

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. R11/2014

### CATCHWORDS

Retail lease – corporate tenant deregistered – effect of deregistration – *Corporations Act 2001*(CW) - s.601AD(1) - company ceases to exist – proceedings for or against former company cannot proceed further - monthly tenancy – nature of tenant’s interest – whether tenancy survives deregistration - whether tenancy vests in ASIC – whether tenancy is frustrated – application of contractual principles to leases – consequence of frustration - person in possession of demised premises having no right to possession – order for possession made

<b>APPLICANTS</b>	Alan George Lovelace-Trotter and Andrea Jennifer Lovelace-Trotter
<b>FIRST RESPONDENT</b>	Ringwood Engineering Pty Ltd (ACN 104 275 498)
<b>SECOND RESPONDENT</b>	Wayne Richard Trotter
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	22 September 2014
<b>DATE OF ORDER</b>	22 September 2014
<b>CITATION</b>	Lovelace-Trotter v Ringwood Engineering Pty Ltd (Building and Property) [2014] VCAT 1237

### ORDER

1. I find that the First named Respondent has been deregistered and that as a consequence no further action can proceed further either by or against it.
2. Declare that the Applicants as owners are entitled to possession of the premises situated at and known as the middle and rear sections of the land and buildings at 34 New Street, Ringwood.
3. Order the Second Respondent to vacate the middle and rear sections of the land and buildings at 34 New Street, Ringwood and remove all of his belongings therefrom by midnight on 12 October 2014.
4. The Second Respondent whether by himself, his servants or agents or howsoever otherwise is restrained from remaining on the said land and buildings after midnight on 12 October 2014 or from leaving any of his belongings on it.
5. Liberty to the Applicants to apply for any further orders in aid of this order for possession.

6. The proceeding as between the Applicants and the Second Respondent is otherwise adjourned to a date and time to be fixed by the Principal Registrar before Senior Member Walker with one day allocated.
7. Costs reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Mr Stavris of Counsel
For the First Respondent	Mr W. Trotter, former Director
For the Second Respondent	In person

**REASONS FOR DECISION**

**Background**

1. The Applicants are the owners of a building and land situated at 34 New Street, Ringwood. The building consists of a double storey office complex with a single storey factory behind it. Behind the factory there is a yard that was previously enclosed with the factory by a fence. I shall refer to that factory and its yard as “the Property”. Behind where the fence was situated, there is vacant land belonging to the Landlords that I shall refer to as “the Rear Land”.
2. The Property was leased to the First Respondent (“the Tenant”) pursuant to a ten year lease (“the Lease”) dated 10 June 2003 which expired on 31 May 2013. The Rear Land was separately leased to the Tenant pursuant to a nine year lease dated 22 July 2004. It is common ground that the lease of the Rear Land has either expired or been determined by the Tenant.
3. The Second Respondent (“Mr Trotter”) is the director of the Tenant. He signed a guarantee of its obligations under the Lease but disputes that he has any liability to the Landlords under its terms.
4. The relationship between the parties has been acrimonious from early in the tenancies. The Landlords complained about Mr Trotter removing the fence between the Property and the Rear Land and making extensive alterations to the factory. The Tenant stopped paying rental for the Rear Land in about June 2005. Although it claimed to have terminated the lease with respect to the Rear Land it nonetheless blocked access to it by means of a gate. The Landlords complain that, even though they have been denied any access to the Rear Land since June 2005, neither the Tenant nor Mr Trotter has paid any rental for it since then.

