VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP525/2014

CATCHWORDS

LANDLORD AND TENANT – Sufficiency of evidence – Circumstantial evidence; whether mere conjecture is sufficient to discharge the burden of proof required in a civil proceeding – Section 115B of the *Victorian Civil and Administrative Tribunal Act 1998*; whether the conduct of a party during the proceeding is to be taken into account by the Tribunal in exercising its discretion to order reimbursement of the application filing fee.

APPLICANT	Mark Lawson
RESPONDENT	Frank Baguley
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	9 February 2017
DATE OF ORDER	16 February 2017
CITATION	Lawson v Baguley (Building and Property) [2017] VCAT 236

ORDER

1. The Applicant's application is dismissed.
2. The Applicant must pay the Respondent $6,458 on the Respondent's counterclaim.
2. Liberty to apply on the question of costs, provided such liberty is exercised within 21 days of the date of this order.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	In person
For the Respondent	Mr P Cohen, solicitor

REASONS

1. The Applicant was a tenant of premises located in Clayton and owned by the Respondent. The leased premises formed part of a large parcel of land, which was previously used by the Respondent to grow flowers on a commercial scale. That business was discontinued in or around 2009, at which time a section of the land and some of the glasshouses located on that section of land were leased to the Applicant (**'the Premises'**).

2. The Applicant leased the Premises for the purpose of providing storage for a large collection of old motor vehicles, some of which were owned by the Applicant, while others were held by him as bailee for friends and customers who had engaged him to restore or repair their vehicles.

3. The leasehold agreement between the parties was not evidenced in any written document. However, it is common ground that a periodic month-to-month tenancy was granted to the Applicant. In or around the middle of 2014, notice was given to the Applicant that the Respondent intended to end the tenancy. At that stage, there were more than 100 motor vehicles stored in the Premises, together with a large collection of motor vehicle parts and associated goods (**'the Goods'**).

4. A dispute arose between the parties which culminated in the Applicant issuing this proceeding on 22 October 2014. At that stage, the Applicant sought injunctive relief to restrain the Respondent from seizing the Goods. On 29 October 2014, the Tribunal made the following orders:

    1. The Applicant is to remove all his cars and other goods from the premises sequentially and reinstate the premises by 4:00 p.m. on 1 December 2014 between the hours of 8:00 a.m. and 6:00 p.m., Mondays to Fridays.

    2. The Applicant is to comply at his own cost with any remediation order from the Environment Protection Authority or other competent authority caused by the Applicant's use and occupation of the premises.

    3. The Respondent must allow the Applicant access to the premises to comply with orders 1 and 2.

    4. The Applicant must pay all arrears of rental by an instalment of $800 by 4:00 p.m. on 30 October 2014 and the balance by 4:00 p.m. on 1 December 2014. The parties are yet to finalise the amount to be paid.

    5. If the Applicant fails to comply with Order 1 the Respondent may remove and dispose of any cars or other goods left on the premises and make good the premises at the cost of the Applicant.

    6. Liberty to apply.

5. It is common ground that not all of the Goods were removed prior to 1 December 2014, or that the arrears of rent were paid. Consequently, the

matter was returned to the Tribunal and further orders were made, which provided for the filing of *Points of Claim*, *Points of Counterclaim* and defences.

THE PARTIES' CLAIMS

6. The Applicant claims that he was denied or restricted access during the period October to December 2014, which prohibited him from removing all of the Goods. He contends that he suffered damage as a result of being denied access as this adversely affected the 'smooth running' of his business. Although no particulars of quantum are specified (or claimed), this issue is, nevertheless, appropriate to consider because it is also raised by the Applicant as his defence to a significant part of the Respondent's counterclaim.

7. The Applicant further claims that some of the Goods were taken by the Respondent or damaged as a consequence of actions on the part of the Respondent. In his *Points of Claim*, he claims $28,455, which is particularised as follows:

   (a) damage to motor vehicle tyres: $3,655;

   (b) damage to motor vehicles: $20,550; and

   (c) stolen Goods: $4,250.

8. The Respondent denies having restricted access to the Premises or stolen or damaged any of the Goods. He counterclaims against the Applicant in the amount of $31,136.72, made up as follows:

   (a) arrears of rent: $6,058;

   (b) cost of removal of Goods: $5,650;

   (c) cost of repairs to the Premises: $18,903.12;

   (d) reimbursement of the application filing fee: $525.60; and

   (e) costs of this proceeding.

THE APPLICANT'S CLAIM

9. As indicated above, the Applicant's claim largely comprises loss suffered as a result of damage caused to his Goods. The Respondent denies liability, primarily on the ground that he did not cause the damage, as opposed to the damage not having occurred.

