Civil and Administrative Tribunal

New South Wales

Case Name:	Pocket Pizza v Melani; Melani v Pocket Pizza
Medium Neutral Citation:	[2021] NSWCATCD 107
Hearing Date(s):	22 and 23 March 2021
Date of Orders:	12 August 2021
Decision Date:	12 August 2021
Jurisdiction:	Consumer and Commercial Division
Before:	S Thode, Senior Member
Decision:	1. In COM 20/28270 the Respondents are to pay to the Applicant the sum of $122,488 by 10 September 2021. 2. Application COM 20/39312 is dismissed. 3. Order the Respondents to pay the Applicant's costs as agreed or assessed on a party and party basis.
Catchwords:	RETAIL LEASES – Mitigation of loss
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Retail Leases Act 1994 (NSW)
Cases Cited:	Nil
Texts Cited:	Nil
Category:	Principal judgment
Parties:	COM 20/39312 Pocket Pizza (Applicant) Annamaria Melani (Respondent) COM 20/28270 Annamaria Melani (Cross Applicant) Pocket Pizza Pty Ltd (Cross Respondent) Dylan Eisenhut (Second Respondent)

	Ben Pichon (Third Respondent)
Representation:	Solicitors: Kells Lawyers (Applicant) Nicoll Legal (Respondent)
File Number(s):	COM 20/39312; COM 20/28270
Publication Restriction:	Nil

REASONS FOR DECISION

1 The parties entered into a retail lease on 16 March 2025, in respect of commercial premises on The Corso, at Manly, New South Wales. The lease was for an initial term of three years commencing on 25 February 2015 and expiring on 24 February 2020. At the commencement date of the lease Pocket Pizza Pty Ltd (the lessee) provided a bank guarantee representing three months' rent plus GST ($22,425) to be held as security against the lessee's performance of the lease.

2 The lessor pleads a breach of contract. It is pleaded that in breach of its essential obligation under the lease, the lessee failed to pay rent and outgoings for the period commencing 25 January 2019 to 24 February 2019 and 25 February 2019 to 24 March 2019.

3 In addition it is pleaded the lessee abandoned the premises because it removed from the premises various fixtures and fittings and was observed by the lessor to have commenced trading from other premises at XX Pittwater Road, Manly. The lease permitted the lessor to terminate the lease without prior notice, however a notice was issued regardless, and on 5 March 2019 the lessor took possession of the premises.

4 Following the termination of the lease the lessor claims expenses for reinstatement of the premises to a condition in which it could be relet. It was pleaded that the lessor has mitigated her losses as far as possible by re-letting the premises to an alternative tenant. The rent is higher as the premises were re-let in a different market to what was in existence at the commencement of the lease with the lessee. The lessor commenced proceedings in the District

Court of New South Wales on 19 December 2019 damages for rent and outgoings, costs, filing fees and interest in the sum of $133,844.02.

5 The proceedings were transferred to the Tribunal on or about 25 June 2020.

6 The lessee filed its cross-claim in the District Court of New South Wales. Those proceedings were transferred also. Regardless, the lessee filed a separate retail lease application in the Consumer and Commercial Division of the Tribunal dated 9 September 2020 and is proceeding on that application.

7 In the section entitled " reasons for asking for orders", the lessee states the following:

> The applicant relies on the attached statement of cross-claim filed with the District Court on 10 July 2020 which was filed pursuant to the orders of the District Court as part of the transfer of the proceedings. The quantum of the claim in the statement of cross-claim are set out below:
>
> false ceiling claim $15,592.31;
>
> liquor licence delay claim $8862.07
>
> loss of fixtures and fittings $105,700;
>
> expenses incurred with Silver Chef $14,618.04,
>
> Total $144,772.42.

8 In the attached statement of claim, the lessee pleads that the lessor represented to the lessee that it was permitted to install a false ceiling in the premises in circumstances when the lessor knew or ought to have known that the representation was untrue because the ceiling in question was common property and as such did not form part of the leased premises and was owned and controlled by the owners corporation as common property. The false ceiling therefore had to be removed by the lessor after commencement of the lease (the false ceiling claim).

9 It is further pleaded that it was a term of the lease that the lessor would not unreasonably delay her consent for the lessee to obtain its liquor licence for the premises as part of the lessee agreeing to enter into the lease. It is alleged that the lessor neglected to provide her consent causing the lessee to suffer loss and damage in the sum of approximately $33,000 is quantified in the affidavit of Dylan Eisenhut (the liquor licence claim).

