Supreme Court

New South Wales

Case Name:	Darzi Group Pty Ltd v Nolde Pty Ltd
Medium Neutral Citation:	[2021] NSWSC 774
Hearing Date(s):	8 to 14 April 2021
Decision Date:	28 June 2021
Jurisdiction:	Equity - Real Property List
Before:	Robb J
Decision:	See pars [139], [142], [211], [234], [239], [242], [247], [252], [262], [266], [285], [291]-[295]. The parties should confer and forward to my Associate draft short minutes of order to give effect to these reasons as required by [295].
Catchwords:	LEASES AND TENANCIES — Renewals and options — Exercise of option — Where lessee commenced original proceedings seeking declaration that the parties had entered into a retail lease — Where Court of Appeal held the parties had entered into a retail lease — Where lessee now seeks specific performance of lessor's agreement to renew the lease pursuant to lessee's exercise of option — Where lessor pleads that the Court should use its discretion to withhold specific performance on account of the inability of the parties to cooperate, the toxic interpersonal relationship between the principals of the lessor and lessee, and because damages would be an adequate remedy — Where the Court found that a breakdown in personal relations between principals of parties to the lease is not a proper basis for the Court to deny the lessee its proprietary right to a renewal of the lease — Where the Court found that damages are not an adequate remedy — Where the Court grants specific performance of lessor's agreement to grant a renewed lease to lessee

LEASES AND TENANCIES — Retail leases — Retail shop lease — Lessee in breach of obligations — Where lessor claimed lessee failed to pay rent in circumstances where lessee paid less than the rent due under the lease on its interpretation of the operation of the Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) — Where COVID-19 regulatory regime required rent to be renegotiated in good faith by lessor and lessee — Where lessor failed to renegotiate in good faith — Where the Court found that the lessor will never be entitled to take a prescribed action against lessee in respect of the short payments in rent

LEASES AND TENANCIES — Retail leases — Retail shop lease — Lessee in breach of obligations — Where lessor claimed lessee failed to pay insurance premiums in relation to outgoings pursuant to the lease — Where lessor and lessee disputed the meaning of ‘insurance’ — Where lessor claimed lessee must pay a share of product and public liability insurance — Where lessee held its own insurance in that regard — Where the Court held that the lessee did not breach the lease by failing to pay the share of premiums claimed by the lessor

LEASES AND TENANCIES — Retail leases — Retail shop lease — Lessee in breach of obligations — Where lessor claimed lessee failed to maintain the premises in good condition — Where lessor sought order requiring lessee to perform a list of maintenance tasks — Where it is unclear on the evidence whether the rectification of the alleged breaches are the responsibility of the lessor or lessee under the lease — Where the Court held that it should make an appropriate order that will facilitate the Court being able to make an order in relation to the cleaning, repair and maintenance of the Premises

LEASES AND TENANCIES — Retail leases — Retail shop lease — Lessee in breach of obligations — Where lessor claimed lessee failed to provide access to the premises for inspection — Where no evidence lessor sought to access premises for purpose of inspection —

	Where the Court refused to make the orders sought by the lessor TORTS — Trespass to land — Damages — Where lessor claimed damages against lessee for trespass on parts of property outside leased premises — Where lessor has not proved that it suffered any loss — Where lessor has not establish that it had title to bring a claim in trespass against lessee — Where the Court found that if the lessor has title to bring a claim in trespass, the damages awardable would be nominal in any event
Legislation Cited:	Competition and Consumer Act 2010 (Cth) Conveyancing Act 1919 (NSW) COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) COVID-19 Recovery Act 2021 (NSW) Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2020 (NSW) Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020 (NSW) Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020 (NSW) Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) Retail Leases Act 1994 (NSW) Supreme Court Act 1970 (NSW)
Cases Cited:	Casquash Pty Ltd v NSW Squash Ltd (No 2) [2012] NSWSC 522 Darzi Group Pty Ltd v Nolde Pty Ltd [2019] NSWCA 210 Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd (No 2) [2020] NSWSC 1141 Sydney West Area Health Service v Staracek (2008) 73 NSWLR 68; [2008] NSWSC 744
Texts Cited:	DK Derrington and RS Ashton, The Law of Liability Insurance (3rd ed, 2013, LexisNexis Butterworths) D Kelly and ML Ball, Principles of Insurance Law (2001, LexisNexis Australia, looseleaf) RP Balkin and JLR Davis, Law of Torts (5th ed, 2013, LexisNexis Butterworths)

Category:	Principal judgment
Parties:	Darzi Group Pty Ltd (plaintiff) Nolde Pty Ltd (defendant)
Representation:	Counsel: WG Muddle SC/ E Peden SC (plaintiff) CD Wood SC/ DW Robertson (defendant) Solicitors: Pigott Stinson (plaintiff) Brown Wright Stein (defendant)
File Number(s):	2019/316670

JUDGMENT

1 The plaintiff, Darzi Group Pty Ltd (Darzi), has, since 2014, operated a restaurant (Restaurant) on part of the ground floor of a property located at Forster owned by the defendant (the Property), Nolde Pty Ltd (Nolde). The balance of the building erected on the Property is a hotel (the Hotel) that at all relevant times has been operated by a company related to Nolde.

2 The principals of Darzi and Nolde are Omid Darzi and Maurice John Koorey respectively.

Agreement to lease and lease

3 On 30 August 2019, the New South Wales Court of Appeal published reasons for judgment in an appeal in proceedings between Darzi and Nolde: *Darzi Group Pty Ltd v Nolde Pty Ltd* [2019] NSWCA 210.

4 As found by the Court of Appeal, on 13 October 2014, Darzi and Nolde signed a heads of agreement pursuant to which Darzi would obtain a lease of the premises from which it now operates the Restaurant (the Premises). Darzi entered into possession of the Premises on 20 October 2014, and the parties thereafter engaged in negotiations with respect to the terms of the lease. On 27 May 2016, Nolde advised Darzi of its agreement to the final outstanding issue, being that Nolde agreed to a lease commencing on 1 December 2014 to run for five years with an option for a further five years and three months. On 31 May 2016, Darzi agreed to a lease on those terms. On 15 June 2016, Darzi sent to Nolde a form of lease that embodied the agreed terms executed by Darzi, and asked for the delivery of a counterpart executed by Nolde. Nolde did

not execute the 15 June 2016 document. Consequently, Darzi commenced proceedings in this Court seeking relief, including a declaration that the parties had entered into a retail lease on the terms contained in the 15 June 2016 document.

5 The Court of Appeal held that the parties had entered into a retail shop lease, pursuant to s 8 of the *Retail Leases Act 1994* (NSW), on 20 October 2014, when Darzi entered into possession of the Premises. Further, it was held that a binding and enforceable agreement for the lease of the Premises came into existence on 31 May 2016 on the terms contained in the 15 June 2016 document, and that the agreement for lease replaced the heads of agreement of 13 October 2014.

6 Paraphrasing the relevant orders made by the Court of Appeal, that Court ordered:

> 4. Declare that, on 31 May 2016, Nolde as landlord and Darzi as tenant entered into an agreement for the lease of the premises in terms of the 15 June 2016 document.
>
> 5. Order that Nolde execute the 15 June 2016 document, attend to the stamping and registration of that document under the *Real Property Act 1900* (NSW), and furnish to Darzi a certified copy of the registered instrument as evidence of Darzi's title.

7 Nolde did not promptly comply with order 5 made by the Court of Appeal.

8 The lease that the Court of Appeal had declared to exist between Nolde and Darzi (Lease) had an initial term of 1 December 2014 to 30 November 2019 with a single option to renew (the Option) for a further term of five years and three months. The Option could be exercised between six months and three months prior to the expiration of the Lease, namely between 1 June 2019 and 31 August 2019.

9 Darzi exercised the Option within the stipulated period, on 27 August 2019.

10 On 10 September 2019, Nolde's then solicitors served upon Darzi a notice that purported to be a prescribed notice for the purposes of s 133E of the *Conveyancing Act 1919* (NSW). The notice specified three alleged breaches of the Lease by Darzi, being the making of alterations to the Premises without Nolde's consent, the failure to pay outgoings and the failure to open the

Restaurant for the purpose of serving breakfast for guests of the Hotel seven days per week.

11 Section 133E of the *Conveyancing Act* has the effect that a lessee's entitlement to exercise an option can only be extinguished by the lessor on the ground of breach of the lease if the lessor serves on the lessee a notice as prescribed by the section, and the lessee does not seek within one month after service of the prescribed notice an order for relief against the effect of the breach, or that relief is not granted in proceedings in which it is sought.

Proceedings

12 On 10 October 2019, Darzi filed the summons by which it commenced these proceedings. Darzi sought a declaration that it had exercised the Option to renew the Lease found by the Court of Appeal to have been made on the terms of the 15 June 2016 document, a declaration that the 10 September 2019 notice was not a prescribed notice for the purposes of s 133E of the *Conveyancing Act*, or alternatively, an order granting relief under s 133F in respect of any breaches that were established and an order that Nolde specifically perform its obligation under the Lease to grant a renewed lease for a term of five years and three months commencing on 1 December 2019.

13 By letter dated 6 November 2019, Nolde's present solicitors formally and irrevocably withdrew the purported s 133E notice and advised Darzi that Nolde would not dispute that, on 27 August 2019, Darzi validly exercised the Option to renew the Lease. Nolde also acknowledged in accordance with s 133G of the *Conveyancing Act* that the Lease would continue in force until the proceedings were determined.

14 The 6 November 2019 letter also advised that Nolde was in the process of executing the Lease, the subject of order 4 made by the Court of Appeal. The executed Lease was provided to Darzi's solicitors under cover of a letter dated 8 November 2019 written by Nolde's solicitors. A window on Nolde's attitude to compliance with order 5 made by the Court of Appeal is found in the following paragraph of the solicitors' letter:

> Nolde has executed the instrument because it was compelled to do so by the Order. Nolde does not admit that the instrument is accurate or that it otherwise reflects terms that have been agreed by Nolde.

15 The validity of the purported notice under s 133E of the *Conveyancing Act* has therefore ceased to be an issue in the proceedings. Nolde has subsequently served on Darzi various other notices and demands that will be considered in due course.

16 One such notice was a further purported notice under s 133E of the *Conveyancing Act* (the second s 133E notice) that was served on 12 December 2019, and claimed that Nolde was not required to grant Darzi the renewed Lease because Darzi had breached the Lease by failing to pay Nolde $36,398.53 for outgoings, as allegedly required by clause 5.1.2 of the Lease. The notice recorded that clause 4.5 of the Lease provided that Nolde was entitled to treat any failure by Darzi to continue to pay all rents and outgoings on time after the exercise of the Option as a breach of the new lease as well as the Lease.

17 Darzi responded to the service of the second s 133E notice by filing an amended summons on 20 December 2019 to add to its prayers for relief a claim for a declaration that the notice is not a prescribed notice for the purposes of the section, and in the alternative, an order pursuant to s 133F of the *Conveyancing Act* giving effect to the exercise of the Option.

18 The prayers for relief in Darzi's amended summons are now embodied in its amended statement of claim filed on 2 October 2020 which, allowing for claims deleted from the original statement of claim, seeks the following additional relief to the prayers relevant to the enforcement of the exercise of the Option:

> **Unconscionable conduct**
>
> 18. A declaration that the defendant has engaged in conduct that is in all the circumstances unconscionable within the meaning of section 62B(1) of the *Retail Leases Act 1994* (NSW) (the RLA) and/or section 21 of the Australian Consumer Law (ACL), in any or all of:
>
> (a) refusing to comply with the defendant's obligations to renegotiate the rent and other terms of the Lease as required by the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) (the Regulation); and/or
>
> …

> (d) wrongfully demanding as a Lease outgoing expense from the Plaintiff a portion of the defendant's product and public liability insurance; and/or
>
> …
>
> 19. A declaration or in the alternative an order under section 72 of the RLA that the rent payable by the plaintiff to the defendant during the "prescribed period" as defined in s 3 of the Regulation is to be calculated in accordance with Principles 3 and 4 of the "National Code of Conduct" as defined in section 3 of the Regulation.
>
> 20. A declaration or in the alternative an order under section 72 of the RLA that the plaintiff is not liable to the defendant for any portion of the defendant's product and public liability insurance in respect of the defendant's hotel premises.
>
> …

19 Nolde filed its defence to the amended statement of claim on 19 October 2020. It is not necessary to refer to Nolde's specific responses to Darzi's allegations at this stage, but it is to be noted that in par 4(c) Nolde asserted that the Hotel is owned and operated by SRI Publishing Pty Ltd. This allegation was repeated in par 4 of Nolde's cross claim.

20 At the hearing, in addition to defending Darzi's claim, Nolde prosecuted its own claim as pleaded in its further amended statement of cross claim filed in court on 13 April 2021 (the cross claim).

21 In its final oral submissions, Nolde formally abandoned its claims for relief in prayers 1 and 3 of the cross claim, being for declarations that Nolde is not obliged to grant Darzi a renewal of the Lease pursuant to the exercise of the Option to renew, or alternatively a declaration that Nolde is entitled to terminate the Lease, as well as an order that Darzi give up possession of the Premises or alternatively that Nolde is entitled to re-enter and take possession: T 267.23 - T 267.38.

22 Consequently, it appeared that the only claim for relief that remains in effect concerning Darzi's entitlement to a renewal of the Lease is that made by prayer 2 of the cross claim, which is in the following terms:

> 2. In the alternative to prayer 1, declare that Darzi is not entitled to an order that Nolde specifically perform its obligation to grant Darzi a renewal of the Lease between the parties for a further term pursuant to Darzi's purported exercise of the option to renew the Lease, and instead order that Nolde is to pay damages to Darzi for its refusal to renew the Lease, such damages to be assessed by a referee appointed by the Court or, in the alternative, in an inquiry into damages.

23 By this change of position, it appeared that Nolde abandoned its claim that Darzi does not have a valid contractual right to the execution by Nolde in its favour of a renewed Lease for a further period of five years and three months from the date of expiration of the Lease. Consequently, it also appears that Nolde does not maintain a claim that it is entitled to terminate the Lease and that it does not have a contractual obligation to grant a renewal of the Lease by reason of the breaches alleged in the second s 133E notice. This understanding is consistent with the fact that Nolde did not mention the second s 133E notice in its final submissions or argue that it was not contractually obliged to execute a renewed Lease.

24 If prayer 4 of the amended statement of claim is still sought by Darzi, the Court should make a declaration in those terms, being a declaration that the notice is invalid. As such, relief in respect of the breach alleged in the notice under s 133F of the *Conveyancing Act* will not be necessary.

25 Nolde's opposition to prayer 6 of Darzi's amended statement of claim for an order that Nolde specifically perform its obligation to grant Darzi a renewed Lease of the Premises is now limited to a claim that the Court, in the exercise of its discretion in granting equitable relief, should not order that Nolde specifically perform its admitted contractual obligation, but instead should declare that Darzi is not entitled to an order for specific performance. Nolde submits that the Court should only order Nolde to pay damages to Darzi to compensate it for losing the benefit of the renewed Lease.

26 As was pointed out by senior counsel for Darzi in opening, by this approach Nolde asks the Court to make an order in favour of Darzi that Darzi has not sought, and is irregular in so far as it involves a request by a defendant that the Court make an order against it in lieu of the one sought by the plaintiff.

27 There is some uncertainty concerning the case as finally put by Nolde in its cross claim.

28 It is necessary to analyse the cross claim as pleaded. In addition to prayers 1 to 3, Nolde sought further relief, by prayers 4 to 7, on the assumption that the Court made an order that had the effect that Darzi had to give up possession of the Premises. That relief was, in substance, an order that Darzi reinstate the

Premises to their former condition (prayer 4); an order that Darzi pay all outstanding rent plus interest (prayer 5); an order that Darzi pay all outstanding outgoings as specified (prayer 6); an order that Darzi pay damages for breach of the Lease (prayer 6A); and an order for costs (prayer 7).

29 The balance of the relief sought by Nolde was set out under the heading "Alternative relief". The chapeau to these claims was: "If the Court *does not* make the orders above, and instead finds that the Lease between the parties is subsisting (which Nolde denies), Nolde seeks the following orders…". The prayers that followed assumed that the Court had made an order that Nolde specifically perform its agreement to grant a renewed Lease to Darzi.

30 In outline, the alternative relief claimed was a declaration as to what areas were included in the Premises (prayer 9); an order restraining Darzi from using or accessing parts of the Property outside the Premises (prayer 10); a declaration that Nolde is entitled to permanently lock or seal off the lobby door between the Premises and the rest of the building (prayer 11); an order restraining Darzi from using the car park or the storage area (prayer 12); an order requiring Darzi to provide Nolde with access to the Premises for the purpose of carrying out an inspection (prayer 13); an order requiring Darzi to undertake certain specified maintenance of the Premises (prayer 14); a declaration with respect to the proper construction of the Lease as to the meaning of the term "insurance" in the obligation to pay outgoings (prayer 15); a declaration that Darzi is to pay for its water usage (prayer 16); a declaration that Darzi is required to pay fire callout fees (prayer 17); damages for breaches of the Lease (prayer 17A); and costs (prayer 18).

31 I note that, in pars 12 to 14 of its final written submissions, Nolde said that it no longer presses the relief sought concerning the door between the lobby and the Premises (as Darzi had also abandoned its claim on that point), and that it abandons its claims that the following matters fall within Darzi's obligation to pay outgoings; namely fire monitoring fees, alarm maintenance fees, water use, fire callout fees and repairs to the bin room doors allegedly damaged by Darzi. Consequently, Nolde has abandoned its claims in prayer 6(b) to (e) and prayers 16 and 17 of the cross claim.

32 There is no prayer in the primary relief claimed in the cross claim for a declaration that Nolde is entitled to terminate the Lease on the ground of breach by Darzi. However, in the pleadings and particulars section of the cross claim, Nolde included the following allegations:

> 15. Nolde has refused to extend the Lease pursuant to Darzi's purported exercise of the option to renew, on the basis that Darzi has breached its obligations under the Lease and therefore Nolde is not under any obligation to extend the Lease.
>
> **Particulars**
>
> i. Failure to pay rent (as pleaded in paragraphs 25 - 30 below);
>
> ii. Failure to pay outgoings (as pleaded in paragraphs 31 - 57 below);
>
> iii. Failure to maintain the Premises in a good condition (as pleaded in paragraphs 58 - 61 below);
>
> iv. Failure to provide Nolde access to the Premises to carry out an inspection (as pleaded in paragraphs 62 - 66 below);
>
> v. Unlawful use by Darzi of non-leased parts of the Building, and committing wilful trespass onto Nolde's property (as pleaded in paragraphs 70 - 89 below);
>
> vi. Darzi's failure as lessee to act in good faith towards Nolde as lessor;
>
> vii. Darzi's conduct in permitting a strip show to take place on its premises in or about 2016 (as pleaded in paragraph 67 below);
>
> viii. Darzi's conduct in abusing and threatening Hotel staff (as pleaded in paragraph 68 below);
>
> ix. Darzi's refusal to communicate directly with Nolde and conduct in banning its staff from communicating with staff of the Hotel (as pleaded in paragraph 69 below).

