VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP983/2017

CATCHWORDS

Australian Consumer Law - s.21 – *Retail Leases Act* 2003 – s. 77 - Unconscionable conduct – what amounts to – s.54 – inhibiting access or disrupting tenant's business – what amounts to – s.57 – damage to premises – abatement of rent – renovation works by tenant not "damage" - no abatement where damage caused by tenant – repudiation of lease – what amounts to – rent-free period and fit-out contribution by Landlord pursuant to lease – provision that proportion be refunded if lease ended early due to tenant's default – requirement additional to Landlord's claim for damages - whether provision requiring refund a penalty - loan agreement – security the borrower's own shares – borrower itself the security – agreement by borrower to execute transfers of units and shares not belonging to it – effect of – no provision in loan agreement requiring repayment of surplus following realization of security – whether payment of surplus to borrower in effect a payment to the lender – whether a penalty – *Personal Property Securities Act* 2009 - s.10 - whether section avoids penal effect - whether order can be made by Tribunal for sale of security and disposition of proceeds – contemplated transfers not provided – interpretation of agreement

APPLICANT	Finetea Pty Ltd (ACN 142 164 449)
FIRST RESPONDENT	Block Arcade Melbourne Pty Ltd (ACN 169 005 949)
SECOND RESPONDENT	Winchelada Pty Ltd (ACN 006 476 786)
FIRST RESPONDENT TO COUNTERCLAIM	Finetea Pty Ltd (ACN 142 164 449)
SECOND RESPONDENT TO COUNTERCLAIM	Kelly Koutoumanos
THIRD RESPONDENT TO COUNTERCLAIM	Premiumtea Pty Ltd (ACN 142 162 785)
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATES OF HEARING	26 - 30 November 2018; 3 - 4 December 2018; 25 - 27 and 29 March 2019, 1 - 9 April and 20 May 2019
DATE OF ORDER	2 October 2019
CITATION	Finetea Pty Ltd v Block Arcade Melbourne Pty Ltd (Building and Property) [2019] VCAT 1529

ORDER

1. Direct that both the claim and counterclaim in this proceeding be listed for further hearing before me on a date and time to be fixed by the Principal Registrar, with one day allocated:

   (a) to hear further submissions as to the final orders that should be made in order to give effect to the findings set out in the attached reasons;

   (b) to determine any application for costs.

2. A brief summary of the submissions to be made on behalf of each party must be filed and served at least two working days before the time fixed for the hearing.

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicant	Mr A.A. Monichino QC with Mr L. Virgona, of Counsel
For Respondents	Mr M.W. Wise QC with Mr A.L. Ounapuu, of Counsel

REASONS

Background

1 The Block Arcade is an ornate shopping centre constructed in about 1889 during Melbourne's land boom era. It is made up of two Arcades, one with access from Collins Street and the other from Elizabeth Street. They meet at right angles under an elaborate dome. The richly decorated interior reflects the Victorian era of its construction, with mosaic and tessellated tiles on the floor, ornamental wrought iron and a glass canopy overhead. It was one of Melbourne's first shopping centres and, since its construction, it has accommodated high-quality retailers. It is highly significant, both historically and architecturally, as a result of which it is on the Historic Buildings Register and is classified by the National Trust. The building, of which the Block Arcade forms part, comprises six storeys, with offices on the floors above. I shall refer to the Block Arcade and the building collectively as "the Arcade". In 2014 the Arcade was purchased by the First Respondent ("the Landlord").

2 The Hopetoun Tearooms ("the Tearooms") is a tearoom business that occupies two shops in the section of the Arcade that is entered from Collins Street. The Tearooms have operated in the Arcade since about the time it was built. Throughout their long history, they have been a fashionable place for people to meet and have tea and refreshment. They were named after the wife of the governor of Victoria at the time the Arcade was constructed. They are a tourist attraction and remain very popular, to the extent that there is usually a queue of people standing near the entrance, waiting to get in. In about March 2010, the Tearooms were purchased by the Applicant ("Finetea").

3 Finetea is the Trustee of the Finetea Unit Trust ("the Finetea Trust") and operates the Tearooms in that capacity, the Tearooms being an asset of the Finetea Trust. The units in the Finetea Trust are wholly owned by Premiumtea Pty Ltd ("Premiumtea") which holds the units as trustee of a discretionary trust ("the Premiumtea Trust").

4 The sole director of both Finetea and Premiumtea is Mrs Kelly Koutamanos ("Kelly"). Her husband, Mr Kon Koutamanos ("Kon") is the financial controller of the Tearooms and Finetea.

5 The Second Respondent ("Winchelada") is a company controlled by Mr Trevor Cohen ("Mr Cohen") and Mrs Helen Cohen ("Mrs Cohen"), who also control the Landlord. Their son, Mr Grant Cohen ("Grant"), is the manager of the Arcade.

The Venture

6 Between September 2014 and September 2017:

(a) works were undertaken in an area of the cellar of the Arcade ("the Basement") with a view to constructing and fitting out a licensed

restaurant there, to be called "Wintergarden", which would be operated by Finetea and complement the Tearooms ("the Venture");

(b) the Landlord granted to Finetea a lease of the Basement and also a shop ("Shop 13") in the Arcade ("the Lease");

(c) Finetea's due performance under the Lease was guaranteed by Kelly;

(d) Finetea took possession of the Basement and Shop 13 pursuant to the Lease; and

(e) Winchelada paid, in several amounts, a substantial sum of money to a builder towards the cost of the Venture and made other payments, purportedly on behalf of Finetea.

7 In order to secure the money Winchelada advanced for the Venture, a loan agreement ("the Loan Agreement") was entered into between Winchelada as lender, Finetea as borrower and Premiumtea and Kelly as guarantors.

8 The Venture was not successful and, following its failure:

(a) the Landlord resumed possession of the Basement and Shop 13, removed most of the partially completed construction works, carried out some renovation works and then leased both the Basement and Shop 13 to other Tenants;

(b) the Landlord sought payment of monies alleged to be due to it under the Lease from Finetea as Tenant and from Kelly as guarantor of the Lease.

(c) Winchelada demanded of Finetea as borrower and from Kelly and Premiumtea as guarantors, repayment of the money due under the Loan Agreement; and

(d) Winchelada sought to enforce security purportedly conferred on it by the terms of the Loan Agreement.

9 On 25 July 2017, Finetea brought this proceeding seeking to restrain Winchelada from enforcing its security under the Loan Agreement on grounds that were set out in affidavits that were filed with the application. An interim restraining order was made, which was renewed at a number of hearings thereafter.

10 Finally, on 27 October 2017, the matter came before me and, after considering the affidavit material on both sides, which by then had become voluminous, I made an order having the effect of restraining the realization of the security until trial and gave directions for the further conduct of the proceeding.

This proceeding

11 In this proceeding, the parties now make the following claims:

(a) Finetea seeks:

(i) against Winchelada, a declaration that the Loan Agreement, or the security conferred by it, is void and an order for repayment

of all amounts that it has paid under it, on various grounds, including an allegation that Winchelada engaged in unconscionable conduct;

(ii) against the Landlord:

A. damages for breach of the Lease;

B. an abatement of rent;

C. damages for wrongful re-entry; and

D. a declaration that it is entitled to occupy a small area in another part of the cellar of the Arcade near the Tearooms.

(b) The Landlord seeks, against Finetea as tenant and from Kelly as guarantor of the Lease, payment of money due under the Lease, for rent and outgoings, the cost of making good the premises and also to recover the value of incentives given to Finetea under the terms of the Lease.

(c) Winchelada seeks against Finetea as borrower and from Kelly and Premiumtea as guarantors of the Loan Agreement, payment of money due under the Loan Agreement. It also seeks an order that transfer forms with respect to the units in the Finetea Trust be executed and provided to it so as to enable it to perfect the security that it claims to have.

The Hearing

12 The matter came before me for hearing on 26 November 2018 with 8 days allocated. Mr L. Virgona of Counsel appeared on behalf of Finetea and Mr M. Wise QC appeared on behalf of the Respondents.

13 The time allocated proved to be sufficient only for openings by both counsel and the cross examination of Kelly.

14 On 4 December 2018, the matter was adjourned, part heard before me, to 25 March 2019, with a further 12 days allocated.

15 At the adjourned hearing Mr L. Virgona of Counsel was led by Mr A.A. Monichino QC in regard to an additional amendment to the Further Amended Points of Claim, which I allowed, and also in regard to submissions concerning the Loan Agreement. Mr M. Wise QC had the assistance of Mr A.L. Ounapuu of Counsel as junior counsel then, and for the rest of the hearing.

16 When the evidence concluded I gave directions for the filing and service of written submissions. Oral submissions were made on 20 May 2019 and took up the full day.

The witnesses

17 The evidence of each witness was given by affidavit and the deponents were cross-examined.

18 For Finetea, evidence was given by Kelly and Kon, Mr Anthony Anastasopuolos, a director of a building company called Blueprint Commercial ("Blueprint"), Mr Lorich, a building expert, and Mr Buchanan, a quantity surveyor.

19 Reports were also filed and evidence was given on behalf of Finetea by a valuer, Mr White, and an accountant, Mr Lipson, as to the value of the Finetea business and in support of a loss of profits claim.

20 The principal lay evidence for the Landlord and Winchelada was given by Grant and by Mr and Mrs Cohen. They also called a building expert, Mr Croucher.

21 Other witnesses called were:

(a) Mr David Bromley, an artist who was engaged to do designs and assist with the interior décor of the Venture;

(b) Mrs Yuge Bromley, an interior designer who was also to assist with the interior design;

(c) Mr Jonathon Frawley, an employee of Lexon Pty Ltd ("Lexon"), the main builder employed in the construction;

(d) Mr Flan Frawley, the registered builder and director of Lexon;

(e) Mr Patrick Barnes, the Landlord's estate agent, who gave evidence in regard to leasing matters and expenses incurred in reinstating and re-letting the Basement and Shop 13;

(f) On a peripheral issue, concerning a memo prepared by Kon, evidence was given by a computer expert, Mr Caldwell and by Mr Peter Koutamanis, the son of Kelly and Kon.

22 In addition to the oral evidence, they were over 4,000 pages of documents, most of them emails passing between the parties, providing an almost daily account of what occurred throughout the period the Venture was undertaken.

Weight and credibility

23 Kelly's evidence did not accord with the emails and other documents in a number of respects which are detailed below. I had the impression sometimes that she was reconstructing events to accord with her assertion that control of the Venture was taken over by Grant on behalf of the Landlord and conducted by him contrary to her wishes. The descriptions that she gave of her reactions to some of events did not accord with the tone and sentiments that she expressed in emails that she sent at about the same time. Her initial account of the circumstances in which she signed the Loan Agreement appears to have been reconstructed. It was corrected in her later witness statement and then added to in cross-examination.

24 I found some of the actions and decisions taken by both Kelly and Kon difficult to understand. She and Kon agreed to take a lease of the Basement and Shop 13 at a substantial rent and engaged consultants and a builder

without first having in place sufficient funds to finance the Venture. They had some money at the time they decided to proceed but they must have known that it would not have been sufficient. Some months after starting the Venture, such funds as they had needed to be used to carry out necessary works that were required by the Council on the existing premises of the Tearooms, otherwise the Tearooms would have been closed down by the Council. Thereafter, it appears that they had no funds at all, apart from the cashflow from the Tearooms, but they nonetheless continued with the Venture.

25 Kon's credit was attacked on the basis of an untruthful profile that he placed on the Internet concerning his experience and qualifications and also, because he had misled Kelly in regard to an incident involving damage to a lift at the Arcade. His evidence at times was inconsistent with his own emails and I found his explanations of these inconsistencies unconvincing.

26 In particular, his evidence concerning the execution of the Loan Agreement was a matter of concern. He said that he did not understand the meaning of the word "execute", which I think is unlikely. He also prepared on his computer what purported to be a detailed file note of a meeting at which the Loan Agreement was signed by Kelly, setting out an account of the signing that turned out to be wrong in a number of respects.

27 He denied that he read some emails and documents that were sent to him and said that he was suffering from depression at the time. However, although it was not disputed that he was suffering from depression, his evidence as to the period during which he was affected by it changed in cross-examination from March until December 2015, to a period ending in August 2016. On a number of occasions, he attempted to put a construction on emails that he sent that I did not think was open. I do not regard him as being a reliable witness.

28 I thought Grant's evidence was generally consistent with the documentation. His answers in the witness box were not always to the point but he was not shaken in cross-examination and I accept that he was an honest witness. I prefer his evidence to that of Kelly and Kon.

29 The evidence of Mr and Mrs Cohen was limited in scope. Mrs Cohen's most relevant evidence related to what occurred at a meeting where Grant is alleged to have threatened to withdraw finance for the Venture. She denied that that occurred and said that she offered to Kelly that she and Kon could withdraw from the Venture if they wished to do so, in which case the Landlord would rent the Basement and Shop 13 to someone else. Mr Cohen's evidence was largely factual and although some of it, which concerned the circumstances leading to the making of the loan, was inconsistent with that of Grant, the difference was not material. I am satisfied that both Mr and Mrs Cohen were honest witnesses and I accept their evidence.

30 Jonathan Frawley said that he was unable to remember a lot of things but his important evidence and most of what he had to say was supported by emails. I accept his evidence.

31 There is no reason to doubt the credibility or reliability of the other witnesses who gave evidence.

The relationship between the parties

32 It is clear that, to start with, there was a warm and friendly relationship between Grant on the one hand and Kelly and Kon on the other. Kon and Grant lunched together on a regular basis and Grant was, at one stage, permitted to eat free of charge in the Tearooms as an acknowledgement of the help that he had given to Kelly and Kon.

33 Grant assisted Kon's unsuccessful attempts to obtain finance for the Venture from banks, including arranging and attending meetings. Grant made two trips to China on behalf of Kelly and Kon in order to source furniture, fittings, crockery and other items for the Venture. On 15 April 2016, when the existing Tearooms premises had to be renovated to satisfy the Council requirements, Grant worked after hours without payment together with another of the Landlord's employees, to carry out temporary works to the Tearoom premises in order to satisfy the Council and obtain an extension of time, while Kelly and Kon attended a function at their child's school.

34 When Finetea's efforts to obtain finance from banks failed, Grant obtained the agreement of Winchelada to advance money to them. First, it was $1,600,000.00 and then, after Kelly informed Grant that she wished to spend $250,000.00 on expensive crockery, the amount was increased to $2,000,000.00. To consider spending so much money on crockery at a time when, on any view, the anticipated cost of the Venture was likely to at least equal the funds that Winchelada had agreed to advance for it, is difficult to understand. Ultimately, much cheaper crockery was sourced by Grant in China.

35 There are a number of emails from Kelly and Kon acknowledging Grant's kindness and assistance and also the financial assistance of Mr and Mrs Cohen through the loan by Winchelada. The tone of the emails did not become negative in tone until just before the Venture was finally abandoned.

The issues

36 The evidence throws up for answer three main questions, namely:

(a) Whose fault was it that the Venture failed?

(b) What are the consequences of that failure? and

(c) Is the security that was intended to have been provided under the terms of the Loan Agreement valid and enforceable, and to what extent?

37 The evidentiary material was almost entirely directed towards the first two questions. The third was largely a matter of interpretation of the document and legal argument.

38 Finetea places the blame for the fact that it undertook the Venture on Grant and it blames the failure of the Venture on both Grant and Lexon. It alleges that, at all material times, Grant was acting on behalf of the Landlord and Winchelada.

39 Apart from the evidence of the witnesses called, the case presented on behalf of Finetea is largely based upon the written record of communications between the parties and others relating to the Venture extending over three years, how some of those communications should be interpreted and the inferences that it is said I should draw from them. In order to see whether the evidence supports the claims made I must go through the events in chronological order to an extent that is not usually necessary. The whole factual matrix must be carefully considered.

How Finetea's case was put

40 In its Further Amended Points of Claim, Finetea alleges that the following "representations" were made on behalf of the Landlord:

(a) "the initial basement representation", which was that, in about late August 2014, Grant recommended the use of the Basement as being "the best thing" for Finetea to expand;

(b) "the redevelopment representation", which was that if Finetea leased the Basement he would actively assist in and facilitate the redevelopment of the Basement for use as an additional tearoom and commercial kitchen for the purpose of Finetea's business;

(c) "the architect representation", which was that, in or around March 2016 Grant offered to make the Landlord's architect available to Finetea for the renovation works, to secure contractors for the renovation works and to manage and oversee the renovation works and that if Finetea did so, Grant, on behalf the Landlord, would personally manage and oversee the works;

(d) "the designer representation", which was that, in or around March 2016, Grant represented that Finetea should engage "the Landlord's preferred designers", Bromley & Co ("the Bromleys");

(e) "the builder representation", which was that, in or around May or June 2016, Grant, the Bromleys, Lexon and also Grant on behalf of the Landlord and Winchelada, recommended to Finetea that it engage Lexon as building contractor and the Bromleys as interior designers and represented that Lexon was the preferred builder for the Landlord and Winchelada and that it should be immediately engaged, despite not then having any concluded building contract, specifications or scope of works.

41 Finetea pleads that, induced, by and in reliance upon the initial Basement representation and the redevelopment representation, it agreed to enter into the Lease for the Basement and for Shop 13. It also pleads that, induced by and in reliance upon "the architect representation" and/or "the designer representation", Kelly and Kon met with Mr and Mrs Bromley on 10 March 2016. However, there is no allegation that the representations were false or that Fintea suffered loss or damage as a result.

The initial Basement representation

42 In August 2014, when Grant is said to have recommended the use of the Basement as being "the best thing" for Finetea to expand, Finetea had been looking for space to expand its business. The Tearooms were, and still are, very popular and the seating capacity in its existing premises is limited to the extent that there was, and still is, always a queue of people outside, waiting to get in. In addition, the kitchen facilities were inadequate.

43 The making of the initial Basement representation, is denied in the Points of Defence but I accept that Grant expressed the opinion that it would be suitable for them and that Kelly inspected the Basement and told Grant that she would think about leasing it.

44 In early September 2014, Finetea engaged Lovell Chen, a firm of heritage architects, to advise upon the feasibility of the Venture. The advice given was that it was possible, but that disability access would be required. After ascertaining that an existing lift to the Basement would not be suitable, it was agreed that the Landlord would relocate the existing tenant in Shop 13 and lease that shop to Finetea so that a new lift could be constructed within it in order to provide disabled access to the Basement.

45 On 1 October 2014, after Lovell Chen had confirmed that the Venture was feasible, Kelly and Kon, on behalf of Finetea, signed heads of agreement with the Landlord by which it agreed to lease the Basement and Shop 13 for a term of 15 years with successive options to renew for three further five-year periods. Finetea was to accept the premises as they were, with the Basement stripped of its existing fit-out, which meant that it had to undertake the new fit-out itself. To this end, there was to be a rent-free period of 12 months, commencing 1 January 2015 and a contribution by the Landlord to the fit-out costs.

