VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT Reference No. BP1422/2015

CATCHWORDS

Lease of *retail premises;* allegations of misleading and deceptive conduct by managing agent and landlord; determination as to liability and assessment of damages; claim by applicant for interest assessed; reimbursement of fees under s115B of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and costs reserved for determination after further submissions.

APPLICANT	Glowell International Pty Ltd
FIRST RESPONDENT	Biggin & Scott Commercial Pty Ltd (ACN 162 490 977)
SECOND RESPONDENT	448 St Kilda Road Pty Ltd (ACN 081 091 965)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	23 February 2017, 26 May 2017 and 16 August 2017
DATE OF ORDER	8 September 2017
CITATION	Glowell International Pty Ltd v Biggin & Scott Commercial Pty Ltd (Building and Property) [2017] VCAT 1342

ORDERS

1 The respondents, Biggin & Scott Commercial Pty Ltd and 448 St Kilda Road Pty Ltd, must pay to the applicant, Glowell International Pty Ltd, damages in the sum of $8,246.31.

2 In addition, the respondents must pay to the applicant damages in the nature of interest in the sum of $1,505.80.

3 Reimbursement of fees under s115B of the *Victorian and Civil and Administrative Tribunal Act 1998* (Vic) and costs are reserved.

4 **By 22 September 2017 the applicant** must send to the respondents and to the Tribunal any further submissions it wishes to rely upon concerning:

(a) why an order under s115B of the *Victorian and Civil and Administrative Tribunal Act 1998* (Vic) should be made that the

respondents reimburse to the applicant the filing fee and the hearing fee it has paid; and

(b) costs.

5 **By 6 October 2017 the respondents** must send to the applicant and to the Tribunal response submissions regarding:

(a) fees; and

(b) costs.

C Edquist
Member

APPEARANCES:

For Applicant:	Ms V Qin Zhang, Director.
For Respondent:	Mr J Silver of Counsel.

REASONS

INTRODUCTION

1 Glowell International Pty Ltd ('the tenant') was between 15 August 2012 and 14 July 2015 the tenant of a suite of approximately 150 m^2 on Level 4, 488 St Kilda Road, Melbourne ('the premises') under a lease ('the lease') made in 2012 with the second respondent 448 St Kilda Road Pty Ltd ('the landlord').

2 The term of the lease was two years only. On expiration, the tenancy became a tenancy from month to month. The lease was terminated on notice, and there is no dispute as to the validity of the termination. Disputes between the tenant on the one hand and the managing agent on the other arose after the termination of the lease. When the tenant asked the managing agent to return the bond, it was informed that the bond moneys of $8,567.74 had been taken to offset payments said to be due from the tenant. Particulars were given in an invoice dated 15 July 2015 for $10,333.13. In support of this invoice the managing agent sent a document titled 'Receipt History' ('the receipt'). The tenant says that the receipt and the revised invoice are full of mistakes. It says the invoice for $10,333.13 was inconsistent with other invoices rendered, that it had been overcharged for a congestion levy by $1,072.44, that carpark rent had been invoiced twice for the 6 months from August 2012 to March 2013, and that it had wrongly been charged $6,902.01(inclusive of GST) for cleaning.

The proceeding

3 The tenant issued this proceeding on 19 October 2015 seeking orders under the *Australian Consumer Law and Fair Trading Act 2012* ('the ACLFT Act') that the managing agent pay to it **$24,103.99** on the basis of its alleged misleading and deceptive conduct.

4 The tenant articulated its claim in a 'statement' which was filed with the application. The sum of **$24,103.99** comprised:

(a) the bond of $8,535.10;

(b) an overpayment of $2,368.89 made due to the managing agent's mistakes, and

(c) accounting, auditing, legal and related professional fees of $13,200.

5 The tenant re-articulated its claim in Points of Claim dated 18 July 2016. In this document the claim was increased to **$35,036.93,** comprising:

(a) the bond of $8,567.74 (not $8,535.10 as previously claimed);

(b) an overpayment of $2,368.89;

(c) additional accounting fees of $8,910;

(d) legal fees of $13,420;

(e) mediation & Tribunal fees of $770.30; and

(f) general loss and damage of $1,000.

6 On 5 April 2016 the landlord was added as second respondent.

The counterclaim

7 The landlord filed a counterclaim seeking arrears of rental of **$4,504.17**, interest on arrears and legal costs of **$3,179.50** (inclusive of GST) on 13 September 2016. The tenant filed a defence to the counterclaim on 5February 2017 seeking to have the counterclaim struck out, and an order for costs.

Section 75 application

8 On 10 February 2017 the managing agent and the landlord sought to have the tenant's proceeding summarily dismissed under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'). The application was heard by Senior Member Levine, who declined to dismiss the proceeding.

New reconciliation and withdrawal of counterclaim

9 The managing agent and the landlord recalculated the amounts they claimed were due from the tenant and sent a new reconciliation to the tenant at 5.59 pm on 22 February 2017. In the email, the solicitor for the managing agent and the landlord advised that 'the respondents hereby withdraw the counterclaim'. This was two days before the substantive hearing was scheduled to begin.

10 Ms Zhang did not accept the new reconciliation, and advised the solicitor for the managing agent and the landlord on the morning of 23 February 2017.

THE HEARING

11 The proceeding first came on for hearing on 24 February 2017. At the start of the hearing the landlord confirmed it had withdrawn its counterclaim. The upshot was that the landlord and the managing agent conceded that the tenant was entitled to a partial refund of the bond of $1,244.96.

