JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
ACT	:	COMMERCIAL TENANCIES (COVID-19 RESPONSE) ACT 2020 (WA)
CITATION	:	TWIN CREEK HOLDINGS PTY LTD and BB APPLECROSS PTY LTD [2021] WASAT 93
MEMBER	:	MS N OWEN-CONWAY, MEMBER
HEARD	:	2 DECEMBER 2020, 15 APRIL 2021 AND 7 JULY 2021
DELIVERED	:	7 JULY 2021
FILE NO/S	:	CC 1156 of 2020
BETWEEN	:	TWIN CREEK HOLDINGS PTY LTD Applicant AND BB APPLECROSS PTY LTD Respondent

Catchwords:

Small commercial lease - Pandemic response - Restrictions - Related body corporate - Group - Entity - Eligible tenant - Interest claimed - Prohibited action - Turns on own facts

Legislation:

Commercial Tenancies (COVID-19 Response) Act 2020 (WA), s 8, s 9, s 16
Commercial Tenancies (COVID-19 Response) Regulations 2020 (WA), Sch 1, cl 2, cl 2(2)

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (WA), r 7, r 8
Corporations Act 2001 (Cth), s 9, s 46, s 46(a)(ii), s 50
Emergency Management Act 2005 (WA)
Public Health Act 2016 (WA)
State Administrative Tribunal Act 2004 (WA), s 9, s 13, s 16, s 17

Result:

Partially successful

Category: B

Representation:

Counsel:

Applicant	:	Mr G O'Brien (Director)
Respondent	:	Mr J Robertson

Solicitors:

Applicant	:	N/A
Respondent	:	Williams & Hughes

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

Pham and Bao [2021] WASAT 29

REASONS FOR DECISION OF THE TRIBUNAL:

These reasons, in part, were delivered orally on 15 April 2021. For the reasons explained below the hearing was reopened and further affidavit evidence was led. These reasons are, in part based upon the transcript of the orally delivered reasons on 15 April 2021, with corrections to the transcribed reasons, amendments and adjustments to the transcribed reasons for syntax, grammar, formatting necessary for publication and addition of formal citations. In addition, the list of exhibited documents is also included in these reasons for completeness.

The application

1 On 14 September 2020, Mr O'Brien, the director of the applicant, applied to the Tribunal, pursuant to s 16 of the *Commercial Tenancies (COVID-19 Response) Act 2020* (WA) (**Act**), for the Tribunal to determine a dispute between the applicant and BB Applecross Pty Ltd, the respondent. By order dated 17 September 2020, the name of the applicant was amended to Twin Creek Holdings Pty Ltd, being the intended applicant in this proceeding.

The orders sought by the applicant

2 The applicant seeks an order that the respondent pay to the applicant money that the applicant says is due, owing and payable pursuant to the terms of a lease between the parties. The applicant claims all monies due, owing and payable pursuant to a lease, as rent for the months of April to December 2020 with no rent relief pursuant to the Act. The applicant also claims interest, pursuant to the terms of a lease, on unpaid rent, variable outgoings and electricity charges.

3 The applicant further seeks an order compelling the respondent to 'provide meaningful financial information' in order to determine any rent relief as referred to in the Act, the Code of Conduct adopted by the *Commercial Tenancies (COVID-19 Response) Regulations 2020* (WA) (**Regulations**) and comprised in Sch 1 thereto (**Code**) and the Regulations.

The respondent's response

4 The respondent's response, briefly, is that it opposes the applicant's application for the payment of all of the money that the applicant claims as no rent relief has been granted by the applicant. What exact amount

the applicant claims as rent due, owing and payable pursuant to a lease, as at the conclusion of the hearing on 2 December 2020 and on 15 April 2021 was unclear.

5 The respondent contends that the Tribunal should order certain rent, otherwise payable pursuant to the terms of the lease, be waived and deferred pursuant to the Act, the Regulations and the Code.

The applicant and respondent's relationship

6 The applicant is the owner of Lot 16 on Strata Plan 63141, being the whole of the land comprised in Certificate of Title Volume 2878 Folio 260. Part of that lot is referred to as 1A, Unit 16, 21 to 23 Queens Road, Mount Pleasant in Western Australia (**property**). The applicant is the landlord of that property and the respondent is the tenant, the applicant having leased the property to the respondent pursuant to a lease dated 19 March 2019 (**lease**).

Jurisdiction of the Tribunal

7 Section 16 of the Act and s 13 of the *State Administrative Tribunal Act*, (**SAT Act**) operate to confer jurisdiction upon the Tribunal to determine disputes as defined by the Act.

8 Such disputes fall within the Tribunal's original jurisdiction, as provided for by s 15 of the SAT Act. Section 17 of the SAT Act confers specific powers on the Tribunal to make orders in respect of disputes, as defined by the Act. Section 16 of the SAT Act directs the Tribunal to deal with a matter falling within its original jurisdiction in accordance with the SAT Act and the Act.

9 The Tribunal's statutory objectives include determining and resolving disputes fairly and according to substantial merits, as provided by s 9 of the SAT Act.

10 To that end, and in compliance with the requirements to comply with the rules of natural justice, the parties were afforded the opportunity to provide the Tribunal and each other with documents upon which they intended to rely, to give oral evidence, cross-examine witnesses and make submissions during the final hearing.

11 The documents before the Tribunal are:

a) Exhibit 1 - hearing book comprised of the applicant's and respondent's filed documents, submissions, the application and response;

b) Exhibit 2 - bundle of financial records and additional documents provided by the respondent to the Tribunal at the final hearing (previously provided to the applicant);

c) Exhibit 3 - email from respondent's solicitor to the applicant dated 22 September 2020 with attached financial documents;

d) Exhibit 4 - Balance Sheet of respondent proposed as at 31 December 2020; and

e) Exhibit 5 - applicant's schedule of interest due, owing and payable pursuant to the lease.

The lease

12 The lease between the parties provides that the respondent was permitted to use the property for:

> Pilates studio and all allied health and wellbeing purposes, provided that such use complies with the planning approval issued by the City of Melville dated 25 February 2019.

