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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : COMMERCIAL TENANCY (RETAIL SHOPS)  
AGREEMENTS ACT 1985 (WA)

**CITATION** : PATTERSON and CRAFT DECOR PTY LTD  
(ACN 008 759 206) [2021] WASAT 89

**MEMBER** : DR S WILLEY, SENIOR MEMBER

**HEARD** : 30 JANUARY 2020, 8, 9 AND 10 SEPTEMBER 2020  
AND 21 DECEMBER 2020

**DELIVERED** : 25 JUNE 2021

**FILE NO/S** : CC 1208 of 2019

**BETWEEN** : MATTHEW DAVID PATTERSON  
First Applicant

JACQUELINE ANNE ARGUS  
Second Applicant

AND

CRAFT DECOR PTY LTD (ACN 008 759 206)  
Respondent

**FILE NO/S** : CC 1670 of 2019

**BETWEEN** : CRAFT DECOR PTY LTD  
Applicant

AND

MATTHEW DAVID PATTERSON  
First Respondent

JACQUELINE ANNE ARGUS

Second Respondent

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*Catchwords:*

Retail shop lease - Questions arising under a lease - Requirement to remove floor tiles - Landlord's fixtures - Requirement to make good - Unconscionable conduct - Failure to properly account for rent and outgoings

*Legislation:*

*Building Act 2011 (WA)*

*Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*, s 9, s 11(5), s 12(1)(a), s 12(1a)(b), s 12(1a)(e), s 12(1b), s 12(1)(d), s 15C, s 15C(1), s 15D, s 15D(1), s 15D(2), s 16, s 16(1), s 16(1)(a), s 16(1)(b), s 16(2), s 26, s 26(1)(a)

*Interpretation Act 1984 (WA)*, s 56

*Property Law Act 1969 (WA)*, s 9(1), s 47(1), s 77, s 78

*Result:*

CC 1208 of 2019: Application partially successful

CC 1670 of 2019: Application successful

*Category:* B

**Representation:**

**CC 1208 of 2019**

*Counsel:*

First Applicant : Mr R Moss  
Second Applicant : Mr R Moss  
Respondent : Mr T Brickhill

*Solicitors:*

First Applicant : Origen Legal  
Second Applicant : Origen Legal

Respondent : N/A

**CC 1670 of 2019**

*Counsel:*

Applicant : Mr T Brickhill  
First Respondent : Mr R Moss  
Second Respondent : Mr R Moss

*Solicitors:*

Applicant : N/A  
First Respondent : Origen Legal  
Second Respondent : Origen Legal

**Case(s) referred to in decision(s):**

Arise Joondalup Pty Ltd and Loveday Corp Pty Ltd [2015] WASAT 92  
Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2) [2000] FCA 2; (2000) 96 FCR 491  
Australian Securities and Investments Commission (ASIC) v Kobelt [2019] HCA 18; (2019) 368 ALR 1  
Australian Securities and Investments Commission (ASIC) v National Exchange Pty Ltd [2005] FCAFC 226; (2005) 148 FCR 132  
CA & Associates Pty Ltd v Fini Group Pty Ltd [2020] WASCA 31  
Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447  
Damaro Pty Ltd and Hydrox Nominees Pty Ltd [2020] WASAT 7; (2020) 99 SR (WA) 1  
Douglass v Lawton Pty Ltd [2007] NSWCA 89  
Duong and Coventry Village Pty Ltd [2016] WASAT 32  
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640  
Head and Zimmerman Investments Pty Ltd [2010] WASAT 75  
Holland v Hodgson (1872) LR 7 CP 328  
Jetpoint Nominees Pty Ltd and Lee [2021] WASAT 10  
Litigation Capital Partners LLP PTE Ltd (Registration No 200922518M) v ACN 117 641 004 Pty Ltd (in liquidation) (formerly known as Vale Cash Management Fund Pty Ltd) [2021] WASC 161  
Murphy and Fremantle Markets Pty Ltd [2009] WASAT 84

New Zealand Government Corporation v H M & S Ltd [1982] QB 1145  
Primewest (Lot 4 Davidson Street Kalgoorlie) Pty Ltd v Broadwater Hospitality  
Management Pty Ltd [2009] WASC 304  
Re Seventy-Ninth Vibration Pty Ltd and Chief Executive Officer of Customs  
(1998) 54 ALD 139  
Secure Parking (WA) Pty Ltd v Wilson [2008] WASCA 268;  
(2008) 38 WAR 350  
Serventy v Commonwealth Bank of Australia [No 2] [2016] WASCA 223  
Spyer v Phillipson [1931] 2 Ch 183; [1930] All ER Rep 457  
Sunderland v Newton (1830) 3 Sim 450  
Thirco Pty Ltd v Chief Executive Officer of Customs [2001] AATA 1015;  
(2001) 34 AAR 122; (2001) 66 ALD 779  
Van der Feltz and Rispoli [2021] WASAT 84  
Vesco Nominees Pty Ltd v Stefan Hair Fashions [2001] QSC 169;  
[2001] Q ConVR 54 - 555  
Vopak Terminal Darwin Pty Ltd v National Fuels Darwin Pty Ltd  
(2009) 258 ALR 89

## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

1           These two applications arise under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) (**Retail Shops Act**). The two applications remain separate but arise out of the same underlying factual context. Both applications are referrals of questions arising under the retail shop lease for the purposes of s 16(1) of the Retail Shops Act.

2           Each application arises under a lease (**Lease**) in relation to premises known as Units 1 and 2, 22 Franklin Lane, Joondalup (**Premises**). The key events that give rise to the applications relate to the end of lease arrangements.

3           The first application (being CC 1208 of 2019) relates to whether Craft Décor Pty Ltd (**Craft Décor**) breached its end of lease obligations and whether it owes, the lessors, Mr Matthew Patterson and Ms Jaqueline Argus (together **the Lessors**) the cost of various works the Lessors say were required as a consequence of those breaches. I shall refer to this application as the **Lessors' Application**.

4           The other application (being CC 1670 of 2019) is made by Craft Décor against the Lessors. This application gives rise to questions as to whether the Lessors also breached their Lease obligations in relation to accounting to Craft Décor in terms of rent and outgoings. I shall refer to this application as **Craft Décor's Application**.

5           In these proceedings I will refer to the parties respectively as Craft Décor and the Lessors, although it will also be necessary to refer only to Mr Patterson at various points. Ms Argus has had no practical involvement with these proceedings.

6           As I will shortly come to, Craft Décor's Application has been admitted by the Lessors. The only question is whether Craft Décor should contribute to half of the cost of the preparation of the auditor's report (allegedly) prepared pursuant to s 12(1a)(e) of the Retail Shops Act. There is also a question as to whether Craft Décor should be entitled to recover \$115 in bank tracing fees.

### *Questions for determination*

7           The parties consider that the following questions arise for determination as questions between the parties arising under the Lease. I agree that the threshold requirement set out in s 16(1)(a) of the Retail

Shops Act is satisfied. I therefore will proceed to determine each question pursuant to s 16(1)(b) of the Retail Shops Act.

8 The questions for determination are as follows:

**Questions arising from the Lessors' Application**

9 The following are the questions for determination that arise pursuant to the Lessors' Application. My summary answers to these questions are in italics:

1. Whether Craft Décor , as lessee, has failed to deliver up vacant possession of the Premises to the Lessors, in such state, condition or order consistent with the due performance and observance of all of the lessee's covenants contained in the Lease, particularly the covenants of repair and to make good the leased premises.

*Aside from painting the surfaces of the Premises (inside and out) which had been previously painted with two coats of paint, no. Craft Décor have not breached the Lease by not removing the floor tiles. Having regard to the evidence, I am also not satisfied that Craft Décor caused the damage to doors, tiles, toilets and vanities as claimed by the Lessors. By failing to paint the Premises as required by cl 15.2(a) of the Lease, Craft Décor has breached the make good covenants of the Lease.*

2. If Craft Décor has failed to fulfil its covenants under the Lease:

- (a) whether the Lessors were entitled to carry out all repairs or works which should have been carried out by Craft Décor; and
- (b) whether Craft Décor is obliged to pay the Lessors upon demand the cost of such repairs or works.

*Craft Décor is obliged to pay the Lessors the amount of \$4,070 (GST inclusive) being the professional costs associated with painting the Premises for the purposes of cl 15.2(a) of the Lease.*

3. Whether Craft Décor should pay the Lessors' legal and professional costs and disbursements on a full indemnity basis pursuant to cl 9.3 and cl 9.4 of the Lease.

*Yes, but limited to the costs arising from the failure to comply with covenant set out in cl 15.2(a) of the Lease.*

10 In the context of the three questions above, the parties agree that there are 10 primary issues that arise for determination in relation to the Lessors' Application. These issues are:

1. Whether covenants in the Lease for the benefit of the Lessors imposing on Craft Décor obligations of repair and to make good the Premises:
  - (a) are enforceable by the Lessors as transferee of the freehold reversion of the land the subject of the Lease against Craft Décor as lessee; and
  - (b) are annexed and incidental to and go with the reversionary estate in the land subject of the Lease,  
  
pursuant to s 77 of the *Property Law Act 1969* (WA) (**PL Act**).

2. If the benefit of the leasehold covenants referred to in Issue 1 are enforceable by the Lessors against Craft Décor, and are annexed to and go with the reversionary estate, whether Craft Décor has failed to deliver up vacant possession of the Premises to the Lessors in such state, condition or order consistent with the due performance and observance of all of Craft Décor's covenants contained in the Lease, particularly the covenants of repair and to make good the Premises.
3. With regard to the subsequent informal oral agreement referred to in paragraphs set out in paras 23 and 24 of the statement of facts contained in the Applicants' Amended Statement of Issues, Facts and Contentions (dated 24 January 2020), made around December 2012 between Craft Décor and the Lessors' predecessor in title of the reversion (as lessor) purportedly waiving the

exercise of its beneficial right to enforce the covenants of repair and to make good the Premises with respect to removal of the floor tiles:

- (a) whether the Lessors as transferee of the reversion are bound by its effect; and
- (b) whether the informal oral agreement purporting to vary the Lease is annexed and incidental to and goes with the reversionary estate in the land subject of the Lease,

pursuant to s 78 of the PL Act.

- 4. Whether the express provisions of cl 15.4 of the Lease required Craft Décor to remove the floor tiles at the end of the Lease.
- 5. In the alternative to Issue 4 above, whether Craft Décor fulfilled its 'end of lease obligations' under cl 15.2(b) of the Lease (make good) with respect to the floor tiles when it installed the floor tiles in or around December 2012.
- 6. Further, or in the alternative to the issues set out above, whether the agreement to allow Craft Décor to remain in the Premises for two extra weeks was made on the basis that Craft Décor would remove the floor tiles and comply with its 'end of lease' and 'make good' covenants, is, in and of itself, an independent contractual agreement, supported by its own consideration.
- 7. In the alternative to Issue 6, whether Craft Décor, having agreed to that the time provided under the Termination Notice (issued on or around 23 November 2018) would be extended by two weeks to 15 January 2019 so that Craft Décor could remove the floor tiles and comply with its other end of lease and make good covenants, is precluded and equitably estopped from claiming or asserting any other right, whether under the terms of the Lease or otherwise, to refrain from removing the tiles.
- 8. Further, or in the alternative to the issues set out in Issue 6 and Issue 7 above, whether Craft Décor has,



by failing to remove the floor tiles and complying with its 'end of lease' and 'make good' covenants as per the extension agreement, engaged in conduct that is, in all the circumstances, unconscionable pursuant to s 15D of the Retail Shops Act.

9. If Craft Décor has failed to fulfil its covenants under the Lease:

- (a) whether the Lessors were entitled to carry out all repairs or works which should have been carried out by Craft Décor; and
- (b) whether Craft Décor is obliged to pay the Lessors upon demand the cost of such repairs or works,

pursuant to cl 15.3 of the Lease.

10. Whether Craft Décor is obliged to pay the Lessors' legal and professional costs and disbursements on a full indemnity basis pursuant to cl 9.3 and cl 9.4 of the Lease.

11 While Craft Décor agrees that these issues need to be determined, it expressly states that it does not accept that there was:

- (a) an 'informal' oral agreement and 'waiver' as described in Issue 3;
- (b) the 'agreement' referred to in Issue 6 and 8; and
- (c) the 'agreement' referred to in Issue 7.

12 I will refer to issues identified at [10] above collectively as the **Issues**.

### **Questions arising under Craft Décor's Application**

13 As I set out at [6], the Lessors have admitted the Craft Décor's Application. Those questions were, essentially:

- (a) whether Craft Décor overpaid strata levies in the amount of \$2,063.23 for the period between 1 July 2018 and 30 September 2018; and

- (b) whether Craft Décor overpaid rent, water rates, council rates and strata levies in the amount of \$1,397.40 between 1 January 2019 and 15 January 2019.

14 Because the Lessors have admitted Craft Décor's Application, it is not necessary for me to engage in these issues in any substantive sense other than, as I indicated at [6], to determine whether Craft Décor is required to contribute to the cost of the report that was prepared by an auditor on instructions from Mr Patterson.

15 Craft Décor also requests that I also determine whether it should be reimbursed for the \$115 it paid in bank tracing fees to meet a 'set off claim' by the Lessors that Craft Décor owed them \$10,511.00 arising from the Lease. The Lessors' 'set off claim' was abandoned in February 2020. As I will come to, the 'set off claim' should never have been made. It was factually wrong and wholly unmeritorious. However, as I will also come to, I do not consider the question of the bank tracing fees is a question that arises under the Lease.

### *Summary of conclusions*

16 In broad terms, for the reasons that follow, I find that Craft Décor:

- (a) was not required under the Lease to remove the floor tiles at the time it vacated the Premises. This is because the floor tiles that Craft Décor replaced in 2013 were a landlord's fixture;
- (b) the Lease governed the relationship between the parties through to the time that Craft Décor vacated the Premises on 15 January 2019. That is, the Lease was extended in December 2018 rather than a separate new agreement made;
- (c) while I accept the Lessors' photographs do evince some damage at the Premises as at 15 January 2019, I am not satisfied on the evidence, that Craft Décor damaged doors, toilets, tiles and vanities as claimed by the Lessors. *Firstly*, the Lessors' evidence does not show the extent of the damage that is claimed. *Secondly*, the evidence of damage in the Premises in the areas that the Lessors were demolishing structures as part of their fit-out of the Premises means that I am not satisfied that Craft Décor is responsible for the damage claimed.

In relation to these items, I find that Craft Décor has not breached its Lease covenants;

- (d) I am satisfied that Craft Décor breached cl 15.2(a) of the Lease in failing to paint the previously painted surfaces of the Premises, inside and external, before vacating. Craft Décor is required to pay the Lessors the costs of this work (being \$4,070); and
- (e) under the Lease, the Lessors are entitled to full indemnity costs for its legal and professional costs and disbursements on account of Craft Décor's failure to paint the Premises before vacating.

17 I also find that the Lessors have failed to properly account for rent and Outgoings under the Lease. They owe Craft Décor \$2,675 in this regard.

***The final hearing***

18 The final hearing for this matter commenced on 30 January 2020, was continued between 8 and 10 September 2020 and concluded on 21 December 2020. The conduct of the proceedings was delayed as a result of the Covid-19 pandemic.