46 Thereafter, extensive investigations of the Basement and its connecting services were made on behalf of Finetea by its architects and others and, on 15 January 2015, Kon informed the agent that Finetea had a detailed report and plan of its set up and that it was "ready to go".

47 Further negotiations then took place, resulting in the Landlord increasing the incentives to $555,000 and agreeing to delay the commencement date of the Lease. On 20 May 2015, the Lease was signed.

48 The incentives were divided into a rent credit of $355,000.00 and a cash incentive of $200,000.00. The rent credit would be credited monthly up to 1

September 2016, with a final credit of $5,783.13 towards the rent for the month of October 2016, which would be payable on 1 October 2016.

49 By Special Provision 4.4, if the Lease were determined by the Landlord early as a result of the Finetea's default, Finetea would repay an amount equivalent to the formula:

$$A = B \times \frac{X}{Y}$$

Where A = the amount to be paid;

B = the Rent credit sum; and

X = the number of days unexpired when the Lease was terminated; and

Y = the number of days in the term.

50 The Lease required Finetea to provide a bank guarantee but the Landlord agreed that this would be deferred until such time as Finetea had obtained finance for the Venture. No bank guarantee has ever been provided.

The redevelopment representation

51 The evidence does not establish a specific representation by Grant that, if Finetea leased the Basement, he would actively assist in and facilitate the redevelopment of the Basement for use as an additional tearoom and commercial kitchen for the purpose of Finetea's business.

52 However, in fact, he was on very friendly terms with Kelly and Kon at that time and he assisted them in the Venture to a considerable extent.

The building works

53 On 5 May 2015, Finetea engaged a builder, Macrobuild, to undertake the fit-out works. At this stage, despite Kon's assurance given months earlier that Finetea was "ready to go", drawings by its architect, Lovell Chen, were still in the course of preparation. Finetea had also not obtained finance to pay for the work, although Kelly said in evidence that she was confident at the time that finance would become available. They had some money to put towards it and they intended to borrow the balance.

54 The minutes of a site meeting that took place on 27 May 2015 record that:

(a) the strip-out of the Basement was almost finished;

(b) the cost of construction was estimated at that time to be $1.5 million plus GST, plus the cost of various other items; and

(c) a "soft opening" was anticipated for 1 September 2015.

55 What went wrong with the progress of the Venture from that point is not established by the evidence before me. Not only was there no soft opening on 1 September 2015, nothing much seems to have been done by then.

56 In a letter to Mr Lovell dated 26 November 2015, Kon blamed Lovell Chen for not finalising plans and designs in accordance with what he and Kelly wanted. Presumably some resolution was achieved because physical work

in the Basement appears to have started in November 2015 although the building permit was not issued by the building surveyor until 22 December 2015.

57 The Building permit identified architectural plans by Lovell Chen and also structural, mechanical, electrical, fire services and hydraulic drawings by Irwin Consult, a firm of engineers. According to the building permit, the total project cost was then expected to be $1,927,000.00. That figure then rose dramatically.

58 In an email for February 2016, Lovell Chen provided a revised opinion of probable cost, estimating a total construction cost of $2,759,759.81 and estimated total expenditure of $3,430,381.84. Even though various alternatives were offered by Lovell Chen to reduce these figures, it is clear that Finetea did not have the means to meet such a cost. That was, perhaps, the reason that work then ceased, although there is no evidence that it was.

The "architect representation"

59 Until then, Grant does not seem to have played any role in what was happening in the Basement and Shop 13, although it appears that he was kept informed. He said that Kelly and Kon told him at that time that they did not have the funds to complete the Venture. He said that he was concerned for them because they no longer had an architect or a builder and he was aware that their rent-free period would expire in October 2016. He said that he tried to assist them.

60 Grant put Kelly and Kon in touch with the Landlord's solicitors who, on Finetea's instructions, terminated the engagement of both Lovell Chen and Macrobuild.

61 In March 2016, Grant also introduced them to the Landlord's architect, Mr Edelsten. Kon referred to Mr Edelsten during cross-examination as "my architect" and "on my team" but he referred to Mr Edelsten in an email of 18 July 2016 as "the Landlord's QS".

62 Although he was occasionally involved, Mr Edelsten did not have a clearly identified role in the Venture. He was consulted from time to time, he attended meetings and he was copied into emails. He reviewed claims for payment by Finetea under the Loan Agreement. It may be that he also had a watching brief for the Landlord or, perhaps, Winchelada, but he was never retained or paid by Finetea, Kon or Kelly, nor does he appear to have held himself out as acting for any of them.

63 In April 2016, Kelly contacted another architectural firm, Mills Gorman, that had been recommended to her by the kitchen designer. She said that she was very impressed with them and with some of their ideas. They sent her a fee agreement on 20 April 2015. Kon negotiated some amendments to it and returned it, requesting an initial meeting so that they could get the project started. The fee agreement was never signed.

64 On 19 May 2016, Kelly told Mrs Bromley in an email that that she was not

convinced that she had seen what she needed to see from Mills Gorman.

The "designer representation"

65 The Bromleys were tenants of the Arcade, occupying a shop next to Shop 13. Mr Bromley is a well-known artist and Mrs Bromley is an interior designer.

66 Kelly said in her first witness statement that, in early March 2016 Grant told her:

> "I have found the perfect people for you, they will have the right vision for you, and you will be able to bring all of this together."

67 After being introduced to the Bromleys by Grant, Kelly and Kon had a number of meetings with them. The first meeting was on 3 March 2016. Kelly said that she was very impressed. She sent an email to Mrs Bromley the following day in which she said:

> "Thank you for taking the time to meet with Kon and myself yesterday.
>
> I was quietly excited and walked away with a slight spring in my step with the hope that you may be able to assist us in getting this project back on track."

On the same day she sent an email to Grant, thanking him for the introduction. Grant responded, saying that, even if Kelly and Kon did not go with the Bromleys, they would get some great ideas.

68 Kelly said in her witness statement that, in the following week, she was not sure that the Bromleys were the right people for the job but, according to Mrs Bromley, in the course of a further meeting on 9 March 2016, Kon said to Mr Bromley words to the effect of:

> "You remind me of my brother, if I had the keys to the Basement with me I would give them to you now to get started."

Mrs Bromley also said that there was another meeting the following day in which Kelly said words to the effect of:

> "Everything you have shown me is magically exactly what I wanted."

I accept that evidence.

69 Thereafter there are a number of examples in the evidence where Kelly said very positive things about the Bromleys and the contribution that she expected they would make to implementing her vision concerning the Venture.

70 The evidence does not establish that the Bromleys were "the Landlord's preferred designer" or that Grant said that they were. It is clear that he thought that Finetea should engage them and that, until shortly before Kelly returned from her second trip to China, both Kelly and Kon appear to have been very happy with the Bromleys and what they thought they could offer.

Renovation of the Tearooms

71 In early March 2016, a crisis occurred relating to the existing Tearooms premises. Kelly and Kon were directed by the Melbourne City Council to carry out a long list of works to those premises. They attempted to comply but, on a further visit, the health inspector was not satisfied with what had been done and threatened to close the Tearooms down that day.

72 In order to obtain a three-week extension, it was agreed that further work of a temporary nature would be carried out. Because Kelly and Kon had to attend their daughter's year 12 formal that evening, Grant stayed back with one of the Landlord's employees and the Tearooms' staff that evening and carried out sufficient work to obtain the three-week extension. It was recognised that, at the end of that three weeks, they would then have to close the Tearooms in order to carry out further, more extensive, works.

73 The extent of this further work was such that it required the closing of the Tearooms for five weeks from the beginning of May 2017. Not only was no revenue earned during that period, but the cost of the further work used up all of the money that Finetea had available to put towards the Venture. In order to assist them, Grant agreed that payment of rent for the existing premises could be deferred until the Tearooms were open again.

74 To carry out the work on the Tearooms, Finetea engaged Blueprint, which attended to and completed all of the works within the five-week period. Kelly and Kon were impressed with their performance and asked them to provide a quotation for the Venture.

Lack of plans

75 The architectural plans prepared by Lovell Chen for the Venture were marked "Not for construction" but they were nonetheless the building permit drawings. Mr Lorich said that that was a matter of concern. Mr Croucher said that the plans were not good but that all construction work on a building of this age was a dynamic process and that variations were to be expected.

The quotations from Lexon and Blueprint

76 Mrs Bromley said that, at the meeting on 9 March 2016, she and her husband had recommended to Kelly and Kon that they engage Lexon for the Venture. Whether on that occasion or shortly afterwards, they said that they would only be involved with the Venture if the builder was Lexon. The evidence concerning the reaction of Kelly and Kon to that suggestion at that meeting is not clear. However, on 10 March 2016, Mrs Bromley emailed Jonathan Frawley of Lexon to say that they (the Bromleys) had been "given the job and the keys". In fact, it is not suggested that Finetea or anyone else had engaged them at that time or that they had received the keys, but it is clear that they expected to be given the job. It is also clear that time was running out if the Venture was to be completed by the end of October 2016 and everyone involved must have been aware of that.

77 To enable Lexon to provide a quote for the Venture, Kon arranged for the drawings and other documents from Macrobuild and Lovell Chen to be provided to Jonathan of Lexon in early April 2017. He also authorised the building surveyor to release to Lexon the stamped plans and building permit, these having also been requested by Jonathan. There were numerous emails exchanged and meetings held and there is no indication in any of the documents relating to these that there was any reluctance on the part of Kelly or Kon to provide the information to Lexon or obtain a quote from it.

78 On 26 April 2016, the Bromleys sent Finetea a costing setting out, in general terms, what they proposed to provide, by way of services and decorative items, for an overall fee of $70,000.00. On the following day, Kelly received a fee estimate from Mills Gorman that she said was "more professional and structured".

79 The Bromleys received no response from Finetea until 19 May 2016, when they were informed in an email from Kelly that Finetea had engaged Mills Gorman as architect for the Venture and Blueprint as builder. Despite this email, there is no evidence that any building contract had been signed with Blueprint. Kelly said in the email that Mills Gorman had its own design team but that she and Kon were anxious that the Bromleys would still be involved in the design, suggesting that they could do "the fun stuff".

80 By 23 May 2017, Finetea had received some drawings from Mills Gorman and Kelly told Kon that she didn't feel that they had quite grasped her ideas for the Venture. At that time, according to Kelly's evidence, they received a visit from Grant and after she told him that she was still a little unhappy, Grant said to her:

> "You don't need an architect for this job, we already have Ken looking after things. All you need is the Bromleys, they are the ones who share your vision. You're just wasting money paying an architect."

81 The Bromleys were not agreeable to Kelly's suggestion that they do "the fun stuff", and in emails on 24 May 2016, first to Kelly and then to Grant, they said that they would no longer be involved in the Venture. Both Grant and Mrs Bromley, whose evidence I accept in this regard, said that Kelly was very upset at their rejection of her proposal and a meeting was arranged between Kelly, Kon, Grant and the Bromleys which took place in Grant's office on 26 May 2016.

82 According to Mrs Bromley's evidence, Kelly said at this meeting that the Bromleys "…were the only ones who had shown her any magic and got her vision…" and she wanted the Bromleys and not Mills Gorman. Mrs Bromley said that they told Kelly and Kon that, if they wanted the Bromleys to work with them, they would have to use their preferred builder, Lexon. In her evidence, Kelly denied having agreed to use Lexon, although she said that she did suggest that Blueprint could do the back of house and Lexon the front of house. Mrs Bromley agreed that this suggestion was made but said that the Bromleys rejected it.

83 Following the meeting of 26 May 2016, Kelly sent an email to the Bromleys stating, amongst other things:

> "Thank you for making the time to meet with us today.
>
> …….
>
> You've reignited the flame in this project – words escape me.
>
> We are meeting with Jonathan from Lexon tomorrow.
>
> I'll be in touch.
>
> Have a lovely weekend."

84 On the same day, Kon sent a text message to Jonathan, stating:

> "Jonathan - would like to meet up with you and landlord at earliest convenience."

85 Jonathan replied that he could meet any time the following day in the afternoon. On the following day, 27 May 2016, Kon met Jonathon in the Basement. According to Kon, the purpose of the meeting was to enable Lexon to price the job. It should be noted that this meeting was called by Kon, not by Grant.

86 Following the meeting in the Basement of 27 May 2016, Jonathan prepared a costing for the "back of house" works from the drawings. In an email of 31 May 2015 addressed to Kon, Grant, Kelly and the Bromleys, he said that Lexon would agree on a price of $950,000.00 plus GST for Stage I of the works, which appears to have been for all of the back of house.

87 In an email in reply, sent the same day and copied to the same people, Kon said that he was very appreciative of the information, that he would like to review the quotation and that he would get back to Jonathan soon.

88 Notwithstanding the positive tone of this email, Kon said in evidence that, at the time he sent it, he was suffering from depression and that he did not want to engage Lexon. He said that he did not have the right mental state at the time to get into conflict and that he was "appeasing Grant". This evidence does not sit well with:

(a) the fact that he called the meeting of 27 May 2016;

(b) his emails directed to supplying Lexon with the necessary documentation;

(c) the meeting of 26 May 2016, in which the Bromleys stated that they would only be involved if Lexon were engaged;

(d) Kelly's desire to have the Bromleys involved; and

(e) Kelly's email to the Bromleys of 26 May 2016.

I am satisfied that the quotation from Lexon was prepared at the request of Finetea and not Grant.

89 On 31 May 2016, Jonathan contacted some subcontractors to say that

Lexon had been awarded the contract. He acknowledged in evidence that that was not the case but said that he wanted his subcontractors to be ready. There is no evidence that Finetea had accepted the quotation by then and Jonathan said that Grant had not accepted it.

90 On the same day, 31 May 2016, Mr Bromley emailed Grant, pointing out that decisions needed to be made quickly and asking him to find out what Kelly and Kon were doing about the quotation from Lexon.

91 On 6 June 2016, in an email addressed to Kelly and Kon and copied to Jonathan and Grant, the Bromleys sent costings for the work that they and Lexon were to carry out. The attachments to this email provided details of the work involved and a total cost of $1,841,215.00. This appears to have been for the whole Venture.

92 In a reply email to the Bromleys sent the following day, 7 June 2016, Kelly said:

> "I really appreciate the amount of thought that's gone into this. It's music to my ears knowing that we're on the same wavelength.
>
> We are really under the pump trying to rush to the finish line with HTR1 *[the existing Tearooms]* and the opening on Thursday. Hopelessly behind and feeling quite stressed. This was really a 12 week job that we squeezed into 4.5 weeks.
>
> Unfortunately, I will not be ready to meet tomorrow. I'm not in the right headspace. Please let me get this over the line - up and running before I take the next step.
>
> Could I please email you on Thursday in regard to our availability."

Her reply was copied to Kon, Jonathan and Grant.

93 On the same day, 7 June 2016, Grant sent the following text message to Kelly:

> "Have just read the email sent to David and Yuge. They have a deadline of October 1 which if they start Monday can meet. You push back and they will not be able to meet. That's the reality. The clean up, concreting et cetera you don't need headspace for. We just need to compare the prices this afternoon and move forward. Please call me if you are concerned."

94 On the same day, 7 June 2016, Blueprint provided a quotation to carry out the back of house works, plus some concreting in the front of house, for $933,385.00 plus GST.

95 On 7 June 2016, Kelly emailed a copy of the Blueprint quotation to Grant. Grant sent it on to both Jonathan and the Bromleys who then compared it with Lexon's quotation. Grant said that he forwarded the quote in order to be sure that they were comparing apples with apples.

96 On the following day, Grant sent the following email to Kelly:

> "Kon Kelly
>
> Hope you are a little more relaxed. Will all work out don't worry.

Re HTR2 [the Venture], not sure why you both care so much as to who does BOH? Whoever does it has contractual arrangements and specifications to follow. You will get what is on paper no more no less. J is $50k cheaper apples for apples. If Kelly wants Bromley & Co to create their magic then they need their team doing it.

……

They have even verbally told me that if it goes over by even 1 cent they will wear it!! Guys this is my strength, unlike running a restaurant.

The BOH is the simple part of the whole project. The complex and exciting part is FOH where you really need the help!!! To me it's a no-brainer.

Have made up my mind and want them to start tomorrow!!!! Well Monday!! It's only early. I know you have had a massive day. Do you feel like catching up for a drink/chat?"

97 On 8 June 2016 Lexon applied to the existing building surveyor, du Chateau Chun, for a building permit. The application identifies Jonathon's father, Flannan Frawley, as being the building practitioner, Block Arcade Melbourne Pty Ltd as the owner and Grant Cohen as being the contact person. In the box intended for insertion of ownership details, it appears that some details were inserted but they have been whited out and I am not able to read them in the copy tendered.

98 On 9 June 2016, Kon complained in an email to Grant that, in forwarding Blueprint's quotation to Jonathan and the Bromleys, he was favouring Jonathan.

99 On the evening of that day, Grant sent an email to Kon as follows:

"Hope you are a little more relaxed.

As I have said K&K, I will not let you guys start until you have a firm fixed price for downstairs. You have one from Bromley, and I suspect Anthony [Blueprint], through no fault of his own, will take months to come up with one as he is relying on architects to draw which you are not happy with, which is the same predicament you find yourself now.

You have to bite the bullet K and do what's best for the business, and take all the emotion out of it.

If you were to do this (ie clear your mind and start from scratch, the choice is obvious).

A fixed quote

Bromley

Soft furnishings to be paid on generous terms

6 gold leaf mirrors to be made allowing you to purchase them over time

Guaranteed not 1 cent over budget

$1,000,000 less than the QS quote

Opening October 1

NO BRAINER !!!!!!!"

The meetings on 10 and 11 June 2016

100 On 10 June 2016, a meeting took place at Grant's office in the Arcade between Kelly, Grant and the Bromleys. Kon could not attend because the Tearooms were to reopen the following day and he needed to be there.

101 Kelly said as to this meeting that:

(a) she did not wish to attend but that Grant insisted;

(b) she was hardly given an opportunity to speak;

(c) every time she attempted to raise an issue she was talked over by Grant;

(d) she said repeatedly to Grant and the Bromleys that she wanted Blueprint to be the builder and not Lexon but that all three of them told her that they would not take no for an answer;

(e) she said on two or three occasions that, before she approved anything or allowed any works to be done, she would need to see proper specifications and plans;

(f) Grant said to her on a number of occasions that the Bromleys were the only ones who could do this job for them and that if she and Kon wanted the Bromleys they would have to use their builder.

She said that, after one and a half hours, she left the meeting to prepare for the re-opening of the Tearooms. She did not suggest that anything had been decided at that meeting.