10. The onus of proving that the Respondent was responsible for the damage caused to the Applicant's goods rests with the Applicant. Direct evidence is not always necessary to establish that a party is responsible for the loss or damage suffered by another party. Such proof may also be established where it is reasonable to draw an inference to that effect. In *Schellenberg*

v Tunnel Holdings Pty Ltd,[1] Kirby J outlined this principle, in the context of a negligence claim, as follows:

> Fourthly, the burden of establishing a claim in negligence rests on the plaintiff throughout the proceedings. That burden requires proof of a preponderance of evidence in favour of the plaintiff's case. This does not necessarily mean proof by direct evidence. The facts necessary to establish liability may be inferred from the proof of other facts. A plaintiff is not obliged to exclude all possibilities inconsistent with the defendant's liability. However, if at the end of the evidence the plaintiff has proved the negligence of someone but not identified the defendant as the person responsible (or has left it equally possible that some person other than the defendant was negligent or that some cause consistent with reasonable care brought about by the plaintiff's damage) the claim must be dismissed.[2]

11. As I understand the case advanced by the Applicant, he contends that the Respondent breached the terms of the lease by causing or allowing to be caused, damage to the Goods located on the Premises. In prosecuting that claim, the Applicant must first prove, on the balance of probabilities, that the damage was caused by some act or omission on the part of the Respondent or those persons working for or authorised by the Respondent. It is not sufficient for the Applicant to merely prove that the damage occurred. He must also establish that the Respondent was, in some way, responsible for that damage. With this in mind, I now turn to consider each of the elements of the Applicant's claim.

Claim for tyres

12. The Applicant claims $3,655 in respect of tyres which he contends were deliberately slashed or vandalised by persons working for or with the Respondent.

13. Although the Applicant was unable to identify any particular person who committed that act, he contended that it was reasonable to infer that the Respondent was responsible for that damage. A number of witnesses were called on behalf of the Applicant, who all corroborated that a considerable number of vehicles stored within the Premises had their tyres slashed.

14. In particular, Mr Hiromatsu Sakai-Chen, a former employee of the Applicant, said that he had been engaged to assist in the removal of the Goods. He recounted that on one occasion he had attended the Premises and found that almost every vehicle had holes in the side walls of their tyres. This included trailers. He recounted that this then required the Applicant to arrange for a tow truck to move the vehicles out of the

[1] [2000] HCA 18.
[2] Ibid at [42] (footnotes omitted).

glasshouses, which delayed the process of removing the Goods from the Premises.

15. Mr Andrew Griffith, a friend and former customer of the Applicant, said that the Applicant had allowed him to store electronic equipment in the Premises and that he had been given unrestricted access in order to collect that electronic equipment as and when required. He said that after he was advised that the Applicant was required to vacate the Premises, he arranged for his electronic equipment to be collected. He recounted that he also had his own vehicle stored at the Premises. He said that when he returned to retrieve his vehicle, all of the tyres had been slashed, as well as many other vehicles which were parked in front of his.

16. Mr John Strozycki, another friend of the Applicant, recounted that there were a number of cars parked in the paddock outside the glasshouses, in readiness for loading onto a truck. He said that when he first saw those vehicles, their tyres were undamaged but when he returned on another occasion, the tyres had been slashed.

17. Leslie Baguley, the Respondent's son, and who had ostensible control over the Respondent's affairs at the relevant time, strenuously denied any responsibility or involvement in the slashing of the tyres.

18. Regrettably, there is no direct evidence which establishes that the Respondent or any person authorised by the Respondent, slashed the tyres of vehicles stored on the Premises. Moreover, the evidence given by the Applicant's witnesses indicates that the Premises were not totally secure, with the glasshouses being easily accessible once a person had climbed the perimeter wire mesh fence surrounding those glasshouses. In those circumstances, it is possible that the tyres were slashed by some person totally unconnected with the Respondent and who gained entry through unlawful means.

19. As it presently stands, the Applicant's contention is based on conjecture only. As the High Court of Australia explained in *Bradshaw v McEwans Pty Ltd*,[3] the assessment of circumstantial evidence in civil proceedings requires more than merely conjecture and surmise:

> The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence while the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the

[3] (1951) 217 ALR 1.

> choice between them is a mere matter of conjecture… But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusions sought then though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise.[4]

20. Although I accept that the tyres on a large number of vehicles had been slashed, I am not persuaded, on the balance of probabilities, that the Respondent or any person connected with the Respondent, slashed or caused to be slashed, those tyres. Consequently, I do not accept that the Respondent is liable for that damage, either under the terms of the lease or by some other cause of action. Therefore, I find this aspect of the Applicant's case unproven.

