VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP179/2014

CATCHWORDS

RETAIL LEASES–*Retail Leases Act 2003* section 52(2)(a)–whether damage to the floor and sub-floor of the premises was caused by the landlord failing to maintain "the structure of, and fixtures in the premises", in a condition consistent with that when the lease was entered into, or whether the need for repair of the damage arose out of "misuse" by the tenant within the meaning of section 52(3)–found that the damage was caused by misuse by the tenant.

Retail Leases Act 2003 section 52(2)–whether the tenant failed to give access to the landlord so as to excuse the landlord from complying with any obligation to maintain.

Tenant found to have been in default of the lease by reason of causing damage to the floor and sub-floor of premises, and in not providing access to the landlord.

Retail Leases Act 2003 section 57(a)–whether the tenant was also in default of its obligation to pay rent (comprising CPI increases first charged by the landlord in August 2014 for the period 1 June 2010-30 May 2014, and later charged for subsequent periods)–whether the tenant was justified in not paying rent either on the ground that valid tax invoices had not been received, or that the premises were unable to be used, or on the ground that their usage was reduced or were inaccessible during the relevant periods–insufficient evidence justifying a finding in the tenant's favour–tenant found to be in default of the lease for this further reason.

Retail Leases Act 2003 section 27–option to renew–whether at the date of the purported exercise of the option by the tenant, it was in default of the lease or had persistently defaulted under the lease, about which the landlord had given the tenant written notice, such that the option was not validly exercisable–held that, as a consequence of the defaults, the option was not validly exercised.

Retail Leases Act 2003 section 54(2)(d), (e)(ii) and (f)–whether the tenant is entitled to compensation by reason of the failure of the landlord to do any of the things therein described–found that there were no such failures.

Relief against forfeiture–whether, notwithstanding the failure by the tenant to exercise its option in accordance with the terms of the lease, whether a claim by the tenant for relief from forfeiture of the term the subject of the purported exercise of the option should be granted–claim for relief dismissed.

Retail Leases Act 2003-section 77–whether unconscionable conduct of the landlord-section 80–whether the landlord was not entitled to insist on strict compliance by the tenant with its option to renew, on the grounds of alleged unconscionable conduct on the part of the landlord–claim dismissed.

PRACTICE AND PROCEDURE–whether, notwithstanding that the tenant did not give notice of its intended reliance on a term of the lease as a defence to the counterclaim for the cost of repairs, it should nevertheless be allowed to rely on the term–whether failure to give notice resulted in material prejudice to the landlord.

APPLICANT (First Respondent to Counterclaim)	Grenville Trading Pty Ltd
Second Respondent to Counterclaim	Wayne Hall
RESPONDENT Counterclaimant	Robert Braszell
WHERE HELD	Melbourne

BEFORE	A T Kincaid, Member
HEARING TYPE	Hearing
DATE OF HEARING	14-18 November 2016, 21-25 November 2016. Oral submissions 10 March 2017, final oral submissions 30 August 2017.
DATE OF ORDER	6 September 2017.
CITATION	Grenville Trading Pty Ltd v Braszell (No 3) (Building and Property) [2017] VCAT 1426

ORDERS

1. The claim by the applicant for damages is dismissed.
2. The claim by the applicant for relief against forfeiture of the term sought by the purported exercise of the option is dismissed.
3. The claim by the respondent for an order that the respondent make good the premises such that they comply with the relevant authorities' requirements, and can then be lawfully occupied and used by the applicant in accordance with the lease, is dismissed.

ORDERS ON THE COUNTERCLAIM

1. It is declared that the lease ended on 19 June 2015.
2. The applicant and the second respondent to counterclaim must pay the respondent $20,591.01 arrears of rent for the period to 30 September 2014.
3. The applicant and the second respondent to counterclaim must pay the respondent $138,591.01 (being rent payable under the lease from 1 October 2014 to 19 June 2015, and damages in the nature of lost rent thereafter to 31 October 2016).
4. The applicant and the second respondent to counterclaim must pay the respondent $56,380.62 (being damages in the nature of lost rent from 1 November 2016 to 6 September 2017).
5. The applicant and the second respondent to counterclaim must pay the respondent $5,733.60 (being damages for failing to remove the equipment).
6. The applicant must by 4 pm on **30 September 2017** remove the caveat lodged by it on the title of the land on which the premises are located.
7. Liberty to apply in respect of costs.

8. **On application by the parties or one of them, the principal registrar is directed to fix the matter for hearing before Member Kincaid; allow a half day.**

A T Kincaid
Member

APPEARANCES:

For Applicant and Respondents to Counterclaim	Mr P Duggan of Counsel, with Mr T Moloney of Counsel
For Respondent	Mr C Northrop of Counsel

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REASONS

1 This proceeding concerns premises at Vincent Street, Daylesford (the "**premises**"), leased by the applicant (the "**tenant**") from the respondent (the "**landlord**") in early 2010, pursuant to the terms of a lease dated 7 August 2009 (the "**lease**"). The tenant conducted a business at the premises known as the "IGA Supermarket".

2 The dispute comes before the Tribunal because each party alleges that the other was responsible for causing damage to the wooden floor and sub-floor of the premises.

3 This damage resulted in a Building Order dated 5 August 2014 (the "**Building Order**") being served by the Hepburn Shire Council (the "**Council**"), preventing occupation of a section in the western part of the premises used by the tenant for deliveries. As a result, the tenant alleges, it was forced to vacate the premises in September 2014.

4 The premises have remained vacant since then, save for the landlord's accessing the premises for the purpose of carrying out repair works, which are now largely complete.

5 I have found, for the reasons that follow, that:

(a) the damage was caused by the use by the tenant of refrigeration and freezer equipment ("**equipment**") that was too heavy for the floor of the premises, and by the failure of the tenant to rectify faults in the drainage installations forming part of that equipment;

(b) the need to repair the damage arose out of "misuse" by the tenant within the meaning of section 52(3)(a) of *Retail Leases Act 2003* (the "**Act**"), amounting also to a breach by the tenant of clauses 3.1.1 and 3.2.5 of the lease;

(c) to the extent that the need for repair did not arise from "misuse" by the tenant or if, notwithstanding the "misuse", the landlord was by force of clause 3.3.1 of the lease nevertheless obliged to repair the relevant part of the premises, the landlord was unable to comply with this obligation because he was denied access to the damaged portions of the premises for the purpose of doing so;

(d) the tenant was also in further breach of the lease at the time that it purported to exercise its option to renew, by having failed to pay rent to the landlord when demanded;

(e) written notice of breaches of the lease, within the meaning of section 27(2) of the Act, were given by the landlord to the tenant;

(f) as a result of the tenant's breaches, and subsequent notices given by the landlord, the lease came to an end on 19 June 2015, notwithstanding the tenant's purported exercise of its option to renew on 10 June 2015;

(g) no relief against forfeiture can be granted to the tenant under section 89(2) of the Act, or on the grounds of alleged unconscionable conduct by the landlord within the meaning of section 77 of the Act;

(h) the landlord is not entitled to damages in the nature of rectification costs that have resulted from the tenant's breaches of the lease, by reason of clause 3.3.1 of the lease; and

(i) the landlord is entitled to arrears of rent to 19 June 2015, and damages thereafter in respect of the inability of the landlord to re-lease the premises beyond 19 June 2015 by reason of this proceeding.

BACKGROUND

6 The lease was originally between the landlord and a Ms Ruchel as and Five Dollars Pty Ltd ("**Five Dollars**") as tenant. The term was for 5 years commencing 1 June 2009.

7 The permitted use of the premises under the lease was as a licensed grocery store.[1]

8 The commencing rent under the lease from 1 June 2009 was $60,000 plus GST per annum, payable in 12 equal monthly instalments on the first day of each month.[2]

9 By an assignment of lease dated 26 February 2010, the tenant took an assignment of the interest of Five Dollars as tenant under the lease (the "**assignment**").

10 Mr Wayne Hall, the sole director of the tenant ("**Mr Hall**"), and second respondent to the counterclaim, signed the assignment as guarantor of the tenant's obligations.

11 Beyond the initial 5 year term expiring on 31 May 2014, the lease also granted the tenant options in respect of three further terms of 5 years each.

12 The latest date for the tenant exercising the first option for renewal was 1 March 2014.[3]

13 The landlord subsequently became the sole landlord.

14 At the expiry of the term on 31 May 2014, the landlord had not given the tenant notification under section 28 of the Act of the last day for the exercise by the tenant of the option to renew.

15 The Municipal Building Surveyor of the Council served on the tenant a Building Notice dated 12 June 2014, requiring the tenant as occupier to show cause why stipulated works to the western section of the premises should not be carried out.

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1 Item 15 of the Schedule to the lease.
2 Item 6 of the Schedule to the lease.
3 Item 19 of the Schedule to the lease.

16 The Municipal Building Surveyor served on the tenant an amended Building Notice dated 16 June 2014, requiring the evacuation of the western section of the premises, in reliance on a report of "Ross Proud, [Structural and Civil Engineer] dated 13 June 2014". The report dated 13 June 2014 was not in evidence.

17 On 5 August 2014, the Municipal Building Surveyor of the Council served on the landlord the Building Order, prohibiting occupation of the western section of the premises,[4] until stipulated works had been carried out.

18 The tenant vacated the premises in late September 2014 when, as a result of the Building Order, it alleges that it could no longer trade.[5]

19 It was not until 19 December 2014, that the landlord gave notice under section 28 of the Act of the last day for the exercise by the tenant of the option to renew (being 19 June 2015) and so, pursuant to section 28(2)(b) of the Act, the lease continued to 19 June 2015, on the same terms and conditions of the lease.

20 By email dated 10 June 2015, the tenant purported to exercise its option to renew.

21 By a caveat lodged on 28 January 2016, the tenant claimed a leasehold interest in the land on which the premises are located, and has not since removed the caveat.

THE COURSE OF THE PROCEEDING

22 The tenant started the proceeding on 7 August 2014, seeking injunctive relief, and compensation for losses arising from the alleged structural failure of the premises.

23 The tenant sought the following relief:

(a) that the landlord immediately commence structural repairs to the premises as identified in the [Building Notice] of 16 July 2014[6] and [the Building Order].

(b) that the landlord be injuncted from preventing access to the premises by [the tenant]; and

(c) that the landlord compensate the tenant for losses arising from the structural failures of the premises.

24 A directions hearing was held at the Tribunal on 10 October 2014, when various orders were made listing the proceeding for a compulsory conference on 20 February 2015.

25 The tenant filed Points of Claim dated 24 October 2014 ("**Points of Claim**").

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4 The western section was described in a plan drawn by Mr Proud office entitled "SK-04" dated April 2006.

5 See affidavit of Ms Decis sworn on behalf of the tenet on 7 August 2014 at [13].

6 This was presumably intended to be a reference to the amended Building Notice dated 16 June 2014.

26 By the Points of Claim, the tenant relevantly alleged:

> 1. The [tenant held] and currently holds the lease for [the premises and] operates, to the extent permissible by the physical condition of [the premises], the business of selling groceries
>
> …
>
> 9. By the end of August 2014, the premises had become unsafe and unusable for the permitted purpose…
>
> 10. The sub floor of the Supermarket had become so damaged [by the end of August 2014] by the long term effects of water exposure it had failed, or was near failure, in so many parts that it was not possible to continue the operation of the Supermarket. …While the operations were continued as long as possible and every attempt was made to mitigate loss, cessation of operations was the only alternative available to the [tenant]. The Supermarket was closed to the public on 24 September 2014.
>
> …
>
> 17. The necessity to cease trading due to the unsafe and unusable state of the premises has caused [the tenant] loss and damage.
>
> 18. In the circumstances the [landlord] is liable to make good the premises such that they comply with all relevant authorities and standards and such that the premises can lawfully be used [by the tenant] for the permitted purpose identified in the lease.

27 The landlord filed a Defence and Points of Counterclaim ("**Points of Counterclaim**") dated 26 November 2014, seeking declaratory relief, and rent arrears of $20,591.01.

28 I determined an agreed preliminary question, discussed below, by orders dated 3 July 2015.

29 The parties unsuccessfully attempted to resolve the proceeding at a compulsory conference on 21 September 2015.

30 At a directions hearing on 3 December 2015, the proceeding was set down for hearing on 16 May 2016.

31 The landlord filed Points of Defence and Amended Points of Counterclaim dated 22 March 2016.

32 The hearing did not take place on 16 May 2016. Instead, I heard argument on a further agreed preliminary question, and I determined it by orders dated 30 May 2016.

33 The hearing took place over 10 days in November 2016, during which time I also conducted a view of the premises.

34 On 16 November 2016, the tenant tendered a proposed Further Amended Points of Claim, and I subsequently granted leave for it to be filed and served on 18 November 2016 (the "**Further Amended Points of Claim**").

35 At the hearing, the tenant led evidence from:

(a) Mr Wayne Hall, the sole director of the tenant;[7]

(b) Ms Elizabeth Decis, Mr Hall's daughter, previously the manager of the supermarket;[8]

(c) Ms Ruchel, previously co-landlord;[9]

(d) Ms Melissa Scoble, who worked at the premises from about 2007 to the end of 2010;[10]

(e) Clayton Scoble, the husband of Melissa Scoble, a carpenter, who undertook carpentry works at the premises from about 2009 and through to 2010;[11] and

(f) Mr P Bruce Wilkinson, Chartered Accountant.

36 The landlord gave evidence,[12] and he also relied on expert evidence from Mr Michael McCann, Chartered Accountant, concerning the tenant's claimed damages.

37 I also heard concurrent evidence from experts providing opinion on the cause of the damage to the premises, being:

(a) Mr Ross Proud, Chartered Professional Engineer, engaged by the tenant;

(b) Mr Bruce Cossins, Registered Engineer and Building Surveyor, engaged by the landlord; and

(c) Mr Bruce Hollioake, consulting civil and structural engineer, engaged by the landlord.

38 By way of general summary, Messrs Cossins and Hollioake gave evidence that, in their respective opinions, the cause of the damage to the floor and sub-floor was leakage from the equipment. Mr Proud and Mr Shaw respectively gave evidence that the principal cause of the damage was high ambient moisture caused by lack of sub-floor ventilation and a leaking storm gutter located in the north parapet of the premises.

39 The tenant also relied on evidence from Mr Peter Shaw, who had become familiar with the premises in 2006, and who had been previously been engaged by the tenant in June 2014 to liaise with the landlord concerning

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7 See also Mr Hall's witness statement at A's TB pp 37-47 and affidavit sworn 19 February 2015, and affidavit sworn 3 May 2016 at A's TB pp 277-285.

8 See also her affidavit sworn 7 August 2014.

9 See also Ms Ruchel's witness statement at A's TB pp 161-162.

10 See also Ms Scoble's witness statement at A's TB pp 124-125.

11 See also Mr Scoble's witness statement at A's TB pp 121-123.

12 See also Mr Braszell's affidavits sworn 12 August 2014, 12 December 2014, 17 February 2015 and 24 February 2015, and his witness statements at R's TB 91-314.

floor rectification proposals then the subject of discussions between the parties. Mr Shaw's area of expertise is the design and construction of supermarkets, having also been the state retail development manager of IGA Distribution Pty Ltd. He was engaged by the tenant in August 2014 to provide a report on the cause and origin of the sub-floor damage.

WHAT EACH PARTY SEEKS

The tenant's case

40 By the Further Amended Point of Claim, the tenant relies on a condition of the lease taken to be provided by section 52 of the Act, which states:

> 52 **Landlord's liability for repairs**
>
> (1) A retail premises lease is taken to provide as set out in this section.
>
> (2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into—
>
> (a) the structure of, and fixtures in, the retail premises; and
>
> (b) plant and equipment at the retail premises; and
>
> (c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.
>
> (3) However, the landlord is not responsible for maintaining those things [referred to in section 52(2)] if—
>
> (a) the need for the repair arises out of misuse by the tenant;
>
> (b)…

41 Given my finding, later in these Reasons, that the lease was not renewed by the tenant, on account of being in default of the lease at the time it purported to exercise its option to renew, I find that the date when the lease "was entered into" for the purpose of section 52(2) of the Act, was 1 June 2009 (the "**comparator date**").

42 The tenant says that works required to comply with the Building Order were those for which the landlord was responsible for carrying out pursuant to section 52(2)(a) of the Act, in order to maintain the structure of the premises in a condition consistent with the condition of the premises on the comparator date.

43 The tenant also relies on a condition of the lease taken to be provided by section 54 of the Act, which states:

> 54 **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—

…

(d) fails to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises; or

…

(e) fails to rectify as soon as practicable—

…

(ii) any defect in the retail premises or in the building or retail shopping centre in which the retail premises are located, other than a defect due to a condition that would have been reasonably apparent to the tenant when entering into or renewing the lease or when the tenant accepted assignment of the lease; or

(f)` neglects adequately to clean, maintain or repair the building or retail shopping centre in which the retail premises are located (but not the retail premises themselves).

44 The tenant also says that the failure by the landlord to do the things provided in sections 54(2)(d), (e)(ii) and (f) of the Act, results in an obligation to pay compensation to the tenant.

45 The tenant also claims damages, comprising:

(a) Past loss of operating profits from 1 July 2014-30 November 2016 in the amount of $370,000; and

(b) loss of value of its business in the amount of $565,000.

46 The tenant also claims that the landlord engaged in unconscionable conduct, contrary to section 77 of the Act, when the landlord failed to ensure that repairs were commenced and completed, despite the landlord's alleged repeated representations that he or his insurer would so.

47 In the event that it fails in its claim for a declaration that it has properly exercised its option to renew the lease, the tenant seeks relief against forfeiture.

The landlord's case

48 The landlord contends that damage to the premises arose between the comparator date and August 2014, and most likely during the period

between May 2010 and 5 August 2014, the date of the Building Order. He contends that damage to the floor and sub-floor was caused by leaking equipment owned by the tenant, and by the equipment being too heavy for the floor of the premises. He therefore claims that the need for repair of the structure of the premises arose out of "misuse" by the tenant within the meaning of section 52(3)(a) of the Act, and therefore no liability arose on his part under section 52(2) of the Act to maintain the structure of the premises.

49 The landlord also contends in paragraph 26 of his Second Amended Counterclaim dated 22 August 2016, that the tenant was thereby in breach of clauses 3.1.1, 3.1.2, 3.2.5 and 3.3.2 of the lease when it purported to exercise its option to renew the lease on 10 June 2015. These clauses (and referred clause 6.2) provide:

> **3. REPAIRS, MAINTENANCE, FIRE PREVENTION AND REQUIREMENTS OF AUTHORITIES**
>
> **Clause 3.1**
>
> Subject to clause 3.3, the tenant must:
>
> 3.1.1 keep the premises in the same condition as at the start of the lease, except for fair wear and tear; and
>
> 3.1.2 comply with all notices and orders affecting the premises which are issued during the term.
>
> **Clause 3.2**
>
> In addition to its obligations under 3.1, the tenant must:
>
> …
>
> 3.2.5 maintain in working order all plumbing, drainage, gas, electric, solar and sewage installations.
>
> …
>
> **Clause 3.3**
>
> 3.3. The tenant is not obliged
>
> 3.3.1 to repair damage against which the landlord must insure under clause 6.2 unless the landlord loses the benefit of the insurance because of acts or omissions by the tenant or the tenant's agents.
>
> 3.3.2 to carry out structural or capital repairs or alterations or make payments of a capital nature unless the need for them results from:
>
> (a) negligence by the tenant or the tenant's agents,
>
> (b) the failure by the tenant to perform its obligations under this lease
>
> (c) the tenant's use of the premises, other than reasonable use for the permitted use, or

(d) the nature, location or use of the tenants installations

in which the case the repairs, alterations or payments are the responsibility of the tenant.

6. LANDLORD'S OBLIGATIONS

Clause 6.2

The landlord must take out at the start of the term and keep current policies of insurance for the risks listed in item 11 against:

6.2.1 damage to and destruction of the building, for its replacement value;

6.2.2 removal of debris

…

50 For completeness, I should add that there is the following further clause in the lease:

LANDLORD'S OBLIGATIONS

…

Clause 6.4

The landlord must keep the structure (including the external faces and roof) of the building and the landlord's installations in a condition consistent with their condition at the start of the lease, but is not responsible for repairs which are the responsibility of the tenant under clauses 3.1, 3.2 and 3.3.2.

51 In addition to these alleged breaches, the landlord also alleges that when it purported to exercise the option to renew on 10 June 2015, the tenant was in breach of its obligation to pay the rent in accordance with the lease (being such part of the rent as is referrable to annual CPI reviews), for the years starting 1 June 2010, 1 June 2011, 1 June 2012, 1 June 2013, and 1 June 2014. He submits that the tenant never sought a declaration to the effect that it was entitled to an abatement of rent pursuant to section 57 of the Act but that, in any event, such entitlement did not arise on the facts.

52 In respect of these alleged breaches, the landlord relies on section 27(2) of the Act, which states:

(2) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the only circumstances in which the option is not exercised at all is if—

(a) the tenant has not remedied any default under the lease about which the landlord has given the tenant written notice; or

(b) the tenant has persistently defaulted under the lease throughout its term and the landlord has given the tenant written notice of the defaults.[13]

53 The landlord submits that the various claimed defaults of the tenant under the lease, about which the landlord alleges he gave written notice within the meaning of section 27(2)(a) of the Act, were not remedied at the date that the tenant purported to exercise the option to renew on 10 June 2015, and therefore the lease came to an end on 19 June 2015.

54 The landlord says that any damages to which the tenant may be entitled as the result of any breach on his part of section 52 of the Act and/or the lease may therefore only be taken to 19 June 2015, and not beyond.

55 The tenant submits in reply that the landlord's unconscionable conduct prevents the landlord from insisting on strict compliance with the statutory requirements set out in section 27(2) of the Act.

56 The landlord also says that the tenant's claim for damages, or compensation arising from alleged breaches by the landlord of sections 54(2)(d), (e)(ii) and (f) of the Act, or from a breach by the landlord of the term implied by section 52(2)(a) of the Act or otherwise fails, because the tenant did not remove the equipment when it was bound to do so, and therefore unreasonably failed to give the landlord access for the purpose of complying with its own obligations.

57 The landlord seeks:

(a) a declaration that the lease therefore came to an end on 19 June 2015 [14] as a consequence of the tenant's alleged failure properly to exercise its option to renew.

(b) arrears of rent (comprising CPI increases) in the sum of $20,591.01 for the period to the end of September 2014;

(c) arrears of rent from 1 October 2014-19 June 2015, and damages thereafter to 31 October 2016 in the amount of $138,231;

(d) damages, by reference to continuing loss of rent from 1 November 2016 in the sum of $5,529 per month;

(e) damages, being expenses allegedly incurred by the landlord to third parties incurred in carrying out rectification works to the damaged floor and sub-floor of the premises caused by the tenant's misuse, in the amount of approximately $79,000; and

(f) damages, being the value of the landlord's own time allegedly taken to undertake these rectification works, in the amount of approximately $96,000.

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13 Clause 12.1 of the lease is to similar effect.

14 See Second Amended Counterclaim (TB "Pleadings Only", pp 43-50).

The tenant's case-new arguments of the tenant arising in its closing written submissions

58 In addition to the above pleaded matters, as late as in its written submissions filed following the hearing, and in defence to the landlord's claims referred to in sub-paragraphs (e) and (f) of the foregoing paragraph, the tenant sought to rely on clause 3.3.1 of the lease.

59 It is common ground that on about 21 July 2014, the landlord received the sum of $170,827.91 from his insurer in respect of the cost of anticipated repairs to the premises, and that this amount was received following the landlord making an insurance claim to which I have referred, under an insurance policy taken out pursuant to clause 6.2 of the lease.

60 The tenant says that given that the landlord's claimed maximum rectification damages (being the amounts paid to third parties, and the claimed value of the landlord's own time) amount to $175,000, and that the rectification damages to which the landlord may be entitled is, in its view, a much lesser sum, the landlord has therefore received a complete indemnity from his insurer. It submits that the effect of clause 3.3.1 of the lease, given that the landlord has received an indemnity in respect of the relevant damage, is that the tenant is not required to pay to the landlord damages referrable to the cost of repair.

61 The landlord objects to the tenant now relying on clause 3.3.1 of the lease as a defence to the landlord's claim for rectification damages. He contends in reply that the evidence showed that not all the expenses incurred by the landlord were covered by insurance, for example the cost of removing the equipment. The evidence did indeed confirmed this. The landlord says that by reason of the tenant's late reliance on clause 3.3.1, the landlord has been deprived of the opportunity to elicit evidence of what was covered by insurance, and what was not.

62 At a brief directions hearing that I held on 30 August 2017, the landlord's Counsel submitted that whilst maintaining its objection to the tenant relying on clause 3.3.1 of the lease, it did not wish to avail itself of an opportunity to call further evidence in respect of this issue, or to make any submissions as to whether clause 3.3.1 of the lease may affect the liability of the tenant in respect of any claimed breach.

63 The Tribunal is not a court of pleadings. Section 98 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**VCAT Act**") states:

> 98 **General Procedure**
>
> (1) The Tribunal—
>
> (a) is bound by the rules of natural justice;
>
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;
>
> (c) may inform itself an any matter as it sees fit;

(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of [the] Act and the enabling enactment in a proper consideration of the matters before a permit.

64 Further, Section 97 of the Act provides:

> **97 Tribunal must act fairly**
>
> The Tribunal must act fairly and according to the substantial merits of the case and all proceedings.

65 I have concluded that, also having regard to these provisions of the VCAT Act, the tenant should not be prevented from relying on the meaning and effect of clause 3.3.1 of the lease by way of defence to the landlord's claim for damages by reference to claimed rectification costs.

66 The lease was plainly and evidence, and its provisions were at all times well known to the parties.

67 Further, as early as the tenant's Amended Points of Claim dated 28 April 2016, the tenant alleged that the landlord had acted unconscionably within the meaning of section 77 of the Act in, among other claimed instances of conduct:

> …[failing] to disclose when [the landlord] was paid insurance monies…for the express purpose of replacing the floor and subfloor on 7 July 2014
>
> **PARTICULARS**
>
> $170,000 was paid by the [landlord's] insurer further to a claim made by [the landlord] in reference to the floor as it was in [May 2010] (the documentation pertaining to same remains undisclosed as at the date of filing [this Amended Points of Claim] despite request for same from [the landlord].

68 By its Second Amended Points of Claim dated 18 November 2016, the tenant continued to allege:

> 23. The landlord-
>
> (a) on or about 21 July 2014 received $170, 827.81 from its insurer…as indemnity for the likely reasonable costs to the landlord of reinstating the [premises] to a standard sufficient to enable tenant to resume its occupation and business;
>
> (b) thereafter failed to disclose his receipt of the insurance payout to the Tribunal or to the [tenant] in any of the three versions of its Points of Counterclaim in this proceeding or to give credit for that payment; and
>
> (c) thereby conducted this proceeding in a way which was vexatious within the meaning of section 92(2) of [the Act].

69 The claimed obligation of the landlord to give credit to the tenant for the amount of the indemnity was thereby put firmly in issue by the tenant, if not the clause of the lease which has now become the primary basis for the tenant submitting that the landlord is bound to do so.

70 Further, as appears above, the landlord specifically relies for its claim on clauses 3.1.1, 3.2.5 and 3.3.2 of the lease. It would, I consider, be contrary to notions of fairness if, the landlord having declined the opportunity to call further evidence on the point, the tenant was now prevented from relying on the meaning and effect of clause 3.3.1 of the lease.

71 I have concluded that the effect of clause 3.3.2 and 6.4 of the lease is that the tenant must carry out structural or capital repairs of the type under consideration in this proceeding and/or "make payments of a capital nature" in respect of them, if the need for them arises from those matters listed in clause 3.3.2(a)-(d) of the lease. By force of clause 3.3.1, however, the tenant is not obliged to do so if the relevant damage, howsoever caused, is damage against which the landlord must insure under clause 6.2 of the lease.

72 I find that the landlord duly insured against the risk that caused the damage to the premises and that, having chosen to call no further evidence in respect of the issue, he has been indemnified in respect of the rectification costs which, I have found, he is entitled to be paid by way of damages, with the exception of the cost of the landlord's removing the refrigeration equipment. I find from the evidence that the landlord has incurred $1,733.60 in removing costs to date, and will incur a further $4,000 to complete the removal.