12 During the course of the first morning, the tenant sought leave to file amended points of claim. This was strenuously opposed by the agent and the tenant. After argument, I granted leave to the tenant to file amended points of claim on terms.

13 The parties agreed during the course of the first day that they would arrange for the respective accountants to meet by 24 March 2017 with a view to reconciling the accounts in issue, and identifying the issues to be determined by the Tribunal at the further hearing.

14 The amended points of claim which the tenant was given leave to file by 31 March 2017 were to reflect the following:

(a) any adjustment to the amounts claimed by the tenant, following the reconciliation of accounts by the accountants;

(b) the fact that the tenant had withdrawn its claim for damages of $13,200 in respect of legal fees; and

(c) any change of position on the part of the tenant regarding application to the lease of the *Retail Leases Act 2003.*

15 On the first day of the hearing the tenant also sought to tender three documents, including two from 2012 which related to the formation of the lease. These documents are not been provided to the managing director or to the landlord before the hearing, and they objected to their tender. After argument, I granted leave to the tenant to file and serve those documents.

AMENDED POINTS OF CLAIM

16 On 31 March 2017 the tenant filed amended points of claim as ordered. In this document a total payment of **$30,351.71** was made, comprising:

(a) the bond $8,567.74;

(b) a surcharged amount of $3,431;

(c) a congestion levy overpayment $1,072.44;

(d) accounting fees of $8,910 (16 May 2016);

(e) accounting fees of $3,300 (22 March 2017);

(f) accounting fees of $1,320 (24 March 2017);

(g) accounting fees of $1,980 (30 March 2017);

(h) mediation & Tribunal fees of $770.30; and

(i) general damages $1,000.

17 The tenant also sought interest plus further professional fees and other costs.

AMENDED DEFENCE

18 On 28 April 2017 the managing agent and the landlord filed amended points of defence. The defence confirmed [at 4(a)] that a meeting had been held between the parties and their respective accountants of 24 March 2017, and indicated [at 4(b)] that a joint statement would be issued by the accountants 'setting out the agreed and disputed facts in relation to the amounts paid and amounts owing'.

19 Furthermore, it was conceded by the managing agent and the landlord [at 2.7] that the total amount due and payable by the tenant under the terms of the lease was $163,623.19, but also conceded [at 2.8] that the total amount paid by the tenant was $164,650.75. The difference is $1,027.56. This

figure was conceded by the managing agent and the landlord as being due to the tenant [at 5(c)]. Notwithstanding, the respondents still sought to have the proceeding dismissed in the prayer for relief.

LETTER FROM HMG PACIFIC DATED 23 MAY 2017

20 On 25 May 2017 the tenant filed the letter from its accountants HMG Pacific dated 23 May 2017. This letter indicated that those accountants did 'not believe it was possible and appropriate for the accountants to make a joint statement'. Moreover, those accountants declined to make any comment regarding cleaning, as this issue was to be decided by the Tribunal. However, the letter confirmed that the tenant had paid the following figures:

(a) rent and outgoings: $143,651.20;

(b) car park rate: $9,240;

(c) congestion levy: $3,191.86

Total: $156,083.06.

21 I consider this concession to be important, because when the cashing of the bond of $8,567.74 by the landlord is taken into account, the amount effectively paid or allowed by the tenant to the landlord is $164,650.80.

22 It is to be noted that this is within $0.05 of the $164,650.75 which the managing agent and the landlord concede in their defence filed on 28 April 2017 has been paid.

23 On this basis, I find that the figure which had been paid or allowed by the tenant is **$164,650.75**.

TENANT ENTITLED TO $1,027.56

24 As I have found that the figure which has been paid or allowed by the tenant is $164,650.75, and as the managing agent and the landlord have conceded in their amended points of defence that the total amount due and payable by the tenant under the lease was $163,623.19, I find that the tenant is entitled to a refund of **$1,027.56**.

REMAINING ISSUES

25 Counsel for the managing agent and the landlord on the second day of the hearing handed up a statement of adjustments which set out how his clients had calculated the refund of $1,027.56 which they conceded was due to the tenant. When this statement of adjustments is compared to the letter from HMG Pacific dated 23 May 2017, it can be seen that the remaining matters in dispute are limited.

26 The landlord in the statement of adjustments says that $9,240 has been paid in respect of carpark rent. This is the same figure identified by HMG Pacific. However, the tenant maintains that it has been wrongly charged

carpark rent in respect of the first two months of the tenancy. **The parties have identified that as an issue I must resolve.**

27 There is a slight difference in the figures contended for by the parties in respect of the congestion levy. The landlord in its statement of adjustments says that the figure to be paid is $3,513.24. HMG Pacific says that the amount paid by the tenant is $3,191.86. The difference is $321.38. At the end of the second day of the hearing the tenant conceded that for the purposes of resolution of the dispute she would accept the landlord's figure. The import of this concession is that this particular dispute falls away.

28 In respect of cleaning, the landlord says that $7,218.75 has been paid. As noted, HMG Pacific deliberately did not express an opinion about this item. **The parties are agreed that I have to determine what sum, if any, is to be paid by the tenant for cleaning.**

29 When the primary disputes have been resolved, I have to make a decision as to which, if any, of the five invoices issued by HMG Pacific can be included by the tenant in its claim for damages. If they cannot be claimed as damages, they must be claimed, if they can be claimed at all, as costs.

30 I must also decide whether the mediation fee of $195, which was paid by the tenant to the Small Business Commissioner's office in respect of a mediation, is recoverable.