33 In pars 18 to 19A of the cross claim, Nolde alleged that, on 12 December 2019, 17 July 2020 and 14 December 2020, it had served notices on Darzi under s 129 of the *Conveyancing Act* (s 129 notices) specifying breaches of the Lease and requiring those breaches to be remedied by Darzi.

34 Section 129 of the *Conveyancing Act* has the effect that, in respect of breaches of leases other than for the non-payment of rent, a right of re-entry or forfeiture for breach of a lease shall not be enforceable unless and until a notice in the prescribed form is served on the lessee by the lessor specifying the breach and requiring the lessee to remedy the breach if capable of remedy, and the lessee fails within a reasonable time to remedy breaches capable of remedy. The section also vests jurisdiction in the Court to make orders on the application of the lessee in the nature of relief against forfeiture.

35 Then, the cross claim pleaded the following allegations:

> 21. In the premises, by reason of Darzi's breaches of the Lease committed prior to 30 November 2019, Nolde was not obliged to grant Darzi a renewal of the Lease between the parties for the further term of 5 years and 3 months.
>
> 22. In the alternative, by reason of Darzi's breaches of the Lease committed after 30 November 2019, in the event that the Lease commenced for the further term of 5 years and 3 months on 1 December 2019, nevertheless Nolde is entitled to terminate the Lease.
>
> 23. In the further alternative, by reason of Darzi's breaches of the Lease and other conduct, Nolde is not obliged to specifically perform its obligation to grant Darzi a renewal of the Lease for the further term pursuant to Darzi's purported exercise of the option to renew the Lease, and instead Nolde is to pay damages, such damages to be assessed in an inquiry into damages.
>
> 24. By reason of the matters pleaded above, the Court should order that Darzi give up possession or occupation of the Premises forthwith, or alternatively declare that Nolde is entitled to re-enter and take possession of the Premises forthwith.

36 Nolde's maintenance of the claims in pars 15 and 21, in so far as they alleged an entitlement not to renew the Lease, is not consistent with the abandonment of prayer 1. I will proceed on the basis that Nolde no longer resists an order that it grant a renewed Lease to Darzi on the basis of alleged breaches of the Lease committed *prior to* 30 November 2019.

37 Further, paragraphs 22 and 24 are not consistent with the abandonment of prayer 3, as the paragraphs allege grounds for Nolde to terminate the renewed Lease and re-enter the Premises. The alleged breaches of the Lease that would remain relevant are breaches committed *after* 30 November 2019.

38 The relationship between par 23 and prayer 2 of the cross claim is not clear. As I understand the case put by Nolde at trial, it was that, even though Nolde was contractually obliged to grant a renewed Lease to Darzi, the Court should not order specific performance of that obligation because damages is an adequate remedy and should be ordered to be paid instead. That is a different case to a claim that it is Darzi's breaches of the Lease that enliven the discretion to order Nolde to pay damages rather than to make an order for specific performance.

39 The uncertainty to which I have referred above arises out of the following part of Nolde's written submissions provided to the Court during Nolde's closing address:

> 1. Darzi Group has been in breach of its lease at various times throughout the relationship. That relationship has now descended into personal hostilities and the Police and the MidCoast Council have been involved.
>
> 2. The Court should not order that this toxic relationship continue.
>
> 3. Therefore, by its Amended Statement of Cross-Claim (ASOCC), Nolde relevantly seeks the following relief:
>
> (a) a declaration that Nolde is not obliged to grant Darzi a renewal of the Lease for the further term of 5 years and 3 months, or alternatively a declaration that Nolde is entitled to terminate the Lease;
>
> (b) alternatively, a declaration that Darzi is not entitled to an order that Nolde specifically perform its obligation to grant Darzi a renewal of the Lease, and instead an order that Nolde is to pay damages to Darzi, such damages to be assessed by a Court-appointed referee or alternatively in an inquiry into damages. Essentially, Nolde says that the Court should refuse to grant specific performance, both for the reason that Darzi is in substantial breach, and because of the dysfunctional relationship between the parties;
>
> (c) damages for trespass, and damages for breach of the Lease (essentially for the non-payment of rent and outgoings); and
>
> (d) an order that Darzi give up possession of the Premises.

40 In the light of pars 1 and 2 of the written submissions, Nolde's claim in par 3(b) that Nolde should be ordered to pay damages rather than that an order for specific performance be made against it, because of the combined effect of Darzi's alleged breaches of the Lease and the existence of a toxic relationship between the parties, is reasonably intelligible. However, it is not clear why it is put that Darzi is "not entitled" to an order for specific performance, rather than that the Court should exercise its discretion not to grant that relief.

41 The confusing aspect of the submission is principally par 3(a), which appears to involve a continuation of the claim for the relief in the abandoned prayer 1 of the cross claim.

42 On the subject of the s 129 notices, senior counsel for Nolde said in final submissions that it was sufficient to focus on the third s 129 notice dated 9 December 2020 (the third s 129 notice), as that notice was intended to "capture all the relevant breaches": T 274.30. As I read the third s 129 notice, it alleges conduct on the part of Darzi that has taken place after 30 November 2019 and that are capable of being breaches of the Lease if that lease has continued on a holding over basis pending the determination of these proceedings, and also breaches of the renewed Lease if Nolde is ordered to specifically perform its agreement to renew the Lease. As required by s 129 of the *Conveyancing Act*,

the third s 129 notice required Darzi to remedy alleged breaches that were capable of remedy within 14 days of receipt of the notice.

43 Senior counsel for Nolde also directed the Court's attention to a letter from Nolde's solicitors to Darzi's solicitors dated 17 December 2020 that responded to a demand made on behalf of Darzi that Nolde withdraw the third s 129 notice. The letter contained the following:

> However, we are instructed that notwithstanding your client's breach of the Expired Lease as set out in the Notice, our client undertakes that it will not take any "prescribed action" and will allow your client to remain in possession of the premises pending the outcome of the Proceedings between the parties.

44 The "prescribed action" referred to in this extract from the letter consists of the actions capable of being taken by a lessor specified in the definition of "prescribed action" in clause 3 of the Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) (COVID-19 Regulation) as in force at the date of the letter. I will consider the significance of this Regulation below.

45 As I understand the extract from the letter set out above, by referring to the "Expired Lease" and to alleged breaches of that lease by Darzi, and by undertaking not to take any "prescribed action", Nolde was acting consistently with the position that it had adopted, until it abandoned prayers 1 and 3 of its cross claim, that Darzi was in breach of the lease that has continued on a holding over basis with the consequence that Nolde could terminate the Lease and refuse to grant the renewed Lease following the exercise of the Option.

46 I have interpreted the effect of Nolde's change of position to be, in the light of its closing submissions, that it no longer claims that breaches by Darzi of the Lease during the currency of that Lease have entitled Nolde to refuse to grant the renewed Lease to Darzi following the exercise of the Option. However, as the third s 129 notice alleges conduct by Darzi that breaches the renewed Lease, on the assumption that it becomes effective with retrospective effect by reason of an order for specific performance against Nolde, Nolde can rely upon the alleged breaches as a basis for terminating the renewed Lease. Further, as Darzi has accepted the moratorium offered by Nolde in par 6 of the 17 December 2020 letter that is extracted above, Nolde will be entitled to terminate the renewed Lease and re-enter the Premises if it establishes, by

means of these reasons for judgment, that the right to do so exists because of Darzi's breaches.

47 If that understanding of Nolde's present position is correct, then the uncertainty in its position to which I have referred above should be resolved in the following way.

48 First, Nolde's abandonment of prayer 1 in its cross claim is effective. Nolde no longer claims that it does not have a contractual obligation to grant a renewed Lease to Darzi. To the extent that it is inconsistent with this position, par 3(a) of Nolde's written closing submissions is superseded.

49 Secondly, prayer 1 in the cross claim and par 3(b) of Nolde's closing submissions are intended to have the following effect. Nolde does not claim that the alleged breaches of the Lease by Darzi extinguished Nolde's contractual obligation to grant the renewed Lease. Rather, Nolde claims that the Court should exercise its discretion by refusing Darzi's claim for an order that Nolde specifically perform its agreement to grant the renewed Lease. That is both because an award of damages would be an adequate remedy in the circumstances, and because the relationship between the parties has been so "toxic" for a long period that it would be an inappropriate remedy for the Court to force the parties to engage in a continuing legal relationship by reason of the renewal of the Lease. On that issue, the conduct of Darzi in committing the alleged breaches of the Lease is relevant to demonstrating that Darzi is not willing to perform its obligations and that it antagonises Nolde, those being matters relevant to the exercise of the discretion more than the strict consequences of breach of the Lease.

50 Finally, Nolde maintains that, if it is ordered to specifically perform its agreement to grant a renewed Lease, it has a right to terminate that lease on the ground of the breaches of the Lease notified to Darzi in the third s 129 notice that are still maintained by Nolde.

51 If this final conclusion is correct, it means that Nolde's abandonment of prayer 3 of the cross claim was too widely stated. Nolde intended only to abandon its claim that it is entitled to possession of the Premises on the basis that the Lease has terminated by effluxion of time and Nolde is under no obligation to

grant a renewal of the Lease because the exercise of the Option was ineffective. Nolde continues to seek the relief in prayer 3 on the basis either that the Court, in the exercise of its discretion, rejects Darzi's application for an order for specific performance of the agreement to grant the renewed Lease, or that notwithstanding that the new Lease is granted, Nolde establishes a right to terminate it for breach by Darzi.

Darzi's breaches of the Lease

52 The cross claim substantially reflects the assertions made in the third s 129 notice, although sometimes in different terms, and with the odd claim made in one but not made in the other. The appropriate way for the Court to proceed is to adopt the formulation of Nolde's claims in the cross claim. It will be convenient to deal with the claims in the order in which they are found in the cross claim. I will use the headings in that document.

53 I note that in final submissions senior counsel for Nolde said: "For the reasons we advanced in writing [referring to Nolde's closing submissions], we'd invite your Honour to find that there have been some breaches. We don't make good every breach that we alleged in the pleading, and I accept that": T 288.39.

54 While being mindful of the allegations in the cross claim that were not explicitly withdrawn by Nolde, I have relied upon Nolde's closing written submissions as a guide to the allegations of breach that Nolde considers have substance.

Darzi's failure to pay rent

55 Clause 5.1.1 of the Lease obliged Darzi to pay to Nolde the rent stated in item 13A in the Schedule. Nolde pleaded in par 27 of the cross claim that, for the period 1 December 2019 to 27 July 2020, the latter being the date of filing of the cross claim, the rent payable under the Lease was $12,064.16 (incl GST), which would have increased to $12,546.74 (incl GST) on 1 December 2019 if the Lease had been renewed for the further term. It pleaded in par 28 that Darzi only paid Nolde $1,304.86 (incl GST) for rent for the month of May 2020 and $2,942.21 (incl GST) for rent for the month of June 2020. Nolde claimed that Darzi owes Nolde $16,985.45 (incl GST), or alternatively $20,846.41 (incl GST), plus interest.

56 In its defence to the cross claim, Darzi admitted the basic facts alleged by Nolde and responded as follows (omitting references to correspondence in the particulars):

> 28. In response to paragraph 28, the cross-defendant:
>
> a. admits it paid the amounts for rent for May 2020 and June 2020 as set out in the paragraph;
>
> b. says that the cross-defendant is an "impacted lessee" as defined in cl 4 of the COVID Regulation;
>
> c. says that the amounts which the cross-defendant paid to the cross-claimant were calculated in accordance with Principle No 3 of the *National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19*;
>
> d. says that the cross-claimant provided evidence to the cross-defendant that it was an impacted lessee;
>
> e. says that the cross-defendant provided a statement to the cross-claimant that it is an impacted lessee;
>
> f. says that the cross-defendant made a request to renegotiate the rent payable under the Lease;
>
> g. says that the cross-claimant refuses to negotiate the rent and other terms under the Lease despite its obligation under section 7 of the COVID Regulation to do so;
>
> h. says that in the premises, it is not in breach of the Lease;
>
> i. says that the cross-claimant is barred by the COVID Regulation from seeking relief against the cross-defendant to the extent that the cross-claimant relies on a failure to pay rent; and
>
> j. otherwise denies the paragraph.

57 Darzi's defence to the admitted claim that it did not pay the whole of the rent due under the Lease for the months of May and June 2020 was that it is an impacted lessee as defined in the COVID-19 Regulation, and the amounts that it paid were in accordance with Principle No 3 of the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19 (the Code). Darzi then claimed that Nolde had refused to renegotiate the rent and other terms of the Lease despite its obligation under clause 7 of the COVID-19 Regulation. Darzi pleaded that it was therefore not in breach of the Lease.

58 I have set out above the prayers in Darzi's amended statement of claim that are relevant to the application of the COVID-19 Regulation to the rent payable by Darzi in May and June 2021. Darzi alleged in prayer 18 that Nolde had

refused to renegotiate the rent as required by the COVID-19 Regulation, and that that constituted unconscionable conduct under s 62B(1) of the *Retail Leases Act* and also s 21 of the *Australian Consumer Law*, being Sch 2 to the *Competition and Consumer Act 2010* (Cth).

59 Darzi also sought a declaration that the rent payable to Nolde during the prescribed period, as defined in clause 3 of the COVID-19 Regulation, is to be calculated in accordance with Principles 3 and 4 of the Code.

60 The present case is likely to be unusual as, following the restrictions on the operation of restaurants that were initially introduced by the State government in response to the COVID-19 pandemic which interrupted their operation and led to dramatic declines in turnover, the income of the Restaurant operated by Darzi substantially declined in the months of May and June 2020 relative to the same months in the previous year. Darzi initiated a renegotiation of its rent under the COVID-19 Regulation with Nolde, and only paid Nolde the amounts for May and June 2020 that Darzi calculated were appropriate on its view of the operation of the COVID-19 Regulation. Then, the turnover of Darzi's Restaurant in June 2020 recovered to the extent that Darzi ceased to qualify as an impacted lessee, and Darzi has paid to Nolde the full amount due for rent under the Lease since June 2020. Therefore, the dispute about the shortfall in rent payments and the operation of the COVID-19 Regulation is for a closed period of two months in this case. That unusual feature may impact on the consideration of how the COVID-19 Regulation applies to the present case, and may have consequences that are not relevant generally.

Communications concerning renegotiation of rent

61 It will be appropriate to preface the consideration of the application of the COVID-19 Regulation in this case by an examination of the communications between the parties concerning the application of the Regulation.

62 Darzi first made a request of Nolde for a reduction in rent in response to the COVID-19 pandemic in a letter from its solicitors to Nolde's solicitors dated 23 March 2020. The letter stated that Darzi's business had been severely affected, noted that Darzi currently employed around 25 people and said:

> 5. Presently the restaurant remains open to provide take-away but it may be that the Government will force our client to close permanently for a period of time.
>
> 6. In the meantime, our client remains committed to keeping as much of its staff employed as is financially viable for so long as it can, for the benefit of those employees and for that of the local community in Forster.
>
> 7. In these circumstances, and to allow our client to continue employing at least some of its employees, our client would be grateful if you would discuss with your client the possibility of your client offering our client a reduction in rent and deferral of rent under the Lease over the next 3 months.
>
> 8. Please seek your client's urgent instructions. Our client has requested a response by no later than 3pm tomorrow (24 March 2020).

63 Nolde's solicitors replied by letter dated 24 March 2020. In the subject heading, they referred to Darzi's lease as being one "expiring on 30 November 2019". The letter said:

> We are instructed as follows:
>
> 1. Our client has also been significantly impacted by the COVID-19 crisis and faces economic uncertainty.
>
> 2. Given these circumstances, unfortunately our client is not in a position to agree to a rent reduction or deferral of rent under the Lease.

64 This letter was written the day before, on 25 March 2020, the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) came into force. That Act amended the *Retail Leases Act* by inserting a new s 87, which authorised the making of regulations to respond to the effect of the COVID-19 pandemic on the businesses of tenants whose leases were subject to the Act.

65 On 7 April 2020, the National Cabinet adopted the Code.

66 On 24 April 2020, the New South Wales Government promulgated the COVID-19 Regulation, which gave legal effect to the Code.

67 Following the promulgation of the COVID-19 Regulation, Darzi's solicitors wrote a further letter to Nolde's solicitors on 28 April 2020. The letter included the following:

> …
>
> 6. We are instructed that our client satisfies the requirement in clause 4(1) of the Regulation in that it carried on a business in Australia as at 1 March 2020 and satisfies the decline in turnover test as set out in rule 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules).

7. We also enclose a copy of a confirmation issued by the ATO regarding our client's registration for the JobKeeper scheme.

8. We have reviewed our client's end of financial year statements prepared by its accountants for the year ending 30 June 2019, and confirm that according to those statements, our client's annual turnover is less than $50 million. We have enclosed an extract from that statement showing the annual turnover. Please note that this includes turnover not just from [the Restaurant], but other hospitality businesses which our client operates.

9. Accordingly, our client is an "impacted lessee" as defined in clause 4 of the Regulation.

10. Pursuant to principle 3 of the leasing principles set out in the Code (the Principles), landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals based on the tenant's reduction in trade during the COVID-19 period.

11. Furthermore, at least 50% of the offer which the landlord must make under Principle 3 must be comprised of a rental waiver. Any deferred rent is to be paid back over the balance of the lease term and for a period of not less than 24 months.

12. In accordance with the principles for calculating reduction in turnover as set out in the Rules, our client has provided its revenue figure for April 2019, which was $195,203.62 and estimates that its turnover for April will be $20,238.26.

13. We enclose figures our client's accountants have extracted which shows the turnover for the [Restaurant] in April 2019, and the turnover for the period 1-26 April 2020.

14. The estimate for April 2020 is comprised of $17,539.82 in actual turnover up [to] 26 April 2020 (as shown in the enclosed figures). The estimated component for the remaining days up to the end of April 2020 is based on the daily average of actual turnover for April to date.

15. Accordingly the reduction of revenue our client has suffered is 89.6%.

16. This letter constitutes a request under clause 7 of the Regulation, which requires the parties to re-negotiate the rent for the Premises, having regard to the economic impact of COVID-19 and the Code.

17. Our client requests that your client offer to reduce the rent in proportion to the reduction in revenue our client has suffered, with the effect that 50% of that reduction will be waived and the other 50% be paid to your client in instalments after the end of the COVID-19 period.

18. We look forward to your client's response. In the meantime, our client will pay rent for the month of May 2020 in accordance with the reduction it considers is applicable under the Code, being an amount of $1,304.86 inclusive of GST.

19. We note that clause 6 of the Regulation prohibits your client from taking any "prescribed action" against our client in the "prescribed period" for non-payment of rent or outgoings.