102 Grant said that the meeting of 10 June 2016 had been arranged by Kelly and the Bromleys and he denied that he had insisted that Kelly attend. He also denied having talked over her. He said that he did not say that the Bromleys were the only ones who could do the job for Finetea or that there was no other choice. He said that Kelly did not say that she did not want to use Lexon. Rather, he said, that she wanted to use both Lexon and Blueprint. He said the Bromleys had said that they would not work with Blueprint and that he told Kelly that she had to make a decision whether she wanted them or not and, if she did, it would have to be on their terms. I prefer Grant's account of the meeting.

103 The following day a further meeting took place in Grant's office between Kelly, Kon, Kon's father, Grant and Mr and Mrs Cohen. Kelly said that the meeting lasted for about three hours, during which she was very upset. She said that she stated on a number of occasions at the meeting that she did not want Lexon to do the work and that she was very happy with Blueprint. She said that, after continually refusing to accept what she was saying, Grant stood up to leave and, as he was leaving, he said to her: "If you don't go with Bromley and Lexon we won't be funding any of this." She said that, after the meeting she became quite concerned that the decision-making

process was being taken out of her hands and was extremely upset that they might not be able go ahead with the Venture. Her version of the meeting was supported by Kon's evidence.

104 Grant said that Kelly had organised a big platter of food and drinks for the meeting. He said that Kelly said that she wanted to engage the Bromleys and that they were vital to her concept, but that she wanted to use two builders; Lexon for the front of house and Blueprint for the back of house. He said that his father pointed out to her the difficulties of having two builders on site. He said that Kon's father agreed and said to Kelly: "Too many chefs". (Other witnesses said that the phrase he used was "Too many cooks"). He said that he (Grant) told Kelly that if she wanted to use the Bromleys, it was a package deal with Lexon because that is what they required. He said that his mother said to Kelly: "If you feel uneasy or unhappy, you don't have to go ahead, we can find another tenant", to which Kelly replied "Oh no, we want the space". He said that, before the end of the meeting, which lasted approximately two hours, Kelly said that she wanted the Bromleys and so she would use Lexon. Grant denied that he got up to leave the meeting and denied that he said that, if Kelly and Kon did not go with the Bromleys and Lexon, they "…would not be funding any of this." He said that the meeting ended amicably.

105 Grant's version is supported by the evidence of his parents who gave very similar accounts of what occurred. Mr Cohen said that the meeting was amicable throughout. Mrs Cohen added that Kelly was agitated at times. Kon's father did not give evidence.

106 Kon agreed that Mrs Cohen had said that they did not have to proceed with the Lease if they didn't want to and that Kelly had replied: "No. I want it", meaning the Basement and Shop 13.

107 On 11 June 2016, when this meeting occurred, there was no current proposal by either the Landlord or Winchelada to fund any of the Venture. Consequently, I think it is unlikely that there was any threat made by Grant at the meeting to withdraw funding if Lexon was not engaged.

108 Further, it is clear that Kelly wanted to engage the Bromleys and it was equally clear that, in those circumstances, they would need to engage Lexon as well. Knowing that, and notwithstanding that they were given an opportunity to exit from the Venture if they wished to do so, they elected to proceed. I prefer the account of this meeting given by Grant and his parents to that given by Kelly and Kon.

109 At 6:55 PM that same day, Kon sent a text message to Grant expressing in very warm terms his and Kelly's gratitude that Mr and Mrs Cohen were intending to travel to Daylesford to see the Bromleys and stating that they, Mr and Mrs Cohen, had shown genuine love and care towards himself and Kelly. On the next day, 12 June, Kon sent an even warmer text message to Mr and Mrs Cohen expressing respect, love and admiration for them both. He also sent a text to Grant, asking him to arrange a meeting between Jonathan, Kelly and himself.

110 It would not appear from this evidence that Kelly and Kon had any ill-feeling at the time towards Mr and Mrs Cohen or Grant or any reluctance to engage Lexon.

111 Following the visit by Mr and Mrs Cohen to Daylesford, Mr Cohen sent Kelly the following text messages:

> "Heather and I spent a couple of hours with David & Yuge [*the Bromleys*] today & can see why Kelly is so happy to be working with them.
>
> ……
>
> You should concentrate for now on the new business side of things which is your forte and let David and his team weave their magic & I expect in a couple of months you will be very satisfied that all your dreams will have come together".

The engagement of Lexon

112 A key issue in the case is whether it was Finetea that engaged Lexon or Grant, acting on behalf of the Landlord.

113 At some stage Lexon obtained the keys to the Basement. In its Further Amended Points of Claim, Finetea alleged that it was Grant who provided the keys to Lexon and instructed Lexon to begin undertaking the renovation works. Jonathan said that it was Kon who gave him the keys. He said that this occurred after he had been to inspect the premises and while they were standing in the Arcade at the top of the stairs leading to the Basement. He said that he was not given the keys by Grant or by anyone else.

114 Kon initially denied having given Jonathan the keys and said that a security officer of the Arcade called John provided 3 electronic fobs to Lexon at the direction of Grant. According to Grant's evidence, these fobs are to give entry to the Arcade itself and do not give entry to either the Basement or Shop 13. He said that he did not give keys to Lexon and said that it was Kon who provided them with keys. In an email of 4 April 2016, Kon acknowledged that the previous builder, Macrobuild, had returned the keys to him. I am satisfied that Lexon received the keys from Kon.

115 A meeting took place in the Basement on 13 June 2016 between Kelly and Jonathan, following which Jonathan sent an email to the building surveyor, copying in Kelly, advising that Lexon had been awarded the job. Later that evening Kelly sent an email to Jonathan asking when he would be available for a meeting in the next day or so. In this email she did not dispute that Lexon had been awarded the job.

116 Kelly said in her second affidavit that she did not send many emails to Lexon and that her communication with Lexon was limited because the Venture had been taken away from her by Grant and that that was her way of protesting that decision. That is inconsistent with both the text and the tone of the emails that she sent. Further, she responded almost immediately to Jonathan's email, and requested a meeting.

117 This meeting took place on the following day between Kelly, Kon and Jonathan on site. It is not suggested that either Kelly or Kon said at that meeting that Lexon had not been engaged.

118 Jonathan sent an email to both Kelly and Kon later that same day, stating as follows:

> "We will have a 2 weeks program issued in the coming day outlining everything kicking off and by next week set out the construction program to complete works.
>
> This week we will be in there setting levels, saw cuttings and preparing the kitchen and ground slabs. Building the kitchen walls and getting all key service trades through with the view of placing concrete from mid next week.
>
> Can you please contact the builder [*Blueprint*] who completed HTR1 [*the Tearooms*] to remove all their ladders, tools, materials and the like by tomorrow, so there are no issues from that side of things.
>
> Big couple of weeks to get everything nutted out and signed off and look forward with working with you. " (sic.)

119 Kon replied immediately by email, with a copy to Kelly, stating:

> "Jonathan,
>
> Thank you.
>
> ……
>
> This has been discussed with the builder – and we have been advised that it will be cleared tomorrow."

120 Later that evening, Mrs Bromley sent Kelly and Kon an email suggesting a meeting to go through the timeline for the interior fit out of the Venture, in light of Lexon's construction schedule. She suggested 2 PM on Thursday. Kelly sent Mrs Bromley a reply email the following day, with a copy to Kon, stating:

> "2 PM is fine with me. See you then."

121 On 16 June 2016, Jonathan sent an email to Kelly and Kon saying that he would forward a draft contract. There were subsequently two drafts of the contract prepared but neither of them was ever signed.

122 On 18 June 2016, Jonathan emailed a draft contract to Kelly, Kon and Grant. The Bromleys were copied into the email. The contract provided for a contract price of $1,672,550 plus GST. The contract says that the builder was "Lexon Group" and the owner was stated to be Kon & Kelly Koutamanis. Although Kon acknowledged in cross-examination that he saw the contract and was aware that he and Kelly were shown as the clients, neither he nor Kelly responded to the email. Grant's response was that he would print it out and go through it on Monday.

123 On 20 June 2016, Jonathan sent an invoice for the deposit payable under the draft contract to Kelly and Kon. The final paragraph of the email states:

"If you can let me know when you have reviewed the contracts and if there is anything there that you wish to discuss or alter."

124 On 21 June 2016 Kon sent an email, copied to Kelly and Grant, to Finetea's finance broker in which he said, as to the work done for the Venture:

"All works that were completed, and monies paid for documentation - have been able to be used for the new builder that has been appointed with a fixed price contract.

The fixed-price contract is to the tune of $1.6 m, with a completion date of Sep 30th 2016.

The builder has resumed work on the site and is very aggressive in completing the required works - working around the clock - seven days.

The builder has resumed putting claims in to the tune of $155K per claim - every 2 weeks."

125 On 23 June 2016 Kelly sent an email to Jonathan, copied to the Bromleys, Grant and Kon, as follows:

"In relation to the contract which is awaiting our signatures, we still need to see the timeline and deliverables. Please advise when this will be ready."

126 Jonathan responded immediately that Lexon would complete that and send it to her for review.

127 By 1 August 2016 signed contracts had not been returned. On that day, Jonathan sent an email, asking whether there was an issue and that it was causing time delays on the project. He said that unless they were returned that day Lexon would be forced to cancel trades that week.

128 Kon replied the same day in an email that was copied to Kelly there was no issue, that he was meeting Ken Edelsten that day and would have the contracts signed. This did not occur, but work nonetheless proceeded.

129 Later on, when the Bromleys had ceased to be involved in the Venture, there was discussion that Lexon's scope of works would be reduced. To that end, a revised building contract was prepared by Jonathan. He informed Kon by email on 25 August 2016 that the revised contract was ready for perusal and collection but it was never executed.

The ceiling height issue

130 The Basement has a vaulted ceiling supported by pillars of face brickwork. The attractive appearance of the pillars was marred by the presence of pipework and services supporting the tenancies above.

131 The existing concrete floor was out of level and in bad repair. It needed to be either replaced or covered with a levelling screed to achieve a level and uniform surface.

132 Kelly was anxious to maximise the ceiling height. The floor to ceiling height was greatest at the western end near the staircase and least at the eastern end where the kitchen and services were to be constructed.

133 It is not disputed that, in order to lower the floor to any appreciable extent it would have been necessary to construct a pumped sewer system. The existing pipework already installed by Macrobuild had not allowed for a pumped sewer system because it had been decided at the time that such a system would be impracticable because, if it broke down, the restaurant would have to close.

134 The Blueprint quotation allowed for removal and replacement of some of the concrete floor as well as some excavation but, although it allowed for the replacement of all of the pipes, it did not allow for a pumped sewer system. Instead, it suggested that there should be a different floor level in the back of house area. Kelly said in cross-examination that she did not want a step between the two areas.

135 The Lexon quotation also did not include a pumped sewer system and contemplated levelling the floors by pouring concrete over the top.

136 On 17 June 2016 Jonathan sent an email to Kelly and Kon offering three options for resolving the floor level issue. The text of this email as follows:

> "Please see options 1, 2 and 3 for floor levels, we think option 3 would work best for this space.
>
> As you can see in the option 3 we have located the landings at the base of the stairs, bar entrance and continued the ramp to the bathroom entrance. This will achieve the maximise ceiling height outcome and staying within the current building permit.
>
> The other option that you wanted to explore removing all floors, this is something you will need to take up with Grant as this will involve an engineer and look at a redesign of the existing Block Arcade footings. Which would be a hugely expensive exercise and would most likely push project time lines out by 3 - 4 months at a minimum.
>
> We will be on site tomorrow if you want to come down and look at how these options would work.
>
> Saying all this we really need an answer either way as we have concrete booked from Wednesday to complete the floor levels throughout. We need confirmed direction no later than Saturday at noon (18/6/16) so we can prepare or cancel all trades and materials." (sic.)

137 Kon's response to this email was "…option 3 - ramp, landing, ramp on both sides of the stairs".

138 Kelly responded:

> "Jonathan,
>
> Thank you for the visual on the 3 options for the floor levels.
>
> I would still like to speak to an engineer before proceeding.
>
> I'm trying to arrange one as we speak."

139 Jonathan answered:

> "Thanks for that Kelly,
>
> When can we expect an answer as we have labour and materials booked to go for next week to get the floors down.
>
> Can you advise asap so we can plan for it".

140 Kelly responded:

> "The engineer said that he could probably give us an answer on the day.
>
> I do not wish to slow this project down at all, just wanting to feel reassured that I have exhausted all options for the ultimate result."

141 Jonathan answered:

> "Not a stress, we will prepare for the back of house pour."

142 Before covering the pipes that had been laid by the former builder, Macrobuild, Lexon had to obtain a plumber's certificate for them. On 18 June 2016, Jonathan sent the following email to Kelly and Kon which he copied to Grant, the Bromleys and also Toby, who was Lexon's site foreman:

> "Hi Kelly
>
> Stephen from Macrobuild came to site today to go over all the plumbing works, we spoke to him about bringing the existing wearing slab down to ground level to try and achieve an additional 400mm height. He said that this was spoken about some time ago and it was found it couldn't be done because of the sewer connection. All the inground pipes are laid at the legal minimum fall now, if the floors are lowered at all you will need to introduce a pump system to pump out all kitchen and bathroom wastewater.
>
> We would strongly recommend not to use sewer pumps, although you have backup devices but if the pumps fail you have to shut your business until the pumps are fixed. Pump warranties only extend to the replacement of pumps and parts not any loose of business and the like.
>
> Also the other day we asked Stephen to bring the plumbing certificate in for the ground works, he won't release this to us as there is money owing to him still. If you can please follow this up as we need this prior to pouring concrete which we have booked for Wednesday." (sic.)

143 Kon replied, in an email that he copied to Kelly, Grant, the Bromleys and Toby from Lexon:

> "Jonathan
>
> Thank you for the feedback in relation to the Stephen – Macrobuild visit.
>
> In relation to the monies – owing, and the certificates being released – this is being settled – at the moment." (sic.)

144 Kelly said that, when she received Jonathan's email of 18 June 2016, she was "quite shocked". She said that she had never directed or requested that

the concrete pour be booked and that she had made it clear that she was going to speak to an engineer first before any works were done on the floor. However, she did not put any of that in her reply email to Jonathan.

145 On Monday, 20 June 2016, the Basement was inspected by an engineer, Mr Doug Turnbull, whose attendance was organised by Kelly. There are different accounts of what Mr Turnbull said but the effect was that he thought it would be possible to excavate the existing slab and there was some discussion about the likely cost.

146 Kelly said in her second witness statement that, after Mr Turnbull left, she said to those present: "It can be done" and "I don't want to hear your stories that it is not possible". She said that Jonathan or Flann said that it would cost an additional $200,000.00 to remove the concrete slab and that they had not included that in their quote, whereupon she replied that it was her understanding that Blueprint had included it in their quote and Lexon needed to find a way to get that done. Jonathan denied that that was said.

147 Following the meeting, Mr Bromley sent an email to Jonathan and Grant in regard to communication and querying whether the project could be done on time. This led to an important exchange of emails.

148 Jonathan responded shortly afterwards, saying that he had assumed that Kelly and Kon were well familiar with the drawings, which did not seem to be the case at all. He said that he would take Kelly through the drawings to get the kitchen signed off, and added:

> "Thanks for your input this morning Grant, it was very much appreciated. Not sure if she listens to you either but it's good to have the third-party there to interject.
>
> I will insist that Kelly sees me for at least an hour each week for the first 4 -6 weeks so we can get the BOH and services the way she wants them and have them at our office so she can't get distracted. It's the only way forward.
>
> I'll send out the invoice to them now, for the deposit. If Bromley and Co can send me the invoice for the $35,000 + GST so we can formally get you going.
>
> Hopefully soon she will realise that we are not all here to work against her."

149 Grant also responded shortly afterwards as follows:

> "Thanks Jonathan
>
> Was a good wake-up call for her to see that you are following drawings and that she need to be on top of the drawings at all times.
>
> She was correct about the columns not being hidden by the kitchen wall but Flan's suggestion was brilliant and she is starting to see that you are creative builders who can work through problems.
>
> If there is no changes to waste in BOH and that can be agreed on this afternoon, can we go ahead with the concrete as planned???" (sic.)

150 It was submitted on behalf of Finetea that the last paragraph in Grant's

email amounts to a direction by Grant to Lexon to pour the concrete. I do not accept that submission. The paragraph is a question, not a direction and it is clear from the other emails that both Grant and Jonathon were looking to Kelly to make decisions, not making their own decisions.

151 In between these three emails, none of which was copied to either Kelly or Kon, Kelly sent an email to Jonathan, copied to Toby, Kon and Grant to say that she was meeting with the kitchen supplier at 1:30 PM the following day. She added:

> "He doesn't seem to think that there will be a problem with pouring the concrete on Wednesday, however is that something we can confirm tomorrow afternoon?"

The concrete pour was put off, pending resolution of some problems to do with the design of the kitchen.

152 As foreshadowed in Jonathan's email, Lexon sent out its first invoice later that afternoon for the deposit payable under the draft contract.

The Loan Agreement

153 Kelly and Kon had been unsuccessful in borrowing the amount required for the Venture from a bank. Before Lexon and the Bromleys became involved, they had been paying for the Venture from the cash flow generated by the Tearooms.

154 In an email of 24 April 2015, Grant raised the possibility of lending them $600,000.00 at 7% interest over four years, with the principal being repaid at $150,000.00 a year and with security to be given over the fixtures, fittings and stock and a "lien" on the Tearooms business. Nothing came of this proposal because, according to Kelly, she and Kon were confident they would be able to obtain financing from a bank.

155 Grant said that he had accompanied Kon on a number of visits to banks where they were told that it would take some time to consider an application for the finance. He then discussed with his parents, Mr and Mrs Cohen, the possibility of Winchelada lending the money for the Venture.

156 Grant said that, on the evening of 20 June 2016, after Kelly and Kon had been refused finance by the Bendigo Bank, he invited them to his home and, following dinner, told them that Winchelada would be prepared to advance the money under a commercial loan agreement. He said that, following some discussion, it was agreed that the amount of the loan would be $1.6 million. He said that Kelly and Kon were overjoyed, that Kon hugged him and Kelly kissed him. I accept that evidence.

157 Thereafter, it appeared that Kelly wanted to spend up to $250,000 on crockery and there were other amounts not included in the builder's quote. According to Grant, he suggested to Kelly and Kon that they increase the amount of the loan to two million dollars, so that they would not "be left short". He said that he was against paying $250,000.00 for crockery and

said that he told them, if they wanted glassware and crockery that would cost that much, they should do that on their own.

158 On 30 June 2016, Kelly told Jonathan in an email that she would like to have heating installed using period-style radiators sourced from America. Jonathan had earlier told her that the cost of additional hydronic heating would probably be about $35,000.00. It does not appear whether this was ever followed up but the fact that the idea was entertained indicates a lack of concern on Kelly's part about the amount of money that was to be spent.

