VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP179/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

RETAIL LEASES–Surrender of lease by operation of law–by re-taking possession of premises, landlord purported to accept the tenant's alleged abandonment of the premises–consideration of factors alleged to have constituted an abandonment of the premises by the tenant–facts found not to be sufficient to warrant a finding that, prior to re-taking possession, the tenant had abandoned the premises.

Whether in the circumstances, the landlord complied with its express obligation under the lease, in respect of a claim for increased rent due to CPI increases, to give "the same notice that it would be required to give under section 146(1) *Property Law Act 1958* (Vic)"–found that the landlord failed to comply.

Whether, if the landlord had complied with the notice requirements, the lease ended by resumption of possession by landlord following alleged failure by tenant to pay rent–alleged failure by landlord to render rent invoices for CPI increases allegedly payable from 1 June 2010 that were compliant with *A New Tax System (Goods and Services Tax) Act* 1999–whether that alleged failure entitled tenant to withhold payment of the whole of the rent invoices–whether, in any event, the tenant was entitled to suspend paying the whole of the rent invoices in reliance on the express term of the lease, on the ground that the premises could not be used or accessed for the permitted use–found to be not so entitled.

Whether the alleged failure by the tenant to pay rent in accordance with the lease, the alleged abandonment and the alleged discontinuation of the business by the tenant, contrary to its obligations under the lease, amounted to a repudiation of the lease by the tenant–found no repudiation and, in any event, notice required to be given by the landlord under the lease was not given.

APPLICANT	Grenville Trading Pty Ltd
RESPONDENT	Robert Braszell
APPLICANT BY COUNTERCLAIM	Robert Braszell
RESPONDENTS BY COUNTERCLAIM	Grenville Trading Pty Ltd and Wayne Clifford Douglas Hall
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
DATE OF HEARING	25 February 2015
DATE OF ORDER	3 July 2015
CITATION	Grenville Trading Pty Ltd v Braszell (Building and Property) [2015] VCAT 985

ORDER

It is hereby declared:

1. The lease between the Applicant and the Respondent dated 7 August 2009 in respect of premises at Vincent Street, Daylesford did not come to an end:
   (a) by surrender at law;
   (b) by a re-entry by the Respondent, purportedly pursuant to the terms of the lease for an alleged failure by the Applicant to pay rent in accordance with the terms of the lease; or
   (c) by the Respondent purporting to rescind the lease upon the Applicant's alleged repudiation.
2. Costs reserved.
3. **This proceeding is listed for a directions hearing before Member Kincaid at 9.30 am on 15 July 2015 at 55 King Street, Melbourne, allow 1 hour.**

MEMBER A KINCAID

APPEARANCES:

For the Applicant and Respondents By Counterclaim	Mr S Moloney of Counsel
For the Respondent	Mr C R Northrop of Counsel

REASONS

1 By an assignment of lease dated 26 February 2010, Grenville Trading Pty Ltd (the "**tenant**") took an assignment of the previous tenant's interest under a lease dated 7 August 2009 (the "**lease**") in respect of retail premises in Vincent Street, Daylesford (the "**premises**"). The tenant traded from the premises as the "IGA Supermarket".

2 The lease names Robert Braszell as the landlord (the "**landlord**").

3 In late September 2014, the tenant ceased trading from the premises following a Building Order dated 5 August 2014. The Building Order was served on the tenant as occupier of the premises, prohibiting occupation of the western portion, until stipulated works had been carried out. The tenant says that this, in effect, prevented the premises from continuing to be used as a supermarket.

4 The parties are in dispute concerning what caused structural failure to the sub-floor area of the premises, particularly below the western portion, which was used by the tenant as a loading bay, and for other purposes connected with the business.

5 The tenant says that the cause of the sub-floor damage was water inundation from a failed box gutter, by a failure by the landlord to manage ground water pooling in the sub-floor, and by the landlord sealing off the ventilation to the sub-floor area.

6 The landlord says that in about 2006, 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 condensate saturating the floor and sub-floor supporting structures, which was not remedied by the tenant notwithstanding the landlord's requests of it to do so. Therefore, the landlord says, the tenant was obliged under the lease to carry out the necessary structural repairs the subject of the Building Order.

PRELIMINARY QUESTION FOR DETERMINATION

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

8 The tenant seeks the following relief:

(a) that the landlord immediately commence structural repairs to the premises as identified in the Notices of 16 July 2014[1] and 5 August 2014.

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

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

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

9 By Counterclaim filed on 26 November 2014, the landlord sought declaratory relief, and arrears of rent from the tenant of $20,591.01.

10 Paragraphs 32-36 of the Points of Counterclaim 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.

11 The parties are also in dispute over whether the tenant, given the events that occurred in 2014, still has a lease over the premises. They consider that if this issue is determined, they will be better able to resolve whether either party is liable to pay any damages to the other and, if so, how much.

12 By orders made on 15 December 2014, I set the matter down for a preliminary hearing, to hear and determine the following question:

> Whether the lease between the applicant and the respondent made 7 August 2009 has ended by reason of the matters alleged in paragraphs 32-36 of the Points of Counterclaim dated 26 November 2014.

THE LEASE

13 The lease stipulates a term commencing 1 June 2009 to 31 May 2014, together with options in respect of 3 further terms of 5 years each.

14 The registered office of the tenant was at all times 387 High Street, Melton Victoria 3337.

15 Mr W Hall, a director of the tenant, signed the assignment as guarantor of the tenant's obligations.

16 The latest date for exercising the first option for renewal was 1 March 2014.[2]

17 The rent under the lease was $60,000 plus GST per annum, payable in 12 equal monthly instalments on the first day of each month.[3]

18 The permitted use of the premises under the lease was a licensed grocery store.[4]

DID LEASE COME TO AN END BY ABANDONMENT?

19 The landlord relies principally on the doctrine of surrender by operation of law, as ending the tenancy.

20 This will apply where a tenant acts in a way that is inconsistent with the continuation of the lease, and the landlord accepts those acts, as ending the lease. The law will find, in such circumstances, that an implied surrender has occurred. This requires a consideration of the background and chronology.