Damage to vehicles

21. The Applicant claims that a considerable number of vehicles stored within the Premises were significantly damaged by persons authorised by the Respondent to enter the Premises during the currency of the Applicant's tenancy. In particular, the Applicant contends that Leslie Baguley, on behalf of the Respondent, permitted the film crew to enter the Premises for the purpose of making a martial arts film. The Applicant said that he spoke with a member of the film crew (who he was unable to name) who had told him that Leslie Baguley had given them permission to enter the Premises, with total freedom to use the stored vehicles as backdrops or props.

22. It is not disputed that the film crew gained access to the Premises, nor is it disputed that some of the vehicles stored on the Premises were damaged, presumably by members of that film crew. However, what is in dispute is whether the Respondent, or persons acting on behalf of the Respondent, allowed that film crew to enter the Premises.

23. Leslie Baguley disputes the Applicant's account of what transpired. He said that one of his friend's son had contacted him and asked whether he could use a part of the farming property, in which the Premises were located, to do a film. He said that the film crew arrived at the property and he told them that they could use any of the glasshouses, except for those glasshouses where the cars were stored because they were leased to another person (the Applicant). He said that he told them that they were not permitted to enter those occupied glasshouses.

24. Leslie Baguley recounted that he was contacted by the Applicant the following day and told that a number of vehicles had been damaged. He said he attended the Premises but was unable to discern whether any damage had occurred. He recounted that he then rang the film-maker and told that person that the Applicant had complained that the film crew had

[4] Ibid at 5.

damaged a number of vehicles. Leslie Baguley said that the film-maker did not admit any damage but, nevertheless, agreed to attend the Premises and meet with the Applicant to discuss the accusation. He recalled witnessing a meeting between the film-maker and the Applicant, although he was not part of that meeting and did not know what they discussed. He said he heard nothing further in relation to that incident until the damages claim was made against the Respondent, almost two years later.

25. Regrettably, neither the film-maker, nor any other person engaged in the making of that film were called to give evidence in the proceeding. Therefore, I am left with what is essentially hearsay evidence from the Applicant against the direct evidence of Leslie Baguley. As I have already indicated, the onus of proving that the Respondent is liable for the damage caused to the vehicles rests with the Applicant. In my view, there is insufficient evidence for me to be satisfied, on the balance of probabilities, that the Respondent or any person acting under his authority, authorised or permitted the film crew to enter the Premises. Therefore, even if I accept that the film crew damaged the vehicles and that the Applicant has suffered loss as a result, there is insufficient evidence for me to find any direct connection between that damage and any act or omission on the part of the Respondent. That being the case, I find this aspect of the Applicant's claim unproven, as against the Respondent.

Items stolen from Premises

26. The Applicant claims that a number of items were stolen or unlawfully disposed of by the Respondent or persons working under his authority. Those items are listed as:

    (a) Batteries, radiators and metal items: $1,000.

    (b) Mitsubishi Pajero accessories: $1,000.

    (c) Trolley jack: $250.[5]

    (d) Box trailer: $800.

    (e) Two wheel car trailer: $300.

    (f) Three vintage refrigerators: $900.

Batteries, radiators and metal items

27. The Applicant gave evidence that he witnessed Leslie Baguley and his son, Shane Baguley taking batteries, radiators and other metal items from the Premises. He said that on one occasion, he hid in the boot of a

[5] The trolley jack has since been recovered. Consequently, the Applicant has withdrawn this part of his claim.

vehicle parked within the Premises and witnessed Leslie and Shane Baguley taking a number of batteries, radiators and other parts.

28. Leslie Baguley disputed this allegation, although he conceded that he had, at one time, removed a number of batteries and radiators from inside the glasshouses to another location. He said he did this in order to exert pressure on the Applicant to pay outstanding rent. He said those items were eventually returned to the Premises and loaded onto pallets and onto the tray of the Applicant's trailer, which were located outside the glasshouses but within the Premises. He said those batteries and other parts were then left behind by the Applicant after he had substantially emptied out the Premises.

29. In support of his evidence, he produced a number of photographs which showed a number of used batteries and radiators located outside the glasshouses, some of which were loaded onto pallets and some onto the tray of a two-wheel car trailer.

30. The Applicant contended that the batteries shown in the photographs were unlikely to be taken from any of the cars stored in the Premises because they appeared not to be the type of battery that would typically be used in a Toyota Corolla, which he said was the predominant make of vehicle stored at the Premises.

31. I do not accept that contention. It requires me to conclude that those batteries were brought onto the Premises by persons other than those connected with the Applicant. This is unlikely. Further, I do not accept that the vehicles stored at the Premises were predominantly Toyota Corollas. Indeed, of the 12 vehicles alleged to have been damaged by the film crew, only three were listed as Toyota Corollas. The remaining vehicles included a Mitsubishi Magna, Alfa, Mercedes Benz and a Holden, in addition to various other Toyota models.