13 There is no dispute between the parties that, at all material times, the respondent operated a pilates studio or fitness/wellness centre and conducted pilates classes at the property. The respondent also operated a physiotherapy service from the property. There was no issue between the parties that the respondent complied with all relevant statutory requirements and the lease to this extent, including the planning approval requirement.

Coronavirus 19 pandemic

14 The relevant Federal and State statutory responses to prevent the spread of the Coronavirus 19 (**COVID-19**) in Western Australia are identified in the decision of ***Pham and Bao*** [2021] WASAT 29 (***Pham***) at pages 4 to 6 and generally adopted herein. Specifically relevant in this proceeding, on 23 March 2020 the closure of certain places of business, worship and entertainment directions (**closure direction**) was

pronounced pursuant to the *Emergency Management Act 2005* (WA) (**EM Act**) and a state of emergency declared on 15 March 2020.

15 The closure direction required an owner, occupier and persons apparently in charge of certain businesses to close those businesses to the public and refrain from operating the same. The operation of a gym was included in the closure directions. Mr Joel Wescombe, a director and shareholder of the respondent, gave evidence that the respondent's business closed pursuant to that closure direction on 23 March 2020. The Tribunal finds that the applicant's business did close as directed.

16 On 25 March 2020 the Closure of Certain Places of Business, Worship and Entertainment Directions (No 2), (**closure directions 2**), were pronounced pursuant to the EM Act and the state of emergency declaration. The closure directions 2 contained additional directions to supplement the closure directions. Clause 5 of the closure directions 2 directed:

> Every owner, occupier or person apparently in charge of an **affected place** must close that place to the public for a period commencing at the beginning of the day after the day [on which the closure directions 2 was made].

17 An expanded definition of 'affected place' was included and expressed to mean one of the following additional activities:

> [W]hether operated on a profit or not-for-profit basis:
>
> …
>
> (l) a health club or fitness centre, including a centre offering yoga, barre or spin facilities;
>
> ….
>
> (o) a wellness centre[.]

18 On 30 March 2020, the Closure of Certain Places of Business and Entertainment Directions (No 3), (**closure directions 3**) were pronounced pursuant to the EM Act and the state of emergency declaration. The closure directions 3 did not alter the closure directions 2 or the original closure directions, respectively for the operation of a gym, health club, health/fitness or wellness centre.

19 On 7 April 2020 the closure directions and the closure directions 2 and 3 were revoked and in their place Closure and Restriction (Limit the

Spread) Directions came into effect (**restriction directions**). Clause 10 of the restriction directions provided that:

> Every owner, occupier and person apparently in charge of an **affected place** must close that place to the public while the directions remain in effect.

20 Clause 14 of the restriction directions defined the 'affected place' to include a gym, an indoor sporting centre, a health club or fitness centre, including a centre offering yoga, barre or spin facilities and a wellness centre (clause 14).

21 The restriction directions also restricted otherwise lawful social interactions between people in an effort to prevent the spread of COVID-19.

22 The restriction directions were subsequently repealed and replaced, but the operation of the respondent's business continued to be restricted until effectively 6 June 2020, when the Closure and Restrictions Directions (Limit the Spread) No 4 was pronounced and came into the effect at 11.59 pm on 5 June 2020 (**closure directions 4**). The Tribunal finds that the applicant re-opened its business on or about 6 June 2020.

23 From 6 June 2020 to the date of the hearing on 2 December 2020, restrictions were imposed by the restriction directions and subsequent directions made pursuant to the *Public Health Act 2016* (WA), EM Act and/or the state of emergency declaration on otherwise lawful conduct of people within the State, restricting social and other activities to varying degrees, so as to reduce or prevent the spread of COVID-19. In particular, clause 11(b) of the closure directions 4 only permitted:

> … gym, indoor sporting centre, wellness centre, health club or fitness centre (including a centre offering yoga, barre, pilates, aerobics, dancing or spin facilities) or boot camp …

to be open to the public if the staff were present at all times to supervise patrons at the place.

24 The note to that requirement provided that closure directions 4:

> *… imposes an obligation on gyms, indoor sporting centres, wellness centres, health clubs, fitness centres and boot camps (which are not in hotels for the exclusive use of hotel guests or in residential premises for the exclusive use of residents) to have staff present whenever patrons are*

> *present, for the purposes of ensuring that appropriate hygiene measures are taken including cleaning of equipment and physical distancing[.]*

25 Clauses 5, 6 and 7 of closure directions 4 prohibited a person who owns, controls or operates premises in the State from allowing those premises to be used for a prohibited gathering. Clause 13 provided that 'prohibited gathering' means, relevantly:

> (b) a gathering of 2 or more persons in a single undivided indoor space or a single undivided outdoor space at the same time … where there is not at least 2 square metres of space for each person at the gathering[.]

In the case of a single, undivided indoor space, allowance must be made effectively, for 4 square metres for each person, or rather (2 metres between all people at all times), which amounts to a circular cubic area of approximately 12.5 metres per person.

26 Consequently, the operation of the respondent's fitness centre conducting pilates classes or a gym or a fitness/wellness centre from 6 June 2020 was limited by the respondent being required to have sufficient staff on the property to ensure sufficient hygiene and cleaning of equipment and to monitor the physical distancing requirements of each person who came to a class.

27 The physical distancing requirement made classes smaller because fewer people could fill the class space. This inevitably is likely and did have an impact on the respondent's business in June 2020, albeit that the impact was moderate. The Tribunal finds that, based on the above, the respondent's business of pilates studio, wellness centre, fitness centre and/or gym was required to be closed to the public between 23 March 2020 to and including 5 June 2020 and that it could not operate at full capacity for some time. Consequently and obviously, there was limited prospect that such a business could be in receipt of ordinary revenue earned from the operation of that business, which was prohibited in that period.

28 In addition, given the terms of the Mass Gathering Directions No 2 and the Prohibited Gathering Directions referred to in ***Pham***, as well as closure directions 4, the Tribunal infers that the prospect of normal business and trade for a pilates studio, fitness centre, gym and wellness centre progressively reduced from at least 21 March 2020 until 26 March 2020 and then it was prohibited until 6 June 2020.

