VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1046/2017

CATCHWORDS

RETAIL LEASE: hearing concerning issues joined in pleadings; concession made early in hearing that notice of default relied on by the respondent/landlord is invalid; applicant/tenant's claims for damages determined; applicant's claims for certain declarations refused on basis that there would be no purpose in making those declarations; claim for declaration regarding an estoppel refused; claim for a new injunction refused; claim for interest reserved; claims for costs and reimbursement of fees reserved.

APPLICANT	Homeh Lazarous
FIRST RESPONDENT	John Kypri
SECOND RESPONDENT	Panayotis Kypri
WHERE HELD	Melbourne
BEFORE	C Edquist, Member
HEARING TYPE	Hearing
DATE OF HEARING	24 November 2017
DATE OF ORDER	20 December 2017
CITATION	Lazarous v Kypri (Building and Property) [2017] VCAT 2148

ORDERS

1 I declare that the parties to the lease ("**the lease**") over the premises at Shop 1, 5 Winifred Street, Essendon ("**the premises**") made on or about 6 April 2016 are the applicant as tenant and the first respondent as landlord.

2 I declare that the second respondent is not a party to the lease.

3 I declare that in re-entering the premises on or about 29 July 2017 the second respondent acted as the agent of the first respondent.

4 I declare that in entering the premises on or about 29 July 2017 through an agent, Mr J. Kypri acted in contravention of the lease.

5 I declare that the notice of breach relied upon by the respondents constituted by:

   a the second respondents' hand written notice dated 6 June 2017;

   b alternatively the second respondents' text dated 16 July 2017;

   is not a valid notice of breach for the purposes of s 146 of the *Property Law Act 1958.*

6 I declare that the lease remains on foot.

7 The first respondent must pay damages to the applicant of $3,325.

8 The issues of whether interest is payable by the first respondent to the applicant, and if so on what basis, at what rate or rates, and between what date or dates, are reserved.

9 Costs, and reimbursement of fees paid by the applicant under s 115B of the *Victorian Civil and Administrative Tribunal Act* 1998, are reserved.

10 The applicant must make any application in respect of interest, costs and reimbursement of fees by 9 February 2018. If no application is made by that date, the proceeding will be struck out without orders being made in respect of any of these matters.

C Edquist
Member

APPEARANCES:

For Applicant	Mr J Silver of Counsel
For Respondents	Mr G J Burns of Counsel

REASONS

1 This proceeding arises out of the breakdown of a relationship between Homeh Lazarous and John Kypri and Panayotis Kypri concerning a shop at 1/5 Winifred Street, Essendon ("**the premises**") which the tenant operates as "Loscar Barbers".

2 A lease ("**the lease**") in respect of the premises was made between Mr Lazarous as tenant and Mr J. Kypri as landlord on or about 6 April 2016.

3 The second respondent, Mr Panayotis Kypri, is Mr J. Kypri's father. It was conceded by Counsel appearing on behalf of both Mr J. Kypri and Mr P. Kypri at the hearing on 24 November 2017 that Mr P. Kypri is not a party to the lease, but acted as Mr J. Kypri's agent. The Tribunal was not asked to remove Mr P. Kypri as a party to the proceeding. Accordingly, as a matter of convenience, notwithstanding that Mr P. Kypri is not a party to the lease, the phrase "the landlords" in these reasons refers to both Mr J. Kypri and Mr P. Kypri.

4 The lease permitted the premises to be used as "Hairdresser and Beauty Salon". The premises required fitting out for this purpose, and the tenant began to fit out and renovate the premises, including installing external signage, and sinks. The fitout included installation of a large mirror.

5 The genesis of the dispute, according to the tenant, is that Mr P. Kypri would come to the premises on an almost daily basis, and disrupt the operation of the business by interrupting staff and clients. The tenant's evidence is that he asked his lawyer to write to the landlords' lawyer on or about 12 May 2017, asking that this behaviour cease or be reduced in frequency.