…

68 Enclosed with the letter was a printout from the website of the Australian Taxation Office (ATO) that demonstrated that Darzi was enrolled for JobKeeper wage subsidies.

69 Also enclosed was an income statement for Darzi for the year ended 30 June 2019 that showed that Darzi had sales of $3,035,948 and a gross profit from trading of $2,198,776. The income statement gave figures for the same variables for the 2017 and 2018 financial years.

70 Finally, the letter attached a brief document, apparently prepared by Darzi's accountants, that set out the income for the Restaurant for the months of April 2019 and 2020 as $195,203.62 and $17,539.82 respectively.

71 By this letter, Darzi initiated the negotiation process under the COVID-19 Regulation, and provided to Nolde the information that appeared to Darzi and its solicitors to be appropriate to satisfy Nolde that Darzi was an impacted lessee. Darzi explained its calculation that, on the basis of its forecasted turnover for April 2020, it would be entitled to an 89.6% reduction in rent for that month. Darzi made a request that Nolde would offer to reduce the rent in proportion to the reduction in revenue, with 50% of the reduction waived and the other 50% to be paid in instalments after the end of the COVID-19 period. The letter stated that Darzi's solicitors looked forward to Nolde's response and then said "[i]n the meantime, our client will pay rent for the month of May 2020 in accordance with the reduction it considers is applicable under the Code, being an amount of $1,304.86 inclusive of GST".

72 Darzi's decision to pay to Nolde a reduced amount of rent for May 2020, based upon the reduction in its turnover in April as against 12 months previously, was a unilateral one, in the sense that it was implemented without Nolde's prior agreement. But it was not described in final or non-negotiable terms. It was to apply "in the meantime", while the negotiations between Darzi and Nolde were taking place. It was open to variation by subsequent agreement. This consideration is relevant to the significant question raised by Nolde as to whether the implementation of the COVID-19 Regulation requires the lessee to continue to pay the stipulated rent until an agreement is reached with the

lessor that the rent should be reduced to a lesser amount in the implementation of the Code.

73 On 12 May 2020, Mr Koorey on behalf of Nolde wrote a letter to Darzi at its solicitors' address. The letter stated:

> In reference to your correspondence dated 28th April, 2020.
>
> Insurance in the expired lease outgoings requirements states Insurance. There is no requirement pertaining to your letter and in this regard disregard your claim. The lease expired on the 30th November, 1919, your actions of deduction on 28th April 2020 is unwarranted.
>
> Further in regard to the present Covid 19 Code of conduct.
>
> This code applies to all tenancies that are suffering financial stress, you need to supply this information.
>
> The objective of the code is to share, in a proportionate way. You are expected to negotiate where possible.
>
> Any AGREED arrangements will take into account revenue, expenses and profitability.
>
> Your client's proposal of a rent of $1,304.86 per month including GST is unacceptable.
>
> Your client's request for deferred payment of any form is rejected based entirely on past actions.
>
> You are requested to fulfil your obligations.

74 In stating that Darzi needed “to supply this information” concerning the financial stress from which it was suffering, Mr Koorey implicitly rejected the adequacy of the information supplied with Darzi’s solicitors’ letter. Mr Koorey stated that the payment made by Darzi for May 2020 was “unacceptable”, without challenging the explanation that the amount had been calculated in accordance with the Code. His rejection of the request for a deferral of payment was expressed in absolute terms. The basis of the rejection, being “based entirely on past actions”, can only be understood as being that Mr Koorey had declined to entertain the application based upon his personal view of the significance of Darzi’s conduct as lessee, which may reasonably be understood as including Mr Koorey’s reaction to the proceedings instituted by Darzi against Nolde and its ultimate success in the Court of Appeal.

75 Darzi made a submission that the Court should act upon the penultimate paragraph in Mr Koorey’s letter as proof that Nolde had an obdurate resistance to good faith negotiations with Darzi as required by the COVID-19 Regulation

and the Code. As will shortly be seen, Nolde must have relented to some extent, because its solicitors made a new response to Darzi's solicitors' letter that was more amenable to negotiation with Darzi. That makes it difficult to justify a finding that Nolde's resistance to negotiations was obdurate. However, there is no room for doubt that Mr Koorey was the sole guiding mind of Nolde, and that his response to Darzi's request for negotiations is strong evidence of Mr Koorey's underlying attitude and justifies suspicion that he was unwilling to accord Darzi any indulgences.

76 On 18 May 2020, Nolde's solicitors wrote a letter to Darzi's solicitors on the issue of the request for a negotiated rent reduction. In the subject heading, the letter referred to the lease as being "expired 30 November 2019 (Expired Lease)". The letter made no reference to Mr Koorey's 12 May 2020 letter. It will be appropriate to set out the relevant parts of this letter in full, as follows:

> …
>
> *Qualification under the Code/ Regulation*
>
> 3. Darzi has not provided Nolde with sufficient information to determine whether it is an "*impacted lessee*" under the Regulation. To be an impacted lessee:
>
> (a) Darzi must qualify for the Jobkeeper scheme under sections 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules* 2020 of the Commonwealth; and
>
> (b) have turnover in the 2018-2019 financial year that was less than $50 million (being the turnover for all business conducted by Darzi, not just in respect of the Premises).
>
> 4. Darzi has provided confirmation that it has enrolled in the Jobkeeper scheme but not confirmation that it has qualified for the scheme. Please provide confirmation from the ATO that Darzi has qualified for the scheme, including all necessary supporting information to show that it has qualified for the scheme and continues to qualify for the scheme. The MYOB extract provided which alleges to show the [Restaurant] turnover for April 2019 and April 2020 is not sufficient to satisfy this requirement.
>
> 5. Darzi has provided a brief extract from an income statement of "gross profit from trading". It is not clear which business this relates to. Our client requires a full copy of the financial statements for the 2018 and 2019 financial years setting out all turnover for all business conducted by Darzi for these financial years.
>
> *Obligation to renegotiate rent*
>
> 6. If Darzi is in impacted lessee under the Regulation (which is not admitted), then in accordance with regulation 7(3) of the Regulation: "*A party to a*

commercial lease must, if requested, renegotiate in good faith the rent payable under, and other terms of, the commercial lease."

7. We note that Darzi has made no request to renegotiate the rent payable under the Lease in accordance with the Regulation.

8. Rather, Darzi has unilaterally decided to reduce the rent it is willing to pay to Nolde to an amount of $1,304.86 (inclusive of GST), which it claims is a reduction of 89.6%, without engaging in any negotiation whatsoever with Nolde.

9. In unilaterally purporting to reduce its rental payments under the Expired Lease and not acting in good faith to negotiate a rental reduction with Nolde, Darzi has not complied with the Code, and further, is currently in breach of its obligations under the Expired Lease to pay rent.

Renegotiation of rent

10. Provided that Darzi can satisfy Nolde that it is an "impacted lessee" under the Regulation (which it has not done to date), then Nolde is ready and willing to renegotiate the rent payable under the Expired Lease in accordance with its requirements under the Regulation and the Code.

11. In accordance with clause 7(4) of the Regulation, provided that Darzi can show that it is an impacted lessee, the parties are to renegotiate the rent payable, and other terms of, the lease *having regard to*:

(a) the economic impacts of the COVID-19 pandemic; and

(b) the leasing principles set out in the National Code of Conduct.

Further information required and Nolde's proposal

12. Nolde requires that Darzi provide it with all information requested in paragraphs 4 and 5 above to satisfy Nolde that Darzi is an "*impacted lessee*" in accordance with the Regulation, and if so the magnitude of any downturn in its business [the Restaurant] at the [Hotel] (and not its other businesses) has suffered as a result of the COVID-19 pandemic.

13. Provided that Darzi is an impacted lessee, given that the restrictions on trade for Darzi's business have been partially lifted since Friday 15 May 2020, and therefore it is likely that the business' turnover will increase, Nolde considers that it is appropriate to review Darzi's trade on a monthly basis during the COVID-19 pandemic period to determine the appropriate monthly percentage rental reduction and/or deferral that must be offered under the Code.

14. In order to assess the impact of COVID-19 on your client, our client is required to have specific regard to your client's revenue, expenses and profitability.

15. To do this, Nolde will require the following information about Darzi's business [the Restaurant] at the [Hotel] (and not its other businesses) in order to determine the applicable reduction in trade and financial hardship suffered by Darzi caused by the COVID-19 pandemic (and any corresponding rental deduction):

(a) a statement of financial performance (or "income statement"), outlining income, expenses, assets and liabilities (preferably audited or certified by a

chartered accountant), for the month of April 2020, and for the corresponding period in April 2019;

(b) a year to date statement of financial performance (or "income statement") for the business, and a statement of financial performance (or "income statement") for the business for the 2019 and 2018 financial years;

(c) other relevant information which shows how circumstances have changed as a result of the COVID-19 pandemic, including:

(i) monthly turnover reports, profit and loss reports and balance sheets for the business from 1 April 2020 to date, generated from an accounting system including all supporting sales reports;

(ii) monthly turnover reports, profit and loss reports and balance sheets for the business for the corresponding period from 1 April 2019, generated from an accounting system and relied upon to prepare Darzi's relevant taxation returns, including all supporting sales reports;

(d) any information as to whether Darzi holds business interruption insurance that covers the payment of rent and outgoings and if the circumstances for a claim on that insurance have been triggered.

16. Nolde will require the above information on a monthly basis from Darzi for the applicable period under the Code in order to determine the necessary percentage rental deduction to offer to Darzi in accordance with the Code.

17. Could we please have your response within the next 14 days. In accordance with the Code our client does not wish to prolong the facilitation of a resolution and accordingly if the parties cannot come to an agreement, our client would like to proceed to have the matter determined in accordance with the Regulation.

18. In the meantime until there is a resolution, our client expects your client to abide by the terms of the Expired Lease.

77 It is not possible to judge the reasonableness of this response without considering it in the context of the requirements of the COVID-19 Regulation and the Code. However, it is appropriate to make a number of comments on the contents of the response in the context in which it was made.

78 Paragraph 7 of Darzi's solicitors' 28 April 2020 letter enclosed a copy of a confirmation issued by the ATO regarding Darzi's registration for the JobKeeper scheme. The document appears on its face to be authentic and states (by means of a tick besides the word "Enrolled") that Darzi had been enrolled for wage subsidies as an eligible business that had been significantly affected. In my view, it was not reasonable for Nolde's solicitors to acknowledge in par 4 of their letter that Darzi had "provided confirmation that it has enrolled in the Jobkeeper scheme but not confirmation that it has qualified for the scheme". A reasonable lessor acting in good faith would have accepted

that, if the ATO was satisfied that Darzi qualified for the scheme to the extent that the ATO would acknowledge that fact, then the ATO's acknowledgement was adequate proof. Nolde's solicitors sought "all necessary supporting information to show that it has qualified for the scheme and continues to qualify for the scheme" without explaining what additional information was required, if the ATO's acknowledgement was insufficient. The reference to the MYOB extract for the turnover of the Restaurant as being insufficient to satisfy Nolde's requirement is in one sense correct, but that information was not provided to prove that Darzi qualified for the JobKeeper scheme, but rather to show the proportionate reduction in its turnover between April 2019 and April 2020.

79 In par 5 of their letter, Nolde's solicitors stated that it was not clear to which business the extract from the income statement related. While the extract is brief, it is an apparently professionally created extract from a computer database that specifically referred to the name of the Restaurant and the address of the Restaurant, and included the name of the Restaurant in the description of the computer file. While it may have been reasonable for Nolde to request additional financial information from Darzi for consideration during the process of negotiation, a reasonable lessor in the position of Nolde would have treated the extract as being prima facie accurate. As it was clear from the nature of the extract that Darzi's financial records were maintained electronically, the only available source of financial information was likely to be a printout of selected information from the database.

80 There appears to be no justification for Nolde's solicitors to have required a full copy of the financial statements for the 2018 financial year, setting out all turnover for all business conducted by Darzi. The trading period to 30 June 2018 is too remote from the commencement of the COVID-19 pandemic. It was not unreasonable, in my view, for Nolde's solicitors to have requested the 2019 financial year statement, as that information may have provided relevant background to the judgments that Nolde was entitled to make during the process of negotiation.

81 In par 6 of the letter, Nolde's solicitors exposed Nolde's resistance to the negotiation process by their express reservation that Darzi's status as an

impacted lessee was not admitted, when the information that had been provided by Darzi's solicitors was sufficient to establish that fact for the purposes of good faith negotiations, given the nature of the information and the seriousness with which Darzi's solicitors had conveyed that information to Nolde.

82 Nolde's solicitors' claim in par 7, that "Darzi has made no request to renegotiate the rent payable under the Lease", flies in the face of par 16 of Darzi's solicitors' letter, which stated: "This letter constitutes a request under clause 7 of the Regulation, which requires the parties to re-negotiate the rent for the Premises…" Furthermore, par 17 was expressed in polite terms, as a request, and par 18 was a statement that the solicitors looked forward to Nolde's response.

83 I also consider that Nolde's solicitors' claims, in pars 7 to 9 of their letter, misstate the quality of Darzi's request for a re-negotiation of the rent. While Darzi did pay a reduced amount of rent for May 2020, in accordance with its understanding of the effect of the COVID-19 Regulation and the Code, it is an oversimplification to characterise Darzi's position as having "unilaterally decided to reduce the rent it is willing to pay". As I have explained above, the proper characterisation of the stance taken by Darzi is that, in the face of the relative collapse of its turnover, it had paid to Nolde for May 2020 an amount of rent *pending the outcome of the negotiation*. It was unwarranted and inflammatory for Nolde's solicitors to accuse Darzi in par 9 of "not acting in good faith", and being "currently in breach of its obligations under the Expired Lease to pay rent".

84 Darzi's solicitors responded to this letter on 27 May 2020. In response to the assertion in par 7 of Nolde's letter that Darzi had made no request to renegotiate the rent payable under the Lease in accordance with the Regulation, Darzi's solicitors referred to par 16 of their 28 April 2020 letter, which stated that the letter constituted a request under clause 7 of the Regulation for a renegotiation of the rent for the Premises.

85 The letter continued:

> *Allegation that our client has breached the Lease*

5. In paragraph 9 of your letter, you allege that our client has unilaterally purported to reduce the rent payable under the “Expired Lease” and is currently in breach of its obligations under the "Expired Lease" to pay rent.

6. Those allegations are misconceived, for the following reasons.

7. The Regulation does not require a tenant who is an "impacted lessee" to pay the normal rent under a lease until the parties have re-negotiated the rent in accordance with the principles under the Code. To suggest such a thing ignores the entire purpose of the Regulation and the Code, and the fact that:

(a) a landlord may not take any "prescribed action" against an impacted lessee during the "prescribed period"; and

(b) a landlord must not take or continue any "prescribed action" against an impacted lessee for failure to pay rent unless the lessor has complied with clause 7 of the Regulation.

8. Furthermore, our client made its request to renegotiate the rent payable under the Lease pursuant to clause 7 of the Regulation *before* the rent for May fell due. As a sign of good faith, it paid the rent that it calculated would be payable having regard to your client's unavoidable obligation to reduce the rent in accordance with the Code, an obligation you have acknowledged in paragraph 16 of your letter.

9. Accordingly our client denies any breach of the Lease as alleged.

86 Darzi's solicitors' letter then addressed the issue of the information that Darzi was required to provide to Nolde, as follows:

10. The information your client has requested our client to supply goes well beyond what is required for your client to comply with its obligations under the Regulation.

Darzi's qualification as an "impacted lessee"

11. Firstly, regarding the allegation in paragraph 3 of your letter that Darzi has not provided sufficient information to determine whether it is an impacted lessee, although you state it is not clear to which business the income statement relates to, there is an ABN listed at the top of the statement.

12. To assist, we have enclosed an extract of the ABN obtained from www.abr.business.gov.au, which shows Darzi is the entity linked to that ABN, as well as the businesses registered to that ABN. Accordingly, the extract we enclosed with our letter clearly demonstrates that the turnover for our client, across all businesses, is less than $50 million.

13. Please also explain why your client requires (as requested in paragraph 5 of your letter), a full copy of the financial statement for our client for the 2018 financial year, when the requirement under the Regulation is only for the 2018-2019 financial year, i.e., the financial year ending 30 June 2019.

14. With respect to our client's qualification for the JobKeeper scheme, please refer to the enclosed letter dated 26 May 2020 from our client's accountants which encloses a report from our client's ATO portal confirming our client's enrolment in and qualification for the JobKeeper scheme.

Evidence required to calculate reduction in rent

> 15. In paragraph 14 of your letter, you state that "*In order to assess the impact of COVID-19 on your client, our client is required to have specific regard to your client's revenue, expenses and profitability*."
>
> 16. No such requirement subsists in the Regulation.
>
> 17. The requirement on your client so far as rent is concerned is that it must offer a rent reduction in proportion to our client's reduction in turnover, and in this regard we refer you to clause 7(4) of the Regulation and the note thereunder, which provides "*In particular, leasing principle No. 3 in the National Code of Conduct requires landlords to offer rent reductions, in the form of waivers or deferrals of rent, proportionate to lessees' reductions in turnover*."
>
> 18. Accordingly your client does not require any of the information your client seeks are set out in subparagraphs 15(a) to (d) of your letter.
>
> 19. We are however instructed that our client's insurance does not cover any interruption of business as a result of a pandemic. No doubt your client would be aware that this is a common exemption for contracts of insurance so far as business cover is concerned.

87 Darzi's solicitors' letter also dealt with the consequences of a reduction in Darzi's turnover for the month of May 2019 in the following terms:

> 20. Our client agrees that the rent reduction required under the Regulation should be calculated on a monthly basis, to take account of variation in turnover. To that end, we refer you to the turnover comparison for May 2020/May 2019 enclosed with the letter from our client's accountants, which demonstrates a decline in turnover of 76.55% for May 2020 compared to May last year.
>
> 21. Accordingly, the rent payable by our client for June in accordance with the Code is $2,942.21 including GST, which our client will pay at the end of this month.

88 In par 22 of their letter, the solicitors stated that they awaited Nolde's proposal with respect to the reduced portion of the monthly rent, noting that at least half of this must be waived. In par 23, the solicitors also requested an extension of the term of the Lease equal to the period for which rent waivers and deferrals were provided, in accordance with Principle 7 of the Code and clause 7(4) of the COVID-19 Regulation.

89 The letter enclosed a record extracted from ABN Lookup which included the details of Darzi's ABN registration referred to in its solicitors' letter.

90 It also enclosed a letter from Alpha Consulting Group dated 25 May 2020, on the subject of Darzi's request to negotiate rent due to COVID-19. The letter explained that Alpha acted as the external accountants and tax agents for

Darzi. The letter provided confirmation that Darzi was eligible and had enrolled in the JobKeeper program with the ATO.