29 The Tribunal infers that participation in classes in such a business may have progressively increased in patronage and turnover from 6 June 2020 by reason of the relaxation of the draconian measures taken to keep the community safe. The Tribunal draws these inferences as they are consistent with the documentary evidence adduced by the respondent, the evidence of witnesses and the obvious decline in turnover for the months of April, May and June 2020, referred to below.

The statutory framework

30 The relevant provisions of the Act and the Code are referred to in the decision of ***Pham*** and are adopted for the purposes of these reasons.

What is this dispute about?

31 Put shortly, as at 2 December 2020, the parties agreed, in substance, that the respondent did not pay rent that was otherwise due, owing and payable pursuant to the lease for the period April 2020 to November 2020. The lease provides that the rent is to be paid monthly on the first date of each calendar month (clause 2 of the lease and part 5 of the disclosure statement).

32 The lease provides that the respondent is liable to pay the specified outgoings. The electricity outgoings are to be paid on the basis of actual consumption, in arrears. All other outgoings are paid on a budgeted/ estimated basis and reconciled from time to time pursuant to the terms of the lease. At the time of the creation of the reconciliation document, being the first page of Exhibit 2 tendered by the respondent, the rent for December 2020 was not due. By the date of the hearing on 2 December 2020 that month's rent was due.

33 Both parties agree that the sum of $5,770.59 inclusive of GST is otherwise due, owing and payable for each month pursuant to the lease in the period April through to December 2020 totalling $51,935.31 (including GST). As at the date of the hearing on 2 December 2020, the applicant referred to the respondent's conduct in not having paid the rent as 'withholding the rent'. The applicant complained to the Tribunal that withholding the rent, or at least that part which was not in dispute, was essentially oppressive and had caused the applicant financial distress. The applicant's alleged financial distress was not particularised in any way. The Tribunal, however, does acknowledge that the non-receipt of such a large sum of money would likely place a landlord in some financial difficulty and distress. At the hearing on 2 December 2020, all outgoings had been paid or were otherwise agreed to be paid.

34 There was a significant dispute between the parties concerning the electricity consumption outgoings rendered to the respondent for payment. Ultimately, that dispute was resolved as at 2 December 2020 and the applicant agreed that the electricity consumption outgoing amounting to $9,921.81, was not properly a cost that could be passed on to the respondent. The applicant conceded that the respondent's objection to the electricity consumption charge in that sum by the applicant was correctly raised by the respondent and the applicant no longer claimed the electricity outgoings of $9,921.81 against the respondent.

35 On the 2 December 2020, the respondent conceded that it is liable to pay the applicant the sum of $99.61 including GST for electricity consumption and further, general variable outgoings in the sum of $3,275.98, being the monthly estimated and budgeted outgoings of $1,637.99 including GST per month for two months. Whether that latter sum had actually been paid as at the date of the hearing on 2 December 2020 was not clear. The total agreed outgoings that were (possibly) outstanding as at 2 December 2021 is $3,375.59. At the time of the hearing there was no dispute about these figures but there was a dispute whether any part of the variable outgoings or the electricity outgoings had in fact been paid by the respondent to the applicant. There was also confusion if any and what amount had been paid in rent and for which months. The confusion was caused by the payment of $20,587.75 by the respondent to the applicant on 1 December 2020 and the lack of evidence of how that sum was in fact or intended to be allocated between outstanding outgoings and outstanding rent, which is the subject of the parties' affidavit evidence adduced on 3 and 4 May 2021. That affidavit evidence establishes that all variable outgoings had been paid as at 1 December 2020 but the electricity outgoings agreed in the sum of $99.61 was outstanding, along with rent.

36 In short, there appeared to be no dispute about the rent and outgoings that are otherwise due, owing and payable by the respondent to the applicant pursuant to the lease for the period of July to December 2020. The rent due pursuant to the terms of the lease is six months of rent at $5,770.59 per month, which amounts to $34,623.54 including GST. There was no dispute about the amount of rent that was due, owing and payable *pursuant to the lease* for the period April, May and June 2020 (three months of rent at $5770.59 per month, totalling $17,311.77 inclusive of GST) or July, August and September 2020 (three months of rent at $5770.59 per month, totalling $17,311.77 inclusive of GST). The applicant claimed payment of all the monies accrued pursuant to the

lease and the respondent claimed rent relief pursuant to the Act for the period April, May and June 2020 only.

37 In addition, the respondent conceded, effectively, that it is liable to pay the applicant some money as rent for the months of April, May and June 2020 including GST. The Tribunal has recalculated that sum at $8,038.45 (see below).

38 The Tribunal has recalculated the amounts claimed by the respondent as rent relief that is based upon the claimed percentage decline in the respondent's turnover for April 2020 at 92.4%, May 2020 at 58.9 % and June 2020 at 9.2% (see below).

39 The dispute between the parties at the conclusion of the hearing comprised two issues:

a) a dispute as to whether the rent that is otherwise due, owing and payable for the period April, May and June 2020 totalling $17,311.77 including GST should be the subject of rent relief pursuant to the Act, the Code and Regulations and the nature of any rent relief; and

b) whether the applicant is entitled to claim interest on unpaid or late-paid outgoings and rent that should have been paid on their due dates pursuant to the lease.

40 On the first issue, the respondent contends that the Tribunal should order the sum of $4,147.63 in rent to be waived and that same sum should be deferred and amortised over two years commencing at the end of the emergency period provided for by the Act, the Regulations and the Code.

41 On the second issue, the respondent asserts that the applicant's claim should be dismissed.

Evidence, consideration and findings

The rent relief calculation based on the respondent's evidence

42 The Tribunal has examined the respondent's figures, along with all the other documents, and concludes that the figures calculated by the respondent are incorrect, as the totals do not correspond with a percentage decline in the turnover for the relevant months or they do not correspond with the base rate of monthly rent *including* GST. The Tribunal has recalculated those figures based on the percentage decline and concludes and finds that the respondent seeks rent relief in

the sum of $9,273.32 and seeks half of that to be by way of waiver ($4,636.66) and the payment of the remaining half to be deferred ($4,636.66). The tables below indicate the Tribunal's findings of the amount of rent relief sought both as to waiver and deferral inclusive of GST for the months of April, May and June 2020.

