

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP366/2014

### CATCHWORDS

Landlord and Tenant - Application pursuant to s 82(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') that this proceeding and another proceeding be heard and determined together; application to amend Points of Claim in this proceeding; application for an order for a reconciliation of amounts payable under lease; application for other interlocutory orders; application by Respondent to strike out proceeding pursuant to s 75 of the VCAT Act.

<b>APPLICANT</b>	Luchio Nominees Pty Ltd (ACN 005 495 992)
<b>RESPONDENT</b>	Epping Fresh Food Market Pty Ltd (ACN 127 544 049)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member C Edquist
<b>HEARING TYPE</b>	Directions Hearing
<b>DATE OF HEARING</b>	1 December 2015
<b>DATE OF ORDER</b>	14 January 2016
<b>DATE OF REASONS</b>	14 January 2016
<b>CITATION</b>	Luchio Nominees Pty Ltd v Epping Fresh Food Market Pty Ltd (Building and Property)

### ORDERS

- 1 The application of the Applicant that this proceeding and proceeding BP1496/2015 be heard and determined together pursuant to s 82(1)(b) of the VCAT Act, is dismissed.
- 2 **Proceeding BP366/2014, being part heard, is listed for further hearing on 18 March 2016 at 10.00am at 55 King Street Melbourne, before Member Edquist, with an allowance of one day.**
- 3 **By 4.00pm on 12 February 2016**, the Applicant must send to the Tribunal and to the Respondent amended Points of Claim which, in marked up format:
  - (i) indicate the Applicant's position regarding the claim for common law repudiation of the lease; and
  - (ii) indicate which of the notices issued under s 146 of the *Property Law Act 1958*, dated respectively 30 October 2010, 9 July 2012 and 12 March 2014, it relies upon in the proceeding; and

- (iii) articulate the legal proposition which it will seek to make out regarding the dynamic nature of the characterisation of the lease, for the purposes of the application of the *Retail Leases Act 2003*; and
  - (iv) articulate, if the Applicant's position is that the leased premises were at the outset, or may have been at the outset, retail premises within the definition contained in the *Retail Leases Act 2003*, when and how the character of the premises changed, so they ceased to be retail premises within the definition contained in that Act.
- 4 **By 4.00pm on 19 February 2016**, each party must send to the Tribunal and to the other party a list of any documents in its possession or power relating to the issue of whether the premises which are the subject of the proceeding are retail premises for the purposes of the *Retail Leases Act 2003*.
  - 5 **By 4.00pm on 11 March 2016**, the Respondent must send to the Tribunal and to the Applicant amended Points of Defence in marked up format.
  - 6 **By 4.00pm on 11 March 2016**, each party must send to the Tribunal and to the other party a statement of contentions relating to the issue of whether the leased premises are retail premises within the definition contained in the *Retail Leases Act 2003*.
  - 7 At the further hearing of the proceeding, neither party shall, without the leave of the Tribunal:
    - (i) be permitted to rely on any claim or defence that is not set out in the Points of Claim or Points of Defence (as amended); or
    - (ii) rely on any document that has not either already been put into evidence, or been disclosed in a further list of discoverable documents on or before 19 February 2016.
  - 8 The application of the Respondent that the Applicant's claim against it be summarily dismissed or struck out pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*, is itself dismissed.
  - 9 Liberty to apply.
  - 10 Costs reserved.
  - 11 **The Principal Registrar is to send copies of these orders to the parties by email.**