32. Consequently, I cannot find on the evidence before me that the Respondent or persons authorised by the Respondent, appropriated the batteries, radiators or metal items from the Premises during the currency of the lease or the moratorium period for collection of the Goods which followed. My finding is reinforced by the fact that further correspondence was forwarded to the Applicant after the moratorium period had expired, which demanded that the Applicant either collect the residual Goods or instruct where they were to be delivered. According to Leslie Baguley, this correspondence was unanswered. In my view, the batteries, radiators or metal items claimed under this head of damage form part of the residual Goods which the Applicant failed to retrieve. Accordingly, and pursuant to the orders made by the Tribunal on 29 October 2014, the Respondent was permitted to dispose of those residual Goods. Therefore, this aspect of the Applicant's claim is dismissed.

Box trailer and car trailer

33. Apart from the batteries, radiators and metal items that the Applicant said he saw Leslie and Shane Baguley take from the Premises, there is no evidence that the remaining items were taken by the Respondent or persons authorised by him. The evidence is circumstantial, in the sense that the Applicant contends that the Tribunal ought to infer that persons connected with the Respondent took those items.

34. In relation to the box trailer and two wheel trailer, the Applicant said that those two items just disappeared.

35. However, photographs produced by the Respondent are inconsistent with that evidence. In particular, those photographs, which are said to have been taken after the Applicant vacated the Premises, reveal that the two-wheel car trailer and the box trailer were both left at the Premises. The photograph showing the box trailer has a number of drums containing some unspecified material loaded on it.

36. It is unclear to me why those two items were left on the Premises, or why no application was ever made for the return of those items. Moreover, there is no evidence of any demand ever being made for the return of those goods, either in writing or orally. Indeed, it would appear that the first time that the "disappearance" of those goods became an issue was when the Applicant filed and served his *Points of Claim* in mid-November 2016, almost two years after the cut-off date for retrieving all Goods from the Premises had expired.

37. By reason of those two items being left on the Premises, coupled with no demand or application ever being made for those Goods to be returned, I find, on the balance of probabilities, that those Goods formed part of the residual Goods that the Applicant failed to retrieve. Consequently, I find this aspect of the Applicant's claim also unproven.

Mitsubishi Pajero parts

38. The Applicant gave evidence that Leslie and Shane Baguley permitted other persons to take various Mitsubishi Pajero parts, which included four left-hand guards, three left-hand doors, two radiators, three back doors, one driver-side guard, two driver-side doors and one pair of front seats. The Applicant estimated the value of these parts to be $1,000.

39. Leslie Baguley denied ever taking any of the Mitsubishi Pajero parts or authorising anyone else to take those parts. He said that the Premises were not secure and it was possible that those parts may have been taken by other tenants or employees of other tenants who were leasing other glasshouses situated outside the area which delineated the Premises.

40. As I have already indicated, the onus rests on the Applicant to prove, on the balance of probabilities, that the Respondent or persons authorised by the Respondent took those car parts. Where there is a conflict in the oral

evidence, that task becomes more difficult. In the present case, there is no corroborating evidence, such as a police report or other witnesses who can attest to what occurred. It is simply a case where one person says one thing and the other something else.

41. Ultimately, I am unable to determine one way or the other whether those parts were taken or not and even if they were taken, by whom and on whose authority. In those circumstances, I find the allegation unproven.

Three vintage refrigerators

42. The Applicant says that there were three 1950's refrigerators left at the Premises when he vacated, one of which belonged to his parents and had sentimental value. He said that the value of those vintage refrigerators is somewhere between $300 and $350, based on eBay sales.

43. Leslie Baguley conceded that there were a number of metal objects left on the Premises after 1 December 2014, which had not been removed by the Applicant. He conceded that he gave his son, Shane Baguley, permission to take those metal objects and sell them for scrap metal. Although no specific mention was made of the three refrigerators, it was not disputed by Leslie Baguley that they were taken. Moreover, it was not disputed that the value of those refrigerators was $300, as alleged by the Applicant.

44. In those circumstances, I consider it likely that the three refrigerators were taken by Shane Baguley and sold for scrap metal. However, the question remains whether the Respondent is liable to compensate the Applicant for the value of those refrigerators.

45. In that regard, I note that the orders made by the Tribunal on 29 October 2014 stated that the Respondent may remove and dispose of any cars or other goods left on the Premises if those Goods were not removed by 1 December 2014.

