

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Gorring v Uptempo Concepts Pty Ltd & Anor* [2019]  
QCAT 128

PARTIES: **JULIE MICHELLE GORRING**  
(applicant)  
v  
**UPTEMPO CONCEPTS PTY LTD T/A LANDLINK  
REALTY GROUP**  
(first respondent)  
**SUREWIN DEVELOPMENT NO. 2 PTY LTD**  
(second respondent)

APPLICATION NO/S: RSL137-17

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 13 May 2019

HEARING DATE: 13 February 2019

HEARD AT: Brisbane

DECISION OF: Senior Member Brown  
Member McBryde  
Member Judge

ORDERS: **Julie Michelle Gorring must pay Surewin  
Developments No. 2 Pty Ltd the sum of FIVE  
THOUSAND, EIGHT HUNDRED AND SEVENTY-  
SIX DOLLARS AND SEVENTY-FIVE CENTS  
(\$5,876.75) within 28 days of the date of this decision.**

CATCHWORDS: LANDLORD AND TENANT – LEASES AND  
TENANCY AGREEMENTS – COVENANTS – AS TO  
REPAIR – where express exclusions on lessee’s repair  
obligations – whether creates an obligation on lessor –  
whether the implied covenant for quiet enjoyment extends  
to repair and maintenance by a lessor.  
  
PROCEDURE – CIVIL PROCEEDINGS IN STATE  
AND TERRITORY COURTS – COURT SUPERVISION  
– COSTS – RECOVERY COSTS – where lease contains  
special conditions indemnifying lessor against claims and  
expenses – whether costs payable on an indemnity basis.

*Retail Shop Leases Act 1994 (Qld)*, s 42, s 43  
*Queensland Civil and Administrative Tribunal Act (Qld)*,  
 s 100, s 103

*Antonino Giuseppina Ensabella & Sons Pty Ltd v Players  
 On Downunder Pty Ltd* [2000] VSCA 73 (2 May 2000)  
*Baque v Rivergum Homes Pty Ltd* [2013] QCATA 200 (4  
 July 2013)  
*BP Refinery (Westernport) Pty Ltd v Hastings Shire  
 Council* (1977) 180 CLR 266  
*Budd-Scott v Daniel* [1902] 2 KB 351  
*Gordon v Lidcombe Developments Pty Ltd* [1966] 2  
 NSW 9, 15; *Aussie Traveller Pty Ltd v Marklea Pty Ltd*  
 [1998] 1 Qd R 1  
*Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd*  
 [1976] 2 NSWLR 15  
*Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009]  
 NSWCA 234 (5 August 2009)  
*Orsay Holdings Pty Ltd v Mekanovic & Ors* [2013] QCA  
 232 (23 August 2013)  
*Southwark London Borough Council v Mills; Baxter v  
 Camden London Borough Council (No 2)* [1999] 4 All  
 ER 449

#### APPEARANCES & REPRESENTATION:

Applicant:	Self-represented
Respondent:	Self-represented

#### REASONS FOR DECISION

##### **What is this dispute about?**

- [1] The applicant, Mrs Gorrington, leased commercial premises on the Gold Coast from the second respondent, Surewin. The first respondent, Landlink, was the agent of Surewin and was responsible for the letting and management of the premises. Mrs Gorrington operated from the premises an aquarium, D & J Plants and Fish. Mrs Gorrington says that Surewin breached its obligations under the lease and as a result she has suffered loss and damage. Surewin denies breaching its obligations and counter-claims for the recovery of rent. Surewin says Mrs Gorrington has not paid. A claim by Surewin for unpaid electricity accounts was abandoned at the hearing.

##### *What do the parties say?*

a. *The evidence*

- [2] At the time Mrs Gorrington lodged the Notice of dispute (the Notice) she was still in occupation of the retail shop. By the time of the hearing Mrs Gorrington had vacated the premises. In the Notice, Mrs Gorrington identifies the main points of the dispute as: water and electrical issues; damage to the building and stock; no working fire alarm or fire hose. Mrs Gorrington identifies in the Notice the remedy she was seeking as: rent reduction; the lessor to 'fix up what is needed'; termination of the lease; removal of the business to suitable alternative premises.
- [3] As is often the case in tribunal proceedings, the statements of evidence filed and relied upon by Mrs Gorrington clarify, at least to some extent, the relevant issues for determination and the relief sought.
- [4] In her statement of evidence<sup>1</sup> Mrs Gorrington says that she entered into the lease on 19 August 2016<sup>2</sup> and went into occupation of the premises in or around September 2016.<sup>3</sup> Mrs Gorrington says that there were numerous issues with the premises from the time she went into occupation. Those issues, as identified in the statement of evidence, can be summarised as follows:
- (a) Water leaks:
    - (i) Defective air-conditioning unit resulting in water leaks in the premises;
    - (ii) Roofing and guttering problems resulting in water entering the premises;
    - (iii) Water leaking through roof ventilators into the premises.
  - (b) Electricity issues and fire hazards:
    - (i) Malfunctioning interior lighting;
    - (ii) Damage to a power point resulting in an electrocution injury to Mrs Gorrington's husband;
    - (iii) Internal fire caused by a malfunctioning power point;
    - (iv) No smoke alarm or fire alarm installed at the premises; no functioning/connected fire hose at the premises; and no fire extinguisher at the premises.
- [5] Mrs Gorrington says that she made requests of the respondents to attend to the various issues the subject of her complaints. Attached to Mrs Gorrington's statement are copies of screen shots of various text messages passing between herself and Mr Robert Boyle, a director of the first respondent. Mrs Gorrington says that she and her husband regularly visited the offices of the first respondent to discuss the damage to the premises. No action was taken by the respondents to adequately rectify or maintain the premises says Mrs Gorrington.<sup>4</sup>

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<sup>1</sup> Statement of Julie Michelle Gorrington filed 20 September 2018.

<sup>2</sup> Ibid, [2].

<sup>3</sup> Ibid, [5].

<sup>4</sup> Ibid, [17] – [19].