10 The lessee alleges that it was prevented from removing its property at the termination of the lease and that it was wrongfully prevented from collecting its fixtures and fittings causing the lessee to suffer loss and damage in the sum of $105,700 as particularised on page 43 of the retail leases application (the fixtures and fittings claim).

11 By reason of the fact that it was prevented from removing goods from the premises, the lessee was prevented from accessing the premises from 5 March 2019 to retrieve goods it had on finance from 'Silver Chef' and suffered loss and damage in the sum of $14,618.04 (the Silver Chef claim).

12 Lastly, the lessee claims that the lessor was not entitled to take possession of the premises and terminate the lease in accordance with clause 15.1 of the lease. Around the time of executing the lease the lessee provided the lessor with a bank guarantee the equivalent of 3 months' rent. The lessor called on the bank guarantee in March 2019 as part of taking possession of the premises and after wrongfully terminating the lease, and the lessee seeks the repayment of the bank guarantee (the bank guarantee claim).

The lessor's claim COM 20/28270

13 The lessor's damages were particularised in a document contained at page 305 of the court book (CB). The document was identified at the commencement of the hearing is being the complete and updated claim for damages. The document was provided in a very small point form and a fresh document was provided to the Tribunal and marked exhibit C. Exhibit C is the lessor's reconciliation of the tenancy ledger and all moneys allegedly due and payable as at 23 November 2019. The lessor claims rent outstanding from the period of 25 January 2019 to 24 February 2019 in the sum of $5197.93; rent outstanding from 25 February 2019 to 24 March 2019 in the sum of $6973.06 or a total of $12,170.99. In addition the lessor claims outgoings in the sum of $26,552.10. The total amount owing in rent and outgoings, as at the date the lessor took possession, amounts to $38,723.09.

14 It is apparent from exhibit C that the reconciliation deducted the bank guarantee which was called upon on 26 March 2019. $22,425 was credited towards rent owing. Additional damages are claimed for making good and re-

letting the premises and are set out in exhibit C. These additional amounts were not challenged during cross-examination. I did not understand the lessees to dispute the expenses were incurred, but the lessee submits it is not liable for these additional damages because of the lessor's failure to mitigate her losses and by holding out for the highest rent. The amounts appearing on the tenancy ledger of exhibit C are the amounts which are claimed as losses and damages by reason of the lessee's breaches and as at 23 November 2019 were calculated in the sum of $122,488.51.

15 Accordingly, subject to the question of mitigation, I am satisfied that the damages should be quantified in the amount for which the lessor contends.

Mitigation of Loss

16 It is the lessee's defence that the lessor was not entitled to take possession of the premises on 5 March 2019 because the lessee had not abandoned the premises (see paragraph 13 of the amended defence CB page 26). It is the lessee's submission and evidence that it had not abandoned the premises but that it had merely shut down the Pizza Pocket restaurant for a short period of time to remodel the premises for rebranding to take place and to reopen the premises under a new name and branding of "Vice Burgers". As a result of the lessor wrongly taking possession of the premises the lessor failed to mitigate any alleged losses because any losses suffered were caused by the delay in marketing the premises for reletting; offering the premises for reletting at a rent significantly higher than the rent which was payable by the lessee for the same period; offering 3 months' rent free to the new tenant of the premises and any expenses incurred (as set out in exhibit C) were not reasonable or necessary.

17 During submissions the parties explained their respective quantifications in respect of this argument. The parties agree that the monthly rent pursuant to the lease was $6973.06. Based on this agreed amount the lessor calculated the loss of rent for a period of 8 months from 5 March 2019 to the commencement of the new lease on 14 November 2019. The total rent that would have been paid by the lessee between 5 March 2019 and the new lease commencing is of $65,481.15.

18 It is the lessee's position, based on the written submissions, that the premises should have been advertised at $5316.67 per month reflecting a correct market rent of $58,000 net p.a. (based on the expert opinion) this being less than the lessee paid at the time of termination. It is the lessee's position that had they the premises been advertised on 5 March 2019 for the reduced rent of $58,000 p.a. a new lessee would have been found immediately and the lessor would have earned $58,000 in the same period. Thus any loss found, would be calculable at no more than $18,216 by reason of the fact that because the lessor had failed to market the premises at a more realistic rent, the lessor was entirely the author of her own loss. The premises were advertised at inflated price of $80,000 p.a. plus GST *plus outgoings* [emphasis added]. This, the lessee submits was a grossly inflated rent not supported by the market on The Corso at Manly at that time.

