VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP126/2016

CATCHWORDS

Retail Lease Act 2003 – rental valuation – Terms of Settlement agreeing to new lease on different terms – found to be an agreement for a lease - rental to be assessed by valuer – rental to continue to be paid at current rate pending assessment – following assessment rental paid for interim period to be adjusted against the amount assessed – rental for period before assessment fixed at a higher rate because Landlord agreed to pay for insurance – higher rate paid by tenant and insurance paid by Landlord - rental assessed by valuer on the basis that the Tenant would pay for insurance – how adjustment should be made with respect to intervening period – no agreement in Terms of Settlement to make allowance for fact that earlier rate higher because it included insurance – in absence of agreement adjustment between the two rental figures to be made without any further adjustment – claim for order for repair – want of repair must be proven

APPLICANT	109 Fitzroy Street Pty Ltd (ACN 100 653 683)
RESPONDENT	Frelane Pty Ltd (ACN 104 410 120)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	In Chambers
DATE OF HEARING	26, 27 and 29 September and 12 December 2016
DATE OF ORDER	31 January 2017
CITATION	109 Fitzroy Street Pty Ltd v Frelane Pty Ltd (Building and Property [2017] VCAT 140

ORDERS

1. Order that the Respondent pay to the Applicant the sum of $134,875.21.
2. Declare that, as from 16 October 2014, the Applicant is responsible to effect the insurances required under the lease of the subject premises in accordance with Clause 16vii of the Terms of Settlement entered into by the parties on 16 October 2014.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr L. Magowan of counsel
For the Respondent	Mr P.R. Best of counsel

REASONS FOR DECISION

The dispute

1. The Respondent ("the Landlord") is the owner of retail premises situated at 109 - 111 Fitzroy Street, St Kilda ("the Premises"). The applicant ("the Tenant") is the Tenant of the Premises.

2. A dispute has arisen concerning the amount to be paid by the Landlord to the Tenant by way of a refund of overpaid rental following a rental valuation carried out pursuant to terms of settlement that the parties entered into on 16 October 2014 ("the Terms of Settlement"). The Tenant also complains that the Landlord has failed to repair an awning in front of the Premises pursuant to the Terms of Settlement.

3. These claims are articulated in this proceeding which was issued on 11 February 2016. The Landlord's counterclaim was settled and orders were made by consent on 15 September 2016 that the counterclaim be struck out with a right of reinstatement.

4. The Tenant's claims came before me for hearing on 26 September 2016. Mr Magowan of counsel appeared on behalf of the Tenant and Mr Best of counsel appeared on behalf of the Landlord. I heard evidence from the director of the Landlord, Mr Paraskevas, and from the directors of the Tenant, Mr Wyndham and Miss Saunders. The hearing occupied three days. Directions were given for outlines of submissions to be filed and served and oral submissions were heard on 12 December 2016.

Background

5. By a lease dated June 10, 2002 ("the Original Lease") one Salvatore Forte, the then owner of the Premises, leased them to the Tenant for a period of five years from that date with options for three further terms of five years each. The permitted use of the Premises was "Licensed Bar, Restaurant and Nightclub and such other use as may be agreed to by the Lessor". The Tenant operates a nightclub in the Premises known as "Robarta".

6. The annual rental payable by the Tenant for the first year was $176,800.00, with annual rental increases of four percent each year thereafter. If the Tenant were to exercise the option to take a further term, the annual rental payable for the first year of that further term would be as agreed between the parties or, in default of agreement, it was to be determined by a valuer to be appointed by the President of the Victorian division of the Australian Property Institute. The decision of the valuer was to be binding on both parties.

7. In July 2003 the Landlord purchased the freehold of the Premises and so became entitled to the reversion.

The Deed of Extension

8. On or about 2 November 2007 the Tenant exercised its option to lease the Premises for a further term of five years commencing on 10 June 2007. On that date the parties executed a document entitled Deed of Extension and Variation ("the Deed of Extension").

9. The Deed of Extension provided for a further term of five years until 9 June 2012, and the variations to the tenancy effected by the document were as follows:

   (a) The rental payable by the Tenant during the term was fixed as follows:

   - for the first year, $226,065.32 per annum plus GST;
   - for the second-year, $235,107.93 per annum plus GST;
   - for the third-year, $244,512.25 per annum plus GST;
   - for the fourth year, $254,292.74 per annum plus GST;
   - for the fifth year, $264,464.45 per annum plus GST;

   such rental to be paid in equal weekly payments in advance.

   (b) There were options for three further terms of five years each.

   (c) The due performance of the lease was guaranteed by the Tenant's directors, Miss Saunders and Mr Wyndham.

10. It is important to note that these amounts of rental referred to in part (a) of the last preceding paragraph are described in the Deed of Extension, simply as "Rental".

11. Around the early part of 2012, there were discussions between the parties for a further term but no agreement could be reached as to the amount of rental to be paid. A mediation took place at the office of the Small Business Commissioner following which the Terms of Settlement were entered into by the parties.

The Terms of Settlement

12. In the Terms of Settlement, the parties acknowledged that the option to renew the lease had been exercised. The new lease was to be in the form of the current Law Institute/REIV Copyright Lease with certain additional matters to be included. The new term was to commence on 10 June 2012 at a commencing rental which was to be determined in accordance with the rent determination procedures of the Small Business Commissioner's office. In other respects it was to follow the terms of the current lease.

13. Significant provisions in the Terms of Settlement were:

   (a) Clause 16 iii.

   "The new lease will commence on 10 June 2012 at a commencing rent which will be determined in accordance with the rent determination procedures of the Small Business Commissioner's Office and will in other respects follow the terms of the current lease (insofar as those terms are not contrary to the Retail Leases Act 2003 (Vic)) with a security deposit equal to three (3) months' rent inclusive of GST."

