VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1152/2018

CATCHWORDS

Retail Leases Act 2003: breach of lease of retail premises; tenant, a company, became deregistered; claim by landlord against guarantors; head lease had been assigned to applicant as tenant; assignment of sub-lease made between tenant and landlord not established; issue as to applicant's ability to sue tenant in absence of express assignment of sub-lease; ss 141(1) and (2) of the *Property Law Act 1958* (Vic) considered; *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632 applied; claim for arrears; claim for damages for loss of bargain; claim for damages in respect of tenant's failure to make-good; *Joyner v Weeks* [1891] 2 QB 31 *applied;* claim for damages in respect of three month rent free period allowed to incoming tenant denied.

APPLICANT	Resdal Corp (Vic) Pty Ltd
FIRST RESPONDENT	Maliad Pty Ltd (ACN: 141 437 649) (Struck out 18/03/2019)
SECOND RESPONDENT	Ka Cheng
THIRD RESPONDENT	Sooi Phing Lee
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	20 March 2019
DATE OF RECEIPT OF APPLICANT'S SUBMISSIONS	3 April 2019
DATE OF RECEIPT OF SECOND AND THIRD RESPONDENTS' SUBMISSIONS	17 April 2019
DATE OF RECEIPT OF APPLICANT'S SUPPLEMENTARY SUBMISSIONS	12 August 2019
DATE OF ORDER	26 September 2019
CITATION	Resdal Corp (Vic) Pty Ltd v Maliad Pty Ltd (Building and Property) [2019] VCAT 1499

ORDER

1 The Tribunal declares, subject to Order 2 below, that the applicant is entitled to an order against the second and third respondents for payment of the sum of $92,827.37.

2 **By 9 October 2019** the parties must submit materials (including if necessary affidavit material) addressing the question of whether the bank guarantee issued by the first respondent in the sum of $18,162.40 has been cashed, and how it is to be taken into account, in any event, in determining the liability of the second and third respondents.

3 Leave is granted to the applicant to make an application for interest within 30 days.

4 Leave is granted to the applicant to make an application for costs within 30 days.

5 Leave is granted to the applicant to make an application for reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* within 30 days.

6 **The principal registrar is directed to refer any application for interest, costs or reimbursement of fees to Member Edquist who will make further orders in order to give the second and third respondents an opportunity to respond.**

MEMBER C. EDQUIST

APPEARANCES:

For Applicant	Ms L. Papaelia, of counsel
For Respondents	Mr K. W. Cheng, in person

REASONS

INTRODUCTION

1 This case arises out of the termination of a lease of a shop located in the Central Shopping Centre in Caroline Springs (**the lease**). The landlord under the lease was Geopec Pty Ltd (ACN 112 042 501) (**Geopec**) and the tenant was Maliad Pty Ltd ACN 141 437 649 (**the tenant**). Ka Wing Cheng and Sooi Phing Lee (**the guarantors**) executed the lease on behalf of the tenant[1], and personally as guarantors[2]. It is to be noted that Geopec is not the applicant in this proceeding. The applicant is Resdal Corp (Vic) Pty Ltd. The applicant's standing bring the proceeding is discussed below.

2 The lease commenced on 6 December 2012, and had a term of five years, but did not run its full course. It came to an end because the tenant fell into arrears of rent, outgoings and other charges under the lease, and the landlord re-entered the premises. The tenant left behind fit out, signage, furniture, appliances and stock including perishable food.

3 The landlord initiated this proceeding against the tenant and the guarantors on 3 August 2018[3]. The proceeding was set down for hearing on 20 March 2019. The tenant became deregistered. According to an ASIC Current & Historical Organisation Extract, this occurred on 10 June 2018, well before the application was filed. The claim against the tenant was struck out on 18 March 2019. The only recourse left to the applicant was to proceed at the hearing against the guarantors.