- [6] Mrs Gorrington says that on or around 4 April 2017, water leaked into a power point causing her husband to be 'electrocuted' and resulting in 'a power trip for numerous hours'.<sup>5</sup> Mrs Gorrington also says that on or about 16 July 2017, a power point underneath the kitchen sink caught fire.<sup>6</sup> She says that the premises had no smoke alarm or fire alarm, no fire extinguisher and there was no functioning or connected fire hose.<sup>7</sup>
- [7] Mrs Gorrington's evidence at the hearing can be summarised as follows:
- (a) Before taking possession of the premises, Mrs Gorrington inspected the premises;
  - (b) Mrs Gorrington requested Landlink to undertake certain repair works before entering into the lease;
  - (c) Mrs Gorrington could not state with any certainty what works were carried out by Landlink before she took possession of the premises;
  - (d) Mrs Gorrington and Landlink agreed that Mrs Gorrington would have the benefit of a three (3) month rent free period;
  - (e) Mrs Gorrington identified an issue with the air conditioning unit after taking possession of the premises and after turning on the air conditioner;
  - (f) The premises were on two levels, with a larger upper area (the upper area) and a smaller lower area (the lower area) accessed down a single step;
  - (g) The lower area was used for the display of fish in tanks and the upper area was used for a variety of purposes including storage and the display of merchandise;
  - (h) The upper area included an area partitioned off by shelving. In the partitioned off area was located the kitchen which included a sink. In addition to being used as a kitchen area, the partitioned area was used for storage purposes including the storage of aquarium plants, and the sink was used for various purposes including washing and cleaning fish tanks;
  - (i) Customers would occasionally enter the partitioned off area;
  - (j) There were two air-conditioning units located at the premises: one in the upper area above the sink and one in the lower area;
  - (k) The air conditioning unit in relation to which Mrs Gorrington complained was located in the upper area. After taking possession of the premises and turning on the upstairs air conditioning unit, Mrs Gorrington identified that the unit leaked;
  - (l) It took approximately three months after entering into the lease for the air conditioner to be repaired by the respondents;
  - (m) Mrs Gorrington did not consider it was her obligation under the lease to carry out maintenance on the air conditioning units including the cleaning of the filters;

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<sup>5</sup> Ibid, [13].

<sup>6</sup> Ibid, [14].

<sup>7</sup> Ibid, [16].

- (n) There were power outages at the premises on the 4<sup>th</sup> of September 2016 and the 5<sup>th</sup> of September 2016. Mrs Gorrington was told by Landlink these outages related to an issue with the supplier of electricity to the premises, Energex, and not the result of any electrical issues within the premises;
  - (o) Mrs Gorrington was unable to say what caused the power outages on the 4<sup>th</sup> and 5<sup>th</sup> of September 2016, however they occurred soon after the fire caused by the power point under the kitchen sink;
  - (p) There were power outages in the premises throughout the tenancy;
  - (q) There were two separate roof leaks both of which were rectified by the lessor;
  - (r) A ‘couple of customers’ accessed that part of the premises in which water accumulated on the floor as a result of the leaking roof;
  - (s) Water penetrated the walls of the premises during periods of rain.
- [8] As a result of the alleged breaches by the lessor of its obligations under the lease, Mrs Gorrington says that she suffered financial loss. In her statement Mrs Gorrington includes a table setting out the various losses claimed totalling \$29,300.<sup>8</sup> The amounts are stated to be estimates. Mrs Gorrington says in her statement:
- Given the nature of the Business and circumstances surrounding this dispute, it is difficult to provide an exact estimation of the loss I have suffered or indeed cogent documentary evidence of this loss. Nevertheless, attached and marked “Annexure H” is any and all evidence of the financial loss suffered by the Business that I am currently able to provide.<sup>9</sup>
- [9] The losses claimed by Mrs Gorrington relate to damage to equipment, stock losses, and loss of income. Mrs Gorrington also makes a claim for pain and suffering.
- [10] Annexure H to Mrs Gorrington’s statement comprises a number of invoices rendered on dates from April 2017 to December 2017 from Aquarium Industries totalling \$2,291.39 for various fish, insects, fish feed and aquarium supplies. How the invoices are said to be evidence of Mrs Gorrington’s financial loss is not further explained in the statement.
- [11] Mrs Gorrington relies upon a statement by her husband, Trevor Gorrington.<sup>10</sup> Mr Gorrington’s statement largely mirrors that of Mrs Gorrington. Mr Gorrington identifies losses suffered by Mrs Gorrington, of which he is aware, estimated at \$1,300 in the form of heaters and pumps.<sup>11</sup>
- [12] In her oral evidence Mrs Gorrington was unable to explain why she had not placed before the Tribunal evidence in support of her claimed losses. Mrs Gorrington’s evidence was that the various issues complained of by her relating to the air conditioner, leaking roof and disrupted power supply had the result of restricting access by customers to the premises. In respect of her claim for loss of income, Mrs Gorrington’s evidence was that she and her husband ‘would well and truly have made that money’. What was

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<sup>8</sup> Ibid, [20].

<sup>9</sup> Ibid, [22].

<sup>10</sup> Statement of Trevor Gorrington filed 20 September 2018.

<sup>11</sup> Ibid, [17].

meant by 'that money' was not further clarified. Mrs Gorrington said that she was not willing to purchase any more fish or attract customers to the shop as a result of the various issues identified with the premises.

- [13] In support of her claim for pain and suffering, Mrs Gorrington's evidence was that pumps 'blew up' in front of customers although Mrs Gorrington was unable to say when these episodes occurred. The connection between these events (details of which were not specified) and the claim for pain and suffering was not further clarified by Mrs Gorrington in her evidence.
- [14] When cross examined in relation to the claimed stock losses arising out of power outages, Mrs Gorrington's evidence was that the power outages on the 4<sup>th</sup> of September and the 5<sup>th</sup> of September 2016 were for a duration of 'a couple of hours' on each occasion. When it was put to Mrs Gorrington that it would be unusual for frozen products left in a freezer to go off in that time frame, Mrs Gorrington disagreed.
- [15] Mrs Gorrington was cross examined about an invoice relied upon by her in support of the claim for loss of stock as a result of power outages.<sup>12</sup> She conceded that the invoice, dated 21 December 2017, was rendered some months after the date she vacated the premises. Under cross examination Mrs Gorrington said that the profit and loss statements and balance sheets for the business, which were not before the Tribunal, would support her claim.
- [16] Mrs Gorrington conceded in evidence that the outstanding rent payable by her to Surewin totalled \$5,876.75. Mrs Gorrington did not concede that any monies were payable by her to Surewin in respect of the electricity accounts.
- [17] Mrs Gorrington gave evidence that she had taken out a policy of public risk insurance as required by the terms of the lease. When asked whether she had claimed under the policy in respect of losses said to flow from the alleged breaches of the lease by Surewin, Mrs Gorrington's evidence was that she had been told by the insurer that claims for losses of fish and plants would not have been covered under the policy.
- [18] Mr Trevor Gorrington gave evidence at the hearing:
- (a) In the period of 3 months after the commencement of the lease Mr Gorrington was setting up the shop to prepare for trading;
  - (b) Mr Gorrington undertook no repairs to the premises in the period of 3 months after the commencement of the lease;
  - (c) There were numerous power outages at the premises. These outages occurred 'every day' that Mr Gorrington was at the shop;
  - (d) On every occasion on which there was a power outage, Mr Gorrington would attend at the office of Landlink and report the outage;
  - (e) When discussing the problems being experienced with the air conditioner, Mr Gorrington was told by Mr Robert Boyle, a director of Landlink, to clean the air conditioner himself. After Mr Gorrington told Mr Boyle that he was not qualified