19 In a closing submission entitled "Table A" the lessee further developed its argument on the failure to mitigate. Table A was sent about one month after the timetable for final submissions had expired. It was said to have been omitted from final submissions by accident. I have taken it into account. It states, summarising previous written closing submissions:

> Reasonable steps to mitigate loss would have avoided claim, as new licensee would have paid. Alternatively, the maximum claim per month for rent would be $1656.39 being the difference between $6973.06 payable by Pocket Pizza and the market rent determined by Mr Hubbard as $5316.67

20 That is derived by a figure of $58,000 net (exclusive of outgoings) found in the concluding paragraph of Mr Hubbard's report, to which must be added outgoings and GST. Rent of $58,000 net plus GST equates to $75,000 gross plus GST (emphasis added).

21 Mr Hubbard is instructed that the monthly rent under the lease was $6973.06:

> The rent as at the relevant date in accordance with the Lease is advised to be $6,973.06 per month including GST which equates to approximately $76,070 p.a. plus GST.
>
> The rent equates to $1,951/m^2 p.a. plus GST of strata building area.

22 Mr Hubbard apparently agrees with the lessor that the rental market at the time the lessor took possession of the premises and re-advertised the premises,

supports a rent of $75,000 gross (inclusive of outgoings) plus GST. As the lessor paid for the removal of the old fit out and funded the refurbishment of the premises, Mr Hubbard even agrees that $80,000 gross p.a. is a realistic rent for the premises.

23 The relevant part of Mr Hubbard's evidence is contained at page 25 of his report. In his opinion a reasonable market rent at the relevant time, being March 2019, was calculable at $75,000 gross (inclusive of outgoings). Outgoings are calculated at $16,906. Mr Hubbard sets out his position as follows:

> Conclusion:
>
> Having regard to the comments above, I am of the opinion that the subject's gross market rental value as at the relevant date may have reasonably been estimated in the order of $1850 per square metre to $2000 per square metre gross plus GST (inclusive of outgoings) which results in a rental range (rounded) of $72,000-$78,000 per annum gross plus GST (inclusive of outgoings.
>
> For valuation purposes I have adopted $75,000 per annum gross plus GST (inclusive of outgoings).
>
> In order to provide a market rent expressed as rent (plus outgoings) the adopted outgoings of 16,906 per annum need to be deducted.
>
> On this basis the market rent as at the relevant date is estimated as follows: estimated gross market rent:
>
> $75,000 per annum.
>
> Less outgoing $16,906
>
> market rent $58,094 per annum
>
> Adopt 58,000 p.a. plus outgoings and GST.
>
> NB: The assessed subject gross rental assessment of $75,000 per annum gross plus GST inclusive of outgoings is lower than the subsequent subject leasing in November 2019 at $80,000 per annum gross plus GST (inclusive of outgoings). In my opinion the reason for this difference is that the subject premises was subsequently offered on a fully fitted out/furnished basis.

24 Mr Hubbard agrees that the advertised rent of $80,000 gross p.a. (a figure including outgoings) was explicable as the premises were subsequently offered on a full fitted out/furnished basis. For reasons set out below I explain that although advertised at $80,000 plus outgoings, Ms Melani insists the new tenant is paying rent of $80,000 gross, (inclusive of outgoings). I have

proceeded on that basis. Based on the analysis provided by the lessee's expert, I cannot conclude that the lessor failed to mitigate its loss. Although the lessee's expert opines that the rent for the premises should have been in effect reduced, it is apparent that the lessor marketed the premises at a rate that was clearly achievable in the market place. A new lessee was found at that rate. I find that the market rent of $80,000 inclusive of outgoings was not unreasonable under the circumstances.

25 There is a small anomaly in the evidence. Although the premises were advertised as $80,000 plus outgoings, (see CB p. 916) the evidence of Ms Melani in the witness box was that the premises were actually leased as $80,000 gross (inclusive of outgoings) plus GST. I accept the evidence from the lessor that was given under oath and is contained at page 38 of the transcript.