   (b) Clause 16 iv.

   "The parties will jointly apply to the small business Commissioner to appoint a valuer to undertake the rental determination as soon as possible".

(c) Clause 16 vii.

"The insurances required to be effected under the lease will be taken out and paid for by the Tenants (and will include the Landlord as an insured party) with a reputable insurer to be approved by the Landlord acting reasonably."

(d) Clause 16 xi.

"The Landlord will waive its entitlement to 2 weeks rent for the period commencing on 1 December 2014".

(e) Clause 16 xii.

"The Landlord waives its entitlement to the shortfall of rent paid by the Tenant during the last two years of the term of the five-year lease which commenced on 10 June 2007".

(f) Clause 17.

"Following completion of the rent determination in accordance with 16(iii) above, rent for the period commencing 10 June 2012 will be adjusted to reflect the outcome of the rent determination."

(g) The Awning

By Clause 16ix, the Tenant was to repaint the front of the Premises at its cost and, on completion, the Landlord was "…to repair the existing awning located at the front of the building or replace it with an awning of similar size and quality...";

(h) Releases

There were mutual releases "…from all claims and actions of whatsoever nature and howsoever arising from or in relation to the subject matter of the Dispute".

The rental determination

14. In August 2015 a valuer appointed by the parties assessed the rental value of the Premises as at 10 June 2012 to be $156,700.00 per annum plus GST. As a consequence, the Tenant claims a refund of the overpaid rental. Its claim is as follows:

Period	Rent per Valuation	Rent paid	Difference
10/6/12-9/6/13	$172,370.00	$268,963.24	$96,593.24
10/6/13-9/6/14	$179,264.00	$268,963.24	$89,699.24
10/6/14-9/6/15	$172,370.00	$248,273.76	$69,008.96
10/6/15-9/6/16	$193,892.81	$123,877.68	($70,015.13)
Total claimed			$185,286.31

15. The figure of $268,963.24 in year one (2012 to 2013) is the amount the Tenant was required to pay for rental at the then current rate of $5,172.37 per week. However the Tenant claims to have paid a total of $306,410.86 during that year, details of which appear below. It claims to have applied the excess to discharge arrears from previous years.

16. Similarly, in year two (2013 to 2014) the Tenant claims to have paid $276,754.20 as detailed below. Again, the difference between that figure and the amount in the column of $268,963.24 is sought to be applied on account of arrears.

17. In year three (2014 to 2015) the Tenant acknowledges not having paid two weeks rent. Further, pursuant to the Terms of Settlement, it was entitled to a credit of two weeks rent and so the rental due for the year as per the valuation is reduced from $186,435.39 to the figure of $172,370.00 as shown.

18. The Landlord's calculations are as follows:

Period	Rent per Valuation	Rent paid	Difference
10/6/12-9/6/13	$172,370.00	$241,929.12	$69,559.12
10/6/13-9/6/14	$179,264.00	$255,343.24	$76,079.24
10/6/14-9/6/15	$186,435.39	$239,633.15	$52,909.65
10/6/15-9/6/16	$193,892.81	$118,273.85	($73,940.99)

19. The figure of $241,929.12 for the first year is arrived at after deducting from the amounts the Landlord says the Tenant paid, arrears from the previous year as well as monies paid for insurance, as follows:

Amount received from the Tenant		$299,995.72
less arrears from the previous year	$41,379.20	
less insurance from the amounts received	$16,687.40	$ 58,066.60
Balance received on account of rent		$241,929.12

That calculation would result in a correspondingly lesser difference to be refunded to the Tenant.

20. The figure of $255,343.24 for the second year is arrived at after deducting from the $268,963.24 the Tenant paid, $13,620.00 said to have been paid by the Landlord for insurance.

21. The figure of $239,633.15 for the third year is said to have been arrived at by deducting from the amount of $257,205.17 that the Landlord says the Tenant paid, amounts claimed by the Landlord with respect to rates and insurance. However, that figure should be $239,345.04, calculated as follows:

Amount received from the Tenant		$257,205.17
less rates paid from amounts received	$8,028.99	
less insurance from the amounts received	$9,831.14	$ 17,860.13
Balance received on account of rent		$239,345.04

Notwithstanding this mistake, the final figure of $52,909.65 is arithmetically correct.

22. If the first two figures for the fourth year are correct, then the figure in the third column as the credit due to the Landlord should be $75,618.75. The figure of $118,273.85 for the fourth year is said to have been arrived at by deducting from the amount of $128,829.13 that the Landlord says the Tenant paid, amounts

claimed by the Landlord with respect to rates and insurance. However, on that basis, I arrive at a slightly higher figure of $119,951.61, calculated as follows:

Amount received from the Tenant		$128,829.13
Less:		
Water rates paid from amounts received	$3,953.44	
Council rates paid from amounts received	$2,619.20	
Insurance from the amounts received	$2,304.88	$ 8,877.52
Balance received on account of rent		$119,951.61

23. Consequently, I think that the figure of $118,273.95 for the fourth year is wrong and it should be $119,651.61, assuming of course that the deductions from the amounts paid by the Tenant are warranted.

Off-sets

24. Further offsets are claimed by the Landlord are as follows:

(a)	Council rates for 2011-2012	$ 6,684.95
	Balance of Council rates:	
	2014-2015 ($8,673.45 less $8,028.99)	$ 644.46
	2015-2016($8,043.45 less $2,619.20)	$ 5,424.25
(b)	Balance of insurance premiums:	
	2014-2015 ($18,813.93 less $9,831.14)	$ 8,982.79
	2015-2016 ($20,235.40 less $2,304.88)	$18,020.52
(c)	Three months bond	$50,412.08

The issues

25. The issues to be determined in regard to the rental claim are:
    (a) What was paid in each year?
    (b) What those payments were for?
    (c) Whether the Landlord is entitled to make deductions from the amounts paid by the Tenant with respect to:
        (i) arrears before 10 June 2012;
        (ii) insurance premiums paid by the Landlord;
        (iii) rates paid by the Landlord.