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<sup>12</sup> Statement of Julie Gorrington filed 20 September 2018, annexure H, invoice no. 651431

to undertake the work, Mr Gorrington said it was his understanding that Mr Boyle would arrange for a contractor to undertake the necessary work;

- (f) Mr Gorrington told Mr Boyle that both air conditioning units were leaking and that water pooled on the floor in the lower area as a result of the leaking air conditioner and, following rain, as a result of the leaking roof;
- (g) Water leaked from a ventilator located in the ceiling of the upper area during heavy rain resulting in water accumulating over 'a fair area' of the floor;
- (h) The roof of the premises also leaked 'where the air conditioner leaked';
- (i) Mr Gorrington was 'zapped' when using a light switch located in the downstairs area of the premises;
- (j) The fire caused by the power point occurred in the upstairs area of the premises below the kitchen sink. The power point was not used at any time during the tenancy;
- (k) When an electrician removed the light switch which had 'zapped' him, Mr Gorrington observed red, dirty, smelly water in the light switch;
- (l) Mr Gorrington was told by the electrician that the light switch was 'a fire waiting to happen';
- (m) The kitchen area was used for washing up dishes, washing plants, cleaning out buckets and setting up fish bowls. The partitioned area was also used for storage. Customers entered the partitioned area of the premises approximately 3 times per week;
- (n) The upstairs area of the premises was also used for the display of merchandise for sale including pet collars, animal beds, kitty litter, and potted plants;
- (o) There was signage on various windows at the premises. Some windows had been painted over with blackboard paint which were used for advertising purposes. Some windows had transfer decals attached to them and signage was also affixed to the windows;
- (p) The business operated by Mrs Gorrington was marketed in a variety of ways including the distribution of flyers in surrounding areas, an illuminated sign in the shop window, online advertising, and signage in the shop windows.

[19] The respondents rely upon statements by Mr Boyle and Ms Lisa Jeffrey. Ms Jeffrey is employed by Landlink as a property manager.

[20] Mr Boyle says that there was an oral agreement with Mrs Gorrington for a rent free period until 30 September 2016 to assist Mrs Gorrington in establishing the business.<sup>13</sup> Mr Boyle refers to repairs to the premises being undertaken early in the tenancy in the form of replacement of a light switch, replacement of a light bulb and replacement of a

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<sup>13</sup> Statement of Robert Gerard Boyle filed 17 October 2018, [13].

window and an inspection of the safety switch and the fluorescent lighting throughout the premises.<sup>14</sup>

- [21] Mr Boyle says that during the tenancy, Mrs Gorrington declined to remove signage at the front of the premises (used by the previous tenant) advertising the sale of pizzas and cakes.<sup>15</sup>
- [22] Attached to Mr Boyle's statement is a letter dated 12 October 2018 from Mr Daniel Metcalfe addressed to: 'To whom it may concern'.<sup>16</sup> The letter contains the opinions of Mr Metcalfe in relation to the operation of the aquarium business. The letter is not signed. Mr Metcalfe was not called to give evidence. Accordingly, we do not have regard to the letter and attribute no weight to it.
- [23] Mr Boyle says that Mrs Gorrington vacated the premises on or about 18 September 2017. Mr Boyle says that Mrs Gorrington owes \$5,876.75 in unpaid rent and \$1,198.79 in unpaid electricity bills.<sup>17</sup> Attached to Mr Boyle's statement is a copy of Landlink's trust account ledger detailing the rental payments made by Mrs Gorrington.<sup>18</sup> Copies of the electricity bills issued by the electricity provider in respect of the premises are also attached to Mr Boyle's statement.<sup>19</sup> As we have observed, it is not contentious that the unpaid rent totals \$5,876.75.
- [24] Mr Boyle says that Landlink responded promptly to issues raised by Ms Gorrington in relation to the air-conditioning unit. He says that a report from the service technician engaged to investigate the leaking air-conditioner noted that the air-conditioner was very dirty with a blocked drain.<sup>20</sup>
- [25] In relation to the fire at the premises, Mr Boyle says that repairs were carried out within approximately 2 hours of Mr Gorrington reporting the fire.<sup>21</sup>
- [26] In relation to power outages at the premises, Mr Boyle says that outages occurred on 4 September 2017 and 5 September 2017, that he instructed an electrician to investigate the cause of the outages and that he was advised by the electrical contractor that the outages were caused by Energex and not any electrical fault within the premises.<sup>22</sup>
- [27] Mr Boyle gave oral evidence at the hearing:
- (a) Mr Boyle was not aware of any problem with the air conditioner in the upper area prior to Mrs Gorrington entering into the lease;
  - (b) Water leaked from the air conditioner in the upper area onto a table and sink and was the result of a blocked drain and dirty filters;

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<sup>14</sup> Ibid, [15] – [17].

<sup>15</sup> Ibid, [22].

<sup>16</sup> Ibid, annexures, page 28.

<sup>17</sup> Ibid, [27] – [28].

<sup>18</sup> Ibid, annexure J

<sup>19</sup> Ibid, annexure K

<sup>20</sup> Ibid, [31] – [36].

<sup>21</sup> Ibid, [37] – [40].

<sup>22</sup> Ibid, [41] – [45].