46. The Applicant says that he was not aware of his rights to seek further assistance from the Tribunal to retrieve those residual Goods. I find this difficult to accept, even taking into consideration that he is a self-represented litigant. In particular, the originating application filed by the Applicant sought an order in the form of an injunction to restrain the Respondent from seizing the Goods. At the hearing of that application, the Applicant appeared without legal representation and was ultimately successful in obtaining injunctive relief. Further appearances before the Tribunal, dealing with procedural orders, including an order that the Applicant be given access to the Premises, were also conducted by the Applicant without legal representation. That being the case, I do not accept that the Applicant was ignorant of his rights to seek further assistance from the Tribunal, especially in circumstances where he said that one of the vintage refrigerators had sentimental value. Again, the

first occasion where any claim was made in respect of the vintage refrigerators is with the filing of the Applicant's *Points of Claim*, almost two years after the moratorium for collection of goods had expired.

47. In my view, the more likely scenario is that the Applicant left those Goods behind. Consequently, this aspect of the Applicant's claim is dismissed.

Conclusion of Applicant's claim

48. Having regard to my findings above, I find that the Applicant's claim in the amount of $28,455 is unproven as against the Respondent. In making that finding, I accept that there were a number of Goods belonging to the Applicant which were damaged or taken by unlawful means. However, there is insufficient evidence to satisfy me, on the balance of probabilities, that those Goods were damaged or taken by the Respondent or persons authorised by the Respondent. Consequently, the Applicant's claim for damages is wholly dismissed.

RESPONDENT'S COUNTERCLAIM

49. As indicated above, the Respondent counterclaims $31,136.72 in respect of arrears of rent, cost of removal of goods, cost of repairs and reimbursement of the application filing fee.

Arrears of rent

50. In support of the Respondent's claim for arrears of rent, the Respondent called Martin Edwards, an employee of the Respondent and responsible for various administrative tasks associated with the Respondent's business. Mr Edwards said that, during the relevant period, he was responsible for generating rent invoices and accounts, as well as banking and associated matters.

51. Mr Edwards prepared a *Customer Ledger*, which showed all invoices and receipts in respect of the rent paid for the Premises during the period 13 May 2013 until 1 February 2015. According to that ledger, $6,058 remains in arrears in respect of rent.

52. The Applicant conceded that there were arrears in rent, although he believed that those arrears related predominantly to the last few months of his tenancy. The Applicant said that he could not dispute the figures produced by Mr Edwards because he was not proficient in accounting and regrettably, failed to keep accurate records of what was invoiced and what was paid.

53. According to the ledger, the last payment of $800 was made on 3 November 2014. A further invoice was created on 11 November 2014 in the amount of $473. It appears that this amount represents the pro rata amount of rent payable up to 1 December 2014, being the last date that the Applicant was permitted to occupy the Premises.

54. The ledger also shows that further invoices were raised after 1 December 2014. In particular, invoices dated 1 January, 3 January, and 1 February 2015, each in the amount of $715 were issued by the Respondent. However, there is no evidence before me that the Applicant remained in possession after 1 December 2014. Consequently, it is unclear why the Respondent continued to charge rent after the moratorium for collecting the Goods had expired.

55. In my view, there was no entitlement to charge rent for any period after 1 December 2014. In forming that view, I am mindful that the Respondent spent some time cleaning and repairing the Premises after the Applicant had vacated. However, the claim made against the Applicant is not couched in terms of rent foregone but rather, arrears of rent. The claim made is based on an obligation to pay rent during occupation and not one where the Respondent contends that it has been deprived of rent.

56. In those circumstances, I do not accept that rent charged on 1 January, 3 January and 1 February 2015, which add up to $2,145, is payable under this head of damage. Other than those three entries, I accept the evidence of Mr Edwards, as recorded in the *Customer Ledger* and find that the amount of rent in arrears up to 1 December 2014 is $3,913. This amount is due and payable by the Applicant to the Respondent.

Cost of removing goods

57. Leslie Baguley gave evidence that the Respondent expended $5,650 in removing the residual Goods left on the Premises after 1 December 2014. A number of photographs were produced to illustrate the condition of the Premises and to prove that some of the Goods were left behind after 1 December 2014. Those photographs show a number of rusty motor vehicle spare parts, some dismantled furniture, two rusty trailers, and the remains of disused carpet all of which are said to be located on the Premises.

58. The Applicant contends that access to the Premises was denied or restricted over the period prescribed by the Tribunal's orders dated 29 October 2014. Consequently, he argued that he should not be held to account in respect of any claim for removing residual Goods from the Premises.

59. The Applicant said that it was a *big job* to remove the Goods, which was made impossible as a result of actions on the part of Leslie Baguley and Shane Baguley. In particular, he said that the slashing of vehicle tyres made it difficult to move those vehicles as they could no longer be driven or towed. In addition, he said that access had been restricted following the orders made by the Tribunal on 29 October 2014. In particular, he recounted that the security fencing surrounding the Premises, being a six-foot wire mesh fence with one access gate, had been locked with a padlock and he had not been provided with the key. Consequently, he

was dependent upon the Respondent opening the Premises to allow entry during the access period ordered by the Tribunal.