4 The shop leased was No.14C. The lease was executed on 20 February 2013 although it was stipulated to have commenced on 6 December 2012. It came to an end about four months prior to the fifth anniversary of its commencement, when the landlord re-entered and terminated the lease on 2 August 2017

5 The dispute came on for hearing on 20 March 2019. The applicant was represented by Ms L Papaelia of Counsel. The applicant called Vlado Naumovski, a director of the applicant, and David Frenkel and Steven Fein, both of Teska Carson, the managing agents. Mr Cheng and Ms Lee appeared in person. The evidence was concluded on the day of the hearing, but the parties were given leave to file submissions after the hearing.

6 The amount claimed from the guarantors (clarified at the opening of the hearing) is $107,952.20. Claims are made for rent, outgoings and other charges due under the lease; loss of bargain damages; and compensation for the tenant's failure to make-good the premises. The guarantors concede that

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[1] Mr Cheng signed the lease as a director of the tenant and Ms Lee signed as secretary director of the tenant, at page 42 of the lease. They also signed the disclosure statement on behalf of the tenant on page 12 of that statement.
[2] Mr Cheng and Ms Lee executed the lease as guarantors at page 3 of the lease.
[3] This was the date when the fee was paid on the application.

the amounts claimed for arrears and loss of bargain damages are correctly calculated, but defend those particular claims on the following bases:

(a) the tenant moved out of the premises because the landlord did not provide a suitable environment to enable it to carry out its business, and specifically insisted on a change of colour and the style the restaurant and the temperature in the restaurant was too high;
(b) the applicant is not entitled to payment of the promotion levy for the period between the termination of the lease and end of the lease term because it did not promote the shopping centre.

7 The applicant's claim in respect of making good the premises has two limbs. The first is for damages in respect of the estimated cost of making good, which is put at $49,500 inclusive of GST. The second is a claim for $15,125, being the value of a rent-free period allowed to the incoming tenant on the basis that this tenant had to make-good the premises. The guarantors dispute both these claims.

ISSUES

8 The issues to be resolved, accordingly, are as follows:

(a) the standing of the applicant to bring the claim;
(b) the viability of the defence that the tenant moved out of the premises because of the landlord's failure to provide a suitable environment for the tenant to conduct its restaurant business;
(c) the liability of the guarantors to pay the promotion levy for the period after the termination of the lease up to the end of the lease term;
(d) the liability of the guarantors for the cost of making good; and
(e) the liability of the guarantors for the cost of the incoming tenant's rent-free period.

THE STANDING OF THE APPLICANT TO BRING THE CLAIM

9 In the applicant's Amended Points of Claim filed in October 2018, it was made clear that the applicant was not the original landlord. The history of the lease was explained in this way:

(a) the registered proprietor of the land at 13-15 Lake Street known as Central Shopping Centre Caroline Springs was Resdal Corp Pty Ltd (ACN 119 629 994) ("**the head landlord**");

(b) by lease signed on or about 21 November 2006 (**the headlease**), the head landlord leased the Centre to Geopec for a term of 50 years commencing on 1 October 2006[4];

(c) the sub-lease of Shop 14C was made between Geopec and the tenant on 20 February 2013.

[4] The head lease was tendered by the applicant.

10 At the hearing the applicant tendered a deed of assignment of lease dated 2 June 2017 made between 5 parties including Geopec, Naumovski Investments Pty Ltd (ACN 120 121 708), the head landlord (Resdal Corp Pty Ltd) and Robert Ugrinovski and Vlado Naumovski. Clause 2 of the deed effects an assignment of Geopec's interest in the head lease and in the head-leased premises, together with Geopec's interest in the covenant's under the head lease, to Naumovski Investments Pty Ltd.

11 Naumovski Investments Pty Ltd (ACN 120 121 708) changed its name to Resdal Corp (Vic) Pty Ltd, ie the name of the applicant. This was established by the production of an ASIC extract dated 19 March 2019 indicating that the proprietary company with the ACN 120 121 708 had changed its name to Resdal Corp (Vic) Pty Ltd on 3 August 2017. On this basis I find that the applicant received an assignment of Geopec's interest in the head lease and in the head-leased premises, and in Geopec's interest in the covenants under the head-lease, under the deed of assignment of lease dated 2 June 2017.