What was paid in each year?

26. Spreadsheets were produced by both sides which were said to have been based upon the parties' respective financial records.

27. The Original Lease contains the usual covenant by the Tenant to the effect that it will pay the rent without deduction. Mr Best referred me to authorities to the effect that it is the duty of a debtor to seek out its creditor and pay it and that, whatever process of payment is used, payment is not achieved until that process has reached the stage at which the creditor has received cash (see *Earthworks*

and Quarries Limited v. F.T. Eastment & Sons Pty Ltd [1966] VR 24 at p.26; *Tenax Steamnship Co Ltd v. Reinante Transoceanica Navigacion SA* [1975] WLR 314 at p. 320). I accept those as general propositions.

28. Mr Best relied upon the evidence of the Landlord's bookkeeper, Miss Leventis, and of the statements that she had prepared of the amounts that she said had been paid. He said that since Miss Leventis was not challenged by cross-examination it should be assumed that the figures that she has provided are correct. I do not think that I can make that assumption

29. Mr Magowan said that, due to the circumstances of the case and time constraints he elected not to cross-examine Miss Leventis . He said that other reasons for not cross-examining her were the fact that the tribunal is presumptively a no-cost jurisdiction and that she was simply a bookkeeper working with assumptions provided to her by Mr Paraskevas.

30. Due to the shortage of time it appears likely that, if Mr Magowan had decided to cross-examine her, the evidence would not have been completed in time and the hearing would have been adjourned until well into the following year.

31. Not having cross-examined her, Mr Magowan has not had the advantage of testing her evidence but that that does not mean that the evidence that she gave should necessarily be accepted. I have to weigh it along with all the other evidence.

32. Mr Magowan pointed out that no original account documents were produced by the Landlord to verify the figures in the statements that Miss Leventis prepared. He pointed out that, on Mr Paraskevas' evidence, the Landlord's accounts were kept on an MYOB system and that the financial records would have been available to verify the figures set out in those statements.

33. According to Miss Saunders' evidence, the Landlord did not issue receipts or annual statements for the rental the Tenant paid. She said that all rental payments which were owed were fully paid by May 2014. She produced a statement of eight pages setting out each payment the Tenant claimed to have made from 6 June 2011. She said that the Tenant's bank statements proving these payments had been discovered and that was not disputed. Indeed, the bank statements were included in the Tribunal Book. The Landlord's statements are also supported by its bank statements.

34. Despite all this argument, when one compares the two sets of statements it does not appear that there is any substantial dispute. In the first year (2011-2012) the Tenant has added in an additional payment that was made on the 31st of May. I think that this properly belongs to the preceding year. Hence I accept the Landlord's evidence that there were 44 payments made for that year. The Tenant also claims a credit of $2,900 for plumbing works that it paid for which it claims was the responsibility of the Landlord and seeks to set that off against rent.

35. For the following year, there were 58 weekly payments, two of them being very slightly less than the amount required. In addition, the Tenant paid $6,413.40 with respect to work done to the Premises which it claimed to set off against the rent.

36. In the 2013 to 2014 year, it is acknowledged that 52 payments were made. In addition, the Tenant paid $7,789.78 for work done to the Premises which it also claimed to set off against the rent. Miss Saunders acknowledged that two week's rent was missed in that year and said that another two weeks rental was not paid as agreed in the Terms of Settlement.

37. In the 2014 to 2015 year the Tenant claimed to have paid 48 payments, making a total of $248,273.76. The Landlord's records show a higher amount being paid each week from 28 October 2014 when the rent was received via the agent. The difference might be payments for rates, which I am dealing with separately.

38. In the 2015 to 2016 year, the Tenant claims to have paid a total of $123,877.68 whereas the Landlord says it received $128,829.13. The difference again might relate to rates.

Conclusion as to the payments

39. On all of the evidence, I find that the following payments set out in the Tenant's statements were made by the Tenant:

10/6/11 – 9/6/12	44 rental payments of $5,172.37			$227,584.28
	14 February:	Plumbing works	$	2,000.00
	28 February:	Plumbing works	$	400.00
	12 April:	Plumbing works	$	500.00
10/6/12 – 9/6/13	56 rental payments of $5,172.37			$289,652.72
	1 rental payment of		$	5,171.00
	1 payment of		$	5,172.00
	13 February:	Building order	$	3,740.00
	25 March:	Building order	$	1,320.00
	4 April:	Building order	$	356.40
	20 May:	Water heaters	$	997.00
10/6/13 – 9/6/14	52 payments of $5,172.37			$268,963.24
	12 July:	Building order	$	1,283.97
	12 July:	Building order	$	1,656.60
	23 July:	Building order	$	886.60
	20 August:	Building order	$	1,980.00
	18 Sept:	Building order	$	339.96
	5 May:	Slippery ramp	$	1,643.95
10/6/14 – 9/6/15	48 payments of $5,172.37			$248,273.76
10/6/15 – 31/8/16	12 payments of $5,172.37			$ 62,068.44
	1 payment of $1,443.74		$	1,443.74
	1 payment of $3,728.63		$	3,728.63

40. The credits claimed by the Tenant for the various payments for plumbing and other work that it made were, the Tenant claims, in order to address matters that

were the responsibility of the Landlord. These credits that the Tenant claims total $16,117.48 and the amounts are as above.