60. The Applicant also said that he had been verbally abused by Leslie Baguley, which further exacerbated the situation because it made him apprehensive in confronting Leslie Baguley over access problems.

61. Mr Sakai-Chen also gave evidence relating to this issue. He said that on numerous occasions he arrived at the Premises at 8 AM only to find the gate locked. On those occasions, he would ring the Applicant and be told to wait or to leave and return at midday, at which time the gate would then be unlocked. He recounted that he was engaged over a period of 3 to 4 weeks to remove the Goods and on at least three days of each week access was denied or restricted.

62. Mr Sakai-Chen also recounted that he had been verbally threatened or confronted by Leslie Baguley and his son, Shane Baguley, which he said also made his task more difficult. However, he could not recall the detail of any such verbal threats or confrontation.

63. Mr Griffith also recounted that access was, at times, difficult. He said that he attended the Premises over a period of two days in order to retrieve his electronic equipment. He said that after those two days, the Premises were always locked, although he could not recall whether the date after which the Premises were locked was before or after 1 December 2014.

64. Mr Griffith recalled that on one day he passed the Premises and noticed that the gate was open. He said he took the opportunity to load his boot with the residual electronic equipment stored at the Premises. He recounted that he was loading his boot and then saw a dump truck reversing towards him. He said he got back into his vehicle and started to reverse in order to clear a path for the dump truck but then realised that the dump truck was accelerating at speed towards him. He said that he apprehended this conduct as a deliberate and threatening act. After that time, he said that he was not comfortable attending the Premises alone and left whatever electronic equipment remaining in the Premises there.

65. Mr Strozycki also recounted that he attended the Premises approximately 11 times but on three occasions, found the gate locked, so he went home.

66. By contrast, Leslie Baguley strenuously denied the allegation that access had been denied or restricted during the period leading up to 1 December 2014. He said that the Applicant had taken everything of value prior to that date and what was left was “rubbish”. He also said that the Applicant always had a key to the gate for the period leading up to 1 December 2014.

67. It is curious that no application was made by the Applicant to the Tribunal during the period 29 October 2014 to 1 December 2014 seeking

assistance to gain access, having regard to matters raised by the Applicant in this proceeding. Further, it is not clear from the evidence given by the Applicant's witnesses, whether the problems associated with access occurred during the period 29 October to 1 December 2014 or after that period.

68. There are no documents or correspondence which corroborate the Applicant's contention that access was restricted during the period 29 October to 1 December 2014. Although that is not a determinative factor, it is odd, given that the failure to remove the Goods during that period exposed the Applicant to the possibility of having to pay for the costs associated with removing residual Goods left behind.

69. Moreover, I do not consider that the evidence of the Applicant's witnesses greatly assist in determining this issue. In particular, Mr Sakai-Chen's evidence was lacking in detail. For example, no details were given of the alleged threatening behaviour directed towards him. Similarly, he was unable to definitively state whether the denial or restriction to access occurred before or after 1 December 2014.

70. Mr Griffiths' evidence regarding access was also limited. His role in removing the Goods was primarily restricted to removing his own electronic equipment. He did not say that he was involved in moving any of the motor vehicles or associated parts, plant or equipment. Further, he only attended the Premises on a limited number of occasions. Consequently, he was unable to say whether access had been restricted in the way contended by the Applicant.

71. Mr Strozycki's evidence was confined primarily to his account of seeing damaged vehicles and vehicle tyres. In relation to access, he said that the front gate had been locked on three of the 11 occasions that he had visited the Premises. However no details were given as to when he attended the Premises and whether his attendance was within the permissible period set out in the Tribunal's orders dated 29 October 2014. In particular, there is no evidence that he attended during the hours of 8 AM to 6 PM, Monday to Friday or between the dates of 29 October and 1 December 2014.

72. That then leaves the evidence of the Applicant, which is at odds with the evidence of Leslie Baguley. In particular, Leslie Baguley said that the Applicant had his own key to the front gate. On the other hand, the Applicant said that the lock to the front gate had been changed and he did not have a key to the new lock.

73. Ultimately, I am unable to determine whether access had been denied or not and even if it was, to what extent. Similarly, I am unable to determine whether the Applicant had his own key to the front gate or whether the only key to the front gate was held by the Respondent. There

simply is insufficient evidence to persuade me, on the balance of probabilities, one way or the other.