12 The failure of the applicant to establish an assignment of the sub-lease was a matter which the applicant acknowledged in its initial written submissions. The issue was touched on in those submissions at [6] where the applicant put forward the following proposition:

> Even though Resdal is not named as the landlord under the sub- lease, it is entitled to pursue the guarantors to the extent that Maliad has breached covenants that touch and concern the land.

13 In support of this proposition, the applicant referred to a number of cases, but did not draw the attention of the Tribunal to any particular passages in those authorities. Moreover, the applicant did not refer to any legislation. Because of the centrality of the proposition to its case, the applicant was given an opportunity to elaborate on its submissions by 12 August 2019, on the basis that if further submissions were filed by the applicant, the guarantors would be entitled to file response submissions by 3 September 2019.

14 The applicant accepted the opportunity to file further submissions on the point, but the guarantors have not filed response submissions. In these circumstances, the Tribunal is now in a position to finalise its decision.

15 In its further submissions, the applicant refers to ss 141(1) and (2) of the *Property Law Act 1958* (Vic) ("**the PLA**"). They provide:

> **Rent and benefit of lessee's covenants to run with the reversion**
> (1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary

> estate, and without prejudice to any liability affecting a covenantor or his estate.
> (2) Any such rent, covenant or provision shall be capable of being recovered, received, enforced and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or of any part as the case may require, of the land leased.

16 The applicant makes no submission regarding the effect of ss 141(1) of the PLA but by its terms, it is clear that the obligation to pay rent by the tenant and the benefit of every covenant in the lease is annexed and incidental to, and shall go with, the reversionary estate in the land. In this way, the applicant, being entitled as head -landlord to the reversion of the sub-lease, is entitled to recover the rent and the benefit of other covenants running with the land.

17 The applicant also elaborates on its original submission, based on the common law. The applicant referred to the decision of the House of Lords in *P & A Swift Investments (a firm) v Combined English Stores Group plc* **(*Swift's case*)**[5] and in particular to the speech of Lord Templeman at pp 637-8 where he said:

> My Lords, the appellant, the surety, joined in a lease to guarantee the performance and observance of the covenants by the tenant contained in the lease. A covenant by a tenant which touches and concerns the land runs with the reversion; the benefit of such a covenant vests in the successors in title of the landlord; the successors in title of the landlord may sue upon the covenants although the benefit of the covenants may not have been expressly assigned. For this purpose a successor in title of the landlord is a person who, at the date of the breach of covenant, is entitled to the reversion expectant on the expiration or sooner determination of the term demised by the lease.

18 Section 141(1) of the PLA is consistent with this common-law principle. In *Swift's case* the original landlord had assigned the reversion to a new landlord, who was the respondent to the appeal. There was no express assignment of the benefit of the tenant's covenants or of the benefit of the surety's covenant. Of particular relevance to the present case is the following passage, also drawn from Lord Templeman's judgment:

> The tenant defaulted in payment of the rent reserved by the lease and thereby committed a breach of a covenant which touched and concerned the land. The respondent landlord, failing to recover the rent from the tenant, brings these present proceedings against the surety to recover the amount of the unpaid rent. The surety denies liability, pleading that the surety's covenant does not touch and concern the land and does not run with the reversion so as to be enforceable by the respondent landlord. The respondent landlord replies that a covenant by a surety, in whatever form or expression the surety covenant may take, is a covenant that the tenant's covenants shall be performed and observed. A covenant by a surety that a

[5] [1989] AC 632at pp 637-638.

> tenant's covenant which touches and concerns the land shall be performed and observed must itself be a covenant which touches and concerns the land; the benefit of that surety's covenant will run with the reversion, and the covenant is therefore enforceable without express assignment. I agree.