- (c) Mr Boyle was never advised by Mrs Gorrington or Mr Gorrington that there was any problem with the air conditioner in the lower area;
- (d) Mr Boyle became aware of the leaking roof in the kitchen area on 6 September 2016 and by 8 September 2016 the leak had been fixed;
- (e) Mr Boyle became aware of a further instance of the roof leaking, on this occasion in the area of the rear wall of the premises, on 6 June 2017 and by 9 June 2017 the leak had been fixed;
- (f) When Mr Boyle was made aware of the power outage at the premises on 4 September 2016, steps were immediately taken to engage an electrician to investigate the cause of the power outage;
- (g) The power outages were subsequently identified as emanating from the electricity supplier, Energex, rather than any issue within the premises;
- (h) After Energex inspected the premises following the power outages on 4 September 2016 and 5 September 2016, neither Landlink nor Surewin were advised by Energex, or an electrical contractor, of any electrical issues within the premises.

[28] The respondents' also relied upon evidence by Ms Lisa Jerry. In her statement of evidence, Ms Jerry says that she engaged tradespersons to undertake repairs to the premises at the commencement of the tenancy.<sup>23</sup> Ms Jerry says that she was instructed by Mr Boyle to engage a contractor to attend to repairs on the air-conditioning unit<sup>24</sup> and to engage a contractor to investigate the cause of power outages to the premises.<sup>25</sup> Ms Jerry's gave similar evidence to that given by Mr Boyle regarding the outstanding rent and unpaid electricity bills.<sup>26</sup>

[29] Ms Jerry's evidence at the hearing was:

- (a) She did not inspect the premises before Mrs Gorrington entered into the lease;
- (b) She did not conduct an inspection of the premises after Mrs Gorrington vacated the premises, nor did she prepare an exit report;
- (c) She attended the premises on two occasions during the tenancy – the first occasion being after the fire in the kitchen area and the second occasion after the rent fell into arrears.

*b. The submissions by the parties at the hearing*

[30] At the end of the hearing the parties were given the opportunity to make oral submissions. The respondents had prepared written submissions. Mrs Gorrington was provided with a copy of the submissions and the hearing adjourned to give Mrs Gorrington an opportunity to consider the submissions and prepare her own oral submissions.

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<sup>23</sup> Statement of Lisa Mamaeroa Jeffrey filed 17 October 2018, [14].

<sup>24</sup> Ibid, [ 23].

<sup>25</sup> Ibid, [26].

<sup>26</sup> Ibid, [20] – [22].

[31] Mrs Gorrington submitted that, as a result of the various defects of which she complained, the premises were not suitable to be leased. She said that there was no evidence that she refused, during the term of the lease, to remove signage at the premises advertising the sale of pizza and cakes.

[32] In relation to the implied compensation provisions of the *Retail Shop Leases Act 1994* (Qld) ('RSL Act') Mrs Gorrington submits:

- (a) The water leaking onto the floor of the premises substantially restricted Mrs Gorrington's access to the premises;<sup>27</sup>
- (b) The water leaks and power outages caused significant disruption to Mrs Gorrington's trading and the respondents did not take all reasonable steps to prevent or stop significant disruption within its control;<sup>28</sup>
- (c) The respondents did not rectify as soon as practicable the issues with the air conditioner and the power supply to the premises;<sup>29</sup>
- (d) The respondents did not rectify as soon as possible a defect in the leased building.<sup>30</sup> In this regard, Mrs Gorrington relied upon the various defects identified in her evidence;
- (e) The respondents neglected to maintain the building;<sup>31</sup>
- (f) Mrs Gorrington entered into the lease on the basis of a false or misleading statement or representation by Landlink. In this regard, Mrs Gorrington said that she had been advised by Mr Boyle that the rent free period would be three months, and not one month as asserted by Mr Boyle.<sup>32</sup>

[33] The respondents' submissions can be summarised as follows:

- (a) Repairs to the premises were carried out by the respondents prior to Mrs Gorrington taking possession;
- (b) The lease contains a number of provisions which require Mrs Gorrington to indemnify the respondents in respect of all claims for damages and loss except to the extent that any such damage or loss is the result of the deliberate act or negligence of the lessor;
- (c) Mrs Gorrington has failed to make out any claim in negligence against the respondents;
- (d) Mrs Gorrington has failed to establish any loss as a result of any action or inaction on the part of the respondents.

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<sup>27</sup> RSL Act, s 43(1)(a).

<sup>28</sup> Ibid., s 43(1)(c).

<sup>29</sup> Ibid, s 43(1)(d)(i).

<sup>30</sup> Ibid, s 43(1)(d)(ii).

<sup>31</sup> Ibid, s 43(1)(e).

<sup>32</sup> Ibid, s 43AA(a).

### Retail tenancy disputes – the statutory framework

- [34] The Tribunal has, with some exceptions, jurisdiction to hear and decide retail tenancy disputes.<sup>33</sup> A ‘retail tenancy dispute’ is any dispute under or about a retail shop lease, or about the use or occupation of a leased shop under a retail shop lease, regardless of when the lease was entered into.<sup>34</sup> ‘Retail shop lease’ means a lease of a retail shop.<sup>35</sup> ‘Lease’ is defined.<sup>36</sup> ‘Retail shop’ means premises situated in a retail shopping centre or that are used wholly or predominantly for the carrying on of one or more retail businesses.<sup>37</sup> ‘Retail business’ means a business prescribed by regulation as such.<sup>38</sup>
- [35] The Tribunal may make the orders it considers to be just to resolve a retail tenancy dispute.<sup>39</sup> The Tribunal may, among other things, order the payment of an amount by a party to a dispute to a specified person.<sup>40</sup>
- [36] A party to a retail tenancy dispute that is within a mediator’s jurisdiction under s 97 of the RSL Act may lodge a notice of dispute with the chief executive.<sup>41</sup> After a notice of dispute is lodged, a mediation conference must be held.<sup>42</sup> If the parties cannot reach a mediated solution to the dispute, or a party to the dispute does not attend the mediation conference, or the dispute is not settled within four months after the notice of dispute is lodged, and the retail shop lease has not ended more than one year before the dispute notice was lodged, the mediator must refer the dispute to the tribunal.<sup>43</sup>
- [37] A retail shop lease is taken to include certain provisions relating to when compensation may be payable by a lessor to a lessee.<sup>44</sup> Sections 43 and 43AA of the RSL Act specify when compensation is payable by the lessor to the lessee.
- [38] The lease was entered into on 19 August 2016. The implied compensation provisions contained in Part 6, Division 7 of the RSL Act were amended in 2016 with the amendments coming into effect on 25 November 2016. As these reasons make clear, the outcome of this matter would be no different applying the RSL Act before or after the 2016 amendments.
- [39] A provision of a retail shop lease is void if it purports to exclude the application of a provision of the RSL Act that applies to the lease.<sup>45</sup> To the extent to which a provision of the RSL Act is inconsistent with a provision of a retail shop lease, the Act prevails and the provision of the lease is void to the extent of the inconsistency.<sup>46</sup>

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<sup>33</sup> Ibid, s 103(1).