Month	Rent payable – Lease incl GST	% claimed and decline in T/O	Rent relief sought	Rent not disputed
April 2020	5,770.59	92.4%	5,332.02	438.57
May 2020	5,770.59	58.9%	3,398.87	2,371.72
June 2020	5,770.59	9.4%	542.43	5,228.16
Total	**17,311.77**		**9,273.32**	**8,038.45**

Rent relief sought	Waiver 50%	Deferral 50%
9,273.32	4,636.66	4,636.66

Interest Claimed by the applicant

43 The Tribunal finds and concludes that this dispute involves a small commercial lease, the respondent being a small business with a turnover of less than $50 million as at 30 June 2019 and is an 'eligible tenant' within the meaning of that term in the Act, the Regulations and the Code.

44 The provisions of s 8(i) of the Act identify that a 'prohibited action':

> … means action under, or in respect of, a small commercial lease (including seeking orders, commencing proceedings in a court or tribunal) …
>
> …
>
> (i) requiring a payment of interest on unpaid rent or on any other unpaid amount of money payable by the tenant to the landlord under that small commercial lease (including, without limitation, operating expenses)[.]

This proceeding is such a proceeding and as such, the applicant's claim for interest is a prohibited action.

45 Section 9 of the Act prohibits the taking of any 'prohibited action' by a landlord during the emergency period. That is, the action taken by the applicant in this proceeding, in so far as its claim for interest is concerned, is prohibited. There are exceptions to that prohibition, but none of those exceptions apply in this proceeding.

46 Therefore, the applicant's claim for interest on unpaid moneys during the emergency period and claimed during the emergency period in this proceeding, that would otherwise be payable pursuant to the lease is a prohibited action. The Tribunal shall dismiss that part of the application because it is prohibited by s 9 of the Act.

Rent Relief issue - eligibility

47 The next issue is a major issue between the parties. The applicant raised a number of arguments to resist any order for the deferral or waiver of rent by way of rent relief under the Act, the Regulations and the Code.

48 At the commencement of the hearing the applicant conceded that the lease is a small commercial lease for the purposes of the Act, the Regulations and the Code. During the course of the hearing the applicant conceded, reluctantly, that the respondent is an 'eligible tenant' for the purposes of the Code and the respondent's rent relief claim. However, the applicant also contends that the respondent was not adversely affected by the COVID-19 pandemic; was not in financial hardship and did not qualify for rent relief at all. This appears to constitute a financial hardship claim, but the premise of the applicant's assertions is that the applicant alleges that the respondent had a higher turnover than disclosed and is therefore *not* an 'eligible tenant'.

49 The applicant's submissions, with respect, were very confused on this issue and no reference was made to the relevant legislation.

50 The applicant's proposition is that the respondent is not an 'eligible tenant' because it has not sustained a decline in income that brings it within the provisions of the Act and particularly the Code. The applicant relies on the following propositions, as understood by the Tribunal:

a) the respondent is a company within a 'group';

b) the 'group' comprises approximately 20 companies; and/or

c) alternatively, the 'group' comprises three companies, BB Online Pty Ltd (**BB Online**), BB Group Pty Ltd (**BB Group**) and the respondent.

51 The applicant asserts that it is entitled to have all of the financial information of the 'group' of companies to assess if there has been a decline in turnover that meets the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (WA), r 7 and r 8, (**JobKeeper legislation**), and the tests referred to therein. That is the central proposition of the applicant's contention.

52 The evidence establishes that:

a) BB Online and BB Group have two shareholders and they own 50% each. They are Joel and Scott Wescombe.

b) Joel and Scott Wescombe are also directors of BB Online and BB Group.

c) Joel and Scott Wescombe are also directors and shareholders of the respondent.

d) Mr Renton is an additional shareholder of the respondent.

e) Messrs Wescombe and Mr Renton own equal shares in the respondent.

f) Mr Renton is not a shareholder or director of BB Online or BB Group and gave evidence that he has no interest in those companies.

g) The respondent is the corporate trustee of a unit trust titled the Applecross Unit Trust and that is its sole concern.

h) Companies acting as trustees for each of the Joel and Scott Wescombe respective family trusts and Mr Renton's family trust are each holders of one of four units in the Applecross Unit Trust.

i) BB Group holds one unit in the Applecross Unit Trust.

53 A commercial search of approximately 20 other companies, which suggests that Joel and/or Scott Wescombe are directors of other companies that used the style 'BB' in their corporate name is provided and relied on by the applicant. There is no evidence that Joel and Scott Wescombe have an interest in the way of a shareholding or otherwise in any of those additional companies.

54 There is no evidence that Mr Renton is a director, shareholder or has any interest in any of those additional companies. The Tribunal was not directed in any way to any of the authorities or the provision of clause 2(2) of the Code, which provides that, for the purposes of cl 2 of the Code only, corporations constitute a 'group' if they are:

> … related bodies corporate (as defined in the *Corporations Act 2001* (Commonwealth) section 9).

55 Section 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**) provides that the phrase 'related body corporate':

> in relation to a body corporate, means a body corporate that is related to the first-mentioned body by virtue of section 50.

Section 50 of the Corporations Act provides, relevantly:

> Where a body corporate is:
>
> …
>
> (b) a subsidiary of another body corporate; …
>
> …
>
> the first-mentioned body and the other body are related to each other.

56 Section 46 of the Corporations Act provides:

> A body corporate (in this section called the ***first body***) is a subsidiary of another body corporate if, and only if:
>
> (a) the other body:
>
> (i) controls the composition of the first body's board; or
>
> (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or
>
> (iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share

> capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
>
> (b) the first body is a subsidiary of a subsidiary of the other body.

57 There is no evidence before the Tribunal that the respondent is a related body corporate, as that phrase is defined and referred to above by the Code, to the additional 20 companies the applicant refers to in the search relied upon by the applicant, or any of them, or to BB Online or BB Group.

58 In order to be satisfied as submitted by the applicant, the Tribunal would likely require cogent and possibly historical evidence of conduct by BB Group and/or BB Online or other companies within the 20 identified by the applicant to establish control of the respondent in the manner described by s 46(a)(ii) of the Corporations Act.

