VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R9/2014

BUILDING & PROPERTY LIST

CATCHWORDS

LANDLORD AND TENANT –. Whether reinstatement works have been adequately completed by the outgoing tenant; reasonable cost of reinstatement works – Damages, whether actual expenditure is required to be shown in order to prove loss and damage.

SECOND APPLICANT	Faycroft Pty Ltd (ACN 158 141 727)
FIRST APPLICANT	Mr Francis Plancentino
RESPONDENT	Granopa Pty Ltd (ACN 111 476 638)
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	26 June & 6 November 2014
DATE OF ORDER	21 November 2014 (corrected 5 January 2015)
CITATION	Faycroft Pty Ltd v Granopa Pty Ltd (corrected) (Building and Property) [2014] VCAT 1453

ORDERS

1. The Respondent must pay the First Applicant $5,876.
2. Liberty to apply on any outstanding matters provided such liberty is exercised on or before 30 November 2014.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr F Placentino (director and in person)
For the Respondent	Mr T Bevan of counsel

REASONS

Introduction

1. On 9 December 2009, the First Applicant (**'the Tenant'**) entered into a leasehold agreement (**'the Lease'**) with the Respondent (**'the Landlord'**) under which the Tenant leased retail premises in the Melbourne CBD (**'the Premises'**). At the time of entering into the Lease, the Premises had recently been refurbished and were offered as a bare shell. The permitted use under the Lease was stated as *retail sale of food and beverages*. The Tenant's intention was to operate a café from the Premises.

2. The Premises comprised approximately 72 m² and formed part of the ground floor of a larger building, which housed other retail premises, all owned by the Landlord. It is known as *Shop 4*. As the Premises were leased as a bare shell, the Tenant was required to undertake fit-out works before commencing its business operations. To financially assist the Tenant, the Lease provided for a rent free period of three months.

3. The Second Applicant, who is a director of the Tenant, guaranteed the obligations of the Tenant under the Lease, pursuant to an undated *Guarantee and Indemnity and Acknowledgement*, which was annexed to the Lease.

4. The initial term of the Lease expired on 30 November 2015, with an option for a further term of six years. According to the Landlord, the Tenant failed to pay all rent due under the Lease, which led to the Landlord serving the Tenant with a notice dated 21 November 2013, pursuant to s 146 of the *Property Law Act 1958*, requiring the Tenant to pay the alleged outstanding rent. On 11 December 2013, the Landlord re-entered the Premises. That prompted the Tenant to lodge an application in the Tribunal for an injunction to allow it to re-occupy the Premises. That application was dismissed.

5. Consequently, the Tenant sought consent from the Landlord to have access to the Premises, solely for the purpose of retrieving its fixtures, fittings and other goods (**'the Tenant's Property'**) and then reinstating the Premises. In response to that request, the Landlord advised the Tenant that it would only allow access to the Premises if the Tenant provided the Landlord with an unconditional bank guarantee to the value of $44,184, as security to ensure that all reinstatement works were carried out properly. According to the Landlord, the value of the bank guarantee was based upon an amount assessed in a *Make Good Report* prepared by Napier and Blakely dated 20 December 2013. The Tenant disputed the opinions and conclusions reached in the Napier and Blakely report and as a result, refused to provide the bank guarantee.

6. Given the impasse, the Tenant applied to the Small Business Commission to mediate the dispute, with a view to reaching some agreement as to what, if any, amount of security should be provided to the Landlord before permission was granted to the Tenant to have access to the Premises for

the purpose of removing the Tenant's Property and reinstating the Premises.

7. The mediation conducted by the office of the Small Business Commission occurred on 29 January 2014 but did not result in a resolution of the dispute. As a consequence, a new proceeding was initiated by the Tenant in the Tribunal, in which it sought an injunction allowing it access to the Premises for the purpose of removing its Goods. That application was heard on 4 February 2014, following which the following orders were made by the Tribunal (**'the Orders'**):

    1. Conditional upon the First Applicant, paying, by 14 February 2014 to the Respondent's solicitors, the sum of $15,000 ("the Security") to be held by them as security for the obligations of the First Applicant to make good the premises pursuant to Clause 17.5(b) of the Lease, order the Respondent to allow the First Applicant access to the premises for the purpose of removing the Tenant's property within seven days following such payment.

    2. Liberty to apply generally, and also in case there should be any dispute as to:

        (a) whether the First Applicant has complied with its obligations to make good the premises; or

        (b) the amount to be deducted from the Security with respect to any claims by the Landlord.

8. Following the making of the Tribunal's orders dated 4 February 2014 (**'the Orders'**), the Tenant paid $15,000 by way of security to the Landlord (**'the Security'**). It was then given access to the Premises to allow it to remove the Tenant's Property and undertake reinstatement works. This work was undertaken by the Tenant in the weeks that followed.