31 Ms Zhang conceded at the opening of the second day of the hearing that the tenant was not pursuing its claim for general damages of $1,000.

32 I pointed out during the hearing that the issue of reimbursement of the filing fee and hearing fees paid would be dealt with separately under s115B of the VCAT Act.

Specific monetary claims made by tenant

33 The tenant in the statement filed with the application asserted that a number of invoices rendered by the managing agent were incorrect, giving rise to a number of specific issues including the incorrect charging for cleaning, an overpayment of $768.45, a double charge in respect of car parking of $1,584, an overpayment of $528 and an overpayment in respect of congestion levy of $1,072.40. These claims were repeated in the points of claim filed on 18 July 2016. The tenant's claims were then supplanted by the amended points of claim dated 31 March 2017.

34 The managing agent and the landlord in their closing submissions, approached the case on the basis that the tenant was asserting four claims of overpayment, namely:

(a) a charge of $540 for car parking during the two 'rent free' months at the beginning of the tenancy;

(b) $1,072.44 overpaid in respect of the congestion levy;

(c) $748.92 in respect of a 'misleading invoice' of June 2015; and

(d) $7,218.85 charged for cleaning at the end of the lease.

35 On the last day of the hearing, it became clear that Ms Zhang contended that the claim for double charging of carpark rent for the six month period from August 2012 to March 2013 of $1,584 had not been resolved. I observed at that point that this claim could not be dealt with in isolation. If it was still contended that that that particular sum had been double charged, I said that it would be necessary to check every single invoice and payment, and do a thorough reconciliation. This was not what the Tribunal was now being asked to do. Rather, the Tribunal was asked to proceed on the basis that the respective accountants for the parties had reached agreement as to the payments actually made, and as to the amounts actually invoiced by the managing agent on behalf of the landlord. It was only necessary for the Tribunal to determine whether the landlord had incorrectly charged in respect of two months car parking during the "rent holiday" period, and whether the cleaning had been properly charged.

36 Ms Zhang conceded the point, and did not press the claim for $1,584.

37 In my view, the claims for $1,072.44 allegedly overpaid in respect of the congestion levy and $748.92 in respect of a 'misleading invoice' of June 2015 fall into the same category as the claim of double charged carpark rent of $1,584. They cannot be treated in isolation, and can only be dealt with as part of a global reconciliation of accounts due and payments made.

38 I now turn to the outstanding issues, namely whether carpark rent was to be included as part of the 'rent holiday', and the tenant's liability for cleaning charges.

CAR PARK RENT

39 The tenant's claim in respect of carpark rent is straightforward. The tenant says that the lease provided that rent was to be paid from 15 October 2012, 'after a 2 month rent-free period' commencing on 15 August 2012. The tenant relies on item 9 in the schedule to the lease. The tenant's position is that carpark rent is to be treated in the same manner as rent.

40 The landlord's counter argument is that the rent referred to in item 9 the schedule is the rent as defined in item 6, that is to say:

> For the first year $46,200+ 10% GST
>
> For the second year $48,048+ 10% GST

41 The landlord also points out that there is a special provision relating to car park rental which appears at item 22 of the schedule. It reads:

> **Car space licence**
>
> The Landlord is to grant a Licence for one (1) car space for the term of this Lease at an initial licence fee for the first year of $240 per month for the car space+ 10% GST. The licence fee is reviewable annually to market….

42 On the basis of item 22 of the schedule, I am satisfied that the landlord is right. The fee payable in relation to the licence to occupy a car space is different in nature to the rent payable in respect of the premises, and it is treated differently in the lease. Accordingly, the rent holiday of two months which applied to the rent, did not apply to the car space licence fee. **I find in favour of the landlord in respect of this disputed item.**

43 It follows that the landlord has not inappropriately charged the tenant in respect of the first two months of carpark rent, and no financial adjustment is required in the tenant's favour in respect of this item.

CLEANING

44 The parties are agreed that the amount which has either been paid or allowed by the tenant (by deduction from the bond) for cleaning is $7,218.75. The issue to be resolved is whether the tenant was obliged to pay for cleaning under the lease. The landlord's position is based on the express terms of the lease. In particular, reference is made to item 10 in the schedule which relates to the outgoings which the tenant must pay or reimburse. It provides:

> All outgoings excluding cleaning charges & insurances (Clause 3.5) are included in the rental.
>
> Cleaning charges pursuant to Clause 4.12 are $15.00 per square metre+ 10% GST and subject to annual review.

45 The tenant says that it was not obliged to pay for cleaning as an agreement was reached with the former managing agent that the tenant would carry out its own cleaning.

Ms Zhang's evidence about cleaning

46 Ms Zhang touched on the cleaning issue on the first day of the hearing, and gave detailed evidence about the issue on the second day. She says she went to see the managing agent about taking a lease of the premises on 6 May 2012. She spoke to Mr Mel Tripodi. She deposed that they discussed the office to be let, and the rent, and says that it was agreed that cleaning would be included. She gave evidence that Mr Tripodi sent to her an email dated 5June 2012, and she put this into evidence. It relevantly reads:

> 180 sq metres $62,500 per annum plus gst
>
> 150 sq metres $45,900 per annum plus gst
>
> Please note that this includes all outgoings…

47 Ms Zhang also put into evidence an offer to lease, which she deposed was sent to her by the managing agent. She drew the Tribunal's attention to 'Lessee's Outgoings', at item 13, which stated 'all outgoings included except for usage costs'. She explained that she understood that 'usage costs' related to consumables such as electricity, telephones, gas and water. I note

that this explanation is consistent with the last paragraph of item 13, which reads:

> In addition to the rental and outgoings, the lessee shall be responsible for all charges associated with the operation of the lessee's business on the premises, including consumable charges such as electricity, telephones, gas, water, etc.