19 The applicant points out that this proposition drawn from Swift's case was followed by the High Court in *Gumland Property Holding Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd*[6]. Relevantly, the High Court (comprising Gleeson CJ, Kirby J, Heydon J, Crennan J, Kiefel J) observed at [102] "the covenants in the Guarantees cannot be regarded as collateral obligations not affecting land, and they run with the land."

20 Later, at [108], the Court addressed the question of whether *Swift's case* was distinguishable as being only concerned with arrears of rent, not loss of bargain damages. In determining that *Swift's case* is not capable of being so distinguished, the Court said:

> The tests stated by the House of Lords go to the question whether a covenant touches and concerns the land so as to entitle a transferee of the reversion to the benefit of the guarantee covenant. There is no reason why this Court should not apply the principle stated by the House of Lords in this respect as part of the law of Australia. There is every reason why their Lordships' exposition of the applicable law should be accepted as part of the law of this country.

21 In the present case, the guarantors, under clause 48.1 of the lease, unconditionally guaranteed to the landlord the payment of all monies payable by the tenant, unconditionally guaranteed the due and punctual performance of the tenant's obligations under the lease, and unconditionally agreed that if the tenant breached any of its obligations under the lease, they would perform that obligation. Under clause 48.2, as a separate undertaking, the guarantors made themselves liable for, and indemnified the landlord, for any loss or damage incurred by the landlord in respect of the tenant's breach of the lease. Applying *Swift's case*, I find that these covenants given by the guarantors, being covenants that the tenant's covenants that touch and concern the land would be performed and observed, are themselves covenants which touch and concern the land. The benefit of those covenants runs with the reversion, and are enforceable without express assignment against the guarantors.

22 The applicant, accordingly has standing to bring this proceeding against the guarantors.

DEFENCES RAISED BY THE GUARANTORS

23 I now turn to the defence raised by the guarantors that the tenant moved out of the premises because the landlord did not provide a suitable environment to enable it to carry out its business, and specifically insisted on a change of

[6] (2008) 234 CLR 237

colour and the style of the restaurant. The guarantors also asserted that the temperature in the restaurant was too high.

24 Obvious difficulties arise when a guarantor seeks to argue, many months after the termination of the lease, that the cause of the failure of the tenancy was the condition of the premises. However, it was not argued by the applicant that these defences could not be raised at this late stage, and each of the guarantors' arguments was addressed on its merits.

Colour and style of the restaurant

25 The allegation here is that the landlord required the tenant to change the colour and style of the restaurant. Specifically, Mr Cheng said that the landlord required the tenant to paint the walls black or a dark colour. The applicant disputes this, and highlights the absence of any documentary evidence to prove the allegation. It refers to the Tenancy Fit out Works Guide annexed to the sub-lease, and points out that no such obligation is contained in that Guide. It is not necessary that I make a determination as to which party is right, because, even if I were to assume that the landlord had directed the tenant to paint the walls black or a dark colour, I cannot be satisfied at this late stage that the colour of the walls had anything to do with the failure of the restaurant. On the contrary, I note that the painting of the restaurant occurred at the outset of the tenancy during the fit out process. The tenancy survived for at least four years after the completion of the fit out. This suggests that the painting was not a causative factor in the failure of the restaurant. I find against the guarantors in respect of this defence.

Temperature inside the restaurant

26 The guarantors contend that the restaurant in the warmer months was very hot. Mr Cheng used as evidence an image on his phone showing an outside temperature of 24° on 23 September 2014 at 5.21 p.m., and a photograph of a temperature gauge said to have been taken at the same time showing a temperature inside the restaurant of 55°.

27 The applicant contends in its original written submissions at [15] that "There was no evidence upon which it can be accepted that the temperature according to Mr Cheng's phone or the gauge was reliable". That is an accurate statement, but I am not prepared to infer that either Mr Cheng's phone or the temperature gauge were wrong. However, even if I were to accept that the two readings were correct, there is an issue as to their significance. Whether the temperature recorded inside the restaurant on this particular evening was the result of a one-off failure of the shopping centre's air-conditioning plant, or represented a systemic issue, could not be established by a single set of readings. Furthermore, the readings were taken in September 2014, which was almost three full years before the termination of the lease. The linkage between the temperature and the termination of the lease is not made out.