6 In early June 2017 Mr P. Kypri told the tenant he had obtained a footpath trading permit, and asked for additional rent for it. The tenant refused, and says that at this point Mr P. Kypri became agitated.

7 The landlords agree that the refusal of the tenant to agree to pay increased rental, following discussions between the tenant and Mr P. Kypri that led to the issue of the footpath trading permit, is an issue between them.

8 Correspondence followed in June and July as to whether the tenant had installed a sink, signs and the mirror in a defective manner.

9 On 6 June 2017 a hand written notice was issued to the tenant by the landlords dated 6 June 2017. A copy of this notice on the Tribunal's file is almost illegible. It appears to require the tenant to provide a plumbing certificate for works carried out in fitting out the shop. There was a request that the certificate be provided within 14 days of the letter.

10 On 16 July 2017, the tenant received a text from Mr P. Kypri. That text noted that the tenant had been given the opportunity to provide a plumbing certificate, and offered a last chance to provide that certificate. Mr P. Kypri

also demanded the removal of a sign of the facade, the removal of a mirror on a fire-rated wall, and a current insurance policy with a limit of liability $20 million. The text said that the tenant had 14 days to fix the problems, and the tenant was advised that if he did not wish to comply he was to take all his belongings out by the "due date 30/07/2007".

11 On 24 July 2017 the tenant received a letter from lawyers acting on behalf of the landlords asserting that the lease had been terminated because breaches had not been remedied. There was a further exchange of correspondence.

12 On 29 July 2017 the landlords, through Mr P. Kypri, re-entered the premises and changed the locks.

THE PROCEEDING

13 The tenant began this proceeding or about 2 August 2017. An urgent application for an injunction was made, and on 3 August 2017, upon the tenant giving the usual undertakings to damages, the Tribunal ordered the landlords to give the tenant access to, and occupation of, the premises. The landlords were restrained from re-entering the premises until 10.00 on 24 November 2017, or until further order of the Tribunal.

14 The injunction was granted on the express basis that the landlords were prohibited from acting in reliance on the alleged notice of default of 24 July 2017, and did not extend to prevent the landlords from exercising rights of re-entry in respect of matters which were not the subject of that notice of default.

15 Orders were also made on 3 August 2017 directing an exchange of pleadings and the filing of witness statements. The tenant was ordered to provide an opportunity for the landlords, together with their technical experts, to inspect the premises for the purpose of determining whether, and if so in what respects, any works allegedly carried out by the tenant had compromised the condition of the premises so as to create a danger to the public.

16 The tenant came back to the Tribunal seeking a further injunction on 19 September 2017 because the landlords had effectively cut off the water. On 19 September 2017 the Tribunal ordered the landlords to supply and reinstate the water check meter servicing to the premises to restore the water supply.

THE PURPOSE OF THE HEARING ON 24 NOVEMBER 2017

17 The proceeding came on for hearing before me on 24 November 2017. Mr J. Silver of Counsel appeared on behalf of the tenant, and Mr G.J. Burns of Counsel appeared on behalf of the landlords.

18 At the outset of the hearing, it became clear that there was a controversy about the purpose of the hearing. Mr Burns said that his instructions were that the hearing was concerned with the question of whether the injunction

should be continued. On the other hand, Mr Silver said that the hearing was a final hearing, and he would be asking the Tribunal to make findings in relation to matters raised in the points of claim filed by the tenant dated 31 August 2017. He said the tenant was also seeking a number of declarations as set out in the prayer for relief, and damages. The claims for damages were initially stated to be for $900 in respect of destruction of a mirror and $1,300 in respect of the repair of a wall. Mr Silver later added a claim for loss of earnings of $225 a day.

19 This controversy assumed great significance when, after taking instructions, Mr Burns informed the Tribunal that the landlords conceded that the notice of 6 June 2017, the text of 16 July 2017 and the letter of 24 July 2017 were in such a form that they did not constitute a proper notice of breach of the lease for the purposes of s 146 of the *Property Law Act 1958* ("**the PLA**").