> Mr Nicholl: …a new tenant was introduced and negotiated an initial lease commencing in November 2019.
>
> Ms Melani: Correct
>
> Mr Nicholl: and that was at the rent of $80,000 plus GST plus outgoings was it?
>
> Ms Melani: No.
>
> Mr Nicholl: So what was the rent payable under that lease?
>
> Ms Melani: It was $80,000 plus GST, gross.
>
> Mr Nicholl: So from the advertisements which was seeking $80,000 plus GST plus outgoings, you negotiated with the new lessee for a different deal at $80,000 plus GST, as a gross rent?
>
> Ms Melani: Yes.
>
> Mr Nicholl: Okay. I also understand as per of that negotiation , that you agreed to a three months rent-free period?
>
> Ms Melani: Yes

26 I am satisfied that the actual rent agreed with the new lessee is $80,000 inclusive of outgoings or "gross" p.a..

27 Ms Melani twice confirmed this to be correct.

28 Based on the evidence of Ms Melani, the rent currently subject of the new lease is $80,000 inclusive of outgoings plus GST. That equates to

approximately $61,000 net p.a.. The experts both agree this to be within a range acceptable for the subject premises in the subject area.

29 Mr Karvon, the expert for the lessor, agrees that the figure adopted by Mr Hubbard of $58,000 p.a. plus GST plus outgoings is very close to his own estimate of $60,450 p.a. plus GST plus outgoings before Mr Karvon attaches a 20% premium for a fit out. The lessee submits that the market rent determination of Mr Karvon was based on an incorrect assumption that the 2019 lease of the premises was $80,000 plus GST plus outgoings. Based on the concession of Ms Melani, I accept that the real estate agent was "testing the market" when he advertised the premises for $80,000 plus outgoings, but that ultimately the new tenant entered a lease on the basis of $80,000 inclusive of outgoings. I find that the experts were not far apart in their opinions that the market rent for the premises ranged between $58,000 and $61,000 plus outgoings plus GST.

30 The main contention between the experts therefore arises from Mr Karvon adding a 20% premium. I am not of the view that the cross examination of Mr Karvon significantly impugned the expert's view that the fitout and improvements have added value to the lease and an added premium of 20% is "consistent in this regard" (CB725). A new lessee was found and is paying rent higher than that of the subject lease. The market supports Mr Karvon's opinion that the premises attracted a premium. On balance I am not satisfied that the lessee has established that the lessor caused unreasonable delay before agreeing to a market rent of $80,000 gross p.a. in November 2019.

31 The lessee particularised the ways in which they said Ms Melani had failed to mitigate her loss. The lessee claims that the lessor "completely failed to mitigate any alleged losses" and that any alleged losses suffered were suffered as a result of the delay in marketing the premises for reletting.

32 As soon as possible after taking possession in March-2019 the lessor promptly engaged appropriately qualified and experienced real estate agents. There is no evidence that they failed to act diligently in promoting the property and negotiating with prospective tenants. A new tenant was located in October 2019 and entered into possession of the premises on 14 November 2019. The

new tenant required a three month rent-free period so that the remainder of the lessee's abandoned fit-out could be removed and to fit-out the premises for its own use. All of the expenses were paid by the lessor.

33 Having regard to the efforts that had been made in 2019 to find a tenant and the delay that had been incurred, I also accept that the rent of $80,000 p.a. to which the new tenant agreed represents market rent at that time for a lease of several years' duration. It was reasonable to seek a higher rent on the basis that the first three months of its lease would be rent-free. I accept that that was a reflection of market conditions based on the opinion as expressed in the Karvon report. Accordingly, the lessor's damages would appropriately be assessed by taking into account the damages as claimed in exhibit C.

34 The lessor's claim for compensation is qualified by the principle of mitigation. That principle is stated as:

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps." [British Westinghouse Electric Co Ltd v Underground Railways Co Ltd [1912] AC 673 at 689]

35 The operation of the principle of mitigation is explained more fully in Karacominakis v Big Country Developments Pty Ltd [2000] NSW CCA 313 at paras 187 -188.