19 The following witnesses gave evidence:

- (a) Mr Davide Espositio (Director of Espo Construction Pty Ltd);
- (b) Mr Patterson (one of the Lessors);
- (c) Mr Sammy Ricciardo (Director of Specialized Plumbing and Gas);
- (d) Mr Giovanni D'Amico (Hamilton Hill Painting Contractor);
- (e) Mr Steven Bristow (Bristow Professional Tiling Service);
- (f) Mrs Mary Nadilo (General Manager of Craft Décor);
- (g) Mr Tony Nadilo (Director of Craft Décor);

- (h) Mr Daniel Papaphotis (Partner, Francis A Jones Pty Ltd - Accountants). Mr Papaphotis was not required to give oral evidence; and
- (i) Ms Tania Anderson (Administration Manager at Craft Décor).

### ***Background***

#### **The Premises and the Lease**

20 On 14 November 2007, Robin and Jean Pyle (the then registered proprietors of the Premises) entered into a lease with Craft Décor as lessee (the **Lease**).

21 At the time the Lease was entered into, the Premises contained maroon tiles in the main showroom. The maroon tiles were installed by Robin and Jean Pyle in or around September 2007.

22 The Lease provided for:

- (a) an initial term of five years commencing on 1 December 2007 and expiring on 30 November 2012; and
- (b) an extended term of five years commencing on 1 December 2012 and expiring on 30 November 2017.

23 Craft Décor used the Premises for the carrying on of a retail business, namely the sale and supply of floor and wall tiles.

#### **Craft Décor replaces the tiles**

24 In or about January 2013, Craft Décor replaced the maroon tiles at its expense. The consent of Robin and Jean Pyle to remove and replace the tiles was obtained. It was agreed that Craft Décor would not have to remove the tiles at the end of the Lease. However, that agreement was not recorded in writing.

#### **Holding over**

25 Pursuant to cl 14 of the Lease (holding over), Craft Décor remained in possession of the Premises on a monthly tenancy from 1 December 2017 to 15 January 2019. I note here this fact is agreed between the parties. The significance of that will be explained later in these reasons.

### **The Premises are transferred to the Lessors**

26 On 20 April 2018, the Premises were transferred to the Lessors.

27 Pursuant to s 77 of the PL Act, covenants in the Lease for the benefit of the Lessors imposing obligations on Craft Décor obligations of repair and to make good the Premises (being covenants which touch and concern the land):

- (a) were enforceable by the Lessors as transferees as the freehold reversion of the land the subject of the Lease as against Craft Décor; and
- (b) are annexed and incidental to and go with the reversionary estate the subject of the Lease.

### **Payments made to the Lessors**

28 By reason of s 47(1) of the PL Act, Craft Décor was required to meet its obligations under the Lease to the Lessors including the obligation to pay rent (cl 2.1 of the Lease) and to meet outgoings (cl 3.1 of the Lease) (**Outgoings**).

29 The Outgoings include strata levies, water and council rates for the Premises.

30 Clause 3.3 of the Lease required Craft Décor to provide the Lessors with written notice (**Notice**) of an estimate for the Outgoings for the 2018/19 financial year.

31 Craft Décor did not issue the Lessors with the Notice.

32 On or about 20 July 2018, the Lessors sent Craft Décor the strata levy notices for a total of \$2,024.95 for the period 1 July 2018 to 30 September 2018. Craft Décor paid the Lessors this amount on 24 July 2018.

33 On or about 9 October 2018, Craft Décor received strata levies (sent by the Strata Managers) for the Premises of \$1,965.00 for the period 1 October 2018 to 31 December 2018 and payment in arrears in the amount of \$2,063.23 (including interest of \$38.28) for the period of 1 July 2018 to 30 September 2018.

34 Craft Décor paid the Strata Managers the full amount of \$4,028.23 on 10 October 2018.

35 It is accepted that Craft Décor paid the strata levies twice for the  
period 1 July 2018 to 30 September 2018. The Lessors did not account  
to Craft Décor for the amount of \$2,063.23 that it, in effect, overpaid the  
strata levies.

36 On 20 December 2018, Craft Décor received an invoice from the  
Lessors in the amount of \$4,620 for rent, water, council rates and strata  
levies for the Premises for the period of 1 September 2019 to 15 January  
2019 (the **January Period**).

37 Despite Craft Décor's demands, the Lessors did not provide  
Craft Décor with a breakdown of the water council rates and strata levies  
for the Premises for the January Period.

38 Between 31 December 2018 and 2 January 2019, Craft Décor paid  
the Lessors' invoices for \$4,620 referred to in [36] above.

39 The proper amount payable by Craft Décor to the Lessors for the  
January Period on account of the rent, water council rates and strata  
levels for the Premises was, \$3,222.60.

40 Despite Craft Décor's demands, until it received an audit report  
(dated 20 March 2020), the Lessors failed to respond to it in relation to  
the sum of \$1,397.40 being the overpayment it made in relation to rent,  
water, council rates and strata levies for the January Period.

### **The Lessors terminate the Lease**

41 On or about 23 November 2018, the Lessors:

- (a) provided Craft Décor with written notice of their  
intention to terminate the Lease (**Termination Notice**)  
within the period of five weeks of the notice, being no  
later than 31 December 2018 (the **Termination Date**);  
and
- (b) required Craft Décor to deliver up vacant possession of  
the Premises, in such state, condition or order consistent  
with the due performance and observance of  
Craft Décor's covenants contained in the Lease.

42 The Termination Notice specified that Craft Décor was required,  
under the Lease, to:

- (a) remove all of the floor tiles (approximately 450m<sup>2</sup>) in the main showroom of the Premises that Craft Décor had installed over five years earlier in (December 2012); and
- (b) remove any of Craft Décor's signage at the front of the Premises and within the Premises.

**Craft Décor request a two-week extension before vacating the Premises**

43 As set out at [41], the Lessors terminated the Lease on 23 November 2018.

44 On 7 December 2018, Mr Patterson emailed Craft Décor (Sonia Tuohy) querying that he had not heard from Craft Décor in relation to vacating the Premises and that he had tradesmen starting work in the first week of January 2019.

45 On or about 10 December 2018 Mr Nabilo (Director of Craft Décor) telephoned Mr Patterson and requested that Craft Décor be given until 15 January 2019 to move out of the Premises.

46 The details of the conversation between Mr Nabilo and Mr Patterson on or about 10 December 2018 are very much in contest in these proceedings.

47 Mr Nabilo says that he called Mr Patterson and explained that he was shocked that the Lease had been terminated as he had understood (from discussions with the Strata Manager) that Craft Décor would be able to stay in the Premises for another 12 to 18 months. Mr Nabilo said to Mr Patterson words to the effect of:

[A]re you kidding me that you want Craft Décor moving out smack bang in the middle of the festive season. It will be impossible as staff and necessary tradespersons would not be available over Christmas to enable Craft Décor to move out.

48 Mr Nabilo says he requested that Craft Décor be given until 15 January 2019 to vacate. Mr Nabilo said that Mr Patterson said he needed to speak with someone about an extension but did not envisage it would be a problem.

49 Mr Patterson says that in that conversation Mr Nabilo explained that '[Craft Décor] cannot get all of this done in the time that you have given us to get out'. Mr Patterson says he told Mr Nabilo that he would extend

the Termination Date by two weeks to 15 January 2019 so that Craft Décor could remove the floor tiles and comply with its other end of lease and make good covenants. Mr Patterson says that Mr Nabilo agreed to those terms.

50 One of the Lessors' arguments is that this conversation between Mr Nabilo and Mr Patterson on or about 10 December 2018 constituted a (separate) enforceable agreement supported by its own consideration.

51 On 17 December 2018, Mr Patterson emailed Craft Décor (Mrs Mary Nadilo, General Manager) explaining that he had called Mr Nabilo and left a message for him to call back. Mr Patterson assumed that because Mr Nabilo had not returned his phone call that the two-week extension was no longer needed.

52 On 17 December 2018, Mr Nabilo says that he called Mr Patterson back to confirm that Craft Décor needed the two-week extension. Mr Nabilo says this was to be confirmed in writing by Mr Patterson in an email sent at 1.14 pm on 18 December 2018.

53 Mr Nabilo says that during one of the telephone calls between himself and Mr Patterson in December 2018 he recalls that Mr Patterson requested Craft Décor remove the floor tiles. Mr Nabilo says he replied with words to the following effect: 'Craft Décor will vacate the Premises and hand back the keys by COB on 15 January 2019'.

54 Mr Nabilo says the following:

Mr Patterson did not say to me during any of my telephone conversations with him that he would extend the time provided under the termination notice so that Craft Décor could remove the floor tiles and comply with its other end of lease and make good covenants.

And:

At no time during any of my telephone conversations or discussions with Mr Patterson, or at all, did I inform Mr Patterson that Craft Décor would remove the floor tiles at the Joondalup store back to a concrete floor.

55 I will return to discuss these issues later in the reasons.

### **The events of 2 January 2019**

56 Further to [36], on 31 December 2018 Craft Décor paid the Lessors \$2,621.85 for the January Period (Craft Décor did not pay the full amount of \$4,620 that the Lessors were demanding).



57 On 2 January 2019, Mrs Nadilo telephoned Mr Patterson.

58 Mrs Nadilo says that during that conversation Mr Patterson 'threatened' to change the locks and take control of the Premises if the balance of the January Period invoices were not immediately paid.

59 Under duress, Craft Décor paid the Lessors the balance of the invoices for the January Period in the amount of \$1,998.15 on 2 January 2019.

### **The events of 7 January 2019**

60 On 7 January 2019, Mr Patterson sent the following email to Craft Décor (Mrs Nadilo):

I've just gone past the store and noticed that you are still open and no work has been done to either move out or remove the tiles and grind back the concrete to a smooth service [sic]. When are you doing this? From my experience this is quite a big job and you haven't even started. Please note that the arrangement is that you need this done by the 15 January 2019. Could you please email me when you are starting this work please[?]

61 Later that same day, Craft Décor (Mrs Nadilo) sent the following email to Mr Patterson:

We are working towards being out of the showroom as agreed.

### **The events of 14 January 2019**

62 On the afternoon of 14 January 2019, Mr Patterson attended the Premises. He exchanged words with Mr Nadilo. This 'exchange' can fairly be described as a confrontation. Mr Nabilo and Mr Zuvela (the warehouse manager at Craft Décor in Fremantle) were on the roof of the Premises removing the Craft Décor signage.

63 Mr Patterson arrived at around 3.45 pm and asked, 'Are you Tony?' to which Mr Nabilo replied 'yes'. Mr Patterson asked, 'How come the floor tiles have not been ripped up?'. Mr Patterson says that Mr Nabilo initially said words to the effect that 'they're not here yet'. It is not in contest that Mr Nabilo as part of that exchange said words to the effect that 'there was no agreement to rip up the floor tiles' and that 'Craft Décor will not be sponsoring your business'.

64 Mr Nabilo says that Mr Patterson then swore at him. Mr Nabilo queried Mr Patterson as to whether he should 'call the cops'.

65 Mr Nabilo then says that Mr Patterson then left for around 10 minutes before returning. Mr Nabilo was still on the roof. Mr Nabilo says that Mr Patterson said words to the effect that he had spoken with three lawyers and that Craft Décor 'did not have a leg to stand on'. Mr Nabilo says, which is confirmed by Mr Zuvela, that Mr Patterson then said words to the effect that 'he was going to get the most expensive quote to remove the floor tiles and that Craft Décor was going to pay the bill'. Mr Patterson then left.

66 Approximately 20 minutes later Mr Patterson returned together with a male person. Mr Nabilo was still on the roof packing the signage onto a pallet. Mr Patterson and the male person walked into the Premises. They started looking around the store which, Mr Nabilo says, was basically vacant.

67 A Mr Treby, who worked in the store adjacent, was walking past the Premises. Mr Nabilo asked Mr Treby to wait for a little while. Mr Patterson and the male person stayed for around 15 minutes. Upon leaving Mr Patterson asked Mr Nabilo where the keys were. Mr Nabilo advised that the rent was paid through to close of business on 15 January 2019 and that he would get the keys at that time.

### **Craft Décor vacates the Premises**

68 On or around 15 January 2019, Craft Décor delivered up vacant possession of the Premises to the Lessors. The state that Craft Décor left the Premises in is a central issue in these proceedings. The Lessors claim that the state of the Premises as at 15 January 2019 did not meet Craft Décor's covenants under the Lease including, but not limited to, the following matters:

- (a) removing all fixtures, fittings, plant, machinery, utensils, shelving, signs and advertising material, counters, floor coverings, safes and chattels from the Premises which belonged to and were put in by Craft Décor and also to make good to the satisfaction of the Lessors all damage caused or occasioned to the Premises by such removal;
- (b) paint with two coats and in a workmanlike manner the outside and inside of the Premises which has been previously been painted;

- (c) remove all bolts and fixtures from walls and floors of the Premises and make good any damage caused by their removal;
- (d) thoroughly clean the Premises including all windows and floor surfaces, high pressure clean any warehouse walls and floor; and
- (e) replace and/or repair of all damaged Lessors fixtures and fittings.

69 Clause 15.2 of the Lease further provided that all of the works listed at [68] above shall be performed with materials of the best quality and to the satisfaction of the Lessors and Craft Décor shall also make good any damage done to the Premises in the carrying out of the required works.

70 The Lessors submit that, despite demand, Craft Décor refused to fulfil its obligations under the terms of the Lease.

**The Lessors engage contractors to undertake work at the Premises**

71 After the Premises were vacated, the Lessors engaged contractors to carry out repairs that, it says, should have been carried out by the respondent. In doing so, the Lessors spent (or undertook works to the value of) \$35,942.72.

72 Craft Décor refused to pay the Lessors the \$35,942.72.

73 The Lessors say the following matters were not addressed by Craft Décor upon vacating the Premises:

- (a) removal and disposal of approximately 450m<sup>2</sup> of floor tiles in the main show room installed by Craft Décor in or around December 2012;
- (b) removal of all Craft Décor signage;
- (c) thoroughly clean the Premises including all windows, floor surfaces, high pressure clean walls and floor;
- (d) paint (two coats) in colour and in a workmanlike manner inside and outside of the Premises (with a paint reasonably specified by the Lessors); and
- (e) replace and/or repair all damaged Lessors' fixtures and fittings; namely:

- (i) remove and replace broken vanity and toilet suite;
- (ii) remove and replace four broken interior doors; and
- (iii) supply and install broken tiles in the toilet.

74 On or around 16 January 2019, Mr Patterson says that he obtained quotes for various works required at the Premises and the total for the lowest of these quotes was \$28,820 (including GST). These quotes included:

- (a) \$22,220 (including GST) on 21 January 2019 for the removal of the floor tiles (including disposal of the waste materials, sanding back the floor, removal of the front counter, removal and replacement of broken toilet suite, replace the broken tiles in the toilet, replace four damaged interior doors. This quote was from Espo Construction Pty Ltd (Mr Esposito); and
- (b) \$6,600 (including GST) from Ascent Painting and Decorating on 23 January 2019 to complete painting at the Premises (inside and out). This quote was the lowest painting quote Mr Patterson received.