73 I find that by reason of clause 3.3.1 of the lease the tenant was not obliged, pursuant to clause 3.3.2 of the lease, to carry out the repairs, whether caused by the tenant's "misuse" or otherwise. I also find that clause 3.3.1, reasonably construed, and having regard to the amount of the indemnity received by the landlord, also excuses the tenant from being "responsible for making payments" to the landlord or to anyone pursuant to clause 3.3.2 of the lease in respect of such repairs.

74 If I am incorrect in allowing the tenant to rely on clause 3.3.1 of the lease, or in my construction of the effect of the relevant clauses as leads to my finding, I address below the quantum of damages to which, but for my findings, the landlord would be entitled.

FIRST PRELIMINARY QUESTION DETERMINED ON 3 JULY 2015

75 I have mentioned that I determined a preliminary question between the parties by orders dated 3 July 2015. I now provide more detail.

76 On 8 December 2014 the tenant's solicitor requested the Tribunal to list the matter for an injunction to prevent the landlord from selling the equipment.

77 The threatened application was resolved by agreement at the hearing before me on 15 December 2014.

78 On that date, one of the matters in dispute was whether the tenant still had a lease over the premises.[15]

79 At that time, paragraphs 32-36 of the Points of Counterclaim dated 26 November 2014 read as follows:

> 32. Further, in breach of the terms of the lease the tenant failed to pay rent in accordance with the terms of the lease.
>
> **PARTICULARS**
>
> The tenant did not pay rent increased by CPI as required by the lease for the period 1 June 2010 to 30 September 2014 totalling $20,591.01. A calculation of the arrears is set out in a notice from the landlord to the tenant dated 3 October 2014, a copy of which may be inspected at the office of the respondent's solicitors by prior arrangement.
>
> 33. Further, in breach of the terms of the lease [the tenant]:
>
> (a) abandoned the premises on 24 September 2014;
>
> (b) failed to keep the premises open for business during normal business hours
>
> **PARTICULARS**
>
> The tenant vacated the premises removing all of its property other than certain items of plant and equipment.
>
> 34. By its conduct referred to above the tenant repudiated the lease, which repudiation was or is hereby accepted by the landlord.
>
> 35. Further and alternatively, by its conduct referred to in paragraph 33 above the tenant surrendered the lease, which surrender was or is hereby accepted by the landlord
>
> 36. Further and alternatively, if the term of the lease continued after the date the tenant abandoned the premises, then on 29 October 2014 the landlord re-entered the premises thereby terminating the lease.

80 The parties considered that if the following question was determined one way or another, they would be better able to resolve whether either party is liable to pay any damages to the other and, if so, how much:

> Whether the lease between the applicant and the respondent made 7 August 2009 has ended by reason of the matters pleaded in paragraphs 32-36 of the Points of Counterclaim dated 26 November 2014 (the "**first preliminary question**").

81 I set down the first preliminary question matter for argument, and received submissions on 25 February 2015.

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[15] Putting to one side the landlord's further contention, developed since, that the option to renew was not exercisable by the tenant.

82 I subsequently determined, with Reasons, that the lease between the landlord and the tenant made 7 August 2009 had not ended by reason of the matters alleged in paragraphs 32-36 of the Points of Counterclaim dated 26 November 2014.[16]

FURTHER PRELIMINARY QUESTION DETERMINED ON 30 MAY 2016

83 As a result of submissions made at a directions hearing before me on 9 May 2016, it became clear to me that neither party was ready to proceed with a hearing then set down for 16 May 2016. Among other outstanding matters, each party was seeking further discovery from the other.

84 It will be recalled that the landlord had by then filed and served Points of Defence and Amended Counterclaim dated 22 March 2016.

85 The landlord's counsel submitted at the directions hearing that some of the time then set down for the hearing might still be usefully taken up by hearing the following further preliminary question:

> Whether the lease between the [tenant] and the [landlord] made 7 August 2009 was not renewed by the [tenant] by reason of the matters alleged in paragraphs 40-50 of the Points of Defence and Amended Counterclaim dated 22 March 2016 (the "**further preliminary question**").

86 The matters alleged in paragraphs 40-50 of the Points of Defence and Amended Counterclaim dated 22 March 2016 were, in summary, that:

(a) the purported exercise by the tenant of the option to renew was bad in form; and

(b) at the time of the purported exercise by the tenant of the option to renew:

(i) there were unremedied defaults under the lease about which the landlord had given the tenant written notice; and

(ii) the tenant had persistently defaulted under the lease throughout its term about which the landlord had given the tenant written notice.

87 For proof of unremedied breach, the landlord principally relied on certain findings that I made in reasons accompanying my orders in respect of the first preliminary question to the effect that the tenant was in breach of the lease when it purported to renew the lease on 10 June 2015.

88 The landlord submitted that in the event that the proposed further preliminary question was determined in favour of the landlord, it would considerably reduce the size of the damages claim. That is, if the tenant was found to have been in breach of the lease at the time it purported to renew the lease on 10 June 2015, it would follow that the lease was not renewed. It would then follow that the tenant's damages, if any, would be confined to the period up to 19 June 2015, when the lease otherwise

[16] *Grenville Trading Pty Ltd v Braszell* (Building and Property) [2015] VCAT 985.

expired. If, however, there was a finding that the tenant was not in breach of the lease at the time it purported to renew the lease, it would follow that subject to the tenant succeeding on liability, the tenant's possible damages may be claimed for the period up to the date of expiration of the first 5 year option period (i.e. 31 May 2019) and, given the further renewal options, possibly beyond.

89 On 9 May 2016 I ordered that I would hear the further preliminary questions on 16 May 2016.

90 By orders dated 30 May 2016 I determined, with Reasons, that the matters alleged in paragraphs 40-50 of the Points of Defence and Amended Counterclaim dated 22 March 2016 were insufficient to find that the lease between the landlord and the tenant had not been renewed.[17]

SECTION 52 CLAIM-DID THE LANDLORD FAIL TO MAINTAIN THE STRUCTURE OF, AND FIXTURES IN THE PREMISES?

91 I now deal with the issue of whether the landlord failed to maintain the premises in a condition consistent with their condition at the comparator date, or whether the need to repair arose out of misuse by the tenant.

92 The origin of the dampness and/or water affecting the bearers and joists in the sub-floor of the premises, resulting in structural failure, is a key issue. Was it caused by leaking equipment, or by some other and if so, what cause?

Parties' respective contentions concerning what caused the damage

The tenant's contentions

93 The tenant alleges that the cause of the damage to the floor and the sub-floor of the was by:

(a) water inundation from a failed box gutter on the northern wall of the premises; and

(b) a high ambient moisture in the sub-floor, caused by:

(i) the failure by the landlord to manage ground water pooling in the sub-floor, by an effective sump pump; and

(ii) inadequate sub-floor ventilation, caused by the landlord sealing off the ventilation to the sub-floor area.

94 The tenant originally alleged that the damage to the floor and sub-floor of the premises was also caused by high soil moisture, but this was not pursued.

[17] *Grenville Trading Pty Ltd v Braszell* (Building and Property) [2016] VCAT 877.

The landlords' contentions

95 The landlord says that in 2006 Five Dollars, the previous tenant, incorrectly installed water collection trays, drainage systems, insulation and waterproof membranes associated with its installation of four new cool rooms and six new freezers. This resulted, he says, in water and condensate subsequently leaking onto the floor and sub-floor supporting structures below the equipment of which, he says, he was unaware on 26 February 2010, the date of the assignment from Five Dollars to the tenant. The landlord says that the subsequent failure of the tenant to rectify the drainage installations of the equipment, and/or to remove the equipment, notwithstanding his many requests of it to do so from May 2010, resulted in the exacerbation of the resulting damage between the date that the tenant commenced occupation under the lease (1 March 2010) and the date of the Building Order (5 August 2014).

96 The landlord says that he did not become aware of leaks from the equipment until May 2010, following notice from the tenant that a section of floor had given way.

97 Therefore, the landlord says, the damage did not result from any failure on his part to maintain the premises in a condition consistent with the condition of the premises when the lease was entered into. Rather, he maintains, it was caused by the tenant's "misuse" within the meaning of section 53(3)(a) of the Act, and that he was therefore not obliged under the lease to carry out the necessary structural repairs the subject of the Building Order dated 5 August 2014.

98 I have already addressed the landlord's seeking rectification costs from the tenant, arising from the tenant's alleged failure, during its tenancy, to remedy the leaking equipment by the installation of drainage trays and/or piping to redirect the water flow.

99 The landlord submits that at no time was he given access to the premises, so that he could carry out repairs to the floor and sub-floor. If I find this to have been the case, it would follow that if I find that the need for repair did not arise from the tenant's "misuse" or, if it did, the landlord was nevertheless bound to repair the damage because of the operation of clause 3.3.1 of the lease, the landlord would not be liable to pay damages or compensation to the tenant.

Layout of the premises

100 The premises are depicted in the attached plan ("**the plan**"), with the direction north to the right of the plan. The building is historic, having been constructed in the nineteenth century.

101 The building containing the premises is located on the westerly side of Vincent Street, Daylesford (which runs north-south in the plan), with the retail entrance at the south east corner, on Vincent Street. Albert Street runs

west-east, along the south side of the building, located on the left of the plan.

102 Immediately to the north of the premises is an open car park, owned by the tenant, and previously used by customers of the tenant's business.

103 The floor area of the premises is about 420 m2. The building is single storey, with corrugated iron roof running in four gabled sections from Vincent Street, westwards towards the rear of the premises.

104 There are box gutters along the northern side (above the tenant's land, previously used as a car park), and along the Vincent Street and Albert Street sides of the building.[18] The box gutters are constructed of heavy gauge zinc and colorbond. The northern box gutter is shown in a photograph taken by the landlord on 14 December 2014.[19] There are three joins in the 22 metre length of the northern box gutter, one of which is in the approximate location of the circle traversing the northern wall in the plan, above the liquor cool room.

105 I mention these, as they relate to the tenant's experts' evidence that the box gutter along the north side leaked, contributing to sub-floor dampness, and resulting in structural failure to the sub-floor framing members.

106 There are with 3 other box gutters, at the bottom of each of the roof valleys, separating the gabled sections of the roof.

107 There is a timber framed sub-floor structure comprising bearers and joists, on a mix of timber stumps and brick piers.

108 There are several sub-floor brick walls dividing the sub-floor into a series of smaller areas. There is a sub-floor brick wall, for instance, running west-east, approximately along the line of the freezer cases at locations 5 and 6 on the plan, but there is a gap in this wall, allowing the southerly section of sub-floor to be seen from the northerly sub-floor.

109 The site slopes downwards towards the west from Vincent Street. The subfloor space is therefore extremely limited at the Vincent Street side of the building, but there is a subfloor space about 2 metres in height at the western side of building, towards the rear. Entry here is obtained through a door at the western end, where the sub-floor space west of location 9 and north of location 7 in the plan can be readily inspected. Part of the sub-floor is supported on a mix of hardwood stumps, supported on sole-plates sitting on the concrete flooring, with 200 mm x 50 mm hardwood bearers spanning up to 2.9 m, 140 mm × 45mm hardwood floor joists spaced at about 580mm centres, and with Baltic pine flooring, approximately 22 mm thick.

110 The basement has a concrete floor. There is a room immediately to the north of the basement, accessed through an opening in brickwork. There is

[18] See plans S01 and S02 contained in the fourth Proud report.

[19] A photo of the box gutter appears at exhibit "RBWS-4" to the landlord's witness statement dated 29 April 2016

a sump pit located there. It measures 400mm x 400mm and is about 400mm deep. There is a 25mm pipe in the sump pit that acts as a drain for water from under the footings, in the event of heavy and prolonged rainfall. The room where the sump pit is located is about 320mm below the concrete basement floor.

111 The plan has certain locations numbered 1-11, depicting the following items:

No on plan	Description
1	1 upright refrigerated display cabinet (cold drinks etc).
2	1 upright refrigerated display cabinet in 3 modules (from left to right) (meat, produce and produce).
3	Dairy cool room
4	1 upright refrigerated display cabinet (dairy)
5 and 6	3 upright freezer display cabinets
7	1 dairy freezer
8	Liquor cool room (on stage, above ground floor)
9	Access by customers to liquor cool room (on stage, above ground floor)
10	1 upright refrigerated display cabinet (delicatessen), hot food adjacent.
11	1 upright refrigerated display cabinet (cold drinks etc).

112 The cool room and freezers were cooled by a vapour compression refrigeration system. Such a system uses liquid "refrigerant", circulating in pipes in a closed environment which, in summary, absorbs heat from the space to be cooled and expels it to atmosphere by a "condenser".

113 "Compressor" and condenser units, two of the four main components of the system, are located outside the west wall of the premises, which are used to cool the freezer units at locations 5 and 6, the dairy freezer at location 7 and the liquor cool room at location 9 in the plan.

114 The third main item of equipment in the system is the "expansion valve" which, by applying an abrubt reduction in pressure to the liquid refrigerant coming from the condensor, lowers the temperature of the refrigerant to a point colder than the space to be refrigerated.

115 The fourth unit in the system is the evaporator, located in the enclosed space to be cooled, which lowers the temperature there to the desired

temperature by absorbing the warm humid air from the space, and releasing cool dry air by a fan into the space.

116 The refrigeration system involves the cooling of air below its dewpoint, which causes "condensation" from the air that is cooled. Ice will also be produced in a freezer-type unit. Water run-off from both condensate and ice is usually managed mechanically by trays and condensate drain lines.

117 A report dated 6 May 2016 of Mr James Nugent, refrigeration engineer of Invertech Pty Ltd, provides support for the proposition, generally accepted by the parties, that there are a number potential sources of water (such as condensate), and that the drainage arrangements forming part of such refrigeration systems (including condensate drain lines to waste, and "suction" lines carrying refrigerant to the compressor) must be effective. The report makes clear that both the refrigerant piping and the drainage piping associated with refrigeration systems should be well insulated and vapour sealed.

118 I find that the collection trays and drain lines forming part of the 3 upright freezer display units at locations 5 and 6, the dairy freezer at location 7 and the cool room at location 9, are "drainage installations" within the meaning of clause 3.2.5 of the lease.

DETAILED HISTORY

119 I now consider the history of the matter, as disclosed by the correspondence between the parties.

120 It is a lengthy recitation, because:

(a) it includes the opinions of the experts concerning the cause of the damage to the floor and sub-floor;

(b) it is relevant to claim of the landlord that the tenant failed to provide access to the landlord (by not removing the equipment) for the purpose of the landlord carrying out repairs; and

(c) it is also relevant to the claims of the tenant that the landlord:

(i) failed to take those steps set out in section 54 of the Act; and

(ii) unconscionably refused to reinstate the premises, notwithstanding his alleged agreement to do so.

121 I will then consider the experts' evidence, and the evidence of the parties themselves and others, as may bear on the cause of the damage.

Prior to 1 March 2010 (when the tenant first occupied the premises)

Trissaro as tenant

122 The premises have been used as a retail outlet for over 150 years.

123 In 1984, Trissaro Nominees Pty Ltd ("**Trissaro**") (of which a Mr Nicholson was a director) became the tenant. Trissaro carried on a supermarket

business, including a licensed liquor store from the premises. During that time Trissaro also purchased the adjoining land on the north side, demolished the house that previously stood on that land and developed it into a car park.

124 On 13 June 2000 the landlord and Ms Ruchel became registered proprietors of the land.

125 The landlord gave evidence that soon after they purchased the land, the landlord was informed that Trissaro had "knocked a hole" in the north wall of the premises to create space for a roller door, and that a sledgehammer had been used from the inside to create the hole.

126 The landlord carried out a substantial renovation to the premises. This occurred in early 2001.

127 Trissaro renewed its lease in 2002.

Five Dollars as tenant

128 On 1 June 2006, Five Dollars became the tenant of the premises by assignment, the principals of which were a Mr and Mrs Ganim.

129 In about August 2006, Five Dollars carried out an extensive new fit out of the premises. The cost of the new fit-out was subsequently reported to be over $220,000.[20]

130 Following the carrying out of its works, Five Dollars started to operate an IGA supermarket (including liquor sale) business.

131 By a report dated 15 May 2007 in connection with a rental determination for the premises, and addressed to a Mr Bartrop of Bartrop Real Estate, "numerous holes in the timber floor" were identified as then being present, "with a substantial area of flooring repaired with chipboard".

New lease with Five Dollars as tenant

132 On 7 August 2009, the landlord and Ms Ruchel entered into a new lease of the premises with Five Dollars (being the lease) for a five year term commencing on 1 June 2009.

133 Item 22 of the Schedule to the lease contained:

> Additional provisions:
>
> …
>
> (d) the Tenant agrees to restore the premises to the same condition (except for fair wear and tear) is when the Tenant took possession of the premises on vacated the premises namely as a functioning supermarket with the same capacity shelving freezers and cool room.

[20] See rental valuation of the premises given by Mr Hives of LEADER dated 15 May 2007.

134 At this time, the landlord and Ms Ruchel provided to Five Dollars an undated disclosure statement pursuant to their obligations contained in section 26 of the Act (the "**disclosure statement**").

Assignment of the lease to the tenant

135 By a sale of business agreement dated 27 January 2010, Five Dollars sold the business conducted by it at the premises to the tenant. Attached to the sale of business agreement was the disclosure statement.

136 The refrigeration and freezer cabinets identified in the plan were also purchased by the tenant from Five Dollars.[21]

The first Fuller report dated 6 February, 2010, obtained by the tenant

137 In early February 2010, Mr Hall requested Mr Simon Fuller, refrigeration engineer of Daylesford Refrigeration, to inspect the general state of the fridges. Mr Fuller provided a written report by email dated 6 February 2010 (the "**first Fuller report**"), as follows:

> I went through the refrigeration at [the premises] and have come up with a brief report for you.
>
> It seems that the medium temperature compressor walls have been experiencing some damage to the compressor or valve plates. It is usually caused from the way the pipework has been installed with incorrect levels. If you have a contact and phone number of the servicing mechanic I could give him a call on your behalf! The cabinets and cool rooms look fine.
>
> Some works that I would suggest to be done would be-
>
> 1 Modify some Suction line pipework
>
> 2 Compressor oil changes
>
> 3 oil filter changes
>
> 4 compressor pump tests
>
> 5 flexible lines fitted to trax oils
>
> 6 leak check plant room
>
> 7 Insulate LT Suction Eliminator
>
> 8 Insulate LT Suction Accumulator
>
> 9 change liquid line dryer cores

138 On 26 February 2010, the landlord and Ms Ruchel signed a Transfer of Lease in favour of the tenant, with the transfer date noted as 1 March 2010.

139 By clause 15 of the Transfer of Lease, the parties agreed to delete Additional Provision 22(d) of the Schedule to the lease. In other words, the tenant, having purchased the equipment from Five Dollars was under no obligation, on vacating the premises, to leave the premises as a functioning

[21] See Contract of Sale of Business, being Exhibit R3.

supermarket with refrigeration and freezer cabinets of the same capacity as those purchased by it.

140 At about that time, a company related to the tenant purchased the adjoining land to the north of the premises, used as a car park.

May 2010-10 August 2011 (being the date of the loss adjuster's report on premises inspection on 2 August 2011)

141 I find that in about late May 2010, Mr Hall of the tenant informed the landlord that a section of flooring at the premises had given way under the foot of one of the tenant's employees, a Ms Ryan. The date of this event is recorded as 24 May 2010.[22]

142 The incident led to both the tenant and landlord inspecting the premises (including the sub-floor) shortly after.

143 Shortly after, the landlord made a claim upon its insurer, CGU.

144 On 27 May 2010, the tenant emailed Mr Fuller, who had provided the first Fuller report:

> Had a member of staff go through the floor at the front of dairy cool room. After looking under the building it seems that there are large areas of the timber floor that [are] saturated. This seems to be around the cool room. Also there is ice build-up on pipework in various areas under the floor.
>
> Can you recommend somebody that might be able to inspect under the floor and advise on how best to insulate/seal the leaks from the cool room. Also what might be to be done to fix/replace the current water damaged areas.
>
> Also how do we stop ice build up on pipes.
>
> These problems seem to be long standing but need to be reviewed and some action taken.

145 I find from this email, and the evidence of Melissa Scoble, that the floor failure occurred in front of the dairy cool room at location 3 in the plan.

146 By email dated 27 May 2010 Mr Fuller responded:

> All cool rooms built on timber flooring should have an insulated floor (step up into cool room). Is this the case with yours?

147 The tenant emailed Mr Fuller on 28 May 2010:

> Freezer has step up.
>
> Liquor seems to be on the floor and dairy cool room the same.

[22] See letter from the loss adjuster to the landlord's insurer Mr McPhan, to the landlord dated 21 December 2010.

The second Fuller report dated 26 June 2010, obtained by the tenant

148 By his report dated 26 June 2010 (the "**second Fuller report**"], following Mr Fuller's inspection of the premises on 16 June 2010, Mr Fuller informed the tenant:

> On inspection of the area below the building and viewing water damage to timber flooring, bearers and joists[s], I can [attribute] the cause to these factors-
>
> - Both Dairy/Milk and liquor rooms have been constructed directly onto timber flooring with no floor insulation. This will cause continuous condensation on the subfloor timber work and eventual rotting.
> - Refrigeration lines beneath the floor have been run into thin wall insulation, this will cause continuous ice formation and water dripping from pipework
> - Freezer cabinet pipework has no insulation where penetrating the floorboards. This will cause continuous condensation on the subfloor timber work and eventual rotting.
> - Low-level condensate pit in cellar is full of water causing flooding of area. Condensate pump requires repair/replacement.

149 The landlord gave evidence that he did not see a copy of the second Fuller report until discovery was given by the tenant in the proceeding.

150 By email dated 9 July 2010, the tenant emailed its insurer:

> The store at Daylesford has some issues related to holes in the floor, allegedly caused by moisture from refrigeration cases. The building owner's answer is "you need to get fixed and claim on your insurance".
>
> Do I have any cover that may cover this type of claim?
>
> Where do we start looking at this issue and who was responsible and who pays?

151 By email dated 9 July 2010, the tenant's insurer responded:

> … As the floor is part of the building… In the first instance the [landlord should] arrange for a qualified person to actually ascertain what is causing the problem. There could be several reasons, is a water pipe under the floor and the pressure of the fridge has caused movement, is there a pipe on the fridge that is not draining properly, how long has this been leaking bearing in mind that you have only been there 3-4 months. If the owner can determine the cause we can then advise if there is a claim which you may be responsible for or maybe the previous tenants may be responsible for.

152 By email dated 16 July 2010, the tenant forwarded to the landlord a copy of the tenant's insurer's email dated 9 July 2010, and requested the landlord to obtain a report by a suitably qualified person to determine "if there are

grounds for a claim and who is responsible for paying". The email also stated:

> I think we also need to add to this that there has been a substantial amount of money spent preparing the floor and about the last five years. So a permanent solution is needed to make the floor fit for the purpose it is leased to us for i.e. supermarket.
>
> There are a few other things related to the building need to be resolved such as:
>
> -the bowing of the north wall and how this is to be resolved i.e. repaired and/or rebuilt.
>
> -the accumulation of water under the building from a spring and/or other source is to be identified and resolved.
>
> -lack of ventilation under the floor
>
> -improve support under the floor in the "store room area and liquor fridge to take the weight of stock and shelves in these areas.
>
> -permanent solutions to underfloor moisture including refrigeration lines and condensation.
>
> You and I have already had preliminary discussions on some strategies such as:
>
> -expand building and get all call rooms into a new section with appropriate floors
>
> -drop store room floor to level of the rest of the floor
>
> -full concrete floor in the building to eliminate need for future repairs to wooden floors
>
> -expand the existing store with possible use of some of the car park
>
> -determine how north wall is to be made good and safe
>
> -Remove water and its sources from under the building
>
> -repair and/or replace installation of refrigeration pipes running under the building
>
> -improve underfloor ventilation to a level and standard that will cope with all the moisture sources under the floor and help keep the area dry and free from moisture build up
>
> From the reply from my insurer it seems that the first step is you as the building owner need to determine the extent of the problems. Then we can determine the action and cost to resolve stop the insurers will help determine responsibility and who has liability to pay. I would like to be involved in determining the scope of work and appointment of a suitably qualified person(s) to inspect and report on the building issues.
>
> Is anything else you would like to add to the list/scope of works for an inspection and report on the building as we have only been tenants for

less than five months and you have owned for many years and have a more intimate knowledge of the building and its history?

Report by Mr Rothenberger, obtained by landlord's insurer

153 The landlord subsequently requested its own insurers to obtain a report. At the insurer's subsequent request, a Mr Rothenberger of "Pattersons InsurerBuild" inspected the premises on 6 August 2010, and subsequently wrote, in an undated report:

> The building is being used as a supermarket and has a number of fridges and freezers which are currently leaking water.
>
> I advised [the landlord] that the leaking from fridges and freezers needs to be repaired as soon as possible, but there is some doubt as to who owns the units and who was responsible for maintenance and/or repairs.
>
> The current tenant has only taken over supermarket business 4 months ago, and the previous tenant had fridges and freezers installed.
>
> There have been repairs to (sic) in front of fridges/freezers, due to floor giving way from being wet.
>
> I entered under subfloor and found large areas under fridges and freezers dripping water, which has caused subfloor to turn black and rot.
>
> The amount of weight from fridges and freezers combined with amount of water on subfloor, has caused flooring to give way in areas and sag in other areas.
>
> To repair damage to sub floor, the fridges and freezers would need to be removed and possible product shelving also, which would impede supermarket operating whilst repairs are undertaken.
>
> The areas that have been damaged due to water is hard to ascertain, because it would not become clear until it has been fully stripped out i.e. floor covering, floorboards, joists, bearers, stumps and with a moisture has entered inside wall frames.
>
> An engineer may be required to draw up plans for repairs to subfloor due to weight of fridges and freezers it carries as well as possible Council permits and appropriate insurance.

154 The tenant gave evidence that he did not see a copy of this report until discovery was given by the landlord in the proceeding.

155 Mr Fuller of Fuller Refrigeration subsequently provided to the landlord a quotation dated 21 August 2010 for $30,250 plus GST. The landlord says that he never asked for the quotation, and that he assumes that the tenant asked Mr Fuller to direct it to him. The quotation states, in part:

> **DAIRY ROOM** [Location 7 on the plan]
>
> …Re-assemble call room and install new polystyrene insulated floor…

LIQUOR ROOM [location 8 on the plan]

…install new polystyrene insulated floor…

GLASS DOOR FREEZER [locations 5 and 6 in the plan]

- …Builder to repair floor and lay black sheet vinyl under
- re-install cabinets using correct method to join cases to prevent dripping all to the manufacturer's specifications
- redo faulty pipe installation back to plant room
- run new drainage to cabinet manufacturers specifications…

SUB FLOOR PIPE INSTALLATION

- remove and replace dripping insulation with correct wall thickness installation on proper brackets.

156 Following the suggestion in Mr Rothenberger's report, the landlord subsequently engaged a civil and structural engineer, Mr Proud, to undertake a structural inspection.

157 Mr Proud (or someone on his behalf, according to the landlord) inspected the floor systems of the premises on 11 September 2010.

158 On 3 December 2010, the tenant emailed the landlord:

> We just had a fridge fall over at the front of the shop, I think because of the uneven floor near the checkouts.
>
> Is there any plan to fix the floor in this building. As we still have a hole and soft spot in the middle of the drinks aisle that has not been fixed. Also the north wall seems to be worse and the ventilation under the building has not been addressed.

159 On 9 December 2010 the landlord responded by email:

> As you probably know structural engineers[23] inspected the building some months ago and I had expected their report and recommendations would have surfaced by now. In conversations with them on the day, they did say that the floorboards were never designed to take the sort of loads the current shelving units are putting on because all the pressure is being channelled to 4-6 narrow points the loads cannot be spread over the joists and bearers hence the unevenness in the floor. The actual joists and bearers are still level over most of the [rest of the] building.
>
> The ventilation is not the problem under the building as the engineers report will probably point out. Up until very recently the areas under the building were dry and there was no moisture on any of the bearers, joists or footings/stumps. The dampness is directly a result of water cascading down from poorly drained and uninsulated cooling and freezing units spread across the building.
>
> Hopefully the reports will be available soon…

---

[23] Which I find to be Mr Proud.