159 Lexon issued its second invoice to Kelly and Kon on 5 July 2015 and asked in the covering email, which was also copied to Grant and the Bromleys, when both invoices would be paid. Kon emailed Grant about the invoices and Grant replied that he had told them [*presumably Lexon*] that the paperwork would be signed and all outstanding accounts would be settled on his return.

160 Grant received a draft loan agreement from Winchelada's solicitors on 8 July 2016 and a revised draft later that day. He said that he forwarded both drafts on to Kon who replied: "It all appears good". He said that he also sent a copy to Kelly.

161 On 10 July 2016, Kon sent an email to Grant saying that an account had been opened at the Tearooms to allow Grant to eat free of charge "…as a token gesture of our thanks to you!!!!"

162 On 11 July 2016, while having lunch with Kon, Grant signed two withdrawal forms, writing his father's signature on the forms, so as to enable Lexon's two invoices to be paid. Before payment would be affected, on the withdrawal forms it was necessary for Mr Cohen to confirm the instruction orally to the bank in each case, and he did so.

163 The following day, 12 July 2016, the final draft of the Loan Agreement was received from Winchelada's solicitors. Grant sent it as an attachment to an email to Kon, stating:

> "Hi Kon
>
> can you please print three copies
>
> 1 for you to retain
>
> 1 for me to retain
>
> 1 for the lawyers to retain
>
> Please execute all three copies.
>
> I will come to your office later today to sign with Kelly and collect."

Kon replied 12 minutes later: "done".

164 I do not accept Kon's evidence that he did not understand the meaning of the word "execute", given that it is not a technical word and he used it correctly in another email relating to the building contract. I am satisfied

that, at the time he sent this email, he had either made the three copies as Grant had requested or intended do so shortly thereafter.

The signing of the Loan Agreement

165 In her first witness statement, Kelly said that she signed the Loan Agreement at about 7:30 PM on 6 August 2016 while she was at her desk preparing to go to China. She said that Grant picked up the three copies of the agreement and said to her: "These need to be signed tonight'. She said that she told him that she was not going to sign them and that she needed to have her lawyers look at them first. She said that Grant then appeared to become quite agitated and said to her:

> "It's a simple loan agreement, there is nothing to worry about".
>
> and
>
> "I am your partner in this, would I be going to China otherwise? You need to trust me, these need to be signed tonight. It cannot wait any longer. After everything I have done for you, you are being unreasonable. You can't keep delaying all of the time."

166 She said that he then opened the pages of the Loan Agreement to the signature page, placed it in front of her and she signed.

167 Kon prepared what purported to be a file note recording the alleged incident, repeating the above account and adding that Grant placed the pen in Kelly's hand and placed the papers in front of her. According to this alleged file note, Kelly was seated, Grant was standing over her, repeatedly tapping away with his left hand pointing on the Loan Agreement and that that she signed it under "pressure" and "duress".

168 Kelly and Kon subsequently acknowledged that this description of the signing of the Loan Agreement is wrong, in that the signing took place on 12 July 2016 before Grant went to China the second time. It necessarily follows that the account she gave in her affidavit is, at best, a reconstruction. The purported file note is not what it claims to be but was created after the event in order to support the account given. According to the computer expert, Mr Caldwell, it was created on 15 July 2017.

169 In cross-examination, Kelly gave another account of what was said at the signing, albeit to a similar effect, but with some added details. She said that Kon was sitting on the couch with his head bowed, and not able to help her. She described the experience as traumatic and said that she was very upset.

170 According to Grant's account of the signing, he went to Kon's office on the afternoon of 12 July 2016. He said that Kon had printed three copies of the final Loan Agreement as he had requested. He said that Kon signed the copies while Grant was standing there and then took the three copies into the third suite, which was Kelly's office, and he (Grant) followed. He said that Kelly was sitting at her desk and Kon put the three copies on the desk in front of her. He said that she hesitated and looked at them. Grant then told her that the documents needed to be signed and Kon said to Kelly:

"What are you procrastinating about?" She then signed the documents and Grant then signed them as a witness.

171 By the time the Loan Agreement was signed, Winchelada had already paid the deposit and the following claim to Lexon. The work was being done at great speed and on a very tight timetable. If it were to continue, Winchelada would soon have to make further payments. Grant was going to China on behalf of Kelly and Kon. It would be understandable that he might want the documents signed before he left, although he denied in cross-examination that he felt under any pressure to have the documents signed.

172 Both Kelly and Kon knew that they were being lent a substantial sum of money and that they were to sign an agreement in order to document the loan and secure the moneys advanced. It is unlikely that either of them would have found the process of signing the documents to be either upsetting or "traumatic". They knew they had to do it. They had received the document some days earlier and had printed it out. They had the opportunity to seek legal advice if they had wished to do so.

173 Thereafter, further payments were made by Winchelada to the kitchen designer and to Lexon and others. The text of the various emails sent and received showed that these were all made either at Kon's direct request or with his knowledge. In one email to another person, Kon describes the Loan Agreement as having been signed and also as having been "approved". There is nothing in these emails to indicate that there had been any coercion on the part of Grant or reluctance on the part of Kelly or Kon to sign the Loan Agreement.

174 Grant's account of the signing of the Loan Agreement fits with the emails and I believe him to be an honest and a more reliable witness than Kelly and Kon. I accept his evidence concerning how the Loan Agreement came to be executed. Further, I do not accept Kon's evidence that he did not authorise any of the payments that were made by Winchelada.

The pouring of the concrete

175 In an email of 21 June 2016, Jonathan asked Kelly to confirm about the concrete floor levels as he needed to book the concreters and the concrete pump back in. A meeting took place that day between Jonathan, Kelly and Kon. According to Jonathan, he showed them the drawings and discussed aspects of the finished ceiling heights. He said that Kelly was concerned about the heights once the slab was poured, that Kon was particularly keen upon Option 3 and Kelly did not say which option she wanted. He said that they spoke about excavation but that both Kelly and Kon said that they did not want there to be a sewer pump. He said that, the end of the meeting Kon took him to one side out of earshot of Kelly and the others and said to him:

"Get the concrete down. I will deal with her.

Kon denied that he had made any such statement but neither he nor Kelly could recall the meeting. I accept Jonathan's evidence that Kon said that to him.

176 Mr Turnbull's subsequent report, which was received on 22 June 2016, said that excavation would be possible and pointed out that the hydraulic drawings by the engineer showed a pumped sewer drainage design which would enable the sewer to be laid at the required depth to accommodate the required floor levels. He recommended that the builder be asked to provide the basis of sewer installations to date.

177 Kelly sent Mr Turnbull's report by email to Grant the same day, stating:

> "I feel that this is important to understand - and get Jonathan to note and mention. If things were not built as per what Doug has noted - then we need to add this to the list of items that Lovell Chen did not complete - and yet we have paid for."

However, it is clear even from Kelly and Kon's own evidence that, by this stage, the notion of having a pumped sewer system had been rejected.

178 Mr Turnbull also suggested that the builder should provide a mark-up of the proposed levels throughout the Basement after the concrete pour. He made no recommendation or suggestion as to how a greater floor-to-ceiling height could be achieved in the absence of a pumped sewer system.

179 Following receipt of the report, Lexon's staff marked the anticipated levels according to Option 3 and on the same day, 22 June 2016, Jonathan sent to Grant by email, which was copied to Kelly and Kon and others, a plan showing the ceiling heights under the beams of the Basement. Kon sent back an email shortly afterwards to Jonathan with the words: "Much appreciated!!" but there was no response from Kelly.

180 According to Grant, on 23 June 2016, he, Kelly and Kon, together with Jonathan, the site foreman, Toby, and Flann from Lexon, walked around the Basement and looked at the markings. It is common ground that reinforcement on bar chairs was in place for the concrete pour that was scheduled for the following day and that the return air vent air-conditioning was positioned in the area that was to be concreted. In cross-examination, Kelly said that she could not remember her exact words at the meeting but that she was opposed to pouring the concrete and remembered saying about the levels indicated: "That is too high. No way. No way."

181 Grant said that Kelly did not raise any objection at that time and, after 15 or 20 minutes, Kon said to him:

> "We can't waste any more time. We just need to press ahead."

182 I accept Grant's evidence that Kon said that to him. It is consistent with the emails from Kon which show his agreement to proceed with Option 3. It also makes sense that he would be concerned about time being wasted, given the limited amount of time available to complete the Venture before rent would have to be paid.

183 At the end of a lengthy email sent by Kelly to Grant later that day, 23 June 2016, she included the following:

> "By the way … you have seen me at my worst. I don't wish you or anyone else to see me that way again 😐
>
> Thank you for reaching out to me …
>
> The answer is yes."

184 Grant said that he thought the answer "Yes" was given to a question that he had asked her on the previous day, which was whether Kelly was still excited about the Venture and it was full steam ahead. Kelly denied that in her final affidavit, saying that her answer was confirmation that she would be providing the Bromleys with the description of the crockery that she wanted to source for the Venture. However, in cross-examination she said her answer was to confirm that she would stop pushing back and that she would cooperate with Lexon and the Bromleys and give them the information they needed. She did not say what question Grant had asked her in this regard. I think Grant's explanation is more likely to be the correct one and so I accept his evidence that he asked Kelly that question and I think it likely that her answer was in response to it.

185 Jonathan said in his witness statement that he considered that he then had instructions to pour the concrete according to Option 3 and he arranged for it to be done in three stages. The first stage was poured on 24 June 2016, the second on 27 June 2016 and the third on 1 July 2016. He said that, before each pour, extensive preparation was required including formwork, steelwork and checking all plumbing and waste point locations. He said that this took several days for each area, that the work done was very visible and that during this time, Kelly and Kon came into the Basement regularly and saw it being done. He said that neither of them objected or told Lexon to stop any of the pours.

186 Both Kelly and Kon denied having instructed Lexon to pour the concrete.

187 In her second affidavit, Kelly said that, when she discovered the first pour had occurred, she was standing at the base of the stairs leading down to the Basement and could see the concrete had been poured in some areas as high as her knee. She said that she shouted at Jonathan, Toby and Grant, who were standing in the Basement, repeatedly asking them if they knew what they had done. She said that since then, she has been suffering severe anxiety and sleeping problems, worried that the floors had been raised to "impossible extremes". In cross-examination she said that she was devastated and yelled at them: "What have you done? You've ruined it? She said that the first concrete pour "…just destroyed me."

188 This very dramatic description does not fit the emails in evidence. In particular, the following day she received an email from Mrs Bromley that said:

> "What a momentous day today with the concrete pour. Looking forward to seeing the place become more and more of a blank canvas for our next stages. That's great that you can come out to Daylesford. Would Sunday work for you and Kon at 12 pm?

189 Kelly responded:

> "Tomorrow noon is perfect. See you then. X".

190 There were other emails from Kelly and Kon about the Venture throughout the period in which the concrete pours occurred but in none of these is there any indication that Kelly was upset about the pours, whether to the extent she suggested or at all. When that was put to her in cross-examination, she said that she felt defeated and thought that she had to put on a brave face and keep going, suffer in silence and "…pretend everything was okay."

191 According to Jonathan, on 28 June 2016, being the day following the second pour, Kelly came down to the Basement and brought everyone coffee. His evidence is supported by a photograph taken in the Basement at that time, showing Kelly and Kon holding what appear to be coffee cups and talking to Flann and Toby.

192 On 29 June 2016 Kelly sent an email to Grant, who was on holiday, speaking in a cheerful tone about a number of matters concerning the Tearooms and concluded:

> "By the way, when you see a smile in my eyes that's real. Enough excitement for one day. I'm off to bed."

193 When this was put to her in cross-examination, she said that this was her putting on a brave face. The email does not have that tone.

194 Visits by Kelly and Kon to the Basement throughout the period of the pours were recorded in the photographs in evidence.

195 It does appear that, at that time, Kelly was concerned about the floor heights and also concerned that control of the Venture was being taken from her. In an email to Jonathan of 4 July 2016, she complained about the Bromleys' alleged failure to produce designs for the interior. Jonathan forwarded her email on to the Bromleys and they took offence. Kelly and Kon then took offence at their reaction. It was not until 11 July 2016, following intervention by Grant and a meeting between Kelly and Mrs Bromley, that the rift was healed.

196 In a text message of 5 July 2016 that Kelly sent to Grant, she said:

> "How dare I ask to be involved in the new Bromley Gallery that I'm paying for? Who said I can have any options, opinions or questions? How dare I have plans that don't agree with theirs? How dare they put a builder on that has lied to me all along about levelling the floors and plumbing issues when I've been told it could be done the way I wanted it for the same price? I'm the one that has to pay for it in more ways than one. How can I trust anyone? I have waited all this time to have no voice, because everyone else knows better. Who gave them all rights? How dare they?????? I have no idea how to mend this."

197 Mr Wise submitted that I should infer from this text that Kelly had authorised the pouring of concrete because she had been lied to by Lexon about the means of levelling the floor. She denied that that was what she meant, and the language is equivocal.

198 Grant responded by text on the same day as follows:

> "Kelly
>
> I have to say that you are not thinking rationally. As I have said I have been a third party to all of this. You have made all the decisions all along. The most important decision was that you wanted Bromley. That came with their builders and you were made well aware of this. To date their builders have performed diligently and are on track to deliver as they promised. A far cry from the position your previous builders/architects left you in. Re the levels, it was your call not to have a pump. Not theirs. This was raised between Jonathan and Macrobuild and was confirmed. That is why the pipes were laid at the level they were. I have invested a huge amount of my time in this project and for you to text me and say that all are lying to you is so off the mark. At every turn people (including myself) has been trying to help you. One minute you tell me that the Bromleys are the only ones that get you the next is HOW DARE THEY! I don't think for one second they were ever intending to make it a B&Co Gallery. On the contrary. As I made this quite clear to them I didn't want it full of his themes. I can't tell you what to do but what ever you decide, you would want to make sure you have a back up plan. However my suggestion is to take a deep breath and reload. What you are working with is a lot better than the alternative!!!!!!
>
> Deep breath Kel
>
> Grant."

199 Kelly then replied:

> "So sorry to be texting you on your holidays. I'm in absolute despair…….
>
> I'll reload and start again."

200 Grant's text sets out concisely the position that is now adopted by the Landlord in this proceeding, that is, he offered assistance to Kelly and Kon but the decisions throughout, particularly to use the Bromleys, were theirs. When asked in cross-examination why she did not take issue with what Grant said in his text message, Kelly said that, by then, it had gone too far. She also said that Grant's text was "another example of Grant "…picking me up and throwing me down". That feeling is not conveyed in her reply.

201 Grant then sent the following text to Kon:

> "Didn't like the sound of Kelly's last text. If this all derails it will be a disaster."

202 Kon replied by email the same day saying:

> "I am so sorry about this - I have just received and discussed the SMS with Kelly. You do not deserve this on your holidays."

Who ordered the contract pour?

203 Finetea's case is that it was Grant, acting on behalf of the Landlord, who directed Lexon to pour the concrete. That is not established.

The option of lowering the floor had been considered earlier when Macrobuild was on site and it was rejected because it would have required the use of a sewer pump. The pipes were then laid at a level that did not require the use of such a pump. The plumbing certificate was obtained in order that those pipes could be used when completing the Venture, indicating that lowering them was not contemplated.

204 Both Kelly and Kon appear to have accepted that the use of a pump was not practicable. Lexon offered three alternatives to deal with the uneven floor that would not require a pump. Kon said that he would prefer Option 3. Kelly said that she wanted an engineer's opinion. She said that she did not wish to slow the project down but wanted to feel reassured that she had exhausted all options.

205 The pouring of concrete was initially deferred due to problems with the kitchen design but in the interim, the engineer, Mr Turnbull, visited and pointed out in his report that a pump could be used but did not make a suggestion as to how the floor could be lowered if a pump were not used. Consequently, it would seem that all options by then had been exhausted.

206 I prefer the evidence of Jonathan and Grant in regard to the discussions that then ensued over that of Kelly and Kon. I am satisfied that Kon said to Grant that they had wasted enough time and had to press ahead. He had already told Jonathan to go ahead and pour the concrete.

207 The alternative to pouring the concrete at that time was to do nothing until some other possible alternative could be found. No such alternative has been identified. It was obvious to everyone that the timetable was very tight and they did not have any time to waste.

208 Although Kelly might not have been happy about the levels that she was shown the day before the first pour, she must have known that there was no alternative if work were to proceed. She knew that the pours were to occur and she knew what that meant in terms of Option3. I do not accept that she gave any direction to countermand Kon's direction to proceed. Although she might have been upset when she saw the finished height of the concrete, I think the account that she gave of her reaction immediately following the first pour was greatly exaggerated.

The ceiling height issue

209 It is common ground that the National Construction Code required a floor to ceiling clearance of at least 2.4 m in habitable areas, and 2.1 m in corridors.

210 Evidence was given by two experts as to the ceiling heights that could have been achieved if the work had been completed. Mr Lorich, on behalf of Finetea, inspected the premises on 13 February 2018 and Mr Croucher, on behalf of the Landlord and Wichelada, inspected it in August 2017 and again on 19 July 2018. Finetea had engaged other experts who had inspected the premises earlier, but they were not called.

One of these was Mr Atchison, a well-known building expert, who provided a report dated 8 September 2016. Both Mr Lorich and Mr Croucher commented on the text of Mr Atchison's report, and Mr Virgona sought to tender it in evidence without calling him. Mr Wise objected and I ruled that, since Mr Atchison was not to be called or made available for cross-examination, his report would not be received into evidence.

211 Mr Lorich said that to achieve an adequate ceiling height it would have been necessary to excavate the original concrete and lower the floor. He said that this would have required engineering advice and investigation of how deep the pillars went down into the surrounding ground. He said that:

(a) the floor slopes 380 mm from the eastern end to the western end;

(b) a concrete core that was taken at the eastern end, where the floor was highest, was 200 mm thick;

(c) if the concrete slab was that thick and it was removed, that would give you nearly "the right ceiling height":

(d) the Irwin Consulting drawings [*the engineering drawings*] provided for a screed of 50 mm to be placed over the top of the existing concrete;

(e) although the building surveyor had given an "in principle" dispensation in regard to the ceiling heights, Lexon would be no more than 90% certain that dispensation would be granted.

212 In conclusion, he said that the ceiling height was too low, which was brought about by raising the floor. He said that the height would be further reduced by screeding to create falls to wastes and also by tiling. He said in cross-examination that he was not aware that Finetea did not want to install a sewer pump.

213 Mr Lorich set out the scope of works that he said would be necessary to resolve the ceiling height problem which Mr Buchanan, a quantity surveyor, costed at $253,100.00.