75 Ultimately:

- (a) Espo completed works between 17 and 25 January 2019 and invoiced the Lessors \$27,170.00 (including GST);
- (b) Mr Patterson (who runs a painting business) painted the Premises himself and invoiced Craft Décor the equivalent of the lowest quote he had received (being the quote for \$6,600 from Ascent Painting and Decorating); and
- (c) Mr Patterson also engaged, at a cost of \$2,172.72 (including GST), Specialized Plumbing and Gas to supply and install a new vanity and toilet suite for the Premises. These works were undertaken on or around 7 March 2019.

### Mr Patterson writes to Craft Décor

76 On 1 February 2019, Origen Legal (acting on behalf of Mr Patterson) wrote to Craft Décor and:

- (a) included the quotes referred to at [74] above;
- (b) set out Craft Décor's covenants under the Lease and the fact that these ran with the land (such that they were owed to the Lessors);
- (c) advised that to settle the matter the Lessors would accept the lowest of the quoted figures (being the amount of \$28,820 (including GST)); and
- (d) noted that, pursuant to cl 9.3 and cl 9.4 of the Lease, all legal and professional costs and disbursements are recoverable on a full indemnity basis.

77 On 8 February 2019, Craft Décor replied to the letter from Origen Legal and:

- (a) refused the Lessors' offer of settlement; and
- (b) stated that it had been agreed with the previous registered proprietors of the Premises that Craft Décor could install the porcelain tiles in lieu of the previous red tiles, without being obliged to remove them when Craft Décor vacated the Premises.

78 Included in that reply from Craft Décor was a statutory declaration sworn by Robin Pyle which outlined the agreement with Craft Décor regarding the porcelain tiles (**Statutory Declaration**). The Statutory Declaration was dated 6 February 2019.

### The Lessors refurbish the Premises

79 One of the complicating factors in this matter is the fact that the Lessors did not simply move into the Premises. They, almost immediately, undertook significant renovation and fit-out works in the 'warehouse' establishing a new trades area (termed as the 'S&T area'), a new kitchen and shower as well as a mezzanine level above. In the main showroom area, a new office has been created.

80 The works involved in this refurbishment are not insignificant. They involve demolition of five rooms, constructing four new rooms as

well as a new mezzanine level. However, there is no evidence of any permits being granted under the *Building Act 2011* (WA). There are not even any plans. There is only one invoice available for the entirety of the fit-out works. That invoice is from EBCO Pty Ltd (EBCO) for \$5,164.50 (GST inclusive). This is despite the fact that it is an agreed fact that Mr Esposito (from Espo) did some tiling work as part of the new fit-out.

81 While, of course, the Lessors are entitled to use and fit-out the Premises as they see fit, in circumstances where they are claiming that Craft Décor has not met its covenants under the Lease, it is important that the Lessors are able to verify (and indeed demonstrate) what works were done as a result of Craft Décor's alleged failings under the Lease, as opposed to the works undertaken for the separate fit-out works for the Premises (for which Craft Décor are not responsible).

### ***The Retail Shops Act***

82 Section 16 of the Retail Shops Act provides (subject to s 11(5) in relation to the rent payable) that a party to a retail shop lease may refer to the Tribunal any question between the parties which they believe to be a question arising under the lease.

83 Section 16(1)(a) of the Retail Shops Act then provides that the Tribunal shall determine whether or not the question referred to the Tribunal is a question arising under the lease, and if it is such a question, hear and determine it.

84 Section 16(2) of the Retail Shops Act provides that the matter for determination referred to in s 16(1)(a) may be determined by the Tribunal in such manner as it thinks fit, subject to each party being given an opportunity to make a written submission.

85 Section 15D(1) of the Retail Shops Act provides that a tenant is not to engage in conduct which is unconscionable conduct in connection with the lease. Section 15D(2) of the Retail Shops Act states:

Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a tenant has contravened subsection (1), the Tribunal may have regard to -

- (a) the relative strengths of the bargaining positions of the landlord and tenant; and
- (b) whether, as a result of conduct engaged in by the tenant, the landlord was required to comply with conditions that were not

reasonably necessary for the protection of the legitimate interests of the tenant; and

- (c) whether the landlord was able to understand any documents relating to the lease; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the landlord (or a person acting on behalf of the landlord) by the tenant or a person acting on behalf of the tenant in relation to the lease; and
- (e) the amount for which, and the circumstances under which, the landlord could have granted an identical or equivalent lease to a person other than the tenant; and
- (f) the extent to which the tenant's conduct towards the landlord was consistent with the tenant's conduct in similar transactions between the tenant and other similar landlords; and
- (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code, if the landlord acted on the reasonable belief that the tenant would comply with that code; and
- (i) the extent to which the tenant unreasonably failed to disclose to the landlord -
  - (i) any intended conduct of the tenant that might affect the interests of the landlord; and
  - (ii) any risks to the landlord arising from the tenant's intended conduct that are risks that the tenant should have foreseen would not be apparent to the landlord;

and

- (j) the extent to which the tenant was willing to negotiate the terms and conditions of any lease with the landlord; and
- (k) the extent to which the tenant acted in good faith; and
- (l) the extent to which the tenant was not reasonably willing to negotiate the rent under the lease; and
- (m) the extent to which the tenant unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and
- (n) the extent to which the tenant was willing to incur reasonable refurbishment or fit out costs.

86 Section 26 of the Retail Shops Act provides the Tribunal with the discretionary powers to make orders as follows:

- (1) Without limiting any power to make an order that is conferred by the *State Administrative Tribunal Act 2004* but subject to this Act the Tribunal may make -
  - (a) an order that requires a party to any matter before it to pay money to a person specified in the order; or
  - (b) an order for a party to any matter before it to do, or refrain from doing, anything specified in the order; or
  - (c) an order dismissing any matter before it. (1a) The power in subsection (1)(b) includes power for the Tribunal to order the parties to enter into an agreement varying a retail shop lease as specified in the order where the Tribunal has found that the tenant under the lease was before entering into the lease misled by the landlord as to the meaning or effect of a term or condition of the lease.
    - (1aa) The Tribunal may, where it considers it appropriate to do so to resolve the matter concerned, make an order terminating a retail shop lease.
- (2) In considering whether to make an order under the *State Administrative Tribunal Act 2004* section 87(2) in a proceeding, the Tribunal may have regard to a certificate issued under section 25C that relates to the proceeding.
- (3) An order of the Tribunal requiring anything to be done or discontinued may fix the time within which that thing is to be done or discontinued, as the case may be.
- (4) The Tribunal may allow any equitable claim or defence, and give any equitable remedy, in a matter before it that the Supreme Court may allow or give.

### ***Relevant legal principles***

#### **Principles of construction**

87 In *Damaro Pty Ltd and Hydrox Nominees Pty Ltd* [2020] WASAT 7; (2020) 99 SR (WA) 1 the Tribunal, at [16] - [23], summarised the relevant legal principles relating to lease disputes arising under the Retail Shops Act. I will broadly set out that summary, together with some more recent case law, below.



In *Secure Parking (WA) Pty Ltd v Wilson* [2008] WASCA 268; (2008) 38 WAR 350 Buss JA (with whom Martin CJ agreed) summarised the proper approach to construction of written contracts (in that instance a lease) at [84] - [86] as follows:

- 84 The general principles to be applied in the construction of written contracts are set out in the judgment of Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99:

It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke v Dunlop* (1888) 39 Ch D 387, at p 393, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Re Alma Spinning Co (Bottomley's Case)* ((1880) 16 Ch D 681, at p 686). Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd* (1932) 147 LT 503, at p 514, that the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects', should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. *Upper Hunter County District Council v. Australian Chilling*

*and Freezing Co. Ltd* ((1968) 118 CLR 429 at 437) (109-110).

- 85 The construction of a written contract involves ascertaining what a reasonable person would have understood the parties to mean. Consideration should ordinarily be given not only to the language of the document, but also to the surrounding circumstances known to the parties, and the apparent purpose and object of the transaction. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, where Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said:

This Court, in *Pacific Carriers Ltd v BNP Paribas* ((2004) 218 CLR 451), has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 [22]).

Also see *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181 at [11]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at [22]; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 82 ALJR 419 at [8], [53]; *Jumbo King Ltd v Faithful Properties Ltd* [1999] 3 HKLRD 757, 773 - 774.

- 86 The preponderance of Australian authority supports the proposition that post-contractual conduct is not admissible in determining what a contract means, as distinct from determining whether it was formed. See *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; (2001) 53 NSWLR 153 [26] (Heydon JA). Also see *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 at [161]; *Bowesco Pty Ltd (receiver and manager appointed) v Zohar* [2007] FCAFC 1; (2007) 156 FCR 129 [79].

89 The above principles were reaffirmed by the High Court in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 (*Electricity Generation v Woodside Energy*) where French CJ, Hayne, Crennan, and Kiefel JJ stated, at [35], as follows:

... [T]his Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties ... intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'. (footnotes omitted)

90 These observations from the plurality in *Electricity Generation v Woodside Energy* were recently endorsed by the Court of Appeal in *CA & Associates Pty Ltd v Fini Group Pty Ltd* [2020] WASCA 31 at [51] (Buss P and Vaughan JA) (*CA & Associates v Fini*) and more recently by Hill J in *Litigation Capital Partners LLP PTE Ltd (Registration No 200922518M) v ACN 117 641 004 Pty Ltd (in liquidation) (formerly known as Vale Cash Management Fund Pty Ltd)* [2021] WASC 161 at [73]

91 In *CA & Associates v Fini*, the plurality in Court of Appeal set out, at [51], the following general principles that are to apply in construing a commercial contract:

...

1. The rights and liabilities of parties under a provision of a contract are determined objectively by reference to its text, context (the entire text of the contract) and purpose.
2. In determining the meaning of the terms of a commercial contract it is necessary to ask what a reasonable business person would have understood the terms to mean. That enquiry will require consideration of the language used

by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

3. The court approaches the task of giving a commercial contract an interpretation on the assumption that the parties intended to produce a commercial result, ie a commercial contract should be construed so as to avoid it making commercial nonsense or working commercial inconvenience.
4. Ordinarily the process of construction is possible by reference to the contract alone.
5. However, sometimes recourse to external events, circumstances or things is necessary; for example, to identify the commercial purpose or objects of the contract (by reference to the genesis of the transaction, the background, the context and the market in which the parties are operating) or to determine the proper construction where there is a constructional choice due to ambiguity.

### ***Unconscionable conduct***

92 Sections 15C and 15D of the Retail Shops Act provides that landlords and tenants shall not, in connection with a lease, engage in conduct that is, in all of the circumstances, unconscionable. Section 15D applies to the conduct of tenants. The long title of the Retail Shops Act includes the prohibition of unconscionable conduct. In this regard see the discussion in *Arise Joondalup Pty Ltd and Loveday Corp Pty Ltd* [2015] WASAT 92 at [101] - [104].

93 The Retail Shops Act does not define 'unconscionable conduct' but it is accepted by the Tribunal that conduct would be unconscionable if the conduct was well outside the expected conduct that characterises commercial relationships: see *Head and Zimmerman Investments Pty Ltd* [2010] WASAT 75 (*Head and Zimmermann*) at [37]; *Duong and Coventry Village Pty Ltd* [2016] WASAT 32 at [18].

94 The concept of unconscionability is grounded in equity which has, as its fundamental tenet, intervention in circumstances where it is not consistent with equity or good conscience for a stronger party to enforce, or retain the benefit of, a dealing with a person under a special disability or disadvantage: *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 at 461, 467 and 474.

95           However, it has been held that a statutory prohibition against unconscionable conduct is not confined to the equitable doctrine of unconscionability: see *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* [2000] FCA 2; (2000) 96 FCR 491 (*Berbatis*) at [24] and *Australian Securities and Investments Commission (ASIC) v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132 (*National Exchange Pty Ltd*) at [30].

96           This broader concept of unconscionable conduct has been accepted by the Tribunal as applying to the Retail Shops Act: *Murphy and Fremantle Markets Pty Ltd* [2009] WASAT 84 at [78] - [85].

97           In *Head and Zimmermann* at [37], the Tribunal found that to establish unconscionable conduct under, relevantly, s 15C(1) of the Retail Shops Act requires:

... a standard of behaviour which, in all the circumstances, is well outside what might be expected in relations between parties to an arm's length commercial relationship and therefore unacceptable.

98           In this way, the term 'unconscionable' must be understood as bearing its ordinary meaning: *Australian Securities and Investments Commission (ASIC) v Kobelt* [2019] HCA 18; (2019) 368 ALR 1 (*Kobelt*) at [14].

99           That is, unconscionable conduct is conduct that is something done not in good conscience: *Kobelt* at [14], *National Exchange Pty Ltd* at [33]. It is conduct that is irreconcilable with what is right or reasonable: *Berbatis* at [13], *Serventy v Commonwealth Bank of Australia [No 2]* [2016] WASCA 223 at [23])

### ***Relevant Lease provisions***

100           The Lease provisions lie at the heart of this dispute. The Lease includes the following provisions:

...

1.       CONSTRUCTION & DEFINITIONS

1.1     ...

(r)     'Lease Premises' means the premises and/or car parking facilities so described in the Schedule and includes:

(i)     all landlord's fixtures and fittings thereon and therein;

- (ii) all alterations or additions made thereto or to the landlord's fixtures and fittings, or any replacement thereof, and
- (iii) the electrical, water, gas and other installations and fittings thereon and therein.

In the case of such premises, the Leased Premises extend vertically from the upper surface of the floor slab on each floor level of the Building to the under surface of the ceiling above the floor slab on each floor level of the Building and extend horizontally to the centre line of inter-tenancy walls and to (but not including) the outer face of external walls and of shop fronts and to (but not including) the outer face or line of all other boundaries of the Leased Premises.

In the case of car parking facilities, the Leased Premises are limited to a height of 3 metres above the surface of such facilities:

...

## 2. RENT

### 2.1 Payment

- (a) The Lessee shall pay the Rent to the Lessor without demand, deduction or right of set-off by equal monthly instalments in advance on the first day of each month, if an instalment is for a period of less than a calendar month that instalment is the Rent for a calendar month then payable divided by the number of days in that calendar month and multiplied by the number of days in that period.
- (b) The first instalment of Rent shall be paid on the Commencement Date.
- (c) All instalments of Rent shall be paid in the manner and at the place as the Lessor directs.

...

## 4. REPAIR AND MAINTENANCE

### 4.1 General Repair Obligations

The Lessee shall keep the Leased Premises and the Lessor's fixtures and chattels situated in the Leased premises in good repair and working condition throughout the Term and shall on expiry or termination of the Term yield up the Leased Premises

to the Lessor in a good state of repair and condition as is required by this Clause 4.