<sup>34</sup> Ibid, sch (definition of ‘retail tenancy dispute’).

<sup>35</sup> Ibid, sch (definition of ‘retail shop lease’).

<sup>36</sup> Ibid, sch (definition of ‘lease’).

<sup>37</sup> Ibid, sch (definition of ‘retail shop’).

<sup>38</sup> Ibid, sch (definition of ‘retail business’).

<sup>39</sup> Ibid, s 83(1).

<sup>40</sup> Ibid, s 83(2)(b).

<sup>41</sup> Ibid, s 55(1).

<sup>42</sup> Ibid, s 56(1).

<sup>43</sup> Ibid, s 63(1) - (2).

<sup>44</sup> Ibid, s 42(1).

<sup>45</sup> Ibid, s 19.

<sup>46</sup> Ibid, s 20.

### **Consideration**

[40] We are satisfied that the premises were used for the conduct of a retail business, that the premises were a retail shop and that the Commercial Tenancy Agreement, which was for a 12 month period, dated 19 August 2016 is a retail shop lease.

[41] We are satisfied that there exists between the parties a retail tenancy dispute and that the parties have complied with the requirements of Part 8 of the RSL Act in relation to the pre-proceedings mediation process. We are satisfied that the Tribunal has jurisdiction to hear and decide the dispute.

[42] We will address firstly our factual findings.

#### *Rent free period*

[43] Mrs Gorrington says that the parties agreed a rent free period of three months. The respondents say the agreed rent free period was one month. Mrs Gorrington makes no reference in the Notice of Dispute or her statement of evidence to any dispute relating to the rent free period. Indeed, the first reference by Mrs Gorrington to any such dispute was under cross examination. Mrs Gorrington's evidence is that it was agreed prior to her entering into the lease that she would enjoy a three month rent free period. Mrs Gorrington says that she entered into the lease on the basis of the representation as to the three month rent free period and that it was a false or misleading statement or representation made by the lessor's agent's. There was no evidence from Mrs Gorrington as to who made the representation, when the representation was made (other than it being made before entering into the lease) or the precise terms of the representation other than the duration of the rent free period.

[44] Mr Boyle's evidence was that the parties agreed on a one month rent free period. He says that the rent free period was from 24 August 2016 to 30 September 2016 (that is, prior to the commencement date of the lease) and that it would be commercially unrealistic for a lease for a period of twelve months to have a three month rent free period. Mr Boyle did not give evidence as to when the rent free period was agreed.

[45] It is not contentious that the lease makes no reference to a rent free period.

[46] We prefer the evidence of Mr Boyle. Where Mrs Gorrington's evidence was frequently vague and uncertain, Mr Boyle's evidence was clear and consistent with the objective facts. We are satisfied that Mrs Gorrington went into possession of the premises in late August 2016. The lease term commenced on 1 October 2016. We find that Mrs Gorrington was permitted to enter into possession of the premises before the commencement of the lease term. The tenancy ledger indicates that Mrs Gorrington began paying rent on 29 September 2016. There is no evidence that Mrs Gorrington raised the issue of the rent free period with the respondents at any time during the term of the lease. There is no evidence that Mrs Gorrington complained to the respondents that she was required to pay rent during the alleged three month rent free period. Mrs Gorrington paid rent during the first three months of the lease term. The facts are consistent with the parties having acted on the basis of Mrs Gorrington not being required to pay rent for the period she was in possession of the premises prior to the commencement of the lease term.

[47] We find it was agreed between the parties that Mrs Gorrington was permitted to enter into possession of the premises prior to the commencement of the lease, and that

during this period she was not required to pay rent. We further find that there were no representations by the lessor or its agent regarding a three month rent free period.

*The air-conditioning units*

[48] Mrs Gorrington's evidence is that after taking possession of the premises and turning on the air-conditioner in the upper area it became apparent that there was a problem with it. Mrs Gorrington's evidence was that it took three months for the air-conditioner to be repaired. In her statement of evidence Mrs Gorrington says that following an inspection of the air-conditioning unit a technician told Mrs Gorrington that the unit looked as if it had never been cleaned.<sup>47</sup> No evidence was led from the technician. Attached to Mrs Gorrington's statement is a tax invoice from Cold Front Air conditioning.<sup>48</sup> The description of work in the tax invoice is:

Service call to check airconditioner leaking. Found very dirty airconditioner with blocked drain. Carry out general airconditioning service maintenance – tested ok.

[49] Mr Gorrington's evidence at the hearing was that he told Mr Boyle that both air-conditioning units were leaking. Mr Gorrington was unable to recall when this conversation took place. Mr Gorrington says that he was told by Mr Boyle to service the air-conditioners himself.

[50] We found Mr Gorrington to be an honest witness and concerned to ensure that he gave accurate and truthful evidence although his recollection of events tended to be somewhat vague. We accept Mr Gorrington's evidence that he had a conversation with Mr Boyle during which Mr Boyle told him to undertake maintenance to the air-conditioning unit. We accept Mr Gorrington's evidence that he told Mr Boyle he was unqualified to undertake the maintenance. We also accept Mr Gorrington's evidence that Mr Boyle advised Mr Gorrington that he would arrange for a technician to inspect the unit. We accept the evidence of Mr Boyle that this conversation took place on or about 27 September 2016. The conversation may have been on the telephone or at the premises. The conversation appears to have been prompted by a text message from Mrs Gorrington to Mr Boyle advising that the air conditioning unit was 'leaking bad'.<sup>49</sup>

[51] We find that a technician subsequently inspected the unit and undertook maintenance work on 16 December 2016.

[52] Mr Gorrington's evidence was that both the air-conditioning units leaked. Mr Boyle's evidence was that he was not advised of any issues with the unit in the lower area. In her statement of evidence Mrs Gorrington makes no mention of any issues with the air-conditioning unit in the lower area. On balance, we prefer the evidence of Mr Boyle and find that neither Mrs Gorrington nor Mr Gorrington complained about the air-conditioning unit in the lower area. Further, in the absence of any cogent evidence, we make no finding that there was any problem with the unit.

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<sup>47</sup> Statement of Julie Michelle Gorrington filed 20 September 2018, [8].

<sup>48</sup> Ibid, annexure 'B', tax invoice dated 19 December 2016.