## **The hearing**

5. This matter first came before me on 10 September 2014.
6. Mr Stavris of Counsel announced an appearance for the Applicants. Mr Trotter was sitting at the other end of the bar table. I asked him whether he appeared for the Tenant as well as for himself and he said that he could not hear me.
7. He then handed up a medical certificate from a medical practitioner stating that he had an ear infection. After reading the certificate I asked Mr Trotter which ear was affected and he replied: "Both". My question was at normal conversational volume and so the fact that he answered my question caused me to doubt that he really was unable to hear me as he claimed. I also noted that the doctor who had provided the certificate had no prior medical history from him, suggesting that he was not Mr Trotter's regular doctor. It transpired that he had seen the doctor just before the hearing and for a single visit.
8. Following a submission from Mr Stavris a speaker telephone was set up in the hearing room and the doctor was telephoned. He was affirmed and he then confirmed the contents of his certificate. He said that, as well as inflammation in his ears, Mr Trotter had a perforated ear drum.
9. After hearing this evidence from the doctor I concluded that I should give Mr Trotter the benefit of the doubt as to his ability to hear and so I adjourned the hearing until Monday, 22 September to allow time for the infection to clear up.
10. Late in the afternoon preceding the day fixed for the adjourned hearing, that is, on Sunday 21 September, Mr Trotter sent faxed copies of a further medical certificate to the registry from a different doctor in the same clinic. This stated that the infection had not responded to the antibiotics that different antibiotics had been prescribed and that Mr Trotter had been referred for a hearing test.
11. The referral letter from the doctor to the specialist was enclosed with the certificate and contains a note that Mr Trotter was proposing to fly to Europe on 30 September 2014. The doctor did not suggest in the referral letter that she thought this would be any problem. It also says that Mr Trotter has had the perforated ear drum for many years.

## **The adjourned hearing**

12. When the hearing resumed on 22 September, Mr Trotter again appeared and again claimed to be unable to hear anything that was said to him. In reliance upon the documents that I have described, he sought a further adjournment of the proceeding. I communicated with him by means of notes. I wrote down in longhand everything said by me or by Mr Stavris and these were passed by the clerk to Mr Trotter. Mr Stavris then made a short submission which I wrote down and had passed to Mr Trotter.
13. Mr Trotter said that the infection in his ears had not responded to antibiotics, and that was borne out by the medical documents that he provided. He said that he had 5% hearing in one ear and no hearing at all in the other. He said that he

needed another few weeks to allow the infection to resolve so that he could regain his hearing. He did not suggest that he was in any pain or discomfort.

14. In the course of his submission Mr Stavris informed me that the Tenant had recently been de-registered. I asked Mr Trotter whether that was true and he said that he had deregistered the Tenant a couple of weeks earlier. He said that it had not conducted any business activity for a number of years.
15. I asked him why, if the Tenant was deregistered and there was no tenant, he had not moved out of the Property. He said that he had spent a large amount of money on the Property over the years and had an option for a further lease and an option to purchase which the Landlords would not recognize.

### **The Landlords' claims**

16. The proceeding, comprising both claim and counterclaim, concerns both the Property and the Rear Land.
17. In the claim, various breaches are alleged of both leases and the Landlords claim against the Tenant:
  - (a) possession of both pieces of land;
  - (b) payment of rental for the Rear Land which has not, it is alleged, been paid since June 2005;
  - (c) payment of various outgoings; and
  - (d) damages for the cost of removing a large number of structures on the Property and the Rear Land that have, it is said, been erected without any permit and which the Maroonah City Council ("the Council") has ordered the Landlords to remove.
18. The claim against Mr Trotter personally is simply that he should "be responsible for any order of the tribunal against the first respondent" as guarantor of the Tenant's obligations under both leases.
19. On 13 February 2013 a counterclaim was filed by the Tenant and Mr Trotter, claiming the sum of \$999,000 as compensation for money spent on renovating the factory. It said that the Landlords had "signed off" on the lease with all the plans for what work was going to be done but then refused to get any permits. Various repair issues are also raised.
20. The application adds:

"We were supposed to have had a three year option to purchase the property with the view that all money spent renovating it was to be my equity for loan. At the last minute the Owner, Mr Lovelace-Trotter decided to change the option to his three year option to sell."
21. The counterclaim was refined by Amended Points of Defence and Counterclaim dated 15 April 2014. By this document, which was drawn by counsel:
  - (a) the Landlords are alleged to have repudiated the lease for the Rear Land by failing to repair the boundary fences;

- (b) the Tenant is said to have accepted the repudiation in 2006 and so terminated the lease for the Rear Land or alternatively, it was surrendered;
- (c) the Tenant renewed the lease of the Property;
- (d) the moneys expended on the Property were expended by the Tenant in reliance upon a representation made to the Landlords that the Tenant would have an option to purchase the Property.

22. The document is so drawn that the counterclaim is by the Tenant only.

### **Matters to be determined**

23. The case on both sides involves the following claims:

- (a) A claim by the Landlords for possession;
- (b) A claim by the Landlords against the Tenant as tenant and Mr Trotter as guarantor for arrears of rental and outgoings;
- (c) A claim by the Landlords against the Tenant as tenant and Mr Trotter as guarantor for damages for the cost of removing the allegedly unauthorized structures;
- (d) A claim by the Tenant for a new lease of the Property;
- (e) A claim by the Tenant for damages for breach of s.52 of the *Retail Leases Act 20013*;
- (f) A claim by the Tenant for compensation pursuant to s.80 of the *Retail Lease Act 20013*;
- (g) A claim by the Tenant for equitable compensation and compensation pursuant to s.158 of the *Fair Trading Act 1999*;

24. The Landlords' monetary claims are all directed against the Tenant in the first instance and then against Mr Trotter as guarantor.

25. The counterclaim is brought by the Tenant only. Indeed, the claims pleaded are of a nature that could only be brought by the Tenant as tenant. It is not clear to me on the documents if Mr Trotter has any claim in a personal capacity.

### **The application for an adjournment**

26. On the application for an adjournment, I decided that, since the Tenant had been deregistered and so was no longer in existence, any proceeding brought against it and any counterclaim brought by it, could not now be proceeded with because the Tenant was not here to defend or prosecute them or even to seek an adjournment of the hearing. I thought that it would have been pointless and inappropriate to adjourn those claims.

27. Further, since there was no longer any tenant it would seem that the Landlords, as owners would be entitled to possession of both pieces of land. Although he was a guarantor of both leases, Mr Trotter was not a tenant under either lease. Whether he had any entitlement to remain there in those circumstances was, I

thought, a short point that could be readily disposed of if arrangements could be made to cope with the hearing problem that Mr Trotter claimed to have.

28. The monetary claims involving Mr Trotter are more complex and time consuming and I thought that they should be adjourned to another day when they would be able to be litigated in the usual way.
29. I therefore decided to deal with and determine the application for possession and adjourn the remaining matters involving Mr Trotter to a date and time to be fixed by the Principal Registrar. The matter was then stood down until 2.15 pm that day.

### **The resumed hearing**

30. When the hearing resumed after lunch arrangements were in place to deal with Mr Trotter's hearing problem. Everything that any person apart from Mr Trotter said was typed by the clerk and displayed on a screen on a side wall for Mr Trotter to read. Despite this arrangement, I noticed on several occasions during the hearing that Mr Trotter answered a question before it had been typed for him to read. I find that he was able to hear, although to what degree it is impossible to say.
31. The hearing was confined to the Landlords' claim for possession. Evidence was given orally, no witness statements having been filed.