9. The Landlord now contends that the reinstatement works have not restored the Premises to a condition commensurate with its condition as at the commencement of the Lease and as a result, refuses to return any part of the Security. The Landlord further contends that even if the Tribunal were to determine that the Premises have been adequately reinstated, it is, nevertheless, entitled to retain the Security and set-off that amount against rent in arrears.

10. As a consequence of the position now taken by the Landlord, the Tenant exercised the liberty given to it to have the proceeding reinstated in order to determine whether the Security, or any part of it, is to be repaid to the Tenant. On 18 July 2014, the proceeding was reinstated to allow that question to be determined. As the hearing was not concluded within the day allocated, a further day was listed on 6 November 2014.

Is the Landlord entitled to retain the Security in payment of rent in arrears?

11. The Landlord contends that as at November 2013, there were arrears of rent totalling $65,495.06. Details of how that amount has been calculated are set out in an affidavit of Franco Di Iorio dated 3 February 2014, the solicitor for the Landlord. Mr Plancentino, director of the Tenant, did not dispute that there was rent in arrears, which exceeded the Security. However, he argued that there were two reasons why the Security could not be applied against any claim for rent in arrears:

    (a) First, the order for the giving of Security did not contemplate that the Security could be applied by the Landlord in payment of rent in arrears; and

    (b) Second, it was not appropriate for the Landlord to apply the Security against rent in arrears because the Tenant has a claim against the Landlord in damages, arising out of the termination of the Lease, which would need to be taken into account if any assessment was to be made as to what amount of rent was owed.

12. Mr Bevan of counsel, who appeared on behalf of the Landlord, argued that it was open for the Landlord to set off any claim for return of the Security against the Landlord's claim for rent in arrears. In that respect, he relied upon Order 2(b) of the Orders, which stated that there was liberty to apply if there was any dispute as to the amount to be deducted from the Security in respect to <u>any claims</u> by the Landlord. Mr Bevan submitted that the Landlord's claim for rent in arrears, which exceeds the Security, falls within what the Orders refer to as *any claims by the Landlord*.

13. I do not accept that the Orders are to be interpreted in the manner suggested by Mr Bevan. In my view, the Orders are to be read in context. Accordingly, the reference to *any claims by the Landlord* is to be interpreted as meaning any claims relating to the reinstatement works undertaken by the Tenant. It does not mean claims arising out of other matters unconnected with the reinstatement works.

14. There are a number of factors which fortify this view. First, there is no counterclaim made by the Landlord in this proceeding. The only indication of there being rent in arrears is set out in the affidavit of Franco Di Iorio referred to above. Therefore, to allow the Landlord to retain the Security, on account of rent in arrears, would effectively allow it to recover $15,000 in circumstances where no claim was ever lodged by it. I do not accept that the Orders contemplated that scenario.

15. Second, there is no mention in the Orders of any claim for rent in arrears. The Orders focus solely on the matters that were before the Tribunal on the day the Orders were made; namely, how much, if any, security should be provided before the Tenant was permitted access to retrieve the Tenant's Property and undertake reinstatement works.

16. Third, the affidavit of Franco Di Iorio, which was filed and relied upon by the Landlord at the hearing on 4 February 2014, although raising the issue of rent arrears, focuses primarily on the dispute between the parties as to how much security should be given before the Tenant is given access to the Premises. In that respect, the affidavit sets out the Landlord's position that it wanted an unconditional bank guarantee to the value of $44,184. There is nothing in the affidavit material filed by the Landlord which indicates that any of the Security would be used in payment of its claim for rent in arrears. In those circumstances, I consider that it would be unfair to now allow that to occur.

17. Having regard to my finding that the Orders do not permit any part of the Security to be applied towards the Landlord's claim for rent in arrears, I will now proceed to determine whether any of the Security may be retained by the Landlord as a result of the reinstatement works.

Have the Premises been reinstated in accordance with the terms of the Lease?

18. There are a number of clauses within the Lease, which are relevant to the question of reinstatement:

> **14 Repair redecoration and Tenants works**
>
> 14.1 The Tenant may not carry out works to the Premises or other parts of the Building (including the erection, painting or fixing of any signs, logos or indicia on or visible from the exterior of the Premises) without obtaining the prior written approval of the Landlord.
>
> If the landlord gives approval, it may impose conditions. These conditions may include specifying:
>
> (a) which parts of the Premises may not be reinstated and which parts must be; and
>
> (b) which items of the Tenant's Property installed as part of the works may not be removed
>
> when the Tenant vacates the Premises.
>
> **Tenant's works**
>
> 14.2 The Tenant must ensure that any works it does, including works under clauses 14.1 and 14.4, is done:
>
> (a) by contractors approved by the Landlord (which may not unreasonably withhold its approval); and
>
> (b) in a proper and workmanlike manner; and
>
> (c) in accordance with any plans, specifications and schedule of finishes required and approved by the Landlord; and
>
> (d) in accordance with the laws and the requirements of authorities; and

(e) in accordance with the requirements and directions of the Landlord.