<sup>49</sup> Statement of Robert Gerard Boyle filed 17 October 2018, 62.

- [53] Mr Gorrings' evidence was that water pooled in the lower area of the premises as a result of the leaking air-conditioning unit and the leaking roof. We will deal with this aspect of the evidence when considering the allegation of the leaking roof.
- [54] There is no evidence as to the impact the issues with the air-conditioning unit had upon the conduct by Mrs Gorrings of the business. There is no evidence that customers were unable to access the premises as a result of the issues with the air-conditioning unit nor is there any evidence that Mrs Gorrings was required to cease trading for any period of time or that the issues had any direct impact upon sales and revenue.

*Leaking roof*

- [55] We find that the roof of the building leaked after Mrs Gorrings took possession of the premises. We find that the roof leaked in the upstairs section of the premises in the kitchen area above the sink. We find that Mr Boyle was made aware of the water leak on 6 September 2016. We find that on 8 September 2016 the leak was repaired. Mrs Gorrings' evidence at the hearing was that the repairs remedied the leak. We find that the leak did not re-occur during the tenancy.
- [56] We find that there was a leak in the roof in the lower area at the rear wall of the premises. We find that the leak caused water to penetrate through the wall causing pockets of water to accumulate under the painted interior surface of the wall. Mrs Gorrings and Mr Gorrings gave evidence that they made numerous complaints to Landlink regarding this particular leak. Mr Gorrings said that water pooled on the floor in the lower area when the air-conditioner was on and when it rained. The evidence of Mr Gorrings was not specific as to how often these episodes of water penetration or leaking occurred, the contribution made to the water pooling by each of the air conditioning unit and the leaking roof, how large the area of pooled water was or the specific occasions on which the leaking and water pooling occurred.
- [57] Mr Boyle's evidence was that the water penetration issue involving the rear wall of the premises was reported by the Gorrings on 6 June 2017 and repaired on 9 June 2017. Mr Boyle said that the issue was caused by rusted iron roofing. Mrs Gorrings' evidence at the hearing was that after the repairs were undertaken the water penetration issues at the rear wall of the premises did not persist.
- [58] We accept the evidence of Mr Boyle. The evidence of Mrs Gorrings and Mr Gorrings was vague and lacked particularity as to when they complained about the leak and the occasions on which the water penetration at the rear wall of the premises occurred. Mr Boyle's evidence, supported by documentary evidence in the form of invoices for repairs, was quite specific as to when the issue was reported and when it was remedied.
- [59] As to the issue of water leaking into the upper area, the evidence of Mr Gorrings was that water also penetrated through a ventilator in the ceiling.<sup>50</sup> Mrs Gorrings and Mr Gorrings refer in their statements of evidence to water leaking through the roof ventilators. Mr Gorrings' oral evidence referred to only one ventilator. There was no evidence from Mrs Gorrings or Mr Gorrings as to the frequency of the water penetration or the extent of the water ingress other than the evidence to which we have referred. There is no evidence as to the cause of the water penetration through the ventilator.

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<sup>50</sup> Exhibit 1, photograph 3.

As we have found, the complaints by Mrs Gorrington regarding the leaking roof in the upper area near the air-conditioning unit and in the lower area were promptly remedied by the respondents.

- [60] In the absence of any probative and cogent evidence we are unable to make any findings as to the cause, frequency and extent of water penetration into the upper area through the ventilator in the ceiling identified by Mr Gorrington in his evidence. Further, there is no evidence as to the impact any such water penetration had upon the conduct by Mrs Gorrington of the business. There is no evidence that customers were unable to access the premises as a result of the alleged water penetration nor is there any evidence that Mrs Gorrington was required to cease trading for any period of time or that the water penetration had any direct impact upon sales and revenue.

*Power outages*

- [61] Mrs Gorrington's assertions in relation to power outages to the premises lacked any adequate particularity. She says in her statement of evidence that the lights in the downstairs area of the premises 'would regularly malfunction for extended periods of time'. No evidence was offered by Mrs Gorrington as to when these malfunctions occurred or how long the 'extended periods of time' were. Mr Gorrington's evidence was similarly vague and lacking in specificity. Mrs Gorrington offered no independent evidence regarding the nature, cause or duration of the power outages.
- [62] Mr Boyle gave evidence that he instructed Ms Jerry to engage the services of an electrician to investigate the cause of the power outages. Ms Jerry also gave evidence to this effect. Attached to Mr Boyle's statement is an invoice from an electrical contractor referring to an urgent after hours call out on 4 September 2017 and an urgent call out on 5 September 2017. The invoice refers to 'Found missing power to phase from street advise Energex of fault.'<sup>51</sup>
- [63] We find that there were power outages to the premises on 4 September 2017 and 5 September 2017 as a result of issues relating to the power supplier, Energex. It may be that from time to time, on other occasions, Mrs Gorrington experienced a disruption of power to the premises. We make no specific finding in this regard. There is no evidence as to when any such outages occurred, the duration of the outages or the cause or causes of such outages. We are not satisfied that the evidence establishes that any power outages were the result of any action or inaction on the part of the lessor or any defect in the premises.
- [64] There is no evidence as to the impact the power outages had upon the conduct by Mrs Gorrington of the business. There is no evidence that customers were unable to access the premises as a result of the power outages and there is no evidence that Mrs Gorrington was required to cease trading for any period of time or that the power outages had any direct impact upon sales and revenue.

*Faulty light switch and power point*

- [65] We find that an incident occurred on 4 April 2017 involving Mr Gorrington when he used a light switch. The incident was described by Mr Gorrington in his evidence as being 'zapped'. We accept this description. There is no evidence that Mr Gorrington sought medical treatment after the incident. There is no evidence from the electrician who

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<sup>51</sup> Statement of Robert Gerard Boyle filed 17 October 2018,71..

investigated the cause of the incident. In the absence of any cogent evidence we are unable to make any findings as to the cause of the incident.

- [66] We find that an incident occurred on 16 August 2017 when a power point in the kitchen area caught fire. There is no evidence as to the cause of the incident. In the absence of any cogent evidence as to the cause of the fire we are unable to make any findings regarding the cause of the fire. We find that the incident was reported to Mr Boyle on 16 August 2017 and that Mr Boyle took immediate steps to engage a contractor to investigate the incident and undertake repairs.
- [67] There is no evidence as to the impact the issues with the light switch and power point had upon the conduct by Mrs Gorrington of the business. There is no evidence that customers were unable to access the premises as a result of the issues nor is there any evidence that Mrs Gorrington was required to cease trading for any period of time or that the issues had any direct impact upon sales and revenue.