59 In addition, the Tribunal does not have sufficient evidence to establish that the respondent as a corporate trustee of the Applecross Unit Trust, is in a position to be controlled by BB Online and/or BB Group, albeit that's Messrs Scott Wescombe's respective family trusts, have an interest in the Applecross Unit Trust; BB Group has an interest in the Applecross Unit Trust and Joel and Scott Wescombe are shareholders of the respondent. Mr Renton, who is a shareholder of the respondent, a director of the respondent and has an association with a corporate trustee for his family trust, that has an interest in the Applecross Unit Trust is not, on the evidence, in a position to 'control' any of the companies to which the applicant refers.

60 The search relied on by the applicant is not one of the ASIC register but is said to be based upon the ASIC register. The Tribunal does not accept that the search provided and relied on by the applicant provides accurate or sufficient information for the purposes of ascertaining whether any of the companies referred to therein are 'related bodies corporate' to the respondent in any case.

61 Therefore, there is no cogent evidence before the Tribunal to persuade the Tribunal on the balance of probabilities, that the respondent forms part of a 'group' as defined by cl 2(2) of the Code and s 9, s 46 and s 50 of the Corporations Act, albeit that there are some factors that suggest there is a relationship between BB Online and BB Hillarys Pty Ltd as both of those companies provided short-term loans to the respondent during April, May and June of 2020, as disclosed in Exhibit 4

(a progressive balance sheet). The respondent's witness explained these short-term loans in evidence. This represents the first flaw in the applicant's argument that the respondent is part of a 'group' for the purposes of cl 2(2) of the Code.

62 The second flaw in the applicant's argument is that the definition of a 'group' for the purposes of the Code had nothing to do with whether an entity is entitled to claim and receive JobKeeper benefits and has nothing to do with assessing the decline of turnover of the entity pursuant to the JobKeeper rules.

63 The definition of a 'group' is only relevant to assessing the turnover of a 'group', as defined by the Code, to ascertain whether the collective turnover of the 'group' as at 30 June 2019 is less than $50 million. There is no evidence before the Tribunal that the respondent forms part of a 'group' at all for the reasons explained, as defined by the Code, or that in any event those said to comprise the group had a collective turnover of $50 million or more as at 30 June 2019.

64 BB Online was not incorporated until March or April 2020 and there is no evidence that BB Group had a relevant turnover at all. The relevant turnover of the respondent was very small, relative to the threshold amount referred to in cl 2 of the Code of $50 million or more as at 30 June 2019. There is no evidence of relevant turnover in respect of the additional 20 companies the applicant refers to and relies on. In any event, the search that has been put before the Tribunal simply refers to appointment as a date in late 2019 or 2020 for many of those additional companies.

65 If that appointment date is in fact the registration date of those companies, none of those companies had a relevant turnover and there is no evidence that the remaining companies, alone or collectively had a relevant turnover of $50 million or more.

66 The Tribunal is therefore satisfied that the turnover of the respondent is simply the turnover of the respondent as a sole trading entity for the purposes of the Code and is not a company within a 'group' for the purposes of the Code.

67 The Tribunal also notes the phrase 'group' has different statutory meanings in different statutory schemes and is not limited always to 'related bodies corporate' as defined by the Corporations Act. However, the State legislature has decided that a 'group' for the purposes of the Code is defined solely by reference to related bodies corporate as

provided for by the Corporations Act. The Tribunal concludes that the respondent is not part of a 'group' for the purposes of cl 2(2) of the Code and in any event there is no evidence that it or any of the additional 20 companies collectively had a turnover of $50 million or more as at 30 June 2019.

68 The next flaw in the applicant's argument is that the applicant states that the respondent's turnover should be assessed for eligibility purposes under the JobKeeper rules by reference to income or turnover of BB Online, because two of the directors and shareholders of that company are directors and shareholders of the respondent. Further, the applicant asserts that during the period when the respondent could not operate because of the various closure and restriction directions, the respondent informed its clientele that BB Online would endeavour to provide pilates online classes so that patrons could perform those classes in their homes. The applicant asserts that BB Online and the respondent are, in truth, one and the same.

69 For the reasons already expressed above, the Tribunal concludes that there is insufficient evidence to establish BB Online is a related body corporate to the respondent. There is no evidence that BB Online is the alter ego of the respondent. There is no relationship between Mr Renton, his corporate family trust and interest in the Applecross Unit Trust on the one hand and BB Online on the other.

70 Further, provision 6 of the JobKeeper rules provide that the JobKeeper benefit is available to an 'entity', and an 'entity' is defined as an employer. Even an 'entity' within a 'group', as defined by the Code, is entitled to apply for JobKeeper benefits if it is an employer. The respondent did have employees and Mr Renton and Mr Joel gave evidence of the same. The respondent is an entity for the purposes of the JobKeeper rules. Even if the respondent had not qualified for JobKeeper benefits or had not applied therefore (which it did), the Tribunal is satisfied that the respondent is an 'eligible tenant' for the purposes of the Act, the Regulations and the Code, because the evidence before the Tribunal clearly establishes that on any view of the matter the respondent suffered more than a 30% loss of income for a period during the statutory emergency period, being April and May 2020. The respondent did register for JobKeeper benefits for April, May and June 2020. That being the case, the Tribunal finds that the respondent is an eligible tenant during the whole of the emergency period ending on 30 September 2020.

71 The applicant further contended that the respondent 'diverted' its receipts to BB Online because during the period when the respondent could not operate as a gym and pilates class, it informed its clients that it could obtain online services from BB Online.

72 The flaw in the applicant's argument and submission is that the respondent was not able to provide a gym or pilates class service during April and May 2020 and 1-5 June 2020 and referred its clients to an entity that could provide substituted services that were not the same as the services that the respondent had been providing. The Tribunal finds that the respondent did not, and never has provided online pilates classes.

73 There is no evidence, for the reasons expressed, that BB Online is the alter ego of the respondent or that they are somehow one and the same or that their turnover should be combined for the purposed of the Act, the Regulations or the Code.

74 The Tribunal dismisses the applicant's submissions that the respondent cannot claim rent relief pursuant to the Act, the Regulations and the Code on those bases.