74. Ultimately, it is the Applicant that bears the evidentiary burden of proving that the Respondent denied him access in order for him to fully comply with the orders made by the Tribunal. I am not persuaded that he has discharged that evidentiary burden. Accordingly, I am unable to make a finding that the acts on the part of the Respondent so hindered the Applicant in complying with the Tribunal's orders dated 29 October 2014, such as to provide a complete defence to the Respondent's claim for the cost of removing residual Goods after 1 December 2014.

What is the cost of removing the Goods?

75. Leslie Baguley gave evidence of the cost to remove residual Goods. The first expense is recorded in a quotation from *Inside Outside Rubbish Removals* dated 26 February 2015 in the amount of $4,400. The second expense relates to the hire of a 20 m³ waste bin in the amount of $1,250. A copy of a cheque butt for $1,250 was also produced to verify payment of the waste bin hire.

76. However, Leslie Baguley conceded that *Inside Outside Rubbish Removal* were not ultimately engaged to undertake the clean-up. He said that that work was done by himself and that his father paid him to do it. When asked what he was paid, he replied that he was paid a weekly wage. In other words, there was no specific or additional amount paid to Leslie Baguley for the clean-up work as he was on a weekly wage at the relevant time. No evidence was given as to what that weekly wage was or over what period of time he worked on the clean-up. Moreover, no invoices were produced as to tip fees or the like.

77. In those circumstances, I am unable to determine what amount was paid for the clean-up of the Premises, other than the amount spent on hiring a 20 m³ waste bin. Therefore, I will allow $1,250 in respect of this head of damage.

Cost of repairing Premises

78. The Respondent claims $18,903.12 for the cost of repairs to the glasshouses on the Premises. A number of invoices were produced to evidence that expenditure. There are three categories of repair work claimed:

    (a) repair of the cement sheet cladding at the base of the glasshouses in the amount of $10,043.12;

    (b) repair of the glazing, in the amount of $6,270; and

    (c) repair of the roller door in the amount of $2,590.

79. It is common ground that some of the cement sheet cladding at the base of the glasshouses was broken and in disrepair. The repair work

undertaken by the Respondent was not limited to simply replacing the broken cement sheet cladding but rather, installing corrugated iron around the whole or a substantial part of the base perimeter of the glasshouses.

80. Similarly, it is common ground that some of the glazing of the glass houses was broken, as was the condition of the roller door. However, the Applicant contends that the condition of the Premises at the conclusion of the leasehold was commensurate with its condition at the commencement of the leasehold, save for fair wear and tear.

81. Mr Sakai-Chen said that the condition of the glasshouses at the commencement of the leasehold were not good. He recalled there being holes in the cement sheet cladding with grass growing through those openings. He said that the roller door was also in bad condition and would not close all the way. He recalled that it would go up but only three quarters of the way down.

82. Mr Griffith also commented on the condition of the Premises at the commencement of the leasehold. He said at first he thought the condition was good but when he looked more closely, he noticed that many of the windowpanes were smashed.

83. Mr Strozycki also recalled the state of the building at the time of the commencement of lease. He said that Premises were not "hot-houses' but more accurately to be described as a "dog house", which was only fit for storing cars and not its intended use.

84. The Applicant also gave evidence in relation to the condition of the Premises. He conceded that minor damage was done to the roller door when his staff bumped the roller door frame. However, he said that it was in *horrible condition* prior to that damage occurring. The Applicant said that the Premises themselves were not in good condition and that the repair work undertaken by the Respondent related to pre-existing damage.

85. Leslie Baguley confirmed that prior to the Premises being leased to the Applicant, much of the plant and equipment used for the growing of flowers had been removed, such as the fans and other equipment. It would appear that the Premises lay dormant for a period of time before being leased to the Applicant.

86. In my view, the predominance of evidence supports the Applicant's contention; namely, that the Premises were not in pristine condition at the time the lease commenced. In that regard, I accept the evidence given by the witnesses called on behalf of the Applicant that, at the time that the lease commenced, some of the cement sheet cladding had been broken, some of the glazing had been smashed and that the Premises, or at least the glasshouses, were in no condition to be let for that purpose.

Indeed, that scenario fits with the fact that the Premises were not let as glasshouses but rather as a storage or motor vehicle repair or restoration type facility.

87. In my view, the remedial work undertaken by the Respondent largely represents a refurbishment of the Premises, to enable those glasshouses to be once again used for that purpose. I do not accept the evidence of Leslie Baguley that what was expended related to repairs undertaken as a consequence of damage caused by the Applicant, although it may be that the Applicant's reasonable use of the Premises exacerbated the pre-existing poor condition of the Premises. However, that is a long way short of finding that the remedial work undertaken by the Respondent was in response to damage caused to the Premises by the Applicant.