> "A plaintiff who acts unreasonably in failing to minimise his loss from the defendant's breach of contract will have his damages reduced to the extent to which, had he acted reasonably, his loss would have been less. This is often misleadingly referred to as a duty to mitigate, although the plaintiff is not under a positive duty. The plaintiff does not have to show that he has fulfilled his so-called duty, and the onus is on the defendant to show that he has not and the extent to which he has not (TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130). Since the defendant is a wrongdoer, in determining whether the plaintiff has acted unreasonably a high standard of conduct will not be required, and the plaintiff will not be held to have acted unreasonably simply because the defendant can suggest other and more beneficial conduct if it was reasonable for the plaintiff to do what he did (Banco de Portugal v Waterlow and Sons Ltd [1932] UKHL 1; (1932) AC 452; Pilkington v Wood (1953) Ch 770; Sacher Investments

Pty Ltd v Forma Stereo Consultants Pty Ltd (1976) 1 NSWLR 5). Whether the plaintiff acted unreasonably is a question of fact."

36 I am satisfied that the lessor acted reasonably in taking the steps that she did to secure a new tenant, including her decision to offer a three month rent free period, when she offered a lease to the new tenant. The lessee has not persuaded me that the hiatus between retaining a qualified real estate agent and the new lease agreement was due to the lessor not having fulfilled her duty or that the loss would have been less had the lessor acted differently. I would have expected to see this supported in the Hubbard report, but no such suggestion was made.

37 In addition the lessor received notice from Northern Beaches Council regarding the referral of the development consent because works conducted by the lessee had not been approved and that a construction certificate was required to avoid a demolition. This was obtained in June 2019. Further delay was caused because a building certificate was required because of unauthorised works that had been carried out by the lessee, and the lessor engaged a building consultant to carry out the necessary tasks (statement of Ms Melani, dated 8 August 2020.) The evidence in my view establishes that the lessor took all steps necessary to re-let the premises in a timely fashion and that remedial works were required before the premises could be re-let.

38 I am not satisfied that the lessee has established that the lessor has failed to mitigate her loss.

Was the lease validly terminated on 15 March 2019?

39 The lessor had originally argued that the premises had been abandoned. I accept and prefer the evidence of the lessee on the issue of abandonment. The premises were not abandoned. The lessee provided evidence that a rebranding to "Vice Burger" had taken place and that it had installed a large graffiti street art emblem that appeared on the wall of the premises displaying 'Vice Burger' in large letters. I am satisfied the lessee had prepared to re-open the premises under a new name and with a new strategy as it was entitled to do under the lease. This is entirely consistent with some of the fixtures and fittings being removed from the premises around March 2019.

40 Mr Eisenhut deposes at paragraph 46 (CB 856) :

> "Pocket Pizza was closed for a short period around the end of 2018 to undertake some the renovations but we reopened on 29 January 2019 and traded until the day Ms Milani re-took possession of the premises in March 2019. Exhibited at page 53 of D3 is a copy of the Deliveroo receipt for the first week in February 2019 showing the business operating in that time".

41 I accept that renovations and rebranding occurred and the premises had not been abandoned, but am uncertain why this is relevant. It is agreed between the parties that the lessee did not need special permission to change restaurant branding of its use from 'Pizza Pocket' to 'Vice Burger'. However, at the same time the rebranding took place, the lessees remained significantly behind in rent and outgoings. The lessees had failed to pay rent and outgoings and were advised by the lessor in writing that unless the breach would be remedied, the lessor would take possession of the premises. The issue of abandonment is not relevant under the circumstances. Indeed in written submissions dated June 2021 counsel for the lessor states "abandonment is not a matter on which the lessor relies on the issue of a valid termination of the lease". Neither party has pleaded repudiation. The lessee may have alleged repudiation on the basis the landlord took wrongful possession of the premises.

42 The lease contained essential terms which required the lessee to pay its contribution towards outgoings within fourteen days after a request for payment being made by the lessor (clause 5.1.3); pay rent monthly in advance on the 25th day of each month (clause 5.3); pay on time all charges for services separately metered to the property; pay on time all rates, taxes, charges (clause 5.5); and keep the premises open for business, conduct its business with due diligence and efficiency and in an orderly and businesslike manner and keep the premises fully stocked and staffed (clause 6.2).

43 Clause 12.1 of the lease explicitly made all of the clauses referred to in paragraph 5 essential terms of the lease. It is not in dispute that from 3 August 2017 until the termination of the lease on 5 March 2019 the lessee was in breach of clauses 5.1.3 and 5.5 of the lease by failing to pay outgoings, council rates, insurance premiums, water rates and usage charges and management fees.