The alleged arrears

41. Mr Paraskevas said that, as at 10 June 2012, there were arrears of rental and outgoings of $58,597.51 plus GST. Of that, he said that $37,617.45 was for outstanding rent. However an email sent to Ms Saunders by Miss Leventis on 6 June 2012 said that the arrears of rental and outgoings at that time totalled $53,236.28. In her witness statement Miss Leventis said that, in the year 2011 to 2012, the Tenant was in arrears in the sum of $41,379.20 and that this amount was deducted from payments received in the 2012-2013 lease year. On 15 June 2012 Miss Saunders informed Mr Paraskevas that all back rent and rates would be paid as soon as they had arranged for additional financing. This would indicate that there were arrears in June 2012 but Miss Saunders did not say in her communication how much they were.

42. By an email dated 19 March 2013, Miss Leventis acknowledged that the arrears then were $39,703.91 and attached a statement crediting $8,360.00 for the plumber's payments that the Tenant had made against what she said was the outstanding rental. By a further email dated 11 April 2013 she acknowledged that the arrears were then $8,670.80. She said that this was arrived at as follows:

Arrears from the previous year:		$46,551.33
Rates (2011-2012),		$ 6,684.95
Total arrears:		$53,236.28
Less:		
Extra payments February - April 2012:	$36,205.48	
Credit for plumber payment:	$ 8,360.00	$44,565.48
Balance of arrears outstanding		$ 8,670.90

43. Miss Saunders said that all arrears for the 2011-2012 year were fully repaid in the 2012-2013 year, when the Tenant paid $306,410.86 as above. She said that the difference between that figure and the rental due to that year of $268,963.24 made up for the arrears. Of the sum paid in that year, $6,413.40 was not paid to the Landlord as rent but related to the building orders and the water heater.

44. The email correspondence demonstrates there were arrears outstanding at the start of the 2012-2013 year. Although no comprehensive accounts have been presented by either side in regard to any period before those mentioned above, Miss Saunders did not dispute Miss Leventis' email of 19 March 2013 that the arrears were then, $8,670.80 and that amount is established.

45. Even from Miss Saunders' statements it does not appear that any more catch-up payments were made beyond those referred to above. The figure of $8,670.80 was arrived at after adding the rates from the 2011 2012 year onto the unpaid rental for that year, allowing the agreed credit of $8,360.00 for work done on the Premises and deducting the additional payments that the Tenant made in the 2012-2013 year. Since there were no further catch up payments made, that amount of arrears was still owed as at the date of the Terms of Settlement and it all related to unpaid rental from the 2011-2012 year.

46. As to the balance of the money that the Tenant claimed for work done on the Premises, the Original Lease provided that the rental was to be paid free of all deductions and so, in the absence of agreement, no set off can be allowed against the rent for any claim against the Landlord. The inability to claim a set off would not shut out a claim for repayment of money that was properly owed by the Landlord but, by Clause 16(xiii) of the Terms of Settlement, the Tenant waived its entitlement to reimbursement for its expenses incurred in regard to various monies expended on the Premises.

47. On the other hand, since the outstanding arrears of rental were with respect to the 2011-2012 year, they are caught by the waiver in Clause 16(xii) of the Terms of Settlement. As a result, the Landlord is not entitled to offset the amount of $8,670.80 against the amount to be paid to the Tenant.

The deductions for insurance

48. There were two separate obligations imposed upon the Tenant in regard to insurance by the terms of the Original Lease. By Clause 2(g), it was required to effect and maintain throughout the term, policies of insurance as described in that clause, relating to potential risks to both parties.

49. The second obligation was imposed by Special Condition 1, which required the Tenant to reimburse the Landlord on demand, with respect to all insurance premiums paid by the Landlord for policies covering the risks identified in the special condition. These generally relate to the building and matters affecting the Landlord. The policies are to be "…for such amounts and with such exclusions, extensions and inclusions as the Lessor shall think fit, inclusive of removal of debris cover and consequential loss cover."

50. Miss Saunders said that no certificate of currency was ever requested by the Landlord and, between 2002 and 2006, the Tenant paid the Landlord's building insurance, which was a combined policy covering the building, as well as the Tenant's usual insurance.

51. In his second witness statement Mr Paraskevas said that, in about 2008, when the parties executed the Deed of Extension, the Tenant requested that the insurance premiums with respect to the two policies should be paid by the Tenant in weekly instalments throughout the year. He said that it was agreed that the Landlord would pay the insurance premiums and that the Tenant would increase its rental payments by an amount equal to the annual premium of the two policies divided by fifty-two. He said that the agreement was to take effect immediately.

52. Mr Magowan complained that the oral agreement alleged is contrary to the express terms of the lease and said that it would would offend the Parol Evidence Rule. He said that both Miss Saunders and Mr Wyndham denied any such agreement.

53. However Miss Saunders acknowledged that, in 2007, the Deed of Extension increased the rent by 9.3% instead of the 4% increase provided for in the Original Lease and that this was done in order to incorporate the additional cost of the insurance which would thereafter be borne by the Landlord. In this way, she said, the Tenant has paid the Landlord's insurance by paying a higher rental. She produced the disclosure statement that was prepared with respect to the

tenancy created by the Deed of Extension. This document shows the council and other rates as outgoings payable by the Tenant but no insurance. This position was not disputed by the Landlord. In any case, it appears to be common ground that the rental payable throughout the term created by the Deed of Extension was on the basis that the Landlord was undertaking the responsibility to pay for the insurance. The dispute is how that situation should be interpreted.

54. It appears therefore that, although the written terms of the tenancy created by the Deed of Extension required the Tenant to insure as described above, the parties had changed that orally. Despite the difficulty that the oral change is inconsistent with the written terms, it is admitted.

55. Much later, in the course of negotiating for a new lease in 2014, Mr Wyndham sent an email on 15 April 2014 in which he suggested to Mr Paraskevas that it had been agreed between the Landlord and the Tenant during discussions that, when the lease was renewed, the weekly rental should include an amount to cover the cost of building insurance. As previously noted, that was already the situation prevailing at that time.