4.2 Additional Specific Repair Obligations

In addition to the Lessee's obligations under Clause 4.1 the Lessee shall throughout the Term carry out the following repairs and maintenance:

- (a) promptly repair or replace all broken, cracked or damaged glass in the Leased Premises, with glass of at least the same or similar gauge and quality;
- (b) promptly repair or replace all damaged, broken or faulty light globes, fluorescent lights, power points, light switches, heating, lighting and electrical appliances, services and wiring in the Leased Premises;
- (c) promptly repair or remove any graffiti upon the Leased Premises;
- (d) promptly repair and keep in proper working order and free from blockage plumbing fittings, drains, water pipes, sewerage pipes, toilets and sinks, to the extent to which they are situated in or under the Leased Premises and provide services or Facilities to the Leased Premises;
- (e) maintain and repair all door and window locks and fittings in the Leased Premises;
- (f) repair any damage or breakage to the Leased Premises, including the Lessor's fixtures, services and Facilities in the Leased Premises, caused by lack of care or misuse by the Lessee or by its employees or agents;
- (g) maintain, water and keep all gardens and lawns in good condition;
- (h) When carrying out any repair in accordance with this clause, the Lessee shall ensure that:
  - (i) the work is carried out by appropriately licensed and qualified tradespersons;
  - (ii) the work is carried out promptly;
  - (iii) the work is completed in high class workmanship and with good quality materials;

- (iv) fittings and materials of similar style and quality are used to the items being repaired or replaced;
- (v) the required consent or approval of any Local or Public Authority is obtained to carry out the work and the conditions of approval are observed;
- (vi) the work is carried out without creating undue noise, nuisance or interference with the use and enjoyment of adjoining or nearby tenants of the Lessor.

...

5. ALTERATIONS, ADDITIONS

5.1 No Alteration

The Lessee shall not without the prior written consent of the Lessor on each occasion:

- (a) make any alterations or addition whatsoever to the Leased Premises or cut maim break disfigure or injure any part thereof or commit any other waste thereof;
- (b) suspend or permit or suffer to be suspended from the interior roof or ceiling of the Leased Premises or any part thereof any article whatsoever other than normal or usual electric light fittings and apparatus or overload the floors of the Leased Premises or permit or suffer the same to be overloaded.

5.2 Approved Alterations

The Lessor shall not unreasonably withhold its consent to any alterations or additions to the Leased Premises required by any order or requisition made by any Local or Public Authority PROVIDED THAT such alterations or additions shall at the election of the Lessor either be carried out by the Lessor pursuant to Clause 5.3 or by the Lessee under supervision of the Lessor or its agent (in which case all costs incurred by the Lessor shall be paid by the Lessee to the Lessor on demand). At the expiration or sooner determination of the Term the Lessee (if so required by the-Lessor) at the cost of the Lessee shall reinstate the Leased Premises to their condition prior to such alterations or additions.

5.3 Right of inspection and Entry



- (a) The Lessor shall have power by its agents and workmen with all necessary appliances to enter into and upon the Leased Premise at all reasonable times to view the state of repair thereof and to serve upon the Lessee a notice in writing of any defect requiring it to repair the same in accordance with any covenant herein contained. In default of the Lessee repairing any defect according to such notice within 21 days of the date of such notice the Lessor by its agents and workmen and/or any person authorised by the Lessor with all necessary materials and appliances may enter the Leased Premises and execute all or any of the required repairs as the Lessor shall think fit and the Lessee on demand shall pay to the Lessor the costs of remedying such default and the Lessor may recover such costs by action or otherwise as for Rent in arrear.
- (b) The Lessor shall have power by its agents and workmen with all necessary materials and appliances to enter upon the Leased Premises at all reasonable times and without previous notice and to carry out any repairs or other works which in the reasonable opinion of the Lessor are of an emergency nature. In the event that the Lessor shall pursuant to this power carry out any works or repairs which should be carried out by the Lessee in accordance with the covenants to be observed by the Lessee herein contained then the Lessee shall on demand pay to the Lessor the costs of such works or repairs and the Lessor may recover such costs by action or otherwise as for Rent in arrear.
- (c) In the event of the early determination of the Term (or of any extension or renewal thereof) the Lessor shall have power by its agents and workmen with all necessary materials and appliances to enter upon the Leased Premises at all reasonable times and without previous notice and to carry out any painting or repairs which the Lessee has failed to undertake in accordance with the covenants set forth herein. In the event that the Lessor shall pursuant to this power carry out any painting or repairs which should be carried out by the Lessee in accordance with the covenants to be observed by the Lessee herein contained then the cost of such repairs shall be paid by the Lessee to the Lessor upon demand being made for payment of the same.
- (d) The Lessor shall have power by its agents and workmen with all necessary materials and appliances to enter upon the Leased Premises after having given the Lessee 14 days written notice of its intention so to do, to carry

out any repairs or other works for which the Lessor is liable and which the Lessor considers it necessary or desirable to carry out. In pursuing such activities the Lessor shall endeavour to minimise the nuisance and irritation caused to the Lessee, but the Lessee shall gratuitously be obliged to suffer such activities and shall not impede or obstruct the carrying out of such repairs or other works.

...

9.3 Consents, Transactions and Default

The Lessee agrees to pay the Lessor's costs, charges, and expenses which are incurred reasonably and properly in connection with:

- (a) the obtaining of any consent from the Lessor, mortgagee or other person, which is required by the Lessee under this Lease;
- (b) the negotiation and preparation of all documents relating to any consent required by the Lessee, and all costs incurred by the Lessor, and by any other party whose consent is required, whether a consent is given, refused, or the application for consent is withdrawn;
- (c) any breach or default by the Lessee under this Lease; or
- (d) the exercise or attempted exercise by the Lessor of any right, power, privilege, authority or remedy, against the Lessee or against the Covenantor, to enforce the Lessee's obligations under this Lease, or to terminate the Lease for the Lessee's breach or default (including for the purpose of or incidental to the compliance by the Lessor with the provisions of Section 81 of the Property Law Act 1969, solicitor's, architect's, surveyor's and valuer's costs and fees).

9.4 Costs on an Indemnity Basis

The Lessor's legal and professional costs and disbursements under Clause 9.3 shall be charged and allowed on a full indemnity basis to the Lessor for costs charges and expenses.

...

11. DEFAULT OR REPUDIATION BY LESSEE

11.4 Lessor Obligated to Mitigate

In the event of the Lessee vacating the Leased Premises, whether with or without the Lessor's consent, the Lessor shall be obliged to take reasonable steps to mitigate its damages and to endeavour to lease the Leased Premises at a reasonable Rent and on reasonable terms. The Lessor's entitlement to damages shall be assessed on the basis that the Lessor should have observed the obligation to mitigate damages contained in this Clause. The Lessor's conduct taken in pursuance of the duty to mitigate damages shall not by itself constitute acceptance of the Lessee's breach or repudiation or a surrender by operation of law.

...

14. HOLDING OVER

If the Lessee, without having duly exercised any option for renewal herein contained but with the consent of the Lessor, shall remain in possession of the Leased Premises after the expiration of the Term or any extension thereof, the Lessee shall so remain as tenant from month to month at the Rent being 110% of the Rent payable immediately prior to the expiration of the Term and upon all the covenants and conditions contained in this Lease with such modifications or variations as are necessary to make them applicable to a tenancy from month to month.

15. PROVISIONS ON EXPIRY OF TERM

15.1 Notice to Let

During the period of 3 months preceding the end of the Term the Lessee shall permit intending tenants and others with authority from the Lessor at all reasonable times to enter and view the Leased Premises and shall permit the Lessor to affix to the exterior of the Leased Premises a sign indicating that the Leased Premises are to be re-let, and shall not tamper with same.

15.2 Make Good

During the last 3 months of the Term the Lessee shall:

- (a) paint with 2 coats of colour and in a workmanlike manner the outside and inside which has been previously painted with paint of a standard reasonably specified by the Lessor;
- (b) where the Lessor at any time has installed floor coverings in the Leased Premises replace all floor coverings in the Leased Premises with new floor coverings of at least equal standard;

- (c) service the air conditioning equipment, complete repairs, replace filters and provide a written report regarding the servicing and repairs from a reputable air- conditioning company;
- (d) replace all lamps and tubes, relamp exit signs and hibay lights in the Leased Premises;
- (e) remove computer, telephone and data cabling and make-good of damaged surfaces including skirtings of the Leased Premises;
- (f) thoroughly clean the Leased Premises including all windows and floor surfaces, high pressure clean any warehouse walls and floor;
- (g) service any roller doors and complete all repairs including replacement of damaged panels and provide a copy of a report from the firm completing the servicing to the Lessor;
- (h) remove all bolts and fixtures from walls and floors of the Leased Premises and make good any damage caused by their removal;
- (i) service fire hydrant and fire hose reels and sprinkler systems within the Leased Premises and complete all necessary maintenance and provide a copy of the report from the reputable firm completing the repairs and maintenance;
- (j) repair any damaged bitumen and concrete in the Leased Premises or licenced parking bays;
- (k) all reticulation to be serviced and any necessary repairs to be completed;
- (l) mow lawns and tidy gardens;
- (m) replace any damaged ceiling tiles;
- (n) pump out of separator facilities or other waste storage tanks including septic systems;
- (o) replace and/or repair of all damaged lessor's fixtures and fittings;
- (p) remove all signage from the Leased Premises;
- (q) an inspection of the roof is to be completed by a qualified industrial roofer and all recommended maintenance is to

be completed and a report by the qualified industrial roofer stating the repairs are completed is to be provided to the Lessor;

- (r) all gutters and down pipes to be cleaned;
- (s) light diffusers in ceilings to be cleaned; and
- (t) plumbing service of plumbing systems including all taps and toilet systems in the Leased Premises.

All such works shall be performed with materials of the best quality and to the satisfaction of the Lessor or its agent and the Lessee shall make good any damage done to the Leased Premises in the carrying out of the required works.

### 15.3 Delivery of Possession

At the expiration or sooner determination of the Term the Lessee shall quietly deliver up to the Lessor possession of the Leased Premises in such state condition and order as shall be consistent with the due performance and observance of the covenants by the Lessee herein contained and shall surrender all keys for the Leased Premises to the Lessor and shall inform the Lessor of all combinations on locks safes and vaults (if any) in the Leased Premises. If the Lessee fails to do so then the Lessor at its option may carry out all repairs or works which should have been carried out by the Lessee in accordance with the covenants of the Lessee herein contained, and if the Lessor carries out any such repairs or works the Lessee shall pay to the Lessor upon demand the cost of such repairs or works.

### 15.4 Removal of Fixtures and Fittings

All fixtures, fittings, plant, machinery, utensils, shelving, signs and advertising material, counters, floor coverings, safes and chattels (but excluding ceilings, toilet and sanitary accommodation, wall finishes, shop fronts, doors and grills, lighting and electrical fixtures or fittings, electrical wiring, hydraulic and drainage and gas services, lifts, escalators and air conditioning) belonging to and erected or put in by the Lessee whether before or after the Commencement Date shall be trade or tenant's fixtures and the Lessee shall at the expiration or sooner determination of the Term remove the same from the Leased Premises (but so as not in any way to injure the land and/or buildings leased by the Lessor) and the Lessee shall immediately thereupon make good to the satisfaction of the Lessor all damage caused or occasioned to the Leased Premises by such removal.

### 15.5 Occupation Fee

Without prejudice to any other rights of the Lessor hereunder, during the period from the date of expiry or sooner determination of this Lease

(including any extension or renewal hereof or period of holding over) until such date as the Lessee has complied with its obligations under **Clauses 15.2 - 15.4**, the Lessee shall pay to the Lessor from time to time forthwith upon demand an occupation fee (calculated on a daily basis) at a rate equal to the rate of the aggregate of the Rent, Outgoings and other monies payable immediately prior to the date of expiry or sooner determination of this Lease and all other obligations on the part of the Lessee hereunder (other than the obligation to pay Rent and Outgoings for such period) shall apply mutatis mutandis.

15.6 Lessor's Right to Remove

If the Lessee fails to comply with its obligations pursuant to **Clause 15.4**, then in addition to its other rights hereunder and at law and otherwise resulting out of such breach the Lessor may:

- (a) by notice in writing to the Lessee deem such of the items referred to in the notice to be abandoned by the Lessee, in which case such items upon delivery of such notice shall be and become the property of the Lessor absolutely and the Lessor shall be at liberty either to retain the same in the Leased Premises or to remove the same or any portion thereof from the Leased Premises in which case the costs of such removal and costs of making good those parts of the Leased Premises occasioned by such removal shall be borne by the Lessee and payable to the Lessor upon demand;
- (b) remove such items or any part thereof to the Lessee's last known abode or place of business, and there or as near thereto as possible to leave the same at the risk in every respect of the Lessee in which case the costs of such removal and the costs of making good those parts of the Leased Premises occasioned by such removal shall be borne by the Lessee and payable to the Lessor upon demand; and
- (c) at public auction or by private treaty sell or otherwise dispose of the same or any part thereof at such price and on such terms as the Lessor in the Lessor's absolute discretion may think fit, and out of the proceeds thereof to reimburse the Lessor in respect of any costs and expenses thereby incurred in which case the costs of such removal and the costs of making good those parts of the Leased Premises occasioned by such removal shall be borne by the Lessee and payable to the Lessor upon demand.

*Overview of the evidence*

101 As I deal with the Issues that are before the Tribunal, it will be necessary, at times, to address the evidence of some of the witnesses in detail. However, for present purposes, I will provide a broad overview of the evidence.

### **The Lessors' evidence**

#### *Mr Patterson*

102 Mr Patterson's evidence addresses his purchase of the Premises, the termination of the Lease and the consequential discussions with Craft Décor (in particular Tony and Mary Nadilo) in relation to the two-week extension of the Lease and also the arrangements to vacate.

103 His evidence also addresses the work he had to do to post 16 January 2019 once the Premises were under his control including obtaining quotes and arranging for works to be undertaken.

#### *Mr Ricciardo*

104 Mr Sammy Ricciardo gave evidence of the work he completed at the Premises in early March 2019 for the installation of a new vanity and toilet suite. At the time he did the work, he observed that the old toilet suite was broken.

#### *Mr Esposito*

105 Mr Davide Esposito gave evidence relating to the work he did in removing approximately 450m<sup>2</sup> of tiles at the Premises (and his related fees paid by the Lessors). He also removed signage and the front counter. The works were completed between 17 January 2019 and 15 February 2019.

106 As I will come to explain, Mr Esposito was an unimpressive witness. His business records are, by his own admission, very poor. That, of itself, is not an issue but he was less than forthcoming as a witness. He did not disclose in his witness statement that he and Mr Patterson lived alongside each other, are friends, and socialise and drink together about once a month. When asked about this in cross-examination, he was guarded, defensive and sought to downplay their friendship. I find that Mr Patterson and Mr Esposito are friends.

107 It is also the case that Mr Esposito did tiling work which was part of the Lessors' shop refurbishment. That makes it difficult for Craft Décor, and for me as decision-maker, to be satisfied that the works

charged by Mr Esposito were works solely done on the basis of the alleged breaches of Craft Décor's covenants under the Lease.

*Mr Papaphotis*

108 Mr Papaphotis provided an auditor's report. Mr Patterson provided a supplementary statement in relation to the auditor's report. These statements went to what was termed a 'set off claim' in which Mr Patterson claimed he was not paid two months' rent and Outgoings. Mr Patterson ultimately conceded, albeit begrudgingly, that Craft Décor had paid the Lessors the rent and Outgoings.

*Craft Décor's evidence*

*Mr Nadilo*

109 Mr Nadilo gave evidence about entering into the Lease, the removal of the old floor tiles in 2012 and their replacement with polished porcelain tiles.