44 In respect of the abandonment claim, it is alleged that from October 2018 until the termination of the lease on 5 March 2019 the lessee was in breach of clause 6.2 of the Lease by failing to keep the premises open for business, failing to conduct its business and failing to keep the premises fully stocked and staffed. For the reasons set out further below, I am not satisfied that the lessee abandoned the premises, but in light of other breaches of essential covenants, such as the non-payment of rent, the issue is not relevant.

45 It is not disputed that on 25 January 2019 the First Respondent breached clause 5.3 of the Lease by failing to pay rent for the period of 25 January 2019 to 24 February 2019. That breach of an explicit essential term was never remedied by the Respondents. On 25 February 2019 the lessee again breached clause 5.3 of the lease by failing to pay rent for the period of 25 February 2019 to 24 March 2019. That breach of an explicit essential term was never remedied by the Respondents. Clause 12.4 of the lease permitted the lessor in such circumstances to terminate the Lease without prior notice, re-enter and take possession.

46 On 5 March 2019 the lessor terminated the lease, re-entered the premises and retook possession, changed the locks and called on the guarantee. By 11 March 2019 the premises were advertised for lease through a reputable national real estate agency and, later, a reputable local real estate agency. The lessor gave the lessee seven days written notice (as required by clause 11 of the lease) to remove all of their stock, fixtures, fittings, plant, equipment, machinery, furniture, furnishings, decorations and any other articles on the Premises after the Lease had been terminated.

47 I am satisfied the lessee never made contact with the lessor again and the lessor dealt with the items that had been abandoned in accordance with the relevant provision of the lease, being clause 11.

48 The landlord's remedies are set out at 12.4 of the lease:

> Landlord's remedies
>
> 12.4 If the tenant is in default under the lease, the landlord may (without prejudice to any other rights of the landlord);

> 12.4.1 terminate this lease by written notice to the tenant and this lease shall be terminated from the date of the notice;
>
> Terminate this lease without prior notice by re-entering and taking possession of the property and ejecting the tenant and any other person on the property;

49 According to the lessor's reconciliation (exhibit C) the rent and outgoings outstanding as at the date the lessor took possession were in the sum of $38,723 and this amount was not challenged.

50 The lessor had sent many reminders to the lessee advising of outstanding rent and outgoings. A list is set out in the submissions at paragraphs 34 and following. The lessee paid rent ant outgoings only sporadically and was, by its own admission, never up to date. The tenant owed $30,903 (CB 665) as at 13 December 2017; $27,190 as at 30 January 2019; $29,388 as at 1 February 2019 and $38,723 by 5 March 2019.

51 I have had regard to the notice sent by email under the hand of Ariessi Doolan, the lessor's property manager, dated 6 February 2019:

> 'this is a reminder that all of the outgoings must be paid in full by 25 February 2019. The lessor will proceed with the legal action should the outstanding invoices not be paid in full by 25 February 2019. Please find attached tenant's tax invoice for your record (sic)'

52 It was conceded by Mr Eisenhut under cross-examination that he understood that one of the "legal actions" available to the landlord was to take possession of the premises unless the outgoings would be paid in full by 25 February 2019.

53 It was an essential term of the lease that the tenant pay money being rent in advance (clause 5.3) by equal monthly instalments on each instalment day. I am satisfied that the lessee had not paid rent in accordance with clause 5.3 for at least 5 months before the lessor took possession. There was a suggestion by the lessee that the lessor had never strictly enforced the terms of the lease and that the lessor had never enforced the lease if rent was not paid in advance.

54 In its defence filed with the District Court and adopted in this application, the lessee pleads:

> "the course of dealing between the plaintiff and first defendant was such that the plaintiff did not require strict compliance with the date of payment of rent and the first defendant had previously fallen behind in rent but would bring the rent up to date in future months. The first defendant relied on the previous dealings that the plaintiff would not terminate the lease without further notice to the first defendant of the plaintiff's intention to do so.

55 The pleading as cast is not a defence to a claim for damages for breach of an essential term. The payment of rent and outgoings is an essential term of the retail lease and have been incorporated as express provisions of the retail lease. The essential obligations such as the payment of rent and outgoings, permitted use, the obligation to maintain and repair, the obligation on assignment and sub-letting and the payment of GST all remain whether or not the lessor had accepted a pattern of late payment.