Background and Chronology

21 The Municipal Building Surveyor 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.

22 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 Mr Ross Proud, Structural and Civil Engineer dated 13 June 2014, obtained by the tenant and provided to the Municipal Building Surveyor.

23 The Municipal Building Surveyor served on the tenant a Building Order dated 5 August 2014, as occupier, prohibiting occupation of the western portion of the premises, until stipulated works had been carried out.

24 The tenant says that this, in effect, prevented the premises from being used as a supermarket.

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

25 The tenant filed an affidavit sworn by Ms Elizabeth Decis on 7 August 2014, which also exhibited the Proud report. In paragraph 13 of her affidavit, she states:

> The ban [by the Municipal Building Surveyor] on access of the parts of the [premises] identified in the [5 August 2014 Building Order] means that the tenant must necessarily close the supermarket as there is no other means of unloading stock, unpacking stock and no office or toilet facilities as these are conducted in the banned area.

26 Ms Decis's affidavit, and a further affidavit of Mr Peter John Shaw, Architect, sworn on 12 August 2014 and filed by the tenant, otherwise make assertions as to the cause of the damage to the premises, which are not relevant for present purposes.

27 By an order of the Tribunal made by consent on 13 August 2014, the proceeding was adjourned to a directions hearing on 10 October 2014.

28 On 30 September 2014, an article appeared in the Daylesford local newspaper *The Advocate*, that read as follows:

> The Daylesford community has expressed its sadness after the local IGA announced it will be "forced to close" this month after parts of the building were condemned by Hepburn Shire.
>
> Manager [of the tenant] Elizabeth Decis said it was devastating that such a viable business and huge part of the community **had to shut its doors.**
>
> **"These parts of the building [that were condemned] are vital to making a supermarket operate"** she said.
>
> "We have tried for months to keep going and work around it but it just got too hard.
>
> …
>
> It wasn't so much a decision as cold reality.
>
> …**Our staff have taken the news as well as can be expected but everyone is gutted that they won't get to work here and with each other any more**" Mrs Decis said.
>
> "We took the business over four years ago…and we are so grateful to this fantastic community for their support (**emphasis added**)"
>
> …

29 The landlord deposes that he read the article on 2 October 2014. He says that the tenant gave no notice to him, or his solicitors, that it was "leaving the premises", if that is what in fact occurred. He deposes that the tenant "simply left".

30 Mr Hall, the director of the tenant, swore an affidavit on 19 February 2015, stating that on 2 October 2014 the landlord telephoned him, "wanting to know what was happening with the supermarket". He deposes to the following conversation having then occurred:

The landlord: It would seem that you have abandoned the site, based on the story in the local newspaper.

Mr Hall: I have not read the local paper, but I am waiting for legal advice on how to proceed.

The landlord: My solicitor can get no reply from [your solicitor] from the [attempted] contacts they have made. The article in the paper suggests to me that you have abandoned the building and are not going to return.

Mr Hall: I assure you that I have never commented to any newspaper, and that [Elizabeth Decis] is devastated that we have had to cease operation due to the increasing safety risks to staff and customers.

We would still be there now if it was safe to be so. It is simply impossible to operate with the Council condemning the back loading dock, the preparation area at the rear of the store, and large parts of the selling area of the store.

The landlord: I want to get on with fixing the floor, and want to know your intentions regarding the occupancy of the shop in the future.

Mr Hall: I am not sure what precisely we are doing with the plant and equipment in the building, but I'm very relieved to hear you confirm that you intend to repair the floor.

31 About this alleged conversation, the landlord deposes that Mr Hall did not say, "I am not sure what precisely we are doing with the plant and equipment in the building". He says that Mr Hall said, "the equipment is yours".

32 Mr Hall also deposes that the cessation of business operations was necessitated by the fact that the premises had become increasingly unsafe for the staff and public. Mr Hall submits that inactivity at the premises was a consequence of these matters. Mr Hall says that at no time did he say or imply to the landlord that the tenant was abandoning the premises.

33 The landlord also deposes that, whatever may be implied by the article, at no time did Mr Hall "say the article [in *The Advocate*] was wrong".

34 In other respects, I find that the landlord's recollection of the conversation between himself and Mr Hall, as expressed in the landlord's affidavit sworn 24 February 2015, is generally in accordance with that of Mr Hall.

35 By "Notice to Tenant" dated 3 October 2014, the landlord's solicitors required the tenant to pay $20,591.01 within 14 days after service. I discuss the contents of this notice, and make a finding as to whether it complied with the terms of the lease, below.

36 The landlord says that he attended the premises on 5 October 2014, 3 days after he read the article in the *The Advocate*. He says that he observed,

through the windows, that all of the stock and shelving had been removed. He deposes that the tenant had not told him that this was intended, and did not explain the reasons for doing so.

37 The landlord observed then that the gate to the premises had been left open, and unlocked. The gate is located at the north-western end of the premises. It opens onto a carpark, which is used by the public. Prior to that time, he alleges, the tenant had kept the gate locked. He also observed that grass at the rear of the premises to the west was overgrown, and that there were supermarket trolleys scattered about in this area, some upturned. He also observed that some shelving remains had been dumped in this area, around a large rubbish disposal skip. Photographs of these observations were put into evidence.

38 On 8 October 2014, the landlord's solicitors wrote to the tenant's then solicitors:

> We refer to our letters dated 18 August 2014, 27 August 2014, 24 September 2014 and 3 October 2014.
>
> Are you still acting for [the tenant] in this matter?
>
> Attached is an article published in *The Advocate* newspaper on 30 September 2014.
>
> The reported comments of Elizabeth Decis, one of your client's employees, would suggest that your client has abandoned the Premises.
>
> Our client's observations that your client ceased trading at the premises last week, and removed stock and shelving, as well as overgrown grass at the rear of the property and the rear gate having been left open and unlocked, are also consistent with your client having abandoned the Premises.
>
> **If your client asserts that it has not abandoned the Premises, please advise of that by the close of business today.**
>
> In the meantime, all our client's rights are reserved (**emphasis added**).