20 Mr Burns said that in these circumstances, there was no need for the injunction to be continued. It was conceded that the lease was in place, and that it governed the relationship between the parties.

21 At the same time, Mr Burns insisted that no concession was made concerning whether the underlying issues constituted a breach of the lease. He foreshadowed that the landlords would prepare and serve a proper notice under the lease in accordance with the law, specifying the alleged breaches relied on. In this way, the underlying matters would come back to the Tribunal.

22 Mr Burns sought an adjournment of the hearing, noting that his client had not instituted a counterclaim. After hearing submissions from both sides, I declined to grant to an adjournment.

THE ISSUES

The tenant's contentions

23 The tenant's contentions regarding the issues to be determined by the Tribunal can be summarised as follows:

a the proceeding was instituted after the landlords took possession of the premises;

b the tenants obtained an injunction on 3 August 2017 which had the effect of putting the tenant back into possession;

c the landlords for some months have been complaining that the tenant was in contravention of the lease, but had never given particulars;

d the purpose of the hearing was to fulfil two functions, namely to confirm:

i the landlords wrongfully took possession, and accordingly the injunction of 3 August 2017 was vindicated; and also

ii the tenant had not contravened the lease, ruling out an entitlement for the landlords to issue a notice to vacate and re-enter, in general.

e the Tribunal should still decide if there was a "Notice to Vacate", and also if the landlords had proven any of the complaints to be breaches of the lease.

24 The tenant's submissions on this point concluded:

> The suggestion by [the landlords'] Counsel that he should have the opportunity to withdraw "the notices," and reissue a valid notice prefaced on the same complaints, would circumvent the entire purpose of [the tenant] bringing the proceeding, and the Tribunal hearing the matter.

The landlords' submissions

25 The salient points made by the landlords in their submissions about the issue to be determined are:

a Prior to the hearing the Tribunal had made orders including orders for the filing and serving of points of claim and points of counterclaim.

b The tenant filed points of claim.

c At the time of the hearing the landlords had filed points of defence, but no counterclaim.

d An application for an adjournment of the hearing was made, but was refused, and the matter proceeded to evidence.

e At the commencement of the hearing the main issue for determination was the validity of the notice of breach.

f A concession was made by the landlords that the notice was not the proper form so as to comply with s 146 of the PLA; and

> As a consequence of that concession the basis of any rights of the [landlords] to re-enter the premises fell away, no further orders of the tribunal in respect of the primary relief sought were required other than orders in respect to damages (if any) suffered by the [tenant] as a consequence of the re-entry by the landlords, and any orders made by the Tribunal in relation to the cost of the proceeding before it.[1]

g An order in respect of the damage suffered by the tenant as a consequence of the re-entry was not resisted, but the order should be restricted to the loss and damage established;

h As to the declaratory orders sought by the tenant, it was submitted that some of those related to the validity of the notice of breach, and had fallen away.

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[1] Landlords' submissions dated 8 December 2017, paragraph 14.

i In relation to the other declaration sought, the power of the Tribunal under s 124 of the *Victorian Civil and Administrative Tribunal Act 1998* ("**the VCAT Act**") is discretionary and the relevant principles ought to be applied. Under these principles, any declaration that does not need to be made should not be made.

j The issue of costs is governed by s 109 of the VCAT Act, and costs ought not be imposed on the landlords.

THE TASK OF THE TRIBUNAL

26 The task of the Tribunal is to deal with the issues identified in the pleadings. In its points of claim dated 31 August 2017, the tenant claims damages, a number of declarations under s124 of the VCAT Act, an injunction restraining the landlords from entering the premises on the basis of a breach relating to the fit out or decoration of the premises on or before 6 April 2018, interest, and costs.

27 In their points of defence, the landlords joins issue with the tenant in respect of each of its claims.[2] The landlords also seek an order that the tenant vacate the premises.

28 As each of the claims for relief made by the tenant is disputed by the landlords, it is convenient to deal with them in turn.