28 Mr Cheng suggested that the air-conditioning problem arose from a deficiency in the relevant plant room. One of the witnesses called on behalf of the applicant was Mr Naumovski, a director of both the head landlord and of the applicant. He was questioned about the malfunctioning of the plant room, and he responded that he had never heard of this. He added that the plant room which serviced the restaurant also serviced 14 other tenancies, and that none of the other tenants had complained.

29 In any event, the applicant referred to clause 76 of the lease, which provided that it was the tenant's obligation to install an air conditioner. Reference to clause 76.1 of the lease confirms that although the tenant is under no obligation to install air-conditioning, it is the tenant's responsibility to do so if desired. It was not suggested by the guarantors that the tenant had installed air-conditioning.

30 For all these reasons I find that the temperature of the restaurant in the warmer months was not causative of the termination of the lease, and accordingly does not provide a defence to the guarantors to the claim now being made against them.

THE APPLICANT'S MONETARY CLAIMS

31 As the guarantors failed to persuade me that the applicant cannot pursue them because the landlord is responsible for the failure of the tenancy, it is necessary to address the specific monetary claims made by the applicant. At the beginning of the hearing, counsel for the applicant tabled an "aide memoire" which set out particulars of the loss and damage claimed. The figures contained in the document were discussed in detail at the hearing, and a number of the claims were not disputed. I now set out the accepted claims.

Arrears of rent until date of termination of the lease on 2 August 2017

32 The landlord claimed $21,115.25 for arrears until 2 August 2017, comprising:

(a) $17,338.45 for rent and outgoings;

(b) $1,363.80 for promotion levy;

(c) $660 for the landlord's costs in relation to the notice of breach;

(d) $253 for the costs of locksmiths to change the locks; and

(e) $1,500 for the landlord's legal costs in relation to the breach

33 The guarantors accepted each of these claims at the hearing. Accordingly, the landlord is entitled to an order for $21,115.25 in respect of arrears of rent, outgoings and associated costs up to the termination of the lease.

Loss of bargain damages

34 The claim here was for damages for loss of the lease. Specifically, the claim was in respect of rent, outgoings and other charges that had been payable

under the lease, for the period of 124 days from the date of termination on 2 August 2017 up to 5 December 2017 which is the date upon which the lease would have expired had it not been terminated. The figures claimed were as follows:

(a) $16,175.18 for rent, calculated at the rate of $47,379.27 per annum;

(b) $2,144.05 for outgoings at the rate of $6,280.20 per annum;

(c) $808.74 for the promotion levy;

(d) $1,064.87 for council rates;

(e) $2,019.27 for GST.

35 At the hearing Mr Cheng, on behalf of the guarantors, readily accepted the figure for loss of rent. He initially reserved his position regarding the figure $2,144.05 claimed in respect of outgoings, but ultimately accepted the claim. After he was taken to the calculation of council rates, he accepted this claim. However, he disputed the claim for the promotion levy in principle, although he accepted the calculation. Because he was disputing the promotion levy, the claim for GST could not be resolved at the hearing.

The promotion levy

36 In respect of the promotion levy claimed after the termination of the lease, Mr Cheng protested that he didn't understand why the charge had been raised. He did not see any promotion being provided by the landlord.

37 Evidence was given by the managing agent, Steven Fein of Teska Carson, about the promotion levy. He deposed that the tenant had the benefit of a marketing consultant, and social media, together with the benefit of specific promotions. A website was maintained using the levy. Mr Cheng did not dispute this evidence. On this basis, I find that the promotion levy was justified, and that the guarantors are liable for it.