Repair of items

14.3 The Tenant acknowledges that the Premises were in good repair at the Commencement Date.

Repair and replace

14.4 The Tenant must:

(a) keep the Premises and the Tenant's Property in good repair excluding fair wear and tear;

(b) promptly replace worn or damaged items in or attached to the Premises (including plate glass, Tenant's Property (other than stock) and those floor coverings and furnishings which are part of the Landlord's Property) with items of similar quality;

(c) …

(d) keep the kitchen exhaust forming part of the Landlord's Property clean and in good repair.

…

Air Conditioning

14.8 Despite anything else in this lease:

(a) the Tenant must do all works required for the maintenance and repair of the air conditioning plant and other Services installed in the Premises (including, capital replacement) so that the air conditioning plant and other Services remain in the same working condition as at the Commencement Date; and

(b) the Tenant must effect a maintenance and repair contract for the air conditioning plant and other Services installed in the Premises and ensure that the contractor performs its obligations under the contract. The Tenant must obtain the Landlord's prior written approval to the maintenance and repair contract including the identity of the contractor (which approval must not be unreasonably withheld).

…

17 Expiry or termination

…

Removal of Tenant's Property

17.3 During the 7 days immediately before the date the Premises must be vacated the Tenant must:

(a) remove the Tenant's Property (including all floor coverings, partitions and tiles) from the Premises; and

(b) make good all damage to the Premises as a result of the installation and removal of these items.

Tenant's Property not removed

17.4 If the Landlord terminates this lease by re-entry, the Tenant may give the Landlord notice within 7 days after termination that it wants to remove the Tenant's Property which it may or must remove from the Premises.

17.5 Within 7 business days after the Tenant gives its notice, the Landlord must give the Tenant a notice, stating:

(a) when and how the Tenant's Property is to be removed from the Premises and by whom; and

(b) any conditions relating to removal of the Tenant's Property, including the provision of a bond or other suitable security for the cost of making good any damage caused by the Tenant's Property being removed from the Premises.

19. The relevant clauses of the Lease are, however, subject to s 52 of the *Retail Leases Act 2003*, which provides:

52. Landlord's liability for repairs

(1) A retail premises lease is taken to provide as set out in this section.

(2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into –

(a) the structure of, and fixtures in, the retail premises; and

(b) plant and equipment at the retail premises; and

(c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

(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.

20. The Landlord contends that the reinstatement works have not been carried out in a professional and workmanlike manner, in that there are a number of items of work which require further remedial work in order to bring the

Premises back to a state commensurate with its condition as at the commencement of the Lease.

21. In my view, the terms of the Lease do not expressly oblige the Tenant to *bring the Premises back to a state commensurate with its condition as at the commencement of the Lease.* Although the Lease requires the Tenant to carry out any *Tenant's works* in a proper and workmanlike manner and to make good all damage caused to the Premises as a result of the installation and removal of the Tenant's Property, it does not require the Tenant to restore the Premises to an original pristine state. Clause 14.4 expressly provides that the Tenant's obligations to keep the Premises in good repair exclude fair wear and tear.

22. The Landlord relies upon the evidence of Mr Russell MacDonald, the maintenance manager of the building, in which the Premises form part. He gave evidence that he was employed by the Landlord as the maintenance manager for the building since 22 March 2010. He said that the building underwent major refurbishment works in or about 2006 to 2009, prior to the Tenant taking possession. In that respect, the Tenant was the first occupier of the Premises since it was refurbished. Mr MacDonald stated that his recollection of the Premises prior to the Tenant undertaking its fit-out works were that the Premises comprised:

    (a) a smooth concrete floor with low finish applied;

    (b) smooth plasterboard walls with low finish applied;

    (c) a painted internal door to the disabled toilet;

    (d) an air conditioning system, comprising solid ductwork with a number of branch-offs to flexible ducting, which were connected to a diffuser boot with a four way diffuser or register attached to it;

    (e) services comprising cold water, sewer, gas, trade waste, electrical distribution board, electrical meter, access lighting, phone points and a kitchen exhaust system;

    (f) fire sprinklers and a fire detection device; and

    (g) emergency lighting.

23. He said there was no broken glass in any of the doors or windows within the Premises nor was any part of the facade of the Premises missing or damaged.

24. Mr MacDonald gave evidence that he inspected the Premises after the Tenant had removed the Tenant's Property and completed its reinstatement works. He said that he observed the following:

    (a) surface coatings applied to be concrete floor by the Tenant had not been removed and there were gouges in the concrete surface;

    (b) a drainage pipe was left uncapped;

(c) some of the plasterboard was damaged after the Tenant had removed tiles from its surface;

(d) the rear internal door to the disabled toilet was damaged;

(e) a facade stone was missing from the front facade of the Premises;

(f) the glazing in the glass entrance door into the Premises was cracked;

(g) the air conditioning did not work and the diffuser boots and registers were missing with the flexible ductwork left hanging open ended;

(h) the fire detection, evacuation system and fire sprinklers had been altered but not reinstated to its original state; and

(i) there had been a failure to clean exhaust filters and ductwork.