### **The evidence**

32. Much of the evidence that was given related to the claims involving the Tenant which, for the reasons which follow, I cannot deal with. Nevertheless, since the evidence was given I should say something about it.
33. On behalf of the Landlords Mrs Lovelace-Trotter gave evidence of formal matters including the ownership of the Property, the Lease, the history of the tenancy and the breaches alleged by the Landlords. She also produced:
  - (a) a certificate from Australian Securities & Investment Commission ("ASIC") to the effect that the Tenant was deregistered on 24 August 2014;
  - (b) a Building Order from the Council requiring demolition of illegal buildings and alterations carried out by Mr Trotter; and
  - (c) a building inspection report prepared by a building expert, Mr James Campbell.
33. She said that she inspected the Property with Mr Campbell when he took the photographs that appear in his report. She said that the photographs and the commentary in the report accurately describe the state of the Property at the time of her inspection.
34. She was cross-examined by Mr Trotter, largely in regard to his contentions that the Landlords were aware that he intended to live in the Property and that they had agreed to the alterations that he had made. She denied those contentions. She agreed that the Landlords had not applied for any building permits but said that Mr Trotter had never given them any plans of the work that he wanted to do or

told them what he was doing. She described the Property, as Mr Trotter had altered it, as being a “fortress” and said that they did not know what he was doing there.

35. Mr Trotter gave evidence that he only agreed to lease the Property on the basis that he would have an option to buy it. He also said that he made it clear to the Landlords that he intended to live in the Property for security reasons. When the provisions in the Lease as to the right of pre-emption given to the Tenant and the permitted use described in it were pointed out to him by Mr Stavris, he said that his solicitor had “stuffed up” and had invited Mr Trotter to sue him but that he had not done so.
36. He said that he had spent \$700,000 on the Property. He acknowledged that he had not obtained any permits for any of the work that he had done but said that it was for the Landlords to obtain permits. He did not say how they would have been able to do that without plans of what he intended to do. He added that the shipping containers that he had deposited on the Property and the Rear Land did not require a permit. When asked whether he had obtained any certificates of compliance from a plumber or an electrician for all of the plumbing and electrical work that had been done he said that he had, but he thought that they had probably been discarded.

### **The breaches alleged**

37. Relevant covenants of the Lease to be observed by the Tenant included the following:
  - (a) not without the approval in writing of the Landlords to employ any person in the repair or maintenance of the Property or to effect any structural alterations, additions or repairs (Clause 1(g);
  - (b) not to make or permit any structural, alterations, additions or repairs to the Property and not without the prior written consent of the Landlords to install any partitions, fixtures or fittings or to redecorate the Property (Clause 1(j);
  - (c) except with the prior written consent of the Landlords, not to use or permit the Property to be used for any purpose other than repair, sales and servicing of catering equipment (Clause 1(o)(i) and Item 13 of the schedule);
  - (d) to observe and comply with all provisions and requirements of all Acts, rules, regulations and by-laws so far as they relate to the Building and the Property or their use (Clause 1(s);

By Clause 3(e), each of these clauses was agreed to be an essential term of the Lease.

38. It is quite obvious from the photographs in Mr Campbell’s report and Mrs Lovelace-Trotter’s evidence that there has been a great deal of very poorly executed structural work carried out in the factory and in the shipping containers deposited behind it. There are photographs of shipping containers that appear to have been converted into living accommodation, exposed electrical wires, a door

removed from the factory and new doorways cut in. Mrs Lovelace-Trotter denied having authorized any of this work.

39. Mr Trotter does not allege that the Landlords knew about or authorized any particular item of work. His position was that he was entitled to carry out work that was described in very general terms in the Lease. He acknowledged that the authorization he relied upon in the Lease required him to obtain permits and that he did not do so. He was also required to do the work in a tradesman like manner and it is apparent from the photographs that the work is not only very poorly executed but incomplete. There is a photograph of an exposed sewer pipe in what appears to be a partially constructed toilet as well as many other examples in Mr Campbell's report.
40. Mr Trotter admitted that he was living in the Property and there is a photograph of what appears to be a bedroom in a container and another bedroom in the factory. I accept Mrs Lovelace-Trotter's evidence that the Landlords did not consent to Mr Trotter living in the Property.