214 Mr Croucher said that:

(a) the process of getting a dispensation in regard to the ceiling heights would not have been a quick one, but would have taken months to go before all the different parties, including the Melbourne City Council;

(b) the architectural drawings were not good and he did not regard them as final drawings;

(c) the floor-to-ceiling heights in evidence were measured to the lowest points of the arches and there was much usable height above that which could be utilised;

(d) the ceiling heights above the lowest points had not been used effectively but that in the area that is considered problematic, the furring channels had not been installed and so the heights of these

could have been adjusted as work progressed, the construction process being a dynamic thing;

(e) no levels had been taken to determine whether the floor was out of level or to establish that screeding or tiling the floor would have been impracticable.

215 As to the time it would have taken to have completed the work, Mr Buchanan said that it would have been finished in mid-December, although he acknowledged that was working on a rough guide, based upon the cost of the work. Mr Croucher said that he thought that it would have taken until December or January.

216 It would appear from this evidence that:

(a) although the floor is relatively flat, it slopes from east to west. It is unclear whether this would have affected the usability of the area;

(b) the problematic ceiling heights are not in the proposed front-of-house area where the public would sit but at the eastern end behind the arches in the food preparation area;

(c) a greater ceiling height could have been obtained by excavating the floor but a sewer pump would then have been needed;

(d) although the time taken to carry out the investigations referred to in Mr Lorich's evidence and complete the construction is unclear, it would seem unlikely that the Venture would have been completed before December 2016;

(e) if the Venture had been completed with the floor at its current level, there is a 90% chance that a dispensation would have been granted by the building surveyor in regard to ceiling heights in the food preparation area.

(f) The fact that, following the pour, work continued and invoices were rendered by Lexon and paid, would indicate that the parties believed that the Venture could continue.

217 I am not satisfied that it has been established that the Venture was unable to proceed because of the level at which the concrete was poured.

Termination of the Bromleys' involvement

218 The Bromleys sent an invoice to Kelly and Kon on 10 July 2016 for $100,000.00 deposit for the interior fit out of the Basement and Shop 13.

219 On the following day Mr Bromley sent a lengthy email setting out how he considered the Venture should be implemented in terms of both decor and responsibility of the various parties.

220 On 13 July 2016, Grant sent an email to the Bromleys and Kon, suggesting a budget of $150,000.00 for the furniture and decorative items.

221 On 20 July 2016, in an email copied to Grant, Mrs Bromley enquired about payment of their invoice, which she said was needed to enable them to purchase items for the Venture. Grant responded, promising to chase it up.

Kon responded to the Bromleys on 22 July 2016, stating that in order to release any funds, Finetea required an invoice itemising what the Bromleys wished to be paid for and a progress report in regard to each item. He said that he could not source funds from "my financial institution" (presumably, Winchelada) without the relevant and required documentation. Mr Bromley sent a very lengthy email complaining that itemising each piece was not in accordance with the agreement and querying what the role of the Bromleys in the Venture was.

222 On 7 August 2016 Kelly and Grant went to China and visited the manufacturers that made the samples that Grant had obtained on his previous trip. Grant said that Kelly was overjoyed at what she saw and on 10 August 2016, while they were still in China, she and Mr Cohen exchanged text messages as follows:

> Kelly: "Good morning Trevor, I'm overwhelmed at the support and help that I've received from you and Heather and in particular Grant for assisting us in this mammoth project. I'm thrilled of the progress we've made. The crockery is beautiful."
>
> Mr Cohen: "Thanks Kelly for your very warm words. We are very pleased that you are able to find what you are looking for and that Grant has been able to help you find what you are looking for."

223 When Kelly returned, there was a meeting at the offices of Decibel Architecture, which was a firm of architects brought in by Jonathan to provide assistance in the Venture. The purpose of the meeting, which took place on 12 August 2016, was to consider the front of house design that was proposed by Decibel and the Bromleys. Kelly said at the meeting that she did not approve of what they proposed, that she had a new vision for the front of house and that she had decided to terminate the Bromleys.

224 On 13 August 2016, Kelly sent the following email to the Bromleys:

> "I would like to thank you both for the time and effort you put into the design of HTR2 [the Venture].
>
> I had been really looking forward to the presentation today at the offices of Decibel Architects.
>
> Both Josh and Adrian together with yourselves have done a great job at putting together a visual, but by the end of the presentation I wasn't in a better position.
>
> I'm the first to admit that communicating what's in my mind doesn't come easy. As much as I would have loved the help, I feel the only way forward is for me is to take this project on myself and to stop expecting others to 'read my mind'.
>
> I can agree or disagree all I like with myself and will work on it night and day till I get it right, however can only blame myself if I don't.

> Grant was kind enough to bring us together. He believes in you both and your incredible work, so will be very disappointed with my decision – that I'm sure of.
>
> His advice over the last few months has been invaluable. His strong persistence on us working together on this even greater – confident that if anyone could contribute positively to this project it was Bromley & Co-. I won't hear the end of it.
>
> Maybe there were too many things left unspoken or not clarified from the start. I will take the blame for that.
>
> Whatever it was, I'm saddened that I have reached the point and hope that you understand.
>
> Thank you for the invitations and tours of your beautiful premises in Chapel Street and Daylesford. Hope that we can still be friendly neighbours and one day soon can enjoy a cup of tea. Lots of love."(sic.)

225 Kelly said that, when she showed the Bromleys' drawings to Grant, he described them as "vomit" and agreed that they could not be involved in the Venture. She said that Grant directed her as to what to say in the email, that he was particular with the words he wanted her to use, and insisted on reviewing and settling the email before it was sent. Grant said that he did not tell Kelly what to say in her email or say that the Bromleys should not be involved.

226 The wording of the email is similar in style to other emails that Kelly sent and I find Grant to be a more credible witness than Kelly. Consequently, I prefer his evidence on this issue. I am satisfied that it was Kelly alone who decided to terminate the Bromleys' involvement in the Venture and Kelly alone who sent the email.

227 Mr Bromley sent the email on to Grant the same day with a very lengthy email setting out his disappointment at the way the Bromleys had been treated, both in regard to the Venture and as tenants of the Arcade. He concluded by acknowledging that they were no longer involved and wished Grant luck.

Lexon's reduced scope of works

228 Following the termination of the Bromleys' involvement on 13 August 2016, there was a discussion about a revised scope of works for Lexon. Jonathan sent an email to Kelly, Kon and Grant in which he said that Lexon was prepared to reduce the scope of its involvement by limiting it to the "back of house" works and a "warm shell" construction. He suggested that Finetea should appoint a qualified architect or designer to document the "front of house" ideas and then put those documents up for re-tender.

229 On 15 August 2016, Jonathan sent Kon an email to the effect that Flann had directed that work would not continue until the outstanding invoice was paid. Kon, who had already sent a number of emails by then, saying that payment would be made, responded as follows:

"I suggest that you get Flann to calm down.

I do not want any issues with the project, and when in the time that we have been on this project has no one been paid.

If there is ever going to be an issue – I will tell you – what the issue is going to be. If I was not going to make any payments – you will get to know about it.

The project has been set back with the poor management of the Bromleys and the like, and therefore we need to recover from this very quickly.

Tell Flann - to pick up the phone and speak to me, as I am not one to go back on my word."

230 The text of this email, as with many other similar emails, does not accord with Kon's insistence that he never paid Lexon or engage Lexon as the builder. The invoice was paid later that day by Winchelada.

231 On 17 August 2016, Mr Edelsten sent an email to Jonathan, copied to Kelly and Kon, saying that someone needed to take full responsibility for the work and to be in a position to certify compliance upon completion.

232 On 18 August 2016, Kon then sent an email to Ken Edelsten and Jonathan, copied to Kelly and Grant, saying they were waiting on a contract that reflected what was currently occurring on the ground and inquiring about the availability of Decibel. Later that day, Kelly sent an email to Kon and Grant asking them to organise for a revised contract from Lexon before proceeding.

233 On 19 August 2017, Decibel sent an email describing the limited role that it was prepared to play.

234 Kon met with Jonathan at Lexon's offices on 20 August 2016 and told Jonathan that he was getting Kelly "to step out and be at arm's length" so that the Venture could be completed. Kon denied that that was said but I prefer Jonathan's evidence.

235 On 22 August 2016, Kon sent Jonathan an email referring to their meeting and noting that a new budget schedule and new contract were required. Jonathan replied saying that they were finalising a contract price that reflected the scope of work and the drawings and advising Kon to engage a project manager. Toby had, by then, cease to be involved.

236 Kon forwarded the email to Grant, who said in an answering email that he didn't disagree with Jonathan, that Lexon were builders and that someone had to coordinate the work. Kon replied in a very strongly worded email that managing the project was Lexon's job and he was not prepared to do it. Later that evening, Kon sent an email to Ken Edelsten, copied to Grant, asking Mr Edelsten to arrange a meeting with Blueprint on site after hours on Wednesday 24 August 2016.

237 According to Grant's evidence, the meeting on 24 August 2016 was organised by Kon on site after hours. Present were Kon, Kelly, Grant, Mr Barnes (the estate agent) and Anthony Anastasopoulos of Blueprint. Grant

left the meeting after about 10 minutes. According to Mr Barnes, the main focus of the meeting was the floor-to-ceiling height at the southern rear side of the Basement where there was to be a kitchen. He said that Kelly said that it was not what she wanted and that her people would not be able to work in that area in a commercial kitchen. He said that he told her that what she had was what her consultants had designed.

238 Later that evening, Kon sent an email to Grant, copied to Mr Barnes, Mr Edelsten, Mr Anastasopoulos and Kelly noting, in summary:

(a) the updated version of the Lexon contract had been received and there were many questions against it;

(b) Kon would inform Lexon that a site manager must be appointed;

(c) the contract required completion dates, project times and other matters to be added;

(d) Finetea would appoint a project manager;

(e) a firm known as Elsie and Betty, who were other tenants in the Arcade, had been approached to be interior designers; and

(f) Mr Edelsten would seek further information from the building surveyor.

239 On the same evening, Kon sent an email to Jonathan, seeking additions to the contract, the appointment of a project manager and a further meeting. He also sent an email to the building surveyor, Miss Chu, asking for details of any dispensation applications and approvals in regard to the lower ceiling heights in the food preparation area. It appears from this email that Miss Chu had visited the site earlier that day and that it was then that Kelly and Kon discovered that a dispensation had been applied for.

240 Miss Chu provided the details of the dispensation application the following day. The application for the dispensation had been signed by Toby on behalf of "the Owner", which was identified in the application as the Landlord. The building surveyor had agreed in principle to give the dispensation, but no dispensation had yet been given.

241 On 25 August 2016, Jonathan informed Kon by email that the contracts were available for review and collection that day. He pointed out that the contract only related to "Stage I works".

242 On the following day, 26 August 2016, Kelly went down to the Basement, "yelled" at Lexon's contractors and ordered them off the site. That incident, which was not denied by Kelly, effectively marked the end of the Venture.

Consequences

243 Kelly and Kon met with Mr Barnes in his office on 29 August 2016 to discuss an email sent by Kelly that day, setting out a lengthy status report and saying how they hoped to complete the Venture.

244 The following day, 30 August 2016, Kon sent a text message to Grant to

say that he would like to speak to him. Grant responded, also by text:

> "Kon it is now out of my hands. You need to deal with Pat. Grant."

245 On 30 August 2016, Mr Barnes sent a letter addressed to Kelly and Finetea on behalf of the Landlord alleging, incorrectly, that the rent-free period had expired and claiming that there was $127,976.00 arrears of rent and outgoings as at 31 August 2016. He then proceeded to ask for a written response by 5 PM Friday, 2 September 2016, dealing with the following issues:

(a) Whether Kelly and Finetea proposed to continue with the Venture and if so, how?

(b) Acknowledgement that the floor of the Basement was not to be excavated.

(c) Shop 13 was to be finished and open for trade no later than 1 October 2016;

(d) Arrears of rent of and outgoings of $129,976.00 were to be paid immediately.

246 Mr Barnes sent a further letter on the same day, 30 August 2016, to Kelly, Finetea and Premiumtea, pointing out that Wichelada regarded them as being in default under the Loan Agreement, that no further funds would be advanced and that "consequences" within the meaning of the Loan Agreement had been triggered.

247 Kelly responded to the letter that Mr Barnes sent on behalf of the Landlord with a three-page letter addressed directly to Grant and Mr and Mrs Cohen, saying that she wished to proceed with the Venture and that she was going to engage Blueprint as builder and Elsie and Betty as interior designers. She agreed to open Shop 13 "as a priority" and she sought a payment plan over eight weeks to pay off the arrears of rent and outgoings.

248 On 8 September 2016, Kelly and Kon sent a letter to Mr Barnes, saying that they were taking "aggressive steps" to try and resolve the situation and asking that the consequences set out in the letters be reconsidered.

249 No further action was taken by either the Landlord or Winchelada at that time.

250 Further correspondence took place between Lexon and Kelly and Kon, in the course of which Kon asked Jonathan for a further invoice for its fourth progress claim. He acknowledged in cross-examination that, when he asked Jonathan for the invoice, he had no intention of paying it. The invoice was rendered but was never paid. Allegations of defective workmanship were made by Kelly and Kon, based upon an expert report they had obtained, and there were arguments about paying the invoice and also concerning who had authorised the pouring of the concrete in the Basement.

251 In the course of these discussions and arguments, both Finetea and Lexon asserted that they were willing and able to continue with the construction

but no resolution of the dispute was reached and construction did not proceed.

Notices of default

252 On 18 October 2016:

(a) Winchelada, by its solicitors Mills Oakley, served upon Finetea as borrower and Kelly and Premiumtea as guarantors notice of default demanding payment of outstanding principal of $762,198.69 plus interest of $7,517.58 and $450 legal costs and expenses. The notice stated that it was the intention of Winchelada to exercise its rights to have transferred to it all the shares in Finetea and Premiumtea and 100% of the units in the Finetea Trust and the Premiumtea Trust within 28 days of that notice;

(b) the Landlord, by its solicitors Mills Oakley, gave notice to Finetea that it was in breach of the Lease in that it had failed to pay base rent and outgoings of $106,944.70 up to and including 31 October 2016 and that it was the Landlord's intention to re-enter the premises and terminate the Lease if the said sum with was not paid within 14 days of service of the notice.

253 On 29 October 2016, Mr Cohen sent the following text message to Kelly:

> "Good afternoon Kelly. Sorry I missed your call. I'm not sure what could be gained in our catching up this weekend. Let me address a couple of points. The way you attacked Grant at our last meeting was shameful. After all he has done for you! I was personally against Winchelada lending money to Finetea, but Grant insisted! He has worked many hours in his office with his contacts and has also travelled overseas twice for Hopetoun using his wealth of knowledge of China and his contacts for the benefit of Hopetoun. The fact that you are behind in your rent is not the fault of the lessors. This project has been going on for over two years and you have had control of the site……..……. Kelly the rent owing needs to be paid as I too have commitments and at my stage in life I do not need this. Nothing personal and never is. We have generously agreed to another weeks grace. I also have concerns as to how you will fund the balance of the build. It seems to me you will still be considerably short. I am told that you are requesting Grant to release funds for the purchase of goods in China. This was never agreed to as the funds were for the building works. However it does concern me that you are relying on those funds to pay for those goods. Kelly, I will leave it with you and Kon to sort out. Grant and I have done all that we can to help you. Regards Trevor."

254 Neither the notice from the Landlord nor the notice from Winchelada was complied with, but some time then passed before those notices were acted upon.

255 On 23 June 2017, the Landlord posted notices of re-entry on the Basement and Shop 13, changed the locks and the Landlord's solicitors served a copy of the Notice of Re-entry on Finetea's solicitors.

Conclusion concerning the factual disputes

256 Looking at all of these communications and the documents relied upon, I am not satisfied that Finetea has proven that control of the Venture was taken over by Grant or that the Landlord is responsible for the decisions that were made throughout the Venture. Although Grant offered advice from time to time, I am satisfied that all decisions were made by Kelly and Kon.

257 It is clear that there was a warm and friendly relationship between Grant and Kelly and Kon, that Grant was anxious to assist them and did so to a considerable extent. Some of Grant's emails, such as the email sent on 8 June 2016 and the email sent on 9 July 2016, are quite strongly worded, but these were sent in the context of other communications which call for decisions to be made, not by Grant, but by Kelly and Kon.

258 In regard to the pouring of the concrete, it does not appear as though Kelly ever made a decision. She wanted the floor to be lowered and she did not want a sewer pump. Those two were incompatible. Even before the engineer appeared on site, it appears that she recognised that work would have to proceed anyway, because she had suggested in her email that the date for the pouring of the concrete would not be delayed. The engineer attended the site and said that the floor could be lowered but did not say how that could be done without a sewer pump. The choice then was to either pour the concrete or do nothing, in which case the Venture would have ceased at that stage.

259 However, Kon did make a decision and gave a direction and Lexon acted upon it. After Kon's decision and direction had been acted upon, Kelly then decided that she did not like it and blamed both Grant and Lexon.

260 In any case, I am not satisfied that the pouring of the concrete had the effect of making the Basement untenantable. I am satisfied that the Venture could still have proceeded to completion. It was ultimately Kelly's decision to terminate, first the Bromleys and then Lexon, which brought it to an end. Those decisions were taken by Kelly, not by Grant.

The disputes that are to be determined

261 I shall deal first with Finetea's claims for relief, then the claims by the Landlord and Winchelada and Finetea's defensive case.

Unconscionable conduct

262 Finetea contends that;

(a) the Landlord has engaged in unconscionable conduct within the meaning of s.77 of the *Retail Leases Act* 2003 ("the Act ") and within the meaning of s.21 of the *Australian Consumer Law* ("the ACL") in relation to the Lease; and

(b) Winchelada has engaged in unconscionable conduct within the meaning of s.21 of the ACL in relation to the Loan Agreement.

263 It seeks a declaration that the Loan Agreement is void and an order for compensation and repayment of the monies that it has paid under it. It also seeks compensation from the Landlord for the amounts it has paid and also damages under s.80 of the Act.

264 Both s. 22 of the ACL and s.77(2) of the Act list factors that should be considered by the Tribunal for the purpose of determining whether the impugned conduct is unconscionable. Those said by Mr Virgona to be relevant in the present case are:

(a) the relative bargaining positions of the supplier and the customer;

(b) the requirements reasonably necessary for the protection of the supplier's interest;

(c) the customer's ability to understand the documents relating to the transaction in question:

(d) the exercise of undue influence or pressure, or the use of any unfair tactics: and

(e) the extent to which the supplier unreasonably failed to disclose to the customer any foreseeable risks.