25. Mr MacDonald said that he had been instructed by the Landlord to obtain quotations from independent contractors to carry out remedial work concerning the above items of work and that the aggregate cost of that remedial work, based on those quotations, is $28,221.46.

26. The Landlord contends that the cost of remedial work far exceeds the amount of the Security and as a consequence, it is entitled to retain the Security.

27. The Tenant disputes almost all of the items of defective work referred to by Mr MacDonald. What follows are my findings in respect of each of the nine items of defective work listed above.

Concrete floor ($7,750 plus *preliminaries* and GST)

28. A number of photographs were produced by both Mr Placantino and by the Landlord showing the current and pre-existing condition of the concrete floor. Based on the evidence given by Mr MacDonald and Ms Ho, the director of the Landlord, I am satisfied that the current condition of the floor is inferior compared with its condition as at the commencement of the Lease. In particular, photographs produced by Mr Placantino of the Premises and an adjoining retail premises, show a bare concrete floor which is, generally, in an acceptable condition without any significant markings. However, photographs tendered in evidence of the current condition of the concrete floor disclose areas of black marks and some areas where the concrete surface has broken away.

29. According to Mr MacDonald and Mr Placantino, the black marks are the residue of paint that was applied to the concrete floor after the Tenant first occupied the Premises. One photo shows a small section of concrete floor which remains unpainted and in its original condition, as it was covered with vinyl tiles during the tenancy, which have since been removed. It provides a useful pictorial comparator.

30. In relation to the concrete surface, Mr Placantino said that the concrete surface had only broken away in areas where channels or trenches had previously been cut into the concrete slab, in order to accommodate electrical conduits and other service pipes, and then filled in or over with cement, to provide a smooth surface. He said that the Tenant had nothing to do with creating those channels or laying those conduits or service pipes and he had no idea what purpose those services may have had historically. He said that the cement in-fill was the only part of the concrete slab showing any deterioration and he believed that this was due to it having less strength than the surrounding concrete slab. He further stated that there was nothing done by the Tenant to create or cause the deterioration of the cement in-fill and that its condition was a consequence of normal wear and tear over the past five years of continual use. The photographs tendered in evidence by both parties supported Mr Placantino's evidence. In particular, it appeared that only those areas where channels had been created in the original concrete slab suffered from surface deterioration.

31. I accept Mr Placantino's evidence that the Tenant had nothing to do with the creation or the in-filling of those concrete channels. I also accept Placantino's evidence that in all likelihood, the porous nature of the in-fill was likely to break up or otherwise deteriorate under the continual pedestrian traffic experienced over five years of use. Therefore, I find that the damage to the concrete floor surface was not caused by the removal of the Tenant's Property but rather, as a result of normal fair and tear. Accordingly, I do not consider that the Tenant is to be held liable to make good that aspect of the concrete floor, under the relevant clauses of the Lease. Moreover, I do not accept Mr MacDonald's evidence that the concrete floor, in its original state, was pristine. Photographs of the Premises and the adjoining retail premises show that the floor, although in good condition, was a bare unfinished concrete slab. It was not polished or sealed.

32. The scope of work contemplated by the Landlord in relation to the concrete floor comprises grinding of the existing concrete slab, patching of all broken surfaces, and the application of two coats of a polyurethane sealer, at a total cost of $7,750, plus *preliminaries* and GST. In my view, that remedial work would produce a finished surface far superior to the surface of the concrete slab as at the commencement of the Lease. Although I accept that the black paint marks should have been removed by the Tenant as part of its reinstatement works, I do not accept that the scope of work contemplated by the Landlord is reasonable to bring about that result. Therefore, and doing the best I can with the limited evidence before me, I will allow 25% of the total cost of the quotation obtained by the Landlord in respect of the concrete floor, which I consider to be a reasonable amount to compensate the Landlord for the removal of the remaining black paint marks. As I have already indicated, the cost associated with making good the surface of the concrete slab is an expense

which I do not consider the Tenant is liable for under the terms of the Lease or the *Retail Leases Act*. Therefore, I will allow $2,131.25 (plus *preliminaries* and GST) in respect of this element of the remedial works claim to be deducted from the Security.