110 Mr Nadilo evidence was that he was 'shocked' when the Lessors terminated the Lease on 25 November 2018 because he had understood that Craft Décor would be allowed to stay at the Premises for a further 12 to 18 months. He also explains that the staff that would be required to help vacate the Premises were taking holidays over the festive period and that it was 'impossible' for Craft Décor to vacate by 31 December 2018. He also gives evidence about his conversations with Mr Patterson in relation to extending the Lease by two weeks.

111 As I have set out, Mr Nabilo also explained that Mr Patterson 'threatened' Craft Décor on 2 January 2019 on the basis of what Mr Patterson regarded as an outstanding payment. Mr Nabilo outlines that Craft Décor overpaid the Lessors \$1,397.40 for the period between 1 and 15 January 2019. Further, Mr Nadilo outlines that Craft Décor overpaid for strata fees between 1 July and 30 September 2018 in the amount of \$2,063.23.

112 Mr Nadilo also provided a further witness statement in relation to the auditor's statement.

*Mrs Nadilo*

113 Mrs Nadilo gave evidence about correspondence she received from Mr Patterson in December 2018 in relation to the termination of the



Lease, the agreement for a two-week extension and in relation to the payment of invoices.

114 She states that in a telephone call on 2 January 2019 Mr Patterson demanded that an outstanding invoice be paid immediately or otherwise he would, in effect, change the locks. Mrs Nadilo also gave evidence as to her observations of changes at the Premises at a mediation conference in October 2019.

*Mr Bristow*

115 Mr Bristow gave evidence of the 'reasonable' cost of removing floor tilings. He considers that a reasonable per square metre rate for removing floor tiles is between \$25 and \$30 (not the \$50 per square metre that Mr Patterson paid).

*Mr Zuvela*

116 Mr Zuvela gave evidence of the exchanges between Mr Nadilo and Mr Patterson on 14 January 2019 when Mr Patterson attended the Premises.

*Mr D'Amico*

117 Mr D'Amico gave evidence as to the 'reasonable' cost of painting the Premises. He considers that, all up, it would cost no more than \$3,700 (including the cost of paint).

*Ms Anderson*

118 Ms Anderson is the Administration Manager of Craft Décor. She gave evidence about the issues with Lessors receiving Craft Décor's payments.

***Credibility of witnesses***

119 In this case, credibility issues arise as between Mr Patterson and Mr Nabilo because each gives conflicting accounts of their telephone discussions in December 2018 and their confrontation on 14 January 2019. The reliability of Mrs Nabilo's evidence is also in issue. For the reasons I set out below:

- (a) I find that Mr Patterson is not a credible witness;
- (b) I find Mr Nabilo to be a credible witness; and
- (c) I do not accept all of Mrs Nabilo's evidence.

120 As I have explained at [105] - [107], I also find that Mr Esposito  
was not a credible witness.

*Mr Patterson*

121 In an overall sense, I find that Mr Patterson was an unimpressive  
and unreliable witness. I set out the following examples.

122 **Firstly**, Mr Patterson did not disclose his friendship with  
Mr Esposito whom he engaged to remove the tiles in the main showroom  
floor. The fact that he and Mr Esposito are friends is, of course, not a  
barrier to Mr Esposito doing work for him. However, the failure to make  
that clear, and thereafter to downplay the strength of the friendship,  
creates perception issues. Certainly, Craft Décor are of the view that  
Mr Esposito did a lot more work than just remove the floor tiles.  
Craft Décor is concerned that the Lessors are trying to shift some of the  
costs of the fit-out onto Craft Décor under the guise of breaches of the  
Lease. I share Craft Décor's concerns in this regard.

123 **Secondly**, Craft Décor submits that Mr Patterson was apathetic in  
making claims against Craft Décor and indifferent to the work this  
generated to Craft Décor in proving the claims were wrong (for example  
the 'set off claim'). I accept that submission.

124 For example, the manner in which Mr Patterson (and his counsel,  
Mr Moss) argued for a 'set off claim' in circumstances where Craft Décor  
would later demonstrate that it had plainly been paid into Mr Patterson's  
account, and the time it took for him to realise and accept this, is  
remarkable. One would have thought that before launching a 'set off  
claim' on the basis that rent and Outgoings had not been paid, that  
Mr Patterson would have, at least, checked all his bank accounts first.  
Mr Patterson wasted his counsel's, the Tribunal's and Craft Décor's time  
in these proceedings.

125 In light of the fact that the 'set off claim' was wholly unmeritorious,  
Mr Moss' submissions on the first day of the hearing that the 'set off  
claim' was a 'mathematical certainty', that it was 'unequivocal' and that  
'there's no defence to it' (ts 24, 30 January 2020) do not reflect well at all  
on Mr Patterson. The fact that those submissions above were made when  
Mr Patterson was resisting the Tribunal grant Craft Décor some time to  
prove it had paid the money (the 'set off claim' was made only very  
shortly before the hearing was due to commence) only compound this.

126           **Thirdly**, Mr Patterson was prepared to give sworn evidence that he never received the disputed rent payments from Craft Décor at the hearing on 30 January 2020. Yet the account that Craft Décor paid the rent into was Mr Patterson's.

127           **Fourthly**, Mr Patterson was also plainly indifferent to the materials he gave the auditor. That auditor's first statement was a complete waste of money as the information was far from accurate or complete. I will discuss that report later in these reasons.

128           **Fifthly**, Mr Patterson says he did much of the warehouse fit-out work himself. However, he can produce no evidence of any costs he has incurred in doing so (other than the single invoice from Espo).

129           As I have set out, at the core of this dispute, Craft Décor are concerned that the Espo costs include Mr Esposito doing fit-out work. The failure of the Lessors save for one invoice from EBCO (different company from Espo), to produce any evidence of the cost or scope of such fit-out works only adds to that concern.

130           As I have stated, it was not apparent in the Lessors' witness statements that Mr Eposito did tiling work as part of the Lessors' fit-out of the Premises (as well as removing the floor tiles in the showroom). While Mr Patterson says this tiling work was much later, the absence of an explanation makes it somewhat difficult to be certain what work Mr Patterson is actually charging Craft Décor for.

131           **Sixthly**, there were also instances where Mr Patterson's answers could be best described as 'sarcastic'. In a way, he was belittling the Tribunal process that he himself commenced. For example, he explained it was a 'terrible travesty' that Craft Décor had to spend fees to trace payments to prove it had paid the Lessors (ts 100, 8 September 2020) to defend the 'set off claim'.

132           **Finally**, and even more problematically, Mr Patterson (on behalf of the Lessors) simply does not have the evidence to demonstrate that Craft Décor damaged toilets, tiles and doors at the Premises. Mr Patterson does not have any record of the state of the Premises at the time Craft Décor entered into the Lease. In circumstances where Craft Décor absolutely deny doing any damage in the warehouse, and where the Lessors progressed the demolition and fit-out works in the warehouse shortly upon taking possession of the Premises, that leaves the Lessors in a somewhat difficult position.

133 While Mr Patterson may (quite reasonably) say that it must have been Craft Décor because they were renting the Premises, the photographs themselves are undated and Mr Patterson was not sure where the photographs were taken within the Premises. For example, he was initially adamant that a photograph he took was in relation to a vanity that had to be replaced. Yet Craft Décor was able to demonstrate the vanity in question was not replaced but in fact demolished by the Lessors as part of the fit-out of the Premises. Mr Patterson conceded that to be so.

134 It is also difficult for the Tribunal to make orders that Craft Décor, for example, damaged doors when there is a photograph of only one damaged door.

135 Having regard to his conduct of the proceedings as a whole, together with his evidence, I am satisfied that Mr Patterson has followed through with his statements made to Mr Nabilo on 14 January 2019 and that he was seeking to, as it were, 'make Craft Décor pay' for not removing the floor tiles, which the Lessors claim was required under the Lease. Mr Patterson's evidence was that at 14 January 2019 '[he] was definitely angry' with Craft Décor and that '[he wanted] to be compensated for the work that I had to perform': ts 192, 9 September 2020.

136 I accept that as at January 2019, Mr Patterson was entitled to be angry at Craft Décor because he clearly believed that Craft Décor would be removing the floor tiles and it did not. For reasons I will explain, Craft Décor was not obliged to remove the floor tiles. However, while Mr Patterson was entitled to be angry, he has, in my view, prosecuted his case with little regard to what the evidence actually demonstrates.

137 While I am not blind to the fact that, as I have found, Craft Décor did not comply with all of its obligations under the Lease, I am of the view that Mr Patterson is seeking, by the Lessors' Application, to extract as much money as he can from Craft Décor, including recovering some of the costs of the fit-out of the Premises that occurred after 15 January 2019.

#### *Mr Nabilo*

138 In relation to Mr Nabilo, I have reached the view that he was, in an overall sense, a credible witness. Whilst he was subject to rigorous cross-examination, I find his answers were considered and truthful.

139 Mr Nabilo was visibly frustrated at how Mr Patterson conducted himself both in relation to the Lease but also in the proceedings before the Tribunal.

140 Mr Nabilo says he was shocked when he received the Termination Notice which required Craft Décor to depart the Premises on 31 December 2018. He sought out Mr Patterson and an extension of the Lease was agreed. The circumstances of that agreement are in issue but what is not in contest is that Craft Décor was given until 15 January 2019 to vacate the Premises.

141 It is also clear on the evidence that in those discussions that Mr Patterson made it clear that he wanted Craft Décor to remove the floor tiles.

142 Mr Nabilo did not expressly say to Mr Patterson that Craft Décor would not remove the floor tiles. I find what he did say was that Craft Décor would give 'vacant possession' and that Craft Décor would 'be out' by 15 January 2019.

143 I do not consider that Mr Nabilo's credibility can be called into issue for not responding directly to Mr Patterson's demands. I find that what Mr Nabilo was, in effect, saying to Mr Patterson that Craft Décor would meet what it considered to be its obligations under the Lease.

#### *Mrs Nabilo*

144 I do not accept the evidence of Mrs Nabilo that she did not talk to Mr Nabilo before she responded to Mr Patterson's query of 7 January 2019 as to when the removal of the floor tiles would commence. I find that she did discuss the matter with Mr Nabilo before sending the following response:

We are working on being out of the showroom as agreed.

145 The email did not directly address Mr Patterson's question but, as I say above, Craft Décor had a different interpretation of the requirements of the Lease than did the Lessors.

#### *Consideration of the Issues*

146 I shall now deal with the Lessors' questions, which arise out of the Lessors' Application:

**Issue 1:** *Whether Craft Décor's obligations under the Lease operate for the benefit of Lessors, including the obligations of repair and make good.*

147 This is not a controversial question. Craft Décor did not contest that its obligations under the Lease were not owed to the Lessors. Pursuant to s 77 of the PL Act, the Lessors may claim the benefits under the Lease: *Primewest (Lot 4 Davidson Street Kalgoorlie) Pty Ltd v Broadwater Hospitality Management Pty Ltd* [2009] WASC 304 at [3] (McKechnie J).

148 It follows that the Lessors can claim the covenants under the Lease as part of the reversionary estate.

**Issue 2:** *If the benefit of the leasehold covenants referred to in Issue 1 are enforceable by the Lessors against Craft Décor, whether Craft Décor has failed to deliver up vacant possession of the Premises to the Lessors in such state, condition or order consistent with the due performance and observance of all of Craft Décor's covenants contained in the Lease, particularly the covenants of repair and to make good the Premises.*

149 This is the key issue that I need to determine in these proceedings. The real contest between the parties is around the Termination and the events leading up to, and immediately following, 15 January 2019; the date the Premises were required to be vacated.

150 Before I proceed to address the question in detail, it is appropriate that I set out the following observations which ultimately, together with my findings on credibility set out above, colour the findings I have made and the conclusions I have reached.

151 *Firstly*, the terms of the Lease are paramount. The terms of the Lease represent the agreement between the parties.

152 *Secondly*, Craft Décor's approach to this case appears to be premised on a belief that it has been wronged by Mr Patterson in relation to the timing of the Termination. While it might be said that the Lessors' decision to terminate the Lease and require vacant possession to be delivered on 31 December 2018 was hardly charitable, it was not illegal or immoral. It was, after all, a commercial tenancy.

153 Let me be clear. I appreciate the difficult position that the Lessors put Craft Décor in by the Termination. I used the phrase 'hardly charitable' above. I accept there are a number of other phrases

that some may use in relation to issue a Termination Notice to a showroom type business requiring vacant possession in only five weeks in the middle of the festive season.

154           However, the fact is that Craft Décor was only on a monthly tenancy. Therefore, there was always a prospect, short of another lease being entered into, that it would have to vacate the Premises without the benefit of a long notice period. I say this because Mr Nabilo's oral evidence highlights his continuing disbelief at being given only five weeks' notice of the Termination.

155           **Thirdly**, these proceedings arise in the Tribunal's original jurisdiction. That being the case, it is for the Lessors to prove their case on the balance of probabilities: *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 at [69].

156           In *Van der Feltz and Rispoli* [2021] WASAT 84 the Tribunal recently set out the following in relation to an application for rent relief (at [13]):

At the outset, it is important to state that as this is a civil proceeding the applicants bear the onus of proving that they are entitled to rent relief. The standard of proof required is the civil standard, that is, proof on the balance of probabilities. The 'balance of probabilities' can be stated as requiring the Tribunal to be satisfied, on the evidence, that the matter found to have occurred is more likely than not to have occurred. It is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal.

157           As I will explain, the Lessors' primary evidence of what they say is Craft Décor's failure to comply with the Lease is found in a series of some 19 photographs which Mr Patterson says, were taken between 16 and 18 January 2019.

158           Those photographs show:

- (a) a damaged door (and possibly a door frame with a missing door);
- (b) a broken toilet cistern;
- (c) dirty floors and a dirty toilet;
- (d) a wall where some paint has come away;
- (e) unpainted showroom walls;

- (f) a water stained vanity;
- (g) a broken tile;
- (h) floor tiles being removed (by Mr Esposito) and the showroom floor;
- (i) water damage; and
- (k) unfinished external walls after signage had been removed.

***The requirements of the Lease***

159 Turning now to the terms of the Lease, and in the light of the principles I have set out at [87] to [91] above, Craft Décor was required to make good the Premises during the last three months of the tenancy. Under cl 15.2 of the Lease, those obligations included the requirement to:

- (a) paint with two coats of colour inside and out (in a workman like manner) any area which had been previously painted with paint reasonably specified by the Lessors;
- (b) replace any floor coverings that Craft Décor had installed with a new floor covering of at least an equal standard;
- (c) replace and/or repair all the Lessors' fixtures and fittings; and
- (d) service of all plumbing systems including all taps and toilet systems.

160 Clause 15.3 required Craft Décor to deliver vacant possession in such state condition and order as shall be consistent with the due performance and observance of the covenants by Craft Décor. If Craft Décor fails to do so then the Lessors, at their option, may carry out all repairs or works which should have been carried out by Craft Décor in accordance with its covenants, and if the Lessors carry out any such repairs or works, Craft Décor shall pay the Lessors upon demand the cost of such repairs or works.