39 On 10 October 2014, Orders were made by the Tribunal for the exchange of pleadings, and for a compulsory conference on 20 February 2015.

40 On 16 October 2014, the solicitors for the landlord wrote to Ms Wise, the tenant's new solicitor:

> We refer to your letter dated 9 October 2014.[5]
>
> We have still not received a response to our letter dated 8 October 2014 to [the tenant's former solicitors] (which is referred to in your letter).

[5] This letter was not in evidence.

In the circumstances our client has assumed that your client has abandoned the premises. If your client says that is not the case, please advise immediately.

We are instructed that your client has left behind at the premises refrigerators, freezers and cool rooms.

We confirm that these items belong to your client as was confirmed by Mr Moloney of Counsel for your client at VCAT on 9 October 2014.

Please arrange for your client to remove these items within 7 days of the date of this letter.

In the meantime, all our client's rights against your client are reserved (**emphasis added**).

41 Ms Wise responded on 16 October 2014:

Thank-you for your letter of today's date. I confirm what Mr Moloney stated at VCAT on 9 October 2014 that the refrigerators, freezers and coolrooms are the property of [the tenant], and as additionally stated by Mr Moloney, that **the lease is still on foot**.

My client has not abandoned the property, but is unable to lawfully operate the business due to the danger posed by the damage to the floors caused by water leaking through the roof due to the landlord's failure to maintain the structure of the premises. The landlord is liable for the carrying out and cost of repairs under the *Retail Leases Act 2003* (**emphasis added**).

42 By Points of Claim dated 24 October 2014 the tenant relevantly alleges:

1. The Applicant [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.

43 By letter to the tenant's solicitor dated 29 October 2014, the landlord's solicitors stated:

> We refer to previous correspondence.
>
> We are instructed that in accordance with the provisions of the lease, earlier today [the landlord] 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[6] is (sic) enclosed for your information.

44 The landlord says that there was an acceptance by him of the abandonment of possession by the tenant when the landlord resumed possession of the premises on 29 October 2014, and he changed the locks.[7]

Alleged abandonment-discussion and findings

45 A surrender by operation of law occurs only where there is an act done by one party, and assented to by the other, which is inconsistent with the continuance of the lease.[8]

46 In *Haddrick v Lloyd*[9] Reed J of the South Australian Supreme Court said:

> Apart from express agreement [surrender of a tenancy] can result from abandonment by the tenant which is followed by acceptance by the landlord. Abandonment of possession is not itself surrender.

47 Similarly, in *NRMA Insurance v B & B Marine Salvage Co Pty Ltd*[10] Jordan CJ stated the principle, as follows:

> It is clear that relinquishment of possession by a tenant, coupled with an acceptance of possession by a landlord, is sufficient to determine the tenancy; but relinquishment by the tenant and resumption of possession by the landlord must take place in such circumstances as to warrant an inference of an agreement that the lease shall be terminated.

48 The decisions indicate that in order to determine whether a tenant has expressed an intention to return to the premises, the conduct of the tenant is considered objectively.[11]

49 Scarman LJ *Morrison Holdings Ltd v Manders Property Ltd*[12] described the approach to be taken:

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

7 cf. *Cummings v Mathieson* [1955] VLR 389.

8 See *Commercial Tenancy Law* (Bradbrook Croft and Hay, 2009) paragraph 16.7 and the decisions there cited. See also *Parsons v Payne* [1945] VLR 34 at 39.

9 [1945] SASR 40 at 42.

10 (1947) 47 SR NSW 274; see also *Watson v Webb* (1948) 66 WN NSW 42.

11 See *Parsons v Payne* (ibid); *Re Stewart, Ex parte Overells' (Pty) Ltd* [1941] St R Qd 175.

> …it must be a question of fact to determine whether the tenant intended to cease occupation or whether he was not only, as the judge found these tenants were, cherishing the hope of return, but making it quite clear that he intended to maintain his right of occupancy and to resume physical occupation as soon as the landlord reinstated.[13]

50 It is therefore necessary for me to consider the conduct of the tenant from late September 2014 (when *The Advocate* attributed remarks to Ms Decis of the tenant that the business had had to shut its doors)[14] to 29 October 2014, in order to determine whether or not the tenant had made it clear that it intended to return to the premises.

51 In *Wood Factory v Kiritos Pty Ltd*[15] the New South Wales Court of Appeal found that the tenant left the premises in circumstances which made it clear that it was inviting the landlord to resume possession. The landlord changed the locks, and re-leased to a third party, having advised the former tenant of its intention to do so.[16] That demise was found to be wholly incompatible with the existence of a current lease to the former tenant, which was deemed in law to have been surrendered.

52 This is to be compared with the facts in *Morrison Holdings Ltd.* A devastating fire took place, which although not wholly destroying the premises, rendered them totally unfit for occupation as business premises. As a consequence of the fire, the tenants vacated the premises, having saved as much of their stock as possible but leaving behind certain fixtures and fittings. They kept the keys to the premises, and on the following day wrote to the landlords stating that they wanted to 'get back into trade as soon as possible' and asking how long it would be before the premises could be made 'weatherproof and suitable for re-occupation for the remainder of [their] lease.' They were found to have subsequently acted in a fashion consistent with their intention to resume trading at the premises as soon as possible.

53 The facts of *Morrison Holdings* are to be distinguished, the landlord submits, from the facts here. He says that, having abandoned possession of the premises, there was no clear expression by the tenant of a desire to return. Indeed, the landlord places particular reliance on the comments of Ms Decis, reported in *The Advocate* and to which I have referred, including her comment to the effect that the staff had accepted that they "would not work at the premises any more".

54 I am not persuaded that there has been any such abandonment of possession by the tenant, as could justify the inference of an agreement to surrender.

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12 [1976] All ER 205.

13 ibid at 211. cf. also *Goldsworthy v Calvert* [1953] QWN 11 where an express agreement concerning the tenant's proposed return, following temporary vacation, could be found.

14 Mr Hall gave evidence that the last trading day of the tenant was 29 September 2014.

15 (1985) 2 NSWLR 105.

16 ibid at 115 para D.