91 The letter included the statement:

> We attach to this letter the revenue data for the Company as extracted from the Company's accounting records which shows the Revenue Reduction percentage, by month for the past three months as compared to the same month of the prior year.
>
> In estimating the revenue for the full month of May, we have relied upon the actual revenue received for the period 1st May 2020 to the date of this letter and extrapolated this to arrive at the Estimated revenue for the full month ended 31st May 2020. Based on this, you will note that the Business has experienced a reduction in turnover of 76.55% in comparison to May 2019.

92 The letter attached a statement of the revenue for Darzi's Restaurant for the months of March to May 2020 in comparison to the equivalent months for 2019. The revenue reductions were 52.41%, 89.88% and 76.55% respectively. The actual income for April 2020 was shown as $19,755.75 (compared to the estimate of $17,539.82 in the attachment to Darzi's solicitors' 28 April 2020 letter), as the figure in the attachment to the earlier letter was only an estimate in respect of the last few days of the month.

93 I consider Darzi's solicitors' letter to be a reasonable and temperate substantive response to Nolde's solicitors' 18 May 2020 letter.

94 Nolde's solicitors responded to this letter on 5 June 2020. Relevantly, the letter stated:

> 2. We disagree with your analysis of the Regulation at paragraph 7 as a justification for your client unilaterally determining what rent it will pay under the Expired Lease for the following reasons:
>
> (a) as outlined in our letter dated 18 May 2020, our client has not received sufficient information from your client to be satisfied that your client is an "*impacted lessee*" under the Regulation. If your client is not an "*impacted lessee*", the Regulation does not apply and our client is entitled to lawfully undertake action.
>
> (b) if Darzi is an "*impacted lessee*", we agree that the protections and prohibitions under the Regulation apply. The Regulation requires parties to have regard to the leasing principles under the Code during any rent renegotiations (under clause 7 of the Regulation). Leasing principle 2 of the Code states that "*tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this code. Material failure to abide by substantive terms of their lease will forfeit any protections under this Code*." Further, one of the overarching principles of the Code is that "[l]*andlords and tenants will be required to discuss relevant*

issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes."

Darzi's decision to unilaterally pay less rent is not in accordance with the overarching principles nor the leasing principles of the Code.

Even if Darzi is an "*impacted lessee*", the Code requires Darzi to abide by the terms of the Expired Lease, including making payment of rent, until such time that the parties agree to an alternate arrangement in accordance with the Regulation (and the Code).

3. It is clear that:

(a) the parties are not reaching an agreement;

(b) our client is unable to properly assess your client's request for a rental reduction without provision by your client of the documents sought; and

(c) in circumstances where your client has made a unilateral decision to pay less rent, the issue needs to be determined as soon as possible.

4. Given this, we put you on notice that our client will contact the Small Business Commissioner to organise a mediation between the parties in relation to this issue pursuant to clause 6 of the Regulation (although, for the avoidance of doubt, our client does not admit that your client is an "*impacted lessee*" and entitled to any protections under the Regulation until it receives the documents requested in the letter dated 18 May 2020).

95 As will be seen below, the issue of whether a lessee is an impacted lessee is not an inherently complicated one. The test will be satisfied, in a case such as the present, where the lessee has qualified for the JobKeeper scheme and had a turnover of less than $50 million in the 2018 to 2019 financial year. More complicated financial information may be required to enable the terms of the rent reduction, waiver and deferral to be negotiated.

96 It will be necessary to defer the consideration of the validity of Nolde's solicitors' claim that the COVID-19 Regulation and the Code required lessees to continue paying the rent stipulated in the lease, unless and until the lessor has agreed to a reduction in the rent, until after I have set out and considered the relevant parts of those instruments.

97 There is no evidence that Nolde initiated any contact with the Small Business Commissioner to organise a mediation between the parties, as foreshadowed in par 4 of the letter.

98 On 16 July 2020, Darzi's solicitors advised Nolde's solicitors that Darzi did not suffer any decline in revenue in June 2020, compared with June 2019, so that, in accordance with the principles in the Code, Darzi paid the full rent under the

Lease for the month of July 2020. As already mentioned, Darzi has continued to pay the full rent since that time.

99 The very next day, on 17 July 2020, Nolde served on Darzi its second s 129 notice under the *Conveyancing Act*. The operative part of the notice was:

> 3. Pursuant to clause 5.1.1 of the Lease, the Lessee is due to pay to the Lessor the total amount of $19,880.93 (incl GST) less the overpaid amounts, identified in paragraphs 2(a)-(e) and (h), making the current amount of rent due and payable in accordance with the Lease $16,985.45 (incl GST).
>
> 4. The Lessee unilaterally decreased the payments of rent to the Lessor as set out in the Lease without:
>
> a. providing sufficient evidence that the Lessee was an "*impacted lessee*" as defined in regulation 4 of the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) (COVID-19 Regulation); and/or
>
> b. obtaining the Lessor's consent to the payment of a reduced rental amount; and/or
>
> c. renegotiating the rental amount payable under the Lease having regard to:
>
> i. the economic impacts of the COVID-19 pandemic, and
>
> ii. the leasing principles set out in the National Code of Conduct;
>
> as required pursuant to regulation 7(4) of the COVID-19 Regulation.
>
> 5. The Lessee is currently in breach of clause 5.1.2 of the Lease in not paying the outstanding rental amount due of $16,985.45 (incl GST) and the Lessor hereby gives the Lessee notice and requires the Lessee to remedy that breach by paying to the Lessor the sum of $16,985.45 (incl GST) within fourteen (14) days of receipt of this Notice.

100 Darzi's solicitors responded to the second s 129 notice on 22 July 2020. In essence, Darzi asserted that it had provided evidence that it was an impacted lessee. The letter stated: "5. Our client can only assume that your client intends to take some form of "prescribed action" in reliance on the Purported Section 129 Notice if our client does not comply with it." The letter further claimed that Nolde had not acted in good faith in issuing the notice, and added: "…your client's issuance of the Purported Section 129 Notice is designed to bring financial pressure and undue stress to bear on our client, notwithstanding the protection our client is afforded under the Regulation." The letter demanded that Nolde unequivocally and unconditionally withdraw the notice, and threatened that Darzi would seek interim injunctive relief.

101 Nolde's solicitors responded to this letter on 23 July 2020. The letter asserted that Nolde had complied with the COVID-19 Regulation, and claimed that Darzi

had failed, in particular, to comply with clauses 4 and 7(4) of the COVID-19 Regulation. The letter advised that Nolde undertook that it would not take any prescribed action, and would allow Darzi to remain in possession of the Premises pending the outcome of the present proceedings.

102 It appears that the parties let the dispute concerning the rent payable in May and June 2020 rest there, and there was no further effort to comply with the COVID-19 Regulation in accordance with either its terms or its spirit. That may in part have been because Nolde's response in serving the second s 129 notice entrenched the dispute, and because its resolution ceased to be pressing because Darzi's financial circumstances had improved and required it to pay the full rent, which it has done.

COVID-19 regulatory regime

103 The determination of the dispute between the parties concerning the underpayment of rent for the months of May and June 2020 requires a consideration of the administrative measures that were put in place to deal with the impact of the COVID-19 pandemic on the ability of business owners who operated their businesses from leased premises to survive the effect of the pandemic financially.

The Code

104 It will be appropriate to start by setting out the parts of the Code that are of particular relevance to the resolution of the present dispute. The Code provided:

> **PURPOSE**
>
> The purpose of this Code of Conduct ("the Code") is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government's JobKeeper programme.
>
> These principles will apply to negotiating amendments in good faith to existing leasing arrangements – to aid the management of cashflow for SME tenants and landlords on a proportionate basis – as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus ("COVID-19") pandemic.
>
> This Code applies to all tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility

for the Commonwealth Government's JobKeeper programme, with an annual turnover of up to $50 million (herein referred to as "SME tenants").

The $50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

…

The Code has been developed to enable both a consistent national approach and timely, efficient application given the rapid and severe commercial impact of official responses to the COVID-19 pandemic.

…

OVERARCHING PRINCIPLES

The objective of the Code is to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords.

It is intended that landlords will agree tailored, bespoke and appropriate temporary arrangements for each SME tenant, taking into account their particular circumstances on a case-by-case basis.

The following overarching principles of this Code will apply in guiding such arrangements:

• Landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period.

• Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes.

• Landlords and tenants will negotiate in good faith.

• Landlords and tenants will act in an open, honest and transparent manner, and will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code.

• Any agreed arrangements will take into account the impact of the COVID-19 pandemic on the tenant, with specific regard to its revenue, expenses, and profitability. Such arrangements will be proportionate and appropriate based on the impact of the COVID-19 pandemic plus a reasonable recovery period.

….

• The Parties will take into account the fact that the risk of default on commercial leases is ultimately (and already) borne by the landlord. The landlord must not seek to permanently mitigate this risk in negotiating temporary arrangements envisaged under this Code.

• All leases must be dealt with on a case-by-case basis, considering factors such as whether the SME tenant has suffered financial hardship due to the COVID-19 pandemic; whether the tenant's lease has expired or is soon to expire; and whether the tenant is in administration or receivership.

…

LEASING PRINCIPLES

In negotiating and enacting appropriate temporary arrangements under this Code, the following leasing principles should be applied as soon as practicable on a case-by-case basis:

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).

2. Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under this Code.

3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under "definitions," below) of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant's trade during the COVID-19 pandemic period and a subsequent reasonable recovery period.

4. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 above over the COVID-19 pandemic period and should constitute a greater proportion of the total reduction in rent payable in cases where failure to do so would compromise the tenant's capacity to fulfil their ongoing obligations under the lease agreement. Regard must also be had to the Landlord's financial ability to provide such additional waivers. Tenants may waive the requirement for a 50% minimum waiver by agreement.

5. Payment of rental deferrals by the tenant must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties.

…

9. If negotiated arrangements under this Code necessitate repayment, this should occur over an extended period in order to avoid placing an undue financial burden on the tenant. No repayment should commence until the earlier of the COVID-19 pandemic ending (as defined by the Australian Government) or the existing lease expiring, and taking into account a reasonable subsequent recovery period.

…

BINDING MEDIATION

Where landlords and tenants cannot reach agreement on leasing arrangements (as a direct result of the COVID-19 pandemic), the matter should be referred and subjected (by either party) to applicable state or territory retail/commercial leasing dispute resolution processes for binding mediation, including Small Business Commissioners/Champions/Ombudsmen where applicable.

Landlords and tenants must not use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.

DEFINITIONS

The following definitions are provided for reference in the application of this Code.

> 1. Financial Stress or Hardship: an individual, business or company's inability to generate sufficient revenue as a direct result of the COVID-19 pandemic (including government-mandated trading restrictions) that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments. SME tenants which are eligible for the federal government's JobKeeper payment are automatically considered to be in financial distress under this Code.
>
> 2. Sufficient and accurate information: this includes information generated from an accounting system, and information provided to and/or received from a financial institution, that impacts the timeliness of the Parties making decisions with regard to the financial stress caused as a direct result of the COVID-19 event.
>
> …
>
> 4. Proportionate: the amount of rent relief proportionate to the reduction in trade as a result of the COVID-19 pandemic plus a subsequent reasonable recovery period, consistent with assessments undertaken for eligibility for the Commonwealth's JobKeeper programme.
>
> …

105 I have omitted leasing principles 7, 8, 10 and 12 which, as shall be seen, are made relevant by the COVID-19 Regulation to the renegotiation of leases, because the subject matter of those leasing principles does not appear to be relevant to the present dispute.

COVID-19 Legislation

106 The Code is not the direct legal source of the regulatory regime to deal with the consequences of the COVID-19 pandemic on the operation of businesses from leased premises. As already noted, on 25 March 2020, the *COVID-19 Legislation Amendment (Emergency Measures) Act* came into force. Relevantly, it amended the *Retail Leases Act* by inserting a new s 87 into that Act. That section authorises the making of regulations to govern the recovery of possession of premises by a lessor, prohibiting the termination of the lease by a lessor, and regulating the exercise or enforcement of other rights of lessors.

107 The *Retail Leases Act*, as in force at the time of the amendment, did not expressly deal with what (if anything) the continuing effect would be of the COVID-19 regime that was implemented by means of the regulation-making power after the end of the COVID-19 pandemic. That situation was addressed by the *COVID-19 Recovery Act 2021* (NSW), which came into force on 25

March 2021. Relevantly, clause 1.25 of Schedule 1 inserted the following s 88(1) into the *Retail Leases Act*:

> (1) The *Retail and Other Commercial Leases (COVID-19 Regulation (No 3) 2020* continues to apply, despite the repeal of that regulation, to anything occurring in relation to a lease while the lease was an impacted lease within the meaning of that regulation.

108 It is to be noted that s 88(1) deals with the effect of the *Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020*, and provides that that regulation is to continue to apply despite its repeal. What is to continue to apply is "anything occurring in relation to a lease". That appears to be a very wide preservation of the effect of the regulation. However, the "anything occurring" is limited to the period that a particular lease was an impacted lease.

COVID-19 Regulations

109 Section 88(1) of the *Retail Leases Act* does not refer to earlier versions of the COVID-19 Regulation, which makes it necessary to consider the relationship between the third version and earlier versions of the COVID-19 Regulation.

110 The changes in the legal relationships between lessors and lessees under leases during the COVID-19 pandemic were effected by a series of regulations, so far as is relevant to the lease the subject of the present proceedings, authorised under s 88(1) of the *Retail Leases Act*. I will refer to those regulations by adopting the shorthand form as follows. COVID-19 Regulation (No 1) came into effect on 24 April 2020 and, by clause 12, was to be repealed six months later on 24 October 2020. COVID-19 Regulation (No 1) was amended by the COVID-19 Amendment Regulation which came into effect on 3 July 2020.

111 Consequently, the conduct of the parties in relation to the payment of rent under the Lease for May and June 2020 was governed by the COVID-19 Regulation (No 1). However, as the communications between the parties' solicitors regarding the application of the COVID-19 regime continued until 23 July 2020, after Nolde had effectively brought the negotiations to an end by serving the second s 129 notice on 17 July 2020, it is possible that the amendments made by the COVID-19 Amendment Regulation may have had some impact.

112 The COVID-19 Regulation (No 2) came into effect on 24 October 2020. The wording of the COVID-19 Regulation (No 2) was substantially the same as the wording of the first regulation as amended, but with subtle differences. Clauses 12 to 14 of the COVID-19 Regulation (No 2) relevantly contained the following saving and transitional provisions:

> 12 Repeals
>
> (1) The *Retail and Other Commercial Leases (COVID-19) Regulation 2020* is repealed.
>
> (2) This Regulation is repealed at the end of the day that is 6 months after the day on which the Regulation commences, except as provided for in subclause (3).
>
> Note—
>
> See section 87(4) of the Act regarding the duration of regulations made under Part 11 (Response to COVID-19 pandemic) of the Act.
>
> (3) Schedule 1 to this Regulation is repealed on the day that is one day after the day on which this Regulation commences.
>
> 13 Savings
>
> (1) Any act, matter or thing that, immediately before the repeal of the repealed Regulation, had effect under that Regulation continues to have effect under this Regulation.
>
> (2) To avoid doubt, a renegotiation under clause 7 of the repealed Regulation, that was commenced but not concluded before the commencement of this Regulation, may be continued and concluded under clause 7 of this Regulation.
>
> (3) In this clause—
>
> *repealed Regulation* means the *Retail and Other Commercial Leases (COVID-19) Regulation 2020*.
>
> 14 Savings provision—impacted lessees
>
> (1) A reference in this Regulation to an impacted lessee extends to a person who was an impacted lessee under the repealed Regulation in relation to a breach of the impacted lease that occurred at any time during the first prescribed period.
>
> (2) To avoid doubt, a person who was an impacted lessee within the meaning of the repealed Regulation at any time during the first prescribed period is taken to be an impacted lessee for the whole of the first prescribed period.
>
> (3) In this clause—
>
> *first prescribed period* means the period from 24 April to 23 October 2020.
>
> *repealed Regulation* means the *Retail and Other Commercial Leases (COVID-19) Regulation 2020*.

113 Consequently, if the renegotiation of the Lease that was initiated by Darzi was not in fact concluded by the service of the second s 129 notice, it was able to be continued and concluded under clause 7 of the COVID-19 Regulation (No 2).

114 Clause 14 had the effect that, if Darzi was an impacted lessee at any time during the period of operation of the COVID-19 Regulation (No 1), it was taken to be an impacted lessee for the whole of that period. That provision makes it clear that a lessee may be an impacted lessee if the definition of impacted lessee was only satisfied for a closed period.

115 The COVID-19 Regulation (No 3) came into effect on 1 January 2021 by operation of clause 2. The relevant parts of clauses 12 to 14 of that Regulation were the same, *mutatis mutandis*, as the equivalent clauses in the COVID-19 Regulation (No 2) considered above. By clause 12(2), the COVID-19 Regulation (No 3) will be repealed on 1 July 2021.

Application of COVID-19 Regulation (No 1)

116 As it was the COVID-19 Regulation (No 1) that is claimed to have originally applied, it will be appropriate to consider the effect of the relevant provisions of that regulation.

117 Whether the COVID-19 Regulation (No 1) applied will, in the first instance, depend upon whether Darzi was at any time during the period of operation of the Regulation an impacted lessee as defined in clause 4, which relevantly provided:

> 4 Meaning of "impacted lessee"
>
> (1) A lessee is an *impacted lessee* if—
>
> (a) the lessee qualifies for the jobkeeper scheme under sections 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* of the Commonwealth, and
>
> (b) the following turnover in the 2018–2019 financial year was less than $50 million—
>
> …
>
> (iii) in any other case—the turnover of the business conducted by the lessee.

118 I am satisfied, on the evidence, that Darzi was in fact an impacted lessee for the months of May and June 2020. It is clear that Darzi qualified for the

JobKeeper scheme and that its turnover in the 2018-2019 financial year was less than $50 million.

119 The operative prohibitions and restrictions on Nolde's response to any short payment by Darzi of rent under the Lease were relevantly found in clause 6(1)(a), which provided:

> 6 Prohibitions and restrictions relating to commercial leases
>
> (1) If a lessee is an impacted lessee, a lessor must not take any prescribed action against the lessee on the grounds of a breach of the commercial lease during the prescribed period consisting of—
>
> (a) a failure to pay rent, or
>
> …

120 "Prescribed action" and "prescribed period" were relevantly defined in clause 3(1) in the following terms:

> *prescribed action* means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal for any of the following—
>
> (a) eviction of the lessee from premises or land the subject of the commercial lease,
>
> (b) exercising a right of re-entry to premises or land the subject of the commercial lease,
>
> (c) recovery of the premises or land,
>
> (d) distraint of goods,
>
> (e) forfeiture,
>
> (f) damages,
>
> (g) requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a lessee,
>
> (h) recovery of the whole or part of a security bond under the commercial lease,
>
> (i) performance of obligations by the lessee or any other person pursuant to a guarantee under the commercial lease,
>
> (j) possession,
>
> (k) termination of the commercial lease,
>
> (l) any other remedy otherwise available to a lessor against a lessee at common law or under the law of this State.
>
> *prescribed period* means the period ending at the end of the day that is 6 months after the day on which this Regulation commences.
>
> *the Act* means the *Retail Leases Act 1994*.