Drainage pipe left uncapped ($450 plus *preliminaries* and GST)

33. Mr Placantino conceded that there was an up-stand of a drainage pipe that was required to be capped. He said that the Tenant was not given access to arrange for its plumber cap that pipe. It appears from the photographs tendered in evidence that the drain is a PVC pipe. According to the quotation submitted by the Landlord, the cost to cap that pipe is $450. However, Mr Placantino said that the cost of the cap would be in the vicinity of $5 and it would not take more than a few minutes to place a cap on that pipe which was easily accessible. During cross-examination, Mr MacDonald conceded that the cost of the cap would be between $5 and $10. He was then asked how the amount of $450 was calculated, given the menial work required to cap the pipe. He said that the $450 was related to other plumbing work, such as the isolation and removal of a pipe in the ceiling space which was not connected to anything. In response, Mr Placantino gave evidence that the pipe in the ceiling space had never been connected to any mains and all that was needed was to physically remove it. No plumbing work was required to isolate it.

34. In my view, the amount of $450 quoted to cap the drain is excessive. Doing the best I can with the evidence before me, I will allow $50 (plus *preliminaries* and GST) for that work to be deducted from the Security.

Damages plasterboard ($540 plus *preliminaries* and GST)

35. It is common ground that some of the plasterboard wall sheets were damaged when wall tiles were removed from their surface by the Tenant. According to Mr MacDonald, some of the backing paper had been torn, requiring replacement of some plaster sheets. However, he opined that the reinstatement work was not satisfactory as the stopping of the plaster sheets had not been sanded back to a state ready for painting. He referred to the quotation from *Adept Construction*, which stated that the cost to make good the plasterboard was $540 (plus *preliminaries* and GST).

36. Mr Placantino conceded that some of the plastering work was less than satisfactory but did not believe that the remedial work was so defective so as to justify repair works costing $540. Regrettably, he did not provide any contrary evidence as to what he considered was a fair and reasonable cost make good the plasterboard.

    Therefore, the only evidence as to the reasonable cost of making good the plasterboard is the evidence of Mr MacDonald and the quotation from *Adept Construction*, which he relied upon. Given the concession made by Mr Placantino as to the current condition of the plasterboard, which is consistent with a number of photographs tendered in evidence, I am of the view that further work is required in order to make good the plasterboard.

I find that the amount of $540 (plus *preliminaries* and GST) is a fair and reasonable allowance for the cost to make good the plasterboard. Therefore, this amount is to be deducted from the Security, as I consider this work to be the responsibility of the Tenant under the terms of the Lease.

Rear internal Door ($475 plus *preliminaries* and GST)

37. As indicated above, Mr MacDonald gave evidence that the rear door leading to the disabled toilet was damaged. Mr Placantino said that the Tenant undertook remedial work to that door by filling in the hole left in the door and then leaving it in a condition ready to be painted. He said that he had recently inspected the door and believed that it had been repainted, presumably by the new tenant. However, during cross-examination, Mr Placantino was unable to say categorically whether the door he saw was a new door or the old door repainted.

38. Given that the door was in a new condition when the Lease was first entered into, I do not consider that leaving the door patched and un-painted is commensurate with the condition of the Premises as at the commencement of the Lease. The Landlord claims $475 plus *preliminaries* and GST, pursuant to the *Adept Construction* quotation, as the reasonable cost to replace that door. In my view, the amount is reasonable and I will order that this amount be deducted from the Security, as I consider this work to also be the responsibility of the Tenant under the terms of the Lease.

Missing stone façade ($775 plus *preliminaries* and GST)

39. The Premises comprise a large shop front window with sits within a masonry wall. According to the Landlord, the lower part of the wall below the shopfront window sill originally had a feature stone tile fixed to it. That stone tile was not present at the time the Premises were re-entered. According to the *Adept Construction* quotation obtained by the Landlord, the cost to supply and re-install the missing stone tile is $775 plus *preliminaries* and GST.

40. Mr Placantino gave evidence that there was no stone tile fixed to the masonry wall when the Lease was first entered into. He drew my attention to a photograph taken when the fit-out works were completed in early 2010. The photograph showed that the brown paint used to paint the shopfront window sill had slightly over-spilled onto the masonry wall. He said that was indicative of there not having been any stone facade at that time because the paint would not have spilled onto the masonry wall if it had been covered with a stone tile.

41. Ms Ho gave evidence that she had a clear recollection of the stone tile being fixed to the masonry façade under the shopfront window at the time the Lease was entered into. She drew my attention to another photograph, which she said was taken shortly before the Premises were leased to the Tenant. That photograph showed the stone tile fixed to the masonry

facade. She said that the photograph accurately depicted the condition of the Premises shortly before the Premises were leased because one could see the *For Lease* sign still hanging in the front window. She speculated that that the stone tile may have been removed during the Tenant's fit out works but not replaced.

42. In my view, it is more likely than not that the stone tile was in place at the time the Lease was entered into. The photograph tendered in evidence by Ms Ho clearly depicts the stone tile and places that photograph in time. By contrast, if the stone tile had been removed by contractors engaged by the Tenant, then it is possible that the paint overspill could have occurred after the stone tile was removed but still during the currency of the Lease.