55 True it is that comments, attributed by an article in *The Advocate* to an employee of the landlord, indicated that the landlord did not intend to resume business at the premises. However, I find that during the conversation between the landlord and the tenant on 2 October 2014, and notwithstanding that he was being pressed to indicate that the tenant had abandoned the premises, Mr Hall did not do so, but instead informed the landlord that he was waiting for legal advice on how to proceed. At this point, and put at its highest for the landlord, the conduct of the tenant was equivocal with respect to returning to the premises.

56 I also note that following the landlord's inspection of the premises on 5 October 2014, the landlord did not take possession, which may have given rise to an argument that a surrender of law had thereby occurred. The landlord chose, instead, to instruct its solicitors to send letters dated 8 October 2014 and 16 October 2014 seeking a confirmation from the tenant as to whether it had abandoned the premises.

57 In response, the tenant's solicitor in her letter dated 16 October 2014 stated that not only were the refrigerators, freezers and cool rooms at the premises considered to be the property of the tenant, but that also the lease "is still on foot", and that the tenant had not abandoned the property.

58 In my view, a reasonable inference from this letter is that the tenant was unable to trade from the premises, that the landlord was, in the tenant's view, responsible for reinstatement of the premises, and that the tenant intended to resume possession pursuant to the terms of the lease once the landlord had done so. Granted, there is no letter from the tenant of the type that was before the court in *Morrison Holdings*, expressly showing a desire of the tenant to return to the premises. However, I find that the conduct of the tenant, including its solicitor on the tenant's behalf, nevertheless expressed a sufficiently clear intention on the part of the tenant to return to the premises.

59 Insofar as the landlord seeks to rely on the tenant's conduct, prior to the letter from its solicitor dated 16 October 2014, as justifying the inference that the tenant had abandoned the premises, then the landlord was clearly disabused of any misunderstanding by that letter.

60 Mr Northrop of counsel, on behalf of the landlord, submitted that one cannot look at assertions of the type made in the tenant's solicitor's letter dated 16 October 2014 when determining, on the objective facts and circumstances, whether there had been an abandonment. I reject this submission. I consider that I may fairly have regard to the evidence of what a tenant says to a landlord, through its solicitor, as to its intentions concerning the premises, when determining whether, on the facts, the tenant has evinced an intention to return.

61 To the extent that there may be any doubt concerning my conclusion about the effect of the letter from the tenant's solicitors dated 16 October 2014, I consider that it is dispelled by the contents of the Points of Claim filed on

24 October 2014. They make it clear that the tenant required the landlord to make good the premises, so the tenant could use them for the permitted purpose, thereby confirming that the tenant wished to return.

62 I also observe that whatever may be said now by the landlord about the characterisation of the tenant's conduct prior to the landlord taking possession, as late as 24 October 2014, the landlord rendered an invoice for rent for the period from 1 November 2014. This demonstrates that almost a month after the tenant ceased trading from the premises, the landlord still considered that the tenant had not abandoned them.

63 The landlord also relies on:

- there being no documentary material showing an intention to return;
- no notice of intention to leave;
- no enquiry by the tenant, prior to leaving the premises, about the time it would take to complete the necessary works;
- no evidence of shelving placed in storage ready to return to the premises;
- no attempt to renew the lease, following its expiration on 31 May 2014;
- no request by the tenant for keys to the premises;
- no request by the tenant for access to the premises;
- no maintenance of lawns;
- no response to notice of intention to dispose of goods; and
- no indication of any intention to acquire new refrigeration equipment.

64 In the circumstances, I also find that the alleged failure by the tenant to make enquiries with regard to the works and, when they were intended to be completed, are not matters rebutting the inference that I have found as to the tenant's intention to return. I accept the tenant's submission that such an enquiry would have served little purpose, given the extent of the contemplated works.

65 I also do not accept that the tenant's failing to attempt to renegotiate a new lease, following its expiry on 31 May 2014, is a relevant factor in determining whether the tenant had abandoned the lease. This was explicable by the fact that there was no evidence of the landlord having served a notice pursuant to section 28 *Retail Leases Act* 2003, informing the tenant of the date after which the option was no longer exercisable. I find, that in consequence of this failure, the tenant had been advised that it had a statutory right of occupation.

66 The landlord and Mr Hall both have differing accounts of what was allegedly said by Mr Hall concerning the return of the equipment. There being no corroborative evidence in support of either account, I am unable, on the evidence, to make a finding one way or the other on this issue.

67 I also do not accept the landlord's submission that it can be reasonably inferred from Mr Hall's comments to Mr Braszell, during the telephone conversation on 2 October 2014, that no decision had been made by the tenant as to whether the tenant would go back to the premises. Even if I am wrong, by subsequent communications from the tenant and its solicitor, the tenant made it reasonably clear that it intended to return.

68 I therefore find that the tenant had not abandoned the premises, and therefore a surrender at law could not subsequently occur by the landlord's re-entry.

DID TENANCY COME TO AN END BY RE-ENTRY PURSUANT TO THE LEASE?

69 I now deal with the landlord's submission, alternatively to its prime submission based on surrender at law, that the failure by the tenant to pay rent gave rise to the landlord's right to re-enter the premises on 29 October 2014.

70 The following provisions were also included in the lease:

> 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**,
>
> 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.

71 The schedule to the lease provided:

> Item 9: How rent is to be paid:
>
> As directed by the Landlord
>
> Item 16-**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-[clause 18] CPI review: Automatic annually

72 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 18.1 On a CPI review date, **the rent is adjusted by reference to the Consumer Price Index** using the following formula [**emphasis added**].
>
> [*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.

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

74 The landlord emailed the tenant on 19 July 2014[17] as follows:

> 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.

75 The landlord deposes that he did not receive a response to this email, and the tenant does not allege otherwise.

[17] 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.

Landlord demands claimed CPI increases

76 By a "Tax Invoice" dated 5 August 2014 addressed to "Mr W Hall, c/- 32 Fisken Street, Ballan 3342", the landlord invoiced Mr Hall in the amount of $18,262.41 for "rental arrears".