56. Miss Saunders sent an email to Miss Leventis on 4 June 2014 asking: "Can you tell me how much we pay for insurance per week?" Miss Leventis replied the following day, stating that the current rent of $5,172.37 included insurance. By a further email sent the following day she said that, although insurance premiums had gone up a few times, the Landlord had not requested the difference. It is not apparent that the Landlord could have requested any difference because it was clear that the rental was fixed and that it had been struck on the basis that the Landlord was to pay the insurance, not the Tenant.

57. Miss Leventis denied that the Tenant was paying a higher rent to take account of the Landlord paying the insurance. She said that the Tenant was simply paying insurance and rental in one payment. There is some force in that. The Deed of Extension did not amend the provisions in the Original Lease that required the Tenant to bear the cost of the insurance. However it is clear that the Tenant was, by agreement, paying a higher amount each week than it would have otherwise, on the basis that the Landlord was undertaking the responsibility of taking out and paying for insurance. Because of that agreement, which is admitted, it would not have been possible for the Landlord to seek to enforce compliance with the covenants to insure contained in the Original Lease. Does that mean that the amounts paid by the Tenant are partly rent and partly insurance premium as Mr Best urged, or is it simply that the Tenant has agreed to pay a higher rent in exchange for the Landlord undertaking this additional burden?

58. In answering this question I think that it is significant that the rental to be paid by the Tenant, which had been increased to take account of the insurance, was a fixed figure for each year of the whole of the five-year term, notwithstanding that the insurance premiums might (and did) fluctuate from time to time. There is no evidence of any agreement that, at the end of each year or at any other time, an accounting would take place in which the premiums that had been paid by the Landlord would be set off against a proportion of the payments made by the Tenant that could be said to be with respect to insurance, with the balance to the paid one way or the other. It seems clear that, throughout the tenancy created by the Deed of Extension, the amounts the Tenant paid, which were solely

described as rental, was all that had to be paid and that as part of this additional oral agreement the Landlord was undertaking responsibility for the insurance.

The proper interpretation of the Terms of Settlement

59. As to how the Terms of Settlement or to be interpreted, Mr Best referred me to the following extract from the judgement of Hall J in *Dong v. Monkiro Pty Ltd* [2005} NSWSC 749 with a judge said (at para 83):

> "83 The following principles apply to the construction of a contract in a commercial context:-
> (a) The court's primary task is to construe the words used by the parties in the contract.
> (b) The common intention of the parties is to be found in the words used in the contract.
> (c) The court will give effect to the plain meaning of words which are unambiguous no matter how capricious, unreasonable, inconvenient or unjust the result.
> (d) The more unreasonable the result, the more unlikely that the construction which gives rise to that result is correct unless an intention to achieve that result is abundantly clear.
> (e) Few words have a plain meaning and are unambiguous or not susceptible of more than one meaning. Until a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means.
> (f) If the words have more than one possible meaning, then the construction will be preferred which is not capricious, unreasonable, inconvenient or unjust.
> (g) The contract shall be looked at as a whole to elucidate the meaning of each clause: the contract must, if possible, be construed so that each clause is consistent in meaning with the whole of the contract.
> (h) Commercial contracts should be construed so as to make commercial sense of them – a conclusion that reflects business common sense is to be preferred to one that flouts it.
> (i) It is necessary to construe a document against the background in which it was made to determine what the words in the document mean – the meaning of words cannot be divorced from their context.
> (j) The meaning given may not necessarily be the most obvious or grammatically correct.
> (k) The purpose of a provision is part of a context in which the meaning of words is to be ascertained. A construction is preferred which gives effect to the commercial purpose of the contract.
> (l) A commercial contract should be construed fairly and broadly whether or not the contract was drawn with assistance of lawyers."

60. Mr Magowan referred me to *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52 and to *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24, where Mason J said:

> "We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract."

61. I accept the correctness of the propositions set out in these passages.

62. Mr Paraskevas said that the Tenant never submitted any proposed insurance policies to the Landlord for its approval as required by Clause 16vii of the Terms of Settlement. Quite obviously, one would not have expected the Tenant to have done so until after the Terms of Settlement had been entered into because any contractual obligation under that document did not arise until then.

63. Mr Best submitted that the rental determination that was made by the valuer did not include a component of insurance. It is accepted by both parties in the pleadings that, in August 2015, the valuer determined the market rental of the Premises as at 10 June 2012 to be $156,700 plus GST. The Terms of Settlement provide that, following completion of the rental determination, the rental for the period commencing 10 June 2012 will be adjusted to reflect the outcome of the rental determination. The determination having been made, I cannot go behind it but it is submitted on behalf of the Landlord that making the adjustment against the assessment only the rental component of each weekly amount paid by the Tenant should be taken into account and considered as rent.

The meaning of clause 17

64. The full clause reads:

> "Following completion of the rent determination in accordance with 15(iii) above, the rent for the period commencing 10 June 2012 will be adjusted to reflect the outcome of the rent determination."

65. The clause does not contain any direction or formula to say how the adjustment is to be made. However the clear intention is that Tenant is to be responsible to pay rental from the beginning of the new term at the rate that the valuer assesses. Pending the assessment, rental will continue to be paid and if it should turn out that the assessed rental is more or less than what the Tenant has paid, than the difference will be refunded or made up, as the case may be. I cannot see how I can give the clause any other interpretation. The comparison is to be between rental as assessed and the amounts that the Tenant has paid as rent up to the date of adjustment.

Is only the alleged rental component to be adjusted?

66. The Landlord contends that the amount to be refunded to the Tenant by way of overpayment should be calculated by deducting from the rental figure an amount to take account of the fact that the Landlord was responsible for the insurance.