161 Clause 15.4 relates to the removal of fixtures and fittings. It provides, in effect, that all fixtures and fittings belonging to and erected or put in by Craft Décor whether before or after the commencement of the Lease are to be regarded as trade or tenant's fixtures shall at the expiration of the Lease or sooner shall be removed from the Premises (but so as not in any way to injure the land and/or the leased buildings) and Craft Décor shall immediately thereupon make good to the satisfaction of the Lessors any damage caused.

162 In circumstances where cl 15.4 has not been complied with, cl 15.6 provides the Lessors with a right to either the take ownership of the tenant's fixtures on the basis of abandonment or to remove such fixtures from the Premises at the Lessors' cost. Alternatively, the Lessors may return such fixtures or sell or dispose of them to cover costs.

163 Clause 11.4 of the Lease requires the Lessors to mitigate any losses upon Craft Décor vacating the Premises.

164 The terms 'floor covering', 'lessor's fixtures' and 'tenant's fixtures' are not defined in the Lease. However, each of these terms has been the subject of judicial consideration. The meaning of these terms is the issue that I turn now to.

### Meaning of 'floor coverings'

165 In *Re Seventy-Ninth Vibration Pty Ltd and Chief Executive Officer of Customs* (1998) 54 ALD 139, Deputy President Forgie of the Administrative Appeals Tribunal gave detailed consideration to the term 'floor covering' and noted that there was no evidence that the ordinary meaning of the term had been displaced by trade usage: at 83. The Deputy President concluded that a 'floor covering' means 'something placed over or upon a floor to protect or conceal it or simply to overlay it': at 80.

166 Deputy President Forgie had occasion to reconsider the question again in her subsequent decision in *Thirco Pty Ltd v Chief Executive Officer of Customs* [2001] AATA 1015; (2001) 34 AAR 122; (2001) 66 ALD 779 where she explained (at [24]) that the term 'floor coverings':

... should be given its ordinary meaning. Relying on my decision in *79<sup>th</sup> Vibration and Anor and Chief Executive Officer of Customs* (1998) 54 ALD 139, [Mr Slonim submitted] that the words describe goods that protect, conceal or overlay a significant portion of the floor in a certain area. The defining characteristics of those goods include their

generally being laid in such a manner as to be fixed to the floor and their providing comfort, easy maintenance and easy replacement[.]

167 In this instance, the porcelain tiles do not appear to be a 'floor covering' for the purposes of cl 15(4)(b) of the Lease. That is, floor tiles are not 'placed' on the floor, they are glued and affixed to it. They are also not easy to replace. The floor tiles are not a 'floor covering'.

### Meaning of 'landlord's fixtures' and 'tenant's fixtures'

168 The term 'landlord's fixtures' is defined in the *Encyclopaedic Australian Legal Dictionary (ALD)* to mean, in the context of leases, 'fixtures that cannot be removed from the premises without substantial damage to the premises' by reference to the decision of the *Spyer v Phillipson* [1931] 2 Ch 183; [1930] All ER Rep 457 (*Spyer*). The consequence of a fixture being a 'landlord's fixture' is that a tenant cannot remove them, even where the tenant is the person who affixed them: *Sunderland v Newton* (1830) 3 Sim 450 (*Sunderland*).

169 The term 'tenant's fixtures' is defined in the ALD to mean 'items attached to land for the purpose of trade, domestic convenience, or ornament, so that they become part of the land, but which the tenant or life tenant is entitled to remove during the term of the tenancy or (sometimes) within a reasonable time after its expiration': by reference to the decisions of *Holland v Hodgson* (1872) LR 7 CP 328; *Vesco Nominees Pty Ltd v Stefan Hair Fashions* [2001] QSC 169; [2001] Q ConvR 54 - 555 (*Vesco Nominees v Stefan Hair*). The right to remove a tenant's fixture is governed by any relevant provisions of the lease: *Douglass v Lawton Pty Ltd* [2007] NSWCA 89; *Vopak Terminal Darwin Pty Ltd v National Fuels Darwin Pty Ltd* (2009) 258 ALR 89.

170 In *Vesco Nominees v Stefan Hair*, Muir J of the Supreme Court of Queensland, at [18], referred to the decision of Lord Denning MR gave the following definition of 'tenant's fixtures' and 'landlord's fixtures' in *New Zealand Government Corporation v H M & S Ltd* [1982] QB 1145 at 1157 where it was explained that:

Before I go any further, I would describe the distinction between 'tenant's fixtures' and 'landlord's fixtures'. The term 'tenant's fixtures,' for present purposes, means those fixtures which the tenant himself fixed into the premises for the purpose of his trade, that is, for the business of the theatre, but which do not become part of the structure itself. Instances are the seats for the stalls, or auditorium, which are fixed by screws or bolts to the floor, wall-brackets for lights which are screwed on to the wall, electric transformers fixed on to the floor, and so forth. All these the

tenant is entitled to remove when his term comes to an end. Whereas 'landlord's fixtures' for present purposes means those fixtures which the tenant himself fixes into the premises so that they become part of the structure itself: see *Boswell v. Crucible Steel Co* [1925] 1 KB 119. Instances are improvements made by the tenant by putting in new doors or windows in place of those that were there before, or a new frontage or a new safety curtain. These improvements become part of the structure itself. The tenant cannot remove them when his term comes to an end[.]

***Was Craft Décor required to remove the floor tiles under the Lease?***

**Evidence**

171 The evidence on the question of the floor tiles is not in dispute. Craft Décor replaced the floor tiles that were extant in 2013 but did not remove them before vacating the Premises on 15 January 2019. They were removed shortly after Craft Décor vacated the Premises by Mr Esposito from Espo.

**Disposition**

172 Craft Décor installed the porcelain tiles in or around January 2013 at its cost. It is not in contest, and I find, that the maroon tiles which were present when Craft Décor commenced its lease were installed by the landlord. I also find that in 2013, Craft Décor replaced these with the then landlord's consent. In many respects it was a like for like replacement of an item that formed part of the Premises.

173 Mr Nabilo considers, and I accept and find, that the porcelain tiles that Craft Décor used were superior to the maroon tiles they replaced. Mr Patterson considered that the tiles were 'beautiful' but just not safe.

174 While the terms of cl 15.4 of the Lease refer to '[a]ll fixtures' 'belonging to and erected or put in by' Craft Décor 'shall be trade or tenant's fixtures' such that Craft Décor are to 'remove the same from the Lease Premises', in my view, cl 15.4 of the Lease does not apply to the floor tiles.

175 This is because in replacing and installing new floor tiles in 2013, Craft Décor were, at its cost, replacing what was then, and remains a landlord's fixture (being floor tiles): *Spyer, Sunderland*. Clause 15.4 applies to tenant's fixtures. The fact that Craft Décor replaced, with consent, a landlord's fixture does not convert that fixture into a tenant's fixture. To hold otherwise in my view would be contrary to the principles enunciated by the Court of Appeal in *CA & Associates and Fini* at [51].

176 By reason of the definition of Leased Premises in cl 1.1(r) of the Lease, the 'Leased Premises' commence 'above the floor slab'. Therefore, when they were installed by the former landlord and affixed to the concrete slab, the maroon tiles became a landlord's fixture.

177 This point is made by Craft Décor. It submits that the porcelain tiles it installed became landlord's fixtures such that it not obligated under the Lease to remove them. This is because to do so would destroy the tiles and, at the same time, do substantial damage to the Premises.

178 I accept that submission. Indeed, from the photographs of the Premises during Mr Esposito's work as well as the evidence of Mr Bristow, to remove a floor tile is to destroy that floor tile.

179 That is, it is plain from the evidence that the floor tiles are affixed by strong adhesive to the concrete floor. The tiles thus now form part of the Premises. The removal of floor tiles is, in effect, a process of destroying the tiles. The floor tiles, as a matter of law and for the purposes of the Lease, is a landlord's fixture.

180 That is, while the floor tiles were installed by Craft Décor, they became and remain a landlord's fixture.

181 If Craft Décor had not replaced the original maroon tiles during its tenancy, it would not have been responsible for removing them upon vacating the Premises. In the same way, having replaced a landlord's fixture Craft Décor has no entitlement, nor can it be required, to remove the floor tiles that it installed. Clause 15.4 of the Lease does not alter that position.

182 The very fact that Craft Décor only removed the floor tiles with the permission of the then landlord further bolsters the view that what was being replaced was a landlord's fixture. If the floor tiles were a tenant's fixture, under the terms of the Lease, the consent of the landlord would not have been required.

183 Likewise, because they are not 'floor coverings', cl 15.2 of the Lease has no application to floor tiles.

184 Returning to the provisions of the Lease, there is nothing in either cl 15.2 or cl 15.4 of the Lease which required Craft Décor to remove the floor tiles as part of giving up vacant possession of the Premises.

185 It follows that I find that the Lease did not require Craft Décor to remove the floor tiles. Therefore, Craft Décor did not fail to comply with cl 15.3 of the Lease in relation to the floor tiles.

*Damage to doors, tiles and vanities*

**Evidence**

186 While there was plainly damage to doors, tiles and vanities in Mr Patterson's photographs, Craft Décor denies that it was responsible for the damage. As I set out at [158], the photographs that are the Lessors' evidence of the damage to the Premises were taken by Mr Patterson between 16 and 18 January 2019.

187 Mr Nadilo was cross-examined in some detail on these matters. In relation to the damaged door at the entrance to the storeroom, his evidence was that when Craft Décor vacated the Premises, the door was in 'perfect condition to my eyes': ts 343, 10 September 2020.

188 In relation to the toilets, his evidence was that one of the toilets has never worked since before the commencement of the Lease. Mr Nabilo's evidence was that the toilet cistern (which was broken into parts in the photographs taken by Mr Patterson) was not broken by Craft Décor: ts 353, 10 September 2020. Mr Nabilo's evidence was that the operational toilets were in working order up until Craft Décor vacated the Premises: ts 356, 10 September 2020. In relation to the vanity, having regard to its age, Mr Nabilo considered this to be in 'excellent condition': ts 352, 10 September 2020.

189 When queried as to how the damage came about if it was not caused by Craft Décor, Mr Nabilo's evidence was (ts 345, 10 September 2020):

In the 48 hours that I was gone, I believe that a lot happened in the building up until 18 January. A lot happened. There was workmen. There was all sorts of stuff, as I've seen from the previous evidence and I've seen what is written inside all this paperwork. There was a lot going on. To suggest that Craft Décor left the place untidy, unswept, unclean, is incorrect - is incorrect.

190 Of course, Mr Nabilo's evidence as to what happened after Craft Décor vacated the Premises is only speculation. However, in cross-examination, Mr Nadilo was adamant that Craft Décor did not damage the toilets, vanities or doors during the lease. In effect, Mr Nadilo said the toilet cistern was not broken up but the toilet itself had never worked and that Craft Décor did not damage the door.

191 The Lessors, on the other hand, state that because Craft Décor was in control of the Premises, it was responsible for the damage. That is plainly not an unreasonable assumption. Mr Patterson's evidence in this regard was as follows (ts 147 - 148, 8 September 2020):

...

**Mr Brickhill:** ... So your evidence is you sent us this photograph which shows damage?

**Mr Patterson:** Yes.

...

**Mr Brickhill:** You don't know whether Craft Décor in fact damaged that door, do you?

**Mr Patterson:** You guys were the only ones living - staying there.

**Mr Brickhill:** No, you don't know whether they in fact damaged that door, do you?

**Mr Patterson:** It wasn't a burglar, I guess.

and:

...

**Mr Brickhill:** ...

So do you accept that when you sent this photograph it was for the sake of saying that this was one of the damaged doors that Mr Esposito or Espo Construction replaced because that was one of the remedial works; is that correct?

**Mr Patterson:** Yes, that is correct[.]

192 Mr Riccardio's evidence was that when he attended the Premises in March 2019, he replaced a toilet cistern which was broken.

### ***Findings***

193 As stated, Mr Patterson's photographs were taken between 16 and 18 January 2019. It is these photographs which form the basis of the Lessor's evidence in the Lessors' Application.

194 Neither the Lessors nor Craft Décor produced a property condition  
report which evinces the state of the Premises at the time that the Lease  
commenced. Nor does the Lease included a provision which deems all  
landlord's fixtures (and chattels) to be in good working order at the  
commencement of the Lease.

195 In that context, cl 4.2 (repair) and cl 15.2 (make good) of the Lease  
must be interpreted in its context, but also objectively, consistent with  
what a reasonable businessperson would understand was the agreement  
and also in a commercial sense. It simply cannot be the case that the  
Lease requires the Premises to be delivered in an 'as-new' state items  
which are landlord's fixtures (such as toilets and vanities which were  
installed before 2007).

196 Having regard to the evidence, I find that I am not satisfied that  
Craft Décor caused the damage to the door, tiles, toilet and vanity.

197 In these proceedings, it is for the Lessors to satisfy me that Craft  
Décor did the damage on the balance of probabilities. The Lessors'  
photographs, such as they are, do not provide a reasonable basis on which  
I can conclude that the damage that is claimed was caused by Craft  
Décor. For example, the Lessors have a photograph of one damaged  
door but claim the cost of two doors (the quote from Coast Edge  
Developments and EBCO actually referred to four damaged doors).  
The Lessors claim the cost of decommissioning the power.  
No explanation or probative evidence was offered for the cost of  
decommissioning the power. The removal of a counter was claimed.  
However, the Lessors appear to now accept that the counter was in place  
at the time Craft Décor entered the Lease.

198 The evidence in this case is such that I am not satisfied that  
Craft Décor caused the damage to the doors, vanities and toilets.  
Leaving to the side Craft Décor's (Mr Nabilo's) denials, Mr Patterson's  
own evidence does not assist the Lessors.

199 As I have set out above, in cross-examination Mr Patterson was  
asked whether the photograph of the damaged door was an example of  
the door that Mr Esposito replaced and for which he is seeking his costs  
reimbursed. He agreed that he was claiming that it was a door that  
Mr Esposito replaced.

200 However, the evidence plainly demonstrates that the door in  
question was not replaced by anyone. It was actually demolished by the  
Lessors in its fit-out of the Premises. Likewise, by way of another

example, Mr Patterson was initially adamant that a photograph he took was in relation to a vanity that had to be replaced (by Specialized Plumbing and Gas). Yet Craft Décor was again able to demonstrate the vanity in question was not replaced but in fact demolished as part of the Lessors' fit-out of the Premises. In cross-examination, Mr Patterson ultimately conceded that to be so.

201 While I accept Mr Patterson's evidence that he has replaced all the toilet vanities; that is not to the point. The point is whether Craft Décor damaged these and failed to make good that damage. The fact that Mr Patterson decided to replace all toilet vanities on taking control of the Premises does not, of itself, mean that Craft Décor damaged them. It may have, but that is a matter of evidence and in my view the Lessors do not have it.

202 As I set out at [195] above, there is something of a disconnect between what the evidence actually shows and what the Lessors have claimed under cl 15.3 of the Lease. Furthermore, the question as to whether Craft Décor actually damaged the Premises is very much in contest.

203 In this regard, I must say that, if the Lessors had produced a reliable record of the state of the Premises as at the afternoon of 15 January 2019 or in the following days which showed there was damage, then that would be probative, even powerful, evidence that Craft Décor had a strong case to answer that it had not complied with some of its make repair and/or good covenants under the Lease (despite its denials). Such evidence would be further bolstered if there were photographs of the damage that had subsequently been repaired by the Lessors which informed the invoices that were claimed.