### **The claim in regard to the option for a further term**

41. Clause 3(f) of the Lease required the Landlords to grant a further term of ten years on the written request of the Tenant delivered to them within a specified period, so long as there was no unremedied breach of the Lease by the Tenant of which the Landlord had given written notice.
42. The Tenant sought such a further term last year but the Landlords refused to grant it on the basis of the extensive breaches referred to above. No further lease was granted and the Tenant continued payment of rental on the first of each month. Although Mr Trotter was still objecting that the Tenant had a right to a further term it took no steps to enforce its claimed right and in view of the extent of the breaches of what were essential terms of the Lease, that is not surprising. It would be very difficult for the Tenant to establish that it was entitled to a further term.

### **Termination**

43. The Landlords allege that they gave notice to the Tenant to remedy the breaches and they were not rectified. However they did not re-enter the Property or resume possession of the Rear Land. The import of Mrs Lovelace-Trotter's evidence was that a physical re-entry of the Property was impracticable because Mr Trotter had created what she described as a "fortress" and the Landlords were even unable to resume possession of the Rear Land because of a gate Mr Trotter has erected.
44. It is well established that bringing a proceeding to recover possession is equivalent to a physical re-entry (see: Bradbrook Croft Hay "*Commercial Tenancy Law*" Third Edition p.573) and that, if a Landlord is entitled to re-enter, that will be sufficient to determine the tenancy. At the hearing, however, recovery was claimed on the basis that, because the Tenant was deregistered, the Landlords were entitled to recover possession.



45. I found that the Landlords were entitled to an order for possession and pronounced an order to that effect but, since the legal issues on the deregistration ground are somewhat complex, I said that I would provide written reasons.

### **The nature of the tenancy**

46. By Clause 3(c) of the Lease, if the Tenant remained in occupation of the Property after the expiration of the Term, without objection by the Landlords, it should be deemed to be a monthly tenant upon the same terms and conditions as the Lease, where possible.
47. A periodic tenancy is a form of leasehold estate. This one was a monthly tenancy in accordance with the terms set out in the Lease. The Tenant was obliged to pay the rental monthly in advance, as provided in the lease document. In the event of default by the Tenant, the tenancy would nonetheless subsist until determined. Determination could be by re-entry in accordance with Clause 7 of the Lease or by accepting a repudiation of the monthly tenancy in accordance with the terms of the Lease.
48. The ground relied upon here is outside the terms of the Lease. It was argued that, because the Tenant was deregistered it was no longer in existence and there was no tenant.

### **The effect of deregistration**

49. By s.601AD (1) of the *Corporations Act* 2001(CW) a company ceases to exist on deregistration. By subsection (2) all the company's property (other than any property held by the company on trust) vests in ASIC. ASIC takes only the same property rights that the company itself held. By subsection (3), if the company held particular property subject to a security or other interest or claim, the ASIC takes the property subject to that interest or claim. By subsection (4) ASIC has all the powers of an owner over property vested in it by the section.
50. On the Tenant becoming deregistered, although its cause of action, if it had one, vested in ASIC, the counterclaim itself abated (*Amcus Pty Ltd v. Hurst Rentals Pty Limited & Ors* [No 2] [2010] NSWSC 239 and the cases there cited). It is not only unnecessary but also impossible to make any order vis-a-vis the Landlords and the Tenant because the proceedings are now a nullity. The principal authority referred to in *Amcus*, is *United Service Insurance Co Ltd (in liquidation) v Lang* (1935) 35 SR (NSW) 487 where Jordan CJ said (at p.497):

“It having been ascertained that there is no appellant before us, we can do nothing except refrain from proceeding any further. The verdict for the defendant and the order for costs given by the learned District Court Judge are, of course, nullities, but in the absence of a plaintiff we have no more power to deal with them in the appeal than he had to make them in the action.”

