to Deike. He rebranded the business at the Moonee Ponds premises to Melbourne Collision Centre. All the businesses are now operated under that brand. No business was run at the premises under the name “Melbourne Repair Centre”;
- l He and David Gavelan used the same insurance broker. He has separate insurance policies for each of the seven panel beating businesses. The reference to Melbourne Repair Centre on the insurer’s rejection letter must be a mistake;
- m Between February 2018 and June 2018, the premises were not open for business due to asbestos contamination. During this time the premises were used as an assessment centre. People would ring a 1300 or 1800 number and be directed to the closest assessment centre. The seven businesses look after 200 plus vehicles each week. If the client

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<sup>4</sup> TB313

<sup>5</sup> TB537

<sup>6</sup> TB715

<sup>7</sup> TB721



- was in East Melbourne they would be directed to the premises to be assessed and the repair would be done elsewhere. No repairs could be carried out in the premises before 22 June 2018 following the storm;
- n The agent said the premises were safe which is why it was used as an assessment centre after the storm. Until a clearance certificate was provided it could not be open to the public;
  - o The business was able to operate from 22 June 2018 after a new roof was installed by the landlord;
  - p He refused to pay the outgoings for the period the business could not operate; and
  - q There was never any shared occupancy or subletting of the premises. The tenant was always in possession of the premises;
- 23 Rohan Saunders of SPI Property Inspections gave the following evidence:
- a He is the author of an expert witness report dated 9 May 2018<sup>8</sup>
  - b He is a registered builder and a building inspector;
  - c He inspected the roof of premises on 8 May 2018 and found the old asbestos roof sheets to be in very poor condition and the gutters completely rusted out. He opined that “the asbestos roof and associated plumbing fixtures has reached the end of its lifespan and that numerous contributing factors and not solely of the alleged tenants have caused it to fail...The roof is no longer water tight and replacement is the only viable option.”
  - d Rubbish in the gutters did not have any effect on the leaks in the roof; The roof was in horrendous condition and dangerous;
  - e He read the report of Bay Building Services dated 19 February 2018.<sup>9</sup>
  - f The storms in November 2017 could have caused flooding. He undertook a 15-minute hose test to create moderate levels of rain and found the asbestos cladding absorbed a lot of water and it did not freely run off;
  - g In his addendum report<sup>10</sup> he stated “I am of the professional opinion that the current condition of the roof...is not fit for the trading purpose of the current tenants, being motor vehicle smash repairs;”
  - h He agreed that the roof may have been in a bad state in 2015; and
  - i Make safe requirements are usually short-term repairs and permanent repairs.

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<sup>8</sup> TB329

<sup>9</sup> 556

<sup>10</sup> TB354

## **Issue 1 - Has the tenant breached the lease?**

- 24 The Notice to Remedy Breach of Lease dated 19 June 2018 sets out six alleged breaches by the tenant as referred to in paragraph 12 above.
- 25 The first breach relied upon by the landlord is that the tenant has transferred the lease or sublet the premises to another person without the consent of the landlord and/or given up possession of the premises, sharing occupancy of the premises and/or entry into an arrangement that gives a person the right to enter into occupation of the premises.
- 26 I do not find that the breach has been proven on the balance of probabilities for the following reasons:
- a The appointment of David Gavelan for one day as a director of the tenant does not equate to the tenant giving up possession of the premises;
  - b The landlord accepted in cross-examination that the lease had not been transferred;
  - c The tenant retained the keys for the premises;
  - d Since the alleged giving up possession, the landlord continued to accept rent and accepted an option to renew suggesting a waiver of any breach by reason of who was occupying the premises;
  - e The Google searches produced by the landlord do not show that the tenant gave up possession or shared possession of the premises;
  - f The letter from the insurer denying cover to the tenants following the November 2017 flooding is not evidence of shared possession by reason of a reference to Melbourne Repair Centre. There could be many explanations for two business names being recorded in the letter. The insurance claim, policy document and other relevant documents relating to the insurance were not in evidence;
  - g David Deicke is not a director of the tenant. His use of the term managing director is a lay person's use of the term and not reference to his legal position within the tenant or the related businesses. His evidence was, and this was not contradicted that he is the controlling mind of the tenant and of six other panel beating businesses regardless of whether he is a director of the companies conducting those businesses;
  - h I accept that the Tenant's business rebranded to operate under the name Melbourne Collision Centre to conform with Mr Deicke's six other businesses;
  - i The tenant's evidence which I accept was that there had been no change of possession and that it has remained in possession since the commencement of the lease.