121 The effect of these provisions, and the extensions made by the later versions of the Regulation, has been that Nolde is and will continue to be prohibited until 1 July 2021, from prosecuting so much of the present proceedings as relates to seeking an order for possession of the Premises against Darzi, a declaration that Nolde is entitled to re-enter for breach, or any order that Darzi pay to Nolde the alleged shortfall in rent for May and June 2020.

122 Clause 7 of the COVID-19 Regulation (No 1) governed the circumstances in which parties to leases were required to renegotiate the rent payable under a commercial lease. It relevantly provided:

> 7 Obligation to renegotiate rent and other terms of commercial leases before prescribed action
>
> (1) A lessor under a commercial lease must not take or continue any prescribed action against an impacted lessee on grounds of a breach of the commercial lease consisting of a failure to pay rent during the prescribed period unless the lessor has complied with this clause.
>
> Note—
>
> This clause does not prevent parties to a commercial lease coming to agreements relating to the lease. For example, an impacted lessee may voluntarily agree to pay full rent during the prescribed period. The clause prevents the lessor taking unilateral prescribed action without complying with the requirements set out in subclauses (2)–(4).
>
> (2) If an impacted lessee is a party to a commercial lease, any party to the lease may request the other parties to renegotiate the rent payable under, and other terms of, the commercial lease.
>
> (3) A party to a commercial lease must, if requested, renegotiate in good faith the rent payable under, and other terms of, the commercial lease.
>
> (4) The parties are to renegotiate the rent payable under, and other terms of, the commercial lease having regard to—
>
> (a) the economic impacts of the COVID-19 pandemic, and
>
> (b) the leasing principles set out in the National Code of Conduct.
>
> Note—
>
> See leasing principles No. 3–5, 7–10 and 12 in the National Code of Conduct.
>
> In particular, leasing principle No. 3 in the National Code of Conduct requires landlords to offer rent reductions, in the form of waivers or deferrals of rent, proportionate to lessees' reductions in turnover.

123 It must be noted that, while clause 6 operated as a prohibition against a lessor taking any prescribed action against the lessee "during the prescribed period", there is nothing in clause 7 which limits the duration of the prohibition on the lessor's conduct under clause 7(1).

124 It is clear that Darzi requested Nolde to renegotiate the rent payable under the Lease. Consequently, Nolde was obliged to renegotiate the rent in good faith. That renegotiation was required to take place having regard to the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code.

125 The Note to clause 7(4) is in my view material to a consideration of how the renegotiation of the rent under the Lease was required to take place, although the Note did not have the legal effect of restricting the general relevance of the leasing principles in the Code required by clause 7(4)(b). The effect of clause 7 was that Nolde will be perpetually barred from taking any prescribed action to recover from Darzi the shortfall in rent paid for March and June 2020, if Nolde did not comply with its obligation to renegotiate the rent in good faith.

Compliance of Nolde with renegotiation obligation

126 As these reasons for judgment have been delivered before 1 July 2021, it is arguable that Nolde's entitlement to commence a prescribed action against Darzi for non-payment of rent after the end of the COVID-19 regime is not strictly an issue in these proceedings. However, in so far as Nolde relies upon the alleged wrongful conduct of Darzi under the Lease as being part of the cumulative grounds for the exercise of the Court's discretion to refuse to make an order for specific performance of the agreement, being the grant by Nolde of the renewed Lease to Darzi, I consider that it is proper for the Court to decide the issue. That conclusion is reinforced by the obligation imposed upon the Court by s 63 of the *Supreme Court Act 1970* (NSW) to grant all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings.

127 I am satisfied that Nolde did not, in fact, comply with its obligation under clause 7 of the COVID-19 Regulation (No 1) to renegotiate the Lease in relation to the rent payable following the request by Darzi.

128 In so far as Nolde relied, in the second s 129 notice, on the fact that Darzi decreased the payments of rent, I do not accept that that was a contravention of the terms or the spirit of clause 7 by Darzi. The Court should hesitate to make general statements about the proper operation of the Code, given the

vast disparity that will exist between the circumstances of the parties to all of the different leases to which the Code and the COVID-19 regime may apply. However, in my view, it is not correct that impacted lessees must continue to pay the rent payable under the lease until such time as the renegotiation process has been completed, and the lessor has agreed to a reduced rent. That situation would run counter to the primary objective of the COVID-19 regime, in preserving leases and the businesses of lessees from the immediate cash flow impacts of the COVID-19 pandemic. The COVID-19 regime assumes that impacted lessees' capacity to pay rent may in fact be immediately affected by the COVID-19 pandemic. It would be entirely counter-productive for the good faith obligation to require lessees to continue to pay the full rent until agreement to the contrary was reached. The reference in clause 8 of the COVID-19 Regulation (No 1) to a dispute resolution process highlights the obvious reality that satisfactory renegotiations may not occur immediately, that a dispute resolution process may be necessary, and that agreement may ultimately not be reached.

129 The extremity of Nolde's position is demonstrated by par 25 of its final written submissions in which it submitted that the COVID-19 Regulation (No 1) should not be interpreted as absolving impacted lessees from the obligation to pay the full rent until lessors have agreed to the contrary because, "[i]f the parliament had intended to override the contract that parties had entered into, it would have required clear words. If the landlord was ungenerous, heavy handed or even unconscionable, the contract stands". I consider that it is hard to imagine a proposition more at odds with the clear intent of the COVID-19 regime than that submission.

130 Nolde's argument about Darzi's reduction in the rent paid was substantially based upon leasing principle 2 in the Code set out above. I do not accept that the intent of leasing principle 2 was to require impacted lessees to continue to pay full rent until agreements to the contrary were made with lessors. In my view, leasing principle 2 was directed at all of the other terms of the lease, breaches of which are not the subject of the prohibitions and restrictions contained in clause 6 of the COVID-19 Regulation (No 1). Some support for this conclusion is found in the fact that leasing principle 2 is not listed in the

Note to clause 7(4) of the COVID-19 Regulation (No 1) as being a leasing principle to be taken into account in the renegotiation process.

131 In any event, as a matter of fact and as I have found above, the payment by Darzi of the reduced rent, calculated on the basis of Darzi's understanding of the intent of the Code, was not done on the basis of a final and absolute statement of position by Darzi as to the amount of rent that it would pay going forward. Properly understood, it was an interim arrangement made in the expectation that Darzi would continue to be an impacted lessee for a period greater than two months, and in the expectation that Nolde would quickly comply with its obligation to conduct with Darzi a good faith renegotiation of the rent. It was implied in Darzi's conduct that it was an open possibility that the renegotiation could lead to an agreement for the payment of a greater amount of reduced rent than Darzi had paid, in which event a balance would become payable to Nolde.

132 In so far as Nolde relied, in its second s 129 notice, on Darzi having provided insufficient evidence that it was an impacted lessee for the purposes of the COVID-19 Regulation (No 1), I reject that argument, and also reject the more general argument that the financial information provided by Darzi to Nolde was insufficient to enable Nolde to comply with its obligation to conduct a good faith renegotiation of the rent with Darzi.

133 First, as I have observed above, it is entirely clear that Darzi was an impacted lessee during May and June 2020.

134 The overarching principles in the Code required the parties to leases to "act in an open, honest and transparent manner, and [to] each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code". Given the urgency of the situation, that meant that lessees would not necessarily be required to provide extensive financial information to lessors, particularly if that information was not readily available and had to be prepared on a bespoke basis to satisfy the requests of lessors. To a considerable extent, it may be necessary for lessors in the renegotiation process to rely upon the honesty of lessees and apparently authentic financial information distilled from the accounting records of lessees.

135 In making that observation, I do not mean to generalise, and depending upon the circumstances, and in particular the amount of the reductions in rent involved, over the course of a good faith renegotiation, lessors may well be entitled to require more financial information than is initially offered by lessees, but that process would need to be tailored to the financial information that was germane to the implementation of the Code, having regard to the reasonableness of causing delay and imposing costs on lessees as a result of the need to prepare additional financial information.

136 In the present case, the request by Darzi for a renegotiation of the rent payable under the Lease related only to two months, and was based upon apparently authentic and correct, albeit concise, information concerning the turnover of the Restaurant in the relevant period, and the equivalent turnover in the period 12 months prior. There was no apparent basis for Nolde to distrust the information, and it has not been shown in these proceedings that the information was false or inadequate.

137 It may well have been that, if the period during which Darzi was an impacted lessee had continued for an extended time, it would have been reasonable for Nolde to refine its requests for provision of further financial information by Darzi.

138 As it happened, Nolde took the extreme course of rejecting the continuation of negotiations, and serving on Darzi the second s 129 notice, which in practical terms brought the renegotiation to an abrupt halt. In particular, if Nolde had responded constructively to Darzi's request, it may have been reasonable during the course of the renegotiation process for Nolde to request at least some of the additional financial information that it sought in order, for instance, to determine an appropriate balance between rent to be waived and rent to be deferred as well as the period of the deferment.

139 Consequently, as matters stand at present, Nolde will never be entitled to take a prescribed action against Darzi in respect of the short payments in rent for May and June 2020.

140 As noted, the COVID-19 Amendment Regulation made a number of amendments to the COVID-19 Regulation (No 1) effective from 3 July 2020.

One of those amendments was to replace the concept of a commercial lease with an impacted lease, though this change is not presently material. The following subclauses were added to clause 7:

> (3A) An impacted lessee must give the lessor the following in respect of the impacted lease—
>
> (a) a statement to the effect that the lessee is an impacted lessee,
>
> (b) evidence that the lessee is an impacted lessee.
>
> (3B) If the impacted lessee does not comply with subclause (3A), the lessor is taken to have complied with this clause.

141 To the extent that these subclauses became relevant to the renegotiation of the rent for the Lease in the present case, they were satisfied by the information provided by Darzi to Nolde.

142 In its submissions, Nolde relied on the observations that I made in *Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd (No 2)* [2020] NSWSC 1141 at [158] to the effect that the COVID-19 regime does not empower the Court to decide the appropriate rent to be paid under an impacted lease, if the parties are unable to renegotiate the lease and the dispute is not able to be resolved by mediation. I accept that there may be cases that must be addressed by the courts where this question arises in future. The difficulty is that, although it may appear to be a mathematical exercise to determine the appropriate reduction in rent by comparing the turnover figures for the current period with the equivalent figures for the 12 months prior, no principles have been established for determining the appropriate split between the waiver and deferral of rent, the appropriate period to allow the lessee to catch up on deferred rent, and whether an extension of the lease should be granted. For the reasons given above, I do not think that this question arises in the present case. That is because a failure by the lessor to comply with the requirements of clause 7 of any version of the COVID-19 Regulation will lead to a permanent prohibition on the lessor taking any prescribed action against the lessee for non-payment of rent while the lessee was an impacted lessee. The position may be different in cases where the lessor complies with clause 7 in good faith, but the parties to the impacted lease are unable to reach an agreement.

143 It is also unnecessary in this case for the Court to consider whether the NSW Civil and Administrative Tribunal would be empowered by s 72(1)(a) and (b) of the *Retail Leases Act* to determine the rent payable by an impacted lessee during the prescribed period: see Nolde's closing submissions pars 15 and 16.

144 Further, it is not necessary to consider whether Nolde's conduct was unconscionable. It would be difficult to make that finding in the present case because, although I have found that Nolde did not engage in the renegotiation process in the manner required by clause 7 of the COVID-19 Regulation (No 1), that was because of an understanding of the effect of the Regulation that Nolde most likely genuinely held. Although Nolde did not accept that Darzi was entitled to reduce its rent without Nolde's prior agreement, and it served the second s 129 notice on the basis that Darzi's conduct constituted a breach of the Lease, it did not attempt to take any prescribed action against Darzi and awaited the outcome of these proceedings. The situation may have been different, for example, in a case where a lessor caused substantial loss to a lessee by ignoring its obligations under the COVID-19 regime, and obliging the lessee to continue to pay the full rent on a protracted basis without engaging in the required good faith renegotiation. This is an issue that should be faced only when it arises.

Darzi's failure to pay outgoings

145 Nolde's claim that Darzi is in breach of its obligation in the Lease to pay a proportion of the outgoings incurred by Nolde in maintaining the Property, of which the Premises are part, is based on the following terms of the Lease:

> 5.1 The lessee must pay to the lessor or as the lessor directs –
>
> …
>
> 5.1.2 the share stated in item 14A in the schedule of those outgoings stated in item 14B in the schedule…
>
> …
>
> 5.3 A payment under clause 5.1.2 must be paid on the next rent day after a request for payment is made by the lessor.
>
> A request for payment can be made –
>
> 5.3.1 after the lessor has paid an outgoing; or
>
> 5.3.2 after the lessor has received an assessment or account for payment of an outgoing.

146 Item 14 in the schedule to the Lease provides:

> Outgoings
>
> A. Share of outgoings: 16.67%
>
> B. Outgoings –
>
> (a) local council rates and charges;
>
> (b) water sewerage and drainage charges;
>
> (c) land tax;
>
> (d) insurance;
>
> …
>
> for the land or the building of which the property is part, fairly apportioned to the period of this lease.

Terms inserted by Retail Leases Act

147 The *Retail Leases Act* also provides that retail shop leases are taken to include a number of provisions. Section 27(a) includes a term that required Nolde to give Darzi a written estimate of the outgoings to which Darzi would be liable to contribute in the disclosure statement that Nolde was required to give to Darzi under s 11. No issue has been raised as to whether Nolde contravened that requirement. However, s 27(b) of the *Retail Leases Act* also included the following provision in the lease:

> A retail shop lease is taken to include provision to the following effect—
>
> …
>
> (b) the estimate of outgoings must be given to the lessee in respect of each accounting period of the lessor during the term of the lease and must be given before the lease is entered into and thereafter during the term of the lease at least 1 month before the commencement of the accounting period concerned,
>
> …

148 There is no definition of accounting period and the term evidently applies to the particular accounting period adopted by the lessor. The apparent purpose of the inclusion of this term is to give the lessee an estimate of the amount of outgoings that it will have to be able to pay in respect of the next accounting period.

149 The *Retail Leases Act* also has the effect of including terms in retail leases that require the lessor to give to the lessee written outgoings statements. So far as is relevant to the Lease in the present case, s 28 provides as follows:

> (1) A retail shop lease is taken to include provision to the following effect—
>
> (a) The lessor must give the lessee a written statement (an outgoings statement) that details all expenditure by the lessor in each accounting period of the lessor during the term of the lease on account of outgoings to which the lessee is required to contribute.
>
> …
>
> (c) The outgoings statement is to be prepared in accordance with relevant principles and disclosure requirements of applicable accounting standards made by the Australian Accounting Standards Board, as in force from time to time.
>
> (d) The outgoings statement is to be given to the lessee within 3 months after the end of the accounting period to which it relates.
>
> (e) The outgoings statement is to be accompanied by a report (an auditor's report) on the statement prepared by a registered company auditor (within the meaning of the *Corporations Act 2001* of the Commonwealth).
>
> …
>
> (h) The outgoings statement need not be accompanied by an auditor's report if the statement does not relate to any outgoings other than land tax, water, sewerage and drainage rates and charges, local council rates and charges, insurance and strata levies, and it is accompanied by copies of assessments, invoices, receipts or other proof of payment in respect of all expenditure by the lessor as referred to in paragraph (a).
>
> …

150 Outgoings statements containing the information required by s 28(1)(a) must therefore be given to the lessee within 3 months after the end of each accounting period. As I understand it, Darzi accepts that the components of the outgoings in respect of which Nolde seeks contribution in the present case fall within s 28(1)(h), with the result that the outgoings statements were not required to be accompanied by an auditor's report. However, that is only so if the statements are "accompanied by copies of assessments, invoices, receipts or other proof of payment in respect of all expenditure by the lessor" for which a contribution from the lessee is claimed. Section s 28(1)(h) will only be satisfied if the documents accompanying the outgoings statement are reasonably sufficient to prove that the lessor has paid the outgoings, and the contribution sought is in respect of outgoings for which the lessee is liable to contribute under the terms of the lease.

151 Section 28A of the *Retail Leases Act* provides:

> (1) A lessee is entitled to withhold payment of contributions for outgoings if—

(a) the lessor has failed to give the lessee a written estimate of outgoings required under section 27 or an outgoings statement required under section 28, and

(b) the lessee has, at or after the expiry of the time when the estimate or statement was required to be given to the lessee, requested the lessor in writing to furnish the estimate or statement to the lessee, and

(c) the lessor's failure has continued for 10 business days after the request was made.

(2) The lessee must pay the withheld contributions within 28 days after the lessor furnishes the estimate or statement.

(3) The lessor is not entitled to recover interest or late payment charges in respect of contributions withheld in accordance with this section.

(4) The lessee is not in breach of the retail shop lease for acting in accordance with this section.

(5) This section does not affect any other rights that the lessee has in connection with the lessor's failure to provide the estimate or statement.

152 Section 29 of the *Real Leases Act* provides for a process of adjustment to ensure that the contribution to outgoings made by lessees under retail leases ultimately equates with their true liability.

Communications concerning payment of outgoings

153 On 28 February 2019, Nolde sent a letter to Darzi attaching "documentation as requested for attention of outstanding outgoing's". The total claimed was $59,306.98, for which Nolde gave credit of $10,000 as a payment received. The balance claimed was $49,306.98.

154 Enclosed with the letter were Nolde's tax invoices addressed to the Restaurant operated by Darzi in respect of categories of outgoings for the period 15 October 2014 to 31 December 2018.

155 The tax invoice for public liability insurance was for the period 15 October 2014 to 31 May 2019 and referred to "Group Policy $20,000,000". The total amount of this outgoings claim was $3,971.84.

156 The supporting documents enclosed with the letter included tax invoices issued by an insurance broking company addressed to Nolde in respect of "Public/Products Liability". The Insured was described as: "Nolde Pty Ltd ATF Koorey Family Trust & SRI Publishing Super Fund & Others".

157 Darzi's solicitors responded to the letter on 22 March 2019. They claimed that Nolde had not complied with s 12A(1) of the *Retail Leases Act*, by failing to provide to Darzi a proper disclosure statement as to the contribution to outgoings required to be paid by Darzi under the original Lease. The letter also claimed that certain outgoings were not payable under the Lease, and other outgoings had not been supported by appropriate invoices. The letter noted that Nolde had failed to provide Darzi with estimates of outgoings in respect of each accounting period as required by s 27 of the *Retail Leases Act*.