**MEMBER C EDQUIST**

**APPEARANCES:**

For Applicant

Mr A Panna QC with Mr P Caillard of Counsel

For Respondent

Mr L Hawas of Counsel

## REASONS

### INTRODUCTION

- 1 This proceeding already has a long history. The Applicant ('Luchio'), owns a property of 551 High Street, Epping which it has leased to the Respondent ('Epping'). There is a significant dispute between the parties concerning the lease.
- 2 There was a directions hearing before me on 1 December 2015. Luchio made application for a number of orders. The first order sought was an order pursuant to s 82(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') that this proceeding be heard and determined together with proceeding number BP1496/2015. Orders were also sought that both actions be listed before the same Member, and that this proceeding be heard immediately before proceeding number BP4096/2015, and that evidence in one proceeding be evidence in the other proceeding.
- 3 A further order sought by Luchio was that it be given leave to amend its Points of Claim. A third order sought was that Epping must file and serve a reconciliation in response to the amounts claimed by Luchio as payable in a notice it had issued to Epping pursuant to s 146 of the *Property Law Act 1958* ('PLA') dated 19 June 2015. Other orders sought included:
  - (a) an order for discovery;
  - (b) orders relating to the Tribunal Book;
  - (c) orders that, at the hearing, the parties not, without the leave of the Tribunal:
    - (i) be permitted to rely on any claim or defence that is not set out in the Points of Claim or Points of Defence (as amended); or
    - (ii) rely on any document that has not been disclosed in the lists of discoverable documents;
  - (d) an order that the parties file and exchange written submissions in relation to whether the lease is a Retail Lease within the definition prescribed in the *Retail Leases Act 2003* ('RLA');
  - (e) an order listing the matter for hearing with an allowance of five consecutive days.
- 4 Epping opposed these orders, and also made an application pursuant to s 75 of the VCAT Act that part of Luchio's claim be struck out or summarily dismissed.

### BACKGROUND

- 5 The parties have been involved in this proceeding in the Tribunal since September 2014. The hearing began on 17 April 2015 and continued on the

following Monday, 20 April 2015. The matter was listed for further hearing on 25 May 2015, but prior to that day the hearing date was vacated and a directions hearing took place on 25 May 2015.

- 6 By letter dated 22 June 2015, Luchio advised the Tribunal that it wished to amend its claim by restricting the orders sought in its Prayer for Relief. The relief originally sought was as follows:
  - (a) a declaration that the lease is a retail lease within the definition prescribed in the *Retail Leases Act 2003* ('RLA');
  - (b) a declaration the lease was terminated and rescinded on 12 August 2014;
  - (c) a declaration that Epping had repudiated the lease;
  - (d) an order that Epping vacate the premises;
  - (e) an order for immediate possession;
  - (f) an order that Epping pay \$66,112.93 being arrears in payments due under the lease;
  - (g) damages and mesne profits;
  - (h) interest;
  - (h) legal costs under the lease;
  - (i) alternatively, orders under s 91(1)(b) and (e)(ii) of the RLA for payment of damages by way of interest.
- 7 The effect of the proposed amendment was "to withdraw the claims relating to repudiation of the lease and reliance upon the notice issued pursuant to s 146 of the *Retail Leases Act 2003* (sic)."
- 8 The intention to amend the Points of Claim was confirmed in a further letter to the Tribunal dated 23 July 2015.
- 9 A directions hearing took place on 27 July 2015. A number of matters were addressed, including the proposed amendment to the Points of Claim. Proposed draft amended Points of Claim were handed up by Luchio's counsel, Mr Caillard, who explained that a new s 146 notice was now being relied on.
- 10 Counsel for Epping, Mr Hawas, objected to the document being filed and served. He submitted that the amendment of Luchio's Points of Claim should not be allowed because the effect of the amendment was to make a new claim which was inconsistent with the claim previously made.
- 11 The orders ultimately made on 27 July 2015 included an order that Luchio's application for leave to amend its claim be listed for hearing on 8 September 2015.
- 12 Luchio's application to amend its Points of Claim was heard on 8 September 2015. I reserved my decision, and on 25 September 2015 ordered that Luchio's application for leave to amend its Points of Claim be dismissed. Reasons were published on 30 September 2015.

- 13 On 1 October 2015, the Tribunal ordered that Luchio must file and serve proposed amended Points of Claim showing in marked up form the paragraphs in the original Points of Claim which it proposed to withdraw. The proceeding was listed for directions on 16 October 2015, and also listed for a compulsory conference on 19 October 2015. Other orders of a housekeeping nature were also made.
- 14 On 16 October 2015, by an order made in chambers, the date by which Luchio was to inform the Tribunal and Epping of any proposed amendment to its Points of Claim was extended to 23 October 2015. The listing of the proceeding for hearing on 4 November 2015, with an allowance of three days, was confirmed.
- 15 A compulsory conference took place on 19 October 2015. The matter was not resolved. One of the orders made following the compulsory conference was that the hearing date of 4 November 2015 was cancelled.
- 16 On 9 November 2015, Luchio made an application that I be recused. That application was dismissed by Judge Jenkins, Vice President. The proceeding was listed for a directions hearing before me on 1 December 2015.
- 17 I must now determine the respective applications made on that day.
- 18 It is logical to begin by determining Luchio's application for an order under s 82(1)(b), not only because it is the first order sought, but because the determination reached may influence the outcome of a number of the other applications.