The first Proud report, obtained by landlord

160 In an undated report arising from his inspection on 11 September 2010 (the "**first Proud report**"), and which I find was written in about December 2010, Mr Proud stated[24]:

> … Punching sheer failure is occurring at most shelf legs and all fridge/freezer cabinet leaks. The current structural timber floor system cannot withstand these applied total and point loads.
>
> A localised dishing [of the joists supporting the floor] was detected under the [freezer units 5 and 6 in the plan], with a deflection of approximately 30 mm containing standing water. This would be deemed a structural failure.
>
> The current timber structural floor system is as follows
>
> 1 Bearers (190×75) at 2210 centres supported at 2700 centres
>
> 2 Joists (140×45) at 550 centres
>
> 3. Flooring-tongue in groove floor joists
>
> The current floor structure is not suitable for supermarket loading.
>
> Building floor plans and supermarket layouts along with shelving/fridge/freezer loadings are required to provide a structural floor system that will comply with current Australian standard[s].
>
> A temporary solution should be installed sooner rather than later to spread the shelving etc loads over a larger area. This can occur with timber/steel members placed over the current floor that the shelving etc legs thereon, with additional support under the floor system as required. Plans and layouts are required to size these members and additional supports.

161 The loss adjuster engaged by the landlord's insurer ("**Mr McPhan**") wrote to the landlord on 21 December 2010:

> Further to our recent on-site inspection and discussions in relation to water damage caused by leaking refrigeration equipment at the above property, we confirm that a report has been forwarded to your insurers (sic) outlining the circumstances of your claim. As soon as we receive confirmation from [the insurer] that a claim will be accepted, we will advise you accordingly.
>
> In the interim, it is suggested that you discuss your legal position in relation to the subfloor system that will be required to accommodate a load of the size that is currently present in the shop and who should be responsible for this cost. It will also be necessary to have the refrigeration equipment either repaired, replaced or modified to ensure that any leaking water is suitably removed away from the flooring system to prevent future damage of this nature from occurring.
>
> Your insurance policy does not provide for installing a new subfloor system. It only provides to reinstate what is already there.

[24] And as elaborated on, during Mr Proud's evidence.

> Further, your insurance coverage does not provide to repair, replace or modify equipment that belongs to the tenant and this will be their responsibility.
>
> As soon as you have reached agreement with the relevant parties as to who is going to contribute to the cost of a new subfloor system, which will need to be designed by qualified structural engineer and the position in relation to the refrigeration equipment has been addressed, we would ask you to advise us so that we can then arrange contractors to quote for the repairs to the water damaged portions of flooring and replacement of the vinyl floor coverings.

162 The landlord took this letter to mean, and I think it is fair to say that it is a reasonable interpretation based on the contents of the letter, that the insurer would probably reinstate the water damaged floor boards, and the sub-floor system, but not indemnify the landlord in regard to the cost of a new subfloor system to accommodate the weight of the equipment.

163 On 24 December 2010 Mr McPhan also wrote to the insurer[25]:

> The owner has advised that the refrigeration systems were installed by the previous tenant about seven years ago. It is unknown as to whether plans or permits were obtained by the tenant.
>
> The refrigeration units have only footing points at each end and the weight is causing them to spear into the timber flooring. The refrigeration units are also leaking a considerable amount of water underneath them and this has damaged the timber floors in the shop itself.
>
> It seems that the units are not functioning correctly or alternatively drip trays or suitable methods of removing leaking water from the units need to be built into the flooring system to prevent liquid from pooling underneath the refrigeration units. In order to repair/replace the damaged sections of flooring in the shop, it would be necessary to remove the refrigeration equipment to gain access. We feel this should be the responsibility of the tenant given that it is their refrigeration units that are causing the problems.

164 On 10 January 2011, the landlord emailed the tenant:

> I have finally received a report from [Mr McPhan, the loss adjuster] regarding damage to the floor of the supermarket.
>
> Our insurance company has agreed to replace floors and subfloor areas damaged by water leaking from refrigeration units and cool rooms. However they will not go ahead with the replacement of floors and floor coverings until the refrigeration equipment is either repaired, replaced or modified to ensure that any leaking water is suitably removed away from the flooring system to prevent future damage of this nature from occurring.
>
> The subfloor system, that is, stumps, bearers and joists was designed and constructed in the 19th century and as such was not meant to carry

[25] Loss adjuster's "First Report" dated 24 December 2010.

> the point loads placed on the floor by the shelving and refrigeration units currently installed in the building. To prevent further structural damage to floorboards etc a new subfloor system will need to be designed by a qualified structural engineer to accommodate a load of the size that is currently present in the shop.
>
> Our insurance coverage does not provide for the repair, replacement or modification of equipment that belongs to the tenant. Our insurance policy also does not provide for the installation of a new subfloor system. It only provides to reinstate what is already there.
>
> With regard to water in the cellar, I will arrange for a plumber to install a sump pump that will automatically remove any water from the lowest point of the cellar area. This should alleviate water problems associated with natural spring/groundwater pooling under the building. There is also a downpipe missing from the rear guttering which allows water to enter the cellar area. I will have this replaced. Other downpipes have been damaged by cars on the east side of the building. I will investigate the possibility of Council installing concrete curbing out from the gutter to stop cars rolling into the veranda posts and crushing the plastic downpipes.

165 Mr Braszell conceded, in cross-examination, that the insurer was not at this time insisting on repair of the refrigeration units prior to reinstating the floor and sub-floor, as the first paragraph of the email dated 10 January 2010 suggests.

166 On 10 January 2011 the tenant emailed the landlord:

> When can we meet to get more info re floor replacement and find out what is involved. What sort of floor do they intend putting in will determine how and where refrigeration pipes and drainage are located and how.
>
> As to the floor itself, when we built the Ballan store[26] the engineering requirements were for a 6 inch concrete slab that had a very high "point loading". I would have thought that this was a starting point for a floor that is used for a supermarket. Let's talk about what is proposed as whatever the end result the Council will have some input into what goes in and to what engineering and other standards.
>
> Also it would be a chance to talk about the north facing wall, was this looked at by the engineer, as it has a curve in it.
>
> We would also like discuss the possibility of having the new finished floor all at one level and is there any possibility of extending the pad out the backyard to create a proper loading bay and a small amount of additional storage…?

167 In February 2011, the tenant became concerned about rectifying the floor to safe workplace standards. Following inspection by a Worksafe inspector, on 4 February 2011, Elisabeth Decis wrote to the landlord:

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[26] Where the tenant also conducted a grocery business.

> …The biggest concern was the floor. [The Worksafe inspector] made mention that it was uneven and proved to be a potential hazard to customers and the staff. I informed him that we were in discussions with the landlord about getting it fixed and he said that he wanted to be informed of when this was going to take place. He said the floor needn't go on the report yet because he understood we were waiting on our landlords.

168 On 21 March 2011, the tenant emailed the landlord:

> Work were in the store today. [Ms Decis] has a written report [attached] re repairs required to the floor. The inspector asked about the state of the floor and made the comments as noted below. We need to get the floor up to a suitable standard asap and if Worksafe get involved they could potentially close the store down with little or no notice.
>
> There are many areas of the floor that require some form of propping up asap. This is especially evident in the liquor cool room where the floor has dropped 75-100 mm in one spot and the floor is not level at any point in the cool room. The dropped floor has left a large gap under the cool room wall.
>
> We need to get together and discuss what is going to happen and when ASAP.

169 On 18 June 2011 the tenant emailed the landlord, following its becoming aware that a builder was about to start work on the floor:

> …What does the works require us as tenants to do? When is it expected to take place, what is the scope and potential disruption etc?
>
> Also we have not made any arrangements to have the refrigeration works done as we have had no info on dates, time, scope of works for floor repairs etc
>
> We wanted it to happen ASAP but we need more info quickly as to what we need to do and what impact it will have on business interruption… And then invoke our business interruption insurance!
>
> The insurance company at this point has noted that work will be done but have not started the claim process as they (and we) do not know what we are claiming at this point in time!

170 On 19 June 2011, the landlord emailed the tenant, in reply:

> It has been quite some time since I last had a conversation with [Mr McPhan, the loss adjuster]. The [insurer has] agreed to replace all floor sections damaged by water from the freezers /refrigerators/cool rooms. They were going to let me know when the builder made contact with you so that you could get a head start on what needed to be done as far as business operations were concerned. I suggested to the agent that renovation work would probably be easier on the business if the floor replacement was done in sections thus allowing you to maintain regular business.

> As far as I know that works will require you to move freezers/refrigerators/coolrooms one at a time while that section of the floor is repaired and the vinyl flooring replaced. I think they are going to eventually replace all the vinyl flooring in the supermarket. I haven't been told when the work will commence.
>
> Now the builder has been appointed I would assume that it would be soon and I'm not sure why he couldn't tell [Ms Decis] what the starting date will be.
>
> I'll contact the agent tomorrow to find out more info and get straight back to you.

171 On 27 June 2011 the tenant emailed the landlord:

> Floor has given way at receiving bay as it is dangerous and at delivery door we are arranging repairs immediately.
>
> Please advise how we will be compensated for the costs.

172 The landlord responded by email dated 27 June 2011:

> I'm assuming that the hole is in the floor that opens out into the car park. Unfortunately the floor, in what is now the loading bay, was never designed to take the sort of loads that have been placed on it particularly when the pallet forklift is loaded with up to half a tonne of grocery items has as has been the case on previous occasions when the floor had been penetrated by the forklift wheels. Your insurance company may be worth approaching but I don't think [the landlord's insurer] will come to the party unless there has been water damage from leaking cool rooms etc that have weakened the floor.
>
> On the subject of floor replacement due to water damage has our insurance agent or their appointed builder been in contact with you in the last week?

173 An inspection took place on site on 2 August 2011, attended by the landlord, the tenant, Mr McPhan, and Craig Hinnenberg of Goldfields Refrigeration.

174 On 2 August 2011, after the inspection, the tenant emailed the landlord:

> Following the meeting on site today where I pointed out the collapsing floor in the liquor cool room and the state of the sub floor underneath. I asked the builder to "make safe" the floor under the cool room. He is doing this on Thursday morning with a suitably sized timber beam, floor plates and "acro" props.
>
> The floor is in an extremely dangerous condition and requires immediate works to make safe and then urgent works to make good.
>
> Please advise if you wish to pay for these "make safe" works directly or we can pay and then deduct the amount from rent payment on 1 September 2011.
>
> Please let us know your preference for payment ASAP. Also what works are to be done to make good and when can we expect permanent repairs to be completed?

We also have a number of small accounts for "make safe" works to various areas of the floor that we have paid for. Please advise how these amounts will now be repaid to us.

175 In a further email to the landlord dated 2 August 2011, the tenant wrote:

> After today's meeting on site I have number of concerns with the level of repairs to take place. Following the discussion with the builder and the insurance company representative I believe the scope of work to be:
>
> 1. Replace floorboards or similar and floor tiles under nominated refrigeration cases and cool rooms.
> 2. Replace sheet vinyl floor to the selling area.
>
> Please advise if you believe any other works are to be done and what they are.
>
> Following the inspection under the building with the builder and the insurance representative they highlighted a large amount of work that needs to be done to the bearers, joists and the whole subfloor structure and a number of areas. And also substantial work to strengthen most or all of the floor throughout the store to take the weight of the fixtures, fittings and stock in the store. The insurance company representative said that they are not liable to do any of this work and it is the responsibility of the building owner and must be addressed by the building owner.
>
> Please advise what additional floor works will be done to ensure that the floor structure is able to safely bear the weight of the supermarket equipment and stock.
>
> I believe that there was some form of building/engineering report completed in recent times. If this is the case is it possible to get access to the report. If not I will commission my own building/engineering report into the state of the building and its suitability for the purpose to which you lease it to us.

176 In a third email to the landlord dated 2 August 2011, the tenant wrote:

> During the underfloor inspection today with the [loss adjuster Mr McPhan] and the insurers builder, I noted that the "sump pump" does not seem to be in operation on the "natural spring under the building" and there is [a] pond formed under the building approximately 6m x 4m by 250mm deep. Add to this that almost all of the underfloor ventilation points have been closed off, seemingly for many years, there is a large build up of moisture in the subfloor area.
>
> Can steps be taken immediately to provide suitable underfloor ventilation and an effective water removal system for the water rising from the "natural spring". These actions may help with the general moisture problems in the subfloor area.
>
> Please let me know what action if any you will take on subfloor water and ventilation and when can I reasonably expect the work to be done.

177 On 2 August 2011, late in the evening, the landlord responded to the tenant by email:

> The whole reason for engaging our insurer was to determine what level of cover we had for damage caused by water leaking from equipment installed by the tenant or tenants. It's fairly obvious that the damage that has occurred to the joists in particular under the coolroom is a result of water coming from the coolroom which has caused rot in the timbers and possible collapse sometime in the not too distant future. There is still quite a load on the Baltic pine floorboards and I would consider it very dangerous to maintain this load or to allow staff to use the section of the coolroom. Prior to [Five Dollars] installing new coolrooms and other refrigeration units the floors and subfloors were in good, dry condition and had been that way for well over 100 years. There has always been spring water in the sump area and this has not led to the water now cascading down from all of the cooling systems installed by the tenants. As you also noted the refrigeration/cooling system was very poorly installed without regard for the nature and style of building and is the primary reason for almost all of the damage to floors and subfloors over the last 5 to 6 years.
>
> I'll discuss the "make safe" works with my insurer but I think that they will consider the damage a direct result of poorly installed and poorly maintained refrigeration/cooling systems and associated plumbing and compressor lines. As such, just as I pointed out in my earlier email regarding damage to the loading bay floor, this is not something that I should have to pay. I provide the building etc but if tenants install equipment that is too heavy for the type and style of building resulting in the compression of tongue and groove flooring or allow machinery, appliances etc to cause major irreversible damage to floors and subfloors and it should be the tenant's responsibility to make good any damage caused in this way.
>
> If I employ any person to "make good or make safe" I will do so on the proviso that if the damage to the structure of the building was caused as a direct result of tenants actions then the tenant will, or should, be liable for all costs of the repair or replacement of damaged structural elements. The damage to the subfloor under the cool room is certainly the result of water cascading down from the cool room above. [The landlord's insurer] has stated that they will cover costs for the repair etc of water damaged floors and subfloors. They have also stated that repairs cannot be made before the cause of the damage has been addressed.
>
> Because the damage has obviously been caused by equipment owned and installed by the tenant I believe, and I checked with my insurer in the morning, that the "make safe repairs" should be your responsibility. Obviously a concrete floor would address problems associated with rot caused by water leaking from refrigeration plant but I'm afraid the cost to do this is much more than I could afford and

would be almost impossible to contemplate without rebuilding the entire structure.

The insurance company representative said that they are not liable to strengthen or reinforce subfloors etc as they are only looking at replacing water damage to the building structure. He did not say that it is the responsibility of the building owner and must be addressed by the building owner. He said that if this was to be addressed it was something that we jointly would need to discuss. At no point did he say that this was my responsibility. I provide the building but as pointed out in the lease agreement tenants are liable for any damage to structural components caused by poorly maintained plant or equipment or plant and equipment that is inappropriate for the type and style of building. The enormous point loads that are now being placed on wooden floorboards have very obviously resulted in much damage over the last six years. The shelving, racking and display units currently installed in the building were designed to be placed on reinforced concrete floors, not 150 year old Baltic pine floorboards. These newly installed units replaced an older style of shelving that spread the load over the entire floor rather than a single point thus resulting in little or no damage to the integrity of the flooring.

178 On 10 August 2011 Mr McPhan wrote to the landlord:

Further to our revisit [on 2 August 2011, the first since the visit referred to in the loss adjuster's letter dated 21 December 2010]…it was noted that there have still not been any works done to the subfloor system.

As advised in our previous correspondence of 21 December 2010, the insurable repairs relate only to damage caused by the leaking refrigeration equipment and therefore is limited to replacement of the affected floorboards and vinyl floor coverings and does not extend to repair or replace the subfloor system that is inadequate to cope with the current weight load.

Whilst in attendance [on 2 August 2011] we were also shown a section of floor underneath the liquor cool room that is in urgent need of repairs. Goldfields Refrigeration inspected the coolroom for any leaks whilst we were present but there is nothing to suggest that the cool room is leaking and that it is more likely this water and damage is as a result of condensation or wet rot emanating from the spring water under the building. It was also noted that there is ankle deep water in another section of the building adjacent to this area. It would be advisable to have a pump or suitable drainage system to take this water away which may in turn alleviate some of the problems underneath.

It is suggested that you consult with the relevant specialists in relation to repairing or replacing the subfloor system. Also as indicated in our previous correspondence, it may be necessary to find out your legal position in relation to having the refrigeration equipment either repaired, replaced or modified to ensure that any leaking water is

> suitably removed away from the flooring system to prevent future damage of this nature occurring.
>
> It may well be the responsibility of the tenant to address this aspect. It is understood that all parties involved would like to proceed with the remedial works as soon as possible and to that end, we seek your assistance to try and expedite repairs. Some of the replacement of the floorboards may also require repairs or replacement of some of the structural timbers e.g. joists or bearers that may not necessarily be covered by insurance.

16 August 2011-24 May 2012

179 A meeting took place at the premises on 16 August 2011, attended by the landlord, the tenant, Mr McPhan, the builder engaged by CGU (Mr Jenkins), and the refrigeration mechanic engaged by Mr Hall (Mr Hinnenberg). The landlord contends, and I find, that the purpose of this meeting was to work out a timeline, convenient to the tenant's business, for the repair and replacement of flooring and subfloor structures.[27]

180 The loss adjusters informed the landlord's insurer on 2 September 2011[28] that:

> All parties are wanting the repairs to be carried out as soon as possible, however they will need to be done outside normal trading hours so as to minimise the disruption to the business. The tenant was also to make further enquiries with his own insurers regarding them picking up the costs to remove and reinstall his refrigeration equipment so that the floors underneath can be accessed for replacement.

181 On 16 September 2011, the tenant emailed the landlord:

> Just to let you know that I have (finally) received quotes for removal and relocation of fridges and cool rooms today and sent them to GIO Insurance.

182 On 30 September 2011, the loss adjuster informed the landlord's insurer:[29]

> The tenant is still awaiting on GIO Insurance to confirm whether or not he will be covered for the removal and reinstalling of his refrigeration equipment and there is still a dispute over who is responsible for repairing or replacing the subfloor system as it is not suitable for its current use as a supermarket due to the heavy load placed on the floor system.

183 On 25 November 2011, the loss adjuster informed the landlord's insurer:[30]

> The tenant of the property was to contact us when he is informed as to what his own Insurers will do with regard to removing and installing the refrigeration equipment that is owned by him. This is required for

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27 See email from the landlord to the tenant dated 7 June 2012 (below).
28 "Seventh Report" to insurer.
29 "Eighth Report" to insurer.
30 "Ninth Report" to insurer.

> us to access the floor underneath and [replace] it. There is also an issue with the subfloor system that needs to be addressed between the owner and tenant in regard to the loads being placed on the floor.

184 On 10 January 2012 the loss adjuster informed the landlord's insurer:

> We are yet to hear from your insured's tenant as to the position with his own insurers regarding removing and reinstalling the refrigeration equipment in the supermarket.
>
> Until the tenant is able to provide us with this information, we are unable to progress any further with the claim.

185 In March 2012, Ms Decis informed the landlord that holes occurred on the floor. By email dated 28 March 2012 landlord emailed Ms Decis:

> Can you tell me of the holes are a result of the hand trolley wheels going through a floor in the loading bay. If not, can you tell me where the holes are situated.

186 Ms Decis responded by email dated 29 March 2012:

> [The holes] are in the shop itself and are not from the result of trolleys. They are in front of the dairy freezer [at location 7 in the plan].

187 By email dated 1 April 2012, the landlord wrote to the tenant:

> I had a look at the floor on Saturday and it is a danger to the public. The only thing stopping people from injury is the vinyl flooring. The floorboards underneath are rotten as a result of the water running from the freezer unit onto the floor and subfloor. This was one of the areas looked at by the engineers appointed by the insurance company in early 2011. There was a freezer in the spot when [Nicho] had the supermarket and it leaked onto the floor. This section was rebuilt about six years ago with new floorboards, joists, bearers and stumps. The refrigeration company that inspected the freezers etc last year quoted on the cost to repair and replace the units and lines that are leaking water onto the floors and subfloor areas. This came to about $30,000 but do not include the repair of floorboards and other parts of the structure damaged by water from freezes, coolrooms and refrigeration lines. Our insurance company (CGU) has already mentioned to you and Wayne [at the site inspection on Tuesday, 2 August 2011] that they will repair and replace all sections damaged by water and completely renew the welded vinyl flooring over the entire floor. As discussed with Wayne [of the landlord] this cannot be done until the refrigeration problems are sorted out. My last email from Wayne on the subject gave me the impression that he was waiting for a quote from his his/your insurance company.
>
> When the decision is made to repair the floor, and this must be done asap, the builders need to work closely with you so that they can repair one section at a time rather than doing the whole job in one go, unless of course you would rather do that.

188 On 10 April 2012 the loss adjuster informed the landlord's insurer:

> We spoke with the tenant of the building, Wayne Hall, on 4 April 2012 in relation to the removal and reinstallation of his refrigeration equipment which is expected to cost him in the region of dollars $80,000-$90,000 to do. His insurers are not willing to accept a claim for this on his behalf.
>
> [An] an engineer is to inspect the subfloor and provide a report as to how the damage to that has occurred as your insured is not willing to pay for its replacement bringing about a dispute between himself and his tenant. At this stage, we do not believe that the subfloor damage is a result of leaking water but rather as a result of condensation and has occurred over a period of time. Once you have the Engineers Report, we will be able to comment further in relation to that aspect.

189 It appears that at about this time Mr Ross Proud was re-engaged at the request of the tenant "to inspect, report on existing damage, load rate and existing floor and recommend repair work".[31] Mr Proud conducted his further inspection on 18 May 2012.

190 By email dated 24 May 2012, the landlord wrote to the tenant:

> It's some time since we last discussed the water damage to the floor and subfloor at the [premises]. [Mr McPhan] mentioned in his email (27/9/2011) that you were submitting a claim to GIO and were awaiting their response. I was wondering if you had made any progress with this claim and if so how you would like to proceed? We will need to coordinate builders, vinyl layers and your refrigeration people in order for this to run smoothly.
>
> I have sought advice regarding spreading the point load stress from the shelving units on the flooring and structural members such as joists and bearers. It would seem that the easiest and probably most cost-effective way to do this would be to set the shelving points on [a flange channel]. This would spread the load across the joists and alleviate the need for a major rebuild of the entire store. It would also make it possible to use trolley jacks perhaps to lift each unit the 50 mm needed to clear the edge of the channel.

31 May 2012-18 June 2014

<u>The second Proud report, obtained by tenant.</u>

191 By email dated 31 May 2012, Mr Proud forwarded to the tenant his second report dated 24 May 2012 (the "**second Proud report**"), resulting from his further inspection on 18 May 2012.

192 The second Proud report identified 3 areas in the plan, being:

(a) "**Area A**" (described as the "Front area of the Building"), comprising the parts of the premises east of the liquor cool room (location 9) and the dairy cases (locations 3 and 4) towards Vincent Street, and south of the 3 freezer cases (locations 5 and 6);

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[31] See "Introduction" to the Second Proud Report.

(b) "**Area B**" (described as the "Rear Area of the Building"), comprising the parts of the premises west of Area A; and

(c) "**Area C**" comprising all the sub-floor of the premises.

193 In respect of Area A, Mr Proud observed that the flooring seemed "structurally sound but some areas may need repairs or replacing". He observed that the joists seemed "structurally sound and typical for age of building", and that the bearers seemed "structurally sound and typical for age of building".

194 Mr Proud stated in his report that the Baltic pine floorboards in Area B were:

> …very poor with the majority of the wood fibre [being] damp and rotten with no structural integrity, also with heavy fungal infestation, suggest complete replacement.

195 He stated that the joists in Area B were:

> very poor, wood fibre damp and rotting with structural integrity compromised, also with heavy fungal infestation, suggest complete replacement.

196 He stated that the bearers in Area B were:

> very poor, wood fibre damp and rotten with structural integrity compromised, also with heavy fungal infestation, suggest complete replacement.

197 In respect of Area C (the sub-floor), he stated:

> Sub-floor area is an extremely damp environment with a severe lack of ventilation.
>
> The rear floor area [of Area B] upon entering the subfloor access door is the worst affected floor with damp rotting, structural members and flooring under extensive fungal attack.
>
> The moist environment seems to be due from a number of factors:
>
> -Blocked and ineffective sub-floor vents and rear windows
>
> ~~-Condensation from refrigerator pipes and units above floor~~
>
> -Natural groundwater

198 I have struck out the second alleged causative factor above, because Mr Proud expressed a wish to have it removed during his cross-examination at the hearing (see further below).

199 The report concluded:

> It is our recommendation that the following works be undertaken
>
> 1. Properly ventilate the floor as soon as possible to help stop any further damage from fungal attack…
> 2. Rotten structural members and flooring need replacing, rear [Area B] of floor is beyond repair. A full new floor design with new

footings will be required with appropriate floor design loads, and durability.

3. Excess natural groundwater needs to be drained away, the existing sum should be assessed for effectiveness we would suggest forming a new sub coupled with a drainage trench with AG pipe covered by a geotextile sock and backfilled with gravel that runs the length of the lower subfloor area as this place is extremely damp.

4. Excess surface water primarily from condensation around refrigerated parts should be alleviated by appropriate sub- floor ventilation and drainage trench is with AG pipe covered by a geotextile sock and backfilled with gravel…

200 By email dated 5 June 2012 the tenant provided a copy of the second Proud report to the landlord. The email stated:

> I have been concerned about the state of the floor for a while. Up to now you have refused to make any repairs to the floor and we have had to get the floor fixed at our expense every time it has failed. I have asked an engineer to inspect the building and provide report which is attached.
>
> There are some observations on the state of the floor and subfloor and recommendations on action to be taken to bring the floor and subfloor up to a suitable standard for a supermarket. Please review the document and advise if you are to undertake any or all of the work recommended and when that is likely to occur.
>
> It is most important to note that this is seen as a safety issue for staff and customers.

201 The landlord responded to the tenant by email dated 7 June 2012:

> I am also anxious to move ahead and provide a safe working environment for IGA staff and customers. In fact in earlier meetings and correspondence with you on this matter I indicated that I was more than happy to work out a timeline for the repair and replacement of flooring and subfloor structures that have been compromised as a result of water leaking from improperly installed and poorly maintained refrigeration, freezer units and cool rooms. We had on-site meetings with builders engaged by CGU as well as refrigeration mechanics. However it has taken you a considerable amount of time (16 August 2011) to respond to this offer and in the meantime the condition of subfloor and floorboards has deteriorated even further.
>
> Up until the present IGA business commenced trading the flooring and subfloor had been in excellent condition with no water bottle fungal problems. Since installation of freezer systems by [Five Dollars] there has been a marked deterioration of all floor and subfloor members. A report on this points to substandard installation with a number of poorly installed and poorly maintained freezer lines and connections with no proviso at all for the adequate drainage of water from the floor and subfloor areas. Consequently a floor that had

> been structurally very sound and dry until recently has now been almost totally ruined.
>
> When [Five Dollars] took over the business they completely removed everything from the interior of the building, including the original office, from the supermarket floor leaving bare walls. They then stripped all flooring and [laid] new Masonite sheeting over the entire floor area. At this stage the floors were in excellent condition with no wet areas or rotten timber. The floors, subfloor bearers and joists had been in this very solid condition for over 100 years and should have remained this way into the foreseeable future.
>
> The installation of new freezers, cool rooms and refrigeration units with no water collection trays or drainage systems and little or no insulation under cool rooms or freezers and incorrectly installed freezer lines has allowed copious amounts of water to flow over and into Baltic pine floors and hardwood subfloors. In fact water up to 25mm deep in sections could be seen lying under freezer units and ice balls bigger than basketballs could be seen attached freezer lines when the premises were inspected by Ross Proud's structural engineer in early 2011.
>
> In earlier correspondence with you I outline how we could move ahead with the repair to damage caused by your plant and equipment stop as you are aware the CGU Insurance Company will repair the water damage caused by your faulty equipment provided, of course, that you stop the leaks and provide adequate drainage away from the building from all of the offending plant and equipment. When this is done we will be able to work out a suitable timetable for the replacement of damaged floorboards, subfloors and vinyl floor coverings.