Damages

29 As noted, the landlords do not contest that damages ought to be awarded to the tenant in respect of the damage suffered by the tenant as a consequence of the landlords re-entry of the premises, but the damages ought to be limited to the loss and damage established by the evidence.

Loss of earnings

30 The contentions of the tenant in relation to loss of earnings can be summarised as follows:

a The tenants evidence was that he lost five trading days, with expected takings of $225 per day.

b $225 is a reasonable estimate, and should be accepted.

c The lock out took place on the evening of Saturday 29 July 2017, and the tenant went back in on the following Saturday.

d Because the shop was normally closed on Sundays, the lost days were Monday 31 July, Tuesday 1 August, Wednesday 2 August, Thursday 3 August and Friday 4 August 2017.

e On Friday, the tenant paid for services of a part time staff member, incurring a cost of $165; and

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[2] In paragraph 35(a) of its points of defence the landlords ask that "The applicant's claim set out in paragraph A, B, C, D, E, F, and G be denied".

f A total loss on trading of $1,125 was claimed.

31 In respect of this particular claim, the landlords conceded that an award of damages should be made for the tenant's loss of ability to operate the business for the days he was locked out. No attempt was made by the landlords to quantify that loss, and no criticism in their submissions was made of the claimed loss of $225 per day.

32 The evidence given by the tenant supports the submission made that the barber's shop was closed for five days. The fact that the tenant had to pay an employee $165 on Friday proved to be something of a red herring because although, if the shop had been open, it would have been appropriate to have set off that expense against the takings for the day in order to achieve a net figure, the shop was not open. Accordingly, it is appropriate to allow damages to the tenant for that day based on the loss of gross takings.

33 In circumstances where a loss of $225 per day was not challenged, I accept that figure, and allow damages for five days at that rate, a total of $1,125.

Damages in respect of the removal of the mirror and consequential damage to the walls

34 The evidence was that when the tenant re-entered the shop, he found a 4 metre mirror, comprising two separate 2 metre mirrors, had been removed. The wall had been damaged. The claim made was for the replacement of the large mirror with 3 smaller mirrors, and for rectification of the wall.

35 The tenant's submissions made reference to the tenant's statement of 20 November 2017 where [at paragraph 3] the cost of the replacement mirrors was put it $300 each, a total of $900 for 3 mirrors. The cost of rectification of the wall was established by an invoice for $1,300 from a contractor called Starbright, which was exhibited to the tenant's witness statement.

36 The respective claims for $900 and $1,300 were not disputed by the landlords, and I accept them.

Summary of awards of damages

37 In summary, I find that $1,125 plus $900 plus $1,300, a total of $3,325, is to be allowed to the tenant.

38 As it has been established that in re-entering the premises Mr P. Kypri acted as an agent for Mr J. Kypri, and that it was only Mr J. Kypri, as landlord, who contravened the lease, it is appropriate that the order for damages is made against Mr J. Kypri alone.

Declarations

39 The tenant seeks a number of declarations under s 124 of the VCAT Act. The first point to be made is that a number of these declarations do not need to be made, as the need for them has fallen away because of concessions

made at the hearing. The declarations which arguably fall into this category are:

a Mr P. Kypri is not the landlord – see prayer for relief, sub-paragraph B(d) ("B(d)");

b the handwritten notice dated 6 June 2017 is not a valid notice of breach within the meaning of the lease – B(e);

c the text message of 16 July 2017 is not a valid notice of breach within the meaning of the lease – B(f);

d in entering the premises on 29 July 2017, Mr P. Kypri acted in contravention of the lease – B(g);

e the lease remains on foot – C(a).

40 On this basis, the declarations which I must consider accordingly are limited to the following:

a Loscar Barbers undertook the fit out of the premises with the full knowledge and consent of Mr J. Kypri – B(a);

b Mr J. Kypri has waived compliance with the requirement in the lease for Losbar Barbers to obtain "written consent" – B(b);

c Mr J. Kypri is estopped from terminating the lease for breach of the "written consent" provisions of the lease – B(c);

d Mr J. Kypri must not decline to renew the lease for any further term on the basis of any conduct that [is the] subject of this proceeding – C(b);

e that in performing any market review of rent payable under the lease, Mr J. Kypri is not entitled to attribute value based on the footpath trading permit – C(c);

f that in accordance with sub-clause 12.1.3 of the lease, Loscar Barbers has given Mr J. Kypri written notice as at 6 November 2017 of his intention to renew the lease for a further term commencing 6 April 2018 – D.