48 Ms Zhang then deposed that she was asked to come into the managing agent's office to pick up the keys and the pass code on 16 August 2012. This had been altered from the previously arranged date of 15 August 2012. When she attended on 16 August, she was handed a lease by Mr Stephen Anderson of Biggin & Scott and told that she must sign in order to receive the key and the pass code. She says that she had no alternative but to sign, as she had arranged to move in and had arranged for utilities to be connected.

49 She says that she pointed out to Mr Anderson that the lease was wrong because it referred to the tenant paying for cleaning. She was told she had no choice but to sign if she wanted to get the keys and the password, but she was also told that cleaning was 'optional'. She deposed Mr Anderson said tenants have an option as to whether they used the landlord's cleaner or did their own cleaning. If cleaning was needed, it would be invoiced. She also said she told Mr Anderson that she did not require cleaning. She added that Mr Anderson said to her that if she got an invoice from the landlord about cleaning she should tell him so that he could talk to the landlord.

50 When she was asked whether the landlord did the cleaning for the tenant, she answered 'not that we know of'. When asked what hours the premises were occupied by the tenant, she answered '9 to 5'. She agreed that if the cleaning was done at 6 pm she would not know about it. But she added that the assertion in the defence that she could have given the pass code to the cleaners was "not right". She later said that the landlord could have provided the key and the code to the cleaner.

51 When Ms Zhang was asked whether the tenant had sought any written confirmation from the managing agent about the cleaning arrangement she said she had not, and that this was not necessary because there was 'a verbal solution already'. Also, she had the offer to lease, and the email from Mr Tripodi, and no invoice was ever received for cleaning.

52 She denied that she was taking advantage of a clerical mistake made in the managing agent's office, and insisted that she was 'the victim'.

Mr Pannunzio's evidence about cleaning

53 The managing agent's current director Mr Alex Pannunzio was called to give evidence about the cleaning dispute. He explained that he had purchased the managing agent business, with effect from November 2013, from the four former directors, who included Mr Tripodi.

54 His evidence was that the landlord provided cleaning at 448 Saint Kilda Road. Two firms of cleaners were used. Cleaning was charged to tenants based on a proportion of the common areas and the floor area of the individual tenancy.

55 Mr Pannunzio deposed that he had spoken to the cleaner who cleaned the tenant's premises and that this cleaner had confirmed that they had been provided with the access code, and carried out the cleaning after 6 pm.

56 The assertion by Ms Zhang that the tenant was never invoiced during the course of the tenancy for cleaning was not disputed. On the contrary, Mr Pannunzio agreed that the tenant had not been charged for cleaning until the end of the tenancy. He explained that the fact that the tenant had not been charged was picked up only when the payments made under the lease were audited when the lease came to an end.

57 When he was asked for an explanation, Mr Pannunzio said that the tenant had not been charged 'probably' because a mistake had been made when the tenancy card was set up. The computer program based on that card did not invoice the tenant for cleaning each month.

58 When he was asked if he could produce the tenancy card, Mr Pannunzio said he could not, but said its contents had been reflected in a computer program. He explained that when he had bought the business from the previous owners he had arranged for the computer program to be changed. The change was effective from January 2014. For this reason the old records were not available.

59 When he was asked who had completed the tenancy card, he said it would have been either Mr Tripodi, or the trust accountant.

60 Importantly, when Mr Pannunzio was asked whether the landlord gave the tenant an option as to whether to have their premises cleaned, he confirmed that a tenant could elect to do their own cleaning. However, they couldn't use another cleaner.

61 When Mr Pannunzio was asked whether Ms Zhang had ever talked to him about not having the cleaning done after he took over in 2013, he said they had had no such discussion. He confirmed that he was not aware the cleaning was not required by her. The issue came to light after an email regarding renewal of the lease was sent in March 2015.

62 Mr Pannunzio suggested that the tenant was seeking to take advantage of a clerical error in the tenancy card that caused the failure to issue invoices for cleaning from month-to-month.

63 Mr Pannunzio was asked by me as to whether it was possible that the tenant card had been set up by Mr Tripodi correctly to reflect that this tenant was not paying for cleaning. Importantly, he conceded that this might have been the case.

64 In re-examination Mr Pannunzio agreed that if the lease said that the tenant was to be charged for cleaning, and the tenant opted not to pay for cleaning but to do their own, the landlord could have been approached and permission sought to change the lease.

Submissions

65 The primary submission made by the managing agent and the landlord was that the tenant had signed a lease which obligated the tenant to pay for cleaning. The managing agent and the landlord referred to Ms Zhang's evidence that she had objected to this at the time of signing, and that the real estate agent had agreed 'to remove it'.

66 Ms Zhang in cross examination said that she had signed the lease which required the tenant to pay for cleaning in order to get access to the premises. She confirmed that she was forced to sign the lease. And she rejected the suggestion that she could have made handwritten changes.

67 The tenant's case can thus be seen as a plea for rectification of the lease, on the basis that its terms, in so far as they deal with cleaning, did not represent the arrangements agreed upon between the parties. However, as Ms Zhang did not seek rectification of the lease, the managing agent and the landlord did not address the case on this basis.