### **Luchio's application for an order under s 82(1)(b) of the VCAT Act**

- 19 Section 82 of the VCAT Act provides:

#### **82 Consolidation of proceedings**

- (1) The Tribunal may direct that 2 or more applications or referrals that concern the same or related facts and circumstances—
  - (a) be consolidated into the one proceeding; or
  - (b) remain as separate proceedings but be heard and determined together.
- (2) The Tribunal's power to give a direction under subsection (1)(a) is exercisable by a presidential member.
- (3) The Tribunal's power to give a direction under subsection (1)(b) is exercisable by any member.
- (4) If applications or referrals are consolidated, evidence given in the proceeding is admissible in relation to all applications or referrals consolidated into that proceeding.

## Luchio's submissions in relation to the s 82 application

- 20 Mr Panna QC, on behalf of Luchio, handed up written submissions and spoke to them. In summary, those submissions are:
- (a) Proceeding BP366/2014 and BP1496/2015 involve the same parties, premises and lease.
  - (b) The principal difference is that the new proceeding relates to a new notice under s 146 of the *Property Law Act 1958*, issued on 19 June 2015.
  - (c) The breaches referred to in the new notice permitting the Landlord to terminate the lease for repudiation because of the Tenant's failure and/or refusal to comply with fundamental terms are substantially the same as the breaches outlined at the commencement of proceeding BP366/2014.
  - (d) The Supreme Court of Victoria in *Solomon Lew v Priester*<sup>1</sup> summarised the matters to be considered on an application for consolidation or joint hearing of a proceeding, and a consideration of these matters points overwhelmingly to the favourable exercise of the discretion so as to permit the two proceedings to be heard and determined together.
- 21 In *Solomon Lew v Priester*, Pagone J identified nine matters to be considered on an application for consolidation or joint hearing of a proceeding, citing Besanko J in *Humphries v Newport Quays Stage 2A Pty Ltd*:<sup>2</sup>
1. Are the proceedings broadly of a similar nature?
  2. Are there issues of fact and law common to each proceeding?
  3. Will witnesses (lay and expert) in one proceeding be witnesses in one or more of the other proceedings?
  4. Has there been an alternative proposal put forward that there be a test case and have the parties agreed to abide the outcome, or, at least, the determination of common issues of fact and law?
  5. Is there a prospect of multiple appeals with substantial delays if the proceedings are not tried at the same time?
  6. Will there be a substantial saving of time if the proceedings are tried at the same time, compared with each proceeding being tried separately?
  7. Will an order that the proceedings be tried at the same time create difficulties in terms of trial management, complexity of procedural issues and difficulties in determining cross-admissibility of evidence?

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<sup>1</sup> [2012] VSC 57 at [12].

<sup>2</sup> [2009] FCA 699.

8. Is one proceeding further advanced in terms of preparation for trial than the others?
  9. Are there parties to one or some only of the proceedings who will be inconvenienced if all of the proceedings are tried at the same time?
- 22 Mr Panna submitted that by having both proceedings heard and determined together all of the issues between the parties would be dealt with at the same time, and that in doing so:
- (a) the parties' costs will be reduced;
  - (b) the time and resources of the Tribunal will be better utilised;
  - (c) it avoids duplication of witness statements, hearings and evidence;
  - (d) it does not cause any prejudice or unfairness to either party;
  - (e) the legal and factual issues can be argued in the same way as if there had been separate proceedings (e.g. the validity of the lease; the intention of the parties for the use of the premises, any issue that may arise in relation to relief from forfeiture); and
  - (f) any danger that two separate hearings may result in inconsistent findings will be avoided.
- 23 Mr Panna conceded that proceeding BP366/2014 was more advanced than the new proceeding BP1496/2015, but he submitted:
- (a) the only witness called by the landlord (in BP366/2014) has been Mr Follachio, who will need to be recalled anyway to address the issues raised by Epping, which produced documents and delivered its defence after he had given evidence;
  - (b) the hearing in BP366/2014 is not well advanced; and
  - (c) although the hearing was listed to commence on 16 April 2015, because of adjournments, there has been only one full day of hearing.