67. Mr Best referred to two emails from Miss Saunders to the Tenant's solicitor to the effect that the rental paid "..included an amount for insurance cover.." (Tribunal Book 410) and that she altered the amount on the application to the valuer, stating that the rental amount included insurance. It is quite clear that the rental amount that was paid by the Tenant pursuant to the Deed of Extension was fixed at a higher figure in order to take account of the fact that the Landlord was paying the insurance but I do not see that the two emails are inconsistent with that.

68. Accepting the correctness of Mr Best's submission as to how a commercial contract is to be interpreted, I cannot interpret the word "rental" in the Deed of Extension as meaning anything other than the payments that the Tenant made, which are clearly described in the document as rental. The covenants in the lease

relating to rental, including non-payment of rental, would necessarily attach to the whole of each such payment. Moreover, if any part of the payment were to be categorised as insurance, there would be the difficulty of identifying what proportion of the sum paid the insurance component was.

69. The premiums paid under the various policies fluctuated and it is not possible to say in regard to any one rental payment how much represented the cost of insurance. Further, the Terms of Settlement did not provide that the adjustment was to be against anything other than rental. Although Mr Best described each rental payment as being a "composite sum", the Deed of Extension described the whole of the weekly payments that were to be made as rental. They were not described as rental and insurance. I think that they are properly categorised as rental, albeit calculated on the basis that the Landlord was paying for the insurance. Such an arrangement would necessarily mean a higher rental but the payments made by the Tenant were nonetheless rental and not anything else.

70. For these reasons I am not satisfied that, for the purpose of making the required adjustment, the rental payments that the Tenant has made can be reduced in order to take account of the fact that it was not responsible to pay insurance premiums.

71. I appreciate that it seems unfair to make the adjustment by simply deducting rental at the assessed rate from the amounts the Tenant actually paid. Between 10 June 2012 and the date upon which the Tenant ceased to pay rental at the higher rate, the Tenant would obtain a refund of the whole of the difference in the two rentals without having incurred the expense of paying for the insurances over that same period. Nevertheless, the parties were aware of the situation at the time they entered into the Terms of Settlement and could have made some provision to take account of that. They did not do so and I cannot make an agreement for them.

Insurance premiums paid by the Landlord after 10 June 2012

72. Concerning the interpretation of the Terms of Settlement, the document referred to insurance in Clause 16vii and to the assessment of rent in Clause 16iii. It provided that the insurances required to be effected under the lease would be taken out and paid for by the Tenant.

73. Quite obviously, the valuer assessed the rental value of the Premises for the purposes of the new lease and that lease provides that the Tenant will be responsible for insurance. However, up to the date of the Terms of Settlement the insurance had already been paid by the Landlord and the rental paid over that period had been struck between the parties on that basis. How can I undo that situation?

74. Mr Best submitted that the Terms of Settlement were not an agreement for a lease. He pointed out that the parties acknowledged in the Terms of Settlement that the Tenant had exercised the option for a new term and that, as a consequence of the valid exercise of the option, a new lease was constituted on the same terms as the Original Lease. That is so, but by the Terms of Settlement the parties subsequently agreed to enter into a new lease for that same period in terms that were different from those of the original lease. The Terms of Settlement are therefore an agreement for a lease in those terms and they are

enforceable as such. The lease agreed to be entered into was to take effect as from 10 June 2012 and so from that date the covenant concerning the insurances was binding upon the Tenant. The Tenant was therefore responsible to pay for insurance as from the commencement date of the lease.

75. Between the commencement of the term created by the Deed of Variation and the execution of the Terms of Settlement, the Landlord was responsible for paying for the insurance and in exchange for assuming that responsibility it received an increased rent. It follows that, up until the execution of the deed of settlement, there was no breach by the Tenant of any obligation relating to insurance.

76. The counterclaim has been struck out and the only claims of the Landlord that I can deal with are the claims for a set-off.

77. The Landlord claims to have paid the following insurance premiums since 10 June 2012 and seeks to set these off against the credit now due to the Tenants:

10/6/12 – 9/6/13	$16,687.40
10/6/13 – 9/6/14	$13,620.00
10/6/14 – 9/6/15	$ 9,831.14
10/6/15 – 9/6/16	$ 2,304.88

78. Since the obligation was upon the Tenant to insure, the Landlord can only seek to claim payment from the Tenant with respect to insurance by way of damages. It would need to argue that; because the Tenant did not insure as required by the Terms of Settlement, the Landlord had to take out policies of insurance itself and incur the expense of doing so. Such a claim would be for damages for breach of contract.

79. Although the Terms of Settlement were entered into on 16 October 2014 the commencement date of the new lease was to be 10 June 2012. As a consequence, it was agreed that the covenants, terms and conditions of the lease created by the Terms of Settlement should take effect as from 10 June 2012.

80. If the Terms of Settlement, properly construed, conferred an obligation upon the Tenant to refund to the Landlord any amounts paid by it with respect to insurance as from the commencement date of the lease, there would be no difficulty in enforcing such an obligation in contract. It would be the enforcement of a contract to pay a sum of money and not an action for payment of damages for breach of contract. However there is no agreement to be found anywhere in the Terms of Settlement that the Tenant is to pay any money on account of insurance premiums paid by the Landlord. Its contractual obligation was to take out and pay for all insurances required by the terms of the lease, not reimburse the Landlord with respect to insurance that the Landlord had taken out itself.

81. Under the Terms of Settlement, the Landlord is not to take out the insurances. Its function is only to approve of the insurer selected by the Tenant and in doing so, it must act reasonably. Clause 16vii is a specific provision designed to override what is set out in the form of lease. By Clause 16ii, it is a special condition of the lease. There is no provision in the Terms of Settlement enabling the Landlord to

take out the insurances itself and seek payment of the premiums from the Tenant.