202 By an email in response dated 5 June 2012, the tenant wrote:

> It seems that the problem is with the works conducted by [Five Dollar] which as owners you must have approved. Was there owners consent for the work done by [Five Dollar]?

203 By email dated 27 September 2012, the landlord informed the tenant of its intention to sell the premises, by putting them up for auction in late October 2012. The tenant subsequently offered to purchase the premises for $750,000. The offer was not accepted by the landlord.

204 The landlord gave evidence, which I accept, that on 8 October 2012, he hand-delivered to the tenant an email, in which he restated the contents of his email to the tenant dated 7 June 2012, but with the following additional paragraphs appearing before the paragraph starting "In earlier correspondence…":

> I think you would agree that if you have wooden floors in your house and you allow water to run onto them over a similar period you would end up with a sort of damage that has occurred to this building. Unfortunately it is not just one "tap" that is leaking water onto the

> floor but at least six that have been allowed to run directly onto the floor.
>
> It should be noted that water is very obviously running from every freezer and refrigeration unit as well as cool rooms directly onto the wooden floorboards and then through to the joists and bearers. Significant damage has been caused to all sections of the floor that are directly below or within close proximity to these units. This damage must be repaired before the floor collapses. Non-corrosive trays with drainage outlets to waste water pipes must be fitted.
>
> (I also noted that in areas under the floor where there were no refrigeration units the ground was completely dry and offcuts of Baltic pine floorboards left behind from when the building was constructed in the late nineteenth century are still in pristine condition).
>
> The damage is not "fair wear and tear" and under the terms of the lease you are required to keep the premises properly cleaned, repaired and maintained. Allowing refrigeration and freezer units and cool rooms to leak onto the floors has caused significant damage to the property and has created a hazardous situation for your employees and the general public.

205 The tenant received a quotation dated 19 October 2012 from Page Constructions for a "new floor" in the amount of about $251,000. The quote stated that the proposed works would take four months, and that it would require the removal of the things, stock and fridges by others.

206 The quotation provided for the removal of all the flooring, timber bearers, timber joists and timber stumps and replacing them with new brick piers, steel bearers and a bond deck with a 130 mm concrete slab poured on top of the bond deck.

207 There is nothing to contradict the landlord's evidence that he did not become aware of the quotation from Page constructions until receiving it with Mr Hall's statement made in this proceeding dated 3 October 2016, and I find that this was the case.

The first Cossins report dated 15 November 2012, obtained by landlord.

208 The landlord inspected the property on 13 November 2012, in the company of Mr Bruce Cossins, Registered Engineer, Building Surveyor and Registered Building Practitioner (**Mr Cossins**"). The "client brief" included the landlord's allegation, at that time, that:

> …the floors [in] the coolrooms and freezer units are undulating due to movement in the floor structure. The movement is related to the timber flooring being saturated and supporting large point loads…[32]

209 By his report dated 15 November 2012 (the "**first Cossins report**"), Mr Cossins stated:

---

[32] See page 3 of the first Cossins report.

> The floors at the freezer and cooler area at the western end of the grocery area [shown in a photograph, immediately east of location 3 in the plan, are] undulating. The maximum deformation measured in front of the coolroom in the south-west corner [location 3 in the plan] is in excess of 80mm.
>
> The floor at the units on the northern side [shown in a photograph, immediately south of location 6 in the plan] has deformed and is holding [pooled] water at the supporting leg.
>
> **Within the subfloor**
>
> The subfloor under the refrigerated units [shown in 5 photographs, at locations 5 and 6 in the plan] is suffering from water inundation. The floorboards, joists and bearers are damp and in places exhibiting free water. The floor of the subfloor area has free water. The timber floor structure is deformed with soft saturated timber.
>
> **Conclusion**
>
> The timber floor structure has suffered distress due to the water from the refrigeration units above the distressed area. The refrigerated units should be self evaporating and have drip trays installed with the discharge from units conveyed to a point of discharge.
>
> The saturated timber has deformed with excess creep occurring due to the high moisture content and applied loads.
>
> In no circumstances should the discharge from the units be free to discharge to the timber flooring.
>
> **Remedial works**
>
> The refrigerated units require removal, the floor reconstructed.
>
> The floor structure will require design to ensure it can adequately carry the applied loads.
>
> The refrigerated units can then be reinstalled ensuring that trays connected to a legal point of discharge are provided.

210 On 19 November 2012 the tenant emailed Mr McPhan, the loss adjuster:

> In relation to floor repairs has insurer taken into account the cost of removing and reinstalling the tenant's equipment so that the repairs can take place?
>
> I have a quote for just remove and replace refrigeration and cool rooms of over $70k. Then there is the cost of the-stocking the shelves, removing the shelves, storage, reinstall and restocking, my guesstimate is another dollars 35k. All up over $100k.
>
> None of this includes any loss of trade or other ongoing expenses!
>
> What is the insurers thoughts on these costs?

211 Mr McPhan responded by email dated 19 November 2012:

No they haven't. The insurance will only pay for the repairs to be done, it is either the landlord or tenant to provide the access. If the equipment belong to the owner then has insurer MAY contribute.

212 The tenant referred the dispute to the Small Business Commissioner for mediation. The mediation was held on 23 November 2012 but the dispute was not resolved.

213 Following the mediation, the landlord's then solicitors, Cinque Oakley Senior, sent a letter to the tenant dated 27 November 2012, as follows:

> … A brief summary of [the landlord's] position is as follows:
>
> 1. In approximately 1999, the floorboards and subfloor of joists, bearers and stumps were inspected and apart from an area directly under the only freezer and a small section under the meat refrigerator all were in good condition. In particular all sub-floor timber was dry with no evidence of moisture. A report from a - and re-stumping specialist was obtained at that time.
> 2. The then tenant paid for the repairs required underneath the freezer and meat refrigerator…
> 4. Subsequent to [the works undertaken by Five Dollar]…it later transpired that none of the [6 new freezers and 4 new cool rooms] were installed properly and in particular no water collection trays or drainage systems [were] installed in line with industry standards. Further none of the units have insulation under them or waterproof membrane to prevent water flowing onto the floor.
> 5. [The landlord was] totally unaware of such deficiencies until recently when a member of your staff put his foot through the floor in front of one of the freezer units.
> 6. An inspection report prepared by Ross Proud in September, 2010 commissioned by [the landlord's insurer] clearly identified the problem as being too heavy loads for the floor and water damage from the freezer unit.
> 7. On my instructions no remedial works have been undertaken by you since that time
>
> …
>
> 11. A further report from Ross Proud dated 24 May 2012, commissioned by you…refers to the damage caused by water and overall observed that the condition of the floor is much worse than it was two years previously.
> 12. [The paragraph refers to the first Cossins report having been provided to the tenant]
> 13. I note that the Lease was transferred to you on 1 March 2010 and whilst it is not suggested that the units were installed by you nevertheless the problems caused by them were evident in September 2010 yet nothing of substance [was done] since then.

Clearly the problem has become worse in those two years to the point where the entire floor will need to be replaced.

14 On the basis of the matters set out in this letter my clients hold you responsible for the cost of replacing the floor structure which will no doubt be significant.

214 This letter was to the effect that the landlord required the tenant to replace the floor structure of the premises at the tenant's cost, and that the landlord would cooperate with the tenant with respect to whatever action was required to be taken immediately and having regard to the safety and welfare of staff and customers.

215 The tenant did not respond to the letter. On 31 January 2013, Cinque Oakley Senior wrote to the tenant's then solicitors:

> I refer to my letter of the 27 November 2012 and email of the 10 December 2012 and would appreciate the courtesy of a reply.
>
> The underlying problem has possibly worsened since November 2012 and your client's inaction in addressing the issue could have unintended consequences for all parties.

The second Cossins report dated 18 April 2013, obtained by landlord.

216 In 2013, the landlord asked Mr Cossins to provide further comment in relation to the allegedly distressed floor, having regard to the conclusions set out in the second Proud report.

217 By his further report dated 18 April 2013 (the "**second Cossins report**"), Mr Cossins stated:

> The subfloor ventilation is limited as the floor is basically a footpath level at the front (Vincent Street) with the site sloping to the rear with the floor in excess of 2 m above ground level at the rear. Thus cross ventilation is limited.
>
> The condensation from refrigerator pipe and units in the retail area, The subfloor condensation from the pipes will add to the subfloor humidity but not to the free water on the floor structure. The condensate from the retail units freely flowing onto the floor and saturating the floor and support structure is the major contributor to the floor degradation.
>
> Natural groundwater was not evident but free water on the subfloor floor surface is from condensate passing down from the flooring.
>
> **Conclusion**
>
> The subfloor ventilation would be adequate if free water was not being provided to the subfloor area.
>
> The discharge of condensate to the flooring and not collecting the condensate and discharging it clear of the subfloor is the major contributor to the distress in the flooring.

The free water on the subfloor ground surface is considered in the main to be condensate which should not have been discharged into the subfloor.

Summary

The timber floor structure has suffered distress due to the water from the refrigeration units [at locations 5 and 6 in the plan] above the distressed area. The refrigerated units should be self-evaporating or have drip trays installed with the discharge from units conveyed to a point of discharge.

The saturated timber has deformed with excess creep occurring due to the high moisture content and applied loads.

In no circumstances should the discharge from the units be free to discharge to the timber flooring

The major contributor to the floor system distress is thus the condensate from the refrigerated units.

218 By email dated 22 July 2013 the tenant wrote to the landlord:

> Please advise when you require insurance works to be done at [the premises]. Please advise what access you require to the building. Are we required to vacate premises while works are done? Or is some other means of repair proposed that does not interfere with our trade if so what is the proposal?
>
> Who is responsible for moving stock and equipment and any costs associated?

219 The landlord responded to the tenant by email dated 25 July 2013:

> The insurance company will not look at repairing damage to the flooring, subfloor including joists, bearers and stumps until all refrigeration lines and equipment have been fitted with drainage trays that remove water to an external drain. When I last checked the underfloor space, water was still running down from refrigerators, freezers, cool rooms and refrigeration lines and there was water pooling on the vinyl floor under some of the units.
>
> [Bruce Cossins] inspected the floor and subfloor and prepared an engineering report which was sent to my insurance company. They consequently advised that no action could be taken until the cause of the problem had been rectified. Please advise if this has been done or if not when you propose to carry out the necessary remedial work.

220 The landlord sent a further email to the tenant dated 10 December 2013:

> With reference to your email of 22/07/2013 can you please advise the problems associated with water running from freezers etc onto the Baltic pine floorboards have been addressed. My insurance company is waiting to hear if you have made any progress towards redirecting water to an external source by a collection of trays and piping before giving the go-ahead for repairs.

The third Proud report dated 16 April 2014, obtained by the tenant

221 On 14 March 2014, almost a year after the second Cossins report, Mr Proud re-inspected the premises. On 16 April 2014, he wrote to the tenant (the "**third Proud report**"):

> The following points are emphasised, since previous damage and rectification recommendations (sic), outlined in [the second Proud report dated 24 May 2012].
>
> 1. The subfloor framework particularly on the south side of the basement [to the north of locations 5 and 6 in the plan] has deteriorated to the point that it is unsafe and has been temporarily propped to prevent collapse.
> 2. Significant deflections have occurred in the floor above.
> 3. There is considerable condensation under the fridges around the pipework. This is to be expected considering the nature of the refrigeration process.
> 4. The origins of the subfloor moisture are:
>
> (a) Natural Soil Moisture.
>
> ~~(b) Condensation from Refrigeration Pipes~~[33]
>
> (c) Natural Spring with Sump underneath the Building.
>
> (d) The subfloor area is a closed damp area lacking any ventilation. The dampness extends over the entire subfloor area.
>
> 5. The provision of adequate subfloor ventilation is absolutely necessary to maintain dry conditions, as is the maintenance of the refrigeration system.
> 6. The presence of subfloor moisture and lack of ventilation is also creating a high relative humidity in the shop above, resulting in the likelihood of mould growth. Under the circumstances there is a possibility of some health issues developing. I would therefore suggest that the health surveyor may have some issues with these conditions.

222 On 31 March 2014, Mr McPhan emailed a Mr Neil Short:

> I am writing to confirm that there is an insurance claim pending on the above building owned by [the landlord] that dates back some time. The building was insured by [CGU] at the time of the loss and they have accepted a claim to replace water damaged floorboards and to replace the vinyl floor coverings but not do any repairs to or replacement of the subfloor system at this stage.
>
> In order to replace the damaged floorboards it will be necessary for the tenant to remove his refrigeration equipment to allow contractors access and then to reinstall its equipment which I understand he doesn't seem to want to do.

[33] Again, Mr Proud removed this sub-paragraph during cross-examination on 21 November 2016.

Hope this provides you with information you require.

223 At the request of the landlord, on 3 April 2014, Mr Ragatz[34] sent by facsimile to Mr McPhan a quotation (undated) for the replacement of water damaged flooring and sub-flooring in the amount of $157,000, which read, in part:

> Large areas of floor and subfloor timbers have been damaged by water leaking from refrigeration units, cool rooms and compressor lines. As well, floorboards and some subfloor bearers and joists have been damaged by the fine point loads from most shelving units which would be okay on a concrete floor but not 20 mm Baltic pine. The water has been leaking for a number of years and any floor exposed to continuous water contact would either rot or to deform as a result…

224 The loss adjuster subsequently engaged Mr Bruce Hollioake, consulting civil and structural engineer, to inspect the building, and to provide a report on the cause of damage to the timber sub-floor areas, particularly with regard to "the contributions made from leaking refrigeration equipment, condensation, lack of ventilation, and potential underground water sources".

225 Mr McPhan provided Mr Hollioake with copies the first Cossins report and the second Cossins report and, it appears, the second Proud report.

The first Hollioake report dated 15 June 2014, obtained by the landlord

226 Mr Hollioake inspected the building on 6 June 2014, together with the landlord. In his report to the loss adjuster dated 15 June 2014 (the "**first Hollioake report**") Mr Hollioake wrote:

> …There is significant damage and rotting of the floorboards, floor joists, and bearers, with these damaged members being saturated, and with free water evident. In some instances the floor joists had failed and others badly deflected. The floorboards themselves were rotted in these areas where the free water was present. Refer photographs 2 and 3 [showing, as described against the photographs, views of "saturated floor joists" and "rotted flooring", and a failed floor joist under the cool room]. These rotted areas are located directly under the display refrigeration units and cool room that have been installed within the supermarket above. The failed flooring members have allowed the refrigeration units to settle, causing significant deflection in the flooring above, refer photograph 4, and in some instances the supporting feet of the display units have punched through the floor. There has been some temporary propping added under some of the currently damaged joists approximately 12 months ago to guard against the risk of collapse at that time.
>
> It is clear that the source of this water is from the refrigeration units above, as the floor is generally dry and virtually undamaged in areas remote from the refrigeration units. The amount of water [coming from] the refrigeration units is sufficient to have then dripped and

[34] It will be recalled that Mr Ragatz was the stumping specialist who carried out works at the premises in 2004-2005.

ponded on the floor. It would appear that the drip trays and condensate discharge [lines] are either blocked or not maintained, as we observed that condensate and drainage pipes appear to have been provided to at least some of the refrigeration units.

The extent of damage to the floor extends to the south, beyond this readily accessed North-West area, however a close-up examination of this damage was not taken due to the limited access, but even from a distance it is quite clear that a similar damage has occurred in the southern area of the building, again corresponding with the location of refrigeration display units [it is unclear whether this is a reference to locations 1, 2, 3 and/or 4 in the plan]

The sub-floor ventilation under this building is limited, however generally good ground clearance exists in this north-west portion of the building, but reducing both the Vincent Street and Albert Street road frontages, where the floor is effectively at footpath level. However no amount of subfloor ventilation would offset the discharge of water, and subsequent damage to the timbers, that is coming from the refrigeration units.

There was no evidence of significant groundwater present in the sub-floor area, and it is [my] opinion that virtually all of the moisture present on the timber bearers, joists and flooring has emanated from the refrigerated display units.

[I] note that the condition of the flooring and sub- floor structure and the portions of the building remote from the refrigeration unit generally remain in good condition. There was a degree of footing movement in the floor, particularly under the cool room, however the amount of subsidence movement in the timber stumps and brick piers [was] not excessive for a building of this age. [I] suspect that the weight of the cool room and product stored within it has caused much of the subsidence and the stump directly under the cool room.

PREVIOUS REPORTS

The [Cossins first report] found that the timber floor structure has suffered distress due to water from the refrigeration units. [It] is highlighted that the refrigeration units should be self evaporating and have drip trays installed with the discharge from the units conveyed to a proper point of discharge. He found that the saturated timber is deformed with excess creep occurring due to the high moisture content and applied loads. This view was supported in his second report, which noted that whilst the sub-floor ventilation is limited, the existing sub-floor ventilation would be adequate if free water was not being discharged to the sub-floor area from the refrigeration units. The [Cossins second report] concluded that the major contribution to the floor system distress is the condensate from the refrigeration units.

The [second Proud report] has made similar findings but also suggested that improved sub- floor ventilation should be provided to the building, along with the installation of a new sump and agricultural drains to deal with excessive natural groundwater.

Both of these reports agree with [my] findings that extensive damage has been caused to the sub- floor structure of this building due to excessive moisture. The Proud report suggests that the sub- floor ventilation and presence of natural groundwater is contributing towards the current damage to the floor structure, however it is [my] opinion, and also the opinion of Cossins that the overwhelming major cause of the damage to the sub-floor structure is from the leaking refrigeration units. [I] saw no evidence of excessive groundwater at the time of inspection, and agree with Cossins that the sub- floor ventilation is generally adequate, under normal circumstances, due to the good ground clearance, particularly in the north-west portion of the building, where some of the worst damage has occurred.

SUMMARY

The floor structure of this building has been severely damaged due to water leakage from the refrigeration units that have been installed above. The contribution to the current damage due to natural groundwater, or poor sub-floor ventilation, is considered to be negligible, as even if the sub-floor ventilation was improved, the current damage to this timber flooring would still have occurred due to the large amount of water that is leaking.

[I] consider the current floor to be dangerous and at risk of sudden collapse. It is also important that existing refrigeration units be immediately connected to a condensate discharge, however because several of these units have already punched through the flooring, this will be difficult to achieve without full removal of the units.

The exact extent of damage throughout the building will not be known until the existing floor coverings are removed and a closer inspection as possible, however large areas of the flooring, generally underneath the refrigeration display units and cool room, will need to be replaced. However, the design capacity of the existing floor is not adequate for the design floor live loading for use as a supermarket/storeroom. Therefore it is likely that the entire floor and floor structure will need to be demolished and a complete new floor install to satisfy current design standard.

The damage to this building caused by the leaking refrigeration units has occurred over an extended period of time generally in the order of years, and certainly of a period far in excess of 72 hours.

227 Mr Hollioake attached to the first Hollioake report a plan showing a partial area of the north-west sub-floor, showing the location of the rotted and split floor joists running north-south, and which are located under the west side of cool room 8, and running south towards locations 5 and 6.

228 The landlord stated in evidence that he provided a copy of the first Hollioake report to Mr Fletcher, the Municipal Building Surveyor.

Service of notices on tenant

229 Mr Fletcher, the Municipal Building Surveyor of the Council inspected the premises on 12 June 2014, and subsequently issued the landlord with an Emergency Order under section 102 of the *Building Act 1993* requiring the landlord and the tenant within 24 hours of service of the order to evacuate the western section of the premises as highlighted in an attached plan dated April 2006. The evacuation order extended to the entire western half of the premises, shown in a plan served with the Emergency Order. Mr Fletcher subsequent served an amended Emergency Order on the landlord dated 16 June 2014 which referred to a report from "Ross Proud 13 June 2014",[35] and which confined the area to be evacuated to a portion of the north west corner only. The effect of this is that it allowed the tenant to continue trading in part of the premises, whereas under the original order, continuing to trade would have been impossible.

230 It was against the service of these notices on the landlord that a meeting took place at the premises on 18 June 2014, attended by the landlord, Mr Hall of the tenant, and members of the tenant's family including his son Ben.

231 The landlord subsequently emailed the tenant at 8:31 pm on 18 June 2014:

> My proposal is to replace the entire wooden floor and subfloor with a suspended concrete slab.
>
> This floor would be on the one level and not on two levels as is the case with the present floor.
>
> The floor slab would be designed by a structural engineer and would comply with all of the requirements associated with the loadings on such floors.
>
> When cured the slab would be covered with welded vinyl to your specs.
>
> The loading bay would be altered to meet with the lower entrance height.
>
> The slab design would include penetrations to accommodate plumbing and electrical work to your requirements. This would require a plan of all installations prior to pouring concrete. The new floor work could commence as soon as all installations, etc have been removed and the floor is free of anything that would impede progress. My estimate to complete the work is in the order of 4-6 weeks. This includes allowing the slab to cure to the required strength.
>
> If there are sufficient funds a 3.5 m wide by 19.6 m deep addition will be added to the western end of the building to accommodate office, store room and bathroom facilities. The loading bay would be relocated to the section. When and if funding is available for this I would like you to provide a plan for this new addition.

---

[35] A report made by Mr Proud bearing that date was not in evidence, but may have been the second Proud report or the third Proud report.

> If this can't be done these facilities will be reinstated to the same position as they are now unless you provide an alternative.
>
> I hope this meets with your approval. If you have any suggestions or alternatives please advise.
>
> Obviously all of the above is to occur ASAP.

232 The landlord gave evidence that Mr Hall said to him at that meeting that the tenant would start to reduce stock and wind down the business over the next three weeks, in order to give the landlord access to the premises.

233 The landlord's evidence is supported by the contents of an email he sent to Mr McPhan (and not copied to the tenant) at 1:18 pm on 18 June 2014, immediately after the meeting, which stated:

> I have just come from a meeting with Wayne Hall and family. They will remove all items from supermarket as soon as possible and demolition of floor and subfloor can commence.

19 June 2014-4 May 2016

234 On 19 June 2014 the landlord emailed Mr McPhan:

> I don't think that [Mr Ragatz] included [in his quotation dated 3 April 2014] the cost of items such as vinyl flooring, demolition and disposal of damaged flooring and sub-flooring, strengthening bearers and joists to engineer specs etc.
>
> I have asked Daylesford engineering to quote on the job. They do a lot of construction work with steel and concrete around the Daylesford area utilising local tradesmen.
>
> Do you have a figure for the cost to recover the floor with welded vinyl. It's roughly 400 m².

Landlord writes to council

235 By letter dated 20 June 2014, but which I find from the evidence was written and delivered on 19 June 2014, the landlord wrote to Craig Fletcher, Building Surveyor of the Council and Paul White, Building Inspector of the Council:

> I met with the [tenant] on [18 June 2014]. I was surprised to see that they are occupying the building and apparently do not have to comply with the emergency order issued to them under section 102 of the Building Act 1993.
>
> I have had three structural reports completed in the last four years that all attest to the fact that water running on to the floors from the tenant's refrigeration and freezer units have seriously compromise the structural integrity of the floor and subfloor. The tenants are acutely aware of this problem and have made no attempt to prevent this from happening in the five years that they have occupied the building. Water collection trays should have been provided to carry water away from the building rather than letting it pool under freezer and

refrigeration installations and then dissipate down through the floorboards, joists, bearers and stumps to the ground level where it eventually ends up in the sump area.

I [attach a copy of the first Hollioake report]. He recommended to you that the building was unsafe in its present state to allow the general public and staff to occupy parts if not all of the building…

When [Five dollars] leased the building from me they were provided with a building that had a very structurally sound, rock solid, level floor and subfloor. Something I think you can attest to after inspecting the building when [Five dollars] completed the general shop fit out 10 years ago.

I did not suspect that [Five Dollars] hadn't complied with regulations when they installed all of their refrigeration installations, cool rooms, freezer lines, compressor lines et cetera this was not drawn to my attention until four years ago when a member of staff put his foot through the floor in front of one of the cool rooms [**I find that this is a reference to the incident on 24 May 2010, referred to above**]. It was only then that the full extent of the damage being caused to the building by water constantly running onto the Baltic pine floorboards and subfloor became apparent.

I have had a number of conversations with the current tenants who had the lease transferred into their name over four years ago. In that time they have done absolutely no maintenance on the building, which is part of the lease conditions and have failed to address the problems associated with the refrigeration. Estimates from construction engineers and builders to repair the damage and replaced the wooden floor with a compliant suspended concrete slab range from $160,000-$200,000. To allow this to take place the building will have to be closed down and completely stripped out.

If you allow the building to be occupied and a member of staff or the general public is seriously injured or killed as a consequence of ignoring Bruce Hollioake's advice that will not be my responsibility. I have done all I can to address the problems caused by the tenants who, by the way operate three supermarkets and are well aware of their responsibilities.

… I would appreciate your support in this matter. I cannot afford to let the tenants occupy the building in its present state. They have a responsibility under the terms of the lease to maintain the building in a safe and secure manner and to make good any damage caused by their installations and equipment. By allowing them to continue trading you are putting lives at risk and making it impossible for me to try and address the problems they are creating.

236 The landlord gave evidence that he had in the following week after the meeting on 18 June 2014 (that is to say, the week starting 23 June 2014), he observed a semi-trailer delivering stock to the premises, and it was then that he became concerned that the tenant intended not to make arrangements to leave the premises.

237 Mr Hall gave evidence that following his meeting with the landlord on 18 June 2014, he immediately appointed Mr Peter Shaw to do the drawings for the proposed works. Mr Shaw emailed Mr Hall on 23 June 2014 to the following effect:

> As discussed last week, before we can produce any drawings, I think it is fundamental that we have an understanding of how the landlord proposes to undertake [his] work on the full scope of same.
>
> The Engineer's design drawings will be required that indicate where under-floor structures are so that we can eliminate clash issues with services. Similarly the locations of columns will have an impact on the internal design.
>
> Similarly a meeting with the Builder will determine what impact their works will have on plumbing, electrical and like services and who pays for the reinstatement of same.
>
> Happy to attend any meeting with the relevant people to better understand the scope of the project and who was doing what. I await instructions from Tom [Maloney] or Ben [Hall] on a meeting date and location.
>
> Enjoy the holiday.

238 On Monday 23 June 2014, Mr Hall of the tenant forwarded to the landlord the email from Mr Shaw, stating:

> Had the attached request for info/meeting from Peter Shaw who was doing a drawing. Can you provide this info ASAP and or have a meeting with Peter Ben and/or Tom Moloney.
>
> AS PREVIOUSLY MENTIONED I am away for two weeks from Tuesday morning. I want to keep this moving as quickly as possible.
>
> Thanks

239 The landlord subsequently received quotations from Fells Powerline and Electrical Pty Ltd dated 30 June 2014, and from Daylesford Engineering dated 1 July 2014 in respect of the construction of a concrete slab, with vinyl floor covering, together with all associated works. The amount quoted was about $209,000 plus approximately $20,000 disconnection and reconnection of electrical supply.

240 On 19 July 2014, the landlord emailed the tenant to the effect that the lease for the premises extended expired on 1 June 2014, and requested the tenant to inform the landlord whether it intended to exercise its option to renew the lease. If it did so, there would be of rental review to apply from 1 June 2014. This correspondence is dealt with below in my Reasons, in connection with the rent dispute between the parties that ensued.

Affidavit of Mr P Shaw, architect sworn 12 August 2014

241 On 12 August 2014, the then solicitors for the tenant instructed Mr Peter Shaw, Architect to provide comment on the cause and origin of the sub-floor damage to the premises.

242 Mr Shaw had also been provided with a copy of the second Proud report, upon which he commented in his affidavit (the "**Shaw affidavit**").