### **Epping's submissions in relation to the s 82 application**

- 24 Mr Hawas made oral submissions. His starting point was the contention that the central issue in BP366/2014 is not whether the lease is a retail lease within the meaning of the RLA, but was whether the lease had been repudiated. The applicability of the RLA is relevant to whether land tax is payable, but is not determinative of Luchio's right to possession.
- 25 Mr Hawas, in overview, submitted that:
- (a) Luchio's repudiation case had been run to its completion, and all that remained was for Epping to complete its case regarding relief against forfeiture.
  - (b) After Luchio realised that its repudiation case was doomed, it sought to amend its Points of Claim. When this application for leave to



amend was refused, Luchio issued the new proceeding and now seeks to consolidate the new case with the old case. It cannot do this conceptually because the claims are inconsistent.

- (c) Luchio's attempt in the old proceeding to get possession of the leased premises is doomed to failure. Luchio has flagged its intention to withdraw the repudiation claim, and the claim under the s 146 notice must fail because the only notice that Luchio can rely on is the March 2014 notice, and that notice is not a valid notice under s 146 of the PLA.
- (d) The only matter remaining in the old proceeding is the application for a declaration regarding the applicability of the RLA.

26 Mr Hawas then articulated his position regarding the s 82 application more fully, as follows:

- (a) It is conceptually impossible to consolidate proceedings where, in the first proceeding, the hearing has almost finished and, in the new proceeding, the hearing has not begun.
- (b) It is conceptually impossible to consolidate two proceedings where the pleadings are inconsistent, and the pleadings are inconsistent here because, in the old proceeding, it is said the lease came to an end in March 2014 and the new proceeding came to an end in July 2015.
- (c) Also, the respective bases for termination of the lease are different, one termination being based on s 146, the other being founded on common law repudiation. The institution of the new proceeding does not cure this vice.
- (d) The claim for possession made in the old proceeding is patently hopeless, and that matter ought to be determined.
- (e) There is no reason why the old claim cannot be heard separately to the new claim. It would be improper for the old claim to be 'consolidated' with the new claim.
- (f) Although much has been made of the argument regarding discovery and its relevance to the old claim, it is contended that discovery has no bearing on the old s 146 notice being relied on. The efficacy of that notice can be determined by looking at it.
- (g) Breaches of the lease are relevant to the new proceeding, where repudiation is being alleged, but they are no longer not relevant to the old proceeding, because repudiation is no longer relied on.

### **Decision regarding Luchio's application under s 82(1)(b) of the VCAT Act**

27 I consider that Luchio's reliance on *Solomon Lew v Priester* is misconceived. I say this principally because, although the two proceedings involve the same parties and the same premises and the same lease, the two

proceedings do not involve the same legal issues, and in key respects do not involve the same facts.

- 28 The primary issue raised by Luchio for determination in BP366/2014 is common law repudiation. That claim is now to be withdrawn.
- 29 Luchio's fallback position is that it is entitled to possession because it can rely on one of three s 146 notices issued, in particular, the notice issued on 12 March 2014. Epping says that that notice is patently invalid. Putting that contention to one side for the moment, it is clear that for Luchio to rely on the notice issued on 12 March 2014 would be inconsistent with its reliance in the new proceeding on a s 146 notice issued on 19 June 2015. Unless Luchio changes its position regarding the validity of the notice of 19 June 2015, it is hard to see how it will secure an order for possession based on the notice of 12 March 2014. Luchio's act in issuing a s 146 notice on 19 June 2015 appears inconsistent with the proposition that the lease was terminated earlier. Accordingly, it seems unlikely that Epping will need to apply for relief against forfeiture in the first proceeding.
- 30 If the issues in BP366/2014 were limited to common law repudiation and the efficacy of the s 146 notice dated 12 March 2014, I would have little hesitation in setting the matter down for a single day so that it could be finalised. I say this because:
- (a) the allegation regarding repudiation is to be withdrawn; and
  - (b) I do not consider it is necessary for the issue of Luchio's entitlement to possession based on the s 146 notice dated 12 March 2014 raised in BP366/2014 to be heard together with BP1496/2015. Indeed, I agree with Epping's submission that the proposition that the s 146 notice dated 12 March 2014 is valid is inconsistent with the pleading in proceeding BP1496/2015, which is based on the notice dated 19 June 2015. This inconsistency is a reason for the two proceedings not to be heard and determined together.
- 31 However, the proceeding also involves the question of the applicability of the RLA, and accordingly, the relevance of this issue to the application to hear and determine the proceedings together must be considered.
- 32 It is Luchio's contention that the question of whether a lease is a retail lease for the purposes of the RLA is not a static one that can only be determined by reference to the lease at the time at which it is made. It is contended that the issue is dynamic, and that the answer is capable of changing depending on the use to which the leased premises are put from time to time. This is one of the reasons why Luchio says a further order for discovery is appropriate.<sup>3</sup>
- 33 Luchio's contention that the issue of whether a lease is a retail lease for the purposes of the RLA is a dynamic one is a new contention which was not