*Mrs Gorrington's claim for compensation*

- [68] Mrs Gorrington claims compensation for financial losses she says she has sustained as a result of the various issues of which she complains. Although not expressed by Mrs Gorrington thus, such a claim may arise:
- (a) As a result of a breach by the lessor of the terms of the lease;
  - (b) As a result of a breach by the lessor of the implied covenant for quiet enjoyment;
  - (c) By operation of the compensation provisions implied in the lease pursuant to section 42(1) of the RSL Act.
- [69] The lease imposed no express obligation upon the lessor to maintain or repair the premises. The lease imposed an obligation upon Mrs Gorrington to keep the premises in good repair and condition except for fair wear and tear, inevitable accident and structural defects and to fix any damage caused by Mrs Gorrington or her employees.<sup>52</sup> The question arises as to whether the express exclusion of fair wear and tear, inevitable accident and structural defects created an obligation upon the lessor to attend to the rectification of matters falling within the meaning of those terms.
- [70] Terms may be implied into a contract as a matter of law or fact. The implied obligations of a landlord to provide quiet enjoyment and not to derogate from the grant are implied at law in all leases.<sup>53</sup> Terms may be implied for business efficacy. For a term to be implied it must:
- (a) Be reasonable and equitable;
  - (b) Be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
  - (c) Be so obvious that it goes without saying;

<sup>52</sup> Commercial Tenancy Agreement, dated 19 August 2016, cl 6.1.

<sup>53</sup> *Budd-Scott v Daniel* [1902] 2 KB 351.

- (d) Be capable of clear expression;
- (e) Not contradict any express term of the contract.<sup>54</sup>

[71] A term imposing an obligation on the lessor to keep the premises in good repair and condition limited to wear and tear, inevitable accident and inherent structural defects is, in our view, not so obvious that it goes without saying. Had the lessor retained control over part of the premises, for example common areas, the implication of a term might be capable of being supported. However the premises were a stand alone building. The lessor retained no control over any part of the building. Accordingly we do not find that a term should be implied into the lease requiring the lessor to repair and maintain.

[72] As we have observed, a covenant for quiet enjoyment is one implied by law in all leases. The Tribunal has jurisdiction in respect of a claim under the general law for a breach of the covenant for quiet enjoyment.<sup>55</sup> Does the implied covenant for quiet enjoyment extend to repair and maintenance by a lessor?

[73] A breach of quiet enjoyment will be found where the lessor has substantially interfered with the ordinary and lawful enjoyment of the property.<sup>56</sup> Substantial interference is conduct rendering the premises 'unfit from a reasonable point of view for the purpose for which' the lease was granted.<sup>57</sup> The covenant for quiet enjoyment does not apply to things done before, or the state of affairs at, the time the lease is entered into. The tenant takes the property in the physical condition in which the tenant finds it.<sup>58</sup>

[74] As we have observed, Mrs Gorrington leased the entirety of the building. There was no part of the building which the lessor remained in possession of, or in control of, after the lease was entered into. There is no evidence before us as to the state of the premises at the time the lease was entered into. Accordingly we are unable to be satisfied that any state of affairs giving rise to water penetration into the premises, or issues relating to the electricity supply to, or within, the property only arose after the lease was entered into. In any event we are not satisfied that, at any time during the term of the lease, the premises were unfit for the purpose of the operation by Mrs Gorrington of her aquarium business. We conclude that there was no breach by the lessor of the implied covenant for quiet enjoyment.

[75] Mrs Gorrington relies upon the compensation provisions implied into retail shop leases by s 42(1) of the RSL Act. We find as follows:

- (a) The various matters complained of by Mrs Gorrington did not substantially restrict her access to the premises. What in fact Mrs Gorrington complained about was access within the premises. Even if we were to accept that access to the premises includes access within the premises, we have found that Mrs Gorrington has not established any such restriction;

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<sup>54</sup> *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266.

<sup>55</sup> *Orsay Holdings Pty Ltd v Mekanovic & Ors* [2013] QCA 232 (23 August 2013).

<sup>56</sup> *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15.

<sup>57</sup> *Gordon v Lidcombe Developments Pty Ltd* [1966] 2 NSWLR 9, 15; *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1.

<sup>58</sup> *Southwark London Borough Council v Mills; Baxter v Camden London Borough Council (No 2)* [1999] 4 All ER 449.

- (b) The various matters complained of by Mrs Gorrington did not substantially restrict or alter access by customers to the premises. Again, what Mrs Gorrington complained about was access by customers within the premises. As we have observed, even if we were to accept that access to the premises includes access within the premises, we have found that Mrs Gorrington has not established any such restriction;
- (c) The lessor did not cause any significant disruption to Mrs Gorrington's business;
- (d) The lessor did not fail to take all reasonable steps to prevent or stop significant disruption within the lessor's control;
- (e) The complaints regarding the leaks in the roof were remedied in a timely fashion;
- (f) There was a delay of almost three months between the reporting of the issues with the air conditioning unit in the upper area and the time a technician carried out maintenance and repairs to the unit. Despite this delay, and for the reasons that follow, Mrs Gorrington has not established any entitlement to compensation as a result of such delay;
- (g) There is insufficient evidence to support a finding that power outages to the premises were the result of a defect in the building nor is there any evidence that the cause of the power outages were matters within the lessor's control;

[76] Mrs Gorrington's entitlement to compensation relating to the breakdown of plant and equipment under s 43(1)(d) of the RSL Act does not arise unless the plant or equipment was under the lessor's care or maintenance. We are not satisfied that the air conditioning units were plant and equipment under the lessor's care or maintenance. The lease imposed upon Mrs Gorrington the obligation to maintain the premises in good repair and condition. The lease imposed no such obligation on the lessor and we have found that no such term is to be implied into the lease. There is no inconsistency in this regard between the terms of the lease and the RSL Act.