265 Mr Virgona referred me to *Australian Competition and Consumer Commission v. Allphones Retail Pty Ltd* (No.2) (2009) 253ALR 324. That was a case involving s.51AB and s.51AC of the *Trade Practices Act* 1974 which also dealt with unconscionable conduct. In that case, Foster J said (at pp. 346- 347):

> "The ordinary dictionary meaning of *unconscionable*, which involves notions of serious misconduct or something which is clearly unfair or unreasonable, is picked up by the use of the word in s.51AC. When used in that section, the expression requires that the actions of the alleged contravener show no regard for conscience, and be irreconcilable what is right or reasonable. Inevitably the expression imports a pejorative moral judgement…….
>
> Normally, some moral fault or moral responsibility would be involved. This would not ordinarily be present if the critical actions are merely negligent. There would ordinarily need to be a deliberate in the sense of intentional act or at least a reckless act …"

266 He also referred me to the following extract from the judgement of Murphy J in *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd (in liquidation)* [2015] FCA 25 as to the approach to be adopted in regard to a claim of unconscionability under the ACL (*citations are omitted*):

> "116. Dealing first with the principles of law, amongst other things, the following matters underpin a proper approach to unconscionability under the ACL:
>
> (a) The Court must first and foremost have regard to the language of the statute rather than judicial explanations of unconscionability: *PT Ltd …; Director of*

Consumer Affairs Victoria v Scully and Another [2013] VSCA 292; (2013) 303 ALR 168 ("*Scully*") … per Santamaria JA (Neave and Osborn JJA agreeing).

(b) "Unconscionability" is not a term of art but simply means "something not done in good conscience": *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 ("*Lux*") at … per Allsop CJ, Jacobson and Gordon JJ; *Scully* at …; *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132 at …per Tamberlin, Finn and Conti JJ.

(c) The court should have due regard to the remedial and beneficial objects of the legislation: *Investec Bank v Naude* [2014] NSWSC 165 ("*Investec*")… per McDougall J.

(d) The court must have regard to the non-exhaustive and non-prescriptive list in s 22(1) although the presence of one or more of these matters will not be determinative to an unconscionability enquiry: *Scully*…. However these matters may nevertheless assist the court in illuminating the scope and meaning of unconscionable conduct: *Scully* …; *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536 … per Macaulay AJA (with whom Harper and Hansen JJA agreed).

(e) The court is not constrained by the general equitable concept of unconscionability although equity's exploration of unconscionable conduct may assist the court: s 21(4)(a) ACL; *Investec* …; *Scully*….

(f) In determining unconscionability, the court is prevented from having regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention: s 21(3)(a) ACL.

(g) Whether or not conduct is unconscionable will depend on careful consideration of all of the conduct and involves standing back and looking at the whole episode: *Lux* ….

(h) The Court's task involves evaluating conduct by reference to a normative standard of conscience which may develop and change over time and which must be understood and applied in the context in which the circumstances arise: *Lux* …; *Scully* ….

(i) Notions of moral obloquy or moral tainting are relevant, but it must be recognised that it is conduct against conscience by reference to the norms of society that is in question: *Lux* …. The task of statutory construction must focus on the text of the statute and a number of the factors in s 22 of the ACL do not necessarily involve dishonesty, sharp practice or conscious wrongdoing (eg s 22(1)(a), (b), (c), (e), (f), (h) and (j)). While conduct involving dishonesty, sharp practice or conscious wrongdoing is no doubt unconscionable, conduct which does not involve those factors may still be regarded as unconscionable. Substituting a test of "a high level of moral obloquy" for the standard of "unconscionability" is of doubtful assistance in determining whether the statutory prohibition has been contravened: *PT Ltd* ….

(j) As "unconscionability" in this context is predicated on "conduct", a person's

conduct is to be distinguished from the consequences that that conduct may have on the lives of other people: *Scully* …; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 … per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

(k) A determination of unconscionability involves a broadly based value judgment, applied to the facts on which reliance is placed, to the extent that they are proved: *Investec* …; *Lux* ….”

267 Mr Virgona submitted that the impugned conduct in the present case was that of Grant who, he said, was the authorised agent of both the Landlord and Winchelada in all dealings with Finetea concerning the tenancy issues as well as the finance arrangements in regard to the Venture.

Alleged unconscionable conduct of Winchelada

268 Mr Virgona submitted that Winchelada acted unconscionably in its dealings with Finetea in a number of respects.

269 He said that there was an unequal bargaining power between the parties, that Winchelada knew or ought to have known that Finetea was not in a position to negotiate the terms of the Loan Agreement and that it took advantage of its superior bargaining position to force upon Finetea onerous terms which were not reasonably required for the protection of its legitimate interests.

270 He pointed out that the terms of the Loan Agreement imposed a repayment requirement of 25% of the principal each year, which he said was oppressive, and the consequences of default were severe. He pointed out that, if one adds the rent payable under the Lease to the capital repayments required under the Loan Agreement, Finetea would have to pay over $880,000.00 each year for the four-year period of the loan, if the full $2 million was advanced.

271 I accept that there was no negotiation concerning the terms of the loan. The Loan Agreement was simply prepared by Winchelada’s solicitors and forwarded to Grant who sent it on to Kelly and Kon. There is no evidence that any of the three of them turned his or her mind to the contents of the document.

272 Mr Virgona submitted that I should find that Kelly and Kon did not have a reasonable opportunity to obtain legal advice but I think that, if they had wanted to obtain legal advice, they had an opportunity to do so.

273 He also submitted that Grant exerted pressure and undue influence over a period of time to take control of the Venture but I do not find that to be the case.

274 Finally, Mr Virgona submitted that, at the time the Loan Agreement was signed, the Venture had already stalled. That was not established.

275 I do not accept that Winchelada took advantage of its superior bargaining position to force upon Finetea onerous terms which were not reasonably required for the protection of its legitimate interests. The terms were indeed

onerous and more than was reasonably required, and that is dealt with below, but that was the result of the drafting of the document and the failure of the parties to consider and negotiate the terms. Had they turned their minds to the wording of the document, the terms might well have been different.

276 To seek to take advantage of such onerous terms in the circumstances might well be unconscionable, but Winchelada does not seek to do so. Mr Wise seeks to read down the two relevant operative clauses so that they only secure the amounts owning and nothing more.

277 As to the requirement to repay $500,000.00 of the principal each year, the repayment terms were agreed upon. I cannot assume that Finetea would have been unable to make repayments in the manner agreed, whether from the cash flow of the expanded business or by means of a refinancing.

278 I think that "unconscionable" is not an apt term to apply to the conduct of Winchelada. There was no "moral obloquy" or "moral tainting". Winchelada is not a moneylender but a private company controlled by Mr and Mrs Cohen. The purpose of the loan, and the intention of Grant and his parents, was to assist Finetea when it was unable to obtain finance elsewhere. The terms of the document that their solicitors prepared are indeed particularly onerous and went well beyond what was required to protect the legitimate interests of Winchelada. However, to the extent that it might otherwise impose a penalty, recovery under the document can either be limited, as suggested by Mr Wise, or the document is invalid. These points are discussed in more detail below.

Alleged unconscionable conduct of the Landlord

279 Mr Virgona submitted that the Landlord acted unconscionably in that:

(a) Grant exerted undue influence and pressure on Kelly to abide by his directions and his choices in regard to the Venture. I do not find that to be established.

(b) The Landlord refused to allow Finetea to engage the builder of its choice and pressured it to disengage its architect, Mills Gorman. I do not find that to be established.

(c) The Landlord failed to disclose that it would refuse to engage with Finetea's builder of choice, being Blueprint, in circumstances where Grant knew that no scope of works had been provided by Lexon at the time they were engaged and that the architectural drawings that had been provided were incomplete. That rolls several allegations into one. I do not find that the Landlord refused to engage with Blueprint. I find that Kelly and Kon would have preferred to engage Blueprint but it was not their builder of choice, because they chose Lexon. They made that choice because the Bromleys would not otherwise be involved. They might also have been influenced by Grant pointing out to them that, if they wished the Bromleys to be involved, they would

have to use Lexon, but in saying that to them he was simply stating a fact. It was a condition imposed by the Bromleys, not Grant.

(d) Certainly, the plans that had been prepared by Finetea's previous architect were less than ideal and were marked "Not for Construction" but it was not suggested that Blueprint would have used any other plans if it had done the work and there is also no evidence that the Venture could not have been completed if those plans had been followed.

280 In all the circumstances, I do not think that a case of unconscionable conduct on the part of the Landlord has been established.

The claim for breach of the Lease

281 Finetea claims that the Landlord is in breach of the following terms of the Lease:

(a) that Finetea could engage contractors who had been approved by the Landlord, or were appropriately licensed and who had appropriate levels of confidence, to carry out work within the premises, such approval not to be unreasonably withheld (Clause 4.8);

(b) that the Landlord would do nothing that would render the premises or any part thereof being in an untenantable condition or otherwise not fit and suitable for the stated purpose of the Lease (Clause 5.1 and Item 12 of the reference schedule);

(c) that the Landlord would ensure that there was no unreasonable interference with the business conducted by Finetea in the premises and that Finetea's right to quiet enjoyment was not significantly interrupted or disturbed (Clause 9.11(c));

(d) that the Landlord would not derogate from its grant under the Lease.

282 As to the first of these, I am not satisfied that Grant or anyone else on behalf of the Landlord prevented Finetea from engaging the contractors that it wanted. As to the appointment of the Bromleys, they were introduced to Kelly and Kon by Grant but it is clear from the emails that he left it to them to decide whether or not they wanted to use the Bromleys. At the beginning, Kelly was enthusiastic about appointing them and was most anxious to have them involved. She then sought to limit their involvement and finally, after returning from the trip to China, she decided that she did not want them at all. I am satisfied that all of those decisions were hers. They were not forced upon her by Grant.

283 As to the appointment of Lexon, instead of Blueprint, that was a condition that the Bromleys imposed if they were to be involved in the Venture. Although the possible appointment of Blueprint was discussed, the evidence does not establish that Finetea ever sought the consent of the Landlord to the appointment of Blueprint, nor is there any evidence that Grant or anyone else on behalf of the Landlord withheld consent to any such engagement.

284 I am not satisfied that Grant threatened to withdraw funding for the Venture unless Finetea engaged Lexon.

285 It is not established that the Landlord rendered the premises or any part thereof untenantable or otherwise not fit and suitable for the stated purpose of the Lease. The basis of the allegation is that, by pouring the concrete and thereby raising the floor level of the Basement, the premises were rendered either untenantable or at least unfit for the purposes of the Venture. Since the Basement has since been re-let, the real argument is that it could not have been used for the intended purpose because of the reduced ceiling height.

286 The first answer to the claim is that the action of pouring the concrete was that of Lexon, not the Landlord. In order for the Landlord to be in breach of the Lease in this regard, it would be necessary to show that it directed the work and that is not established. It is clear that Grant was anxious that the work should proceed as quickly as possible, given the limited time available to have the Venture completed. The emails that he sent do not, on a reasonable interpretation, amount to a direction to Lexon to pour the concrete. I am satisfied that it was Kon who directed Lexon to proceed with pouring the concrete and not Grant.

287 The evidence also does not establish any derogation from the Landlord's grant under the Lease or unreasonable interference by the Landlord with the business conducted by Finetea in the Basement or Shop 13 or any interference with Finetea's right to quiet enjoyment.

288 For these reasons, the claim that the Landlord was in breach of the Lease in the respects suggested is not made out.

The claim under s.54 of the Act

289 Finetea claims that Grant, acting on the Landlord's behalf, unreasonably took action that caused significant disruption to its business by, amongst other things, consenting to building works without any regard to the rights of Finetea.

290 It claims that it is entitled to compensation under s.54. That section, where relevant, provides as follows:

> "Tenant to be compensated for interference
>
> (1) A retail premises Lease is taken to provide as set out in this section.
>
> (2) The Landlord is liable to pay to the tenant reasonable compensation for loss or damage (other than nominal damage) suffered by the tenant because the Landlord or a person acting on the Landlord's behalf—
>
> (a) substantially inhibits the tenant's access to the retail premises; or
>
> …….
>
> (c) unreasonably takes action that causes significant disruption to the tenant's trading at the retail premises; or
>
> …….

(3) The tenant must give the Landlord written notice of the loss or damage as soon as practicable after it is suffered but a failure to do this does not affect any right of the tenant to compensation.

……

(5) The amount of the compensation is the amount that is—

(a) agreed between the Landlord and the tenant; or

(b) if there is no agreement, determined under Part 10 (Dispute Resolution)."

291 This section appears to be directed to actions taken by a landlord that inhibit access to the leased premises or disrupt the tenant's trading. There is no evidence that the Landlord inhibited access to the Basement or Shop 13 in this case. Finetea had exclusive occupation and unlimited access to the Basement and Shop 13 throughout the period of the Lease. Further, there could have been no disruption to Finetea's trading because it did not commence trading in either of those premises.

The claim under s.57 of the Act

292 Finetea also seeks an abatement of rent under s.57 of the Act. It says that the premises were damaged within the meaning of that section by the performance of the building works and works that rendered the premises unusable or inaccessible.

293 Mr Virgona submitted that, by reason of the abatement of rent, the Landlord's purported re-entry for non-payment of rent was wrongful and amounted to a repudiation of the Lease which Finetea accepted.

294 I do not find on the evidence that the Basement or Shop 13 were damaged within the meaning of the section. Certainly, they were a building site but that was because Finetea had a builder altering them for the purposes of the Venture. If the raising of the floor level amounted to "damage" within the meaning of the section, that was done by Lexon on Kon's instructions, not by the Landlord, and there is no abatement under the section where it was the tenant that caused the damage relied upon (See s.57(1)(a)).

Repudiation

295 Finetea claims that the Landlord, by its actions, evinced an intention no longer to be bound by the Lease and has repudiated it.

296 As to what constitutes repudiation, he referred me to the well-known case of *Laurinda Pty Ltd v. Capalaba Park Shopping Centre* [1958] HCA 23. In that case, Brennan J. said (at para 14):

> "Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way."

297 In the later case of *Shevill v. Builder's Licensing Board* [1982] HCA 47 Wilson J said (at para.8):

> "Repudiation of a contract is a serious matter and is not to be lightly found or inferred: *Ross T. Smyth & Co., Ltd. v. T.D. Bailey, Son & Co*. (1940) 3 A11 ER 60, at p 71. In considering it, one must look to all the circumstances of the case to see whether the conduct "amounts to a renunciation, to an absolute refusal to perform the contract*": Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App Cas 434, at p 439."

298 Mr Virgona also referred me to *Sopov v. Kane Constructions Pty Ltd* [2007] VSCA 257 and *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* [1978] HCA 12. In the latter case, Stephen, Mason and Jacobs JJ, in the majority judgment of the High Court, said (at para 21):

> "No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognise his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him."

299 Since none of the breaches of the Lease have been established, the claim for repudiation must fail.

Possession of the "Red Area"

300 The "Red Area" is an area in the cellar of the Arcade, adjacent to the cellar portion of the Tearooms premises. It is delineated and marked in hatching on a plan that is Exhibit GAC 5 to Grant's affidavit sworn on 22 November 2018 and filed in this proceeding. It forms part of a larger area described by Grant as being "the Centre Management Area".

301 Kon said that Finetea has had the use and occupation of the Red Area since "at least 2013" with the consent of the then owner of the Arcade. He said that, before the Landlord purchased the Arcade, some discussion had taken place between Finetea and the previous landlord about increasing the area in the cellar that forms part of the existing Tearooms premises to include the Red Area.

In support of that contention, he relied upon a note, handwritten by a Mr Parsons, who was then the on-site manager of the Arcade. Kon described this note as being an agreement, but that is not how it reads. It refers to "verbal offers and agreements" regarding additional space offered to Finetea. It was intended to be copied onto the letterhead of Finetea and sent to Mr Barnes, the agent for the then landlord. The letter was typed by Kon and signed by Kelly. It is undated, although in the footnote there is the date, 22 May 2014. According to Kon's evidence, due to an oversight, it was never sent. It talks about an area that will be added but it does not suggest that it has already been added. According to Mr Barnes's evidence, the

lease of the Tearooms was renewed on 26 September 2013 and there was a variation of lease dated 28 March 2014. Mr Barnes said that, apart from a request to expand their tenancy into the adjoining shop on Collins Street, he does not recall Kelly or Kon contacting him again regarding any additional space in the Arcade.

302 It is not suggested that there was any additional rent negotiated for increasing the size of the tenancy, nor is there any evidence that the original landlord agreed to this proposal. Since it was never put to it, it is unlikely that it did. I am not able to find that there was a variation to the lease to include this additional space.

303 Grant said that he inspected the Arcade on the day of settlement of the Landlord's purchase. He said that his inspection included the basement and that Finetea was not occupying or enjoying exclusive possession of any part of the Red Area at that time. He acknowledged, however, that Finetea and other tenants have used areas of the cellar of the Arcade from time to time to store unwanted items and that centre management has continued to allow tenants to store such items since settlement. He said that centre management uses the area to store miscellaneous records and files.

304 According to Grant's evidence, the Centre Management Area is locked off by the Landlord and no tenant has access to the area. He said that access to is by a key to unlock the security door but fobs are also required in order to arm and disarm the security system. When a fob is used, the identity of the fob used to gain access is recorded so that, by reference to that record, the person gaining access on a particular occasion can be identified.

305 During the renovation of the original Tearooms, Grant, at Kon's request, allowed Finetea to move kitchen equipment into the Red Area on a temporary basis. The majority of this equipment was moved back in the week prior to 11 June 2016, but since a large cool room had been constructed in the Tearooms cellar as part of the renovation, there was no room in the existing premises to accommodate three refrigerators and a freezer. Consequently, they have remained in the Red Area. Grant said that he gave Kelly the key to the door so that she could have access to them and that he disarmed the alarm between 15 April 2016 and 12 April 2018, because Finetea did not have a fob to disarm the alarm for that area.

306 On 12 April 2018, in order to provide some security, the Landlord erected a wall to isolate the Red Area from the rest of the Centre Management Area.

307 According to Grant, it was contemplated that, when the Venture was completed, the remaining items belonging to Finetea in the Red Area would be accommodated in the Basement. In the meantime, Grant agreed that they could remain within the Red Area. Since the Venture will now never be completed, the Landlord wants the items to be removed.

308 I accept Grant's evidence in regard to these matters. I am satisfied that the Landlord has allowed Finetea and other tenants to store unwanted items in the cellar but I am not satisfied that Finetea has been occupying the Red

Area as tenant and it is not established that it has any ongoing right to continue occupying it.

309 Consequently, I am satisfied that the Landlord is entitled to an order that Finetea vacate the Red Area.

310 There are also claims in the Landlord's prayer for relief for:

(a) Orders to make good any damage to the Red Area and reinstate the Red Area to the original condition as at the commencement of Finetea's occupation; and

(b) Mesne profits of the Red Area from 23 June 2017.

Since Finetea is still in occupation, these claims are premature and cannot be determined.