Tenant's general contentions regarding declarations

41 The tenant's central contention is that even though the landlords have conceded that they did not issue a valid notice of breach, the Tribunal still needs to determine if there were any proven breaches of the lease that would entitle the landlords to issue a valid notice of breach.[3] The tenant goes on to say that no breaches were proven, and that the specific complaints made are no longer a basis for any future notices, or attempts at re-entry.[4]

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3 Tenant's submissions dated 8 December 2017, paragraph 21

4 Tenant's submissions dated 8 December 2017, paragraph 22.

Landlords' general contentions regarding declarations

42 The power of the Tribunal to make a declaration is discretionary, and is to be exercised subject to the general principles governing the making of a declaration by a Court.[5]

43 The relevant legal principles, the landlords contended, included that a declaration should not be made unless there is some utility in doing so;[6] it is really needed,[7] and the granting of the declaration has a purpose.[8]

44 I accept the thrust of these submissions. I note that in *Victoria v Bradto Pty Ltd* [9] Bowman J, Vice President said at [56]:

> The power to make such a declaration is discretionary. It has previously been determined that this Tribunal will be influenced by the principles governing the making of declarations at common law when exercising its discretion pursuant to s.124 – see, for example, *Moira Shire Council v Demaio* (unreported, 7th September 1999), and I would fully agree with that proposition.

45 Furthermore, in *Kracke v Mental Health Review Board,* Bell J, President, said at [808]:

> When exercising its power to make declarations under s 124(1), the Tribunal applies the general discretionary principles developed by the courts. When a declaration is called for, however, the power is there to be used:
>
> Section 124 ... is perfectly general in its terms giving a Tribunal constituted by a presidential member power to make a declaration in a proceeding. Inferentially, declarations under that section should be made, subject to the specific jurisdictional stipulations that the matter be in a proceeding where the Tribunal otherwise has jurisdiction to deal with, in accordance with ordinary equitable principles.[10]

46 I comment that s 124 of the VCAT now gives power to make a declaration to any member who is a legal practitioner, in addition to any presidential member. This amendment obviously does not affect the general principle that in exercising the power to make a declaration, the Tribunal must apply the usual equitable principles.

47 I consider the following passage from the decision of Morris J, President, in *Director of Consumer Affairs Victoria v AAPT Ltd* at [69] is also relevant:

> However the fact that present applications are brought in the public interest does not mean that the traditional equitable doctrines are

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5 The authorities cited by the landlords were *Victoria v Bradto Pty Ltd* [2006] VCAT 1864 at [56] and *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [808).

6 *Director of Consumer Affairs Victoria v Craig Langley*. [2008] VCAT 842 at [144]-[145] was the citation given, but it appears to be wrong.

7 *Lawson v Mooney Valley CC* [2010] VCAT 273 at [16].

8 *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 at [69].

9 [2006] VCAT 1864.

10 [2009] VCAT 646 at [808].

> irrelevant. …. In a nutshell, for declaratory or injunctive relief to be appropriate, it ought have consequences.[11]

Landlords' specific contentions

48 The landlords contended that some of the remaining declarations sought by the tenant relate to past performance of obligations under the lease or relate to the performance or non-performance of obligations by a party under the lease. The landlords contend that these issues are now irrelevant, and declaratory relief should not be made in respect of them, are as the declarations are being sought in:

> an attempt to create a situation which may deprive the [landlords] of rights which exist against the [tenant] but have not yet been exercised. It is clear from the statements made by the [tenant's] counsel during the conduct of the claim that it is the [tenant's] desire and intent to create a situation whereby as a consequence of the proceeding the [landlords are estopped from making any further claims in respect of the [landlords'] performance of [their] obligations under the lease.[12]

Discussion

49 Although I accept that as a matter of principle I should not make declarations which are unnecessary or have no purpose, I consider that I must address each proposed declaration on its own merits, with a view to determining whether the claimed declaration should be made.