243 The Shaw affidavit contained the following:

> 12. I have read the [second Proud report].
>
> 13. I concur with the conclusion set out therein, that (sic) the reference to "condensation from refrigeration pipes [and units above floor]". In my view any condensation in the circumstances represents precipitation of excessive moisture in the air resulting from the water inundation identified below. This airborne moisture is unable to disperse due to the wholly inadequate subfloor ventilation.
>
> 14. All of the ventilation ports on the north wall have been sealed and the ventilation to the remainder of the subfloor area is generally poor. The subfloor area ventilation is entirely inadequate given the amount of water flowing into the subfloor from the failed roof and the sump/groundwater… what minimal (if any) condensation that may be caused by the refrigeration plumbing is negligible in the context of the amount of water/moisture flowing into the subfloor area from the failed box gutter and the sump.

244 Mr Shaw's observations in respect of the box gutter were as follows:

> 15. Photographs number 13, 14 and 15 [coloured versions of which appear in the applicant's TB pages 208-210] are of the box gutter immediately above the damage to the subfloor in photograph 8 [a coloured version of which appears in the applicant's TB page 205].
>
> 16. Box gutters should be constructed to have a constant fall to the outlet or outlets. The above box gutter in this case has a flat area or slight dip at or near a joint in the sheet metal from which the box gutter is constructed. This joint is immediately above the most serious subfloor damage, water damage to the ceiling [shown in photograph 4 in applicant's TB page 201, photograph 6 in the applicant's TB page 203 and photograph 9 in the applicant's TB page 206], rotting of the flooring beneath the cool room [shown in photograph 8 in the applicant's TB page 205 and photograph 9 in the applicant's TB page 206] and in line with the vertical watermarks evident in photograph 10 [in the applicant's TB page 207] [taken] in 2014 but not present in photographs from 2005.
>
> 17. Photograph [in the Applicant's TB page 210] is a photograph of the joint in the box gutter. The uppermost sheet of sheet metal is

on the "downhill" side of the joint. As is evident from the photograph the joint has failed and the natural flow of the water falling into the gutter is directly into the opening between the two sheets of sheet metal into the roof space and on to the Nao damaged timber ceiling lining and then from there down the wall, in and through the particle board flooring and then into the floor substructure (in this case the joists, bearers and stumps).

18. Any box gutter should be constructed so as the "downhill" section of a joint in sheet metal is lapped under the "uphill" section. Any such joint should then be sealed with an appropriate sealant and two rows of rivets with an overlap of the sheet metal of no less than 300 mm.

19. There is no evidence of any riveting of the joint and the joint has failed. The gap between the two sheets of sheet metal in this case is between 5mm and 10 mm.

20. It is unlikely in my opinion, that [this] joint was made by a professional plumber.

21. The constant pooling of water [in] this area is evidenced by the pooling of water and the growth of moss at this integer and not otherwise in the box gutter.

22. The subfloor area has been subject to inundation from both the failed box gutter and intermittently operation of the sump. Upon inspection in 2005 I found that electric sump pump was not operating as per photograph 1, which I took in 2005, water had flooded the area around the sump and the surrounding timbers and debris evidenced long-term water inundation.

245 Mr Shaw also provided observations of the north wall deflection, as follows:

23. I have measured the deflection of the brick/northernmost wall of the supermarket. As at 7 August 2014 the outward deflection of the wall is 100-110 mm at the base and 50 mm at the parapet (in line with the failure of the box gutter joint)… In the circumstances the defection in the north wall is most likely a consequence of water inundation from the failed box gutter joint and the lack of weatherproof ceiling around the loading bay roller door thereby weakening the footings of the wall.

Conclusion

24. The cause of subfloor damage to the premises… is due to the combination of water inundation from the failed box gutter as noted above, failure to consistently manage groundwater pooling in the subfloor and the sealing of ventilation to the subfloor area.

The fourth Proud report dated 8 October 2014, obtained by the tenant

246 The tenant requested Mr Proud to reinspect the premises in October 2014. In his subsequent report dated 8 October 2014 (the "**fourth Proud report**")

Mr Proud repeated his statements in the second Proud report concerning the condition of the flooring and sub-flooring members in Areas A, B and C, together with the observations he earlier made concerning the causes of the moist environment, being:

- blocked and ineffective subfloor vents and rear windows
- ~~Condensation from refrigerator pipes and units above floor~~[36]
- Natural ground water

247 The discussion section of the fourth Proud report included the following observations:

> The primary source of the decaying condition of the subfloor [in Area B is] due [to a] combination of excessive moisture and no effective subfloor ventilation.
>
> Condensation occurs when moisture laden air comes in contact with object (sic) at a lower temperature. The amount of water condensing out of the air is relative to the temperature difference and volume of water vapour held in the air.
>
> The volume of water vapour in the air (humidity) is a feature of the air temperature and the availability of free water to evaporate from a primary source and the relative temperature difference of the free water surface and the air temperature.
>
> This effect on an environmental scale is termed the "Water Cycle".
>
> At a local level this same effect occurs particularly in a relatively closed system as is the case with the subfloor area.
>
> The conditions occurring in the subfloor area duplicate these very (sic).
>
> 1. The area is closed with little or no natural ventilation.
> 2. The quantity of free moisture available for evaporation present in (sic) substantially higher than would be expected simply from the natural soil moisture content due to leaks at roof level
> 3. The air temperature in the subfloor area is relatively constant and reflects the temperature of the soil mass and other building components and is typically around 15-20 degrees C.
> 4. Relatively high humidity of the air in the subfloor area.
> 5. The presence of…building components that are at a much lower temperature such as the refrigeration piping and the air and flooring immediately under the fridge units.
>
> The end result is water condensation at the interface of the air and lower temperature building components such as the flooring immediately below the fridges and the refrigeration pipework evidenced by the accumulation of ice around the pipes and very high

[36] Again, I have struck through this comment, because in cross-examination Mr Proud recanted from this conclusion.

moisture content in the timber framework. The further removed from [37]the source of colder temperatures the less the temperature difference and the less condensation occurs.

Ventilation and the effect of the refrigeration pipes

Under normal circumstance (sic) subfloor areas with normal soil moisture as the water source [,] the convective airflow from adequate inlet and outlet ventilation maintains the air moisture content and temperature at a level similar to atmospheric conditions.

Under these normal conditions, condensation moisture is unlikely as the temperatures of the timber framing, flooring et cetera are all close to ambient and the volume of moisture relatively low. In addition, adequate ventilation and (sic) prevents the growth of fungus and mould. This is evident in subfloor Area A [Front Area of Building]

In subfloor areas where there is no additional free moisture or low temperatures zones [Subfloor Area C[38]] but still only little ventilation, the timber framing has not decayed.

Source of excessive moisture.

Initially it was suggested that the source of the free water condensed around the refrigeration pipes was due to leakage from the fridges. The refrigeration technicians were called in and the system checked for leaks. No leaks were found during this investigation. It was also thought that subsoil moisture may be contributing. The [apparent] moisture conditions in subfloor [Area A] was very low in comparison, which effectively discounted this source as a major contributor.

It was these facts (sic) that further investigation lead (sic) to the discovery of considerable leakage from the box gutter behind the parapet wall on the northern side of the building.

The evidence of the extent of the leakage is summarised below.

1. The box gutter lap joints-PLATE B[39] DRG NO SO1
2. The discharge point at the eastern end is higher than the lap joint resulting in all the water flowing to the western end discharge point over the leaking lap joint.
3. The ceiling lining boards directly below the lap joint in question have completely rotted away refer photo C1 and C2 on DRG No SO2. Both of these photos also indicate the blistered paint that is reflective of the moisture in the boards.

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37 The fourth Proud report states "Area B" here, but Mr Proud made the correction during evidence.

38 The fourth Proud report states "Area B" here, but Mr Proud made the correction during evidence. It seems unlikely, however, that Mr Proud intended to refer to "Area C" here, because page 24 of the fourth Proud report states that Area C has the "worst affected floor with damp rotting, structural members and flooring under (sic) extensive fungal attack".

39 The fourth Proud report states "PLATE 3" here, but Mr Proud made the correction during evidence.

4. The internal surface of the concrete base is scouring/weathering in a manner typical of water exposure particularly with the old river gravel concrete.

5. The pump some is brick and concrete which is designed for collection of surface water not subsoil moisture. On each inspection the pump well has been full of water.

6. The presence of excessive moisture in the soil is further confirmed by the movement that has occurred in the external brickwork in and around the middle of the wall adjacent to where the pump well is located.

Conclusions

The accumulative (sic) effects of high air moisture content, no ventilation and reduced temperature zones over an extended period of time open (possibly years) have created atmospheric condition (sic) in subfloor space [in Area B[40]] Conducive (sic) to timber decay and rot.

248 The fourth Proud report adopted the same first three recommendations as appeared in the second Proud report, but recommendation no 4 was materially different:

> Excess surface water primarily from leaking roof drainage, and wall openings needs to be stopped by appropriate maintenance of the box cutters and window opening flashings (emphasis added).[41]

249 By way of summary, therefore, following Mr Proud's inspection of the premises in early October 2014, he altered his assessment of what had caused the damage to the floors and subfloors. The fourth Proud report states, in effect, that the damage to the floor and sub-floor elements was caused by the cumulative effects over an extended period of time ("possibly years") of:

(a) high moisture content in the subfloor areas, primarily caused by alleged leakage from the box gutter behind the parapet wall on the northern side of the building;

(b) little or no ventilation, combined with high humidity of the air in the subfloor areas, creating water condensation at the point where that air meets the piping under the refrigeration units which, having a much lower temperature than the surrounding air, resulted in water condensation.

250 I find from the evidence given by Mr Proud that the reference to "refrigeration technicians" in the paragraph of the fourth Proud report headed "Source of excessive moisture" is a reference to representatives of business called Goldfields Refrigeration and Air-Conditioning

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40 The fourth Proud report states "Space A" here, but Mr Proud made the correction during evidence

41 cf. recommendation no 4 of the second Proud report stated:
"Excess surface water **primarily from condensation around refrigerated parts** should be alleviated by appropriate sub- floor ventilation and drainage trenches with an AG pipe covered by a geotextile sock and backfilled with gravel."

("**Goldfields**") of which, the evidence indicated, Craig Hinnenberg was principal, and whose son Brandon was also associated. I also find that the references by Mr Proud to the system being "checked for leaks" and that "no leaks were found during this investigation" are references to the occasion on which Goldfields inspected the premises on 2 August 2011, and referred to in the email from Mr McPhan to the landlord dated 10 August 2011.

The third Cossins report dated 21 April 2016, obtained by the landlord

251 The solicitors for the landlord re-engaged Mr Cossins to re-inspect the premises on 20 April 2016, in order that he might respond to the observations made in the Shaw affidavit and the fourth Proud report.

252 Mr Cossins confirmed in his report dated 21 April 2016 (the "**third Cossins report**") that his conclusions in respect of the cause of the damage to the floor and subfloor, as expressed in the first Cossins report and the second Cossins report, had not changed.

253 In respect of the observations made by Mr Shaw in the Shaw affidavit, Mr Cossins stated:

> The external northern wall… has bowed out to the north leaving a gap between the floor and the wall. If water from the box gutter was entering the building and running down the wall it would have passed directly into the sub-floor.
>
> The water damage previously visible [to me] showed the water passing through the flooring and gravitating down the subfloor timbers [,] not from humidity in the sub-floor.
>
> The free water in the flooring is thus not considered to be from the box gutter.
>
> It is noted that since the refrigeration units have been relocated and are not operating that the sub- floor is completely dry. This is so even though the sump pump is inoperable as the power to the building has been disconnected.
>
> The assertion that the refrigeration units are not the cause of the floor damage is refuted.

254 In respect of the observations made by Mr Proud in the second Proud report, Mr Cossins stated:

> [in respect of Mr Proud's observations that one of the causes of the moist environment is blocked and ineffective subfloor ventilation]:
>
> The sub-floor ventilation is poor but with the street frontages being basically at ground level and the northern wall being on the title boundary the only external sub- floor access ventilation is the rear western wall. The subfloor has good clearance throughout and is considered to be satisfactory provided the sub-floor moisture is controlled.

> [Mr Cossins observes that Mr Proud expressly found in the second Proud report that a cause of the moist environment is "condensation from refrigerator pipes and units above floor" and that moreover, Mr Proud made an express recommendation in regard to dealing with this cause in paragraph number 4 of his recommended works]
>
> [in respect of Mr Proud's observation that one of the causes of the moist environment is "natural groundwater"]:
>
> the sub- floor moist environment from natural groundwater is not substantiated as the groundwater flow would be from the south and west. The south and west areas of the subfloor were dry with free water in the north-east sub- floor of the building.
>
> At present the sub- floor [in area A] is completely dry and when [I] previously inspected [the sub-floor], the wet sub- floor was only under the refrigerator/freezer units. This does not support the conclusion that sub-floor water [in area B] is groundwater.

255 Mr Cossins concludes that "the condition of the timber floor under the refrigerator/freezer units [was] exactly as described [in the Fuller report]", and that the Fuller report "confirms the conclusions [subsequently] reached in the first Proud report, the second Proud report, the first Cossins report, the second Cossins report and the first Hollioake report.

The second Hollioake report dated 4 May 2016, obtained by the landlord.

256 It will be recalled that Mr Hollioake inspected the premises on 6 June 2014 at the request of Mr McPhan, the loss adjuster for the landlord's insurer, and his central findings contained in the first Hollioake report are set out above.

257 At the request of the landlord, Mr Hollioake reinspected the premises on 13 November 2014, and provided his further opinion in a report dated 4 May 2016 (the "**second Hollioake report**").

258 In the second Hollioake report, Mr Hollioake repeated his findings in the first Hollioake report as to the cause of the damage to the floor and sub-floor of the premises, although in slightly different language, requiring its restatement:

> [**Upon my inspection on 6 June 2014**] there was significant damage and rotting of the floorboards, floor joists, and bearers to a large area of [the premises], with these damaged members being saturated, and with free water evident. In some instances the floor joists had failed and others badly deflected. The floorboards themselves were rotted with the wood fibres saturated and softened in those areas where the free water was present. There was also significant fungal growth. Refer to photographs two and three. These rotted areas were located directly and around the display refrigeration units and liquor cool room that had been installed within the supermarket above. Refer also Appendix C. The failed flooring members had allowed the refrigeration units to settle, causing significant deflection on the flooring above, refer photograph 4, and in some instances the

supporting feet of the display units have punched through the floor. There had been temporarily propping previously added over some of the damaged floor joists to guard against the risk of total collapse of the refrigeration units.

It was clear that the source of this water was from the refrigeration units above, as the floor was generally dry and virtually undamaged in areas remote from the refrigeration units. The amount of water leaking/condensing from the refrigeration units was sufficient to have tripped and ponded on the floor under the units, working its way down to the flooring and subfloor framing. Whilst I [am] not a refrigeration expert, it appeared that the drip trays and condensate discharge from the refrigeration units was either missing, blocked or not properly installed or maintained. I however observed that condensate and drainage pipes had been provided to at least some of the refrigeration units. In several areas ice had formed on the refrigeration pipes under the floor, generally at joins or splits in the insulation material. Refer photographs 5 and 6.

There was no evidence [**during my inspection on 6 June 2014**] of groundwater present in the sub- floor area, and it was my opinion that virtually all of the moisture present on the timber bearers, joists and flooring, and the dampness on the concrete floor below, had emanated from the refrigerated display units.

[My] subsequent inspection [**on 13 November 2014**], when the flooring had been removed, allowed a closer look at the floor framing and ground conditions. This inspection confirmed that the only significant damage to the flooring had occurred in the areas directly under or adjacent to the refrigeration units. Refer photograph 7. The condition of the flooring and sub- floor structure and the portions of the building remote from the refrigeration unit generally remained in good condition, including the floor framing under the east side of the liquor cool room and along the north wall of the building. Refer photograph 9. The soil surface was also dry in these areas, with old pieces of timber that had been resting on the ground surface for many years not displaying decay or any evidence of dampness. Refer photograph 8. This suggests that the sub- floor area under the building, even in the areas of reduced ground clearance, was not excessively wet due to groundwater and suggests that the ventilation was more than adequate under this building, particularly given the ground clearances involved.

There was a degree of footing movement in the floor of this building, particularly under the cool room, however the amount of subsidence and general movement in the timber stumps and brick piers were not excessive for a building of this age. I suspect that the weight of the cool room and products stored within it contributed to any subsidence that had occurred in the stumps directly under the cool room.

As noted above, whilst the sub- floor ventilation under this building is limited, no amount of sub- floor ventilation would have offset the discharge of water from the refrigeration units, and the subsequent

damage to the timbers. There is good ground clearance and the north-west portion of the building and there was no evidence of damp soil conditions in the east and south portions of the building, other than under the refrigeration units. I therefore do not believe that an adequate sub- floor ventilation existed in this building for general usage.

The damage to the floor of the building was extensive and significant, and the damage had made the building dangerous stop there was a real risk of sudden collapse of portions of the flooring, particularly around the cool room and display refrigeration units, due to the extent of the decay within the sub-floor structure and flooring itself.

[**Of the opinions provided by Messrs Shaw and Proud**] at the time of my inspection [on 13 November 2014], I was unaware of a box gutter roof leak, but there was no doubt that the overwhelming source of water causing the primary damage to this floor was from the refrigeration units. The box gutter leak was reportedly under the box gutter on the north wall, and whilst there was significant damage to the sub- floor framing in this area, equally extensive damage was located directly under the dairy freezer [at location 7 in the plan], located some 5m away from the north wall. In my opinion, the leak in the box gutter did not contribute to the damage under the dairy freezer and the balance of the building in general. It is possible that the leaking box gutter may have contributed towards the damage to the floor under the north side of the liquor cool-room, where some broken floor joists existed, however I believe that a more consistent source of moisture was required to cause the magnitude of timber saturation and resultant damage that has occurred. Refer photograph 3. It has been my experience that a leaking box gutter will generally affect the ceilings and walls before affecting the floor, and with the intermittent source of moisture, the timbers would generally dry out some degree between rain events. The level of saturation evident was not primarily due to a leaking box gutter.

[Mr Hollioake subsequently addresses the conclusions expressed in the Shaw affidavit,].

Consideration of reported observations of others who inspected the premises

259 In addition to the opinions of the experts called by the parties, and the parties' own observations as to what they observed in the sub-floor, which I shall come to, the reported opinions of two other gentlemen deserve consideration.

260 Prior to the findings of Mr Proud, following his inspection on 11 September 2010, Mr Fuller, a refrigeration mechanic engaged by the tenant, inspected the premises on 16 June 2010 and, in summary, in the second Fuller report ascribed the major cause of the damage to the timber flooring to faulty installation of the refrigeration and freezer units, with flooding below caused by the sump pump having malfunctioned. The contents of his

subsequent quotation dated 21 August 2010, containing the work that he considered was required to be done, also makes that clear.

261 Mr Rothberger of Pattersons *InsurerBuild*, engaged by the landlord's insurer, following his inspection on 6 August 2010, subsequently made express written findings in his undated report that the refrigerator and freezer units were then leaking water, causing the sub-floor below them to turn black and rot. Mr Rothenberger observed that the weight of the equipment, combined with the amount of water in the sub-floor, had caused the flooring to give way in some areas, and sag in others.

262 Mr Fuller and Mr Rothenberger were not called to give evidence. However, I consider that, taken together, these reports, consistent in their nature, by specialists respectively engaged by each party at an early time in the context of the dispute, provide a powerful snapshot of the physical circumstances existing in the sub-floor in mid-2010. I consider that although neither was called, section 98 of the *Victorian Civil and Administrative Tribunal Act 1998* allows me to give their reports some weight when determining the factual question before me. They give strong corroborative support to the landlord's own evidence as to what he saw in May 2010. In particular, they both reported "water damage" to the timber flooring, bearers and joists associated with the refrigeration and freezer equipment. Mr Fuller's subsequent quotation dated 21 August 2010 also refers to the works being required to "prevent dripping" from refrigerator and freezer cabinets above, faulty pipe installations and "dripping insulation". In Mr Rothenberger's case, "leaking water" and "dripping water", specifically under the fridges and freezers, is mentioned by him, causing the flooring to "give way" in some areas and "sag" in others.

263 Mr Hall, in his evidence, relies on the findings of Mr Fuller and experts Mr Proud and Mr Shaw, as to the cause of the damage to the floor and sub-floor of the premises. He maintains though, that the view of Mr Fuller in about June 2010 was that the "moisture" under the floor of the premises was due to condensation caused by the unventilated environment, and the ready availability of pooled water. I do not accept that this is a proper characterisation of Mr Fuller's view. I find the tenor of Mr Fuller's report, and his subsequent quotation, to be that "water" and "dripping" was occurring, associated with the faulty installation of the refrigeration and freezer equipment.

264 Mr Fuller's report speaks of "water", and attaches much greater causative significance, in my view, to the defective construction of what I take to be the dairy freezer and cool room at locations 7 and 8 in the plan, and the freezer cabinet pipework below locations 5 and 6 in the plan, than to lack of ventilation.

265 I also observe that there is no evidence as would contradict the landlord's contention that the tenant did not provide to the landlord, during the period prior to the commencement of this proceeding, with a copy of the Fuller

report. I find that it was not provided by the tenant to the landlord following the tenant's receipt of it in June 2010, and nor did the tenant ever refer to it in his discussions with the landlord. I conclude from this that the tenant saw it as being against its own interest to do so.

266 Significantly, Mr Proud was another eye witness in 2010. He was then engaged by the landlord. The first Proud report stated that when he (or his representative) inspected the premises on 11 September 2010, there were observable 30 mm floor deflections under freezer units 5 and 6 in the plan, containing "standing water". This also accords with the landlord's evidence concerning what he saw on 11 September 2010.

267 Further, Mr Hinnenberg of Goldfields Refrigeration, again not called to give evidence, appears to have been reported as having come to a view as to the cause of the damage that appears to have differed from those previously expressed by Mr Fuller and Mr Rothenberger. It appears to have been expressed by him at a joint inspection of the premises on 2 August 2011. It can be seen above that this caused Mr McPhan, to ascribe a different cause of the damage in his report dated 10 August 2011 to that expressed by him in his previous correspondence. That is to say, on 24 December 2010, he reported to the insurer that in his view the cause of the damage had been the leaking refrigeration and freezer units. His reports to the insurer dated 10 August 2011 and 10 April 2012 however, demonstrate a change of view. The only material in evidence, upon which this altered opinion could have been based, are the contents of his email to the landlord dated 10 August 2011 containing a report of his inspection of the premises, together with the landlord and the tenant, and Mr Hinnenberg on 2 August 2011. In it, he alleges, there was nothing to suggest [presumably to Mr Hinnenberg] during the inspection that day, that the cool room was leaking, and that it was more likely that water damage is a result of condensation or wet rot emanating from the spring water under the building.

268 I attach less weight to the reported findings of Mr Hinnenberg (assuming that they were his), given that they seem only to relate to the cool room allegedly not leaking (and not the dairy freezer or the freezer display cabinets), and there was no report from Mr Hinnenberg confirming his views one way or another.

269 There is also a disagreement among those attending the inspection on 2 August 2011 as to the findings then made. For instance, the landlord promptly emailed the tenant on 2 August 2011, denying the suggestion made in the tenant's email earlier that day that damage had been caused by condensation and lack of ventilation.

270 The landlord disagreed with the Goldfield's assessment referred to in the letter. He says that at the time of the inspection on 2 August 2011, the dairy cool room (at location 3 in the plan) and the liquor cool room (at location 8 in the plan) were leaking water.

271 Further, if there were verifiable findings on 2 August 2011 to the effect that the coolroom was not leaking, the loss adjuster has omitted to make any observations concerning whether or not the dairy freezer and the freezer display cabinets were leaking. For this further reason, I discount the reported findings whether made by Mr Hinnenberg, or others, at the inspection on 2 August 2011.

The parties' own observations of the nature of the floor and sub-floor damage in May 2010

272 I consider that the physical observations of the parties themselves are a primary source of evidence concerning the cause of the damp environment in the sub-floor.

273 Mr Hall gave evidence that the disclosure statement provided by Five Dollars with the sale of business agreement dated 27 January 2010, made no reference to the fact that the floors were damaged, that (in his words) they represented a risk to the safety of customers and staff, and were in need of replacement. Mr Hall says that with no adverse indication as to the state of the floors, he presumed that they were adequate to the task, and that he therefore made no changes to the operation of the business or the premises as existed in March 2010. I find, with reference to the disclosure statement, that it was the one provided by the landlord in about August 2009 to Five Dollars.

274 Mr Hall's evidence was that when the lease was assigned to the tenant in February 2010, the refrigeration and freezer equipment, and the cool rooms were "functioning properly".

275 Prior to the tenant assuming its interest in the premises on 1 March 2010, Mr Hall had however not sought any independent assessment of the structure of the building. As has been seen in the correspondence, he had Mr Fuller, refrigeration engineer, inspect the general state of the fridges in early February 2010, and who subsequently made observations in the first Fuller report.

276 I consider that one may fairly conclude from paragraph 6 of the first Fuller report, and I find that Mr Fuller did not, at that time, undertake a check to determine whether there was any leaking to the sub-floor from the refrigeration and freezer equipment.

277 I find from Mr Hall's evidence that it was only following the occasion when Ms Ryan's foot "went through the floor of the premises" in about May 2010, and following a report from Clayton Scoble, qualified carpenter, who was engaged to carry out some emergency repairs following this incident, that Mr Hall first carried out his own careful inspection under the floor of the premises.

278 Mr Hall's witness statement dated 3 October 2016 states, in relation to his inspection in May 2010:

> I…observed that [under the floor] it was very wet, that there was no ventilation and that there was significant mould and rot on everything in the cellar and on the timbers. The open "head height area" of the cellar [which I find is the sub-floor at the north-west corner of the premises] contained old equipment refrigeration lines and pipes. The cellar area was smaller than the shop floor and I presumed that there were lower areas beyond the brick walls of the cellar.
>
> In the course of my initial inspection I stepped into a separate area of the cellar adjacent to the north wall [which I find is the area below the liquor cool room]. This area was historically some sort of stairway entrance to the cellar which had been blocked off. Stepping through an opening in the brickwork from the cellar to the separate area I stepped into approximate 40 cm deep in water which had formed a large pool in the foundations.

279 The landlord gave evidence that when he met with Mr Hall at the premises in May 2010, after the Ryan incident, he saw water running down piers and stumps in the subfloor of the premises underneath the dairy freezer at location 7 in the plan, the freezer display cases at locations 5 and 6 in the plan, and that he also saw formations of ice on the "condenser lines" located underneath the stock room also shown in the plan on the western side of the premises. The landlord says that this was the first time that he became aware of these matters given that, as I have found, Five Dollars had never raised with him any damage to the floors, or water leaking onto the floors or subfloors with him.

280 The landlord also disputes the allegation made by Mr Hall that Mr Hall could have stepped into approximately 40 cm deep water during the course of his initial inspection, forming a large pool in the foundations. In his reply witness statement dated 24 October 2016, the landlord contends, by reference to the depth of the space where the sump pit is located (being 320 mm below the concrete basement floor) that there was 40 cm deep water in that space, as alleged by Mr Hall, the entire basement in the north-west corner of the premises would have been flooded.

281 I also observe that the tenant's email to Mr Fuller dated 27 May 2010 referred to saturated areas of the timber floor under the building that were saturated, which suggested also of ice build-up on refrigeration pipework and "leaks" under the cool room.

282 The landlord also gave evidence that when he accompanied a representative of Mr Proud on the inspection on 11 September 2010, he was able to see water standing up to 25 mm deep lying in pools under the freezer cabinets at locations 5 and 6 in the plan. He said that he was able to do so by following the suggestion of Mr Proud's representative to remove the panel skirting that surrounded each of the units, as a result of which he was able to obtain a clear view of the floor below.

283 I find the landlord's evidence to be more specific than Mr Hall's, particularly as to the existence and, more importantly, the location of water.

Mr Hall provides no information as to whether he was able to observe the cause of the wetness that he saw.

Findings in respect of the condition of the floor and sub-floor in 2006 (at time of works carried out by Five Dollars)

284 The landlord gave evidence that that he has always had an interest in the restoration and preservation of heritage buildings, and in the three or four weeks prior to his and Ms Ruchel's purchase of the land, he inspected the premises carefully as he intended to do restoration work on the premises if they bought the land.