77 Although the invoice did not describe the basis for the "rental arrears" charge, subsequent correspondence indicates that it was for claimed CPI increases plus GST, said by the landlord to be payable under clause 18 of the lease, for the rental years beginning 1 June 2010 to 1 June 2013.

78 It appears that since 1 June 2010, the landlord had not enforced its rights to CPI increases pursuant to clause 18 of the lease, and sought to do so by this invoice.

79 The invoice provided no details as to the percentage CPI increase that the landlord had applied in order to calculate the CPI increases.[18]

Notice to tenant

80 The landlord's solicitors sent to the tenant a document entitled "Notice to Tenant" dated 3 October 2014, addressed to the tenant's registered office and, on its face, described as "copied" to Mr Hall at 32 Fisken Street, Ballan 3342, as guarantor. By the "Notice to Tenant" the landlord demanded the payment of $20,591 "rent arrears".

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

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

83 By a document entitled "Tax Invoice (October 2014)" dated 24 October 2014 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". I find that this was intended to be a charge by the landlord for rent allegedly due from the tenant on 1 November 2014.

84 By letter dated 24 October 2014, the tenant's solicitor wrote to the landlord's solicitor 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.[19] 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%.

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[18] Details of the rate were not provided until the landlord's invoice dated 24 October 2014.

[19] The "Tax Invoice (October 2014)", to which I find Ms Wise refers, appears to have been rendered for the month of November 2014.

Landlord re-enters

85 By letter dated 29 October 2014 the landlord's solicitor wrote to the tenant's solicitor 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[20] is (sic) enclosed for your information.

86 By letter dated 29 October 2014 the landlord's solicitor wrote to the tenant's solicitor, as follows:

> We refer to your letter dated 29 October 2014.[21]
>
> 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.

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

[21] This letter was not in evidence. The date appears to be a mistaken reference to the tenant's solicitor's letter dated 24 October 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].

87 The tenant's solicitor responded by letter dated 30 October 2014, 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 even 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 (**emphasis added**).

88 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 the 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 the 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** [**emphasis added**].
>
> [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]

89 By letter to the landlord's solicitors dated 6 November 2014, the tenant's solicitor alleged that the tenant had never received valid tax invoices that comply with the *A New Tax System (Goods and Services Tax) Act 1999* (the "**GST Act**"), as "they were not compliant [with the GST Act] and do not contain all information prescribed by law." The tenant's solicitor informed the landlord's solicitors that for the period from 1 March 2010 to 30 September 2014 the tenant had made rent payments of $5,000 per month also invoiced by the landlord, plus GST payments charged by the landlord of $28,000. The tenant's solicitor alleged that this figure was considerably in excess of the landlord's claim for $20,591.01 made in the Notice to Tenant dated 3 October 2014.

90 The tenant's solicitor also re-asserted the tenant's alleged right to "a reduction in rent" calculated by the extent to which the supermarket had been rendered inoperable by the landlord's alleged failure to maintain the premises since 2010.

91 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 refrigerators, freezers and cool rooms owned by the tenant, and which had been the subject of previous correspondence between the parties.

92 The threatened application was resolved by agreement at the hearing before me on 15 December 2014, and I made consequential orders for a hearing on the preliminary issues now before me.

Alleged termination for non-payment of rent-discussion and findings

93 The issues raised by the correspondence to which I have referred, and in submissions before me, are whether:

(a) the Notice to Tenant dated 3 October 2014 served by the landlord's solicitors on the tenant complied with clause 7.4 of the lease; and if so

(b) 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 2010; 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

entitled the tenant not to pay the whole of the rent alleged to be due by the Notice to Tenant dated 3 October 2014.

Did Notice to Tenant dated 3 October 2014, served by the landlord's solicitors on the tenant, comply with clause 7.4 of the lease

94 A CPI review under the lease adjusts the rent payable under the lease (see clause 18).

95 Clause 7.4 of the lease provided:

> The landlord must give the tenant, before terminating this lease under clause 7.1 for non-payment of rent, **the same notice** that it would be required to give under section 146(1) of the *Property Law Act 1958* (Vic) for a breach other than the non-payment of rent [**emphasis added**].

96 Section 146(1) of the *Property Law Act 1958* (Vic) provides as follows:

> A right of re-entry or forfeiture under any proviso or stipulation in a lease...shall not be enforceable…unless and until the lessor serves on the lessee a notice-
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) in any case, requiring the lessee to make compensation in money for the breach.

97 I find no basis for reading down the expression "give…the same notice in section 146(1) of the *Property Law Act 1958* (Vic)" in clause 7.4 of the lease to a reference only to a fourteen day period of notice. It must be a

notice "the same notice" as that required under section 146(1) of the *Property Law Act 1958*. The landlord must therefore, in my view, specified "the particular breach" in the Notice to Tenant dated 3 October 2014, in accordance with section 146(1)(a) of the *Property Law Act 1958* (Vic). Did he do so?

98 The Notice to Tenant dated 3 October 2014 expressed the breach as follows:

> 4. The lease contains terms, among others,
>
> (a) that the landlord must pay rent, on the days and in the way as directed by the landlord, without deduction, to the landlord without the need for a formal demand (clause 2.1.1);
>
> (b) amounts payable and consideration provided under or in respect of the Lease (other than under clause 17.3) are GST exclusive (Clause 17.2);
>
> (c) the recipient of a taxable supply made under or in respect of the Lease must pay to the Supplier , at the time the consideration of the supply is due, the GST payable in respect of the supply (clause 17.3);
>
> (d) A party is not obliged, under clause 17.3, to pay the GST on a taxable supply to it under the Lease, until it is given a valid tax invoice (clause 17.5).
>
> 5. In breach of clause 2.2.1 and clause 17.3 of the Lease, the Lessee has failed to pay rent plus GST as set out in valid tax invoices given by the Lessor to the Lessee.
>
> **PARTICULARS**

Rent Arrears	01/06/2010-30/05/11	$1,680 + GST=	$1,848.00
Rent Arrears	01/06/2011-30/05/12	$3,838.80 + GST=	$4,222.69
Rent Arrears	01/06/2012-30/05/13	$4,742.54 + GST=	$5,205.79
Rent Arrears	01/06/2013-30/05/14	$6,350.85 + GST=	$6,985.93
Rent Arrears	June 2014	$529.23 + GST=	$582.15
Rent Arrears	July 2014	$529.23 + GST=	$582.15
Rent Arrears	August 2014	$529.23 + GST=	$582.15
Rent Arrears	September 2014	$529.23 + GST=	$582.15
			$20,591.01

99 The sum of the first four amounts claimed in the particulars is $18,262.41. Although the Notice to Tenant dated 3 October 2014 did not say so, this was the amount previously claimed in the "Tax Invoice" dated 5 August 2014.