75 The Tribunal is therefore satisfied on the evidence and concludes that the respondent, as a tenant of the property, pursuant to a small commercial lease, suffered decline in its turnover of more than 30% in the months of April and May and during the period in which the respondent sought rent relief from the applicant and that it met the JobKeeper test. Consequentially, the Tribunal concludes that the applicant's demand or request for financial information concerning BB Online, BB Group and/or any of the additional companies referred to by the applicant is without foundation and was an unreasonable request in light of the proper construction of the Act, the Regulations and the Code, the Corporations Act and the relevant evidence, which evidence the applicant had at all material times.

76 The Tribunal is satisfied therefore that the respondent was at all material times in April, May and June 2020 an 'eligible tenant' for the purposes of the Act, the Regulations and the Code and was entitled to make the claim for rent relief to the applicant pursuant thereto. Further, the Tribunal finds that the respondent did make a rent relief claim and the applicant refused it and did not provide any rent relief to the respondent.

The rent relief claim

77 The Tribunal is satisfied on the evidence, and particularly the evidence attached to the bundle in Exhibit 2, the respondent's submission dated 1 December, supported by the Business Activity Statements of the Applecross Unit Trust, that the respondent suffered a 92.4% reduction in turnover in April 2020, a 58.9% reduction in turnover in May 2020 and a 9.4% reduction in turnover in June 2020.

78 That percentage is calculated by reference to the period of trading in the six months from September 2019 to February 2020, which became the relevant comparison period. The Tribunal is also aware that the respondent's business only commenced trading in January 2019 and had no turnover until April 2019, which totalled the sum of $772 for the whole month. The Tribunal is satisfied that the decline in turnover, as claimed by the respondent, is accurate for a start-up business, such as that of the respondent. The applicant did not challenge those figures or that it met the JobKeeper test, once BB Online, BB Group and any other company were excluded from consideration.

79 The Tribunal is satisfied that the respondent did apply to the applicant for rent relief first on 4 May 2020. It was an application by an email from a Mr David Lewis (who purported to act for the respondent and was described as a chief executive officer of Best Body Physio & Pilates, which provided administrative services for the respondent) for a rent reduction of 100% for the months of April, May and June 2020 with all amounts waived and a further request for 50% of all outgoings payable by the tenant for that same period to be waived.

80 By the conclusion of May 2020, it was quite clear that the respondent had not suffered 100 per cent loss of turnover in April or May 2020 and ultimately it became clear that the respondent suffered a very small percentage loss of turnover in June 2020.

81 By his email on 22 June 2020, Mr Renton, on behalf of the respondent, requested the applicant for 75% rent relief on average for the months of April, May and June 2020, having attached an estimated financial statement that evidenced that proportionate reduction in the respondent's turnover based on reasonably accurate actual accounts for April and May 2020 and an estimate of the turnover for June 2020.

82 The decline was calculated by reference to a comparison period of January, February and March 2020, being an appropriate comparison period for a start-up business. The respondent's estimate of a 75%

decline in turnover over the three months, April, May and June 2020, was surprisingly accurate, given that June 2020 had not concluded and the accounts and the BAS statement for that quarter were not due for finalisation for some time after June 2020.

83 The applicant criticised the claimed average estimated turnover decline and the fact that the respondent sought 75% rent relief because the applicant asserted that the respondent suffered only a 73.55% average decline in turnover, a difference of 1.45% on actual accounts when they were prepared after June 2020.

84 That discrepancy does not demonstrate to the Tribunal that the respondent did not supply sufficient *accurate* financial information in all of the circumstances before the end of June 2020. The applicant cross-examined Mr Renton that this was an inaccuracy and the respondent had not complied with the provisions of the Code. The Tribunal rejects that proposition. In the email of 22 June 2020, Mr Renton, on behalf of the respondent, reasonably sought 37.5% of the rent for April, May and June 2020 to be waived and 37.5% of the same rent to be deferred until the end of the emergency period.

85 The emergency period at that time was enacted to end on 30 September 2020 and was later extended to 28 March 2021. Mr Renton proposed that payments of the deferred rent would begin over the balance of the term of the lease at the end of the emergency period. On 22 September 2020, the respondent's solicitor provided similar information, but based on actual accounts, together with a graph depicting the decline for each month. The Tribunal is satisfied that at all material times the respondent provided the applicant with sufficiently accurate information of its financial position in all of the circumstances, particularly when the applicant knew or should have known that the respondent could not trade during the period 23 March 2020 to the beginning of 6 June 2020 owing to the various closure and restriction directions referred to above.

86 The information provided by the respondent to the applicant in support of its claim for rent relief was supported by the respondent's entitlement to JobKeeper benefits and the evidence presented of the respondent's decline in turnover. That information provided for a proper and accurate basis for the respondent's claim for rent relief. In light of the various closure and restriction directions referred to, the applicant should have accepted the respondent's eligibility to claim rent relief without more, or should have at least engaged with the respondent in a

useful and constructive manner to negotiate the rent relief for the claimed period.

87 At no time did the respondent receive an offer from the applicant in terms proposed by the respondent's application or any other specific terms. The provisions of the Act, the Regulations and the Code impose an obligation on the parties to negotiate in good faith with regard to the principles embodied in the Code, fairness and proportionality in order to arrive at a compromised position for the emergency period, acknowledging no fault on the part of the tenant or landlord. This did not occur.

88 In its place, an argument about an inflated electricity account received by the applicant and passed to the respondent for payment, distracted the parties from the real issue before them, along with the applicant's argument about the respondent forming part of a 'group' and the claim for interest.

89 In keeping with the principles embodied in the Code, fairness and proportionality, the Tribunal concludes that the rent relief should be ordered commensurately and in line with the respondent's decline in turnover claimed by the respondent for the months of April, May and June 2020. The Tribunal accepts that 50% of the rent relief should be waived and 50% should be deferred.

90 However, given the respondent's speedy return to pre-restriction turnover and having exceeded it in July 2020, on the evidence before the Tribunal, the Tribunal finds that there is no compelling reason to allow a long period of deferral. There has been sufficient deferral to date.

The evidence of what is due, owing and payable pursuant to the lease?