88. In forming that view, I note that the Applicant conceded that some damage was caused to the roller door track. According to Leslie Baguley, the damage was more extensive than simply the track but also included a dent in the door itself. Doing the best I can with the evidence before me, I find that the Applicant contributed to the already poor condition of the roller door and on that basis is liable to pay a percentage of the replacement cost, taking into consideration any betterment. Accordingly, I will order that the Applicant pay half the cost of replacing the roller door, in the amount of $1,295.

89. As for the remaining work done, I am not satisfied that the remedial work results from any damage caused to the Premises by the Applicant, save for fair wear and tear. Moreover, there is no term in the leasehold agreement which requires the Applicant to reinstate the Premises to a condition any different to what they were when he first commenced occupation. Consequently, I find that the damage was predominantly pre-existing and on that basis, this aspect of the Respondent's counterclaim is dismissed, save and except for the Applicant being liable to contribute to the cost of replacing the roller door.

Reimbursement of VCAT application fee

90. Section 115B of the *Victorian Civil and Administrative Tribunal Act 1998* states that at any time, the Tribunal may make an order that a party to a proceeding reimburse another party for the whole or any part of any fee paid by that other party in the proceeding. The Respondent claims $525.60, being the application fee payable on the filing of his counterclaim.

91. In making an order under that section, the Tribunal must have regard to:

    (a) the nature of, and the issues involved in the proceeding; and

    (b) the conduct of the parties (whether occurring before or during the proceeding); and

    (c) the result of the proceeding.

92. In my view, no order should be made for reimbursement of the application filing fee. I have formed this view based on several factors.

93. First, I consider that the conduct of the Respondent is a factor to be taken into account in this case. In particular, it is common ground that in early 2015, the Respondent deposited a large quantity of residual material on the front lawn of the Applicant's mother's residential home in Glen Waverley. According to the Applicant, this conduct was totally uncalled for, especially in circumstances where the Respondent had access to a tip adjacent to the Premises. Photographs of the material deposited on the front lawn depict old tyres and wheels, disused carpet, pieces of timber, pieces of metal, some vegetation, and drums filled with used oil, which appears to have then leaked onto the lawn. According to the Applicant, some of that material did not belong to him. In particular, he said that a mattress and some concrete blocks, which could also be seen within the rubble of deposited material, were not part of any of the residual Goods left on the Premises.

94. The Respondent contends that the items deposited on the front lawn of the Respondent's mother's residence were part of the Goods which should have been collected by the Applicant. He said that a letter was sent to the Respondent asking him to direct where to deposit those Goods. He said that as no response was received to that letter, he felt it was appropriate to deposit those Goods at the Applicant's then place of residence.

95. In my view, and having regard to the nature of the materials deposited on the front lawn and the orders made by the Tribunal on 29 October 2014, that conduct was inappropriate. Indeed, it beggars belief why some of the Goods were thrown into a 20 m^3 bin for disposal at a tip, while other items were seen fit to be deposited on the front lawn of the Respondent's mother's residence. In my view, that conduct is at odds with the spirit of the Orders made on 29 October 2014, which permitted the Respondent to remove the Goods and dispose of them at the Applicant's cost.

96. Second, it is not clear whether the Premises constitute *retail premises* under s 4 of the *Retail Leases Act 2003*. The evidence given during the course of the proceeding indicates that the Premises were used for more than simply storage and that mechanical repair work was undertaken by the Applicant. If that is the case, then s 92 of the *Retail Leases Act 2003* may prohibit an award for the reimbursement of the application filing fee. It states:

> (1) Despite anything to the contrary in Division 8 of Part 4 of the *Victorian Civil and Administrative Tribunal Act 1998*, each party to a proceeding before the Tribunal under this Part is to bear its own costs in the proceeding.

(2) However, at any time the Tribunal may make an order for a party to pay all or a specified part of the costs of another party in the proceeding but only if the Tribunal is satisfied that it is fair to do so because –

(a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or …

(3) In this section, **"costs"** includes fees, charges and disbursements.

97. Accordingly, I find that in, the circumstances of this case, it is not appropriate to order that the Applicant reimburse the Respondent in respect of the application filing fee.

Conclusion on counterclaim

98. Having regard to my findings set out above, I conclude that the Respondent has succeeded in respect of his counterclaim in the amount of $6,458, calculated as follows:

(a) arrears of rent: $3,913;

(b) disposal of residual Goods: $1,250; and

(c) repair of the Premises: $1,295

99. Accordingly, I will order that the Applicant pay the Respondent $6,458.

100. The costs of the proceeding will be reserved, with liberty to apply. In that regard, I refer the parties to my comments and observations regarding s 92 of the *Retail Leases Act 2003* referred to above.

SENIOR MEMBER E. RIEGLER