68 Rather, Ms Zhang gave evidence as to an agreement she had reached with the landlord through Mr Stephen Anderson that although the lease required the tenant to pay for cleaning, the tenant had an option to do its own cleaning, and if the tenant did not did not want the landlord's cleaner, then the tenant would not be charged for cleaning.

69 The managing agent and the landlord did not dispute that if any such agreement could be established by the tenant then it would be effective to relieve the tenant from strict application of the lease in so far as it related to cleaning.

70 Rather, the managing agent and the landlord concentrated their submissions on why Ms Zhang's evidence as to the agreement should not be accepted. Specifically, they highlighted that Ms Zhang did not lead evidence from the former real estate agents, or any other witnesses to the alleged agreement, that she did not produce contemporaneous documents such as diaries or emails, and produced no written evidence of any agreement that amended the lease. Furthermore, they pointed out that she produced no evidence to suggest that she had followed up the "cleaning exemption" with the managing agent. At the same time, she did not deny the cleaners had attended to clean the tenant's premises, and could not do so as she was never in the office during the hours that the cleaners attended, and she acknowledged that the cleaners had access to the tenant's premises.

71 It was contended that, on the balance of probability, in the absence of any of the evidence that the Tribunal could have expected to have been led based on her version of events, Ms Zhang's story "is utterly improbable"

72 On the other hand, it was submitted that Mr Pannunzio gave 'clear evidence' that it could easily happen that cleaning would not be charged for if the details on the tenancy card were not entered correctly into the agent's system. Reference was also made to Mr Pannunzio's evidence that the landlord could have consented to the change, by hand written amendment, and that had not occurred.

73 As to credibility of the witnesses, it was asserted that Ms Zhang did not challenge Mr Pannunzio's evidence, and that he should be treated as a credible witness. In contrast, she should be treated as an unreliable and vague witness.

74 Finally, it was noted that her version of the events had "developed" as the case progressed from the original points of claim dated 14 October 2015, through the defence to counterclaim dated 5 February 2017 through to the position taken in the hearing.

75 Specifically, in October 2015, the case was:

> Per lease and instructions… office cleaning is optional. We informed [Biggin & Scott] before moving in that we would do our own office cleaning… which was fully acknowledged…

76 In the defence to counterclaim dated 5 February 2017 the tenant's case was that Ms Zhang was asked to sign the lease on the spot, and was denied any changes, or a chance to obtain legal advice. In other words, instead of saying she was allowed to "opt out" after signing the lease, she disputed the lease was correct and contended she signed under objection.

77 The tenant's position during the hearing was based on the new documents which the tenant was granted leave to tender on the first day. These documents included the offer to lease.

78 It is necessary to address these arguments one at a time.

Discussion

79 The first criticism of the tenant's case regarding the alleged agreement that the tenant was not to be charged for cleaning was that it did not lead evidence from the former real estate agents, or any other witnesses to the alleged agreement. As Ms Zhang did not contend that there were any witnesses to the alleged agreement other than Mr Mel Tripodi and Mr Stephen Anderson of Biggin & Scott, the relevant enquiry is whether the tenant is to be criticised for its failure to call Mr Tripodi and Mr Anderson. The managing agent and the landlord placed great weight on this failure and invited the Tribunal to draw an adverse inference against the tenant on the basis that the tenant did not call them as witnesses, under the rule in *Jones v Dunkel.*[1]

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1 (1959) 101 CLR 298.

80 This being the case, it is necessary to address *Jones v Dunkel* briefly. The case concerned an appeal to the High Court of Australia by a widow whose husband had been killed when driving up a winding road through wooden hills south of Sydney. The widow brought proceedings against the owner and the driver of the other truck alleging that the driver had been negligent. There were no eyewitnesses to the collision, which took place in darkness. The defendants sought a direction from the trial judge that the case be dismissed before it went to the jury, but the judge allowed the case to go to the jury. The jury found in favour of the defendants. The issue on appeal was whether the trial judge had misdirected the jury regarding the weight which ought to be attached to the fact that the driver of the other truck, who had survived the accident and had given a statement to police, was not called as a witness. In separate judgements, Kitto J, Menzies J and Windeyer J found that the trial judge had misdirected the jury. As they constituted a majority, the appeal was allowed.

81 The relevant passage in the judgement of Kitto J is:

> [A]ny inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.[2]

82 Windeyer J expressed the principle in these passages:

> Then, I think, his Honour should, when the juryman asked his question, have given an answer in accord with the general principles as stated in *Wigmore* on Evidence 3rd ed. (1940) vol. 2, s. 285, p. 162 as follows: "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.[3]
>
> As *Wigmore* points out (*Evidence* 3rd ed. (1940) vol. 2, ss. 289, 290, pp. 171-180), exactly the same principles apply when a party, who is capable of testifying, fails to give evidence as in a case where any other available witness is not called. Unless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case. [4]

83 In the present case I consider that no adverse inference should be drawn against the tenant because it did not call Mr Tripodi and Mr Anderson because Ms Zhang had given direct evidence as to her conversations with

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2 (1959) 101 CLR 298 at 308.
3 Ibid at 320-321.
4 Ibid at 321.

those individuals. She was not asking the Tribunal to draw any inference from circumstantial evidence. To adopt the language of Windeyer J, she did not need to call another witness in order to elucidate the facts she relied on.

84 This observation leads to a second point, which is that the tenant did not need to call any further witness to support its case. Ms Zhang had given evidence about her dealings with Mr Tripodi and Mr Anderson. Unless her evidence was regarded as so unsatisfactory that it could not be accepted, the managing agent and the landlord ran the risk that her uncontradicted evidence would be accepted. It accordingly was a matter for them, rather than for the tenant, to call Mr Tripodi and Mr Anderson if they were able to do so.