91 The Tribunal provided the parties with its reasons, in substance, to this point orally on 15 April 2021. There was at all times, and was on 15 April 2021, a dispute between the parties concerning the amount of undisputed rent owed to the applicant by the respondent as at the hearing date (2 December 2020). Whilst the respondent had indicated rent for October, November and December 2020 had been paid as at 2 December 2020, the applicant disputed that fact and the respondent had not provided objective evidence of payment.

92 On 15 April 2021, the Tribunal proposed to make final orders that granted the respondent a waiver of $4,636.66 in rent for the period April, May and June 2020 and further granted the deferral of payment of the

sum of $4,636.66 in rent for the period April, May and June 2020, until 30 June 2021. Whilst no dispute arose on 15 April 2021 to those proposed orders, the respondent asserted that undisputed rent in the period July to December 2020 had been paid and so the Tribunal's proposed orders that the respondent pay the undisputed rent for that period was a moot point.

93 The applicant asserted some rent had been paid just on the morning of the hearing (2 December 2020) but could not say how much. Despite best endeavours during the hearing on 2 December 2020 and 15 April 2021 to ascertain what had and had not been paid by the respondent to the applicant in terms of rent and outgoings in the period April to December 2020, the evidence was incomplete.

94 Accordingly, orders were made allowing the parties to reopen the evidence on this point and specific orders were made to file documentation relevant to this issue. The parties filed affidavits concerning the amounts paid and outstanding by 4 May 2021.

95 The parties' affidavits and documents established that on 1 December 2020 the respondent paid to the applicant the sum of $20,587.75. The respondent's records annexed to the affidavit of Mr Renton, establish that this sum comprises rent including GST of $5770.59 for each of October, November and December 2020 (totalling $17,311.77) plus variable outgoings for two months totalling $3,275.98. Mr Renton's affidavit does not deal with the undisputed rent due, owing and payable pursuant to the lease for the months of July, August and September 2020 except to 'confirm' that:

> 3.1 as at the Final Hearing Date [2 December 2020] the only rent that was outstanding was for the emergency period between April 2020 and September 2020 inclusive that was pending the outcome of the hearing in the Tribunal and the [respondent]'s request for rent relief under the [Act.]

96 Mr Withers' affidavit, filed on behalf of the applicant, states that the outstanding rent payable by the respondent pursuant to the lease as at 2 December 2020 was $46,544.15. He states there were no outstanding variable outgoings - that is the sum of $3,275.98 (two monthly moieties of variable outgoings of $1637.99 each) or some part thereof was not owed as at 2 December 2020, although the amount of $99.61 (being the agreed electrical charges) was outstanding. Mr Withers states that on 1 December 2020 the applicant received from the respondent $20,578 but he had been unable to 'allocate' the monies received against any

outstanding rent. He acknowledges that $99.61 was allocated to payment of outstanding agreed electricity charges and he allocated $1,637.99 towards variable outgoings that were possibly due but not outstanding for December 2020. The Tenant Trust Ledger Report attached to that affidavit notes that that sum of $1,637.99 relates to variable outgoings for the period 18 November 2020 to 17 December 2020, not payable until 17 December 2020. Mr Withers states that 'Rental arrears remained (as above)'. The 'as above' reference relates to the sum of $46,544.15. That sum is said to be the amount due, owing and payable pursuant to the lease with no reduction for rent relief for the months of April, May and June 2020. That sum divided by the monthly rent inclusive of GST ($5,770.59) does not yield a whole number as expected, given that the applicant's position is that it was paid rent in full to date in March 2020 before the dispute arose. Mr Withers' affidavit seems to be more concerned with the applicant's internal accounting and allocation of the funds received, which is irrelevant for the Tribunal's purposes.

97 On the evidence as at 4 May 2020, the parties remained in dispute about the sum of rent that is owed for July to September 2020. It remains for the Tribunal to determine on the evidence led by the parties, what rent and outgoings are due, owing and payable pursuant to the lease. It also remains for the Tribunal to make an order about when all monies due, owing and payable to the applicant must be paid. It is for this reason that the precise detail of the order was the subject of a hearing listed on 7 July 2021.

98 At the short hearing on 7 July 2021, the respondent sought an order that the undisputed rent for the period July, August and September 2020 be paid 14 days after the undisputed rent for the period April, May and June 2020. That submission was rejected as there is no basis in the evidence to treat those undisputed amounts differently.

99 The applicant sought an order that all monies be paid within 14 days, including the deferred rent. That latter submission was not accepted by the Tribunal as the deferred rent, although, significantly deferred now, should be treated in a different category to the undisputed rent and electricity charges.

Conclusion

100 The Tribunal finds on the evidence that the respondent has not paid the monthly rent due, owing and payable pursuant to the lease for the months of April, May and June 2020 or July, August or September 2020. The Tribunal shall order that that sum totalling $17,311.77 inclusive of

GST ($5,770.59 per month for three months) be paid as rent pursuant to the lease for the months of in respect of the months of July, August and September 2020. The respondent offered no reason why the rent due, owing and payable pursuant to the lease for the months of July to September 2020 inclusive were not paid in accordance with the lease as and when the rent fell due. The dispute concerning rent relief claimed by the respondent has, from 4 May 2020, related to the period of April, May and June 2020. Again on 22 June 2020 Mr Renton's request for rent relief concerned only that rent due, owing and payable by the respondent pursuant to the lease for April, May and June 2020. The proposed orders and submissions made by the solicitors for the respondent for rent relief in this proceeding dated 22 September 2020 and 1 December 2020 relate to only that rent due, owing and payable by the respondent pursuant to the lease for April, May and June 2020. The respondent's solicitors proposed orders dated 21 October 2020 concerned only the rent due, owing and payable by the respondent pursuant to the lease for April and May 2020. At no stage in this proceeding has the respondent claimed rent relief for the rent due, owing and payable pursuant to the lease for the months of July to September 2020, and yet it remains unpaid.

101 Further at no stage in this proceeding has the respondent claimed rent relief for the rent due, owing and payable pursuant to the lease for the months of October and November 2020 but they were not paid until 1 December 2020. No explanation is offered by the respondent as to why that rent payment was delayed. The Tribunal finds that the rent due, owing and payable pursuant to the lease by the respondent for the months of July to November 2020 inclusive should have been paid by the respondent as provided for by the lease for the reasons above. The Tribunal shall order that the unpaid and undisputed rent for the period of July, August and September 2020 shall be paid by the respondent to the applicant, totalling $17,311.77 inclusive of GST.