285 The landlord had renovations carried out in 2001 by a Mr Merrifield who, the landlord claims, was an experienced and fastidious builder. The landlord gave evidence that, as part of these renovations, he engaged a local plumber, Mr Wilkinson, and a Ballarat-based plumber, Mr Orr to carry out all roofing and gutter work. Mr Wilkinson constructed the first three gables on the south side and, when Mr Wilkinson could not continue, Mr Orr completed the remaining gable on the north side of the building, including the box gutter on the northern side. It is this box gutter which, according to evidence called by the tenant, is the principal source of water ingress to the premises.

286 The landlord gave evidence that during the works he carried out in 2001, the old galvanised roofing iron was replaced with heritage red colorbond. The landlord contends that, as a measure of his attention to detail during these works, he replaced the old 10 foot high advertising hoardings along the southern and eastern sides of the building with signs similar to the original. He gave evidence that he found the original signs to be still in place, behind the newer 1921 addition. The landlord says that he undertook these further works in consultation with the Hepburn Shire Heritage Advisor, and the local historical society which had records and photographs of the early building and the renovated "1921 version".

287 The landlord speculates that Trissaro's creating a hole in the northerly external brick wall during its tenancy, to create a loading bay caused the bulges in the northern wall of the premises, on either side of the roller door,[42] which are still visible. The bulges were the subject of evidence given by Mr Shaw, a witness called by the tenant, to which I have referred.

288 The landlord gave evidence that in late 2004 or early 2005, Mr Nicholson of Trissaro requested the landlord to inspect two sections of floor that were of concern to him. The landlord asked the owner of a well-known house re-stumping business, Mr Ragatz, also to attend the inspection. Upon inspection, the landlord says, they found a small section of the Baltic pine floorboards in the wine racking area (north of location 10 in the plan) had been damaged by borer.

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[42] A photo of the 'bulge" appears at exhibit "RBWS-7" to the landlord's witness statement dated 29 April 2016.

289 At that time, the landlord says, he also inspected below another section of the flooring, which revealed a situation that was, he says, of more concern to him. This was the flooring under the refrigerated dairy display cabinets at location 4 in the plan. The landlord gave evidence that it was clear to him that there was water leaking from below the display cabinets, running unchecked onto the flooring directly beneath the cabinet and damaging the floorboards. He concluded that that at the time of installation of the display cabinets, no allowance had been made by Trissaro to collect the water coming from the cabinets. The landlord accessed the subfloor beneath the display cabinet at location 4 in the plan, and observed that the water was evident in the subfloor framing members.

290 After the inspection, the landlord sent the following undated[43] letter to Trissaro:

> … I also inspected other areas of the floor that you were concerned about and discovered that most, if not all floorboards under freezer and refrigeration units were in poor condition and in some places have rotted out completely [the landlord gave evidence this was a reference to the floor at location 4 in the plan, under the dairy display cabinets]. This damage has obviously been caused by water leaking from the freezer units[44] directly onto the floor. Sections of the floor, particularly under the dairy foods section, are saturated and the water could be seen running through the floorboards and onto the bearers and joists. The water from all units and runs to the lowest point in the cellar where it has accumulated to a depth of about 50 mm. The sump pump, which should be used to drain water from the spot in an emergency was lying on its side in the water and rendered useless from water damage. It should be noted that water is very obviously running from most freezer and refrigeration units directly onto the wooden floorboards and then through to the joists and bearers. Significant damage has been caused to some sections of the floor particularly the area under the dairy foods units and this damage must be repaired before the floor collapses.
>
> (I also noted that in areas under the floor where there were no refrigeration units the ground was completely dry, and offcuts of Baltic pine floorboards left behind from when the building was constructed in the late 19th century are still in pristine condition condition).
>
> This damage is not "fair wear and tear" and under the terms of the lease you are required to keep the premises properly cleaned, repaired and maintained. Allowing refrigeration and freezer units to leak onto the floor is has caused significant damage to the property and has created a hazardous situation for your employees and the general public.

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43 The landlord gave evidence that it was sent at about the time of his inspection.

44 The landlord gave evidence that this was a reference to the dairy display cabinet at location 4 in the plan, the freezer units at locations 5 and 6 in the plan not having being not having been installed at that time.

> … I will repair the damage to the floorboards in the bottle shop area as soon as possible. You must repair the areas affected by water running from freezers, refrigeration units and cold storage rooms. The units must not be allowed to leak onto the floors in the future and non-corrosive trays with drainage outlets to waste water pipes must be fitted.
>
> … In our most recent conversation you stated that you had prospective buyer for the property. Before this happens I would like to see repairs and maintenance made to the premises in line with [the provisions] of the lease agreement.

291 The landlord says that Trissaro subsequently agreed to replace the damaged floor the subject of the landlord's complaint, and to install drip trays and drainage to an external source, at its cost. The landlord stated that Trissaro engaged Mr Ragatz to replace the damaged timbers, and Trissaro then made good the dairy display cabinet, with appropriate collection trays and drainage to waste, to the landlord's satisfaction.

292 I find that the only evidence of damage to floorboards and sub-floor framing members, prior to the tenant occupying the premises in 2010 was in late 2004/early 2005. The premises were then occupied by Trissaro. It was caused by water leakage from refrigeration units at location 4 in the plan, which was subsequently fixed to the landlord's satisfaction.[45] I find from the landlord's evidence that the Trissaro works were completed, and the damaged floor sections made good to the landlord's satisfaction.

293 The landlord gave evidence that the fit-out carried out in August 2006 by Five Dollars, the subsequent tenant, included the stripping back of the entire 400 m² flooring back to the floorboards. It also removed the old office in the north-west corner of the premises, and build a new office area. Its builders also constructed new flooring where the old office had been located. Five Dollars also laid new Masonite underlay over the floors of the entire retail section of the building, onto which it welded vinyl flooring throughout.

294 Five Dollars also installed new fire equipment, smoke detection/alarm systems and emergency lighting and security camera. Most of the internal areas and some of the external sections of the premises were painted in IGA colours. Advertising signs are put in, and all exterior display windows were covered in opaque vinyl.

295 Exhibited to the landlord's witness statement dated 29 April 2016 is a copy of a floor plan for the premises dated April 2006[46] showing the extent of the works carried out. The landlord gave evidence that this is a copy of the plan given to the landlord by Mr Fletcher, Municipal Building Surveyor on 12 June 2014, together with the Building Notice.

.[45] Paragraphs 110-113 above.

[46] See "RBWS-4" to the landlord's witness statement dated 29 April 2016

296 After the floors had been completed by Five Dollars, the landlord says, it installed new refrigeration plant, dairy and liquor call rooms, freezers, display cabinets, shelving, checkout registers and storage cabinets.

297 I find, from the landlord's evidence, that Five Dollars installed the external freezer and refrigeration plant-the condensor and compressor to which I have referred-together with three new inverters on the roof, including one on the northern gable. I find that all the cool rooms, refrigerators and freezers were brought onto the premises by Five Dollars during its renovations, and that all the equipment was owned by Five Dollars.

298 The landlord gave evidence that as far as he is aware, none of the cool rooms, refrigerators and freezers were moved following their installation by Five Dollars. There was nothing in the evidence that contradicted this, and I find that this was the case.

299 The landlord gave evidence that at the time of the works carried out by Five Dollars, he considered the floor to be in excellent condition, with no wet areas or any rotting. He said that he was able to observe this on several occasions during the visits that he made to the premises when the builders engaged by Five Dollars were undertaking these works. I find from the landlord's evidence that at the completion of the works undertaken by Five Dollars in August 2006, the floor and the sub-floor were in an undamaged condition.

300 I also find that Five Dollars never reported any damage to the floor to the landlord. I also find that the landlord did not see a copy of the Bartrop report dated 15 March 2007 to which I have referred, alluding to "damaged floors", prior to it being provided to him on 19 April 2016 by solicitors for the tenant.

301 I find from the landlord's evidence that he saw no water damage to the floor and sub-floor in 2006, when Five Dollars installed new refrigeration and freezer units at the premises (including the liquor cool room at location 8 in the plan, the dairy freezer at location 7 in the plan, and the freezer units at locations 5 and 6 in the plan). Indeed, I find from the landlord's evidence of his observations of the floor and sub-floor in 2006, at the time of the works of Five Dollars, the floor and sub-floor were in good, dry condition.

The condition of the floor and sub-floor on 1 March 2010

302 Mr Hall says that he was never made aware, prior to the time that the tenant commenced its tenancy on 1 March 2010, that:

(a) there had been no inspection or maintenance of the refrigeration by the landlord whilst he was responsible for its maintenance prior to March 2010;

(b) the floor and subfloor had started to fail, and were in need then of replacement;

(c) the flooring, even though it was not beyond repair as at March 2010, was unsuitable for the use prescribed in the lease;

(d) the north wall of the building was structurally unsound and represented a safety concern to the public and had compromised the structural integrity of the building;

(e) all ventilation to the sub-floor had been blocked;

(f) the landlord, or some other unqualified person, had worked on the box gutter on the inside of the north wall of the building, resulting in water regularly flooding into the cellar; and

(g) there was a watercourse or spring in the foundations of the building that required pumping.

303 Any suggestion that the landlord was responsible for inspecting and maintaining the refrigeration and freezer equipment installed by Five Dollars, and purchased by the tenant, must fail and is rejected.

304 During the giving of his evidence, however, Mr Hall withdrew his further allegation, in his witness statement, that the landlord was "obviously aware of all these [alleged] serious concerns…and made no attempt to bring these matters to [the tenant]'s attention". Plainly, that concession was properly made, given my finding above concerning the landlord's knowledge of the state of the floor and sub-floor of the premises.

305 There was no evidence of a natural watercourse or spring below the premises, as contended by Mr Hall, other than some correspondence from the landlord, that he retracted in evidence as being loose language. I find the allegation unproven. I accept the landlord's evidence that the sump pit acts as a drain in the event of heavy and prolonged rainfall, and not to counter the effect of any naturally occurring watercourse or spring.

Other Witnesses

Joanna Ruchel on behalf of the applicant

306 Ms Ruchel, previously the wife of the landlord, gave evidence to the effect that both she and the landlord were aware of 'serious problems with rot and ventilation", and that the landlord was aware of "longstanding and serious problems with the floor", that were the cause of regular complaint by Mr Nicholson and Ms Gamin.[47]

307 The landlord denies these assertions,[48] and has given cogent evidence as to his lack of knowledge of serious damage to the floor (see below). There is no credible evidence as supports the assertions of Ms Ruchel, and I discount them.

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47 See Applicant's TB at pp 161-162.
48 See Respondent's TB at p 294.

Thomas Reeves on behalf of the applicant

308 Mr Reeves is the son of Ms Ruchel and, for the time that Ms Ruchel and the landlord were married, was a step-son of the landlord.

309 Mr Reeves, a qualified carpenter, lived with the landlord and Ms Ruchel from the end of 2005, having previously lived with his father in Queensland. He gave evidence that the landlord requested him in 2009 to look at the floor, and that it was "rotting down there because of the freezers that [Trissaro] had put in and that [Five Dollars] was complaining about the state of the floors". He said that when he and the landlord were working under the floor in 2009, "a lot of it was badly affected by borer and rot", and that, in summary, the landlord was always aware of this.[49]

310 The statements attributed by Mr Reeves to the landlord are incorrect: I have found that it was it was Five Dollars that installed the equipment, not Trissaro. I am also satisfied from the evidence given by the landlord that the relevant works undertaken by the landlord with Mr Reeves were in 2011, not 2009 as alleged.[50] For this reason, I prefer the landlord's evidence as to his state of knowledge of the condition of the floor and sub-floor prior to 2010.

Clayton Scoble on behalf of the applicant

311 Clayton Scoble is a qualified carpenter, and operates his own property maintenance business in Daylesford. He gave evidence concerning repairing sections of flooring during the period of the Five Dollars tenancy, and "16 or 17 visits" after 11 March 2010. He opined that the rot that he observed was due to "not enough ventilation".[51] I prefer to consider the evidence of the experts in this respect.

312 The landlord for his part responds in evidence that to the extent that Mr Scoble carried out works for Five Dollars, he was never made aware of this by Ms Ganim, the proprietor.[52]

Melissa Scoble on behalf of the applicant

313 Ms Scoble was employed by Five Dollars, and then the tenant at the premises between 2007 and the end of 2010. She is married to Clayton Scoble. She was in charge of the delicatessen and the fruit and vegetables section. Ms Scoble gave evidence of having been asked regularly by Ms Ganim of Five Dollars to open up the cellar door to provide ventilation to the cellar, and that as long as she could remember, "all of the cellar and everything in it was dripping wet". She also gave evidence that whenever it rained, "water would flow into the back area around the roller door in the loading dock".[53]

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49 See the Applicant's TB at 126-129.
50 See Respondent's TB at 295.
51 See Applicant's TB p 121.
52 See Respondent's TB p 295.
53 See Applicant's TB pp 124-125.

314 I find the evidence of Ms Scoble to have been at a very general level of recollection. It is answered by the landlord in meticulous fashion, with supporting photographs.[54]

315 I also find that on 26 February 2010, the date of the assignment to the tenant, there is no evidence that the landlord was aware of any damage to the floor or sub-floors other than that identified during the tenancy of Trissaro. I find that there is nothing that persuasively challenges the landlord's evidence that at no time prior to May 2010, was he aware of damage to the floor and sub-floor, other than that which arose during the Trissaro tenancy. To the extent that it is suggested otherwise by the evidence of Ms Ruchel, Mr Reeves, Mr Scoble and Mrs Scoble, I find their evidence to consist mainly of broad assertions, that is generally well met by the landlord.

316 There is also no evidence to support the proposition that the state of the flooring in March 2010, was unsuitable for the use prescribed in the lease, as contended by Mr Hall. There is no evidence upon which I can make a finding other than that on 1 March 2010 the floor and sub-floor had suffered anything other than nominal damage. It is clear from the above summary of events, that the tenant was able to use the premises as a "licensed grocery store" from March 2010 to September 2014, without the tenant making any claim to the landlord during that period that the premises, or part of the premises, were unable to be used for the use permitted by the lease. The tenant's allegation as to alleged unsuitability of the premises in March 2010 fails.

Conclusion-The cause of damage to the floor and sub-floor

Analysis of expert evidence

317 In reaching a conclusion as to the cause of the damage, I attach prime importance to the physical observations made by persons who were able to view the sub-floor in 2010. They include Mr Fuller, Mr Rothenberger, the parties themselves and, on 11 September 2010, Mr Proud who then observed standing water below the freezer units at locations 5 and 6 in the plan, with consequent "dishing" of the floor joists amounting to structural failure.

318 These various observations make clear, and I find, that in 2010 there was excessive leaking water under the equipment, and that the floor was not strong enough to bear the weight of the equipment. In other words, even if leaking water was not in issue, continued use of the equipment would cause damage due to its weight.

319 In the second Proud report dated 24 May 2012, Mr Proud unambiguously ascribed the cause of the moist environment to be "condensation from refrigerator pipes and units above the floor", together with lack of

[54] See Respondent's TB pp 296-297.

ventilation and the presence of natural groundwater, but subsequently changed his mind about this.

320 The first Cossins report dated 15 November 2012, obtained by the landlord and the second Cossins report dated 18 April 2012 provide strong evidence of Mr Cossins's physical observation that the source of the water was the equipment, and that the ventilation would be adequate if there was no leaking equipment.

321 Also, the gist of the reports by Mr Cossins and Mr Hollioake is that the rotting to the sub-floor members water was localised, confined the areas below the equipment, and that these areas dried out once the equipment was moved away.

322 I find that the views expressed in these reports are sufficient to conclude that the cause of the damage to the floor and the sub-floor was water leaking from the equipment, rather than leakage from the northern box gutter and lack of ventilation, propounded by Mr Shaw for the first time in August 2014 and by Mr Proud for the first time in October 2014.

323 In respect of the observations made by Mr Proud in the fourth Proud report, in coming to his amended conclusion that a leakage from the box gutter behind the parapet wall on the north side of the building was a source of excessive moisture in the subfloor, Mr Proud:

(a) does not address Mr Proud's own finding during his inspection on 11 September 2010, to the effect that there was a localised dishing of the joists supporting the floor under freezer units 5 and 6 in the plan, with a deflection of approximately 30 mm, containing standing water; and

(b) does not address the saturated flooring on the "southern side of the building" [being the other side of the sub-floor brick wall, under location 4 in the plan][55]; and

(c) discounts completely the condensation from the refrigerator/freezer units which, Mr Proud stated in the first Proud report and the second Proud report was a primary source of water.

Findings

324 The lay and expert evidence demonstrates to my satisfaction that the damage to the floor was caused by the tenant's leaking and inadequately insulated refrigeration equipment, and the excessive weight of that equipment.

325 It is notable that no witness called by the applicant was asked about the presence of drip trays or properly functioning drainage installations for water from the refrigeration equipment.

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[55] which area, Mr Cossins stated in evidence, showed "free water" under unit 4 and movement under the unit.

326 I find that after the initial discovery of damage to the flooring from leaking refrigeration equipment in May 2010, the condition of the flooring and sub-floor deteriorated as water continued to leak onto the wooden floors, and that it gradually started to affect and damage the sub-floor areas as well.

327 I find that the tenant was also aware, from the first Proud report, that the floor was unable to bear the weight of the tenant's equipment, and that no steps were taken by the tenant to alleviate the problems caused by excessive weight, despite a clear recommendation in the first Proud report.

328 I find that the deterioration to the floor and sub-floor after May 2010 was due to misuse by the tenant within the meaning of section 52 of the Act, in continuing to use the refrigeration equipment, when the tenant knew or should have known that it was too heavy.[56]

329 It follows that the damage to the premises, resulting in a Building Order dated 5 August 2014 being served by the Shire of Hepburn, and the tenant's subsequent vacating of the premises in late September 2014, was not due to:

(a) any failure by the landlord to maintain the structure of, and fixtures in, the premises consistent with the condition when the lease was entered into on 1 June 2009, as required by section 52(2) of the *Retail Leases Act 2003*;

(b) any failure by the landlord to keep the structure (including the external faces and roof) of the building in which the premises are located in a condition consistent with their condition at the start of the lease on 1 June 2009 (as required by clause 6.4 of the lease); or

(c) any other like obligation on the landlord

but was due to the failure of the tenant to comply with 3.1.1 and 3.2.5 of the lease, in default of the lease, and the tenant's misuse within the meaning of section 52(3) of the *Retail Leases Act 2003*. The applicant's claim in this respect is dismissed.

Did the tenant fail to give access to the landlord so as to excuse the landlord from complying with any obligation to maintain?

330 Clause 3.2 of the lease provides:

> 3.2 In addition to its obligations under clause 3.1, the tenant must:
>
> …
>
> 3.2.8 permit the landlord, its agents or workmen to enter the premises during normal business hours, after giving reasonable notice (except in cases of emergency)
>
> (a) to inspect the premises,

[56] The circumstances are analogous to *ME.SA.TA Pty Ltd v Rastogi* [2007] VCAT 1242 at [79], in which Senior Member Davis found that a tap being left on by the tenant and the tenant allowing water to leak from a tenant's fixture (from a pipe attached to a post mix machine) amounted to "misuse" within the meaning of section 52(3) of the Act.

(b) to carry out repairs or agreed alterations, and

(c) to do anything necessary to comply with notices or orders of any relevant authority…

331 If it is considered that clause 3.3.1 of the lease excused the tenant from complying with any obligation to carry out repairs following its found breaches, and that this was instead the responsibility of the landlord, I also find that pursuant to clause 3.2.8(b) of the lease[57] the tenant was bound to grant proper access to the landlord for the purpose of doing so.

332 I find from the correspondence that the tenant failed to do so, for the following reasons.

333 By his email to the landlord dated 16 July 2010, the tenant confirmed the earlier discussion between the two that a concrete floor might be constructed, that would "eliminate the need for future repairs to the wooden floors".

334 It is also clear from the correspondence prior to 27 June 2011, that the landlord then anticipated that his "insurer's builder" would be replacing the damaged floor in sections, so as to allow the tenant to maintain its regular business. There is therefore no basis for concluding that, prior to this time, the landlord was requesting the tenant to remove its equipment so as to allow repairs to proceed.

335 However, by its email to the tenant dated 2 August 2011, the landlord made clear that the concrete floor proposal that had plainly been the subject of discussions between the parties was not going to proceed, for reasons of cost.

336 I further find:

(i) from the loss adjuster's email to the landlord's insurer dated 2 September 2011, that on 16 August 2011 the tenant agreed to make enquiries of his own insurer to determine whether it would pay the costs of removing and reinstalling the equipment so that the floors and sub-floors could be accessed for the purpose of being replaced;

(ii) from the tenant's email to the landlord dated 16 September 2011, that the tenant was aware of his obligation to remove the equipment so that repairs could be undertaken;

(iii) from the loss adjuster's email to the landlord's insurer dated 30 September 2011, 25 November 2011 and 5 January 2012 that the tenant was, during this period, awaiting a response from its insurer in respect of whether it would indemnify the tenant in respect of the cost of removing the equipment;

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[57] And also as an implied term of the lease at law, to do all things as to enable the landlord to comply with his obligations.

(iv) from the email from the landlord to the tenant dated 1 April 2012, that the landlord considered that he would not be able to carry out the repairs "until the equipment had been moved";

(v) from the email from the loss adjuster to the landlord's insurer dated 10 April 2012, that the tenant was then aware that it was not going to be indemnified by its insurer in respect of the cost of removing the equipment, and that the tenant was aware that such costs were likely to be in the region of $80,000-$90,000;

(vi) from the email from the landlord to the tenant dated 24 May 2012, that the landlord was then enquiring what progress the tenant had made with its insurer concerning whether the insurer would prepared to indemnify the tenant in respect of the cost of removal of the equipment;

(vii) from the email from Page Constructions to the tenant dated 19 October 2012 and the tenant's email to the loss adjuster dated 19 November 2012, that the tenant was aware that rectification works would require the removal of the equipment and that it was hoping that the landlord's insurer would pay these costs;

(viii) from the loss adjuster's email to the tenant dated 19 November 2012, that the tenant was then aware that the landlord's insurer would not be paying these costs;

(ix) from the email from the tenant to the landlord dated 22 July 2013, that having been made aware that neither the landlord's insurer or the tenant's insurer would indemnify the tenant in respect of the cost of removing the equipment, the tenant made a further enquiry as to who (if not the tenant) would be paying these costs;

(x) from the email from the loss adjuster to Mr Short dated 31 March 2014, that the tenant had still failed to put any proposal to the landlord for the removal of its equipment so as to enable replacement of the damages floors to proceed.

337 The tenant answers the landlord's allegation that it denied access to the landlord for the purpose of conducting repairs by evidence from Mr Hall that as early as September 2012, the landlord discussed replacing the floor with concrete, and extending the building. Mr Hall gave evidence that these discussions resulted in the tenant obtaining the quotation from Page Constructions dated 19 October 2012.

338 A telling moment was in early September 2011 when, the correspondence shows, the tenant decided to make his own enquiries of his insurer to determine whether it would indemnify him with respect to the cost of removing the refrigeration and freezer equipment to allow the discussed renovation to proceed. It was only in April 2012 when the tenant informed the loss adjuster that the cost was likely to be $80,000-$90,000 and that the tenant's insurer was not accepting a claim in this respect. The landlord was

still enquiring about the tenant's position concerning insurance on 24 May 2012.

339 After the 2 August 2011 meeting, the tenant subsequently failed to make any meaningful proposal to the landlord. I find from the correspondence that the landlord's proposals concerning rectification of the premises, leading to the final proposal on 18 June 2014, depended upon the tenant repairing the faulty refrigeration equipment which, probably for reasons of cost to the tenant, never occurred.

340 In particular, the tenant took no steps, in response to the landlord's solicitor's letter dated 27 November 2012 to the effect that the tenant was liable to rectify the leaking freezers and cool rooms or installation drainage trays and/or piping to redirect the water flow.

341 I find that the damage to the premises consequently worsened as a result. The tenant's failure to take appropriate steps to prevent water leaking from its equipment has ultimately led to the collapse of major bearers and joists in some parts of the building, and eventually the tenant having to vacate the premises following service of the Building Order.

342 The substantial gist of Mr Hall's evidence is that, given that the landlord never ascribed the cause of the damage to the floor and sub-floor to something for which the tenant was liable (and I have found this proposition to be unsustainable), the tenant was always "flexible" and "agreeable" to repairs to the floor, but that, in the absence of being given specific details or plans as to how rectification was to proceed (that is to say, what type of floor was going to be installed, how long the installation works would take, or when any works were likely to commence), the tenant was not prepared to remove the fridges, shelving, counters and stock as would have been required to facilitate the re-flooring of the premises. Mr Hall gave evidence that this would have required the tenant to have received six weeks' notice, mainly for the purpose of running down stock levels. I do not see a sufficient basis, from the landlord's conduct, for the tenant failing to take appropriate steps to remove the equipment, or at least to stop the leaking from the equipment that continued throughout the period from May 2010 to September 2014.

343 In conclusion, given what I have found was the cause of the damage, it was the responsibility of the tenant to give the landlord access to allow rectification work to be done, and that it was the responsibility of the tenant to arrange its affairs, whatever the cost, so as to provide to the landlord a programme concerning removal of the equipment upon which the landlord could act. I find that whatever may have been discussed by the parties concerning rectification, there was no reasonable basis for the tenant failing to make arrangements. I find it most likely that the reason why the tenant was not prepared to make arrangements for the removal of the equipment, so as to give the landlord access, was because of the cost of doing so against which the tenant was uninsured.

344 I find that the discussions and correspondence between the parties, in which the landlord put various proposals to rectify the premises by incorporating a concrete floor, were not reasonably capable in all the circumstances of giving rise to a legitimate expectation on the part of the tenant that the landlord had committed himself to a course of action, to the effect that the tenant was not then obliged to take steps to remove its equipment, from which it would be unconscionable for the landlord to resile.

345 I should also make a further observation in respect of the landlord's contention that the tenant failed to move its equipment so as to afford access to the landlord. In his evidence, Mr Hall denied the landlord's proposition that the landlord had at all times informed the tenant that he considered the tenant to be responsible for the damage to the floor and sub-floor. This denial of Mr Hall's is also relevant to whether the landlord gave to the tenant a written notice or notices of default within the meaning of section 27(2) of the Act.

346 Mr Hall's evidence, in respect of any allegations by the landlord that the tenant was responsible for causing the need to repair the floor and subfloor, was as follows:

> [Prior to the time that the tenant obtained the quotation from Page Constructions in October 2012, the landlord] appeared to fully appreciate that the floor was not functional and needed urgent replacement. Even [at] this stage [the landlord] made no allegations against [the tenant]'s and did not ask for any contribution [to the cost of repairs]. There was no contention [by the landlord] that [the tenant] was responsible for the state of the floor or that [it] should contribute to the cost of repairs. [In 2014 the tenant] it was never the case that [the tenant] resisted removing the refrigeration and cool rooms…[the tenant] was always ready to assist with the repair of the floors as it was manifestly in [its] interest to do so but it was equally clear to myself and the landlord that [the tenant] had not caused the problem or the damage.

347 Given the contents of the correspondence that I have set out above, I am unable to accept this evidence. For instance, on 9 December 2010, relying on his own observations in May 2010, together with the findings of Mr Rothenberger and Fuller, the landlord informed the tenant that the dampness was "directly a result of water cascading down from poorly drained and uninsulated cooling and freezing units spread across the building". He informed the tenant to similar effect by his subsequent emails dated 10 January 2011 (responded to by the tenant on the same date), 19 June 2011 (to which the tenant did not expressly respond in writing), 27 June 2011 (to which the tenant did not expressly respond in writing), and 1 April 2012-in response to which the tenant never denied the cause of the damage alleged by the landlord.

348 Notwithstanding the contents of the second Proud report, that gave some support to the proposition that the damp environment was caused by factors

other than the tenant's leaking equipment, the tenant never contested the propositions made in the subsequent correspondence from the landlord, starting with his email dated 7 June 2012, to the effect that the flooring and sub-floor structures had been compromised as a result of water leaking from improperly installed and poorly maintained refrigeration, freezing units and cool rooms. The landlord repeated this allegation in his email dated 8 October 2012, by his then solicitors' emails to the tenant dated 27 November 2012 and 31 January 2013, to which there were no responses in writing by the tenant.