204 However, the Lessors' evidence is, in reality and aside from the question of the painting, a series of photographs that show a damaged toilet cistern, a damaged door, a broken tile, a tiled showroom and an unpainted showroom and exterior. To the extent that the Lessors have shown that a door and a toilet were damaged, Craft Décor was able to prove that these were not fixed but were in fact demolished by the Lessors as part of the fit-out. That is why I have reached the view that the evidence does not support the Lessors' claim.

205 I have already set out that I find that Mr Patterson was not an impressive or credible witness. I do not accept his evidence that all or any of the 'damage' that is plain from his photographs (set out at [158])



was done by Craft Décor. I find that Mr Patterson was seeking to make Craft Décor responsible for as much of the fit-out work undertaken by the Lessors at the Premises as he could. This was to, as it were, pay Craft Décor back for not removing the floor tiles as he thought had been agreed.

206 On the question of how the damage came about, in my view, it is entirely plausible that workman or others who attended the Premises in the days after Craft Décor vacated, knowing that the Lessors were undertaking (or were going to shortly undertake) a fit-out which involved the demolition of a significant portion of the warehouse, may have caused some damage.

207 For example, the evidence establishes that Espo was working at the Premises at the time when the photographs were taken. Espo did the tiling work for some of that fit-out (but Mr Patterson says that was later). Of course, I am by no means saying that Espo caused the damage. I simply do not know. However, what I am saying is that, in my view, how that damage came about is ultimately unknown. Therefore, I find that there is no reasonable basis on which I can be satisfied that it was Craft Décor that caused the damage.

208 Likewise, to the extent that the photographs shows the toilets to be less than clean (indeed they were filthy), there were workers at the Premises removing floor tiles and attending to other tasks at the time the photographs were taken. When one looks at the amount of dust and debris that are generated when floor tiles are moved, as is evident from the photographs taken by Mr Patterson, it is completely plausible that the state of the toilets as it appears in the photographs was not the result of Craft Décor.

209 Furthermore, having Mr Riccardio give evidence that he viewed a damaged toilet when he attended the Premises in March 2019 is of no real utility. This is because in March 2019, the Premises had been under the control of the Lessors for some seven weeks at that point.

210 It follows that, on the evidence, I am not satisfied on the balance of probabilities that Craft Décor is responsible for the damage to the Premises evident in the photographs taken by Mr Patterson. To the extent that the Lessors seek costs for damages to doors, a broken tile, toilets and vanities, their claim fails.

211 I therefore find that Craft Décor did not breach cl 15.3 (or cl 4.2) of the Lease in relation to damage to the Premises, including a broken cistern, the toilet, broken tiles, the vanity as well as doors.

### *Painting*

#### **Evidence**

212 Craft Décor concedes it did not paint the Premises. Indeed, the photographs taken by Mr Patterson are plain evidence that the walls of the Premises were not painted upon Craft Décor vacating. The photographs also show that the painted surfaces were not made good after Craft Décor had removed its signage.

213 Mr Nabilo's evidence is that sometime in December 2018, most probably on 10 December 2018, Mr Patterson said to him that '[he] will be doing the painting. I have got my own colour scheme and signage requirements'. Mr Nabilo says that he understood that to mean that Craft Décor did not have to do the painting.

214 Mr Nabilo's evidence in this regard was as follows (ts 385, 10 September 2020):

...

**Mr Brickhill:** ... [W]hat was your view in relation to the painting one?

**Mr Nabilo:** In my evidence I was – Mr Patterson at one stage said to me during a phone call, I will be doing painting, I have got my own colour schemes and signage.

**Mr Brickhill:** And what about paragraph 70?

**Mr Nabilo:** Paragraph 70? At no time did Mr Patterson inform me of the paint colours and the types of paint he required. I have searched Craft Décor's records, and Craft Décor has received no communication indicating the colours or types of paint he and Ms Argus had required or required.

**Mr Brickhill:** Okay and then – okay, so when you get these demands with these extra items, we have dealt with the tiles, what's your view in relation to them?

**Mr Nabilo:** It was never mentioned. Mr Patterson was a painter, it's a paint shop, why would he want us to paint it[?]

*Findings*

215 I find that the Lessors are entitled to the cost of painting the Premises. There was a clear obligation in cl 15.2(a) of the Lease that Craft Décor was required to repaint surfaces which were painted within the last three months of the tenancy.

216 While the Lease outlines that the paint is to be specified by the Lessor, the statement by Mr Patterson that he would do the painting does not mean that Craft Décor are not liable to comply with the make good covenants of the Lease. Mr Nabilo, on his own evidence, did not clarify what Mr Patterson meant by that comment. Furthermore, even considering Mr Patterson's comments, Craft Décor could still have undertaken the painting as required.

217 In doing so, Craft Décor could have asked the Lessors to specify a reasonable paint as per the Lease. If the Lessors refused to engage on that issue, then Craft Décor would then have an argument that the Lessors had waived the need to comply with the Lease in that regard. However, that is not what occurred. On the evidence, it does not appear to be in contest that the question of painting was never discussed after the conversation between Mr Nabilo and Mr Patterson on or around 10 December 2018. The simple fact that Craft Décor was not told which paint it should use, a question that was never asked of the Lessors, does not mean that terms of the Lease had been waived.

218 I therefore find that Craft Décor did not comply with the make good requirements of cl 15.3 of the Lease in relation to the painting. The Lessors are entitled to be reimbursed for their costs in making good what Craft Décor was required to do under cl 15.2(a) of the Lease.

*Quantification of painting costs*

219 The Issues for the Tribunal, as agreed between the parties do not actually address the question of quantification of any costs. However, both parties' submissions refer to quantification of the various items that are in contest. For reasons of finality, I therefore consider it appropriate that to the extent that I find that Craft Décor breached the Lease, I should attempt to quantify the costs involved.

220 Mr Patterson did the painting himself. It was a process that was running in parallel with other works, including the fit-out works: ts 208, 9 September 2020.

221 Mr Patterson says that the showroom was painted first and then the exterior. The showroom was the priority: ts 210, 9 September 2020.

222 The debate around the painting is, again, complicated by the fit-out which primarily relates to the warehouse.

223 The Lessors claim the amount of \$6,600 for painting, being the lowest quote, it received for painting works after Craft Décor vacated the Premises. Craft Décor submits that the \$6,600 invoice from Mr Patterson includes the painting of new rooms that were part of the Lessors' fit-out. The problem is that Mr Patterson admitted that to be so. He gave the following evidence (ts 210-211, 9 September 2020):

...

**Mr Brickhill:** ... [Y]ou painted the walls in the [new] SNT area and in the kitchenette and in the office. Is that correct?

**Mr Patterson:** My employees did, yes. All right.

**Mr Brickhill:** Well, whoever did the painting. That's part of that invoice you're claiming?

...

**Mr Brickhill:** ... [T]hat's part of the Vivid Paint and Colour's invoice that you're claiming?

**Mr Patterson:** Yes.

**Mr Brickhill:** Is that right? Thank you[.]

224 The area that the parties referred to as the 'SNT area' was the area the subject of the Lessors' fit-out. Mr Patterson therefore admitted that the invoice he wanted paid included the area and the walls which were new as a result of the fit-out.

225 Mr Patterson also gave evidence that 'all the walls in [room] six, seven, eight, nine and ten' were painted: ts 223, 9 September 2020. Again, rooms six, seven and eight were part of the fit-out (which included a new kitchen area). These rooms were demolished/rebuilt in a different format from the Premises vacated by Craft Décor. That is, to paint 'all' the walls is to paint walls that were erected by the Lessors as part of the fit-out.

226 For the reasons, I cannot accept the painting invoice that was furnished by Mr Patterson's painting company (Vivid Paint and Colour)

for \$6,600 to be the basis on which Craft Décor should pay the 'make good' costs under the Lease.

227 That being the case, the only reliable evidence of the cost of painting is Mr Giovanni who was called by Craft Décor. Mr Giovanni's witness statement included a total cost (including paint) of \$3,700 (GST exclusive).

228 Mr Patterson questioned Mr Giovanni on the basis that his evidence did not include all the painting necessary including the ceiling, 12 doors, the bulkhead and based on the Master Painter's Guide (which is based on a square metre costing). In that context, Mr Giovanni agreed that \$6,000 plus GST was reasonable: ts 258, 9 September 2020.

229 However, while the Lessors' closing submissions refer to the fact that Mr Giovanni suggested the cost of \$6,600 'sounds fair', it was based on different surfaces being painted. The actual costs claimed by the Lessors (being the painting set out in the Vivid Paint and Colour invoice dated 16 May 2019) is to repaint 'all walls'. There is no reference in that invoice to painting the ceiling nor any doors.

230 Likewise, the quote from Accent Painting and Decorating (Accent Quote), on which Mr Patterson's Vivid Paint and Colour quote is based on requirements that are beyond those set out in cl 15.2(a) of the Lease. That is, the Accent Quote refers to a coat of primer and sealer as well as two coats of Dulux paint. The Lease only requires two coats of paint.

231 Therefore, I am not prepared to base the painting costs on the Lessors' quotes. That being the case, I consider the most prudent approach to be to allow the maximum quote set out in by Mr Giovanni's witness statement of \$3,700 plus GST (being a total of \$4,070).

**Issue 3:** *With regard to the subsequent informal oral agreement referred to in paragraphs set out in paragraphs 23 and 24 of the statement of facts contained in the Applicants' Amended Statement of Issues, Facts and Contentions (dated 24 January 2020), made around December 2012 between Craft Décor and the Lessors' predecessor in title of the reversion (as lessor) purportedly waving the exercise of its beneficial right to enforce the covenants of repair and to make good the Premises with respect to removal of the floor tiles:*

*(a) whether the Applicants as transferees of the reversion are bound by its effect; and*

*(b) whether the informal oral agreement purporting to vary the Lease is annexed and incident to and goes with the reversionary estate in the land subject of the Lease,*

*pursuant to s 78 of the PL Act.*

232 For the reasons I have set out above, the oral agreement between the former landlord and Craft Décor is of no relevance in these proceedings (other than to confirm that the then landlord would not ask Craft Décor to remove the tiles when it vacated the Premises). Even without that oral agreement, Craft Décor were not required under the Lease to remove the tiles at the time it vacated the Premises.

233 It is therefore not necessary to address Issue 3 any further.

**Issue 4:** *Whether the express provisions of cl 15.4 of the Lease required Craft Décor to remove the floor tiles at the end of the Lease.*

234 For the reasons set out at [172] to [185] above, no.

**Issue 5:** *Whether Craft Décor has fulfilled its 'end of lease obligations' under cl 15.2(b) of the Lease (make good) with respect to the floor tiles when it installed the floor tiles in or around December 2012.*

235 For the reasons set out at [172] to [185] above, yes.

***Issue 6: Further, or in the alternative to the issues set out above, whether the agreement to allow Craft Décor to remain in the Premises for an two extra weeks was made on the basis that Craft Décor would remove the floor tiles and comply with its 'end of lease' and 'make good' covenants, is, in and of itself, an independent contractual agreement, supported by its own consideration.***

236 Issue 6 is an important issue in the resolution of these proceedings. Before I come to my findings, it is important that I briefly repeat the relevant chronology of events leading up to the Termination Notice and the decision to allow Craft Décor to vacate the Premises on 15 January 2019.

237 The Lessors delivered the Termination Notice on 23 November 2018. The Termination Notice required vacant possession by 31 December 2018. For completeness, it is noted that the Termination Notice specified that the tiles were to be removed and the concrete floor sanded back to its original condition.

238 On 7 December 2018, Mr Patterson then emailed the Lessors to 'touch base' as he had not heard from anyone in management about vacating.

239 On or around 10 December 2018, Mr Nabilo called Mr Patterson and explained that he was 'shocked' to receive the Termination Notice and that he had understood that Craft Décor would be able to remain for a further period. Mr Nabilo said words to the effect that Craft Décor would not be able to move out on 31 December 2018 due the festive season and that it would be impossible for staff and tradespeople to be available over Christmas. Mr Nabilo wanted the Premises until 15 January 2019. What Mr Nabilo said is not in contest.

240 Mr Nabilo says that Mr Patterson indicated that it should not be a problem but that he needed to speak with someone and would get back to him.

241 On his own evidence, Mr Patterson says that he agreed:

... to *extend* time provided for under the Notice [sic] two weeks to 15 January 2019 so that [Craft Décor] could remove the floor tiles and comply with its other end of lease and make good covenants.  
(My emphasis)

242 Mr Patterson then says that 'Tony agreed to those terms and the conversation ended'.

243 Mr Nabilo agrees that during their conversations in December 2018, Mr Patterson had said he wanted the tiles removed. That is consistent with the Termination Notice which also set that out.

244 However, Mr Nabilo says that at no time did he agree to remove the floor tiles. When questioned (at considerable length ts 363 - 382, 10 September 2020) during cross-examination about the floor tiles, Mr Nabilo gave the following evidence (ts 366, 10 September 2020):

...

**Mr Moss:** ... But in this period of time that we're talking about, around the time of these agreements, the agreements that we say - obviously you say it's something else. But what did he say to you?

...

**Mr Moss:** ... But in this period of time that we're talking about, around the time of these agreements, the agreements that we say - obviously you say it's something else. But what did he say to you?

**Mr Nabilo:** Are you talking in reference to removing tiles?

**Mr Moss:** Removing tiles?

**Mr Nabilo:** I do not dispute that Mr Patterson asked me to remove the tiles at some stage, you've got it in writing there, it's on the termination notice. He can write it on emails, you can send it in letters, he can ring me up 10 times a day. That is what he is demanding. That is not what I agreed to.

**Mr Moss:** But that's not what you told him?

**Mr Nabilo:** It's absolutely what I told him. I told him that - I told him that vacant possession will be his on 15 January 2019[.]

245 When he was questioned as to whether there was an 'agreement' as to removal of the porcelain tiles, Mr Nabilo responded as follows (ts 366, 10 September 2020):

...

**Mr Moss:** He didn't mention at all, was that right?

**Mr Nabilo:** No agreement. I am here to serve the best interests and the commercial interests of Craft Décor Pty Ltd as a director, and I take that position very, very seriously[.]



246 When cross-examined as to his silence on Mr Patterson seeking assurances that Craft Décor would be removing the floor tiling, Mr Nabilo responded as follows (ts 369, 10 September 2020):

...

**Mr Moss:** You neither answered yes or no[?]

**Mr Nabilo:** I am not going to say yes, I am not going to say no, I am going to tell you that we will move out, vacate the premises by 15 [January].

247 Another exchange was as follows (ts 377, 10 September 2020):

...