- 27 The second breach relied upon by the landlord is that the tenant failed to carry on the business of the permitted use efficiently and/or keep the premises open during the business hours which are normal for the permitted use. The landlord relied upon the tenant not operating its business between November 2017 and June 2018.
- 28 I find that this breach has not been proven for the following reasons:
- a I accept the evidence of the tenant as confirmed by the landlord's agent that there was flooding in the premises in November 2017;
  - b The landlord and tenant acknowledge that flooding occurred in November 2017 due to water ingressing through the roof;
  - c The landlord claimed the roof leaked because of the installation of flues in 2015 by the tenant. I do not accept this to be the case as if it was there would have been flooding in previous years;
  - d I accept the evidence of the tenant that the flooding occurred after a storm on about 19 November 2017. This is supported by data from the Bureau of Meteorology and evidence from the agent;
  - e It is not disputed that following the flooding asbestos issues were identified in the roof at the premises;
  - f WorkSafe issued an Improvement Notice on 11 January 2018 relating to identifying asbestos and having an asbestos register for the premises;
  - g Azcor Consultants issued an asbestos removal certificate on 19 December 2017 following make safe works.<sup>11</sup> They prepared an asbestos register in February 2018;
  - h The landlord's insurers covered the cost of make safe repairs for the premises including making the premises water tight after the storm. This supports my finding that the damage was storm related rather than due to installation of flues in 2015;
  - i It is more likely than not that the issues with asbestos arose after the November 2017 storm rather than from the tenant installing flues in 2015.
  - j The permitted use under the lease is "panel beater, spray painting and mechanical repairs and any other use which the landlord will consent to in writing which consent shall not unreasonably be withheld."
  - k The tenant operated a panel beating business. I accept the tenant's evidence which was not challenged that a panel beating business can not operate from premises which are not water tight;

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<sup>11</sup> TB938

- l I accept the tenant's evidence that it would not operate the business other than for assessing vehicles until the asbestos issues were resolved due to public and staff safety concerns;
  - m The tenant claims it was unable to use the premises from 19 November 2017 to 18 June 2018 due to a structural defect in the roof;
  - n The asbestos issues were resolved by February 2018 for which an asbestos register was prepared.
  - o The landlord says the roof had a few more years in it but nevertheless it was replaced in June 2018.
  - p I prefer the expert evidence of Rohan Saunders of SPI Property Inspections to the landlord's evidence and find that the old roof was not water tight;
  - q The roof was replaced in June 2018. Until the roof was replaced the premises were not water tight and not fit for the operation of the tenant's business;
  - r If the tenant could not fully operate its business due to the roof not being water tight (other than using the premises to assess vehicles), it cannot breach the lease by not operating. It was prevented from operating its business due to the state of the roof.
- 29 The third breach relied upon by the landlord is that the tenant failed to pay rent for May and June 2018 being \$12,868.44 inclusive of GST. This breach has not been substantiated for the following reasons: -
- a The rent figure is based upon the landlord's revised rent of \$245,000 per annum which is the subject of a rental determination process;
  - b The landlord did not pursue this claim at the hearing;
  - c The agent's evidence was that the tenant did not owe anything for rent if the old rent was applied ie the only outstanding rent amounts are in relation to the disputed revised rent.
- 30 The fourth breach relied upon by the landlord is that the tenant failed to pay fire equipment services totalling \$322.03. This claim was abandoned at the hearing.
- 31 The fifth breach relied upon by the landlord is that the tenant caused flues to be installed in 2015 without consent and council permit, the latter being retrospectively issued. This is said to have caused debris from the flue installation to be left in the skillion section of the roof. Damages of \$1,002 for the replacement of the rear section of roofing because of debris from the flue installation being left on the roof is claimed. The landlord has not proven this breach for the following reasons:
- a No evidence was produced of the roof repairs or to show the roof had to be repaired because of the installation of flues; and
  - b The claim was not addressed at the hearing.

- 32 The sixth and final breach relied upon by the landlord is that a \$250 excess was paid by the landlord to settle the claim for remedial work to the roof. The Tribunal does not know why this claim is said to be a breach of lease by the tenant as it was not addressed at the hearing. On that basis the claim must fail.
- 33 I am satisfied that the November 2017 storm caused the premises to flood. I do not accept the landlord's contention, for the reasons previously given, that the 2015 installation of flues by the tenant caused the premises to flood in 2017. If the \$250 excess referred to in the Notice of Breach relates to the insurer arranging repairs to the roof following the storm, then the excess is a liability of the landlord and not a liability of the tenant.
- 34 I have found that the six alleged breaches by the tenant set out in the Notice to Remedy Breach of Lease dated 19 June 2018 have not been proven. The tenant has not breached the lease.

**Issue 2 - If the tenant breached the lease, is the landlord entitled to possession of the premises?**

- 35 Because the tenant did not breach the lease, the landlord's Notice of Termination of Lease dated 20 July 2018 is defective. The landlord is not entitled to possession of the premises.