43. Accordingly, I find that the Tenant is liable to replace the stone tile. As a consequence, I will order that $775 (plus *preliminaries* and GST) is to be deducted from the Security, as I consider this cost to also be the responsibility of the Tenant under the terms of the Lease.

Glazing of front door ($550 plus *preliminaries* and GST)

44. The front main entrance door to the Premises is made of an aluminium frame with a glass insert. The lower section of the glass has cracked. According to the Landlord, the cost to supply and install new glass is $550 plus *preliminaries* and GST.

45. Mr Placantino gave evidence that the cracking of the glass was caused by a structural defect in the door frame, in that it had not been properly secured into the masonry wall. He contended that this was not the responsibility of the Tenant. Mr Placantino referred to a chain of email correspondence between him and the Landlord in or around 15 May 2013, where he notified the Landlord that the door was coming away from its hinges. That email states, in part:

> I put you on notice that the door is in danger of coming away from frame and hitting the ground. As you have maintenance staff at your disposal I request that you attend to the issue as soon as possible.
>
> The door in question was there when we entered the lease and we have had nothing to do with the construction and fixing of the frame.
>
> The clause you refer 14.42 relates to fair use and wear and tear.
>
> This frame was put on to marble and concrete brick work using WOOD SCREWS and was never safe. I cannot be held responsible for repair works that were not safely and professionally applied. Having a building built in such a way is against the Australian Building Code and is an offence to own property in such a condition.
>
> Please attend to this matter urgently.

46. In my view, the fixing of the door frame into the masonry wall is a structural element of the Premises and the Landlord is responsible for maintaining the structure in a condition consistent with its condition as at

the commencement of the lease, pursuant to s 52 of the *Retail Leases Act 2003*. I further find, on the balance of probabilities, that the likely cause of the cracked glass is as a result of the door coming away from its frame.

47. Accordingly, I find that the Tenant is not liable to pay the Landlord in respect of this element of the reinstatement work.

Air conditioning ($4,244.18 plus GST)

48. It is common ground that the air conditioning was not operating at all or at least properly, as at the date when the Lease came to an end. It is also common ground that aspects of the air conditioning system have been altered by the Tenant during its tenancy of the Premises.

49. According to the Landlord, there is a common air conditioning system, which services all of the retail tenancies forming part of the building in which the Premises are located. Each of the individual retail tenancies have their own temperature sensor, which records their ambient temperature and relays that information to a central monitor, from which individual temperatures within each tenancy can be adjusted.

50. Mr MacDonald gave evidence that he is responsible for monitoring and adjusting ambient temperatures within each of the tenancies. He said that during the Tenant's fit-out works in March 2010, he noticed the temperature in the Premises drop from an ambient temperature of just under 20°C to -40°C, which he said was indicative of there being a fault in the system. He produced two print-outs of computer screen shots, one showing the ambient temperature of the Premises at 18.6°C and the other, at -40°C. Regrettably, those print-outs are not dated.

51. Curiously, neither Mr MacDonald nor any other representative of the Landlord made any further investigation as to why the ambient temperature in the Premises was displayed as -40°C. This is despite the fact that complaints were subsequently made by the Tenant as to be effectiveness of the air conditioning system in the Premises.

52. According to Ms Ho, the Landlord was not concerned about the anomaly in the recording of ambient temperature within the Premises because the problem did not affect the air conditioning for the other tenancies. During cross-examination, she said that she suspected that the anomaly in the recording of ambient temperature was caused by the Tenant having removed the temperature sensor and leaving the connecting wire hanging bear. She said that she formed this view because of advice she received from Mr MacDonald and also after seeing a photograph showing a bare wire protruding from the wall, which she suspected was the wire previously connected to the sensor. Mr MacDonald gave evidence consistent with that of Ms Ho, albeit that he conceded during cross examination that he had never actually seen the sensor fixed to the wall within the Premises. He said that he suspected that the sensor was removed by contractors engaged by the Tenant to undertake the fit-out works because that would explain why the central monitor suddenly

showed an ambient temperature of -40°C. He said that he obtained a quotation from *Delta CS* for the supply and installation of a controller and sensor at a cost of $1,820.50, inclusive of GST. The Landlord claims that the Tenant is liable to pay this amount, to be deducted from the Security.

53. Mr Placantino denied having removed the temperature sensor. He said the photograph showing the wire protruding from the wall related to a disused phone point, which was disconnected when the Tenant removed the Tenant's Property. He said that he had no recollection of ever seeing a temperature sensor in the Premises and had no reason to believe that any of the contractors employed by the Tenant to undertake the fit-out works would have disconnected or removed the temperature sensor without telling him. He stated that he had specifically raised questions with his electrician about the air conditioning system not operating efficiently but nothing was mentioned about any missing or removed temperature sensor.