158 On 21 August 2019, Darzi sent a letter to Nolde that referred to its outgoings statement dated 28 February 2019. The letter also referred to Darzi's solicitors' letter dated 22 March 2019. In addition to repeating other claims made by the solicitors, Darzi claimed that it was not required to pay a share of GST on outgoings because clause 15.2 of the Lease had the effect that outgoings should be reduced by the amount of any credit or refund of GST, which included insurance premiums. The letter stated that Darzi was ready willing and able to comply with its obligation to pay a share of outgoings "provided Nolde serves a proper outgoings statement that complies with section 28 of the Retail Leases Act, accompanied by all supporting documentation prescribed by that section". The letter also said: "Darzi Group also requires written estimates of outgoings for any further accounting periods, as required by section 27 of the Retail Leases Act".

159 This final request was a prospective request for written estimates of outgoings for all future accounting periods.

160 As noted above, the Court of Appeal decided the appeal in the proceedings commenced by Darzi to establish that it had an enforceable agreement for lease with Nolde on 30 August 2019. It was held that the parties had entered into a retail shop lease under the *Retail Leases Act* on 20 October 2014. Although the Court of Appeal held that the actual agreement for lease came into existence on the later date of 31 May 2016, the conduct of Nolde was regulated by the *Retail Leases Act* from the earlier date. Prior to the Court of Appeal's decision, Nolde had taken the stance that Darzi had no rights as lessee other than by reason of its occupation of the Premises on a month-to-

month basis. A consequence of the Court of Appeal's decision was that Nolde was at risk of not having complied with its obligations under the *Retail Leases Act* from 20 October 2014. That circumstance may explain some of the following conduct by Nolde.

161 It appears that Nolde attempted, on 6 October 2019, to deliver to Darzi an envelope containing purported outgoing disclosure statements for the years 2014 to 2019. Each of the outgoing disclosure statements listed classes of outgoings with estimated amounts for stipulated periods (from 2015 onwards for financial years) together with Darzi's share of the outgoings. The outgoings included public risk insurance, and also the fire monitoring and fire callout fees that have now been abandoned.

162 It appears that Nolde was attempting to provide outgoings estimates retrospectively, except for the period 6 October 2019 to 30 June 2020.

163 It also appears that, on either 11 or 13 October 2019, Mr Koorey or some other person on behalf of Nolde, attempted to deliver to Darzi at the Restaurant further copies of a 2014 disclosure statement and outgoing disclosure statements for the years 2014 to 2019. That appears from handwritten notations apparently signed by Mr Koorey on the bottom of each of the documents. The copy of the envelope that is in evidence states that an attempt was made to hand deliver the documents at “5.36” on 13 October 2019, but the documents were "not accepted by staff under instruction of their boss".

164 On 6 November 2019, Nolde's solicitors served Darzi at its registered office, with a copy to its solicitors, with a document purporting to be an outgoings statement under s 28 of the *Retail Leases Act* for the period 1 December 2014 to 30 June 2019. The outgoings statement claimed $33,289.31 for insurance, $14,564.77 for local government rates and charges, $16,099.88 for water sewerage and drainage rates and charges and $16,503.18 for land tax. The total was $80,457.14, which left an amount owing after a credit of $10,000 paid by Darzi of $70,457.14. The outgoings statement was accompanied by a schedule of outgoings that listed all of the amounts paid by Nolde and the calculation of Darzi's proportion.

165 The supporting tax invoices included invoices relating to industrial special risks insurance as well as public/products liability insurance, and covered the period of the outgoings claim. The parties insured included Nolde, SRI Publishing Super Fund and "Others". An analysis of the schedule of outgoings, the schedule of declared values as at 31 May 2019 in respect of the industrial special risks insurance, together with the individual tax invoices for the two types of insurance, suggests that an attempt may have been made to apportion part of the insurance costs to the Building owned by Nolde at Forster. However, the basis of the apportionment does not appear to be disclosed.

166 On 12 December 2019, Nolde's solicitors served on Darzi's solicitors the first s 129 notice, which included a demand that Darzi pay $36,398.53 as its share of outgoings under clause 5.1.2 of the Lease by 5pm on 27 December 2019. The amount of the claim was based upon the $70,457.14 claimed in the 6 November 2019 outgoings statement less the $33,289.31 for the two types of insurance and $769.30 under the heading water rates.

167 On the same date, Nolde's solicitors served on Darzi's solicitors a notice of breach of the Lease in accordance with s 133E of the *Conveyancing Act*, on the basis that Darzi had failed to pay the $36,398.53. The notice stated that Nolde proposed to treat the breach as precluding Darzi from being entitled to exercise the Option for renewal of the Lease. As explained above, Nolde has abandoned this claim.

168 Darzi's solicitors responded on 17 December 2019 by letter to Nolde's solicitors. The letter referred to the bill of costs arising out of the costs orders made by the Court of Appeal that was served on 27 November 2019, in which the amount of costs claimed was $194,642.10. The letter claimed that Darzi was entitled to set off its costs claim against the amount claimed by Nolde in the s 129 and s 133E notices.

169 The letter then referred to Darzi's 22 August 2019 request, in accordance with s 28A(1)(b) of the *Retail Leases Act*, to be provided with proper outgoings estimates. The letter stated that Nolde had not provided Darzi with proper outgoings estimates that conformed to the requirements of s 27 of the *Retail*

Leases Act, with the result that Darzi was entitled to withhold its contribution to outgoings under s 28A(1) of the *Retail Leases Act*.

170 However, the letter enclosed a cheque for $36,398.53, on a without admissions and without prejudice basis, in favour of Nolde in reduction of whatever outgoings may be proved to be owing for the period 1 December 2014 to 30 June 2019.

171 On 11 February 2020, Nolde's solicitors served on Darzi's solicitors a supplementary outgoings statement, for the period 1 December 2014 to 30 November 2019. The supplementary outgoings statement varied the amounts claimed for insurance, local government rates and charges, water sewerage and drainage rates and charges and land tax by small amounts, giving a new total of $81,392.71. Nolde allowed a credit of $46,398.53 for amounts paid by Darzi and claimed $34,994.18. The supporting documents accompanying the supplementary outgoings statement appear to be the same as for the original statement, save that the schedule of outgoings contains a different table for insurance calculations that sets out the total premiums incurred in conformity with the tax invoices, and then gives separate amounts for the Hotel at Forster owned by Nolde on both a GST inclusive and a GST exclusive basis.

172 The supporting documents included an email to Mr Koorey from Nolde's insurance broker, which contained for both public/products liability and industrial special risks insurance a schedule stating the total premium for the policy and the amount apportioned to Nolde's Property at Forster and also the Restaurant operated by Darzi.

173 Darzi's solicitors responded to the supplementary outgoings statement by letter to Nolde's solicitors dated 5 March 2020. The letter noted that Darzi's obligation under the Lease to contribute to outgoings in respect of insurance was "for the land or the building of which the property is part, fairly apportioned to the period of the lease". The letter noted that the insurance tax invoices identified “SRI Publishing Super Fund & Others” as insureds. As well as noting that the tax invoices appeared to include insurance premiums for insureds other than Nolde in respect of the Property at Forster, the letter also stated that Nolde had no right to claim GST in cases where it was entitled to claim an input

tax credit. The letter requested that Darzi's solicitors be provided with the schedules attached to each of the tax invoices so that they could determine the amount of Darzi's liability.

174 The letter repeated Darzi's claim to a right of set-off on the basis of an assertion that Nolde had conceded that it was liable to Darzi for at least $102,695.45 for legal costs.

175 The letter also enclosed a cheque for $5,690.11 in part payment of outgoings representing the difference between the balance alleged to be owing in the outgoings statement and the amount claimed for insurance costs.

176 Nolde's solicitors responded to this letter on 10 March 2020. The response referred to the email from Nolde's insurance broker that had been included in the documents supporting the supplementary outgoings statement, and gave an explanation of the legal principles supporting Nolde's treatment of GST. The letter demanded that Darzi pay the outstanding amount by 10 March 2020, being the date of the letter.

177 On the same date, Darzi's solicitors sent to Nolde's solicitors, on a without admissions and without prejudice basis, a cheque for $29,304.07. Consequently, as at 10 March 2020, Darzi had paid to Nolde the full amount of the contribution to outgoings claimed by Nolde to that date.

178 Nolde's solicitors delivered a further outgoings statement to Darzi's solicitors on 16 April 2020, for the accounting period 1 December 2019 to 31 March 2020. The amount claimed was $6,261.55, for a proportion of the same categories of outgoings claimed in the earlier statements. The supporting schedule of outgoings was in the same form as the schedule that accompanied the supplementary outgoings statement. There were no tax invoices supporting the insurance premiums, or any separate information from the insurance broker apportioning the premiums to Nolde's building in Forster.

179 Darzi's solicitors responded by email dated 28 April 2020. They acknowledged that Darzi was obliged to pay a proportion of the industrial special risks insurance premium, but claimed that the public liability insurance was not insurance "for the land or building of which the property is part". The email

noted that Darzi was required by the Lease to maintain public liability insurance. The email claimed that the amount payable under the recent outgoings statement should be $5,872.58, after deducting the amount of $388.97 claimed in respect of product and public liability insurance. The email also stated that Darzi had previously paid $5,723.68 with respect to Nolde's public liability insurance, for which it should be given credit. On the basis that the $388.97 claimed for public liability insurance in the outgoings statement and the previously paid $5,723.68 should be deducted from the claimed amount of $6,261.55, Darzi's solicitors advised that Darzi would pay the balance of $148.90 at the same time as it paid rent for the month of May 2020.

180 On 5 June 2020, Nolde's solicitors responded to Darzi's solicitors' email. The email included the following:

> The Lessor's policy includes the restaurant and is charged to the Lessee as an outgoing. The "product" component includes equipment for the whole building, inclusive of all equipment owned by the Lessor in the restaurant that is used by the Lessee. Insurance is an outgoing that is payable by the Lessee under the Lease. The Lessee has not provided evidence that it has maintained an acceptable PPL policy for the leased Premises (and areas being used that fall outside the leased Premises) for the term of the Expired Lease.
>
> The Lessee has been aware that the Lessor has maintained a PPL policy for some years that includes the leased Premises as well as the Lessor's equipment that is used by the Lessee, for the benefit of the Lessee, and has never raised it as an issue before which is why the Lessor has continued including the leased Premises and the equipment in its PPL policy.
>
> Our client demands that the Lessee pay the balance due under the Outgoings Statement by 12 June 2020.
>
> …

181 The email also asked for a copy of Darzi's public and products liability policy, as well as proof of payment of the current premium. It stated that the policy should note Nolde as an interested party, and advised that, if Darzi was able to provide the proof requested, Nolde would not seek payment of a contribution to the premium in respect of public and products liability insurance from the time of receipt of the policy.

182 Darzi's solicitors provided to Nolde's solicitors a copy of Darzi's insurance policy, together with a certificate of currency, under cover of an email dated 30 June 2020. The email explained that Darzi had changed insurers and that its premium was funded and payable by instalments.

183 Darzi's policy did not note Nolde as an interested party. Darzi's solicitors requested advice as to the legal basis of Nolde's claim to be entitled to be noted as an interested party on Darzi's insurance policy.

184 The email also reiterated Darzi's position that the premium for public liability insurance was not an outgoing to which Darzi was required to contribute.

185 By letter dated 10 July 2020, Nolde's solicitors asked Darzi's solicitors to provide copies of Darzi's public liability insurance policy in place between 1 December 2014 and 31 October 2019. The letter asserted that the Lease required Darzi to pay its share of outgoings including insurance "for the land or the building of which the property is part", and this included all insurance as relating to the Building, including product and public liability insurance.

186 The letter demanded that Darzi pay the outstanding contributions to outgoings claimed by Nolde within 14 days of the date of the letter.

187 Darzi's solicitors' 24 July 2020 letter in response reiterated positions previously stated and noted that "there is a genuine dispute between the parties about the validity of your client's purported outgoings statements and the construction of the relevant clauses of the Lease".

188 Nolde's outgoings statement for the accounting period 1 April 2020 to 30 June 2020, which was served on 1 September 2020, claimed a total amount of $11,780.21, being $5,667.56 for the period and $6,112.65 being the amount in dispute. The claim for water rates was made on the basis that Darzi was liable to pay 16.67% of the access charge and 30.82% of water usage, on the basis that there was a separate water meter for the Premises.

189 Darzi paid Nolde $3,727.22 under cover of its solicitors' letter dated 28 September 2020, on the basis that this amount was Darzi's estimate of the amount for which it was liable given the information supplied by Nolde. Darzi's solicitors challenged the 30.82% charge for water usage. They reiterated Darzi's position on the issue of public and product liability insurance premiums. A point was also taken about the possibility that Nolde had double claimed part of the premium for the industrial special risks insurance.

190 Nolde's solicitors responded on 9 October 2020 by serving a supplementary outgoings statement on Darzi's solicitors that reduced the amount previously claimed in respect of insurance premiums from $2,602.68 to $1,700.44. The amounts for the other outgoings remained the same. Nolde gave credit for the $3,727.22 that had since been paid, and claimed an additional amount of $1,038.10, as well as the $6,112.65 that was already in dispute, giving a total claim by Nolde of $7,150.75.

191 Darzi's solicitors acknowledged in a letter to Nolde's solicitors dated 19 October 2020 that they had made an error in their calculations in their 28 September 2020 letter, and said that Darzi had paid an additional $415.23 to Nolde accordingly.

192 Nolde's solicitors claimed in a letter dated 6 November 2020 to Darzi's solicitors that Darzi's 27 August 2020 exercise of the Option was not valid and that Nolde considered that Darzi was on a month-to-month lease of the Premises on the same terms as the expired Lease. The letter also enclosed an outgoings statement for the period 1 July 2020 to 30 September 2020, as well as copies of invoices for council rates and water rates that had not previously been provided to Darzi. The amount claimed for the period was $5,050.86, giving a total outstanding amount of $11,786.38.

193 Nolde served its third s 129 notice on 14 December 2020. As noted above, the total amount claimed for outstanding outgoings was $7,353.96. As I understand it, this amount represents the difference in principle between the parties as to how Darzi's liability to pay a proportion of outgoings is to be calculated.

194 Further, I understand that Nolde relies upon what it alleges has been Darzi's long-term delinquency in relation to payment of its share of outgoings as being an aspect of the breakdown in the relationship between the parties, which Nolde says is a reason for the Court to exercise its discretion to not make an order that Nolde specifically perform its agreement to grant a new Lease to Darzi.

195 As I understand Nolde's final written submissions, a number of the issues that were originally in dispute are no longer in contention. First, Nolde no longer claims for fire monitoring fees, alarm maintenance fees or fire callout fees.

Secondly, Nolde now accepts that it is only entitled to a contribution of 16.67% of its water usage, and is not entitled to a larger percentage of the total water used on the basis that the water used by Darzi's Restaurant is separately metered.

196 The only issue of principle remaining is the determination of the meaning of the expression "insurance…for the land or the building of which the property is part" in Item 14B of the Schedule to the Lease.

197 Of the two types of insurance obtained by Nolde, Darzi only disputes Nolde's claim in respect of product and public liability insurance.

198 Although Darzi asserted, in par 68 of its written closing submissions, that the insurance benefited not only Nolde but other third party entities, such as SRI Publishing, I have explained above when considering Nolde's 11 February 2020 supplementary outgoings statement that Nolde apportioned its premium payments between the insurance in respect of its Property at Forster and other insured interests. That was done on the basis of the information supplied by the insurance broker, and no attempt has been made in these proceedings to challenge that apportionment. The Court has no reason to believe that the apportionment was not carried out correctly by the broker.

199 Darzi's submission, put briefly in par 69 of its final written submissions, was that product and public liability insurance does not fall within the natural and ordinary meaning of "insurance…for the land or the building". Furthermore, Darzi submitted that its construction was also consistent with the fact that the Lease contains other insurance requirements, for example the requirement in clause 8.1.1 that Darzi keep insurance for public liability of not less than $20,000,000. It submitted that it would be a peculiar construction if Darzi was required to have public liability insurance but also to pay for part of Nolde's public liability insurance.

200 Nolde submitted, in par 89 of its final written submissions, that the product and public liability insurance is insurance in respect of the building because it is insurance against the risk that the building injures someone (poor hand-rail, raised floor, falling light fitting). It submitted that, if someone was hurt in the Restaurant by an aspect of the Restaurant that the landlord was responsible

for (or indeed if someone was injured in the Hotel), then Nolde may well be liable, at least for contribution.

201 A number of factors contribute difficulty to the determination of this question as, although the parties have portrayed it as purely an issue of construction, it is possible that the answer requires consideration of the terms of Nolde's insurance policy. That policy wording is not in evidence.

202 Nolde's claim is in respect of two types of insurance, products liability insurance and public liability insurance.

203 As is explained in DK Derrington and RS Ashton, *The Law of Liability Insurance* (3rd ed, 2013, LexisNexis Butterworths) at [11-160] in relation to product liability insurance:

> …The cover basically applies to liability incurred for personal injury or property damage through goods produced and supplied by the insured… In other words, whereas general public risk insurance will provide cover only for the insured's liability arising from his breach of his general duty to the harmed third party, this class of cover will extend to his liability for harm caused by breach of his contract in the production or sale of the offending product.… A typical policy will cover liability for harm caused by or in connection with or arising from goods or the containers thereof sold or supplied by the insured…

204 To the extent that Nolde paid premiums for product liability insurance, it is difficult to see how the cover would extend to products produced and supplied by Darzi from the Restaurant, or how that cover would be attached to the whole of Nolde's Building at Forster.

205 In Kelly and Ball, *Principles of Insurance Law* (2001, LexisNexis Australia, looseleaf), the following is said about public liability insurance at [14.0320] (footnotes omitted):

> Public liability insurance is available in a variety of forms. Essentially, it covers the insured against liability for personal injury (including death) or property damage… It is normally occurrence based cover: see [14.0010]. The cover is often restricted to a particular location, business or activity. It is also often restricted to liability arising from an accident or to "accidental" property damage and personal injury. In some cases, the cover is closely restricted, as where the policy covers "liability of the insured in respect of accidents happening in or about the property", "property" being defined as including outbuildings and other permanent domestic improvements. In other cases, the cover is limited only to accidents within Australia or within New Zealand. The most restrictive cover is where the policy is expressed as covering the insured against liability "as owner or occupier" of the relevant premises.

206 The problem that this description of the possible range of public liability insurances creates is that, if the cover is limited to a particular location, it is likely to be a location of which Nolde was the owner or occupier. There is no reason from the description of the range of cover provided by public liability insurance above for the Court to infer, in the absence of the policy, that the public liability insurance cover obtained by Nolde was restricted to any particular location, or if it was, that it extended to the Premises under the Lease.

207 The email prepared by Nolde's insurance broker that apportioned the premiums as between the building at Forster and the other interests covered provides no insight into the question of whether the apportionment was influenced by the location of the risks, or whether it was based only on an assessment of the risks.