38 As noted, Mr Cheng accepted the calculation of the promotion levy. The upshot is that in relation to the claim for damages for loss of bargain, there will be an award of $808.74 for the promotion levy in addition to awards of $16,175.18 for rent, $2,144.05 for outgoings and $1,064.87 for council rates. The total of these loss of bargain claims is $20,192.84.

GST

39 Because the promotion levy has been allowed, it is possible to finalise the claim for GST made as part of the claim for damages for loss of bargain. The claim for GST is allowed at $2,019.28.

AWARD MADE IN RESPECT OF LOSS OF BARGAIN DAMAGES

40 Allowing for GST, the total award made in respect of loss of bargain damages is accordingly $22,212.12

MAKING GOOD

41 The applicant's claim for making good is based on clause 20.1 of the sub-lease. Under this provision, the tenant is required, when the lease ends, to give the premises back to the landlord in the same condition as they were at the start of the lease, except for fair wear and tear. The reinstatement obligation includes reinstating the ceiling if it has been removed including air-conditioning and fire sprinkler alterations to suit the reinstated ceiling, removing all the tenant's property, and leaving the premises in a clean and tidy condition, with all wiring and cabling secured and made safe.

42 Mr Fein gave evidence that he had been the managing agent at the time that the tenant broke the lease. He deposed that he told Mr Cheng about the obligation to make-good. After the tenant left, he made an inspection. He described what he saw as the "complete abandonment of a working restaurant." Apart from the fit out, stock, signs and furniture had been left. Mr Fein's evidence about these matters was supported by photos.

43 The guarantors confirmed in their defence that when they took possession of the shop, it was "completely empty". They installed a ceiling, partitions, pumping system, wiring, a raised floor, and a canopy.

44 On the basis of Mr Fein's evidence, I find that the tenant failed to make-good the premises upon abandonment. One of Mr Cheng's submissions was that the landlord had the benefit of the fit out when endeavouring to re-let the premises. From this it is clear that the tenant made no attempt to make-good the premises in the period after the abandonment up to the end of the term of the lease in December 2017. I accordingly find that there has been a breach of clause 20.1 of the sub-lease. I now turn to the question of quantification of the applicant's loss.

45 The claim made by the applicant was for two separate sums. The first was for the estimated cost of making good, which was put at $45,000 plus GST, a total of $49,500. The second was for the sum of $15,125, which was claimed in respect of loss of rent for a three month rent free period granted to the incoming tenant on the basis that it said it would need this time in order to make-good the premises.

THE CLAIM FOR THE COST OF MAKING GOOD

46 Mr Fein identified a quotation from K & K Industries dated 4 September 2017. This set out a scope of work including preliminaries, stripping out the joinery and bulkheads, removing partitions, removing the bathroom, removing frosting on windows, removing floor coverings, grinding concrete, removing and decommissioning light fittings, removing and decommissioning air-conditioning and ceiling fans, dismantling, decommissioning and disposing of all fixtures and fittings, capping and decommissioning electrical cables and gas pipes and the fire sprinkler system, removing the ceiling, removing and disposing of tables and chairs, removing all debris (using a skip bin) and undertaking a final clean. The

scope of work also included reinstatement including repairing and plastering of walls, repainting, installing floor coverings, installing of new ceilings, and installing and reconfiguring the fire and sprinkler service. The quotation was $49,500 inclusive of GST, and formed the basis of the applicant's claim.

Reasonableness?

47 One of the defences raised by the guarantors was that the claim for the cost of making good was not reasonable.

48 Mr Fein gave evidence that K & K industries were a reputable interior fit out company who were "always in the running" and that Teska Carson "often got them involved". Mr Fein conceded that he had not obtained another quote, but justified this decision on the basis that K & K Industries were "good contractors" and that he was "comfortable" with their price, as it was "not over the top". He added that "restaurants are the most expensive to make-good".

49 Mr Naumovski also gave evidence in relation to the quotation received from K & K Industries. When it was put to him that the quote was reasonable, he responded that it was "cheap". He added that he had the experience to make that assessment.