349 It was only in its third email dated 2 August 2011, that the tenant expressly raised issues concerning the alleged pond around the (defective) sump pump, and inadequate sub-floor ventilation, although not expressly linking these issues to the damaged floor and sub-floor. This was, of course, after an inspection that day when issues concerning the ventilation of the sub-floor, and the water surrounding the sump pump were addressed. Tellingly, again, the landlord responded to this email on the same day, again to the effect that the sub-floor damage was caused by poorly installed refrigeration equipment, to which there is no response from the tenant in evidence.

350 Again, on 8 October 2012, the landlord hand-delivered to the tenant a copy of a revised version of the landlord's 7 June 2012 email, to which the tenant provided no response by email.

351 I consider it likely that if the tenant contested the landlord's propositions concerning the equipment being the cause of the damage, it would have done so with greater force than is apparent from its correspondence to the landlord.

SECTION 54 RETAIL LEASES ACT

352 I am not satisfied that the tenant has demonstrated that the landlord failed to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading at the retail premises, as required by section 54(2)(d) of the *Retail Leases Act 2003*. I find that the cause of the tenant's disruption in late September 2014 when, it says, it could no longer trade, was due to the tenant's own conduct and inaction since May 2010, when it was aware that the weight of the equipment, and leaking from it, may lead to structural failure.

353 I am not satisfied that the tenant has demonstrated that the landlord failed to rectify as soon as practicable any breakdown in the equipment not under the tenant's care, as required by section 54(2)(e)(i) of the *Retail Leases Act 2003,* since I have found that the equipment was under the tenant's care.

354 I am not satisfied that the tenant has demonstrated that the landlord failed to rectify as soon as practicable any defect in the retail premises any, as required by section 54(2)(e)(ii) of the *Retail Leases Act 2003,* because the tenant never provided sufficient access for the landlord to do so.

355 I am not satisfied that the tenant has demonstrated that the landlord failed to rectify adequately clean, maintain or repair the building in which the premises are located, as described in section 54(2)(f) of the *Retail Leases Act 2003.*

FURTHER DEFAULT BY THE TENANT UNDER THE LEASE-FAILING TO PAY RENT-LOSS OF OPTION TO RENEW

356 Section 27(2) of the Act provides:

> If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the only circumstances in which the option is not exercisable is if-
>
> (a) the tenant has not remedied any default under the lease about which the landlord has given the tenant written notice; or
>
> (b) the tenant has persistently defaulted under the lease throughout its term and the landlord has given the tenant written notice of the defaults.

357 The landlord submits that the failures by the tenant to:

(a) comply with the relevant provisions of the lease regarding its use of the premises (and I have found this to have been the case); and

(b) and to pay rent,

put the tenant in default of the lease within the meaning of section 27(2) of the lease, such that it was not entitled to exercise the option to renew when it did.

358 The option granted to the tenant to renew the lease for a further term is not exercisable if either or both of the circumstances in sections 27(2)(a) and (b) of the Act apply. The landlord submits that both circumstances apply.

359 I should mention that in my Reasons accompanying the orders in respect of the first preliminary question,[58] I found that the Notice to Tenant dated 3 October 2014, served by the landlord's solicitors on the tenant, failed to comply with the notice requirements of clause 7.4 of the lease. It followed that the landlord did not have a right to re-take possession on 29 October 2014, in reliance upon that Notice.

360 I also then made findings concerning whether, on account of:

(i) the alleged failure by the landlord to charge GST in accordance with the GST Act between 1 March 2010 and 30 September 2014; and/or

(ii) any damage to the premises between 1 March 2010 and 30 September 2014 that rendered the premises unable to be "used or accessed for the permitted use" within the meaning of clause 8.1 of the lease

[58] See *Grenville Trading Pty Ltd v Braszell* (Building and Property) [2015] VCAT 985 at [94]-[114].

the tenant was entitled not to pay the whole of the rent alleged to be due by the Notice to Tenant dated 3 October 2014. In summary, I found that neither matters gave rise to such an entitlement, save for the tenant being entitled to withhold the GST component of the amounts charged by the landlord.[59]

361 The tenant having then been found to have been in breach of the lease for not paying the whole of the rent due, the landlord subsequently sought orders that the tenant had not validly exercised its option to renew the lease, as it purported to do on 10 June 2015.

362 I subsequently held, in deciding the second preliminary question, that these further findings did not prevent the tenant submitting at the hearing that it was not in breach of the lease for failing to pay the rent due, and/or that it was entitled to withhold rent pursuant to the provisions of the lease and/or section 57 of the Act.[60] This was because I held that my further findings were not fundamental or necessary for the purpose of my answering the preliminary questions-in effect, whether the lease had ended by abandonment by the tenant on 24 August 2014 (giving rise to a surrender at law), by re-entry by the landlord following service of a notice dated 3 October 2014 or by the landlord purporting to rescind the lease following the tenant's alleged repudiation.[61]

363 I now consider the arguments of the parties on whether the tenant was in default of the lease in not paying the rent alleged to be due by the Notice to tenant dated 3 October 2014.

Relevant terms of the lease

364 The following provisions were also included in the lease:

> **Clause 2.1.1** The tenant must pay the rent without any deductions to the landlord on the days and in the way indicated in Item 9 without the need for a formal demand. The landlord may direct in writing that the rent be paid to another person. The rent is reviewed on each review date specified in item 16-
>
> …
>
> (b) on a CPI review date, the rent is reviewed in accordance with clause 18.
>
> **Clause 7.1** The landlord may terminate this lease, by re-entry or notice of termination, if-
>
> 7.1.1 **the rent is unpaid for 14 days after becoming due for payment**,

---

59 See *Grenville Trading Pty Ltd v Braszell* (Building and Property) [2015] VCAT 985 at [115]-[129].

60 The tenant's counsel also submitted that the issue was not squarely before me at the preliminary hearing, and that he wished for the opportunity to develop his argument further in this respect.

61 See *Grenville Trading Pty Ltd v Braszell* (Building and Property) [2016] VCAT 877 at [36]-[48].

7.1.2 the tenant does not meet its obligations under the lease…

7.1.7 the tenant, without the landlord's written consent-

(a) discontinues its business on the premise, or

(b) leaves the premises unoccupied for 14 days

Clause 7.3 For the purpose of section 146(1) of the *Property Law Act 1948* (Vic), 14 days is fixed as the period within which the tenant must remedy a breach capable of remedy and pay reasonable compensation for the breach.

Clause 18.1 On a CPI review date, the rent is adjusted by reference to the Consumer Price Index using the following formula:

[*a formula is set out*]

Clause 18.2 If CPIB is not published until after the CPI review date, the adjustment is made when it is published but the adjustment takes effect from the relevant CPI review date. In the meantime, the tenant must continue to pay the rent at the old rate and, when the adjustment is made, the tenant must immediately pay the shortfall or the landlord must immediately repay the excess, as the case may be.

Item 9 of the Schedule:

How rent is to be paid:

As directed by the landlord

Item 16 of the Schedule:

Review date(s):

…

(b) CPI review date(s): Annually on the anniversary of the commencement date except on the commencement of any further term.

…

Item 17 of the Schedule-

Who may initiate reviews:

…

CPI review: Automatic annually

How the rent dispute arose

365 The dispute between the parties over the payment of rent arose in the following circumstances.

366 The landlord emailed the tenant on 19 July 2014,[62] as follows:

[62] I am satisfied from an affidavit sworn by the landlord on 24 February 2015, that the email was sent 19 July 2014, and not "Saturday 19 June", the date that the body of the email bears.

> I note that the current lease for [the premises] expired on 1 June 2014. The latest date for exercising the option for renewal was 1 March 2014.
>
> Kindly advise if you intend to exercise the option to renew the lease. If you choose to exercise the option to renew there is to be a rental review to apply from 1 June 2014.
>
> The lease, which [was assigned to you by Five Dollars Pty Ltd], commenced on the 1 June 2009 and was transferred into you name on 1 March 2010. The sum of $60,000 plus GST per annum, payable in 12 equal monthly payments on the first day of each month, was the agreed initial rent for the first 12 months.

367 The landlord deposed that he did not receive a response to this email, and the tenant did not allege otherwise. As explained above, the required notice by the landlord pursuant to section 28(1) of the Act had not, at this time, been given by the landlord, and so the lease was continuing pursuant to section 28(2)(b) of the Act.

Landlord demands claimed CPI increases

368 I have already indicated that the commencing rent under the lease from 1 June 2009 was $60,000 plus GST per annum, payable in 12 equal monthly instalments on the first day of each month.[63] Since 1 June 2010 (the start of the second year of the 5 year term of the lease), the landlord did not enforce its right to be paid CPI increases pursuant to clause 18 of the lease. Rent of only $5,000 plus GST per month only was invoiced by the landlord to the tenant from 1 June 2010.

369 By a "Tax Invoice" dated 5 August 2014 (the "**first tax invoice**"), the landlord invoiced Mr Hall in the amount of $18,262.41 for "Rental Arrears".

370 The first tax invoice claimed $18,262.41 as follows:

Rent Arrears	01/06/10-30/05/11	$1,680 +GST	$1,848.00
Rent Arrears	01/06/11-30/05/12	$3,938.80+GST	$4,222.69
Rent Arrears	01/06/12-30/05/13	$4,732.54+GST	$5,205.79
Rent Arrears	01/06/13-30/05/14	$6,350.85+GST	$6,985.93
Total Arrears			**$18,262.41**

371 The first tax invoice did not describe the basis for the "Rental Arrears" charge.

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63 Item 6 of the Schedule to the lease.

372 The landlord's solicitors subsequently sent the tenant a document entitled "Notice to Tenant" dated 3 October 2014 (the "**Notice to Tenant**"), addressed to the tenant's registered office and to Mr Hall as guarantor.

373 By the Notice to Tenant, the landlord's solicitors demanded the payment of $20,591 "rent arrears". This amount comprised the $18,262.41 sought in the first tax invoice, plus CPI increases (of "$529.23+GST") allegedly payable for each of the months of June, July, August and September 2014.[64]

374 By a "Tax Invoice" dated 24 October 2014 (the "**second tax invoice**") addressed to "Mr W Hall, c/- 32 Fisken Street, Ballan 3342", the landlord invoiced Mr Hall for $6,082.15 for "monthly rental 26 Vincent Street Daylesford 1/11/2014".

375 The second tax invoice also set out the CPI calculations adopted by the landlord for CPI increases for the rental years beginning 1 June 2010 to 1 June 2013 claimed in the first tax invoice.

376 By letter dated 24 October 2014, the tenant's solicitor wrote to the landlord's solicitors as follows:

> I am instructed by [the tenant] that [the landlord] has sent to it a rent invoice in relation to the premises for October.[65] Pursuant to clause 8 of the lease my client is suspending a fair portion of the rent and building outgoings (clause 8.1.1) until the premises are again wholly fit and accessible for the permitted use. Given that the premises can no longer be lawfully or safely used for the permitted purpose and the building [is] completely inaccessible for the permitted purpose, that fair portion is 100%.

Landlord re-enters

377 By letter dated 29 October 2014, the landlord's solicitors wrote to the tenant's solicitor (the "**landlord's solicitors' first letter**") as follows:

> We are instructed that in accordance with the provisions of the lease, earlier today [the tenant] terminated the lease by re-entry, as rent remained unpaid for a period in excess of 14 days after becoming due for payment.
>
> Copies of the notices given to your client in respect of non-payment of rent[66] is (sic) enclosed for your information.

378 By letter in response dated 29 October 2014, the tenant's solicitor wrote to the landlord's solicitors:

> I refer to your letter of today's date. As you are well aware the landlord is not entitled to re-entry for unpaid rent as the rent has been suspended pursuant to clause 8 of the lease as stated to you in my

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64 No claim was made in the "Notice to Tenant" for rent due on 1 October 2014.

65 The second tax invoice, to which I find the letter refers, appears to have been rendered for the month of November 2014.

66 A copy of the notice dated 3 October 2014 sent to the registered office of the tenant in respect of alleged outstanding rent was enclosed with the letter.

correspondence to you dated 24 October 2014. [The tenant] is suspending a fair proportion of the rent and building outgoings (clause 8.1.1) until the premises are again wholly fit and accessible for the permitted use. No rent is due until that time. If you do not advise by close of business today in writing that the lease remains on foot we will be compelled to issue proceedings seeking declaratory relief.

379 By further letter dated 29 October 2014, the landlord's solicitors wrote to the tenant's solicitor (the "**landlord's solicitor's second letter**"), as follows:

> We refer to your letter dated 29 October 2014.
>
> 1. Our client has validly terminated the lease by re-entry due to non-payment of rent by [the tenant].
> 2. The notices dated 3 October 2014 to [the tenant] regarding non-payment of rent concerning rent arrears for the period between 1 June 2010 and September 2014.
> 3. The non-payment of rent arises because [the tenant] failed to pay the increased amount of rent **due to automatic CPI increases required under the lease**. Instead, [the tenant] continued to pay rent at the rate which applied in the first year of the lease.
> 4. Under clause 2.1.1 of the lease, [the tenant] is required to pay rent without any deduction to [the landlord] and without the need for a formal demand.
> 5. [The landlord] invoiced the tenant in relation to the unpaid rent. Further, the notices dated 3 October 2014 in relation to non-payment of rent were provided to [the tenant].
> 6. There can be no issue about rent being suspended under clause 8 in the period 1 June 2010 to September 2014. Your client used and accessed the premises for its permitted use in that period. Indeed, your client paid rent in that period except for the increased rent amounts as a result of CPI increases. [The tenant] has not purported to suspend rent in that period.
> 7. Your letter of 24 October 2014 alleged an entitlement of [the tenant] to suspend rent with reference to the rental invoice for October 2014.
> 8. Accordingly, that letter provides no answer to the notices to [the tenant] for non-payment of rent in respect of the period 1 June 2010 to September 2014.
> 9. Further, [the landlord] denies that [the tenant] is entitled to any rent suspension in the period between 1 October 2014 and 28 October 2014, as the relevant damage to the premises was caused by [the tenant].

380 The tenant's solicitor responded by letter dated 30 October 2014 to the landlord's solicitor's second letter, as follows:

I refer to your letter dated 29 October 2014. I have utilised your numbering for ease of reference.

1. [The landlord] has not validly terminated the lease.
2. The [Notice to Tenant dated 3 October 2014] is incorrectly addressed and the figures incorrectly calculated.
3. The landlord continued to invoice [the tenant] for the old rent up until July 2014 then did not send an invoice for September 2014.
4. The invoices delivered to tenant stating the rent to be $5,500 constitutes a waiver in writing of the requirement under the lease to pay the increased amount. Further, clause 2.1.1 refers to Item 9 of the schedule [to the lease] which requires the tenant to pay the rent as directed by the landlord. The landlord directed the amount and the method via the written invoices and [the tenant] has complied with that.
5. I note that the calculations by [the landlord] for back rent are incorrect and my client is not obliged to pay any incorrect amount.
6. [The tenant] is entitled to withhold a significant amount of rent and outgoings from 2010 onwards as the first occasion of the floor failing was in 2010 and there have been ongoing issues with access with significant sections of the supermarket having to be closed off in 2010.
7. My letter of 24 October 2014 confirms the rent suspension for October 2014.
8. This letter provides the answers in relation to 1 June 2010 to September 2014.
9. The damage was not caused by [the tenant] and in any event is irrelevant to the operation of clause 8 in this context.
10. The lease remains on foot.

There is no doubt that the landlord is acting unconscionably and in particular, acting in bad faith, by purporting the end the lease in this manner. Take notice that we are proceeding with our application for declaratory relief in VCAT and this and previous correspondence will be produced on the issue of costs.

381 The landlord's solicitors responded by letter dated 3 November 2014, as follows:

We are instructed that our client does not accept the contentions set out in your letter regarding the notice to your client dated 3 October 2014 and the termination of the lease.

In particular, we are instructed to note the following:

1. You have not said why you say the notice dated 3 October 2014 [addressed to the registered office of the tenant] was incorrectly addressed]

2. You do not explain why you say the figures are incorrectly calculated.
3. No waiver in writing of the requirement under the lease to pay the increased amount has been given.
4. Item 9 of the Schedule refers to how rent is paid, not how much is required to be paid.
5. Our client does not agree that there was any entitlement to rent abatement.
6. Our client denies that he is acting unconscionably or in bad faith. On the contrary, he is acting in accordance with his rights under the lease.

…

Clearly there is a dispute about validity of the notice dated 3 October 2014 and the termination of the lease.

[The letter continued on the subject of the landlord's wish that the tenant remove refrigerators, freezers and cool rooms owned by the tenant, so the landlord might carry out repair works to the premises]

382 By letter to the landlord's solicitors dated 6 November 2014, the tenant's solicitor replied:

Invalid tax invoices

..The tenant is not in breach of the lease. [The Notice to Tenant] stated that the tenant was 'in breach of clause 2.1.1 and clause 17.3 of the [lease], the [tenant] has failed to pay to the [landlord] rent plus GST as set out in a valid tax invoices (sic) given by the [landlord] to the [tenant]'.

However the tenant has not received valid tax invoices which comply with [the *A New Tax System (Goods and Services Tax) Act 1999*]. All tax invoices received by the tenant are invalid as they are non compliant and do not contain all information prescribed by law.

Overpayment by [the tenant]

As a result of the defective and inchoate invoices rendered by your client since the 1 March 2010 the tenant was not required to pay GST. Therefore, during the period 1 March 2010 to 30 September 2014 the tenant had made payments totalling $28,000 in addition to the rent of $5,000 per month invoiced to it. We note that this is considerably in excess of the landlord's claim for $20,591.01.

Be advised that in addition to the above overpayments to [the landlord], [the tenant] is entitled, further to clause 8 of the lease to a reduction in rent calculated by reference to which the supermarket has been rendered inoperable by [the landlord's] failure to maintain it since 2010…

By way of resolution of this immediate issues (sic) of your client's purported re-entry and ineffective invoices [the tenant] is prepared to pay the disputed amount ($20,591.01)

…

Was the tenant in default under the lease in failing to pay the claimed rent (being CPI increases) because of the alleged failure by the landlord to comply with the GST legislation?

383 The "Additional provisions" of the lease contained the following terms:

> (a) It is expressly agreed that the tenant will pay Goods and Services Tax payable in respect of the rental and all monies payable by the tenant pursuant to this lease.

384 The following provisions were also included in the lease.

> Clause 17.1 Expressions used in this clause 17 and in [*A New Tax System (Goods and Services Tax) Act 1999* (Cth)] have the same meanings as when used in [*A New Tax System (Goods and Services Tax) Act 1999* (Cth)]
>
> Clause 17.2 Amounts payable and consideration provided under or in respect of this lease (other than under clause 17.3) are GST exclusive.
>
> Clause 17.3 The recipient of a taxable supply made under or in respect of this lease must pay to the supplier, at the time the consideration is due, the GST payable in respect of the supply. This obligation extends to supply consisting of a party's entry in to this lease.
>
> …
>
> Clause 17.5 A party is not obliged, under clause 17.3, to pay the GST on a taxable supply to it under this lease, until given a **valid tax invoice** for the supply [**emphasis added**].

385 The tenant alleged in the correspondence to which I have referred, that between 1 March 2010 and 30 September 2014[67] it made GST payments of $500 per month amounting to $28,000. It says that because a "valid tax invoice" for the relevant supply was not given by the landlord within the meaning of clause 17.3 of the lease (because the invoices did not contain sufficient information to enable the recipient's identity of the recipient's ABN to be clearly ascertained,[68]), it was not obliged to pay the GST component. The tenant says that at the time of the service of the Notice to Tenant dated 3 October 2014, it therefore had a cross-claim against the landlord amounting to $28,000.

386 Section 29-70(1A) of the GST Act provides as follows:

> A document issued by an entity [in this case, the landlord] to another entity [in this case, the tenant] may be treated by the other entity [in this case, the tenant] as a tax invoice for the purposes of this Act if:
>
> (a) it would comply with the requirements for a tax invoice but for the fact that it does not contain certain information; and

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67 These invoices were not in evidence

68 In breach of section 29-70 (1)(c)(ii) of the GST Act

(b) all of that information can be clearly ascertained from other documents given by the entity [in this case, the landlord] to the other entity [in this case, the tenant]

387 I find that in respect of all rental invoices up to and including the invoice for the month beginning 1 September 2014, the tenant paid the GST component of the rent invoices submitted by the landlord without demur and, in respect of its tax returns, claimed the purported $500 GST charges as input tax credits.

388 I find that in all respects the tenant chose to treat the purported tax invoices, notwithstanding that they may not have complied with the GST Act, as tax invoices, as it was entitled to do under the above provision of the GST Act. I further find that, having done so, to the extent the invoices failed to comply with the GST Act, the tenant has made an election, and cannot now adopt a position that is inconsistent with having done so.

389 The tenant's making of an election, in respect of tax invoices previously paid by it does not, I consider, prevent its requiring a valid tax invoice in respect of purported tax invoices that it has not yet paid. To the extent, therefore, that there were outstanding invoices at the date of the landlord's re-taking of possession on 29 October 2014, I find that the tenant was not obliged to pay the GST component.

390 I find that to the extent that the landlord rendered purported tax invoices to the tenant that were not compliant with the GST Act, the tenant was not prevented, by its past conduct, from requiring a valid tax invoice as a condition of payment of the GST in accordance with clause 17.5 of the lease.

391 It follows that of the total of $20,591.01 claimed by the landlord in its Notice to Tenant, (which the second tax invoice subsequently made clear were for CPI adjustments under clause 18 of the lease), $1,871.90 were charges for GST. In my view, the tenant was not obliged to pay the GST charges until provided with a valid tax invoice pursuant to clause 17.5 of the lease.

392 I therefore find that on 3 October 2014 (and no later than 24 October 2014, when the tenant was provided with particulars of how the claimed CPI adjustment was calculated), subject to any right in its favour to abate the payment of rent under section 57 of the Act, the tenant was in default of clause 7.1 of the lease for not paying $18,719.11 rent to the landlord when demanded.

Was the tenant in default of the lease in purporting to suspend payment of the whole of the $18,719.11 rent due on 3 October 2014 (net of GST), because the premises allegedly could not be used under the lease, within the meaning of section 57 of the Act?

393 Section 57 of the Act provides:

> A retail premises lease is taken to provide the following if the retail premises, or the building in which the premises are located, is damaged-
>
> (a) except where the tenant caused the damage, the tenant is not liable to pay rent, or any amount in respect of outgoings or other charges, that is attributable to any period during which the premises cannot be used under the lease or are inaccessible due to that damage; and
>
> (b) except where the tenant caused the damage, if the premises can be used under the lease but that use is reduced to some extent by the damage, the tenant's liability for rent, and any amount in respect of outgoings or other charges, that is attributable to any period during which the use is reduced is decreased to the same extent…

394 Clause 8.1 of the lease is to similar effect.

395 It follows from my analysis above that the right of the tenant under section 57 of the Act to an abatement of its liability to pay rent and outgoings is not engaged, because it does not apply where the tenant has "caused the damage". I have found that the tenant caused the damage to the floor and sub-floor.

396 If, however, I am incorrect in this conclusion I find, for the following reasons, that section 57 of the Act did not, on the evidence, excuse the tenant from the obligation to pay rent to the landlord.

397 I should make some preliminary observations. By its first Points of Claim dated 24 October 2014, the tenant did not seek any declaratory relief pursuant to section 57 of the Act the effect that it was entitled to an abatement of 100% of its rent and otherwise payable, because the premises allegedly could not be used or accessed for the permitted use. Nor did the tenant choose to do so in its most recent iteration of claim contained in its Second Amended Points of Claim dated 18 November 2016.

398 Counsel for the tenant submitted in his opening, however, that the tenant was not obliged to pay the rent claimed in the Notice to Tenant because the premises could not be used or accessed for the permitted use. I should mention that counsel for the landlord quite properly concedes that the only basis available to the tenant for not paying the rent that was charged by the landlord, lies in the rights conferred upon the tenant by section 57 of the Act.

399 I had thus always understood the tenant's position to be that it relied upon the statutory right to abatement contained in section 57 of the Act, as also foreshadowed in its solicitor's letter to the landlord's solicitors dated 24 October 2014. In fairness to the tenant, I propose to deal with the argument.

400 The outstanding "rent" charges (being CPI increases) the subject of the Notice to Tenant were for the year 1 June 2010-30 May 2011 and the subsequent 3 years to 30 May 2014, and 4 months thereafter.

401 In order to establish its right not to pay the rent of $5,205.79 charged by the landlord for say the "period" 1 June 2012-30 May 2013, the tenant would need to persuade me that during that period the premises "[could] not be used under the lease or [were] inaccessible due to that damage".

402 I find that there was no evidence that in respect of any of the periods for which rent was charged from 1 June 2010, the premises could not be used or accessed by the tenant the purpose of a licensed grocery store due to the damage the subject of this proceeding.

403 Counsel for the landlord correctly submits, in his closing submissions, that there was no evidence concerning how the Building Order affected the tenant's business, other than that deliveries had to be by a different entry.

404 There is no sufficient evidence as would give rise to an entitlement of the tenant to suspend the whole (or indeed any part) of the rent payable prior to that date. The most the tenant asserts, in the correspondence to which I refer below, is that there have been occasions when the floor failed in localised areas and that there were ongoing issues with access with sections of the supermarket resulting in a section having to be closed off in 2010".[69]

405 I also note that the tenant did not in any correspondence make any abatement claims against the landlord, in respect of any of the periods covered by the Notice to Tenant, until its solicitor's letter to the landlord's solicitor dated 24 October 2014.

406 It follows that in relation to the rent claimed by the landlord by the Notice to Tenant, the tenant did not have any right pursuant to section 57 of the Act and/or the provisions of the lease to suspend its obligation to make payment pursuant to clause 2.1 of the lease.

407 I have therefore concluded that even if I had found that the landlord caused the damage, section 57 of the Act was nevertheless not, on the evidence, engaged. That is to say, the tenant was not entitled to suspend any part of the rent allegedly payable for the period to the end of July 2014 by reference to section 57 of the Act, except the amount claimed for GST in the amount of $1,871.90.

Did the landlord give the tenant written notice that the tenant had not remedied defaults under the lease?

408 The landlord submits that he gave written notice to the tenant pursuant to section 27(2)(a) of the Act about the default comprising the tenant's failure to pay rent by:

(a) the first tax invoice;

(b) the Notice to Tenant;

(c) the second tax invoice;

(d) the landlord's solicitor's first letter;

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69 Letter tenant's solicitor to the landlord's solicitors dated 30 October 2014.

(e) the landlord's solicitor's second letter; and

(f) the Points of Counterclaim.

409 Although I found in the first preliminary hearing that the Notice to Tenant did not meet the requirements of the *Property Law Act 1958*, I also found that sufficient information was subsequently provided by the landlord by the second tax invoice. I also observe that there is no authority, in any event, to the effect that notices given by a landlord under section 27(2) of the Act must comply with section 146 of the *Property Law Act 1958*.

410 Letters or emails are sufficient to constitute written notice within the meaning of section 27(2) of the Act.[70]

Conclusion

411 I find that the option granted to the tenant by the lease was not exercisable by the tenant, because at the time it purported to exercise its option to renew on 10 June 2015, it was in default under the lease within the meaning of section 27(2)(a) of the Act because:

(a) It failed to keep the premises in the same condition as at the start of the lease, except for fair wear and tear, in breach of clause 3.1.1 of the lease

(b) it failed to maintain in working order the drainage installations forming part of the equipment, in breach of clause 3.2.5 of the lease; and

(c) it failed to pay paid amounts claimed by the respondent in a Notice to Tenant dated 3 October 2014 (save for amounts claimed by the respondent in respect of GST).

412 I find that the landlord gave written notice to the tenant requiring it to repair refrigeration equipment so that it would not cause further damage to the premises.[71] I find that these notices amounted, in effect, to the landlord informing the tenant in writing within the meaning of section 27(2) of the Act of its failure to comply with clauses 3.1.1 and 3.2.5 of the lease.