Loscar Barbers undertook the fit out of the premises with the full knowledge and consent of Mr J. Kypri – B(a).

50 My first observation is that Loscar Barbers is the tenant's trading name, so in effect the declaration is being sought by the tenant. My second point is that I consider that there is now no utility in making the declaration, because it relates to an issue which, if established, would underpin the validity of the notice of breach. As it was conceded at the hearing by the landlords that the notice of breach is not in proper form and is of no effect, the need for this particular declaration falls away.

Mr J. Kypri has waived compliance with the requirement in the lease for Loscar Barbers to obtain "written consent" – B(b).

51 Again, because this is an issue which, if established, would be relevant in underpinning the validity of the notice of breach, there is no need for this particular declaration to be made now.

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11 [2006] VCAT 1493 at [69].
12 Landlords' submissions paragraph 25.

Mr J. Kypri is estopped from terminating the lease for breach of the "written consent" provisions of the lease – B(c).

52 I am not prepared to make this declaration for two reasons. The first is that it goes to the validity of the notice of termination, which has now been withdrawn. The second is that the doctrine of estoppel is complex, and if the tenant wishes to make out an estoppel he will have to establish a number of matters. Estoppel was not canvassed sufficiently during the hearing to allow any finding about an estoppel to be made.

Mr P. Kypri is not the landlord

53 The tenant pleads in his points of claim dated 31 August 2017 that the lease was made between the tenant and the Mr J. Kypri, and in their points of defence dated 15 November 2017, the landlords agreed. The point was also conceded at the hearing. I am prepared to make a declaration about this because it is relevant to the order regarding damages that I must make today.

The handwritten notice dated 6 June 2017 is not a valid notice of breach within the meaning of the lease – B(e)

54 This was conceded the hearing. I prepared to make a declaration to this effect because it is relevant to the order regarding damages that I must make today.

The text messages 16 July 2017 is not a valid notice of breach within the meaning of the lease – B(f)

55 Again, this was conceded the hearing. I am prepared to make a declaration to this effect because it is relevant to the order regarding damages that I must make today.

In entering the premises on 29 July 2017, Mr P. Kypri acted in contravention of the lease – B(g)

56 The tenant pleaded in his points of claim that the lease was entered into on Mr J. Kypri's behalf by Mr P. Kypri "exercising actual or apparent authority as his son's agent." The landlords agreed with this proposition in their points of defence. That Mr P. Kypri was acting as the agent of Mr J. Kypri was also conceded at the hearing.

57 I find that the agency extended to Mr P. Kypri's action in re-entering the premises on 29 July 2017. He did so on behalf of Mr J. Kypri. One declaration I am prepared to make is that:

> In entering the premises on or about 29 July 2017 Mr P. Kypri acted as the agent of Mr J. Kypri.

58 Another relevant declaration that I make is:

> In entering the premises on or about 29 July 2017 through an agent Mr J. Kypri acted in contravention of the lease.

The lease remains on foot – C(a)

59 This point was conceded on behalf of the landlords. It is appropriate that a declaration be made about the issue, as the status of the lease flows directly from that concession.

Mr J. Kypri must not decline to renew the lease for any further term on the basis of any conduct that [is the] subject of this proceeding – B(b)

60 I am not prepared to make such a declaration, on two grounds. Firstly, it is not necessary to make such a declaration to dispose of the proceeding, because of the concessions made that there was no valid notice of breach and that the re-entry was illegal. Secondly, the phrase "any conduct that is the subject of the proceeding" is very wide, and this opens up an issue as to the precise nature of the conduct which might be the basis of any such declaration.