56 In any event, the submission is not advanced further by the lessee. I am not satisfied that the fact that the lease had not been strictly enforced before March 2019 disentitled the lessor to serve notice or to take possession of the premises for breach of an essential term.

57 I am satisfied that the letter of 6 February 2019 constituted a written notice to the tenant and but that the lease was not terminated on the day of the notice because it provided a term of 14 days for payment by 25 February 2010. I find that the lessor understood that "legal action" referred to the lessor's right to take possession of the premises should the outgoings not be paid and that the lessor did terminate the lease in accordance with clause 12.4.2 when it took possession and re-entered the premises without further notice, as it was entitled to do. For these reasons and as explained in paragraphs 13 to 15 above I find that the lessee is liable to the lessor for the damages as set out in exhibit C.

The lessee's claim COM 20/39912

The false ceiling claim

58 On balance I prefer the lessor's evidence in respect of this claim. I accept that Mr Eisenhut and Mr Melani were present at the premises when these were being inspected prior to the lease being entered. In January 2015 Mr Eisenhut

deposes that he was told “you can get rid of the ceiling it is just a false ceiling and you can build a mezzanine level”.

59 I accept the evidence of Mr Eisenhut that he believed that there would be no problem to remove the false ceiling. I accept Mr Melani did believe at the time he made the statement, that to be the case. I do not accept the suggestion by the lessee that the false ceiling had already been subject of extensive litigation between the lessor and the owners corporation and that by reason of that litigation Mr Melani knew, in a legal sense, that the mezzanine was owned by the owners corporation and the owners corporation had no intention to let the lessor appropriate common property. To suggest Mr Melani was aware of these facts and misrepresented these to the lessee is not consistent with the evidence. It was clearly not a straightforward question and the issue in dispute between the owners corporation and Ms Melani required clarification by an Adjudicator of the Tribunal. The lessor did not know or at least could not conclusively have known that the owners corporation would not consent to the removal of the false ceiling. The issue did become subject of extensive litigation between the Melanis and the owners corporation, but not until 2016. An adjudicator found in October 2016 that the drop ceiling was common property rather than part of the lot, and whilst the owners corporation gave consent to the lodgement of the DA with the local council, the owners corporation was not asked to consent to the removal of the ceiling. As much was found by the Tribunal: “such consent [for the removal of the ceiling] should be sought and should not be unreasonably withheld. This may require the second respondent to provide evidence to the owners corporation of council consent and compliance with fire safety”.

60 On balance I accept Mr Milani and find that although the ceiling was discussed with Mr Eisenhut, he did not make a false representation that the ceiling could be removed in circumstances where he knew or ought to have known that that was not the case. At that time of the discussion the lessor was in no different position to the lessee to conclusively know whether or not the owners corporation would agree to the removal of the ceiling

61 The false ceiling was installed and in 2016 the owners corporation sought orders from the Tribunal to have the ceiling removed. Proceedings were commenced between the Milanis and the owners corporation in 2016, the lessee was named as a second respondent. The key issue in those proceedings was a dispute whether the ceiling or false ceiling was part of the common property or part of the lessor's lot. The ceiling and mezzanine were found to be common property. The lessee was ordered to remove and replace the false ceiling on 19 September 2017. The lessee states that the lessor, or her agent, knew this in 2015 and should have said as much. I reject this contention. Ms Melani admitted that she was aware of a dispute with the owners corporation about the false ceiling but did not understand the significance of it as her brother Mr Melani dealt with the owners corporation on her behalf. I do not find that Ms Melani's agent falsely represented to the lessee that a false ceiling could be installed. I am not satisfied the lessor misrepresented the terms of the lease or that such a misrepresentation enticed the lessee to commence construction for a mezzanine level . I am of the view that it was incumbent upon the lessee to ensure it complied with the requirements of Part 6 of the Strata Schemes Management Act 2015 and to ensure it had the authority of the owners corporation before refitting the premises and interfering with common property. I accept that Mr Melani said as much in his meeting with Mr Eisenhut (see statement of Mr Melani at CB 313) .