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<sup>3</sup> Paragraph 34 of Luchio's written submissions dated 1 December 2015.

raised at the opening or during the hearing of BP366/2014. If it were asked why this was the case, Luchio's explanation, no doubt, would be that the matter has only been raised for consideration as a result of Epping, during the hearing, putting into evidence a number of documents which it had not discovered prior to the hearing. Be that as it may, there has been no legal argument as to the correctness of the proposition relied upon, and, having regard to the criticality to the parties of the issue of whether the RLA applies to the lease, I consider that it is appropriate that the matter be properly argued.

- 34 However, this conclusion does not mean that the two proceedings should be heard together. The issue of the applicability of the RLA is a stand-alone issue which can be determined in BP366/2014, and having been determined, will bind the parties in any subsequent proceeding including BP1496/2015.
- 35 The upshot is that I agree with Epping's contention that the legal issues raised in the old proceeding are not the same as the legal issues raised in the new proceeding, which relate to the validity of the subsequent notice of 19 June 2015, and the purported termination of the lease on 23 July 2015, and potentially an application for relief against forfeiture.
- 36 In these circumstances, I consider that an order that BP366/2014 be heard and determined together with BP1496/2015 would not necessarily reduce the parties' costs, nor would it necessarily mean that the time and resources of the Tribunal would be better utilised, nor would it necessarily avoid duplication of witness statements and evidence. There are no common legal issues other than, potentially, relief against forfeiture. As there appears to be no realistic prospect that relief against forfeiture will need to be determined in BP366/2014, there is no realistic danger that two separate hearings may result in inconsistent findings.
- 37 On the other hand, to order, at this point, that the further hearing of BP366/2014 be conducted together with a hearing of BP1496/2015, would be likely to cause prejudice or unfairness to Epping, as Epping would be denied the opportunity to pursue at the earliest possible time the determination of proceeding BP366/2014 in its favour on the basis that the claim for common law repudiation will have been withdrawn, and that there can be no successful claim for possession by Luchio based on the s 146 notice dated 12 March 2014 in circumstances where that notice is defective on its face, alternatively, is inconsistent with the issue of the subsequent notice on 19 June 2015.
- 38 Accordingly, I find that the application made by Luchio that BP366/2014 be heard and determined together with BP1496/2015, should be refused.
- 39 BP366/2014 must be set down for further hearing. I consider allowance of one day is appropriate.

- 40 There will be an order for further discovery relating to documents relevant to the issue of the applicability of the RLA so as to ensure that no party is taken by surprise by any new document at the further hearing. I note that the making of this order is not to be construed as a determination that Luchio's contention, namely, that the applicability of the RLA is a dynamic issue, is correct at law. As I have indicated, the matter has not yet been argued.
- 41 In circumstances where Luchio's application to have the two proceedings heard and determined together has been refused, I do not consider that an order for further discovery regarding documents relevant to relief against forfeiture should be made in BP366/2014. Epping has, during the hearing, put into evidence documents relevant to this issue. Any concern that Luchio will be taken by surprise by the tendering of new documents at the resumed hearing can be dealt with by an appropriate order. Furthermore, having regard to the reliance which is being placed in the new proceeding on the subsequent notice dated 19 June 2015, it is hard to see how in the old proceeding, a claim for possession based on the s 146 notice dated 12 March 2014, or any earlier notice, can be successful.
- 42 In order to avoid the risk of surprises in the resumed hearing, and the attendant risks of inconvenience, delay and further expense, I am persuaded that I should make an order that neither party shall, without the leave of the Tribunal:
- (a) be permitted to rely on any claim or defence that is not set out in the Points of Claim or Points of Defence (as amended); or
  - (b) rely on any document that has not either already been put into evidence, or been disclosed in a further list of discoverable documents on or before 19 February 2016.