The Landlord's claims under the Lease

311 There are three claims by the Landlord in regard to the Lease. They are:

(a) Arrears of rent and outgoings and loss of rent until the premises were able to be relet;

(b) The cost of reinstating the premises; and

(c) Reimbursement of the rent credit sum and the cash incentive.

Arrears of rent and outgoings

312 Mr Barnes calculated arrears of rent and outgoings and loss of rent and outgoings of both premises from the date upon which Finetea had paid until the Landlord was in receipt of equivalent payments from the new tenants.

313 Rent and outgoings in respect to Shop 13 is claimed up to 23 October 2017 and rent and outgoings with respect to the Basement is claimed up to 28 February 2018, when the rent-free period for the new tenant expired. Details are deposed to in Mr Barnes' affidavit of 17 August 2017. He said that the total owed was $226,324.25 and he exhibited a statement providing a breakdown of that figure.

314 In regard to Shop 13, the full rent and outgoings for the month of October 2017 was claimed, less nine days. Since the new tenancy commenced on 9 October, it should have been the other way around that is, instead of deducting nine days from the full month's payment, he should have deducted 22 days. The difference reduces the amount claimed by $3,711.33.

315 Otherwise, the amounts claimed are established and I assess the unpaid rent and outgoings as well as the loss of rent and outgoings at a total of $222,612.92.

The cost of reinstating the premises

316 Possession of the Basement and Shop 13 was obtained on 23 June 2017. Thereafter, the Landlord removed the lift and reinstated Shop 13 to its original condition.

317 In the Basement, the Landlord completed the partially constructed toilets and reinstated the air-conditioning, electrical distribution, sprinklers, water supply and stairwell. It removed the partially completed fittings and mechanical works that had been placed there as part of the Venture. The payments made in this regard by the Landlord were listed in Schedule 1 to the Respondent's submissions.

318 In his affidavit of 17 August 2018, Mr Barnes deposed that the Landlord had spent $261,336.64, excluding GST, and exhibited the supporting invoices to his affidavit. Both Mr Barnes and Grant gave evidence that these sums were expended. An objection was taken to one of the major invoices which is missing a page. However, the total of the invoice appears on the final page and I accept Grant's evidence that that amount was paid.

319 The total claimed is $261,336.64, excluding GST. Since GST paid by the Landlord on this work would have been an input credit in each case that could be claimed by the Landlord in its Business Activity Statements, it would have been inappropriate to allow it.

320 Mr Barnes gave evidence that the amounts expended on work and materials to reinstate Shop 13 and the Basement were as follows (the figures stated are inclusive of GST):

Supplier	**Cost**
Seagull Electrics Proprietary Limited	$84,579.86
Seagull Electrics Proprietary Limited	$53,670.60
Network Fire Systems Proprietary Limited	$ 7,727.50
Commercial Mechanical Services (Vic)	$27,940.00
Commercial Mechanical Services (Vic)	$44,000.00
WKH Maintenance Services	$ 6,520.36
Lexon	$17,484.50
Lexon	$19,382.00
Decibel Architecture	$ 3,915.00
Sokolski Consulting Group Proprietary Limited	$ 1,017.50
Retrospective Building Solutions	$ 2,660.10
Retrospective Building Solutions	$ 1,190.70
Retrospective Building Solutions	$ 2,544.10
Lambert Rehbein	$ 990.00
Lambert Rehbein	$ 5,280.00
Lambert Rehbein	$ 1,650.00
TMA Architects	$ 3,696.00
TMA Architects	$ 501.60

TMA Architects	$ 2,046.00
WW Champ & Co	$ 2,233.00
WW Champ & Co	$ 412.50
Nigel Lewis Architect	$ 1,925.00
Total (Including GST)	**$291,366.32**
Less: GST	$ 26,487.85
Net amount without GST	**$264,878.47**

321 The small difference between these two figures was not explained, but since the claim is for the lesser sum of $261,336.64, that is the amount that will be allowed.

Reimbursement of the rent credit sum and the cash incentive

322 Annexure C to the Lease provided that the Landlord would contribute $555,000.00, being $355,000.00 as a rent-free period $200,000.00 as a cash contribution towards fit out works. The Landlord now seeks to recover the bulk of the incentive given pursuant to Special Provision 4.4.

323 Mr Virgona referred me to the Queensland case of *GWC Property Group Pty Ltd v. Higginson* [2014] QSC 264 where a similar clause was struck down as a penalty.

324 In that case, by a deed separate to the lease, a landlord agreed to make a contribution to its tenant's fit-out and grant an abatement of rent and "a signage fee". The contribution was a payment per square metre of nett lettable area, and the deed provided that, if the lease should be terminated at any time during the initial seven-year period, the tenant would pay to the landlord:

(a) a percentage of the fit-out contribution proportionate to the amount by which the original period of the lease was shortened; and

(b) the whole of the amount by which the rent and signage fee had been abated.

325 The presiding judge, Dalton J, referred to the following passage from the joint judgment of all members of the High Court in *Andrews v ANZ Banking Group Ltd* [2012] HCA 30 (at paragraph 10):

> "10. In general terms, a stipulation *prima facie* imposes a penalty on a party ("the first party") if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party…. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and *in terrorem* of the satisfaction of the primary stipulation…. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation.

The first party is relieved to that degree from liability to satisfy the collateral stipulation.

326 The learned judge said that the test of whether a provision is a penalty is an objective one and the matter is to be judged at the time the contract was made. He pointed out that the unabated rent and signage fees could never have been said to be due while the lease and incentive deed remained on foot and they only became due because of the termination following the lessee's breach. He said that the obligations imposed by the clauses were well in excess of any genuine pre-estimate of damages arising from the breach of the lease and so they were penalties.

327 He said (at para 36):

"…By the bargain contained in the lease and Incentive Deed, the landlord obtained abated rent and fees in consideration for its lease of the premises, together with the fit-out payment. Had the contract been performed according to its terms, that is all the landlord was entitled to. The repayment clauses at cll 2.4, 3.3 and 4.3 of the Incentive Deed sought to give the landlord an advantage which it would not have had if the lease were performed according to its terms. Before the lease and Incentive Deed were signed the landlord was in the position that its potential tenant would contract only on the basis that it received abatements and a fit-out. The impugned clauses do not restore the landlord to that pre-contractual position; they give it an advantage which it would never have had if the lease had uneventfully run its term."

328 He said that, for the defendants to establish that the clauses were penal, they needed to show that the stipulated repayments were extravagant and unconscionable in comparison with the maximum loss that might be suffered on breach of the contract. In that regard, he said (at para 49):

"The facts of this case provide no reason to doubt that common law damages would not be an adequate remedy. In this case the failure of the primary stipulation was brought about by, indeed was, a breach of contract. This was a commercial leasing transaction. The repayment clauses were wholly penal in their operation: providing for significant sums to be paid over and above damages which would be payable to the landlord at common law. Each of the repayment clauses expressly preserved the landlord's common law rights to damages."

329 In *Ringrow Pty Ltd V BP Australia Pty Ltd* [2005] HCA 71, in a joint judgment of all members of the court, the High Court said, as to the test to be adopted:

"11. The starting point for the appellant was the following passage in Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86-87 ...:

'2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage ...

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and

> inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach ...
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (*a*) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach ...
>
> (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ...
>
> (*c*) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'…."

330 In applying these principles, the Court said (at paras 31 -32):

> "31. …. The law of contract normally upholds the freedom of parties, with no relevant disability, to agree upon the terms of their future relationships. As Mason and Wilson JJ observed in *AMEV-UDC Finance Ltd v Austin* [1986 HCA 63]:
>
> > "[T]here is much to be said for the view that the courts should return to ... allowing parties to a contract greater latitude in determining what their rights and liabilities will be, so that an agreed sum is only characterized as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach."
>
> 32. Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. That is why the law on penalties is, and is expressed to be, an exception from the general rule. It is why it is expressed in exceptional language. It explains why the propounded penalty must be judged "extravagant and unconscionable in amount". It is not enough that it should be lacking in proportion. It must be "out of all proportion". It would therefore be a reversal of longstanding authority to substitute a test expressed in terms of mere disproportionality. However helpful that concept may be in considering other legal questions …, it sits uncomfortably in the present context."

331 The question in the present case then becomes whether the stipulated repayments are extravagant and unconscionable in comparison with the maximum loss that might be suffered by the Landlord from the breaches of the Lease alleged.

332 The meaning of the terms "extravagant" and "unconscionable" in this context were considered in *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, Kiefel J. said (para 34)

> "As explained below, "extravagant", "exorbitant" and "unconscionable" are "strong words"…; despite the different expressions used, they all describe the plainly excessive nature of the stipulation in comparison with the interest sought to be protected by that stipulation."

333 In the same case, Keane J said (at para 236) that the question as to whether a stipulation is penal is to be assessed by reference to the question, whether it is extravagant or exorbitant by reference to the obligee's legitimate interest in the performance of the contract assessed by the greatest loss that could conceivably be proved to have followed from a breach or failure to comply.

334 In the present case, it can be said that, if the Lease had been performed according to its terms and Finetea had continued to occupy the Basement and Shop 13 for the full period of the term, the Landlord would only have been entitled to the rent and outgoings provided for in the Lease. Clauses 4.4 and 5.5 of the Lease require Finetea to pay, not only damages for breach of the Lease but substantial additional sums that it would not have had to pay if the Lease had been performed according to its terms.

335 There is a separate claim by the Landlord for the cost of reinstating the premises and the loss of rent and outgoings suffered until they were relet. It seems to me that that is the loss the Landlord has suffered. Certainly, the rent-free period was granted in the expectation that Finetea would remain in occupation for the full Lease period, but any incentive to an incoming tenant is the price that a landlord agrees to pay in order to induce the tenant to enter into the lease.

336 In the present case, in exchange for the incentive, the Landlord obtained the benefit of the Lease and a contractual right, after the rent-free period had expired, to receive rent and outgoings for the term of the Lease. That rent was struck in the expectation that the Basement and Shop 13 would be fitted out in the manner contemplated at the expense of both parties and then occupied by Finetea for the period of the Lease. Had Finetea not broken the Lease, it would not have been responsible for paying rent and outgoings for the rent-free period, nor would it have been responsible to repay to the Landlord its contribution towards the fit out. The rent-free incentive and the fit-out contribution were part of the consideration for its entry into the Lease.

337 Because of Fintea's breach, the Landord has lost the benefit of the Lease. It is entitled to damages for the loss of the Lease. The Landlord now seeks an order that, in addition to those damages, it should receive back the value of these incentives. That is "extravagant and unconscionable in amount" and out of all proportion to the damage it has suffered. To allow such a claim would be to enforce a penalty.

338 Further, to allow such a claim in addition to damages would be to order double recovery because the Landlord would be receiving both damages for what it has lost and also the price that it paid to acquire what it has lost. A

clause designed to bring about such a result imposes a punishment for the breach and protects no legitimate interest.

The Loan Agreement

339 The Loan Agreement provided for a line of credit to Finetea up to two million dollars plus interest in order to finance the Venture. According to Clause 2.3, the moneys advanced were only to be used "…towards the development and benefit of the business known as the Hopetoun Tearooms or otherwise as approved by the lender in writing". Upon works for the Venture being completed or items installed to the satisfaction of Winchelada and on the provision of a tax invoice satisfactory to it, it would provide money for those works and items.

340 Interest of 7.5% per annum was to be paid monthly in arrears or capitalised. If interest was not paid when due, a default rate of 12% per annum would be charged. Interest accrued daily with monthly rests.

341 The period of the loan was expressed to be three years but Finetea was required to repay not less than $500,000.00 per annum from the date of the agreement.

342 On 28 August 2017, Winchelada's solicitors served a notice of default on Kelly. This notice claimed that the borrower, being Finetea, had breached Clause 8.1(a) of the Loan Agreement in that it had failed to make a repayment on the loan in accordance or 5.1(b) of the agreement within two business days of the due date. The due date for the repayment was said to have been 8 August 2017.

343 According to the table of loss and damage that I was given at the conclusion of the hearing, the amount presently owing, as at 9 April 2019, was $960,103.10. Interest from that date will have continued to accrue at the same rate as has been used in the calculation I was given (7.5%) with monthly rests.

Security for the loan

344 Finetea claims that the security provisions of the Loan Agreement, which are Clauses 2.2 and 8.2(a), amount to a penalty and are void and unenforceable.

345 Clause 2.2 of the agreement, provides:

> "In consideration of the Lender providing the loan to the Borrower, the Borrower agrees:
>
> (a) to grant security interests over the Borrower's shares in Finetea Pty Ltd ACN 142 164 449 and the units in the Finetea Trust;
>
> (b) to grant security interests over the Guarantor shares in Premiumtea Pty Ltd ACN 142 162 785 and the units in the Premiumtea Trust; and
>
> (c) on the date of this agreement it will sign transfer forms required to transfer 100% of the shares in Finetea Pty Ltd ACN 142 164 449 and Premiumtea Pty Ltd ACN 142 162 785 and 100% of the units in the Finetea Trust and the

Premiumtea Trust, and for the transfer forms to be held by the Lender's lawyer, Mills Oakley, in escrow until either the loan and any interest payable is repaid (in which case the transfer forms will be returned to the Borrower) or the shares and units are transferred to the Lender."

346 Clause 8.2 of the agreement provides as follows:

"If an Event of Default has occurred and has not been remedied, the Lender may notify the Borrower that any accrued but unpaid interest and any other amounts outstanding under this agreement are due and payable, in which case those amounts are immediately due and payable, and:

(a) from the date that is 28 Business Days from an Event of Default, the Lender will lodge all transfer forms signed by the Borrower to affect the transfer of ownership of 100% of the shares in Finetea Pty Ltd ACN 142 164 449 and Premiumtea Pty Ltd ACN 142 164 449 and 100% of the units in the Finetea Trust and for the Premiumtea Trust; and

(b) if the transfer forms require any amendments or variations to affect the transfer of ownership in accordance with Clause 8.2(a), the Borrower appoints the Lender to be the attorney of the Borrower for it in its name and as its act and deed from time to time if and when such attorney thinks fit for the purpose of giving full effect to execute and sign transfer forms and for this purpose to generally execute and perform any act deed matter or thing relative to the execution and lodgement of the transfer forms. The Borrower ratifies and confirms any power exercised by the Lender."

347 Mr Wise submitted that, as a result of these clauses, Winchelada was an equitable mortgagee,and referred me to Fisher and Lightwood's *Law of Mortgage*. The Second Australian edition of that work is in the Tribunal library and, at paragraph 1.28, the learned authors state:

"An equitable mortgage is a contract which operates as a security and is enforceable under the equitable jurisdiction of the court. The court carries it into effect, either by giving the creditor immediately the appropriate remedies or by compelling the debtor to execute a security in accordance with the contract…"

348 In the present case, the Loan Agreement contains no agreement to grant a mortgage by the owner of any of the property sought to be charged to secure the loan.

349 Mr Monichino also pointed out that there was no reference to a mortgage in any of the operative clauses of the Loan Agreement nor any provisions that detail the rights of Finetea and Winchelada as mortgagor and mortgagee. He said that the document did not require a deposit with Winchelada of certificates for either the shares or the units together with a memorandum of deposit, which he said was highly unusual in the context of an equitable mortgage of shares. He said that, if the parties had intended to create an equitable mortgage over the shares and units, provisions addressing those matters would have been included in order to give the Loan Agreement commercial efficacy.

350 Mr Monichino pointed out that the only type of security interest that had been discussed by the parties was a lien. He said, citing various authorities, that an equitable lien is a right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness. He said that, unlike a mortgage, an equitable lien does not transfer title to the property and thus cannot be enforced by foreclosure. Rather, it was enforceable by a judicial sale of the property to which is attached.

351 He pointed out that, as well as their being no express creation in the Loan Agreement of a mortgage or agreement to execute one, there was no advance of money upon deposit of title deeds, no written memorandum of mortgage and no specifically enforceable promise to deliver the certificates to Winchelada, as distinct from a requirement that Finetea deposit them with the solicitors, to be held by those solicitors as stakeholders.

352 I accept that, although it was clearly the intention that the shares and units would be security for the funds advanced, there was no specific creation of any mortgage or charge in the Loan Agreement nor any agreement in it by either Kelly or Premiumtea to mortgage their shares and units.

The Personal Property Securities Act 2009 ("the PPS Act").

353 By Clause 40A of its Further Amended Points of Defence and Further Amended Counterclaim, Winchelada said that, by Clause 2.2 of the Loan Agreement, on a proper construction, Finetea agreed to grant security interests over Premiumtea's shares in Finetea, Premiumtea's units in the Finetea Trust and Kelly's shares in Premiumtea.

354 It said that the Loan Agreement created a security interest within the meaning of the PPS Act.

355 On 8 December 2016, Winchelada caused to be registered on the Personal Property Securities Register its alleged interest in the shares and units as "collateral" within the meaning of the PPS Act, as follows:

Collateral	Grantor	Secured party
Shares in Premiumtea	Kelly Koutamanos	Winchelada
Shares in Finetea	Premiumtea	Winchelada
Units in Finetea trust	Premiumtea	Winchelada

356 By s.10 of the PPS Act, "collateral" means, in substance, personal property to which a security interest is attached. By s.140(2), a creditor with a security interest who realises the collateral must apply the proceeds of realisation as follows:

(a) non-security obligations that have a higher priority to the creditor's interest;

(b) reasonable expenses incurred in relation to the enforcement of the creditor's interest against the collateral, to the extent that the expenses are secured by the creditor's security interest;

(c) security interests in the collateral that have a higher priority to the creditor's interest;

(d) obligations to the creditor that are secured by the security interest in the collateral;

(e) obligations to persons holding interests or security interests in the collateral that have a lower priority (whether under this Act or otherwise) than the interest of the secured party;

(f) to the grantor.

357 Mr Wise submitted that Clauses 2.2 and 8.2 of the Loan Agreement do not amount to a penalty because Winchelada would be required by s.10 of the PPS Act to account for any profits or surplus funds and it was not able to retain any income that it received in the meantime.

358 Mr Monichino pointed out that, since the grantor of the security is Finetea, and since part of the security includes the shares in Finetea, the protection given by the PPS Act is "chimeric" because:

(a) if Winchelada were to sell the shares and units to itself under s.130 of the PPS Act, then the notice pursuant to s.129 of its intention to do so, when given to Finetea would, effectively, be given to itself;

(b) the notice to be given to the "grantor" under s.137 of the PPS Act of the proposed disposal would also be effectively given to itself and Kelly and Kon, not being in control of the Grantor, could not object;

(c) neither Kelly nor Kon would be entitled to seek a statement of account in respect of profits generated by the Finetea business as neither of them is a grantor, nor will they be entitled to a distribution of any profits generated by the business;

(d) although s.114(2) of the PPS Act requires a distribution to "the grantor" of the profits generated by the sale, they will not be distributed to the same party that was, in substance, the grantor of the security interest;

(e) even if Kelly had an equity of redemption over the shares in Premiumtea she would have no power to enforce Premiumtea's equity of redemption for the Finetea shares and units, since she is a mere object of a discretionary power in whose favour an appointment of capital or income could be made under the Premiumtea Trust.