100 Neither the "Tax Invoice" dated 5 August 2014, nor the Notice to Tenant dated 3 October 2014, stated that the sum of $18,262.41 represented the rent for the period 1 June 2010 to 30 May 2014 as "adjusted by reference to the Consumer Price Index, using the [formula set out in clause 18.1 of the lease]" as provided for in clause 18 of the lease, plus GST.

101 Each of the last four amounts claimed is 1 month of "rent arrears" of $582.15 including GST per month, for the months of June, July, August and September 2014. Each amount is made up wholly of the claimed CPI increase payable for the relevant month. It was calculated by dividing the rent including CPI increase plus GST for the year 1 June 2013-30 (sic) May 2014 by 12.

102 The tenant's solicitor subsequently contended that the Tax Invoice dated 5 August 2014 "gave no indication of how the alleged arrears had arisen".[22] I agree.

103 The Notice to Tenant dated 3 October 2014 also provided no particulars of how the alleged arrears had arisen, other than replicating the amounts referred to in the Tax Invoice dated 5 August 2014, plus the further charges for June 2014-September 2014.

104 By a document entitled "Tax Invoice (October 2014)" dated 24 October 2014 addressed to "Mr W Hall, c/- 32 Fisken Street, Ballan 3342", the landlord invoiced Mr Hall for $6,082.15 for "monthly rental" which, I have found, was for rent allegedly due on 1 November 2014. This was made up of $5,529.23 (being one-twelfth of the claimed CPI adjusted rent of $66,350.85 for the period 1 June 2013 to 31 May 2014) plus GST of $552.92.

105 By that invoice, the landlord first provided details of the percentages in a column headed "CPI increase" which he had applied to the base rent of $60,000 for each of the four rental years from 1 June 2010 to 1 June 2013, and which were also used for the calculation of the sums claimed in the Notice to Tenant dated 3 October 2014.

106 By applying these percentages, one could calculate, for the first time on the evidence, how the sums the subject of the "Tax Invoice" dated 5 August 2014, the sums claimed in the "Notice to Tenant" dated 3 October 2014 and the "Tax Invoice (October 2014)" dated 24 October 2014 had been calculated.

107 In *Primary RE Limited v Great Southern Property Holdings Ltd*[23] Judd J referred to a judgment of Hodgson JA in *Macquarie International Health*

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[22] See paragraph 8 of affidavit of Ms Wise sworn 26 November 2014.

Clinic Pty Ltd[24] as providing a useful summary of the legal principles applicable to the construction of the statutory requirements in section 129 of the *Conveyancing Act 1919* (NSW).[25] In that decision, his Honour said:

> 308. The purpose of s 129 is to give the lessee an opportunity to remedy any alleged breaches before the lessor exercises its legal rights of forfeiture: *Fletcher v Nokes* [1897] 1 Ch 271 at 274; *Horsey Estate Ltd v Steiger* [1899] 2 QB 79 at 91; *Ex parte Dally-Watkins : Re Wilson* (1956) 72 WN (NSW) 454 at 456.
>
> 309 In my opinion, a proper opportunity is not afforded unless the lessee is alerted to the particular breaches on which the lessor proposes to rely and what the lessor requires in order to bring about a position where termination would not occur.
>
> 310 The reported cases are concerned with notices issued pursuant to alleged breaches of covenants to repair. In *Fletcher v Nokes* [a repair case] North J said (at p 274):
>
> …the notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him. [In the case of a notice stating "you have broken the covenants for repairing"] the plaintiff has not condescended upon any details, and, in my opinion, the notice was not sufficient.
>
> …
>
> 312 Lord Russell CJ said [*in Horsey Estate Ltd* at p 91]:
>
> To determine the character of the required notice, what it shall contain and when it ought to be given, it is necessary to consider the scope [of the Act] as a whole. The object seems to me to require in the defined cases (1) that a notice shall proceed any proceeding to enforce a forfeiture, (2) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought o offer any, and if so, what compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest is sought to forfeit the opportunity of considering his position before any action is brought against him.

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23 [2011] VSC 242

24 [2010] NSWCA 268

25 Which for present purposes, can be taken to have the same words as section 146 *Property Law Act 1958* (Vic)

…

> 323. In my opinion, the above authorities clearly indicate that a notice under s 129 must not only allege breach, but must also describe the particular acts or omissions constituting the alleged breach; and the notice must indicate the acts of the tenant which the landlord would consider sufficient for the lease to continue, and upon completion of which the landlord would abandon its claim to forfeit. The standard of particulars or degree of specificity depends upon the circumstances, including the nature of the covenant alleged to be breached, the tenant's actual or constructive knowledge, and whether the landlord claims reasonable compensation.

108 The facts in *Primary RE Limited* were not concerned with what is now before me-an alleged breach by a tenant to pay rent, as adjusted by alleged CPI increases. I respectfully adopt Hodgson JA's approach that the standard of particulars or degree of specificity depends upon the circumstances, including the nature of the covenant alleged to be breached, and the tenant's actual or constructive knowledge.

109 *Grepo & Anor v Jam-Cal Bundaberg Pty Ltd*[26] is an example of where a demand in respect of claimed CPI increases was found to be bad. The plaintiffs leased part of their land to the defendant company and remained living on the remainder of the land in a residential house. The lease was for 3 years, with an option to renew for 3 years. The lease provided that the initial annual rent was subject to CPI increases for the second and third years of the original term, if a determination was made. The plaintiffs never requested CPI increased rent until after the original term had expired. The question was whether the defendants were obliged to pay CPI increased rent for the second and third years of the original term. The Court found as follows:

> The notice under [section 124 of the *Property Law Act 1974* (Qld)] of 8 August 2013, demanded alleged unpaid rent in various amounts, which would have left the defendant in a state of uncertainty as to what was being demanded, rendering compliance impossible in the absence of further enquiry. The defendant was not obliged to comply with that notice.