82. If the claim is for breach of contract, the Landlord has the difficulty that a party cannot agree to do, or to have done, something in the past, simply because performance is impossible because the time for performance has already expired. Put another way, parties can agree that, due to something that occurred in the past, one party will pay a sum of money to the other. However they cannot agree that one party will do, at an earlier time, something that that party has not done, so as to found a claim for damages for breach of contract in favour of the other party on the ground that he has not done it.

83. The Tenant cannot be found to have been in breach of an obligation to take out insurance with respect to any period prior to the Terms of Settlement because there was no contractual obligation on it to do so at that time. That obligation did not arise until the Terms of Settlement were entered into. As from that date any failure to comply with the Terms of Settlement would be a breach of contract for which damages would be recoverable by the Landlord.

84. Until the final form of the new lease was agreed upon and executed, the Terms of Settlement themselves took effect as an agreement for a lease and the insurance policies required to be taken out under it needed to be taken out and paid for by the Tenant in accordance with Clause 16vii.

85. The Terms of Settlement are silent about insurances that were taken out by the Landlord between the agreed commencement date of the term and the date of the Terms of Settlement.

86. For these reasons I am not satisfied that it is open to the Landlord now to claim back the monies already paid for insurance before the Terms of Settlement were entered into.

87. If the Tenant is in breach of its obligation to insure for the period following the execution of the Terms of Settlement a claim for damages for breach of covenant may be brought. However a breach would need to be established.

88. The case has not been argued in this way. I will make a declaratory order to the effect that, as from 16 October 2014, the Tenant is responsible to effect the insurances required under the lease in accordance with Clause 16vii of the Terms of Settlement. Until the entitlement of the Landlord to an award of damages has been established and quantified, I am not satisfied that any amount on account of insurance premiums paid by the Landlord should be set off against the refund due to the Tenant. Any claim by the Landlord against the Tenant for the recovery of damages in respect of failing to insure should be the subject of a proceeding directed to that purpose.

The deductions for rates

89. The Landlord seeks to offset the following amounts that it paid on account of Council and water rates.

10/6/11-9/6/12	Council rates paid	$6,684.95
10/6/14-9/6/15	Council rates paid	$8,028.99
	Balance of Council rates	$ 644.46

10/6/15-9/6/16	Water rates paid	$3,953.44
	Council rates paid	$2,619.20
	Balance of Council rates	$5,424.25

90. It was not disputed that, at all material times, the Tenant was responsible to pay the rates. Miss Saunders said that in some years the Tenant would pay the rates and in other years it would make payment to the Landlord.

91. The rates for the year 10/6/11 to /6/12 of $6,684.95 were not paid at the time by the Tenant but they have already been taken into account in the arrears referred to above. Since they have already been set off against arrears of rent the debt is extinguished no further claim can be made with respect to them. There is no claim for any earlier arrears.

92. In April and May 2014, there were emails between the parties seeking to make some arrangement for weekly payments by the Tenant on account of rates.

93. On 12 June 2014 Mr Paraskevas sent an email to the Landlord's solicitor, a copy of which went to the Tenant, stating that there had been a reduction in the rates by the council and that the new amount should be $163.50 week which, when added onto the rent, made a total of $5,335.80 week. In response the solicitor stated that he had amended the schedule to the lease to make it clear that the Tenant did not reimburse rates.

94. The foreshadowed lease in these terms was never agreed upon and instead the Terms of Settlement were entered into. Weekly rental continued to be paid at $5,172.37 and no amount was added onto the rental instalments with respect to the Tenant's liability for rates. However when an estate agent was appointed by the Landlord, the Tenant commenced making regular weekly payments to the agent on account of rates.

95. In the 2014-2015 year the rates were $8,360.30 plus GST, making a total of $9,196.33. In the same year, the Tenant paid to the Landlord's agent weekly instalments on account of rates totalling $11,812.51, leaving a credit of $2,616.18 in favour of the Tenant, to be applied on account of rates for the following year. It is unclear on the evidence whether these instalments on account of rates are still being made.

96. There is clear documentary evidence of the making of these payments to the Landlord's agent yet a demand to set-off allegedly unpaid rates for this period was made by the Landlord and no mention was made in its material of the receipt of these sums by its agent, which total $11,812.51.

97. The fact that the unpaid rates for the year 2011-2012 amounting to $6,684.95 were already accounted for in quantifying the arrears was also not made clear.

98. All of this leads me to question the reliability of the Landlord's evidence in regard to arrears of rates. The liability for payment of rates is ongoing and it is quite impossible for me to make any determination on the evidence that I have as to whether or not the rates payable by the Tenant are in arrears at the time this decisions is handed down. In those circumstances, it is not appropriate to make any offset on account of rates against the amount now due to be paid by way of a credit to the Tenant.

99. No dispute concerning rates was raised during the mediation with the Small Business Commissioner and there is nothing in the Terms of Settlement about rates. If there are outstanding rates the Landlord should take appropriate legal action as it might be advised.

The awning

100. In its prayer for relief in the Points of Claim, the Tenant seeks an order that the Landlord repair the existing awning located on the front of the Premises or replace it with an awning of similar size and quality. The wording of the order sought repeats that of Clause 16ix of the Terms of Settlement. That clause required the Tenant to paint the front of the building and Miss Saunders sent an email to the Landlord's agent on 2 March 2015 informing him that that had been done.

101. In his witness statement, Mr Wyndham said that the awning is rusted and not structurally sound enough to have new lighting or heating installed under it. He said that when it rains, it leaks to the extent that patrons cannot stand underneath it. He said that, notwithstanding the Terms of Settlement the Landlord has not replaced or repaired the awning. He said that it is an eyesore and detracts from the Tenant's business. A video taken on 26 January 2016 showing leaking from the underside of the awning was tendered in evidence.