413 By reason of not having remedied defaults under the lease about which the respondent had given the applicant written notice, the option granted to the applicant to renew the lease was not exercisable by the applicant on the date that it purported to do so, and so the lease ended on 19 June 2015.

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70 See *Westside Real Estate Investments Pty Ltd v Nguyen* [2011] VCAT 1830 at [23]; *Computer & Parts Land Pty Ltd v Property Sunrise Pty Ltd* [2012] VCAT 1522 at [31] and [41].

71 For example, the emails from the landlord to the tenant dated 10 January 2011, 19 June 2011, 27 June 2011, 1 April 2012.

NO RELIEF FROM STRICT COMPLIANCE WITH SECTION 27(2) OF THE ACT, IN RELIANCE ON UNCONSCIONABLE CONDUCT

414 The tenant claims that it would be unconscionable for the landlord to avail himself of his strict legal rights in section 27(2) of the Act, and that the Tribunal should prevent him from doing so.[72]

415 The tenant claims that the landlord has engaged in unconscionable conduct within the meaning of Section 77 of the Act, and within the meaning of the general law.[73]

416 Section 77 of the Act provides:

> **77 Unconscionable conduct of a landlord**
>
> (1) A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) Without limiting the matters to which the Tribunal may have regard for the purpose of determining whether a landlord has contravened subsection (1), the Tribunal may have regard to—
>
> (a) the relative strengths of the bargaining positions of the landlord and tenant; and
>
> (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the landlord's legitimate interests; and
>
> (c) whether the tenant was able to understand any documents relating to the lease; and
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the tenant or a person acting on the tenant's behalf by the landlord or a person acting on the landlord's behalf in relation to the lease, for example—
>
> (i) concerning trading on Sundays or days that are public holidays where the premises are located; or
>
> (ii) to agree to a lease term of less than the minimum period provided by section 21; and
>
> (e) the amount for which, and the circumstances under which, the tenant could have acquired an identical or equivalent lease from a person other than the landlord; and
>
> (f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants; and

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72 Paragraph H20 of the tenant's submissions.
73 Paragraphs H12-H19 of the tenant's submissions.

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the tenant acted on the reasonable belief that the landlord would comply with that code; and

(i) the extent to which the landlord unreasonably failed to disclose to the tenant—

(i) any intended conduct of the landlord that might affect the tenant's interests; and

(ii) any risks to the tenant arising from the landlord's intended conduct that are risks that the landlord should have foreseen would not be apparent to the tenant; and

(j) the extent to which the landlord was willing to negotiate the terms and conditions of any lease with the tenant; and

(k) the extent to which the landlord acted in good faith; and

(l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and

(m) the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and

(n) the extent to which the landlord required the tenant to incur unreasonable fit out costs (**emphasis added**).

417 Section 80 of the Act provides:

(1) A…tenant, who suffers loss or damage because of unconscionable conduct of another person that contravenes section 77…may recover the amount of the loss or damage by lodging a claim with the Tribunal against the other person.

418 I will now trace the history of the way in which the tenant has put its claim that the landlord has engaged in unconscionable conduct within the meaning of section 77 of the Act.

419 By its Points of Claim dated 24 October 2014, the tenant alleged that the cause of the subfloor damage that directly resulted in the cessation of the tenant's business operations was a failure of the roof guttering which, over time, cause major floor timbers to rot and fail and which had caused the sub-floor environment to become and remain constantly humid. This humidity, it was alleged, in combination with the landlord's failure to maintain pumps to a sump in the cellar and the sealing off of effectively all of the subfloor ventilation by the landlord resulted in the cessation of the tenant's business. The tenant alleged that the landlord behaved unconscionably in consistently asserting in his correspondence and maintaining that damage to the floor of the supermarket was caused by the tenant, when the landlord had actual personal knowledge of these alleged causes of the water damage to the floor and subfloor. Furthermore, the

tenant alleged, in failing to disclose his alleged actual knowledge of the true state of the premises, the landlord acted unconscionably, and that having made proper disclosure, the floor would have been repaired by the landlord before the catastrophic failure that caused the cessation of the tenants grocery business. The claim was also put on the basis that the landlord was obliged to disclose his alleged actual knowledge to the tenant at the time that the tenant took an assignment of the lease, which would have resulted in the tenant not entering into the lease at all or, if the tenant had done so, it would have been able to minimise disruption and financial losses consequential to the state of the premises.

420 These allegations were all denied by the landlord in its Points of Defence and Counterclaim dated 26 November 2014.

421 By Amended Points of Claim dated 28 April 2016, the tenant alleged that the landlord acted unconscionably within the meaning of section 77 of the Act in:

(a) making false representations to the Council with the intention and effect of having the premises declared unsafe to be occupied or used by the tenant. This claim arose from alleged communications between the landlord and the Council between 20 June 2014 and 15 July 2014. This claim was abandoned by the tenant's counsel during his opening at the hearing.

(b) at the meeting at the premises on 18 June 2014, to which I have referred, representing that he was going to repair the failed floor in order that the tenant could recommence operations. The tenant alleged that the representation was false, in that the landlord never intended to repair or replace the floor, and that he was, instead, intending to convert the premises into a number of retail shops which would leave no room for the tenant's operations.[74] The tenant claimed that, in reliance upon the landlord's representations, and at the direction of the landlord, the tenant expended monies and retained the services of an architect (Mr Shaw) to advise the landlord and the tenant upon the specifications and design of proposed new flooring, and also delay the initiation of legal proceedings which would necessarily have occurred immediately had the tenant been made aware of the true intentions of the landlord.

(c) failing to disclose to the tenant that on 7 July 2014 the landlord was paid about $170,000 insurance monies for the express purpose of replacing the floor and the subfloor, and that the landlord had therefore been compensated in respect of damage relating to the flooring of the premises at the time he commenced his counterclaim against the tenant on 26 November 2014.

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[74] As demonstrated, allegedly, by the landlord's making an application to the Council for consent to convert the premises into a number of retail shops.

422 How the above alleged conduct on the part of the landlord resulted in loss and damage to the tenant was not, in my view, satisfactorily set out in the Amended Points of Claim dated 28 April 2016.

423 By proposed Second Amended Points of Claim tendered by the applicant on day 3 of the hearing on 16 November 2016 and subsequently filed, with minor amendments, on 18 November 2016, the tenant abandoned its previous claim that the landlord failed to disclose his true intentions at the meeting which took place on 18 June 2014. Instead, the tenant now alleges that the failure by the landlord to complete repairs to the premises, notwithstanding:

(a) the landlord's representations to the tenant on various occasions (including by emails from the landlord to the tenant between 10 January 2011 and 19 June 2011) that the landlord would repair the premises, or the landlord's insurer would do so on the landlord's behalf; and

(b) the receipt by the landlord from his insurer, on or about 21 July 2014, of the amount of $170,827.81 for the very purpose of conducting repairs

is unconscionable, contrary to section 77 of the Act.

424 It is not clear to me, from the amended pleading, how it is said that the tenant has suffered loss or damage because of the claimed unconscionable conduct of the landlord.

Tenant's Submissions

425 The tenant's written submissions go beyond the way the tenant puts its case in the pleadings.

426 First, it says[75] that:

(a)` by [the second paragraph] of its email dated 10 January 2011, and repeatedly thereafter, the landlord represented that his insurance company had agreed to repair the floors and subfloor areas damaged by water leaking from refrigeration units and cool rooms; and

(b) by [the second paragraph] of its email dated 10 January 2011,[76] and by other communications, the landlord represented that the insurer had imposed a precondition on those floor repairs, being the prior repair by the tenant of the refrigeration equipment.

427 The tenant submits that the insurer had never agreed to repair the floor itself, nor to contract anybody else to repair the floor on its behalf. At most, the tenant alleges, the insurer had indicated to the landlord only that it would accept his claim, and pay him an appropriate financial settlement.[77]

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75 Paragraph H4 of the tenant's closing submissions.
76 And in other emails at ATB pp 155 and 158 (although these emails do not appear to be pertinent).
77 Paragraph H6 of the tenant's closing submissions.

428 Further, the tenant says that the landlord's repeated insistence that the insurer required repairs to the refrigeration equipment as a precondition to any repair works was "a repeated bald lie", and that the landlord's repetition of the lie "was used by the landlord to obfuscate and delay while the tenant continued to make regular timely rent payments".[78]

429 The tenant submits that both representations were "deceptions",[79] and were "not reasonably necessary for the protection of the landlord's legitimate interests" within the meaning of section 77(2)(b) of the Act.

430 The tenant also relies in its closing submissions on further alleged instances of unconscionable conduct, being:

(a) an alleged representation made by the landlord at the meeting on 18 June 2014, to the effect that the proposed works then discussed would require the tenant to close down for "only 5-6 weeks", it being implied that the tenant "would be permitted to resume occupation";[80]

(b) the fact that the landlord was holding funds of $170,827.81 for the purpose of the mooted repairs;[81]

(c) "the failure of the landlord to complete those repairs even now";[82]

(d) "the fact that [on 18 June 2014, when the landlord alleges the tenant agreed] to move out "as soon as possible", the landlord was an entire year short of obtaining the building permit necessary for the proposed works;[83] and

(e) "the landlord's silence in response to the tenant's written offer by its solicitors to pay the entirety of the disputed rent at October 2014 into the Tribunal, pending resolution of the proceeding", which offer was neither acknowledged nor responded to.[84]

431 The tenant also submits that "the last, but perhaps most significant instance of unconscionable conduct on the landlord's part arose from [the landlord's] selective representations and silences about the alleged rent arrears referred to in his solicitor to his notice to the tenant dated 3 October 2014."[85]

432 In respect of these alleged instances of unconscionable conduct on the part of the landlord and, it seems, the events referred to in paragraph H8 of the tenant's submissions, the tenant does not seek pursuant to section 80 of the Act the payment of any loss or damage that may have been incurred by the

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78 Paragraph H6 of the tenant's closing submissions.
79 Paragraph H3(a) of the tenant's closing submissions. Allegations of misleading and deceptive conduct were not pleased in the Second Amended Points of Claim, although they were made in the tenant's earlier pleadings.
80 Paragraph H5 of the tenant's submissions.
81 Paragraph H3(c) of the tenant's submissions.
82 Paragraph H3(d) of the tenant's submissions.
83 Paragraph H3(e) of the tenant's submissions.
84 Paragraph H3(f) of the tenant's submissions.
85 Paragraph H7 of the tenant's submissions.

tenant as a result. Instead, it contends, that the significance of the claimed "events" [of alleged unconscionable conduct] is twofold.

433 First,[86] the tenant submits that by reason of:

(a) my earlier preliminary ruling to the effect that the landlord failed to give proper notice to the tenant in accordance with clause 7.4 of the lease, prior to re-taking possession on 29 October 2014;

(b) the fact that the landlord did not otherwise serve proper notice upon the tenant in accordance with clause 7.4 of the lease; and

(c) my further preliminary ruling to the effect that the tenant's exercise of its option on 10 June 2015 was not invalid as to form[87]

there is no proper basis for the landlord refusing to grant the tenant a further term. This appears to be a legal submission[88], rather than an alleged consequence of any claimed unconscionable conduct on the part of the landlord. I am of the view that whether an option is not exercisable depends on a consideration of matters referred to in section 27(2) of the Act, and the circumstances then existing-not an analysis of previous acts or omissions of the landlord. I see no merit in the tenant's submission, and it is rejected.

434 For completeness, I also see no basis for finding, if it be the submission, that any claimed unconscionable conduct on the part of the landlord gives rise to the conclusion that there is no valid basis under section 27(2) of the Act for the landlord refusing to grant the tenant a further term.

435 Second, the tenant submits that with respect to its failing validly to exercise its option in accordance with the requirements of the Act and the lease (which, I have found to be the case), any reliance by the landlord on its strict legal rights would be unconscionable within the meaning of section 77 of the Act and at law, and that the landlord should be prevented from doing so.[89]

436 In this respect, the tenant also relies on the established common-law proposition that the tenant was in a position of "special disadvantage" regarding the landlord; that the landlord knowingly dealt with the tenant without regard to its disability, and therefore the landlord should be prevented from relying on its strict legal rights. [90]

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86 This submission appears at paragraph H11 of the tenant's submissions.

87 I note for completeness that the effect of my decision was that I determined that the purported exercise of the option by the tenant was not invalid *as to form* only.

88 Summarised in the relevant heading in the tenant's submissions as "option exercise valid by reason of earlier rulings".

89 See paragraphs H12-H20 of the tenant's submissions.

90 See *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 461-463; *Australian Competition and Consumer Commission v Samton* [2002] FCA 62 at [64]; *Australian Competition and Consumer Commission v Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; [2003] HCA 18 at [42]-[43].

437 The tenant submits that "the unusual circumstances of this case" put the tenant in a position of special disadvantage regarding the landlord generally, but particularly in relation to the exercise of the option because:

(a) at the date of its purported exercise of the option on 10 June 2015, the tenant had received no valid notice for the purpose of section 146 of the *Property Law Act 1958*;

(b) the tenant had nevertheless offered in good faith to pay the entirety of the landlord's claim for rental arrears into the Tribunal's trust fund pending the resolution of the proceeding; and

(c) the tenant had received no response to that offer.

438 In summary, the tenant contends, the tenant was in a position of special disadvantage because it had "made its position clear, while the landlord had caused or suffered his position to become opaque". The tenant submits that the landlord knew (or should have known) that "the tenant was, as a consequence of the landlord's selective communications, unable to judge its own best interests confidently."[91]

439 I have found that at the date that the tenant purported to exercise the option on 10 June 2015, it had not remedied its defaults under the lease about which the landlord had given the tenant written notice within the meaning of section 27(2)(a) of the Act.

440 I find that the reasons why the tenant had not remedied these defaults did not arise out of any unconscionable conduct on the part of the landlord, in the *Amadio* sense, or in the sense describe in section 77(2)(b) of the Act. I find that it did not do so because it had incorrectly taken the view that it was not liable to pay rent and outgoings on the basis that the structural damage to the premises, causing it to quit the premises, was a matter for which the landlord was responsible. I find that there was no unconscionable conduct on the part of the landlord, in either of the senses contended for by the tenant, that led the tenant to this conclusion.

441 I find no basis therefore for ruling that the landlord should not be entitled to avail himself of his strict legal rights under the lease, and pursuant to section 27(2) of the Act, or to make an order under section 91 of the Act "compelling the landlord to grant the tenant a further term pursuant to the lease."

NO RELIEF AGAINST FORFEITURE

442 The tenant seeks relief against forfeiture of the term the subject of the option, that I have found was not exercisable.

443 The landlord contends that relief against forfeiture is not available to relieve the tenant against loss of the renewal of the lease, relying on the statement of principle in *Finch v Underwood*:

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91 See paragraph H19 of the tenant's written submissions.

> The tenant must take the option to renew as he finds it; if it contains conditions precedent he must comply with them before he can claim the benefit of it, and if he has not done so a court of equity cannot relieve him [by granting relief against forfeiture][92]

444 The landlord also relies upon the well-known authority of *BS Stillwell & Co Pty Ltd Budget Rent-A-Car System Pty Ltd*,[93] to the effect (citing *Finch*) that an option to renew a lease constitutes an irrevocable offer to grant a further term which the tenant can accept by complying strictly with the terms of the offer.

445 The entitlement of a tenant to renew a lease is to be assessed at the date of the time of its exercise. In *McDonald v Robbins*[94] Dixon CJ said:

> The condition precedent is expressed in the covenant in the lease by the defendant, which confers the option by the words 'the lessees having duly observed performed fulfilled and kept all the covenants conditions agreements and stipulations herein contained or implied on their part to be observed performed fulfilled and kept'. No doubt these words make it essential to the right to exercise the option that the lessees' covenants in the lease 'have been so observed and performed that there is no existing right of action under them at the time when the option becomes to be exercised.

446 I accept the landlord's further submission that if at the time of the purported exercise by the tenant of the option, there is an existing default under the lease for which an action would lie, the tenant cannot accept the offer of a new lease.[95]

447 In summary, the landlord submits that in Victoria, unlike other jurisdictions, there is no right to relief against forfeiture in respect of an option to renew a lease. This is due to the nature of an option, as an offer by the landlord to grant a new lease. The tenant can only accept the offer, and hence have any rights in relation to the new lease, by complying strictly with the terms of the offer. The landlord also relies upon the statement of the relevant principles discussed by Dixon J in *Lontav Pty Ltd v Pineross Custodial Services Pty Ltd (No 2).*[96]

448 I am also of the view that the authorities satisfactorily indicate that the underlying rational for relief against forfeiture is that it is intended to grant relief against the loss of proprietary rights only, as opposed to pure contractual , such as an option. It is only in the case of proprietary rights that the exercise by a landlord of its strict legal rights might be considered

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92 Ibid at 315. Cited with approval in *Stillwell*.
93 [1990] VR 589.
94 (1954) 90 CLR 515 at [519].
95 *Finch v Underwood* (1876) 2 Ch D 310; *BS Stillwell & Co Pty Ltd v Budget Rent-A-Car System Pty Ltd* (ibid).
96 [2011] VSC 485 at [107] ff.

to be unconscionable or inequitable, and which might therefore attracts an equity to such relief.[97]

449 The tenant submits that *Computer & Parts Land Pty Ltd v Property Sunrise Pty Ltd*, in its reliance on statements of principle in *Lontov*, was wrongly decided. It does so because there was an express finding in *Lontov* that the premises were not retail premises to which the Act applied, and therefore the Court was not concerned with the unconscionable conduct provision contained in section 77 of the Act, together with the wide powers conferred upon the Tribunal in section 91(1)(e) of the Act to make such orders as it considers "necessary or desirable to resolve the matter concerned" may therefore be engaged.

450 I am however satisfied that the authorities establish that an option to renew a lease is a contractual right only, which must be strictly complied with, and which does not therefore attract the doctrine of relief against forfeiture. I am not persuaded that the sections of the Act relied on by the tenant should be so construed so as to displace these established principles.

451 The claim for relief against forfeiture will be dismissed.

DAMAGES

Rent Arrears

452 The landlord seeks:

(a) arrears of rent (comprising CPI increases) in the sum of $20,591.01 for the period to the end of September 2014;

(b) arrears of rent from 1 October 2014-31 October 2016 in the amount of $138,231;

(c) continuing loss of rent from 1 November 2016 in the sum of $5,529 per month;

453 I find that these damages were caused to the landlord by the tenant improperly taking the view that it had properly exercised its option to renew the lease for a further term, lodging a caveat on the land, and bringing this proceeding. It has taken until this day for the tenant's claims to be determined against the tenant, during which period the landlord has been prevented from re-leasing the premises.

Rectification Costs

454 The landlord seeks the following damages:

(a) expenses allegedly incurred by the landlord in allegedly carrying out the reinstatement works to the floor and sub-floor of the premises, in the amount of $79,241.07, as set out in pages 51-55 of the Tribunal

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[97] See *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd* [2005] VSC 236 per Hollingworth J at [114]. See also *Computer & Parts Land Pty Ltd v Property Sunrise Pty Ltd (ibid)* per Senior Member Steele at [44]-[48].

Book (Pleadings), and addressed in the landlord's witness statements; and

(b) the value of the landlord's time allegedly taken to undertake reinstatement works in the amount of approximately $96,000 as set out in page 55 of the Tribunal Book (Pleadings).

455 I have found that the tenant is not liable to pay such damages, by reason of the operation of clause 3.3 of the lease. Should I be incorrect in this finding, I now deal with the damages claim.

Expenses incurred by the landlord

456 In respect of the expenses of $79,241.07 claimed to have been incurred by the landlord, he gave evidence that between November 2014 and the date of the hearing, he undertook repairs to the damaged floors and sub-floor at the premises.

457 At the date of the hearing, this included, by way of summary:

(a) demolishing the old floors and sub- floor, removing and disposing of the debris (the old brick piers have been retained);

(b) the obtaining of engineering designs for the new sub-floors and floors designed to carry a loading of 7kPa;

(c) the obtaining of building permits;

(d) arranging for the equipment, some of which had partially fallen through the floors, to meet to be moved around the building as works in various areas of the building have been undertaken. Landlord contends that this was a costly and time wasting exercise because each time an item of equipment had to be moved, he had to employ a contractor or other workers to assist him, and that the tenant's refrigeration equipment remains in the building.

(e) rebuilding the sub-floor and installing new timber floors and plywood tongue and groove flooring panels.

458 The landlord gave evidence that he has engaged the following contractors for the purposes of the works:

(a) Vivid Civil Engineering, which was first engaged to design a suspended concrete floor, however the concrete floor proved to be too costly and difficult to install within the building. Accordingly, vivid designed the new floor and subfloor made from LVLs (laminated veneered lumber) capable of carrying a 7kPa loading, which he considers is more than adequate for a retail or similar use building;

(b) Daylesford engineering, which designed and manufactured venting ducts;

(c) B Williams Pty Ltd, which disposed of debris;

(d) Provincial Geotechnical Pty Ltd, which undertook soil testing;

(e) Fells Powerline and Electrical Pty Ltd, which undertook electrical works; and

(f) Goldfields Refrigeration, which assisted with moving some of the items of refrigeration equipment;

459 The landlord says that he also engaged casual labour from time to time brackets including friends) to assist with the removal of debris, including the packing of rubbish from the floor demolition to a 20 tonne skip and from there to the transfer station, carrying timber into building into the building from transport vehicles, placing plaster on walls, carrying sheets of plywood into the building, placing insulation under the flooring and also helping with the gluing and screwing down of plywood panel flooring sheets.

460 The landlord provided the following further details concerning what he himself did;

(a) he began the rectification works by removing the old vinyl and masonite underlay from the entire 400 m² floor, and placing the debris into a 20 tonne skip located on the west side of the building;

(b) during these works the had to move most of the refrigeration equipment by way of using a Coles trolley jack. Most of it was moved to the west end of the building so that he could start removing floorboards from the eastern section. He says that he had difficulty with the units that had collapsed through the rotten floors and he had to use hydraulic jacks and a C-section steel channel in order to raise them to floor level and then move them with a trolley jack.

(c) floorboards were then removed, and he took photographs of water damaged areas on his iPhone as works progressed;

(d) all the floorboards and rotten timber were then placed in a skip;

(e) joists and bearers were then lifted and taken outside to storage;

(f) debris was then removed to the 20 tonne skip and once for all, this was taken away by the contractor;

(g) the brick piers were checked for level by using a laser level, and any differences in height were adjusted with packers when the LVL bearers were put in place;

(h) after initial building inspection approval, new LVL H3 treated bearers and joists then put in place and secured with galvanised tie-downs to all the brick piers. The two meter high wooden piers in the basement area were placed on sole plates and secured with Dyna bolts to the concrete basement floor;

(i) new 25 mm H3 and LSP treated tongue and groove plywood flooring within glued and secured to joists with 65×12 treated decking screws over the entire 400 m² of floor area; and

(j) during these works the refrigeration plant had to be moved about the new floor so that work could progress, and on occasion he borrowed a Coles trolley jack to assist.

Value of the landlord's own time engaged in rectification works

461 The landlord gave evidence that in total, he calculates that he worked for 121 days, usually on an 8 hour per day basis, and sometimes longer. At $100 per hour, he calculates the value of his time at $96,000. He claims $100 per hour on the basis that to his knowledge, it is a salary paid to a commercial project manager or a commercial site foreman and that, in his experience, tradesmen working on commercial sites in Daylesford get paid about $110 per hour. He also provided evidence concerning the costs that he would have incurred had he engaged a contractor to carry out the works. These quotations include an undated one from Mr Regatz in the amount of $157,000 being the estimated cost to rebuild and replace water damage floorboards and subfloor which, he contends did not appear to conclude all the items such as vinyl flooring, demolition and disposal of damaged flooring, strengthening bearers and joists to engineering specifications. Another quotation was provided by Daylesford Engineering dated 1 July 2014 in the amount of $209,775 expressed to include restoration works, including demolition, site measurements, concrete footings, fabrication and installation of all steelwork and laying Bondek.

462 Were it not for my previous finding, I am satisfied, in the circumstances, that the landlord would be entitled to be recompensed for his own labour engaged in the rectification works.

Tenant denies liability for betterment

463 The tenant submits that much of the works described by the landlord as having been undertaken achieved a substantial betterment of the premises compared to their condition on 1 March 2010.

464 The tenant contends that, on the landlord's own case-

(a) only certain parts of the floor and subfloor, being those in close proximity to the refrigeration and freezer equipment were damaged;

(b) the balance of the floor was undamaged;

(c) none of the undamaged parts of the floor were subject to any notices from the Council pursuant to the *Building Act 1983*;

(d) despite these independent considerations, it is clear from the landlord's evidence that the entirety of the floor was removed, and replaced;

(e) the landlord has replaced the entirety of the floor with a new structure with an allowable load of 5 kPa (although I find from the landlord's evidence that he in fact replaced the entirety of the floor with a new structure having an allowable load of 7 kPa).

465 The tenant submits that the evidence shows that the floor had a pre-damage carrying capacity of only 1.5 kPa, and that this appears from the fourth Proud report. The tenant submits that the works amounted to betterment, being a more than threefold increase in the carrying capacity of the floor, and that this represents a major capital upgrade to the premises which, if the whole damages claim in this respect is successful, would have been at the tenant's expense.[98]

466 I find, however from the references in the fourth Proud report (and indeed the second Proud report) to 1.5 kPa (or 150 kgs per square metre) are to what he considers is the load rating of the existing floor in Areas A and B (but intended, I believe, to be a reference to Areas B and C) in their then observed "present condition". Mr Proud goes on to state, in his reports, that if the floor was a new floor in good order, and with the existing timber dimensions, he would have provided a load rating of 3.0 kPa (or 300 kg/m²). I therefore calculate that the landlord has had works carried out that increase the load rating from 3.0 kPa to 7.0 kPa. Rather than a threefold increase, I find the landlord to have more than doubled the load rating, and therefore a measure of betterment has been achieved by him.

467 I consider that the landlord must give credit to the tenant for the value of the betterment, in this respect, achieved by him. I also consider that the tenant should not have to pay for the replacement of a new floor which, on the evidence of the landlord has occurred. The tenant submits that damages claimed by the landlord should be reduced by 80%. Doing the best I can, I find that the damages claimed by the landlord, but which I have found the landlord is not entitled to by reason of clause 3.3 of the lease, should be reduced by 50% on account of the betterment obtained.

468 Being otherwise satisfied by the amounts claimed by the landlord, including the reasonableness of the estimates therein, I find that the landlord would therefore have been entitled to damages in respect of this head of $39,620.53.

469 In regard to the value of the landlord's own time spent in the rectification works, I am not satisfied with the evidence submitted by the landlord in support of his claim to have spent 960 hours on the rectification project. I do however acknowledge that having spent considerable period of time engaged in the works, he should be given some recompense. In deference to the lack of supporting evidence concerning the claim number of hours worked by the landlord, I reduce claim in this respect by 25% to $68,500. I further reduce this amount by 50% on account of the betterment obtained by the use of his hours, arriving at a figure of $34,250.

Tenant denies liability for damage allegedly caused by Five Dollars

470 The tenant submitted that the tenant is not liable for any damage done to the premises prior to 1 March 2010, from which date it commenced occupation

98 See, for example *Hoad v Scone Motors* [1977] 1 NSWLR 88.

of the premises and responsibility to maintain the equipment. That is to say, the tenant should only be liable for paying the cost of damage that it is proved to have caused, as opposed to the party from which it received an assignment of the term, Five Dollars.

471 I accept that as matter of general principle, in the absence of a special covenant in the assignment by which an assignee of the term may accept liability for breaches by its predecessor (and there is no such provision in the Transfer of lease dated 26 February 2010), an assignee of the term is not liable for such breaches.

472 I find however that there is no satisfactory evidence, however, of the extent of damage to the floors and sub-floors during the period from the installation of the equipment by Five Dollars in about 2006 and 1 March 2010, when the tenant commenced occupation. I find that no more than nominal damage, if any, had occurred before 1 March 2010, and that the damage occurred to the floors and sub-floors after that date, exacerbated by the tenant's refusal to move the refrigeration equipment or to provide such preventative measures between May 2010 and September 2014 as may have lessened the damage.

473 I make the accompanying orders.

A T Kincaid
Member

ANNEXURE – THE PLAN