In performing any market review of rent payable under the lease, Mr J. Kypri is not entitled to attribute value based on the footpath trading permit – C(c

61 I decline to make such a declaration. A first ground is that it is not necessary to make such a declaration now, given the concessions made by the landlords which I have referred to.

62 A second ground is that such a declaration would fetter the discretion of the Tribunal in the event that the Tribunal was asked, in the future, to review any market review of rent made pursuant to the terms of the lease. I consider it would not be appropriate for me to such a declaration.

In accordance with sub- clause 12.1.3 of the lease, Loscar Barbers has given Mr J. Kypri written notice as at 6 November 2017 of his intention to renew the lease for a further term commencing 6 April 2018.

63 I decline to make such a declaration. The tenant produced no evidence that such a notice had been given.

64 This does not mean that the tenant is precluded from producing such a notice if it presently exists, on another occasion, or from giving such a notice if the tenant is entitled to do so under the terms of the lease.

THE NEW INJUNCTION SOUGHT

65 The next remedy sought by the tenant in the prayer for relief was an injunction restraining Mr J. Kypri or Mr P. Kypri or anyone on their behalf for entering the premises on the basis of an alleged breach relating to the fit out or decoration of the premises on or before 6 April 2018.

66 I decline to grant any such injunction for a number of reasons. Firstly, the Tribunal's discretion as to whether an injunction should be granted under s 123 of the VCAT Act is subject to the principles applied by the Courts. The principles upon which an injunction should be granted in Australia are well-established. See for instance *Australian Broadcasting Commission v*

O'Neill.[13] Key issues such as establishing a prima facie case and that the balance of convenience weighs in favour of granting the injunction, were not addressed at the hearing. These are not theoretical considerations. If, in the light of the concessions made by the landlords that there was no notice of breach, and that the re-entry was illegal, why would the balance of convenience require an injunction to be granted today?

67 Furthermore, in order to obtain an injunction, the party moving for the remedy has to give the relevant undertaking as to damages. No such undertaking was offered on behalf of the landlords.

68 Quite apart from these significant issues, the tenant would have had to demonstrate that an injunction should be granted on the basis of "an alleged breach relating to the fit out or decoration of the premises." That is a very broad phrase. The tenant may have in mind a breach of a kind underpinning the defective notice of breach, but that is not entirely clear.

69 In any event, there is an issue of proof. The tenant seems to be contending that because the landlords issued a notice of breach, and were later directed to file witness statements, potentially including an expert report, and yet failed to do so, the Tribunal would have been constrained to have found that the landlords could not prove the existence of any defect. If that is the basis upon which the tenant's argument proceeds, the tenant may have faced difficulties because of his failure to produce a required plumbing certificate or a second electrical certificate. The evidence about certificates is inconclusive. In his witness statement the tenant says that he has given Mr P. Kypri "all certificates I have." However, no plumbing certificate was put into evidence by the tenant. The tenant disputes a second electrical certificate is needed.[14] For clarity, I confirm that I today make no finding about the existence, or non-existence, of defects in the work.

INTEREST

70 The tenant made a claim for interest in the prayer for relief, but the topic was not addressed in final submissions. I will give leave to the tenant to make an application against Mr J. Kypri for interest. Any such application can be made at a costs hearing.

COSTS

71 The tenant sought costs in the prayer for relief. Although no submissions were made about costs in the tenant's final submissions, costs were raised at the hearing. There may be reasons why costs were not addressed in final submissions. For instance, a written offer may have been made prior to the hearing. I will give the tenant leave to make an application for costs, but I draw the tenant's attention to the fact that as the lease is governed by the *Retail Leases Act 2003*, costs will be governed by s 92 of that Act. In order

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13 [2006] HCA 46.

14 Tenant's witness statement dated 20 November 2017, paragraphs 22 and 23.

to ensure that the proceeding does not stay on foot indefinitely, any application for costs must be made within 60 days.

72 Any application for reimbursement of a filing or hearing fee made under s 115B of the VCAT Act can be made at the same time as any application for costs.

C Edquist
Member