### **Leave to amend**

- 43 On 22 November 2015, Luchio filed and served proposed amendments to the Points of Claim pursuant to the orders made by Judge Jenkins on 9 November 2015. The effect of the amendments, had they been allowed, would have been to withdraw the claim by Luchio for a declaration that Epping has repudiated the lease.
- 44 If it is Luchio's intention to withdraw the allegation regarding repudiation of the lease then it should be allowed to amend its Points of Claim accordingly.
- 45 A question, however, remains as to whether any amendment of the Points of Claim regarding the s 146 notices is necessary, or at least appropriate.
- 46 There are three s 146 notices referred to in the original Points of Claim, namely, notices dated 13 October 2010, 9 July 2012 and 12 March 2014. In its written submissions, Luchio says that if proceeding BP366/2014 is heard together with proceeding BP1496/2015, then it will rely only on the

subsequent notice, that is to say, the notice dated 19 June 2015.<sup>4</sup> As the Tribunal has declined to order that the two proceedings be heard together, the question of whether Luchio will rely only on the subsequent notice is left begging.

- 47 It is appropriate that Luchio should define its position about this issue, particularly as, in its written submissions, Luchio concedes that the notice issued on 19 June 2015 ‘addresses the same issues as those relied upon for repudiation in the earlier notices’.<sup>5</sup>
- 48 It is also appropriate, in my opinion, that Luchio should amend its Points of Claim to articulate the legal proposition which it will seek to make out regarding the dynamic nature of the characterisation of the lease for the purposes of the RLA. Furthermore, it would appear that when BP366/2014 was commenced, Luchio’s position was that the lease was not, and never had been, a retail lease within the definition prescribed in the RLA. If Luchio’s new position is that the leased premises were initially, or at least *may* have been initially, retail premises within the definition contained in the RLA, but that the character of the premises has changed, then it should fully articulate its position. Epping will thus be put in a position where it can investigate the position before the hearing resumes.

#### **Orders for reconciliation of accounts payable and orders for further discovery**

- 49 Luchio seeks an order that Epping provide a reconciliation in response to the amounts claimed by it in the s 146 notice dated 19 June 2015.
- 50 It is not necessary for the Tribunal to determine this application today, having regard to the Tribunal’s refusal to order that BP366/2014 and BP1496/2015 be heard together. It is appropriate that this application should be determined at a directions hearing fixed specifically for BP1496/2015.
- 51 Having regard to the Tribunal’s order, which will likely result in BP1496/2015 being heard after the hearing in BP366/2014 is concluded, and having regard to the order which will be made in this proceeding for further discovery of documents relevant to the issue of the applicability of the RLA to the lease, the determination of any application for an order for further discovery should be determined at the proposed directions hearing to be fixed for BP1496/ 2015.

#### **Epping’s s 75 application**

- 52 At the hearing on 1 December 2015, Mr Hawas contended that Epping was entitled to an order pursuant to s 75 of the VCAT Act that the proceeding against it be summarily struck out or dismissed. He noted that Luchio had indicated that it was going to withdraw its common law repudiation claim,

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<sup>4</sup> Luchio’s written submissions, paragraph 15.

<sup>5</sup> Luchio’s written submissions, paragraph 18.

and he said that the alternative claim for possession based on the s 146 notice dated 12 March 2014 was hopeless as the notice was defective on its face. However, he did not argue this point in detail, and said that the s 75 application was not pressed. Accordingly, the application will be dismissed on this basis. However, it is to be noted that the s 75 application would have been unlikely to have succeeded anyway, as the issue of whether the lease was subject to the RLA still remains to be determined in the original proceeding.

**Member C Edquist**