359 For these reasons, he said that there is no effective duty imposed by the PPS Act for Winchelada to account to Finetea or Premiumtea or to Kelly or Kon for any income generated by the Finetea business while under its control. Moreover, he said that, notwithstanding the requirements of the PPS Act, upon the happening of an event of default:

(a) Winchelada could take the shares in Finetea and then, after removing the current directors by its power as majority shareholder in Finetea, operate the Finetea business itself;

(b) at the same time, Winchelada could take the shares in Premiumtea (which owns the units) sell the Premiumtea shares to a related third-party, and sell the units to an independent third party at market value.

(c) while there is an obligation under the PPS Act for Winchelada to account to the grantor for any excess received from any sale, any surplus on the sale of the units would be returned to Premiumtea which, at that point, would not, for all intents and purposes, be the same grantor or guarantor that entered into the Loan Agreement. Therefore, either Winchelada or a third party would receive a windfall and the Koutamanos family would not get the benefit of any surplus proceeds on the sale of the units.

360 Mr Monichino submitted that I do not need to determine whether there was a security interest under the PPS Act because, by its prayer for relief, Winchelada seeks a declaration that it is entitled as equitable mortgagee to lodge the signed transfer forms and affect a transfer of ownership of the shares. It seeks no declaratory relief to the effect that it has a security interest within the meaning of the PPS Act. That may be so but I still need to determine the effectiveness or otherwise of these provisions.

361 I accept that the points raised by Mr Monichino are valid possible scenarios. However, the real question is whether the Loan Agreement created any security interest at all, whether within the meaning of the PPS Act or otherwise. For the following reasons, except for the shares, I do not find that such any such interest has been created.

Clause 2.2

362 The drafting of Clause 2.2 does not take into account the following:

(a) Although Finetea agreed to grant a security interest over "the Borrower's shares in Finetea", since Finetea itself was the borrower and since it had no shares in its own capital, there were, and still are, no such shares.

(b) Although Finetea agreed to grant a security interest over the units in the Finetea trust, those units were and still are owned by Premiumtea.

(c) Since Finetea did not own the Guarantor's shares in Premiumtea, it could not grant security interests over them itself.

(d) The requirement to execute share transfers was imposed upon Finetea, not on the shareholder, Kelly. A transfer executed by Finetea would be ineffective.

(e) Similarly, the requirements to execute transfers of "…the units in the Finetea Trust and the Premiumtea Trust…" (sic.) were imposed upon Finetea, and not upon the owners of those units. Again, a transfer executed by Finetea would be ineffective

(f) In any case, since the Premiumtea Trust is a discretionary trust, there are no units to transfer. It would have been possible for Premiumtea, as trustee, to charge the trust property of the Premiumtea Trust but it

was not required to do so by the terms of the Loan Agreement and there is no evidence that it has done so.

363 Quite obviously, a security interest over property can only be created by the owner of that property and a transfer of units or shares executed by someone other than the owner would be ineffective. Even if the clause were to be interpreted as an agreement by Finetea to procure the granting of the security interest or transfer relating to a particular piece of property, that would not create a security interest because it had and still has no power to require Premiumtea or Kelly to execute any documents. If it fails to do so then presumably Winchelada will have an action against it in damages for breach of an agreement to procure the granting of the security interest but, in the context of a default by Finetea, that would be of no utility.

Clause 8.2

364 The drafting of Clause 8.2 does not take account of the fact that the owners of the shares and units in question are Kelly and Premiumtea, who are defined in the agreement as "Guarantor".

365 By Clause 11, "the Guarantor" agreed to guarantee the due performance of the Borrower and to indemnify Winchelada against any loss. However, the clause does not impose upon either Kelly or Premiumtea any obligation to execute any document or register any transfer, nor does it purport to create any charge over the shares or the units.

366 The power in Clause 8.2 to "lodge" transfer forms for registration relates only to forms executed by Finetea, not to transfer forms executed by anyone else. The lodging would presumably have to be with the company in each case, since it would be the directors who would need to record the transfer of the shares and units, although notification of the change of shareholder and any subsequent changes in directorship of the two companies would need to be given to ASIC.

367 Transfer of units in the Finetea Trust is governed by Clause 6 of the Trust Deed, which provides that a transfer form may not be required, but the Unit holder is still required to provide a certificate for the units to be transferred.

The nature of the security contemplated

368 Normally, where a charged asset is realised, the party that provided it as security is entitled to receive back any surplus after the discharge of the secured debt. In this case, the party contracting to provide the security is Finetea and the security includes its own shares. If the units were sold, then the benefit of any surplus would not pass to the ultimate beneficial owners of the Finetea business but would pass instead to Finetea, the shares in which would then be owned by Winchelada. If the shares were sold, then the benefit of any surplus would pass to whoever acquired the shares in the company.

369 Moreover, this result would apply regardless of how much or how little was owed to Winchelada.

370 It is difficult to see how the scenario contemplated by these clauses would have worked in practice. Although a company might charge its assets and undertaking, and even its uncalled capital, it cannot sensibly charge itself.

371 How these practical difficulties were intended to be overcome has not been stated. Argument was largely directed to the question, whether the clause, if operative, would be a penalty and void or unenforceable.

The "security" that was given

372 Signed transfers of Kelly's shares in both Premiumtea and Premiumtea's shares in Finetea were provided on 16 December 2016. It is clear from the evidence that those transfers were provided by her with the intention that they would be part of the security for moneys advanced and owed under the Loan Agreement.

373 A transfer of the shares to Winchelada would effect a transfer of ownership of the shares in each case to the transferee, but, since the company in each case is a trustee, mere control of the company would not provide beneficial ownership of the assets of either trust.

374 There is no executed transfer of the units, and so unless and until a transfer of the units in the Finetea trust is effected, the unit holder will remain Premiumtea, which holds the units as trustee of the Premiumtea Trust. As Mr Wise and Mr Ounapuu acknowledged and indeed, pointed out, although Winchelada could, by means of the share transfers, secure control of Premiumtea through the appointment of directors, those directors would be bound by the provisions of the Premiumtea Trust deed. They would have a discretion as to the appointment of capital and income, but that discretion would have to be exercised in favour of the classes of beneficiaries named. In order to be able to distribute profits to itself, Winchelada would need to obtain a transfer from Premiumtea of the units in the Finetea Trust into its own name and it has not done so.

375 It now seeks an order that Premiumtea execute transfers to it of the units in the Finetea Trust. I cannot make such an order because under, the terms of the Loan Agreement, Premiumtea did not agree to execute such a transfer. An obligation to obtain such a transfer was imposed upon Finetea but that does not bind Premiumtea.

376 However, a Trustee is entitled to pay expenses and repay obligations properly incurred by it in the course of carrying on the business of the trust.

Does the loan agreement impose a penalty?

377 As stated above, whether or not a particular stipulation in a contract amounts to a penalty is to be assessed at the time the contract is made.

378 In Clause 40A of its Second Further Amended Points of Claim, Finetea contends that:

> "…clauses 2.2 and 8.2(a) of the Loan Agreement constitute a penalty and are void and unenforceable at common law, alternatively in equity, in that:

(a) they enabled Winchelada to forfeit the shares and units and thereby take legal control and ownership of the [Tearooms] business, notwithstanding that the amount owing under the Loan Agreement, following any event of default, may have been substantially less than the value of the [Tearooms] business;

(b) the Loan Agreement imposed no obligation upon Winchelada, as lender, to sell the shares and units and to repay to Finetea, as borrower, any surplus funds realised in excess of the amount owed to Winchelada under the Loan Agreement;

(c) any repayment of any excess funds upon a realisation of the shares and the units (which repayment was not mandated by the Loan Agreement) would not be a repayment back to the person(s) who were the beneficial owners of the shares and the units at the time of entry into the Loan Agreement;

(d) Winchelada, as legal owner of the shares and units following their transfer, was entitled to retain the profits of the [Tearooms] business generated over an indefinite period;

(e) the Loan Agreement did not require Winchelada to apply any profits generated by the [Tearooms] business during the time that Winchelada had legal control and ownership over the [Tearooms] business, towards the reduction of any debt payable by Finetea under the Loan Agreement;

(f) Finetea was deprived of the means of repaying any monies repayable under the Loan Agreement from the profits of the [Tearooms] business derived from the continued operation of the [Tearooms] business;

(g) the forfeiture of the shares in the units was extravagant, unconscionable and disproportionate, and bore no relation to any possible damage to, or interest of, Winchelada arising from a breach of the Loan Agreement by Finetea, and was not commensurate with any legitimate commercial interest of Winchelada to be protected from a breach of the Loan Agreement; and

(h) the consequences of a breach of the Loan Agreement, as stipulated by clauses 2.2 and 8.2 a, was out of all proportion to the legitimate interests of Winchelada which the Loan Agreement was entitled to protect."

379 If the subject clauses were effective and were implemented, the shares and the units would be transferred to Winchelada. The document is silent as to what would then happen. There is no requirement to sell the shares or units and deal with the proceeds in any particular way. There is nothing in the loan agreement that would prevent Winchelada from carrying on the Finetea business and no requirement for it to deal with the income of the business in any particular way.

380 Mr Monichino submitted that the clauses were designed to expropriate the Finetea business if there should be any default at all, however minor. He said that there were at least 10 different default events of differing severity, ranging from a change in the composition of Finetea's board of directors to non-payment of any amount that was due and payable, and that if any of these were to occur, there is the single consequence of Winchelada

becoming entitled to a transfer of the shares in the two companies and the units in the two trusts.

381 Since the borrower is Finetea and, since the shares in Finetea will be owned by Winchelada, any surplus following realization of the security that is to be paid to Finetea would effectively go to Winchelada. Consequently, the result intended to be brought about by Clause 8.2 would be that Winchelada would become the owner of the Tearooms without having any obligation under the terms of the document to account to Kelly, Kon or the other beneficiaries of the Premiumtea Trust for any of the income earned by the business or any surplus from any sale of the business.

382 I accept Mr Monichino's submission that the Finetea business is valuable, although the precise value was not established by the evidence. The Loan Agreement was a credit facility, with advances to be made to Finetea to pay for necessary work and materials as the Venture progressed. There was no requirement for Finetea to access the whole of the $2 million. Clause 8.2 would apply regardless of the amount outstanding under the facility. Accordingly, even if there was a relatively small amount owed, and a relatively minor breach, Winchelada could assume ownership of the Tearooms under that clause.

383 Mr Monichino referred to the tests set out in Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* referred to above and submitted that the effect of the two clauses does not constitute a genuine pre-estimate of damage that Winchelada may suffer by reason of the breach but instead is wholly disproportionate to the potential damage. Certainly, the document does not require there to be any proportion between the loss and the remedy.

384 Mr Wise referred me to *Andrews v ANZ Banking Group Ltd* [2012] HCA 30 and submitted that, if the clauses referred to are a penalty, they are nonetheless enforceable to the extent of compensating Winchelada for the breach by Finetea of its obligations under the Loan Agreement. He said that, to that extent, Winchelada was entitled to exercise rights as equitable mortgagee with respect to the shares and units for the monies that it was owed.

385 By way of example, he referred me to the order made by the English Court of Appeal in *Jobson v Johnson* [1989] 1 All ER 621, a case mentioned with apparent approval by the High Court in *Andrews*.

386 That case concerned a contract for the sale of shares by instalments. It provided that, upon any default in payment of an instalment of the purchase price, the purchaser was required to transfer the shares back to the vendors for the amount of the initial payment, without regard to any other instalments that the purchaser had paid. The effect of this requirement was that the vendors would receive the shares back upon payment of a sum considerably less than their value. The Court of Appeal held that the requirement to re-transfer the shares was a penalty and refused a decree of specific performance. Instead, it gave the plaintiff, who was the assignee of

the vendors, the option of an order for the sale of the shares by the court and payment to him out of the proceeds of the amount due and interest, or an enquiry into the value of the shares and, if that did not exceed the amount to be paid by the plaintiff, an order for the re-transfer of the shares would be made.

387 Mr Wise submitted that similarly in the present case, if Clauses 2.2 and 8.2(a) would operate as a penalty, the relief the Tribunal could grant relief limited to removing any additional detriment. He suggested that I could declare that these clauses were void and unenforceable insofar as they permitted Winchelada to retain income from the Finetea business without applying it in reduction of the debt.

388 The approach as to remedy taken by the Court of Appeal in *Jobson* was expressly overruled by the English Supreme Court in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67 (*at para 87* per Lord Neuberger Of PSC and Lord Sumption JSC; Lord Carnwath JSC agreeing). In the course of their joint judgement, their Lordships acknowledged that, unlike in England, the High Court of Australia in *Andrews*, recognized the concept of partial enforcement.

389 In *Andrews*, the issue was whether certain honour, dishonour, non-payment or over-the-limit fees charged by a bank were penalties. In a unanimous judgment, the High Court held that the equitable jurisdiction in regard to penalties had not "withered on the vine" but that both the equitable and common law rules as to penalties remain in effect in Australia. At paragraph 10 of the judgment, the Court said (*citations omitted*):

> "10. In general terms, a stipulation *prima facie* imposes a penalty on a party ("the first party") if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party …. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and *in terrorem* of the satisfaction of the primary stipulation…. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation."

390 This view was adopted by the majority of the High Court in the subsequent case of *Paciocco v Australian and New Zealand Banking Group Ltd*, which concerned a similar question in regard to bank fees. In that case, Kiefel J said (at para 31 – *citations omitted*):

> "31. Equity also viewed the purpose of penal bonds as compensatory and this was the basis for its intervention... Equity looked to what condition the bond was security for and allowed the obligee compensation for the loss flowing from failure of the condition (usually limited to principal, interest and costs) … The purpose of a bond was only to secure the interest of the obligee in the promise or undertaking to be performed …. Where

> compensation was possible for default, the exaction of a penalty was deemed inequitable …. The aim of the equity courts was to compensate in the event of default, not to punish … It follows that they would not tolerate individuals exacting punishment."

391 Mr Monichino said that this case concerns the common law doctrine of penalties. However, the foregoing High Court authorities would suggest that, even if the collateral stipulation would have been void at common law, it is nonetheless enforced in equity to the extent of the prejudice suffered by Winchelada by reason of the failure of the primary stipulation, although no more than that.

Conclusion as to penalty

392 The scheme contemplated by the Loan Agreement was that, in the event of any default by Finetea, Winchelada or its nominee would become the sole shareholder of both companies and the owner of the units in the Finetea Trust as well as units that were thought to exist in the Premiumtea Trust, which is actually a discretionary trust.

393 Under the terms of the document, that consequence would be the same, regardless of the seriousness of the breach or the amount that was owing at the time. There was no requirement for any accounting by Winchelada to anyone for any monies that it would receive, either by conducting the Finetea business or by its sale.

394 Having regard to the authorities referred to, that arrangement would be a penalty, and so would be void and unenforceable at common law. For the reasons given, the provisions of the PPS Act would not have saved the situation.

395 However, partial enforcement could be allowed in equity in a way that would avoid the penalty by confining recovery to the actual amount owed.

396 Mr Wise submitted that the penal aspect could be avoided by adopting an arrangement such as that used in *Jobson*. Although the relief aspect of the order made in that case was specifically overruled by the English Supreme Court, the same approach used in *Jobson*, has been adopted by the High Court of Australia in *Andrews*.

397 Had the whole scheme as contemplated by the loan agreement being fully implemented, and if I were to accept Mr Wise's submission, I would have had to order that an accounting for surplus funds be made to someone other than Finetea or Premiumtea. The person in the whole structure intended to benefit ultimately from the operations of Finetea is Kelly. However, she is not the beneficial owner of the Finetea business. She is simply one of the persons in whose favour an appointment of capital or income under the Premiumtea Trust might be made. Such a person does not have an equitable interest in the trust property but a mere right to have the trust properly administered (see *Official Receiver in Bankruptcy v Schulz* [1990] HCA 45 para 15; *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* 5th Ed. para 4-060).

398 The Tribunal's power to tailor an order to avoid a penalty in the present case to avoid a penalty is unclear. Although it has a duty to apply equitable principles where that is incidental to the exercise of the jurisdiction that Parliament has given to it, it has no inherent jurisdiction nor does it have an implied equitable jurisdiction (see *Pizer's Annotated VCAT Act* 5th Edition para V520 and the cases there cited).

399 However, the only security that Winchelada has, in fact, are the shares in the two trustee companies. Since control of those companies will not enable Winchelada to take ownership of, or apply for its own benefit, the property of either trust or the income to be derived from the Finetea business, there is no need to grant any relief apart from a declaration that the shares are held as security for the amounts of principal and interest falling due under the Loan Agreement and ordering that, following satisfaction of any amounts owed, they must be transferred back to the grantor of the security, Kelly. Confining relief in this way will, in effect, avoid any penalty and allow partial enforcement as contemplated in *Andrews.*

Conclusion

400 I find that:

(a) Clauses 2.2 and 8.2(a) of the Loan Agreement, insofar as they are effective to create any security over any of the assets referred to, assessed at the time the Loan Agreement was entered into, were designed to impose a penalty;

(b) the only security held by Winchelada for amounts owed to it under the loan agreement are the shares in Finetea and Premiumtea. Those shares are held by it as security only and after the amounts owed to it are satisfied, they must be transferred back to Premiumtea and Kelly;

(c) the claim by Finetea otherwise fails;

(d) the claim by the Landlord for debt and damages for breach of the Lease, being unpaid rent and outgoings, loss of rent and outgoings while the Basement and Shop 13 were untenanted, is established in the sum of $222,612.92;

(e) the claim by the Landlord for damages, being the cost of making good the Basement and Shop 13, is established in the sum of $261,336.64;

(f) the claim by the Landlord to recover the incentives pursuant to Special Provisions 4.4 and 5.5 of Annexure C of the Lease fails;

(g) the Landlord is entitled to an order for vacant possession of the area of the cellar of the Arcade known as "the Red Area";

(h) the claim by Winchelada for monies due under the loan agreement is established in the sum is $992,905.08;

(i) the claim with respect to mesne profits of the red area is not determined and should be the subject of a separate hearing.

Orders to be made

401 Mr Wise requested that, prior to formal orders being pronounced, he be permitted to submit an updated table of loss and damage. He also foreshadowed an application for costs.

402 I will direct that the proceeding be listed for further hearing before me, with one day allocated, to determine any application for costs and to hear further submissions as to the precise orders that should be made in order to give effect to the above findings. A brief summary of the submissions to be made must be filed and served at least two working days before the time fixed for the hearing.

SENIOR MEMBER R. WALKER