54. Mr Placantino conceded, however, that the Tenant had altered the air conditioning duct work after discovering that the air conditioning was not operating effectively. He said that the original installation comprised solid ductwork with a number of registers cut into that ductwork and three sections of flexible ductwork branching off that solid ductwork. The flexible ductwork extended to diffuser boots, which were left hanging in the ceiling space and had four-way registers attached to them. He said that the Tenant disconnected the diffuser boots and left the flexible ductwork open-ended because it took the view that the air conditioning would operate more effectively without any diffusers. Those three diffuser boots and registers have never been reinstated. According to Mr MacDonald, the cost to reinstate those diffuser boots and registers is $2,848.10, pursuant to a quotation from *Select Air Conditioning* dated 5 March 2014.

55. Turning to the issue of the temperature sensor and controller, I prefer the evidence of Mr Placantino to that of Mr MacDonald. I have formed this view for a number of reasons. First, it seems unlikely that no investigation would have taken place in circumstances where the central recording of ambient temperatures for the Premises suddenly shows a drop close to 60°C, especially where complaints are subsequently made about the effectiveness of the air conditioning within the Premises. Second, it makes no sense that the Tenant or its contractors would have removed the temperature sensor. There is no utility served by removing that device, as it is not obtrusive and is obviously of some importance. Moreover, as Mr MacDonald only commenced his employment towards the end of the fit-out works in March 2010, he was unable to give any evidence of having ever having seen the temperature sensor in situ. By contrast, Mr Placantino was able to say that he had never seen the temperature sensor at the time when the Lease was entered into in December 2009.

56. Accordingly, I find, on the balance of probabilities, that the temperature sensor and controller was not installed at the time when the Lease was

first entered into. Therefore, I do not find the Tenant responsible to replace the temperature sensor and controller.

57. In relation to the missing diffuser boots and registers, the quotation submitted by *Select Air Conditioning* also includes the supply of a return air plenum, return air ductwork and return air grille. However, there is no evidence indicating that the return air plenum and grille were missing or requiring replacement. The only items which are said to have been removed relate to the diffuser boots and four way registers. That is consistent with Mr Placantino's evidence that those were the only aspects of the air conditioning that the Tenant interfered with.

58. Therefore, I am not satisfied that the Landlord has established that the replacement of the return air grille, return air flexible ductwork and return air plenum are necessary or the responsibility of the Tenant. Accordingly, I will adjust the *Select Air Conditioning* quotation to remove those items from the quotation. I will also reduce the amount allocated for labour to $1,000, to reflect the lesser amount of work required. Therefore, I find that $1,609.18 plus GST is to be deducted from the Security, as I consider this cost to also be the responsibility of the Tenant under the terms of the Lease.

Fire detection and sprinklers ($1,621.69 plus GST)

59. Mr MacDonald gave evidence that the fire sprinkler heads were extended so that they protruded past the false ceiling installed by the Tenant as part of its fit-out works. He said that in order to reinstate the Premises, the extensions would need to be removed and the sprinkler heads re-positioned to the underside of the concrete ceiling.

60. Mr Placantino gave evidence that the only sprinkler heads which were extended related to those which were within a bulkhead constructed by the Tenant as part of its fit-out works. It is common ground that the construction of that bulkhead was to remain pursuant to Clause 14.1 (b) of the Lease. Therefore, Mr Placantino submitted that there was no basis to reinstate the sprinkler heads to their original position, unless the bulkhead was to be to be removed.

61. This issue becomes more confusing when one considers the evidence of Ms Ho, who said that the claim in respect of the fire services did not relate to repositioning sprinkler heads but rather, concerned making the Premises *fire compliant*. However, no evidence was adduced to indicate that the Premises were not *fire compliant* or what work was required to make the Premises *fire compliant.*

62. Therefore, I find that insufficient evidence has been adduced on behalf of the Landlord to demonstrate that the Tenant has done anything which it was not permitted to do under the Lease. As I understand the evidence, the construction of the bulkhead was with the consent of the Landlord and there is no call upon the Tenant to dismantle that work or reinstate it to its

original condition. It is part of the Tenant's Property which was not to be removed.

63. As I have already indicated, according to Mr Placantino the only changes made to the fire protection system was the extension of sprinkler heads to the underside of the bulkhead. The general statement made in the affidavit filed by Mr MacDonald that the *fire protection, evacuation system and fire sprinklers that existed when the premises were first occupied had not been reinstated* and the oral evidence of Ms Ho that the fire services quotation relates to making the Premises *fire compliant* lack any particularity, sufficient for me to understand the nature of the complaint. In those circumstances, I find that the Landlord has failed to prove liability on the part of the Tenant in respect of this element of its claim and as such, no further amount is to be deducted from the Security.