110 It appears from the judgment in *Grepo*, that the defendant contended that the demand was far too broadly and uninformatively cast in a number of respects, and that this also played a part in his Honour's finding.

111 A provision in the lease entitles the parties to a rent increase or reduction, as the case may be, "by reference to the Consumer Price Index using [an expressed] formula". I consider that it is not sufficient compliance with section 146(1) of the *Property Law Act 1958* for the landlord to claim rent, as adjusted by claimed CPI increases, without also providing details of how

[26] [2014] QSC 119

the CPI increases have been calculated by him. I find that where there is a failure to do so, as in this case, the landlord has failed to specify the particular breach complained of, as is required by section 146(1) *Property Law Act 1958*, and therefore as required by clause 7.4 of the lease.

112 There is also evidence that the CPI percentages adopted by the landlord for the purpose of his Tax Invoice dated 5 August 2014 and the Notice to Tenant dated 3 October 2014, were thought by the tenant to be incorrect. [27] The analysis required to reach this conclusion, if indeed it is a correct one, could in my view only be undertaken after receipt by the tenant of the "Tax Invoice (October 2014)" dated 24 October 2014. If the tenant can only determine, by a document subsequently received from the landlord, whether he is in breach of a notice purportedly given earlier pursuant under section 146(1)(a) of the *Property Law Act 1958*, then I consider that the landlord has failed sufficiently to specify the particular breach complained of by the landlord.

113 Further, I also consider that having regard to the terms of clause 18 of the lease, which requires an adjustment "*by reference to* the Consumer Price Index using [a specified] formula", whomever[28] undertakes the adjustment, the other party must also be "referred" to the provisions of the Consumer Price Index upon which the adjusting party relies. This was not done until the "Tax Invoice (October 2014)" dated 24 October 2014.

114 For the sake of completeness, and if I am wrong in my finding 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, I will consider whether the landlord was, but for the failure to give the required notice, entitled to take possession when he did.

Was the tenant entitled not to pay the claimed rent (including CPI increases) because of any failure to comply with the GST legislation?

115 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.

116 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.

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27 See paragraph 13-15 of the affidavit of Ms Wise sworn 26 November 2014.

28 Clause 18 suggests that it is open to either party to make an adjustment.

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**].

117 The tenant submitted, in effect, in the correspondence to which I have referred, that between 1 March 2010 and 30 September 2014[29] 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,[30] 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.

118 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
>
> (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]

119 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.

120 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.

121 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

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[29] These invoices were not in evidence

[30] In breach of section 29-70 (1)(c)(ii) of the GST Act

respect 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

122 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.

123 It follows that of the total of $20,591.01 claimed by the Notice to Tenant dated 3 October 2014, $1,871.90 were GST payments. The tenant was on 3 October 2014 liable to pay rent to the landlord, within the meaning of clause 7.1 of the lease, in the amount of $18,719.11.

Was the tenant entitled to suspend payment of the whole of the rent due on 3 October 2014 (net of GST) because the premises allegedly could not be used or accessed for the permitted use, pursuant to Clause 8.1 of the lease?

124 Clause 8.1 of the lease provided:

> If the premises or building are damaged so that the premises cannot be used or accessed for the permitted use
>
> 8.1.1 a fair proportion of the rent and building outgoings is to be suspended until the premises are again wholly fit and accessible for the permitted use.
>
> 8.1.2 the suspended proportion of the rent and building outgoings must be proportionate to the nature and extent of the damage or inaccessibility.

125 Again, putting to one side my finding that the Notice to Tenant dated 3 October 2014 failed to comply with clause 7.4 of the lease, I now consider whether the tenant was, in any event, entitled under clause 8.1 of the lease to suspend payment of the whole of the rent (being the claimed CPI increases), because the premises allegedly could not be used or accessed for the permitted use.

126 The CPI increases were claimed in respect of the period 1 June 2010-30 September 2014. The tenant claims not to be obliged to pay the CPI increases because the premises allegedly could not be used or accessed for the permitted use.

127 I have concluded that there is no evidence that at any time, prior to service of the Building Order on or about 5 August 2014, the premises could not be used or accessed by the tenant for the purpose of licensed grocery store, sufficient to entitle the tenant to suspend any proportion of the rent payable prior to that date. The most the tenant asserts, in the correspondence to which I have referred, is that "the first occasion of the floor failing was in

2010 and that there have been "ongoing issues with access with significant sections of the supermarket having to be closed off in 2010"[31].

128 It follows that in relation to the CPI increases amounting to rent claimed by the landlord for the period to the end of July 2014, the tenant did not have any right pursuant to clause 8.1 of the lease to suspend its obligation to make payment pursuant to clause 2.1 of the lease.

129 In summary, I have concluded that the tenant was not entitled set off against the rent claimed by the Notice to Tenant dated 3 October 2014, any amount on account of GST other than $1,871.90. I have also concluded that 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 clause 8.1 of the lease. But for the failure by the landlord to give the required notice, he was therefore entitled to take possession of the premises when he did.

DID TENANCY COME TO AN END BY REPUDIATION BY TENANT?

130 The following provisions were also included in the lease:

> Clause 7.5 Breach by the tenant of any of the following clauses of this lease is a breach of an essential term and constitutes repudiation: **2.1.1**…**17** [**emphasis added**]
>
> Clause 7.6 Before terminating for repudiation (including repudiation consisting of nonpayment (sic) of rent), the landlord must give the tenant written notice of the breach and a period of 14 days in which to remedy it and to pay reasonable compensation for it. A notice given in respect of a breach amounting to repudiation is not an affirmation of the lease.

131 I have found that the tenant did not abandon the premises as contended by the landlord.

132 I also make no finding as to the whether it was the landlord's or the tenant's breach that led to the Building Order, preventing the tenant from keeping the premises open for business during normal business hours. That is a matter for later determination.