**Mr Moss:** Mr Patterson demanded of you to remove the floor tiles on the following occasions. Firstly, starting with the termination notice dated 23 November 2018. Secondly, the telephone conversation where he again demanded the removal of floor tiles in consideration of extending your occupancy for two weeks. We say it was on 12 December. Thirdly, by the invoice that I showed you. Fourthly, on 7 January in email to Mary Nadilo, your general manager, asking when the floor tiles would be removed, in which you didn't answer the question. Fifthly, the confrontation at the premises between Mr Patterson and yourself on 14 January where he asked you why are you still open for business the day before you had to get out, and why you haven't removed the floor tiles. So the question is this, why at no time before or after any of those separate events did you not tell Mr Patterson that you had an undertaking from your previous landlord waiving his rights to require the removal of the tiles

**Mr Moss:** Why didn't you tell him at any time? You said before you're not required to, that's not what I am getting at. I'm asking you why you didn't?

**Mr Nabilo:** Mr Patterson was placing demands, and all these occasions, he's just placing demands, and

**Mr Moss:** But you had this undertaking?

**Mr Nabilo:** Demand doesn't equate to an agreement in my book, because agreements usually require two people consenting, and actually coming to a mutual decision and a mutual arrangement[.]

248 Mr Nabilo said the following in his witness statement:

At no time during any of my telephone conversations or discussions with Mr Patterson, or at all, did I inform Mr Patterson that Craft Décor would remove the floor tiles at the Joondalup store back to a concrete floor. Craft Décor was not obligated to remove the polished porcelain tiles as they had been installed in place of the maroon tiles.

249 On 17 December 2018, Mr Patterson called Craft Décor and followed up with an email to the effect that because no one had called him back, that Craft Décor no longer needed the '*extension*' to the Lease. (My emphasis).

250 Following that email, Mr Nabilo called Mr Patterson and the date of 15 January 2019 was agreed. This was to be confirmed by Mr Patterson in writing.

251 On 18 December 2018, the following email exchange took place:

**Ms Anderson:** Tony Nadilo has advise [sic] me you will provide a letter to Craft Décor vactating our Joondalup showroom. Can you please forward the notification to me. I will arrange for Tony to sign tomorrow morning.

**Mr Patterson:** If it's ok I'll send an invoice stating the 15<sup>th</sup> as departure date and the amount due to be paid.

252 On 20 December 2018, the Lessors sent an invoice to Craft Décor in the following terms:

2 week *extension* to lease including water council rates and strata fees for units 1 and 2, 22 Franklin Lane, Joondalup. This is a final invoice before termination of lease for 15 January 2019.

(My emphasis).

253 It is not in contest, and I find, that at the time these discussions took place, the Premises were being rented by Craft Décor pursuant to cl 14 of the Lease (holding over). Viewed objectively, these communications, as I have emphasised above, confirm that the Lease was to be extended by two weeks. That is, the 'agreement' was to extend the holding over period under the Lease, not to negotiate a new lease. I note here that this 'fact' is agreed between the parties: see [25] above.

254 There is nothing in the evidence that suggested that the parties sought to vary the terms of the Lease. I find that the extension was, in effect, an extension of the holding over period under the Lease. It follows that cl 14 of the Lease (holding over) governed the relationship between the parties after the expiration of the term set out in the Schedule

to the Lease. Clause 14 provides that during the holding over period the rent shall be 110% of the rent that was payable immediately prior to the expiration of the lease term and 'upon all the covenants and conditions contained in this Lease with such modifications or variations as are necessary to make them applicable to a tenancy from month to month'.

255 It follows that because the Lease was extended by two weeks, for the same reasons I explained at [172] to [185] above, Craft Décor was under no obligation to remove the floor tiles.

256 While I have no doubt that Mr Patterson was, during these discussions, stating a desire for the floor tiles to be removed, this was because of his belief that it was required of Craft Décor under the Lease. I accept Mr Nabilo's evidence and find that he responded to Mr Patterson's demands by saying, words to the effect that, the Lessors 'will get vacant possession by 15 January 2019' and that 'we will be out by 15 January 2019' but did not expressly commit to removing the floor tiles.

257 It seems to me that both Mr Nabilo and Mr Patterson were both saying that the Lease covenants should be complied with in the agreement to extend the holding over. The contest is actually around what the covenants in the Lease actually were.

258 However, for present purposes, the parties to the Lease agreed to extend the holding over by two weeks. I therefore find that the oral agreement made in December 2018 was not a separate agreement supported by its own consideration. As I have stated, it was an oral agreement to extend the holding over period under the Lease.

259 I would also add that, in terms of variations to the Lease, the Lease was executed as a Deed. Pursuant to s 9(1) of the PL Act, the formalities of a Deed require the parties that are bound by that Deed, to sign the Deed. That tends to indicate that formal changes to the Deed must be reduced to writing.

260 Because of the conclusions I have reached, it is not necessary to consider whether the Lessors' demands for the floor tiles to be removed as a condition of a new (separate) two-week lease could be regarded as 'key money' for the purposes of s 9 of the Retail Shops Act and therefore void. That issue simply does not arise.

***Issue 7: In the alternative to Issue 6, whether Craft Décor, having agreed to that the time provided under the Termination Notice (issued on or around 23 November 2018) would be extended by two weeks to 15 January 2019 so the Craft Décor could remove the floor tiles and comply with its other end of lease and make good covenants, is precluded and equitably estopped from claiming or asserting any other right, whether under the terms of the Lease or otherwise, to refrain from removing the tiles.***

261 I note here that Craft Décor do not accept that there was an 'agreement' for the purposes of Issue 7. Craft Décor says it did not agree that it promised the Lessors that it would, in exchange for the holding over period being extended by two weeks, remove the floor tiles.

262 I have found in the context of Issue 3 and Issue 6 that Craft Décor said that it would 'give up vacant possession' and 'be out'. I have found that Craft Décor did not promise to remove the floor tiles as part of those discussions.

263 It follows that the question of equitable estoppel does not arise.

***Issue 8: Further, or in the alternative to the issues set out in Issue 6 and Issue 7 above, whether Craft Décor has, by failing to remove the floor tiles and complying with its 'end of lease' and 'make good' covenants as per the Extension Agreement, engaged in conduct that is, in all the circumstances, unconscionable pursuant to s 15D of the Retail Shops Act.***

264 As was explained in *Head and Zimmermann* at [37], at the core of the question of unconscionable conduct, for the purposes of the Retail Shops Act, is conduct or behaviour:

which, in all the circumstances, is well outside what might be expected in relations between parties to an arm's length commercial relationship and therefore unacceptable.

265 Having regard to the narrative of events leading up to 15 January 2019, I can see nothing in the conduct of Craft Décor that could be regarded as unconscionable. In short, Craft Décor was issued with the Termination Notice in November 2018 which required it vacate the Premises on 31 December 2018.

266 While the Lessors were entitled to terminate the Lease in the manner it did, it seems to me that it would be a particularly difficult time to vacate the Premises. This is because, as at late November 2018, it is likely that

many of the staff from Craft Décor had planned leave for the end of the year period. Indeed, Mr Nabilo's evidence confirmed that to be the case.

267 Mr Nabilo contacted in December 2018 Mr Patterson and explained that Craft Décor could not vacate the Premises by the end of year and needed two extra weeks to vacate. At some point in these discussions Mr Patterson again referred to the need for the floor tiles to be removed. Mr Nabilo did not directly address Mr Patterson's requests and said that Craft Décor would provide 'vacant possession' and 'be out' by 15 January 2019.

268 To the extent that Mr Nabilo's failed to expressly respond Mr Patterson's requirement that the floor tiles be removed as part of vacating the Premises, in my view, Mr Nabilo was entitled to respond that Craft Décor would provide 'vacant possession'. By saying that, I find what Mr Nabilo was saying was that Craft Décor would comply with its requirements of the Lease. Mr Nabilo did not consider that Craft Décor was obliged to remove the floor tiles under the Lease. In this regard, for the reasons I have explained, I agree with Mr Nabilo.

269 While the Lessors have made much of Mr Nabilo's failure to say to Mr Patterson that while Craft Décor needed an extra two weeks, it would not remove the floor tiles, Craft Décor were entitled to rely on the Lease as the touchstone which determines its obligations.

270 There was nothing unconscionable in Mr Nabilo responding to Mr Patterson's requirements to remove the floor tiles, which I have found was not required by the Lease, with a general comment that Craft Décor would provide 'vacant possession' and 'be out'. There is also nothing 'unconscionable' in Mrs Nabilo advising Mr Patterson that Craft Décor was working on getting out 'as agreed'.

***Issue 9: If Craft Décor has failed to fulfil its covenants under the Lease:***

***(a) whether the Lessors were entitled to carry out all repairs or works which should have been carried out by Craft Décor; and***

***(b) whether the respondent is obliged to pay the Applicants upon demand the cost of such repairs or works,***

***pursuant to cl 15.3 of the Lease.***

271 For the reasons I have explained, Craft Décor has failed to comply with cl 15.2(a) of the Lease. The Lessors were entitled to carry out the

painting which should have been done by Craft Décor. By reason of cl 15.3 of the Lease, Craft Décor owe the Lessors the cost of the painting (which I have found to be a total of \$4,070).

***Issue 10: Whether the Craft Décor is obliged to pay the Lessors' legal and professional costs and disbursements on a full indemnity basis pursuant to cl 9.3 and cl 9.4 of the Lease.***

272 The terms of cl 9.3 and cl 9.4 of the Lease are clear. To the extent that Craft Décor has breached the Lease, it is required to pay the Lessors' 'costs[, ] charges and expenses' on 'a full indemnity basis'.

273 Craft Décor have breached the Lease by failing to paint the Premises as required by cl 15.2(a) of the Lease. It is therefore liable to pay the Lessors' legal and professional costs in this regard. The professional costs of painting are \$4,070 and its legal costs are to be determined.

274 The quantification of those costs arising under the Lease is not a matter for the Tribunal.

### ***Craft Décor's Application***

275 As I explained at [6] and [13] to [15], the Lessors have conceded Craft Décor's Application. That is, the Lessors admit that they breached the Lease in the manner in which they accounted for the payment of rent and Outgoings. The updated auditor's report of 20 March 2020 outlines that Craft Décor should be paid \$2,675. I find that this is the amount that Craft Décor is owed in relation to Craft Décor's Application.

276 However, Craft Décor's Application has not been resolved because the Lessors proposed to require Craft Décor pay half of the auditor's fee of \$3,201 (Craft Décor's share being \$1,600.50). The Lessors submit, by reason of s 12(1b) of the Retail Shops Act, the cost of preparing the 'audit' referred to in s 12(1a)(e) 'shall' be split between the landlord and the tenant.

277 The use of the word 'shall' in a written law is imperative: s 56 *Interpretation Act 1984* (WA).

278 Section 12(1a)(e) provides that an operating expenses statement is be accompanied:

[B]y a report on the statement prepared by a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth which includes a ... statement by the auditor as to whether or not the operating expenses statement correctly states expenditure by the landlord

during the accounting period concerned in respect of operating expenses to which the tenant is required to contribute, and as to whether or not the total amount of estimated operating expenses for that period (as shown in the estimate of operating expenses given to the tenant) exceeded the total actual expenditure by the landlord in respect of those operating expenses during that period.

279 To my mind, based on the evidence in this matter, it would be a triumph of form over substance for the materials that were provided by the Lessors for the purpose of the report prepared by Mr Daniel Papaphotis on 15 January 2020 to be regarded as an 'audit' that falls within the terms of that required by s 12(1a)(e) of the Retail Shops Act.

280 The premise that underlies the preparation of an 'audit' for the purpose of the Retail Shops Act is that the information provided to an auditor is correct and that it is also complete. In this case, the evidence establishes that Mr Patterson was indifferent to whether the materials he initially gave the auditor was complete or correct.

281 The evidence also demonstrates that the information provided to the auditor was not accurate, nor complete. It did not include the bank details which evidence two months' worth of payments made to one of Mr Patterson's nominated bank accounts. All that had happened is that Mr Patterson did not realise that Craft Décor had been directed by the Lessors' agent to pay its rent and Outgoings into. On the basis he requested Mr Papaphotis prepare a report (but he did not give Mr Papaphotis all of the necessary information).

282 To my mind, what was provided to the auditor, and what the auditor prepared based on that limited information, was not an 'audit' for the purposes of s 12(1a)(b) of the Retail Shops Act. In my view, the cost of the 'audit' process should lie where it falls. That is, on the Lessors.

283 The cost of the bank tracing fees is a cost that Craft Décor incurred in proving that the Lessors' 'set off claim' was false. I am not satisfied that is a question arising under a Lease that I may address.

### *Conclusions*

284 In summary, I conclude and find as follows:

#### **CC 1208 of 2019 (Lessors' Application)**

- (a) Craft Décor was not responsible for removing the floor tiles under the Lease.

- (b) At all times, the Lease governed the relationship between the parties. The holding over period was extended to 15 January 2019 by consent. The agreement to allow Craft Décor to stay an additional two weeks was an extension of holding over. It was not a new and separate agreement.
- (c) On the evidence, I am not satisfied Craft Décor damaged the doors, tiles vanities and toilets as claimed by the Lessors. Accordingly, I am not satisfied that Craft Décor did not comply with its covenants under cl 4.2 and cl 15.2 of the Lease in relation to these items.
- (d) No claim of equitable estoppel arises against Craft Décor under the Lease.
- (e) No claim of unconscionable conduct arises against Craft Décor under the Lease.
- (f) Craft Décor has breached cl 15.2(a) of the Lease in relation to the painting of the Premises. As a result, pursuant to cl 15.3 of the Lease it is required to pay to the Lessors the cost of the painting fixed at \$4,070 (GST inclusive).
- (g) Pursuant to cl 9.3 and cl 9.4 of the Lease, the Lessors are entitled to their legal and professional costs and disbursements on a full indemnity basis in relation to Craft Décor's failure to paint the Premises. However, the quantification (and recovery) of those costs under the Lease is not a matter for the Tribunal.

**CC 1670 of 2019 (Craft Décor's Application)**

- (a) The Lessors have breached cl 2 and cl 3 of the Lease in failing to properly account for the payment of rent, water rates, council rates and strata levies.
- (b) Craft Décor have overpaid the requirements of the Lease by \$2,675. It follows that the Lessors are required to pay \$2,675 to Craft Décor.



*Orders*

285 The orders that I propose to make are as follows, but I will first hear from the parties as to the precise form and content of the orders necessary to give effect to these reasons.

The Tribunal's proposed orders are as follows:

**CC 1208 of 2019**

1. Craft Décor Pty Ltd (ACN 008 759 206) is, within 28 days of the date of these orders, required to pay Mr David Patterson and Ms Jacqueline Anne Argus (the Lessors) the amount of \$4,070 on account of the failure to paint the Premises pursuant to its make good covenants set out at cl 15.2(a) of the Lease.
2. Craft Décor Pty Ltd (ACN 008 759 206) is obliged to pay the Lessors' costs and fees in relation to painting the Premises on account of its breach of cl 15.2(a) of the Lease in accordance with cl 9.3 and cl 9.4 of the Lease.
3. The Lessors' application is otherwise dismissed.

**CC 1670 of 2019**

1. The application is allowed.
2. Mr David Patterson and Ms Jacqueline Anne Argus (the Lessors) are to, within 28 days of the date of these orders, pay Craft Décor Pty Ltd (ACN 008 759 206) the amount of \$2,675 on account of their failure to properly account for rent and outgoings under cl 2 and cl 3 of the Lease.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

DR S WILLEY, SENIOR MEMBER

25 JUNE 2021