50 The guarantors offered no evidence regarding the reasonableness of the quotation relied on by the applicant. It is to be noted that the quotation is dated 4 September 2017, which was shortly after the abandonment of the premises but before the expiration of the term of the lease. Accordingly, it cannot be said that the applicant is seeking to recover the cost of making good assessed at a date substantially after the date of breach of the covenant, when inflation might have raised the cost of the work. In these circumstances, and noting that Mr Fein and Mr Naumovski respectively said the K & K Industries quotation was "not over the top" and "cheap", I find that the quotation was reasonable.

The other defences raised by the guarantors

51 The second defence raised was that as a well-built fit out and cooking equipment had been left behind which this would have assisted the applicant in re-leasing the premises. Putting aside my doubt that this factor is relevant to the assessment of damages for breach of the tenant's covenant to make-good, I reject this defence on an evidentiary basis. The guarantors called no expert evidence from a leasing agent to support their argument. On the other hand, Mr Naumovski deposed that the state the premises had been left in made them hard to lease. The class of tenants was limited, as "the people looking at it were in the food industry" because the premises needed "de-fitting".

52 The third defence raised was that the fit out and the cooking equipment left behind were being used by the incoming tenant. Even if it is accepted that this was the case, I do not think it is a factor to be taken into account in

assessing the applicant's claim for damages for breach of the make-good covenant. The utility of the fit out is not to the point, unless the incoming tenant paid for the fit out. Reference to the new tenant's lease establishes this was not the case.

53 The final defence raised by the guarantors is that as the applicant had not actually carried out the make-good works, it could not recover their estimated cost.

54 In rebutting this proposition, the applicant relied on a number of authorities including *Tabcorp v Bowen Investments*[7]. In this case, a tenant of a commercial building had, in breach of a covenant in the lease that it would not without the written approval of the landlord make any substantial alteration or addition to the premises, substantially altered the foyer. The measure of damages was held by the High Court to include the cost of rectification, not merely the difference between the value of the building with the old foyer and the value of the building with the new foyer.

55 The applicant also relied on the decision of Hargrave J of the Supreme Court of Victoria in *Fenridge v Retirement Care*[8]. There a lessee had breached an obligation to deliver up premises at the end of a lease in as good repair, order and condition as they were at commencement of the lease. In developing an apartment complex, the lessor did not conduct any of the precise make-good works required. It had determined that it would never do so. It was held, nonetheless, that the lessor was entitled to recover cost of the required make-good works. The Supreme Court, at [354] referred to *Joyner v Weeks*[9]; where the Court of Appeal in England considered a case where the premises were left in a state of disrepair. The Court there held that the 'ordinary prima facie rule' for assessment of damages for breach of a make-good obligation is 'such a sum as will put the premises into the state of repair in which the tenant was bound to leave them'. The rule in *Joyner v Weeks* has been approved by the High Court. As the Supreme Court observed in *Fenridge v Retirement Care* at [359:]

> In *Graham v Markets Hotel Pty Ltd*, the High Court stated that 'the general rule' for assessing damages for breach by a lessee of a covenant to deliver up the demised premises in good repair was 'settled or 'authoritatively stated, in *Joyner v Weeks*.

56 I can see no reason not to apply the "general rule" as stated in *Joyner v Weeks*, and find that the applicant is entitled to recover the reasonable estimated cost of making good the premises, even though it has not carried out the works. I accordingly award $49,500 to the applicant in respect of this claim.

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[7] [2009] 236 CLR 272
[8] [2013] VSC 464
[9] [1891] 2 QB 31

The claim for the three month rent free period allowed to the incoming tenant

57 Mr Naumovski gave evidence that on 24 July 2018 a new lease was executed between the applicant and SDJ Hospitality Group Pty Ltd (**the new tenant)**. This lease was tendered. The term commenced on 9 April 2018. Reference to the lease confirms that the new tenant was given a rent free period of three months from the commencement date. Mr Naumovski deposed that the free period had been given for a number of reasons, including to enable the new tenant to clean out and "de-fit" the premises.