133 It therefore remains for me to consider whether, the tenant's failure to pay rent in accordance with the terms of the lease, without more, constituted a repudiation of the lease, accepted by the landlord by the re-taking of possession[32] alternatively by averment in the Points of Counterclaim.

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[31] Letter tenant's solicitor to the landlord's solicitors dated 30 October 2014.

[32] There is no reason in principle why a landlord may not rely on the re-taking of possession as a effecting a surrender of the term and acceptance of a repudiation of the tenant's obligations under a lease: see *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 59 ALJR 373 at 386-387 and 57 ALR 609 at 632 (per Brennan J)

134 The principles applicable to whether non-payment of rent may amount to a repudiation were summarised by Samuels JA in *Wood Factory Pty Ltd v Kiritos Pty Ltd*[33]:

> …*Shevill v Builder's Licensing Board*[34] [concerned] the effect and significance of a breach of the covenant to pay rent. Since in the present case it is submitted that the first appellant's failure to pay rent constituted a repudiation of the lease it is necessary, I think, to indicate what it is that *Shevill* and *Progressive Mailing*[35] have decided on this point. In *Progressive Mailing* Mason J (at 378; 618) said:
>
> > "*Shevill* decided (a) that the proviso for re-entry in that case, cl 9(a) did not make breach of the covenant to pay rent breach of an essential term of the contract ; and(b) that the evidence did not justify a finding that there was a fundamental breach of contract which would have entitled the lessor to rescind under the general law and sue for damages."
>
> In the same case Deane J (at 389: 637), described the decision in *Shevill* as having "turned upon the conclusion that the breaches of the covenant to pay rent in that case did not constitute repudiation or fundamental breach". In making these observations their Honours no doubt had in mind the statement of Gibbs CJ (with whom Murphy and Brennan JJ agreed) in *Shevill* (at 627):
>
> > "It is clear that a covenant to pay rent in advance at specified times would not, **without more**, be a fundamental or essential term having the effect that any failure, however slight, to make payment at the specified times would entitle the lessor to terminate the lease."
>
> Wilson J in *Shevill* (at p 634) spoke to the same effect:
>
> > "…However, I know of no authority or principle in law which requires me to hold that consistently late payment of rent without more is sufficient tom establish repudiation of a lease."
>
> I would add a reference to my own judgment in *Shevill* in this Court…[where] I…endeavoured to collect the authorities (to most of which Mason J referred in *Progressive Mailing* (at 380:621) in support of the same proposition) which show that mere breaches of covenant, including breach of a covenant to pay rent, do not constitute repudiation or fundamental breach. *Progressive Mailing* is itself authority for the same principle or, at lease, contains considered statements to that effect.
>
> In *Progressive Mailing* (at 379; 620) Mason J (with whom Wilson and Dawson J agreed) said:
>
> > "…In support of [the submission that the evidence did not justify the conclusion of repudiation or fundamental breach] the

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33 (1985) 2 NSWLR 105 at 115-117

34 (1982) 149 CLR 620

35 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (ibid)

> appellant points out correctly, that repudiation of a contract is a serious matter and is not to be lightly inferred and that neither a breach of a covenant to pay rent nor a breach of a covenant to repair, without more, constitutes a breach of a fundamental term, nor amounts to a repudiation of a lease."

Brennan J (at 383; 625) observed:

> "A lessor can recover damages for loss of the benefit of a lease only where the lessee has repudiated the lease before determination of the term. Such a repudiation is not necessarily established by proving default in the payment of rent."

And his Honour refers to Gibbs CJ's statement in *Shevill* (at 627), which I have quoted above.

Their Honours in *Progressive Mailing* did not, therefore, hold that breaches of covenant to pay rent amounted to repudiation or fundamental breach. It was the *refusal* to pay the rent (per Mason J at 381: 623) or the *withholding* of rent (per Wilson J at 382; 624), under colour of a false claim persisted in without foundation , and in conjunction with other breaches of covenant that established repudiation or fundamental breach.

135 In *Wood Factory* his Honour found that the failure by the tenant to pay rent did not amount to a repudiation. When the respondent landlord issued its statement of claim, the rent had not been paid for five months. However, there was nothing to suggest, his Honour found, a refusal to pay. His Honour found the circumstances to be identical to those found by Gibbs CJ in *Shevill*, relying on a quote from his Honour's judgment (at 624):

> "…It is enough to say that the only possible inference is that the lessee was experiencing financial difficulty which made it unable to make the payments of rent at times required by the lease. It is however impossible to conclude that the lessee was unwilling to comply with its obligations."

136 Similarly, I am not persuaded that the failure by the tenant to pay the claimed CPI increases, particularly when the relevant calculations were only provided by the landlord on 24 October 2014, 5 days before the landlord took possession, demonstrated that the tenant was unwilling to comply with its obligations, or had evinced an intention to renounce its obligations under the lease.

137 In my view, there is no basis for finding here that there was a refusal to pay rent, or the withholding of rent under colour of a false claim persisted in without foundation, and in conjunction with other breaches of covenant. There are therefore no circumstances that bring this matter within those that, for instance, enabled the High Court in *Progressive Mailing* to find that there had been a repudiation. I think it is also a fair summation of Mr Northrop's position that he would be less able to press the argument that the tenant had repudiated the lease if I find, as I have, that the tenant had not abandoned the premises.

138 Even if there was a repudiation, I also note that the landlord's right to rescind the lease relying on the tenant's failing to pay rent, which I have discussed above, are further regulated by clauses 7.5 and 7.6 of the lease. Clause 7.5 is to the effect that a failure to pay rent "is a breach of an essential term and constitutes a repudiation" of the lease. Clause 7.6 requires a notice to be served before terminating for repudiation. For the reasons I have given, the Notice to Tenant dated 3 October 2014 does not comply with clause 7.4 of the lease. I also consider that the Notice to Tenant does not sufficiently comply with the requirements of clause 7.6 of the lease, because it makes no mention of alleged repudiation by the tenant.

139 I make the declarations attached, and reserve costs.

MEMBER A KINCAID