**Issue 3- Is the landlord entitled to compensation from the tenant?**

- 36 The tenant did not breach the lease. Accordingly, the landlord is not entitled to compensation from the tenant.

**Issue 4- Is the landlord entitled to compensation from the guarantor?**

- 37 As the tenant is not liable to the landlord, there is no liability for the guarantor to guarantee. The landlord is not entitled to compensation from the guarantor.

**Issue 5- Is the tenant entitled to compensation from the landlord?**

- 38 The tenant claims it was unable to use the premises from 19 November 2017 to 18 June 2018 due to a structural defect in the roof.
- 39 For the reasons set out in paragraph 27 of these reasons I find that the tenant was prevented from fully operating its business at the premises from 19 November 2017 to 18 June 2018. It was able to have some limited use of the premises for vehicle assessments between February and June 2018. All repairs were conducted off site during the period.
- 40 The tenant claims reimbursement of \$37,196.39 calculated as follows:
- a \$34,894.18 for rent paid between 19 November 2017 and 18 June 2018; and
  - b \$2,302.21 for outgoings paid between 19 November 2017 and 18 June 2018.

- 41 The calculations relied upon by the tenant are based on the receipt history produced by the landlord.<sup>12</sup>
- 42 Section 52 of the RLA provides
- (1) A retail premises [lease](#) is taken to provide as set out in this section.
  - (2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises [lease](#) was entered into—
    - (a) the structure of, and fixtures in, the retail premises; and
    - (b) plant and equipment at the retail premises; and
    - (c) the appliances, fittings and fixtures provided under the [lease](#) by the landlord relating to the gas, electricity, water, drainage or other
  - (3) However, the landlord is not responsible for maintaining those things if—
    - (a) the need for the repair arises out of misuse by the [tenant](#); or
    - (b) the [tenant](#) is entitled or required to remove the thing at the end of the [lease](#).
- 43 For the reasons set out in paragraph 27 I found that the flooding on 19 November 2017 was caused by the storm event on that day and the age and condition of the roof. I did not find that the tenant caused the roof to leak because of the installation of flues in 2015.
- 44 The landlord said he was aware of asbestos issues with the premises after the roof was damaged in November 2017. He saw pieces of asbestos roofing loose on the roof and about 20 holes in the roof.
- 45 By reason of s52 of the RLA the landlord is required to maintain the roof in the same condition it was in at the start of the tenancy. The tenancy started in 2013. There is no evidence that there were asbestos issues other than a lack of an asbestos register at the start of the tenancy.
- 46 I accept the evidence of Rohan Saunders of SPI Property Inspections that he observed large rust holes in the roof, gutter failure and that the asbestos roof had deteriorated over time.
- 47 I accept the uncontradicted evidence of the tenant that the premises were watertight at the start of the lease.
- 48 The landlord agreed in cross-examination that after 19 November 2017 the premises were not watertight and unable to be used as a panel beating shop until the roof was replaced in June 2018. He also agreed with the contents of an email dated 31 May 2018 from Rohan Saunders which stated that the current condition of the roof is not fit for the trading purpose of the tenant.<sup>13</sup>

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<sup>12</sup> TB219-221

<sup>13</sup> TB354

- 49 The evidence is that the premises were watertight at the start of the tenancy and not watertight from 19 November 2017 until the roof was replaced on 18 June 2018.
- 50 The landlord did not maintain the roof in a condition consistent with the condition of the premises when the lease was entered into. For the reasons stated the deterioration of the roof was not caused by any misuse by the tenant associated with the installation of flues in 2015.
- 51 I find the landlord breached the lease by not maintaining the roof.
- 52 Section 57 of the RLA provides that where premises are damaged as in this case, the tenant is not liable to pay rent or outgoings during the period in which the premises cannot be used.
- 53 The premises could not be used for the permitted purpose between 19 November 2017 and 18 June 2018.
- 54 Section 54 of the RLA provides that the tenant is entitled to reasonable compensation from the landlord in the present circumstances.
- 55 Clause 8.1 of the lease provides that if the premises are damaged and can not be used for the permitted use a fair proportion of the rent and buildings outgoings is to be suspended until the premises are wholly fit again.
- 56 The tenant has not claimed any loss or damage other than reimbursement of the rent and outgoings paid while the premises were not fit for the permitted use. The tenant's business interruption claim following the flooding in November 2017 was rejected by its insurer due to the condition of the premises. The tenant did not pursue any claim against the landlord at the hearing other than for reimbursement of money paid.
- 57 I find that \$37,196.39, being the amount of rent and outgoings paid by the tenant during the period when it could not operate its permitted use from the premises, is a reasonable amount of compensation that the landlord is to pay the tenant.

L. Forde  
**Senior Member**