51. In *Amcus*, Slattery J said after referring to this passage (at para 17):

“Jordan CJ’s statement is clear that upon ascertaining that a plaintiff is dissolved and no longer exists, the court must “do nothing except refrain from proceeding any further”. “

52. The proceedings both by and against the Tenant abated upon the Tenant's deregistration. I am unable to make any determination of the claim the Landlords have brought against it. I cannot even adjourn or strike out that claim. In regard to the counterclaim although I first thought that I could strike it out it is clear that I cannot do so. However these comments apply only to these proceedings. The underlying causes of action remain unaffected and continue.
53. Any property that the Tenant had at the time of its deregistration has vested in ASIC. That includes its cause of action. The question then is whether the monthly tenancy survived the deregistration. If so, since a periodic tenancy is a form of property it also vests in ASIC.
54. It occurred to me that perhaps I should order that notice of the proceeding be given to ASIC but it is clear from the cases that it is not the practice of ASIC to take any part in these sorts of proceedings, apart from pointing out that any proceeding concerning the deregistered company has abated

### **The effect of deregistration on the monthly tenancy**

55. In *Youngmin v. Heath* [1974] 1WLR 135 the English Court of Appeal decided that, where a tenant is a natural person, a monthly tenancy is not automatically determined by death. What that case really establishes is that, where no steps are taken to determine the tenancy it will continue and the legal personal representative, if a grant of representation is made, will be liable to meet the ongoing rental out of the estate, although if he has not entered into possession there will be no privity of estate and he will not be personally liable.
56. However at p.138 of the report it appears to have been assumed by Denning MR that it would have been open to the Landlord to re-take possession of the premises, even though the relevant legislation (s.9 of the *Administration of Estates Act 1925*) had vested any property of the deceased person in the Probate Judge.
57. Whether the same situation applies where a company is deregistered is unclear. Certainly, the question is largely academic unless an application is made, either to ASIC or the Court to reinstate the registration of the Tenant.
58. The power to reinstate a deregistered company is found in s.601AH. By subsection (1), ASIC can reinstate a company if it is satisfied that it should not have been deregistered. By subsection (2), an application to reinstate can be made by "a person aggrieved by the deregistration".
59. In *Casali v Crisp* [2001] NSWSC 860 Jordan CJ said (at para 27):

"The mere fact that a person is a shareholder or a director of a deregistered company is insufficient to establish that that person is a person aggrieved within s 601AH; see eg *Re Waterbury Nominees Pty Ltd* (1986) 11 ACLR 348. As Olney J said in *Re Waldcourt Investment Co Pty Ltd* (1986) 11 ACLR 7, 12:

"I do not think that either a shareholder or a director as such must necessarily be aggrieved by the cancellation of the registration of a company. An applicant

must, in my opinion, show that his interests have been or are likely to be prejudicially affected by the cancellation of registration.”

That prejudice might be shown by the shareholder showing that he or she was also a creditor of the company or that there might well be a surplus of assets if the company were reinstated and certain events occurred.”

60. According to Mr Trotter, he deregistered the Tenant because it had not carried on any business for some years and he had a number of other companies and business names that he had to pay for. He also said that the Tenant had no liabilities. He did not identify the act or omission by which he caused the deregistration to occur but his evidence was clear that it was he who caused it to be deregistered. In those circumstances it is unlikely that he would be “a person aggrieved” by the deregistration within the meaning of the section. In any case, he did not suggest that he proposed to apply to have the Tenant reregistered.
61. If the Tenant were reregistered, it would be taken to have continued in existence as if it had not been deregistered (S.601AH(5)) and its interest as monthly tenant would re-vest in it. However it seems to me that the reregistration of the Tenant is unlikely to occur, particularly since there are no creditors.
62. In the meantime, the Landlords have no tenant to occupy the Property and pay the rent and no tenant upon which to serve a notice pursuant to s.146 of the *Property law Act 1958* or any other notice pursuant to the terms of the Lease which define and govern the monthly tenancy. The other party to the Lease has ceased to exist. In those circumstances, the monthly tenancy cannot function as contemplated by the parties.