Failure to clean ductwork and filters

64. Mr MacDonald gave evidence that the remedial works have and will create significant dust, requiring the ductwork and filters to be professionally cleaned. Insufficient evidence was given as to undertaking that work.[1] Consequently I find that the Landlord has failed to establish that it has suffered loss as a result of this aspect of its claim. Accordingly, I find that the amount of the Security to be returned to the Tenant is not to be reduced by reason of this factor.

Preliminaries

65. Apart from the cost to make good the air conditioning, the cost of the remaining items of work for which I have found the Tenant liable are based on the quotation from *Adept Constructions*, which was exhibited to the affidavit of Mr MacDonald. That quotation provides a separate price for each component of work, including a price for what is referred to as *preliminaries*. The *preliminaries* total $6,690 and are made up as follows:

    (a) Rubbish removal: $550

    (b) Site supervision: $2,500

    (c) Project management and contract administration: $500

    (d) Hand-over clean: $640

    (e) Builder's overhead and margin: $2,500

66. The aggregate price of all of the items of work in the *Adept Constructions* quotation, excluding *preliminaries* and GST (but including the items for which the Tenant is not liable), is $10,720. Therefore, the *preliminaries* represent 62% of the base price for construction. Leaving aside the cost of *rubbish removal* and *hand-over clean*, which total $1,190, the remaining cost for supervision, administration and profit is $5,500. If the price for *rubbish removal* and *hand-over clean* are added to the price for the base

[1] See further orders dated 5 January 2015 and accompanying Reasons at [16-19].

building work (which then totals $11,910), supervision, administration and profit equate to a mark-up of 46%. I find this to be excessive, especially when one considers that *site supervision*, *project management* and *contract administration* are all part of the builder's overheads. Therefore, it seems that there is some doubling up of this component.

67. In my view, $800 should be allowed for *rubbish removal* and *hand-over* clean, given the more limited scope of work for which the Tenant is liable. That would make the aggregate cost of the base building work $6,380.43. To that figure, I find that a mark-up of 30% for supervision, administration and profit is fair and reasonable. Accordingly, I find that the reasonable cost to make good reinstatement of the Premises in accordance with the relevant provisions of the Lease is $8,294.56, plus GST.

Conclusion

68. Having regard to my findings set out above, I find that the following amounts constitute loss and damage suffered by the Landlord for which the Tenant is liable under the Lease:

Item	Description	Amount
1	Concrete floor	$2,131.25
2	Capping to pipe	$50
3	Plasterboard walls	$540
4	Rear door	$475
5	Missing stone tile	$775
6	Glazing to front door	$0
7	Air conditioning	$1,609.18
8	Fire services	$0
9	Cleaning of ductwork	$0
10	Rubbish removal and hand-over clean	$800
Subtotal		$6.380.43
11	Supervision, administration and profit	$1,914.13
Subtotal		$8,294.56
	GST	$829.45
Total		**$9,124.01**

69. Therefore, I find that $9,124.01 is to be deducted from the Security, being the amount which I determine to be the loss and damage suffered by the Landlord as a result of the Tenant failing to comply with its reinstatement

obligations under the Lease. Accordingly, I will order that the balance of the Security ($5,876) is to be repaid to the Tenant by the Landlord.

No Loss

70. In determining that $5,876 is to be repaid to the Tenant by the Landlord, I have taken into consideration Mr Placantino's submission that the in-coming tenant has undertaken its own fit-out works which has, to some extent, covered over defects in the reinstatement work undertaken by the Tenant, resulting in the Landlord not having to expend its own money to effect repairs.

71. In response, Ms Ho said that she provided the incoming tenant with a rent-free period, which formed part of the consideration to secure a new lease. She said this was required having regard to the condition of the Premises, following completion of the reinstatement works undertaken by the Tenant. She commented that had the Premises been properly reinstated by the Tenant, her negotiations with the incoming tenant would have been more favourable to the Landlord.

72. In my view, it is of little consequence whether the Landlord has actually expended monies or alternatively, has accepted a discount on rent in order to procure a fresh lease. In either case, the Landlord has suffered a loss by reason of the Tenant having breached its obligations under the Lease. Moreover, even if it could be proved that the Landlord had no intention of repairing defects found to exist in the reinstatement works (or accepting a rent discount in lieu thereof), that factor would not necessarily mean that it was not entitled to damages. In *Bellgrove v Eldridge* [2] the High Court considered this issue in the context of building defects and stated:

> It was suggested during the course of argument that if the respondent retains her present judgment and it is satisfied, she may or may not demolish the existing house and re-erect another. If she does not, it is said, she will have a house together with the cost of erecting another one. To our mind this circumstance is quite immaterial and is but one variation of a feature which so often presents itself in the assessment of damages in cases where they must be assessed once and for all.[3]

73. Therefore, I do not accept the argument that a failure to prove actual expenditure results in the dismissal of the Landlord's reinstatement claim.

SENIOR MEMBER E RIEGLER

[2] (1954) 90 CLR 613.
[3] Ibid at 620.