102 The Tribunal concludes for the reasons expressed that the respondent should be granted rent relief pursuant to the Act for the sum referred to and in the manner referred to as follows:

a) $4,636.66, which sum is waived in its entirety; and

b) $4,636.66, the payment of which sum is deferred.

103 As to the months of April, May and June 2020 and the rent that is indisputably due, owing and payable pursuant to the lease as found by the Tribunal ($8,038.45), the Tribunal finds no monies have been paid as

rent pursuant to the lease in respect of that period. The Tribunal finds that that sum is due, owing and payable pursuant to the lease for those months the Tribunal shall order in this proceeding for that sum be paid. The additional deferred rent amounting to $4,636.66 is payable. The Tribunal rejects the contention by the respondent that that sum should be paid over the balance of the lease term. As stated, the deferred rent should be treated differently to that of the undisputed rent. The Tribunal concludes no further deferral past 31 August 2021 is justifiable on the evidence and so finds.

104 As appears from the affidavit evidence filed by the parties, as at 1 December 2020 the respondent has paid all outstanding variable outgoings and seems to have prepaid the variable outgoings that were due sometime in December 2020. There shall be no order for the payment of the variable outgoings in the sum of $3,275.98 and the applicant's claim therefore shall be dismissed.

105 The Tribunal finds that, regardless of how the applicant's staff have allocated the funds received on 1 December 2020, the respondent has not paid the electricity charges as at 2 December 2020.

106 The Tribunal does not accept Mr Withers' statement for the applicant concerning the amount of unpaid rent as it is inconsistent with the documentary evidence and the agreed position of the parties as to the monthly rent and the agreed outgoings.

107 The Tribunal finds as follows:

a) The applicant is owed 17,311.77 rent for July to September 2020 and the Tribunal shall order payment thereof by the respondent.

b) The amount due, owing and payable pursuant to the lease for the period April, May and June 2020 is $17,311.77.

c) The Tribunal grants a waiver of the sum of $4,636.66 against the sum referred to in (b) above pursuant to the Act, the Regulations and the Code.

d) The Tribunal grants a deferral of the sum of $4,636.66 against the sum referred to in (b) above pursuant to the Act, the Regulations and the Code.

e) Following the grant of rent relief by waiver and deferral, the applicant is entitled to payment of the sum of $8,038.45 and the Tribunal shall order payment thereof by the respondent.

f) The applicant's claimed period of deferral to pay the deferred rent of $4,636.66 is refused there being no evidence before the Tribunal that the respondent has suffered any ongoing financial decline after July 2020. As stated above the Tribunal concludes that the period of deferral for this sum is 31 August 2021.

g) As agreed and as found, the applicant is owed $99.61 in electricity charges and the Tribunal shall order the payment of that sum.

108 For the reasons referred to herein the time for payment of the undisputed rent and outgoings is 22 July 2021 and the time for payment of the deferred rent is 31 August 2021.

109 Both parties are now provided with the opportunity to apply for costs and orders are made to facilitate that process.

Orders

1. Pursuant to s 17(3)(c)(i) of the *Commercial Tenancies (COVID-19 Response) Act 2020* (WA) the rent payable by the respondent to the applicant pursuant to the lease between them dated 19 March 2019 in the period 1 April 2020 to 30 June 2020 in the sum of $4,636.66 inclusive of GST is waived.

2. Pursuant to s 17(3)(c)(ii) of the *Commercial Tenancies (COVID-19 Response) Act 2020* (WA), payment of the rent payable by the respondent to the applicant pursuant to the lease between them dated 19 March 2019 in the period 1 April 2020 to 30 June 2020 in the sum of $4,636.66 inclusive of GST is deferred to 31 August 2021 (deferred rent).

3. Pursuant to s 17(2)(a) of the *Commercial Tenancies (COVID-19 Response) Act 2020* (WA), the respondent shall by 22 July 2021 pay to the applicant the sum of $5,770.59 inclusive of GST for each of the months of

July, August and September 2020, and totalling $17,311.77 inclusive of GST, being unpaid rent that was due, owing and payable pursuant to the lease between the parties dated 19 March 2019 on 1 July 2020, 1 August 2020 and 1 September 2020 respectively.

4. Pursuant to s 17(2)(a) of the *Commercial Tenancies (COVID-19 Response) Act 2020* (WA), the respondent shall by 22 July 2021 pay to the applicant the sum of $8,038.45 inclusive of GST, being rent that was due, owing and payable pursuant to the lease between the parties dated 19 March 2019 in respect of the period April, May and June 2020.

5. Pursuant to s 17(2)(a) of the *Commercial Tenancies (COVID-19 Response) Act 2020* (WA), the respondent shall by 31 August 2021 pay to the applicant the deferred rent, referred to in order 2 above, the sum of $4,636.66 inclusive of GST.

6. Pursuant to s 17(2)(a) of the *Commercial Tenancies (COVID-19 Response) Act 2020* (WA), the respondent shall by 22 July 2021 pay to the applicant the sum of $99.61.

7. The applicant's application for interest is dismissed.

8. The applicant's application for payment of variable outgoings in the sum of $3,275.98 is dismissed.

9. The applicant's application for the payment of rent due, owing and payable pursuant to the lease for the months of October, November or December 2020 is dismissed.

10. Each party has liberty to apply for their costs of the proceeding by filing with the Tribunal and giving to the other party the following document by 22 July 2021:

    (a) a schedule of the costs claimed in sufficient detail to enable the Tribunal to assess and fix any costs which might be awarded, together with any supporting document upon which the applicant wishes to rely as relevant to its claim for costs;

(b) written submissions addressing the basis upon which it is contended costs should be awarded and the quantum of costs claimed.

11. If a party applies for costs of the proceeding, pursuant to order 10 above, the other party may file with the Tribunal and give to the party who has applied for costs, written submissions opposing the application for costs by 5 August 2021.

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

MS N OWEN-CONWAY, MEMBER

8 JULY 2021