58 At [12] of its original written submissions, the applicant makes the claim on the basis that "[t]he authorities establish that, in addition to the cost of making-good premises, damages may be awarded for loss of the use of premises while they are undergoing make-good works". Reliance is placed on an 1835 English case, *Woods v Pope*[10]. It is said that in this case a landlord was successful in a claim for compensation for the loss of use of premises for a reasonable time during which the landlord was undertaking make-good repairs. It is argued that in the present case the applicant should be entitled, in addition to the actual cost of making good the premises, compensation for the loss of use of the premises while those works were being carried out. In the present case, that loss was said to be represented by the rent-free period given by the applicant to the new tenant.

59 I do not accept that this case falls within the principle said to be established by *Woods v Pope.* In *Woods v Pope* the landlord carried out the make-good works. In these circumstances, it was a small step for the court to allow compensation for the loss of use of the premises while that work was being carried out, in addition to the cost of actually carrying out the work. Here, the situation is different.

60 The tenant abandoned the premises in August 2017, about four months before he lease ran to full term. On 2 June 2017 the applicant had received an assignment of the head-lease. It, accordingly, was the party in control when the lease was forfeited. The applicant must have been aware that it would be entitled to an order for damages in respect of the cost of making good the premises from the tenant, and yet it took no step to undertake the make-good works. Mr Naumovski was asked about this, and deposed that the applicant could not afford to carry out the work. In any event, the make-good works were not carried out.

61 In late July 2018, that is to say about eleven months after the termination of the lease, the premises were let to the new tenant. The tenant sought, and was granted, a rent-free period while it fitted out the premises for its own purposes. Mr Naumovski deposed that this was because the tenant had to remove the tenant's fit out. This is not consistent with Mr Cheng's contention that the incoming tenant retained much of the existing fit out and equipment. On this basis I am not satisfied, on the balance of probabilities,

[10] (1835) 6 C & P 782

that the necessity for the applicant to grant the three month rent free period to the incoming tenant was because of the presence of the tenant's fit out. There may have been other reasons that the rent free period was allowed. For these reasons, I reject the applicant's claim for damages of $15,125 in respect of the loss of rent incurred by it during the incoming tenant's fit out period.

Tenant's bank guarantee

62 The documents handed up during the hearing included a bank guarantee dated 6 December 2012 issued in respect of the premises by the tenant in favour of the landlord. The amount of this rental bond was $18,162.40. There is no expiry date. The "aide memoir" regarding loss and damage submitted by the applicant makes no reference to this bond. Moreover, as far as I can see, neither party dealt with the bank guarantee in submissions. Before final orders are made, it is appropriate that each party be given an opportunity to submit evidence and submissions regarding the bond. This can be done in writing, without the necessity for a further hearing, unless one party or the other reasonably insists on a hearing.

SUMMARY

63 Under paragraph 33 above, the applicant is entitled to an order for arrears of rent and outgoings and associated costs up to 2 August 2017 totalling $21,115.25. Under paragraph 40, the applicant is entitled to an order for damages for loss of bargain totalling $22,212.12. Under paragraph 56, the applicant is entitled to an order for damages in respect of the cost of making good of $49,500. The total of these three awards is $92,827.37. I will make a declaration that the applicant is entitled this sum, subject to the issue of the rental bond being dealt with.

64 As the applicant sought interest in its points of claim, leave will be granted to the applicant to make an application for interest, on the basis of the application is to be made in writing within 30 days.

65 Leave will be given to the applicant to make an application for costs on the basis that any such application is to be made within 30 days. The parties are reminded that as this is a case that falls within the *Retail Leases Act 2003*, the entitlement of the successful party to the costs is governed by s 92 of that Act.

66 Leave will also be granted to the applicant to seek reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* on the basis of the application is to be made in writing within 30 days.

67 In the event that the applicant applies for interest, costs or reimbursement of fees, the guarantors will be given an opportunity to respond.

MEMBER C EDQUIST