102. No expert report or oral expert evidence has been produced to the effect that the awning is structurally inadequate or that it is now in want of repair. Mr Wyndham produced a letter dated 16 September 2016 from a company known as Crew Products, a business that he had approached to install external clear blinds and outdoor heaters on the underside of the awning. The operative part of the letter states:

> "On or about September 2013 I had a site meeting with Trish in relation to upgrading the front area of Robarta.
>
> Upon inspecting the area, it was noted that there was severe rusting of the overhead canopy, the area that we would need to attach the awnings & heaters.
>
> Because of the problems with the structural integrity of the awning, I advise that we would not be able to do any works until the structure was inspected internally and repaired."

103. The author of this letter described himself as a sales manager and there is no evidence that he has any technical expertise that would have enabled him to assess the structural adequacy of the awning.

104. Mr Wyndham said that, on 14 September 2016, he saw a male builder examining the awning. He said that the builder told him that:

(a) he had been engaged by the agent of the Landlord to provide a quote for the replacement of the underside of the awning;

(b) it was difficult to estimate the scope of work without removing large sections of the existing roof to reveal its true condition; and

(c) the advice that he (Mr Wyndham) had received to the effect that the apparent evidence of extensive rust damage would make it impossible to install external clear blinds and outdoor heaters was correct.

105. On 8 November 2016, the Tenant's solicitors wrote to the Landlord' solicitor requesting that the plans for the proposed work to the awning be produced.

106. Mr Parastevas said that the Landlord was in the process of replacing the underside of the awning. He produced what he described as a scope of works but it is difficult to ascertain from these two very simple pieces of paper precisely what was proposed to be done. The soffit (that is, the underside of the awning) was to be replaced with a commercial grade compressed cement sheet but there is no indication in the document that any rust removal or repair to the fabric of the awning or other structural work was intended.

107. Mr Magowan said in his submissions that he was instructed that, on 28 November 2016, some work was carried out to the awning. He said that only one business day's notice was given to the Tenant and the extent of the work was not known.

108. When I viewed the awning during the on-site inspection before this most recent work was carried out, the underside appeared to have been sheeted with a pressed metal material that was quite old and damaged in places but it was not possible to view the internal structure of the awning itself. There are two large metal struts attached to the front facade of the upper floor of the Premises which provide support for the awning from above. They certainly looked to be quite robust but I am not an engineer and can draw no conclusions from my observation.

109. Mr Magowan referred to the covenant for repair set out in section 52 of the *Retail Leases Act* 2003 and also sought to draw an analogy with the implied warranties concerning domestic building work that are to be found in section 8 of the *Domestic Building Contracts Act* 1995.

110. He said that the awning had not been inspected by engineer and that no opportunity had been provided to the Tenant to have it inspected. He said that the Tenant is licensed to have 32 people outside and has outdoor furniture for that purpose but that it cannot seat patrons outside without heaters and pulldown screens. He said that neighbouring premises, including a business operated by the Landlord's directors further down the street, seat patrons outside in this way but, due to the inadequacy of the awning, the Tenant is unable to do the same.

111. Mr Magowan said that an order should be made that the Landlord forthwith provide details of the insurance claim and the work undertaken to the awning and a direction be given that the Tenant is entitled to engage an appropriately qualified engineer to prepare a report as to various matters, including whether or not the awning needs to be replaced or what is required to repair it.

112. Mr Best pointed out that the clause in the Terms of Settlement gave the Landlord the option of repairing the awning instead of replacing it. He referred me to the following passage from the judgement of the Lewison LJ in the case of *SJ & J Monk (a firm) v. Newbigin* [2015] 1 WLR 4817 at [26] from

> "Repair is the converse of disrepair. A state of disrepair is a deterioration from some previous physical condition. Accordingly, that which requires repair is in a condition worse than it was at some earlier time…. If it is shown that property is worse than it was at some earlier time, it does not matter whether that deterioration resulted from error in design, or in workmanship, or from deliberate parsimony or any other

cause…. In our case the hereditament was, in this sense, worse than it was at some earlier time because of the decision to strip out the interior."

113. Mr Best submitted that there is no evidence that any rusting of the awning means that it is in a state of disrepair. He said that, merely because the awning may not be structurally sound enough to support the new lighting or heaters that the Tenant wants to hang from it does not mean that it is in a state of disrepair.

114. Certainly, something can have rust on it and still fulfil its function. The obligation imposed upon the Landlord by the Terms of Settlement is to repair the awning if it can be repaired or otherwise replace it. In order to establish the breach of this obligation alleged by the Tenant it is necessary for the Tenant to establish on the balance of probabilities that the awning is now in a state of disrepair. It has not done so, save for the leaking which I am told has now been addressed.

115. No order of this tribunal is required for the Tenant to engage an engineer to inspect the awning and determine whether or not it is structurally adequate. Since there is no evidence to demonstrate that the work already done by the Landlord is insufficient to repair the awning, this part of the claim is not established.

The bond

116. It is common ground that the Tenant is required to pay a bond equivalent to 3 months rental, which, following the valuation, amounts to $50,412.08. That amount should be deducted from the credit to be allowed to the Tenant and dealt with by the Landlord in accordance with the lease.

Orders to be made

117. There will be an order that the Landlord pay to the Tenant the sum of $134,875.21, calculated as follows:

Period	Rent per Valuation	Rent paid	Difference
10/6/12-9/6/13	$172,370.00	$263,790.87	$91,420.87
10/6/13-9/6/14	$179,264.80	$268,963.24	$89,698.44
10/6/14-9/6/15	$176,090.65	$248,273.76	$72,183.11
10/6/15-9/6/16	$193,892.81	$123,877.68	($70,015.13)
Total claimed			$185,287.29
Less Bond			$ 50,412.08
Balance			$134,875.21

118. There will also be a declaration that, as from 16 October 2014, the Tenant is responsible to effect the insurances required under the lease in accordance with Clause 16vii of the Terms of Settlement.

119. Costs will be reserved.

SENIOR MEMBER R. WALKER