85 A third reason for declining to draw any adverse inference against the tenant because it did not call Mr Tripodi and Mr Anderson is that the failure is readily explained by Ms Zhang's evidence that she did not know how to contact them. Her evidence was that she had no information regarding their whereabouts. Furthermore, she said that she indicated to the solicitor acting for the managing agent and the landlord that she expected those parties to call Mr Tripodi and Mr Anderson. That solicitor indicated that they would not be calling them. No contact details were provided by the solicitor to Ms Zhang. At the hearing the managing agent and landlord did not call either Mr Tripodi or Mr Anderson. In circumstances where the managing agent and landlord did not call either Mr Tripodi or Mr Anderson, but did not ensure that Ms Zhang had their contact details, they cannot criticise her (and through her the tenant) for any failure to call them as witnesses.

86 Having made that point, I acknowledge that counsel for the managing agent and the landlord drew evidence from Mr Pannunzio that Mr Tripodi and Mr Anderson worked elsewhere and were not now associated with the managing agent. I accept this evidence, and emphasise that there is no reason to draw any inference on the *Jones v Dunkel* principle against the managing agent and the landlord on the basis that they did not call either of these witnesses.

87 The evidence from Ms Zhang that she expected the managing agent and the landlord to call Mr Tripodi and Mr Anderson provides a further basis for declining to draw an adverse inference against the tenant, because it suggests that the tenant had nothing to fear from their evidence.

88 The criticisms that Ms Zhang did not produce contemporaneous documents, or an amended lease, or evidence to suggest that she had followed up the 'cleaning exemption' with the managing agent, overlooks the fact that in cross-examination she deposed that she didn't write to confirm her discussion with Mr Anderson because 'there was a valid solution already'.

89 I note that this answer is consistent with her evidence that she was told that if she received an invoice for the cleaning, she could talk to Mr Anderson who would take the matter up with the landlord. Furthermore, no invoice

for the cleaning was received during the tenancy to prompt her to contact the managing agent about the matter.

90 It was contended that Ms Zhang was 'an unreliable and vague witness'. I acknowledge that sometimes during the hearing I found her evidence to be repetitive and not to the point. However, her evidence about the discussions with Mr Tripodi and Mr Anderson was quite clear. Furthermore, the arrangement regarding the cleaning was consistent with her interpretation of the offer to lease. Equally importantly, it is consistent with the established fact that during the course of the tenancy the tenant was not charged for cleaning.

91 I was asked by the managing agent and the landlord in their submissions to contrast Ms Zhang's evidence with Mr Pannunzio's evidence. In particular it was contended that his evidence was clear and was not challenged.

92 I agree that Mr Pannunzio's evidence was clear and was not shaken in cross-examination. However, his evidence could only take the landlord's case so far, because he had purchased the managing agents' business long after the lease had been formed. While he was able to give a credible explanation as to why the cleaning had not been charged, i.e. because a clerical error had been made in the tenancy card, this was only supposition. The managing agent and the landlord had not called either of the individuals who Mr Pannunzio said might have completed the tenancy card, namely Mr Tripodi or the trust accountant, so the managing agent and the landlord were not in a position to present direct evidence as to what had happened. I draw no inference under the *Jones v Dunkel* principle against the managing agent of the landlord about this, but I also emphasise that the managing agent and the landlord are inviting the Tribunal to accept a mere theory as to what might have happened, not to accept direct evidence that something had actually occurred.

93 A real difficulty for the managing agent and the landlord is that the theory they have invited the Tribunal to accept regarding the incorrect completion of the tenancy card is that there is a real possibility that the tenancy card *was* completed accurately at the outset, precisely because Mr Tripodi personally, or through a clerk, completed the tenancy card to reflect the fact that the tenant was not to be charged for cleaning.

Finding as to cleaning

94 In circumstances where Ms Zhang gave uncontradicted evidence regarding conversations she had with Mr Tripodi and Mr Anderson which led to the outcome that the tenant was not to be charged for cleaning, in circumstances where that evidence is consistent with the fact that the tenant was not charged for cleaning during the currency of the lease, I find on the balance of probabilities that the arrangement reached with the managing agent who was acting for the landlord at the time the lease was formed was that the tenant was not to be charged for cleaning.

95 I make this finding notwithstanding the argument put by the managing agent and the landlord that Ms Zhang progressively changed her case during the course of the proceeding. Ms Zhang is not a lawyer, and she did not actually obtain legal advice, although she clearly investigated using lawyers at some point before the hearing. Another relevant factor in my view is that although she was able to present the tenant's case at the hearing without using an interpreter, English is clearly not Ms Zhang's first language. I consider there is an underlying consistency in her basic claim that the tenant was to do its own cleaning and the landlord was not to do it, and that basic claim remained intact whether Ms Zhang was referring to the email and the offer to lease, or the discussions she had on 16 August 2012 with Mr Anderson.

96 On this basis, I find that the sum of $7,218.75 for cleaning should not have been charged to the tenant, and the tenant is entitled to an order for payment of this sum.

Summary so far

97 I have found above that, apart from the disputed carpark charge and the cleaning charge, the tenant is entitled to a refund of $1,027.56.[5]

98 The car parking claim has been resolved against the tenant.

99 The award of $7,218.75 for cleaning means that the tenant is entitled to an award of at least ($1,027.56 + $7,218.75=) $8,246.31 for damages.