### **Frustration**

63. It has been held by the House of Lords that, as in the law of contract, a leasehold interest may be determined by frustration (see *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] AC 675) where the frustrating event has rendered it incapable of performance, although such cases will be rare (ibid). That the ordinary principles of contract apply to a lease was accepted as correct by the High Court in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14 per Mason J. (at paras 24 & 27); Brennan J. (at para 5 – although he left open the question of frustration); Deane J. (at para 3) and *National Carriers* was cited with approval. Deane J. added (at para. 4):

“4. The actual application to leasehold interests of the common law doctrines of frustration and termination for fundamental breach involves some unresolved questions which are best left to be considered on a case by case basis whereby adequate attention can be focussed on particular problems which might be overlooked in any effort at judicial codification. One cannot however ignore the fact that the clear trend of common law authority is to deny any general immunity of contractual leases from the operation of those doctrines of contract law.....  
..... That trend should be followed in this Court and it should be accepted that, as a general matter and subject to one qualification, the ordinary principles of contract law are applicable to contractual

leases. The qualification is that the further one moves away from the case where the rights of the parties are, as a matter of substance, essentially defined by executory covenant or contractual promise to the case where the tenant's rights are, as a matter of substance, more properly to be viewed by reference to their character as an estate (albeit a chattel one) in land with a root of title in the executed demise, the more difficult it will be to establish that the lease has been avoided or terminated pursuant to the operation of the ordinary principles of frustration or fundamental breach. Indeed, one may reach the case where it would be quite artificial to regard the tenant's rights as anything other than an estate or interest in land (e.g., a 99 year lease of unimproved land on payment of a premium and with no rent, or only a nominal rent, reserved). In such a case, it may be difficult to envisage circumstances in which conduct of the tenant short of actual abandonment would properly be held to constitute repudiation or fundamental breach or in which anything less than a cataclysmic event such as the "vast convulsion" referred to by Viscount Simon L.C. in *Cricklewood Property and Investment Trust Ltd. v. Leighton's Investment Trust Ltd.* (1945) AC, at p 229 would warrant a finding of frustration."

64. In *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24 Brennan J. cited with approval the following passage from the judgment of Lord Radcliffe in *Davis Contractors Ltd. v. Fareham Urban District Council* (1956) AC 696, at p 729 :

". . . whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."

65. In the present case the Landlords never promised to grant a lease to a non-entity, where there was no-one to pay the rental and outgoings, no-one upon whom a notice could be served and no-one to even occupy the Property. The deregistration of the Tenant has frustrated the Lease.

## **Conclusion**

66. The consequence of the frustration of a lease is not altogether clear. Although performance of the lease appears to be discharged on the happening of the frustrating event the lessee's estate might remain vested in the lessee, but the lessee would be considered to be a trustee for the Lessor (see *Chitty on Contracts* 31<sup>st</sup> Ed. Vol. 1 23-056). If that is correct it would appear that the Landlords are the beneficial owners of the monthly tenancy, even if they could not simply resume possession as in the case of a deceased tenant.

67. In this case ASIC has not entered into possession of the Property or otherwise attorned tenant to the Landlords and the deregistration of the Tenant has occurred in circumstances where it is unlikely ever to be reregistered.

68. In any case, I am unable to do anything in regard to the proceedings against and by the Tenant. All that I can deal with are the claims with respect to Mr Trotter. Possession is sought against both respondents including Mr Trotter. Whatever the situation is with respect to the Tenant's monthly tenancy, he has no tenancy or

other right to occupy the Property and the Landlords as owners of the reversion and beneficial owners of the monthly tenancy (if it still exists) are entitled to an order for possession.

69. The other claims involving Mr Trotter are adjourned to a date and time to be fixed by the Principle Registrar with one day allocated.

**Rohan Walker**  
**Senior Member**