[77] Even had we been satisfied that Mrs Gorrington had established a liability in the lessor in respect of the various matters complained of, for the reasons that follow we are not satisfied that Mrs Gorrington has established any loss or damage as a result. In addition to the factual findings we have made we will address each of the various heads of compensation claimed by Mrs Gorrington:

- (a) Claim for damage to pumps, heaters and other appliances: the loss claimed is 'estimated' at \$1,300.00. Mrs Gorrington claims that 20 heaters (for fish tanks) and 15 pumps (also for fish tanks) were damaged as a result of the power outages. There is no evidence offered by Mrs Gorrington as to when the losses were sustained, how the issues with power supply to the premises were connected with damage to the pumps and heaters, what the 'other requisite appliances' said by Mrs Gorrington to have been damaged were, what the actual damage to the pumps and heaters was, or the cost of purchasing or replacing the pumps, heaters or other 'requisite appliances.'
- (b) Loss of fish, plants and remaining stock as a result of power outages and associated failures of pumps and heaters: the claim is 'estimated' at \$13,000.00. In support of her claim Mrs Gorrington relies upon invoices from three suppliers

of aquarium related products. In respect of one of the suppliers, various invoices for the supply of fish and what appears to be fish food are attached to Mrs Gorrings statement. None of the invoices refer to plants. One of the invoices is dated after Mrs Gorrings vacated the premises. There is no evidence offered by Mrs Gorrings as to when the alleged losses were sustained, how the issues with power supply to the premises were connected with the loss of fish and plants, what the 'remaining stock' was, or the cost of purchasing or replacing the plants or other 'remaining stock.'

- (c) Loss of income as a result of restricted customer access to shop as a result of damage to premises: An amount of \$10,000.00 is claimed. There is no evidence that any of the matters complained of by Mrs Gorrings resulted in access to the premises by customers being restricted or that customers within the premises were impacted by the issues complained of resulting in loss of income by Mrs Gorrings. There is no evidence by Mrs Gorrings that the shop was closed at any time or that customers were turned away from the premises as a result of the issues complained of. There is no evidence that customers did not undertake purchases as a result of any of the issues identified by Mrs Gorrings. Finally, there is no evidence in the form of financial reports, books or ledgers for the business operated by Mrs Gorrings that would support any claim for loss of income.
- (d) Claim for stress, pain and suffering: Mrs Gorrings claims an amount of \$5,000.00. No evidence was offered as to how the amount was calculated. There was no evidence that Mrs Gorrings suffered any medical condition or diagnosable psychiatric or psychological condition as a result of the various issues she complains of. Mrs Gorrings offered no evidence about stress, pain or suffering alleged to have been suffered by her. Neither party made any submissions as to whether loss of the type claimed by Mrs Gorrings is captured by 'loss or damage' within the meaning of that term in s 43(1) of the RSL Act or how 'reasonable compensation' for any such loss and damage should be assessed.

#### *Conclusion on Mrs Gorrings claim*

- [78] Mrs Gorrings has failed to make out her claim in relation to breach of the lease by Surewin and loss alleged to have been sustained by Mrs Gorrings as a result of such breach. Accordingly, the claim is dismissed.

#### *Counter-application*

- [79] As we have observed, the parties are in agreement that the amount of unpaid rent is \$5,876.75. Mrs Gorrings offers no defence to the claim for unpaid rent and, in our view, none is available. Surewin is entitled to recover the unpaid rent and we order accordingly.

#### *Costs*

- [80] The respondents seek costs. They rely upon the terms of the lease or alternatively upon s 47 of the QCAT Act.

[81] The lease contains the following special condition:<sup>59</sup>

The lessee hereby indemnifies the lessor against all claims, actions, losses and expenses, for which the lessor may become liable arising out of the act or neglect of the lessee its servants, agents, employees, licensees and invitees in the use of the demised premises.

[82] The lease contains the following definition of ‘claim’:<sup>60</sup>

‘Claim’ includes any claim or legal action and all costs and expenses incurred in connection with it.

[83] The respondents say that by operation of the special condition and the definition of ‘claim’, Mrs Goring agreed to indemnify the lessor for any and all costs, including legal costs, incurred in connection with recovering the unpaid rent.

[84] It is necessary for us to consider the meaning of the special condition. The special condition should be given its plain and ordinary meaning, unless doing so would result in manifest absurdity. The word ‘use’ is defined as to ‘take, hold or deploy (something) as a means of accomplishing or achieving something’. The word is therefore directed at putting something to a particular purpose. In this case, the ‘use’ of the demised premises is the conduct of a retail shop. We are satisfied that the payment of rent is a concomitant of the ‘use’ by the lessee of a retail shop. We are satisfied that the failure by Mrs Goring to pay rent is an ‘act or neglect’ within the meaning of the special condition. We are satisfied that the payment of legal costs associated with defending the claim by Mrs Goring and prosecuting the counter-application against Mrs Goring falls within the meaning of ‘expenses’ in the special condition.

[85] The lessor claims an amount of \$500.00 for legal fees associated with the claim for unpaid rent. Following the hearing we made directions for the respondents to file and serve a copy of the invoice rendered by the solicitors in respect of the claimed costs and evidence of payment of the invoice by 4:00pm on 29 March 2019. The respondents did not comply with that direction. There is no evidence before us regarding the particulars of the legal costs claimed or the payment of those costs. In the absence of such evidence we do not allow the respondents’ claim for costs.

[86] Had we been satisfied that legal costs had been incurred as claimed by the respondents we make the following observations. We accept that the special condition creates a contractual entitlement in the lessor to recover the legal costs it has incurred. The lessor relies upon the decision in *Baque v Rivergum Homes Pty Ltd* (‘*Baque*’)<sup>61</sup> as support for its submission that costs should be awarded on an indemnity basis. We do not accept this submission. It is clear from *Baque* that the relevant contractual provision in that case was in quite specific terms, creating an entitlement to the recovery of costs on a solicitor and own client basis.

[87] In *Antonino Giuseppina Ensabella & Sons Pty Ltd v Players On Downunder Pty Ltd* (‘*Ensabella*’)<sup>62</sup> a landlord claimed costs on an indemnity basis relying upon a provision of a lease in similar terms to the present case. In *Ensabella* the court held

<sup>59</sup> Commercial Tenancy Agreement, dated 19 August 2016, Special Conditions.

<sup>60</sup> Ibid, cl 1.2(3).

<sup>61</sup> [2013] QCATA 200 (4 July 2013).

<sup>62</sup> [2000] VSCA 73 (2 May 2000).

that as the provision relied upon did not refer expressly to how costs should be taxed, there was no sufficient reason for ordering anything but party and party costs, there being 'nothing in the lease to compel another view'. We agree with *Ensabella* and find that the same reasoning applies in the present case. Standard costs are, as a general rule, in the order of 65% of indemnity costs. We would have allowed the respondents 65% of the amount claimed for costs, an amount of \$325.00.