208 Taking the only policy that was in evidence as an example, the liability component of Darzi's liability insurance covered: '… all sums that the Insured Person shall become legally liable to pay for compensation in respect of Personal Injury, Property Damage or Advertising Liability happening during the Period of Insurance within the Territorial Limits as a result of an Occurrence in connection with Your Business or Products' (Court Book B1168). The purpose of using this example is to show that, while Darzi's risk of public liability would logically be greatest in respect of its occupation and use of the Restaurant on the Premises, its public risk policy was not attached to the Premises in the sense that it only applied to Occurrences happening there. "Territorial Limits" was defined as "anywhere in the world", subject to a number of immaterial exclusions generally concerned with events occurring outside Australia.

209 These considerations assist the Court in preferring the construction of the Lease proposed by Darzi. Product and public liability insurance is not of its nature "for the land or the building of which the property is part". At most it can be said that the cover may extend to liability arising by reason of events occurring on the land or the building, but there is no reason to assume either that the cover was limited to such occurrences, or that it extended to events occurring on the Premises the subject of the Lease.

210 The fact that clause 8.1.1 obliged Darzi to keep current an insurance policy covering liability to the public assists in the conclusion that the Lease did not contemplate that Darzi would be required to contribute to the premiums for public liability insurance obtained by Nolde.

211 Consequently, not only has Darzi not breached clause 5.1.2 of the Lease by failing to pay the share in the premiums for product and public liability insurance claimed by Nolde, but Nolde is not entitled to the declaration sought in prayer 15 of the cross claim that the term "insurance" in Item 14B includes product and public liability insurance for the building obtained by Nolde.

212 Nolde made submissions in response to an argument that it said Darzi appeared to press. That was an argument that may have been current at one stage to the effect that Nolde was not entitled to any of the share of outgoings that it claimed, as it had not provided Darzi with the outgoings estimates referred to in s 28A of the *Retail Leases Act*. I do not understand that Darzi has maintained such an argument in its final written submissions. If that is a correct understanding, then it is not necessary for the Court to deal with Nolde's submissions in response.

213 However, if the argument remains live, I would note that Nolde's submission that Darzi only made one request for an outgoings estimate on 21 August 2019, so that s 28A would only apply to one accounting period, ignores the fact that, as noted above, Darzi's one request was that Nolde provide the required outgoings estimates indefinitely into the future. I consider that s 28A of the *Retail Leases Act* does not require lessees to make separate requests for outgoings estimates before the commencement of each accounting period. A single request will be effective if it requires outgoings estimates to be supplied before each accounting period for the duration of the Lease.

214 However, if it were necessary for the Court to deal with this argument, I would accept Nolde's submission that the failure by a lessor to deliver outgoings *estimates* upon request by the lessee does not have the effect, under s 28A of the *Retail Leases Act*, that the lessor is perpetually disentitled to the proportion of the outgoings in accordance with the lease. In my view, if the lessor subsequently gives the lessee an outgoings *statement* that complies with s 28

of the *Retail Leases Act*, then s 28A(2) will have the effect that payment will be required within 28 days of receipt. The lessor's failure to provide an outgoings *estimate* will have the effect that the lessee will not be required to comply with a term such as clause 5.3 of the Lease in this case, in so far as it requires the lessee to make payment on the basis of the lessor having received an assessment or account that has not yet been paid. However, if the lessor complies with s 28, by giving the lessee within three months after the end of the accounting period a statement of outgoings actually paid, the lessee will be obliged to pay the share of outgoings payable under the lease.

215 Darzi's final submissions did not address the issue that had been raised earlier in correspondence concerning Darzi's right to set off its entitlement to be paid legal costs against its obligation to contribute to outgoings under the Lease. Nolde said in its submissions that it has now paid the costs order. I understand that this issue is no longer relevant.

216 The final argument put by Nolde concerning payment of a share of outgoings by Darzi was that Darzi's performance of its obligations under the Lease was so delinquent that its conduct should be taken into account by the Court as a ground for declining to make an order for specific performance of the agreement to grant a renewed Lease. Nolde said, in par 60 of its final written submissions, that "[s]ince 2019, Darzi has consistently made payment of outgoings late, and has unilaterally refused to pay various expenses included in the outgoings statements issued to it by Nolde". Nolde added in oral submissions "Mr Darzi reneged on every obligation, so he was late in making payments, he in some circumstances only made payments when issued with a demand, he didn't pay any outgoing statements without lengthy solicitorial correspondence" (T 268.40).

217 Nolde based those submissions on an analysis of the correspondence and conduct of the parties on the subject of payment by Darzi of a share of the outgoings incurred by Nolde. The reason I have analysed those matters in some detail above is that I consider that the analysis demonstrates on its face that Darzi acted properly and reasonably in response to Nolde's outgoings claims. It appears that, because Nolde did not accept that Darzi was entitled to

a lease, it did not deal with Darzi on the basis of the terms of the Lease until after the publication of the judgment of the Court of Appeal. Thereafter, the parties went through a process that took some time by which they put the treatment of outgoings on a proper footing in accordance with the Lease. Nolde's initial attempts to do so were probably ineffective because of their retrospective nature, but in due course, aided by the advice of their respective solicitors, the parties, so to speak, caught up with their need to deal with outgoings in accordance with the terms of the Lease. Darzi was within its rights to deal with the issue as it did.

218 In any event, to the extent that there were disputes between the parties as to how the Lease operated in relation to Darzi's obligation to contribute to outgoings incurred by Nolde, Darzi has generally succeeded in this case or Nolde has abandoned positions that it had previously adopted.

Darzi's failure to maintain the Premises in good condition

219 The only claim for relief made by Nolde in its cross claim in respect of Darzi's obligation under the Lease to maintain the Premises in good condition is that part of the alternative relief in prayer 14 (claimed on the assumption that the Court finds that Darzi is entitled to a renewal of the Lease) which seeks an order requiring Darzi to perform a list of maintenance tasks.

220 Notwithstanding that limited prayer, Nolde pleaded in par 15 that it is not under any obligation to extend the Lease because of breaches by Darzi that include its failure to maintain the Premises in good condition.

221 The specific breaches are alleged in pars 58 to 61 of the cross claim, which claimed a significant number of breaches by Darzi of clauses 6.1.3, 7.2, 7.3.1, 7.5 and 7.7 of the Lease.

222 In pars 105 to 108 of its final written submissions, Nolde only referred to clauses 6.1.3, 7.2 and 7.7. It did so in respect of the submission in par 105 that Nolde also seeks consequential orders in prayer 14 of the cross claim relating to access to the Premises as well as maintenance (rodent control, cleaning and rubbish removal and air-conditioning plant).

223 Consequently, it now appears that Nolde has sought to demonstrate the alleged breaches by Darzi for the purpose of obtaining an order that Darzi rectify the breaches, rather than that the breaches are of a character that entitles Nolde to terminate the Lease.

224 The Lease relevantly provides:

> 6.1 The lessee must
>
> …
>
> 6.1.3 keep the property clean and dispose of waste properly; …
>
> 7.2 The lessee must otherwise maintain the property in its condition at the commencement date and promptly do repairs needed to keep it in that condition but the lessee does not have to –
>
> 7.2.1 alter or improve the property; or
>
> 7.2.2 fix structural defects; or
>
> 7.2.3 repair fair wear and tear.
>
> …
>
> 7.7 The lessee will at its own cost ensure that the air-conditioning plant is maintained and serviced by specialist contractors under service contracts. The lessee will keep the air-conditioning plant in good repair and condition excluding fair wear and tear and repairs of a capital nature. The lessor will be responsible for repairs of a capital nature and replacing the air-conditioning plant as a result of fair wear and tear.

225 Clause 7.5 gives Nolde a power by notice to require Darzi to do the work necessary to comply with its obligations, and to reimburse Nolde if it does the work following Darzi's failure to comply with the notice.

226 Nolde referred, in par 108 of its final written submissions, to concessions that Mr Darzi was said to have made in cross-examination concerning inadequate cleaning and maintenance of the Premises. Reference was made in particular to an Improvement Notice issued to Darzi by MidCoast Council dated 22 January 2020 that listed defects referenced to public health concerns, and also included defects relating to the maintenance of the Premises. Many of the items in the Improvement Notice relating to health concerns were much stricter than would be required by the cleaning and repair obligations contained in the Lease. Nolde also relied on an email dated 22 January 2020 from a representative of the operator of the Hotel to MidCoast Council complaining

(with supporting photographs) about inadequate cleaning by Darzi of the Restaurant's bin room.

227 There was also correspondence between the solicitors for the parties about the issue of the maintenance of the Premises by Darzi, including a letter from Nolde's solicitors dated 6 February 2020 that enclosed photographs of parts of the Premises that may possibly demonstrate inadequate maintenance by Darzi, but in some cases may also be consistent with fair wear and tear.

228 Darzi's response to this aspect of Nolde's claim was to assert, in par 102 of its final written submissions, that there was no positive evidence of these allegations, including no evidence of the state of the Premises at the commencement of the Lease. The essence of Darzi's response was that the evidence was not sufficient to establish Nolde's claim.

229 It is difficult for the Court to resolve this aspect of the dispute on the basis of the material that was in evidence. In particular, it is difficult to weigh the significance of limited and episodic evidence of apparently inadequate cleaning and maintenance without having a comprehensive understanding of the reality of the manner in which the Premises have been occupied by Darzi, and without also having an opportunity to inspect the Premises.

230 It does seem to me to be likely that Darzi's performance of aspects of its obligations to clean and maintain the Premises has been inadequate at times. The Court would not readily ignore the Improvement Notice issued by the Council.

231 In these circumstances, however, the Court would not readily issue an injunction against Darzi in the terms of the orders sought in prayer 14 of the summons. Looking at the list of maintenance tasks that Nolde seeks to have included in the order, the Court cannot, without assistance, assess which tasks may genuinely involve cleaning and maintenance within the obligation imposed upon Darzi by the Lease, and which tasks require the remediation of fair wear and tear or structural deficiencies that are the responsibility of Nolde. The injunction that is sought by Nolde is too general.

232 On the other hand, there is sufficient evidence to warrant the Court in declining Darzi's submission that Nolde's claim for relief should be dismissed.

233 If the Court makes an order that Nolde specifically perform the agreement to grant a renewed Lease to Darzi, then attention should be given to the ongoing relationship between the parties, and steps should be taken to avoid the continuation and recurrence of grounds for disputation and aggravation as between the parties.

234 I am satisfied that, unless the parties can come to a satisfactory agreement (which I consider would be preferable to the imposition of a court order), I should make an appropriate order that will facilitate the Court being able to make an order in relation to the cleaning, repair and maintenance of the Premises in the future that might minimise the likelihood of continuing disputation. The parties should consider this aspect of these reasons, and they have leave to confer, if they are able, and to provide my Associate with brief written submissions within 14 days as to their preferred approach to establishing a regime to deal with this problem. If necessary, I would consider appointing a suitably qualified local expert as a referee to prepare a report to the Court to deal with the issue.

Darzi's failure to provide access to the Premises pursuant to the Lease

235 By prayer 13 of its cross claim, Nolde sought an order requiring Darzi to provide Nolde with access to the Premises for the purpose of carrying out an inspection of the Premises.

236 The Lease relevantly provides:

> 9.1 The lessee must give the lessor (or anyone authorised in writing by the lessor) access to the property at any reasonable time for the purpose of –
>
> 9.1.1 inspecting the condition of the property, or how it is being used; or
>
> 9.1.2 doing anything that the lessor can or must do under this lease or must do by law;

237 Nolde's specific complaint, as set out in pars 64 and 65 of the cross claim, was that on 5 June 2020, Nolde served Darzi with a notice that stated that Nolde required Mr Peter Naylor to carry out an inspection of the Premises on behalf of Nolde, but Darzi has refused to allow Mr Naylor access to the Premises.

238 Nolde gave as particulars of this allegation par 104 of Mr Koorey's 19 October 2020 affidavit and pars 5 to 6 of Mr Naylor's 16 October 2020 affidavit. The relevant paragraphs of Mr Koorey's affidavit contained the complaint that, in mid-January 2018, Mr Darzi banned him from entering the Premises so that he "could not even have a cup of coffee" in the Restaurant in his Hotel. Mr Koorey also gave evidence that he was told, on 26 February 2018, of a verbal altercation between Mr Darzi and the resident manager at the Hotel that led to the police being called. Mr Naylor's evidence was of an incident on 6 May 2019, when Mr Darzi demanded Mr Naylor stop painting the walls of the garden beds that are located in front of the Restaurant and form part of the frontage of the Hotel.

239 The Court is confused about these allegations by Nolde. The alleged breaches do not appear to involve Darzi refusing Nolde access to the Restaurant in order to inspect its condition or to do something required by the Lease. In these circumstances, the order sought by Nolde should not be made.

Darzi's other fundamental breaches of the Lease

240 This subheading is taken from Nolde's cross claim. The first complaint made by Nolde, in par 67, was that, in or about 2016, Darzi permitted the Premises to be used for a strip show, which was performed in view of the Hotel's guests. This incident was claimed by Nolde to be a breach of clause 6.1.1 of the Lease, in so far as it required Darzi to use the Premises as a licensed restaurant.

241 Nolde's witnesses gave evidence of the incident, which Darzi was not in a position to contradict through Mr Darzi, as his evidence was that he was not in the country at the time. The Court does not have a good reason for rejecting the evidence of Nolde's witnesses. That said, the incident is bizarre and questionable, as it is difficult to believe that the patrons of the Restaurant who apparently promoted the performance by the lady in question would have her carry out her performance naked on a table in a large family restaurant in broad daylight and in full view of passers-by on a beachfront road at Forster.

242 Nevertheless, I find that the incident more probably than not occurred generally in the manner related by the witnesses. However, Nolde has not established that Darzi, through Mr Darzi, was aware of the incident in advance or

authorised it. The evidence does not permit a finding that any employee of Darzi authorised the performance by the lady within their authority. If the incident took place in 2016, it did not surface until a point was made of it by Nolde in these proceedings.

243 It is not an event that in my view could properly affect the continuation of the relationship of lessee and lessor between Darzi and Nolde.

244 The second complaint made by Nolde, in par 68 of the cross claim, was that between about October 2014 and 24 July 2020 Mr Darzi verbally threatened and abused Hotel staff in front of guests of the Restaurant and the Hotel.

245 If I understand the evidence referred to in the particulars given by Nolde, the evidence primarily refers to an incident involving Mr Darzi and the female resident manager of the Hotel on about 26 February 2018, another between Mr Darzi and a Hotel receptionist on about 15 January 2020, and a verbal dispute between Mr Darzi and Mr Naylor in May 2019. The Court was shown video recordings of the incidents involving Mr Darzi and the resident manager and Mr Darzi and Mr Naylor. Comprehensive submissions were made as to what the Court could infer from the evidence concerning the initiator of the incidents and the level of aggression involved.

246 There may, over a period of a number of years, have been an occasional verbal dispute between Mr Darzi and employees of the Hotel. It is possible that the female employees of the Hotel who were involved felt intimidated to some extent. The evidence does not justify a finding as to who initiated the incidents or what the real level of threat was. There did not appear to be any violence or threat of violence by any of the participants.

247 It is open for the Court to conclude that there was surprisingly little manifest animosity between Mr Darzi and the employees of the Hotel given the intensity of the emotions that must have been triggered by the prosecution of the proceedings to establish the existence of the Lease.

248 According to a New South Wales Police Force COPS report dated 17 March 2020 that is in evidence, on 13 January 2020 Mr Koorey made a report to the Police about an alleged incident on 9 January 2020, when Mr Darzi had been

rude and intimidating to staff of the Hotel. The attitude of the Police recorded in the report was: “No further action, recorded for reference as it appears the dispute is becoming petty”. I agree.

249 The final allegation of fundamental breach of the Lease made by Nolde was its claim, in par 69 of the cross claim, that, since around early 2019, Darzi has refused to accept any correspondence from Nolde and has stated that Darzi will only correspond with Nolde through the parties’ solicitors.

250 Nolde relies on clause 14.2 of the Lease for this allegation, which provides:

> A document under or relating to this lease is –
>
> 14.2.1 served if it is served in any manner provided in section 170 of the *Conveyancing Act 1919*; and
>
> 14.2.2 served on the lessee if it is left at the property.

251 In support of this claim, Nolde relied upon a letter dated 18 October 2019 from Darzi’s solicitors in which a demand was made that Nolde cease communicating directly with Darzi, and that Mr Koorey instruct the staff at the Hotel not to communicate with Darzi’s staff at the Restaurant. Mr Koorey gave evidence in his affidavit of at least three occasions in 2019 when staff of the Restaurant refused to accept correspondence from Nolde delivered by staff of the Hotel.

252 Clause 14.2 of the Lease is not a term that imposes a performance obligation on Darzi. It is a term that has the effect that service of documents that is implemented as permitted by the clause will be effective service on Darzi, whether or not the documents actually come to Darzi’s attention. Regardless of whatever stance Darzi adopted concerning its preferred manner of communication with Nolde, a request that the communications be between the parties’ solicitors had no effect on Nolde’s entitlement to effect service by leaving documents on the Premises. Nolde did not have to secure the agreement of the Restaurant staff to accept service of the documents. Service would be effective if simply left at the Premises.

253 Furthermore, the continuing existence of a right provided by clause 14.2.2 for Nolde to serve documents under or relating to the Lease by leaving them at the Premises is not inconsistent with a requirement by Darzi that personal

communications between the parties during the currency of their dispute be conducted through their solicitors. Such communications are not generally by their nature required to be served, and even in the case of documents such as the ss 129 and 133E notices, a request (as that is all that it can be) for Nolde to serve the documents on Darzi's solicitors does not in any material way prevent Nolde relying upon clause 14.2.2.

254 In any event, it was a common and sensible proposal for the parties during the pendency of the litigation to communicate through their solicitors to avoid the creation of any intimidating circumstances for the staff of either party.

Trespass claim

255 Nolde has made a claim for damages against Darzi for trespass on parts of the Property outside the Premises.

256 Nolde has not proved that it has suffered any actual loss by reason of the alleged trespass, and claims that it is entitled to an amount of damages simply assessed by the Court to vindicate its proprietary right as owner of the Hotel.

257 Nolde's claim for damages for trespass is undermined by its pleaded assertion in par 4 of the defence and the cross claim that SRI Publishing Co Pty Ltd is the lessee of all parts of the Property, except for the Premises, and uses the Property to operate the Hotel. As is stated in RP Balkin and JLR Davis, *Law of Torts* (2013, 5th ed, LexisNexis Butterworths) (Balkin and Davis) at [5.11] (citations omitted): "The plaintiff with a legal estate and exclusive possession may sue in trespass. Only a tenant and not the landlord can sue if a third party trespasses on the land demised". I understand that principle to be uncontroversial. This defect in Nolde's title to sue Darzi for trespass exists whether or not Nolde or Mr Koorey has some right of control or ownership of SRI Publishing Co Pty Ltd.