Award of damages to be made against both managing agent and the landlord?

100 I can see no reason why the award of damages of $8,246.31 should not be made against both the managing agent and the landlord.

101 Taking the award of damages for $1,027.56 first, it is appropriate that the award should be made against both the managing agent, which was responsible for the invoicing, and against the landlord, which has had the benefit of holding the $1,027.56. It is noted that no submissions were put forward by the managing agent or the landlord as to why they should be treated differently in terms of liability. On the contrary, it was suggested in their submissions [at 35] that:

> If Glowell is unsuccessful, the balance of the bond not disputed as payable ($1,027.56) should be "set off" against any amount found owing by way of legal costs to the respondents

In other words, both the managing agent and the landlord sought to obtain a benefit from the retention of the $1,027.56.

102 With respect to the $7,218.75 wrongly deducted for cleaning, it is to be noted that, as with the $1,027.56, no submissions were put forward by the managing agent or the landlord as to why they should be treated differently

[5] Paragraph 24 above.

in terms of liability. In my view, the award should be made against both the managing agent, which was responsible for the management of the tenancy from late 2013 and wrongly invoiced the tenant for the cleaning at the end of the lease, and against the landlord which had the benefit of the wrongful retention of the $7,218.75.

103 The upshot is that I find that the award of damages of $8,246.31 should be made against both the managing agent and the landlord.

REMAINING ISSUES

Mediation fee $195

104 The tenant initiated a mediation with the landlord through the office of the Victorian Small Business Commissioner. The landlord paid a mediation fee of $195, and now claims this fee as damages. Ms Zhang said the fee is claimable because she had to go to a mediation conducted by the Small Business Commissioner as a result of the managing agents' misleading conduct. She had no choice because they would not admit their mistakes and so she had to come to the Tribunal. Going to the mediation with the Small Business Commissioner was a necessary step in that process.

105 The managing agent and the landlord dispute liability for the mediation fee. They dispute that it can be claimed as damages, and say that if the fee can be claimed at all, it must be claimed as costs on the basis that the mediation fee was incurred as part of the process of getting before the Tribunal.

106 I reject the proposition that the mediation fee is a cost of the proceeding. It is a fee paid not to the Tribunal, but to another entity. And it was paid in or about September 2015, the month before this proceeding was begun. If the mediation fee is recoverable, it must be recoverable as damages.

107 Before I address the specific question of whether the mediation fee constitutes damages, it is appropriate that I acknowledge that the managing agent and the landlord correctly submitted that *Hadley v Baxendale*[6] sets out the rules governing remoteness of damage in a claim for breach of contract. In their submissions, the managing agent and the landlord quote the following well known passage from the judgement of Alderson J:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

108 In my view the recoverability of the mediation fee damages is linked to the status of the lease. If the lease was a lease of *retail premises* for the

6 (1854) 9 Ex 341.

purposes of the *Retail Leases Act 2003* ('the RLA'), then I might have been disposed to have allowed recovery of the mediation fee by reason of the operation of s 87 of the RLA. This section provides that every retail tenancy dispute, other than a proceeding for an order in the nature of the injunction, must be referred to the Small Business Commissioner for mediation or another appropriate form of alternative dispute resolution, before it is brought to the Tribunal. Had the premises been governed by the RLA, then, in the event a dispute arose, the incurring of a mediation fee charged by the Small Business Commissioner would presumably have been in the contemplation of the parties at the time they formed the lease, and in this way would have been recoverable under the second limb of the rule in *Hadley v Baxendale*.

109 However, it was conceded by Ms Zhang during the hearing that the RLA did not apply to the lease. Accordingly, there was no need for the mediation fee of $195 to have been incurred. I find that it is not recoverable as damages.

Accountant's fees

110 The tenant makes a claim for accounting fees invoiced in May 2016 totalling $8,910. These are fees which Ms Zhang deposed the tenant had paid to its accountants HMG Pacific. The supporting invoice put into evidence indicated the base payment of $8,100 related to:

> [O]ur professional fees and disbursements due in relation to:
>
> Fiscal Year-2013, 2014 and 2015

111 The tenant also makes a claim in respect of four other invoices which were put into evidence on the second day of the hearing. These related to a meeting between the parties respective accountants at Biggin & Scott on 24 March 2017, and work prior to and following that meeting including preparation of a further reconciliation, and preparation of a letter addressed to the Tribunal. The invoices (all inclusive of GST) were respectively:

(a) an invoice dated 22 March 2017 for $3,300;

(b) an invoice dated 24 March 2017 for $1,320;

(c) an invoice dated 30 March 2017 for $1,980; and

(d) an invoice dated 23 May 2017 for $1,100.

112 On the first day of the hearing the invoice dated 16 May 2016 was attacked by the managing agent and the landlord on the basis that it was not clear on its face that the work was limited to the forensic task of identifying precisely what was paid and what ought to have been paid by the tenant to the landlord under the lease.

113 Ms Zhang confirmed in response that in each of those years, tax returns had been filed separately, and that the invoice related to the work her accountant had specifically carried out in order to confirm that the July 2015 invoice

was incorrect. She said the invoice is claimable as damages as it flowed from the misleading invoice.

114 Mr Silver pointed out that no report had been submitted by HMG Pacific, nor had any evidence been given by the tenant's accountant, Mr Yim. At this point on the first day I gave the parties a *Jones v Dunkel* warning, and from this point, at least, Ms Zhang was aware that her failure to call Mr Yim might lead to the managing agent and the landlord making a submission to the Tribunal that the failure to call him entitled the Tribunal to draw an inference that his evidence would not have been helpful to the tenant's case.