258 I make the following observations concerning Nolde's trespass claim in case it be determined that, contrary to its pleadings, Nolde had title to maintain such a claim in respect of the Hotel or any other part of the Property owned by Nolde.

259 In its cross claim, Nolde pleaded trespass claims based upon the alleged unauthorised use of a doorway between the Premises and the lobby of the

Hotel and the lobby itself: pars 70 to 82. This claim does not appear to be mentioned in Nolde's written closing submissions. It is a strange claim, as the door between the Premises and the foyer of the Hotel was part of the Property at the inception of the Lease, and its use was, as a practical matter, necessary or convenient to enable Darzi to comply with its obligation under the Lease, as mentioned above, to provide breakfast to patrons of the Hotel and to give them preference for lunch and dinner bookings.

260 Furthermore, it is of the very nature of a hotel foyer that there is a standing implied invitation to all persons who may have some proper business in entering the foyer to do so.

261 The claim pleaded by Nolde in par 81 of its cross claim was that "the continued use of the Hotel Lobby and the use of the Lobby Door by Darzi's staff and patrons constitutes an unlawful trespass onto Nolde's Property, for which Nolde claims damages from Darzi". Nolde did not actually allege that it published any prohibition against persons within these categories entering the Hotel lobby, whether via the door to the Restaurant or by other entrances. Nolde only pleaded allegations concerning exchanges between Nolde and Darzi that ultimately led to Darzi acquiescing in the door between the Restaurant and the Hotel lobby being permanently sealed by Nolde.

262 If this aspect of Nolde's trespass claim remains a claim made by Nolde, I would reject it because there was no allegation that Nolde had prohibited any relevant persons from entering the Hotel foyer, and in any event, Nolde has not established any basis for Darzi being liable in trespass for Mr Darzi, its staff or its patrons entering and exiting from the Restaurant through the Hotel lobby. Even if those persons were individually guilty of trespass, it has not been established that their actions were done on the instruction or with the authority of Darzi, so that Darzi would be responsible for their conduct.

263 The second aspect of Nolde's trespass claim concerned a lock-up storage area in the underground car park of the Building: pars 83 to 89.

264 Nolde submitted, in par 124 of its written closing submissions, that the evidence establishes that Nolde had exclusive possession of the storage area, not just ownership of the land. I do not understand how the authorities referred

to in the footnote to that submission (fn 94) overcome the effect of the allegations in Nolde's pleadings that it was only a lessor of the Hotel (with SRI Publishing Co Pty Ltd being the lessee), which causes me, in the absence of evidence to the contrary, to infer that Nolde was not in possession of the relevant land.

265 As pleaded, Nolde's claim was that from the inception of Darzi's occupation of the Premises in October 2014, Nolde permitted Darzi to use equipment contained in the storage area, namely post mix soft drink bottles and a CO2 gas canister, which had been used by SRI Publishing Co Pty Ltd when it had operated the Restaurant before Darzi. On 19 December 2019, Nolde's solicitors on its behalf demanded that Darzi cease accessing and using the storage area. Darzi continued to use the area until about 1 September 2020. Nolde complained both that the continuing use by Darzi of the storage area without Nolde's authority and Darzi's entry into the storage area for the purpose of removing its equipment constituted trespass by Darzi.

266 I doubt that it could be trespass by Darzi to enter the storage area to comply with the demand by Nolde that Darzi remove its equipment. However, if Nolde had established that it had title to bring a claim in trespass against Darzi, the evidence properly would establish that claim in respect of Darzi's continued entry into the storage area or storage of its equipment there, after Nolde had withdrawn its agreement to that conduct. Trespass is actionable *per se*, that is without proof of actual damage, but in the circumstances of this case the damages that would have been awarded would be nominal: see Balkin and Davis at [5.19].

Specific performance of the agreement to renew the Lease

267 As I have noted above, Nolde abandoned its claim that Darzi had not effectively exercised its Option for a renewal of the Lease. For the reasons considered above, I have also found that Nolde is not entitled to terminate the Lease on the ground of breach committed by Darzi. In those circumstances, the remaining and paramount issue between the parties is whether the Court should make an order against Nolde for specific performance of its agreement

to grant a renewed Lease to Darzi that came into existence upon the effective exercise by Darzi of its Option to renew.

268 The parties accepted that specific performance is a discretionary remedy, and Nolde submitted that, in the particular circumstances of this case, the Court should in the exercise of its discretion decline to make an order for specific performance in favour of Darzi. As that would leave Nolde in breach of the Lease, Darzi's remedy would be limited to an award of damages.

269 Nolde's case as to why the Court should exercise its discretion in favour of Nolde was put in substance on three grounds. First, Nolde submitted that the circumstances of the present case are exceptional, in that the exercise by Darzi of its rights as lessee of the Premises requires continual cooperation between Darzi and Nolde as the owner of the Property of which the Premises form part, and the Court should not make an order that requires continuing cooperation between the operator of a restaurant and the operator of a contiguous hotel, when the evidence establishes that the ability of the parties to cooperate has broken down. Secondly, Nolde relied upon a consideration related to the first, being that the interpersonal relationship between the principals of Nolde and Darzi have now disintegrated to the point where the relationship is poisonous, so that an order should not be imposed upon Nolde that requires its principal to continue to suffer the disappointment and aggravation that he has endured for most of the duration of the Lease to date. Finally, Nolde submitted that, even if the first two considerations are not sufficient to determine the exercise of the Court's discretion against making an order for specific performance, having regard to those matters, damages in this case will provide an adequate remedy to Darzi.

270 Darzi's response to those submissions was to deny their validity as a matter of fact, and also to rely upon what it submitted was the generally accepted principle that the effect of the decision of the Court of Appeal was that Darzi has an existing proprietary interest in the Premises in the nature of a leasehold interest, and it is the practice of the Court to grant specific performance of agreements to renew such a leasehold interest because of its proprietary nature and the inherent uniqueness of individual parcels of land, particularly in

cases where the party with the benefit of the agreement for renewal has established and conducts a business from the land.

271 I accept the submission advanced by Darzi that a lessee under an existing lease, who validly exercises an option for renewal, has a very strong claim for an order for specific performance of the agreement for renewal. Nolde did not dissent from this proposition in principle. In *Sydney West Area Health Service v Staracek* (2008) 73 NSWLR 68; [2008] NSWSC 744 at [21], Bryson AJ said:

> Although there is always a discretionary element in the decision to grant or withhold specific performance, the claim for specific performance of the entitlement to a renewal term is a very strong one; specific performance will give effect to an equitable interest which already exists.

272 Furthermore, the lessee will not usually be denied an order for specific performance of the agreement to renew the lease even if some breaches of the obligation to repair are established, at least where the lessee has the capability and wherewithal to carry out the repairs. Bryson AJ also said at [30]:

> The end result is that I am now asked to compel the lessor to execute a renewed lease although, after he has been put to a great deal of trouble, three significant repair items have not been carried out. On one hand, I am reluctant to compel the lessor to grant the lessee its entitlements when he has not received his own. On the other hand, I regard it as disproportionate to refuse to enforce entitlement because of non-performance of repair obligations which, while they are not insignificant, are of relatively low value, in the scale of what must be the value of the property and of the leasehold entitlement. There is no reason to doubt that the lessee has the resources to meet its obligations.

273 In that case, Bryson AJ found at [26]: "… the need for repairs has given the lessor a great deal of unwarranted trouble and the lessee has not responded reasonably or promptly to needs to carry out significant repairs, or to requests from the lessor to comply. The lessor has been assiduous in seeking compliance". It appears that the breach of the lessee's obligation to keep the premises in good repair was more serious in that case than may be true in the present. His Honour resolved the issue by saying, at [31]: "I am of the view that I should order specific performance, but before I do I should require the lessee to conform with its outstanding repair obligation, and if this does not happen within a reasonable time, which I estimate at four months, specific performance should be withheld".

274 In the present case, as I have recognised above, there is room for doubt that Darzi has entirely performed its obligation to keep the Premises clean and in good repair in this case, although the evidence has not positively satisfied me that serious breaches of that obligation have occurred. I have foreshadowed a process, whether by agreement between the parties or following a report by an independent expert to the Court, that appropriate specific orders be made if their necessity is demonstrated, for Darzi to carry out necessary repairs, and perhaps for an appropriate protocol to be laid down to clarify the respective responsibilities of the parties moving forward for the purpose of reducing the scope for further disputation. If an order for specific performance is to be made, I will decide the appropriate timing for that order in association with the resolution of the dispute concerning the repair and maintenance of the Premises.

275 On the basis that the lessee's right to an order for specific performance is not absolute, and the Court retains a discretion as to whether or not to make that order, Nolde relied upon the decision of Pembroke J in *Casquash Pty Ltd v NSW Squash Ltd (No 2)* [2012] NSWSC 522 (*Casquash*). Relevantly, the question addressed by his Honour was whether the Court should exercise its discretion to make an order in favour of the plaintiff lessee for relief against forfeiture of the lease under s 129 of the *Conveyancing Act*. His Honour held:

> [58] However the circumstances of this case, and in particular the conduct and attitude of Carin Clonda on behalf of the plaintiff, remove the necessity for the consideration of these distinctions. On any view, it would not be in the interests of justice to exercise my discretion in favour of the plaintiff. This is no ordinary commercial lease. The lessor and lessee are bound under this lease to co-operate with each other to an extent that is not always usual. Annexure B to the lease lists many aspects of the premises that require rectification and repair. The defendant is required to carry out the works over the 5 year period of the lease. Those works must be undertaken to the satisfaction of the plaintiff. The parties cannot therefore avoid each other. They are bound to remain in a proximate relationship during the term of the lease.
>
> [59] I will not detail all of the unsavoury evidence that reflects the wholesale breakdown in the relationship or the wilful and obdurate conduct on behalf of the plaintiff. The relationship is poisonous, acrimonious and unsalvageable. At the hearing, Carin Clonda even instructed her counsel to attempt to introduce evidence of her sexuality and certain discrimination to which she said she was subjected. The parties are engaged in litigation on other fronts, not just in these proceedings. The plaintiff's breaches were deliberate and recalcitrant. The monetary breach was the ultimate result of the insistence by Carin Clonda on a form of the lease that was procured by conduct that I have characterised

> as dishonest. The non-monetary defaults were the result of wholly unreasonable behaviour. There is no hope for the continuation of a stable commercial relationship. Carin Clonda said herself that the relationship between the plaintiff and the defendant was untenable. Some evidence suggested that she wanted to send the defendant "broke". She refuses to deal with anyone on behalf of the defendant other than through a psychologist whom she has appointed as her representative. This is an extreme case. If I grant relief against forfeiture, there will only be more disputation. And there will likely be more litigation.

276 I accept Darzi's submission that this case is distinguishable from the present one. Although the Court is required to exercise a discretion in each case, in *Casquash* the issue was whether the Court should relieve against forfeiture of a lease that had validly been terminated by the lessor for breach. In the present case, Nolde has not established any breach by Darzi that would justify termination of the Lease, and the only question is whether the Court should make an order for the specific performance of the agreement to renew the Lease. Although Equity favours relief against forfeiture, the basis upon which the discretion to grant that remedy exists is more at large than the case where an existing lessee seeks specific performance of an agreement to renew the Lease, which is almost as of right. Furthermore, in *Casquash* the lease imposed upon the lessor an onerous obligation to repair the premises over a number of years, which was an obligation that could not conveniently be performed without a substantial level of continuing cooperation by the lessee in giving the lessor the necessary access to the premises. Not only had the lessee committed serious breaches of the lease, but its conduct had been duplicitous. The relationship between the parties was found to be "poisonous, acrimonious and unsalvageable" because of the wilful and mendacious conduct of the lessee. There is no equivalence at all between *Casquash* and the present case.

277 In its attempt to establish that equivalence in respect of the need for Darzi and Nolde to co-operate harmoniously, Nolde drew attention to a number of terms in the Lease that it said required cooperation between the parties throughout the term of the Lease. I accept Darzi's submission that the quality of the conduct of the parties that is required under the Lease is not of a nature that justifies the equation of the present case to contracts that depend upon the effectiveness of interpersonal relationships, or even to a case such as

Casquash, where a positive and onerous obligation imposed by the lease on one party could not be performed without a significant and continuing amount of day-to-day cooperation between the parties.

278 Nolde submitted that the entitlement granted to Darzi by Item 22 of the Schedule to utilise the name of the Hotel in any information material giving directions to the Restaurant, and the requirement in Item 25 that Darzi must open the Restaurant for the purpose of serving breakfast for guests of the Hotel and to use its best endeavours to ensure that guests are given preferential treatment for lunch and dinner bookings, required the Restaurant and the Hotel to work harmoniously together. That may be so in a loose sense, but they are matters that would be attended to by the respective staff of the parties and would not involve their principals. It is true that clause 5.1.2 requires Darzi to pay a share of outgoings to Nolde, but in no real sense does the preparation and service of outgoings estimates or statements require cooperation between the parties. Clause 7 of the Lease requires the lessor to maintain aspects of the Property, and that may require communication between the parties in accordance with clause 9, to enable Nolde to arrange relevant persons to carry out works. Such works will be carried out by contractors and, although it will be necessary for appropriate arrangements to be made, that will not require a high level of personal cooperation between the parties. The position is the same in respect of the case, under clause 7.4, where an authority requires work to be done to the Property of a structural nature. Equally, if Darzi fails to do work required of it under the Lease, and Nolde becomes entitled to do that work under clause 7.5, the level of communication required between Darzi and Nolde to enable contractors retained by Nolde to carry out the work is not of a nature that requires substantial personal cooperation. The obligation imposed upon Darzi by clause 9.1 to give nominees of Nolde access to the Premises for the purpose of inspections permitted by the Lease can be implemented by means of giving appropriate notices. In so far as clause 9.4 imposes upon Darzi an obligation to give Nolde a copy of any notice relating to the Premises or the Property, that generally will be satisfied by Darzi forwarding the notice to Nolde.

279 It does not follow from the fact that the terms of a particular lease require ongoing communications and limited intercourse between the parties to the lease that a breakdown in personal relations between the principals to the lease is a proper basis for the Court to deny the lessee its proprietary right to a renewal of the lease.

280 Mr Koorey's evidence established as plainly as could be that Mr Koorey personally finds Darzi's entitlement to continue in occupation of the Premises for the remainder of the term of the renewed Lease intolerable. Darzi made a number of telling submissions as to why the Court should find that Mr Koorey's stance was, in effect, no more than a tantrum of a wealthy man, who considered that it was his right to do what he wanted with property that he indirectly owned and who may have considered himself at times to be above the law. Perhaps there is some force in these submissions, but there is no purpose in the Court making detailed findings that might unnecessarily exacerbate the difficulties that may arise between the parties during the balance of the term of the renewed Lease.

281 It is sufficient for the Court to state its finding that, while the relationship has had its ups and downs and there have been squabbles, nothing that Darzi has done justifies the Court denying Darzi specific performance of its contractual right to the grant of a renewal of the Lease.

282 It is convenient at this point to note that I have not found it necessary to make any detailed findings concerning the credit of any of the witnesses. I am satisfied that all of the witnesses who gave evidence in cross-examination gave their evidence in a satisfactory way and honestly. However, all of the witnesses gave evidence on the basis of recollections that have been influenced by their own interests and their roles in the ongoing disputes between the parties. The perceptions of the witnesses must have been influenced by the ongoing legal dispute, which culminated in the commencement of the original proceedings for the enforcement of the agreement to grant the Lease on 29 May 2018. In any event, the competing credit of the parties' witnesses was most relevant to the question of who was responsible for the small number of verbal altercations that occurred over the years. I have not found the fact of those altercations to

have any real significance to the issues, and it is not practicable for the Court to make precise findings concerning the nature of those disputes and the responsibility for them, based upon insubstantial judgments about the relative credibility of the witnesses.

283 It is finally necessary for the Court to consider Nolde's argument that the Court should deny Darzi specific performance of the Lease because damages are an adequate remedy.

284 My consideration of this issue must be prefaced by my recording that I do not accept, in the context of an application for an order for specific performance by an existing lessee, who is not in material breach of the lease, of an agreement for the grant of a renewed lease following the valid exercise of an option in that regard, that it is an available defence of the lessor that specific performance should not be granted because damages is an adequate remedy.

285 In my view, it is obvious on the evidence that damages would not be an adequate remedy for Darzi in this case.

286 Mr Koorey is a relatively rich man and he tendered detailed evidence to establish his wealth. I would infer that the value of the Hotel to Nolde is sufficient to enable Nolde to meet any order for damages that might be made in favour of Darzi.

287 Nolde did not come to court with any positive case to establish the quantum of the damages suffered by Darzi and an offer to pay those damages. Nolde's case is simply that specific performance should be denied and an order for damages made against Nolde in favour of Darzi. Nolde's case is that the Court should refer the assessment of damages to a referee. That course would leave Nolde free to conduct an unrestricted resistance to Darzi's claim for damages, and subject Darzi to a continuing obligation to meet the costs of the assessment process.

288 There would also be an indefinite continuation of the litigation that must be a substantial cause of the hostile attitude of Mr Koorey to Darzi and its continuing operation of the Restaurant from the Premises.

289 Photographs of the Restaurant and its location depict an established and apparently attractive venue, with appealing and open views over the beach and the ocean, on a beachside road at Forster. That is self-evidently a favourable location for the operation of a restaurant. Nolde put in evidence a couple of potential alternative locations for the establishment of the Restaurant, but the evidence was not capable of establishing that Darzi would necessarily be able to secure those sites, or to establish a successful restaurant on those premises.

290 There is no feasible way that any process of assessing the damages suffered by Darzi could accurately determine the loss suffered by Darzi over the balance of the term of the renewed Lease on the basis of a comparison between the forecast future profits of the continued operation of the Restaurant from the Premises, compared with a forecast of the cost of re-establishing the Restaurant at another location, the potential loss of goodwill, the likely profits from the alternative venue, and the chance that the attempted relocation would fail.

291 Consequently, the Court will make an order for specific performance of Nolde's agreement to grant a renewed Lease to Darzi.

292 That order will be made whether or not the process foreshadowed above whereby, through the agreement of the parties or by an independent expert report, a clearer protocol is able to be developed to deal with existing and future issues concerning cleaning and the repair and maintenance of the Premises.

293 I have not referred separately to each of the prayers for declaratory relief made by Darzi and Nolde. These reasons may support certain declarations being made but not others. The parties should consider each of the claims for relief in preparing short minutes of the orders to be made.

294 Darzi is entitled to an order that Nolde pay the costs of these proceedings. If there is any proper basis for argument as to the basis upon which the costs should be paid, I will hear the parties.

295 The parties should confer and forward to my Associate draft short minutes of order to give effect to these reasons for judgment.

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