115 On the second day of the hearing, Mr Yim was not available to give evidence. No arrangement had been made by Ms Zhang to put him in the witness box, or even have him available to give evidence by telephone.

116 Ms Zhang took advantage of the fact that the case ran into a third day to do two things in relation to her claim for accountant's fees. Firstly, in order to rectify the lack of detail contained in the original invoice from HMG Pacific dated 16 May 2016, which had been tendered, she handed up an amended invoice also dated 16 May 2016, which gave further detail about the work carried out. Secondly, she called Mr Yim as a witness by telephone.

117 Counsel for the managing agent and the landlord also took advantage of the fact that the case ran into to a third day, in order to cross-examine Ms Zhang. Critically, counsel obtained a concession that each of the invoices related to work by the tenant's accountant in respect of the proceeding.

118 That concession is, I consider, determinative of the issue of whether the invoice of HMG Pacific dated 16 May 2016 is claimable as damages as distinct from costs, because it means that the work of HMG Pacific in May 2016 was preparatory to the issuing of the application. The tenant's purpose in engaging Mr Yim was clearly to formulate a claim in the Tribunal. Accordingly, the accountant's fees invoiced in May 2016 are clearly costs of the proceeding.

119 The fees reflected in the HMG Pacific invoices dated 22 March 2017, 24 March 2017 and 30 March 2017 are related to the meeting of accountants on 24 March 2017 which was agreed to on the first day of the hearing. The work accordingly related to the proceeding, and the invoices are therefore are also to be characterised as costs.

120 The final invoice from HMG Pacific related to preparation for and attendance at a meeting, and the drafting of the letter addressed to the Tribunal dated 23 May 2017. This invoice also is to be treated as costs.

COSTS AND REIMBURSEMENT OF FEES

121 On the last day of the hearing I was invited to accept submissions regarding costs after I had delivered my substantive decision. I propose to adopt that course.

122 I also intend to grant leave to the parties to make submissions regarding VCAT reimbursement of fees under s 115B of the VCAT Act

INTEREST

123 In its submissions, the tenant confirmed that it is seeking interest on 'overdue money'. The tenant referred to item 14 of the schedule to the lease, which indicates that the interest rate payable on overdue money is:

> 2% higher than the interest for the time being fixed at the time of default under Section 2 of the Penalty Interest Rates Act 1983.

124 Reference to the lease indicates that interest on overdue money is payable, under clause 3.6, to money which the **tenant** has not paid within seven days of the due date. Accordingly there is no express entitlement in the tenant to receive interest on money which is overdue from the landlord.

125 The Tribunal does not have a general power to award interest under the VCAT Act. However, the Tribunal may award interest if it is empowered to do so by an enabling act.

126 As I have found that the premises are not *retail premises* for the purposes of the RLA, I have no power under that to award a range of interest over that Act.[7]

127 However, the Tribunal has jurisdiction in relation to any dispute arising under the lease on the basis that it is a contract for the provision of services, and the accordingly constitutes a consumer and trade dispute as defined in s 182 of the Australian Consumer Law and Fair Trading Act 2012 ('the ACLFT Act').

128 Under s 184(2)(b)(ii) of the ACLFT Act the Tribunal has jurisdiction to award damages in the nature of interest. And under s 184(4) of that Act the Tribunal may base an award of damages in the nature of interest on the interest rate fixed from time to time under s 2 of the *Penalty Interest Rates Act 1983*, or any lesser rate it thinks appropriate.

129 An award of damages in the nature of interest is discretionary, and there must be grounds to justify such an order. I have found that the tenant is entitled to a total award of damages of $8,246.31 comprising $1,027.56 which the managing agent and the landlord conceded was due, and $7,218.85 in respect of cleaning which I have effectively found they wrongly charged after the lease had been brought to an end. In practical terms the tenant has been out of its money since July 2015, because if the invoice for $10,333.13 had not been raised in July 2015, the bond would

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[7] See *Retail Leases Act 2003* s91(2).

have been returned. As noted, there is no contractual entitlement in the lease on which the tenant can rely to recover interest from July 2015. However, I find it is appropriate that I award interest on the sum of $8,246.31 calculated between the date of institution of the proceeding, namely 19 October 2015, and today. I can see no reason not to adopt the interest rate fixed from time to time under s 2 of the *Penalty Interest Rates Act 1983.*

130 I accordingly find that the tenant is entitled to payment of interest on the principal sum of $8,246.31 in the sum of $1,505.80, as follows:

471 days between 19 October 2015 and 31 January 2017, at 9.5% per annum, or $2.1417 cents per day, a total of $1,008.76; and

220 days between 1 February 2017 and 8 September 2017 at 10% per annum, or $2.2593 cents per day, a total of $497.04.

131 As the award of damages of $8,246.31 is to be made against both the managing agent and the landlord, the award of damages in the nature of interest should be against both respondents also.

SUMMARY

132 I have found above that the tenant is entitled to an order for payment of $8,246.31 against both the managing agent and the landlord.

133 To that sum must be added award of $1,505.80 in the nature of interest against both the managing agent and the landlord.

134 The tenant is entitled to orders for the payment of monies totalling $9,752.11 against both the managing agent and the landlord.

135 Costs, and reimbursement of fees under s 115B of the VCAT Act are reserved pending receipt of submissions from the parties.

C Edquist
Member