Liquor licence

62 The lessee pleads a breach of clause 28 of the lease seeking damages in the sum of $33,232.

63 It is alleged that the lessor unreasonably delayed the lessee's liquor licence. The lessee submits the parties entered into an oral agreement "around the time of the negotiating the lease that the liquor licence was an integral part of the lease" (see statement of cross claim page 41 of the CB). The lessee "estimates" losses in the sum of $33,232 as a result of the lessor's delay in granting a liquor licence. There is no contemporaneous evidence that the lessee complained to the lessor that the lessor was unreasonably withholding her consent to the liquor license application. The statement of cross claim does not disclose a cause of action regarding this head of damage. There are no

particulars provided to support a claim for breach, be it of an “oral agreement” or “implied term” of any other cause of action. The evidence of Mr Eisenhut refers to an attachment at pages 47 of DE-3 of his exhibit. However when I analysed it, it makes reference to an “application” to perform building works on the premises, not an application for a liquor licence. It is the lessee’s application for building works the lessor objects to on the basis of an insufficiently fire rated ceiling. The parties refers to the offer by the lessor’s agent, which states that “the lessor will support any application [for a liquor license]” at p861 of the CB. There is no contemporaneous evidence that supports the contention that the lessor delayed the obtaining of a license. Very short reference is made at paragraphs 41 to 44 of the lessee’s written submissions that do not advance this issue.

64 I accept the lessor’s submission that this claim was a recent invention to bolster up the lessee’s claim for set off. Even if I have erred and there is evidence to support a claim that there was unreasonable delay by the lessor in consenting to the liquor licence, I do not accept that the lessee has provided sufficient evidence it has suffered a loss. Mr Eisenhut deposes that he lost “approximately $33,000” because he was unable to obtain a liquor licence in time. The entire evidence in support of the $33,000 claim is contained at page 886 of the court bundle which is a photocopy of three sales summaries for the years 2015, 2016 and 2017 showing sales for $24,152 and $39,843 and $6794 respectively. I do not follow how the presentation of these three sales summaries allows me to arrive at a finding that the lessees lost $33,000 in revenue by reason of delay in obtaining a liquor licence. The submissions do not explain how the evidence supports this claim for damages. Finally I have had regard to pages 171 to 177 of the court book disclosing an email exchange of 11 November 2015 between the parties which supports a finding that the liquor license was supported by the lessor. However, the agent had pointed out that the lessee had failed to attach any of the “necessary documentation for supporting a liquor licence application”. I am satisfied that the lessee took no further steps to move the application forward in any meaningful way. This claim is dismissed.

Fixtures and Fittings

65 The lessee claims loss and damage in the sum of $105,700 as a result of its inability to retrieve fixtures and fittings. The lessee submits the limited seven day period provided by the lessor to remove and collect all fitout and individual items was unreasonable. It is pleaded

> "it was a term in the Lease that the cross claimant would be given a reasonable time and was permitted to remove the "tenant's property" at the termination of the Lease." (see CB p41).

66 I am not referred to the "term in the Lease". I have had regard to clause 11 which requires a tenant to move from the property all of the tenant's property and if the tenant fails to comply with its obligation, within 7 days after written request from the landlord to do so then the landlord may do anything the tenant has failed to do, and in relation to any of the tenant's property left on the property may treat the tenant's property as abandoned (see clause 11.2 and 11.4 on page 140 of the CB). I do not find that seven days was an unreasonable time frame to permit the lessee to remove its items as the lease clearly allows for a period of seven days. I am not satisfied that a breach of the lease is established.

67 Under cross-examination Mr Eisenhut and Mr Pichon both conceded that they took no steps to regain access to the premises and to salvage their fixtures and fittings. They entered the premises through a manhole after the locks had been changed. It is not clear what was removed during that undertaking. On the contrary , the landlord invited the tenant to make arrangements to have fixtures and fittings removed. Neither the second or third respondent's availed themselves of the offer. However even if I have erred and the lessor has breached a term of the lease, the claim for loss and damage alleged has not been made out.

68 The tenants claim damages for fixtures and fittings discarded by the landlord in the sum of $105,700. The estimation of the value of the lessee's fixtures and items was provided by Mr Eisenhut. The evidence contained at 851 of the court bundle is a mere list of fixtures and fittings mostly unsupported by evidence.

69 In particular, the lessee states it should be reimbursed $2750 for a brand new dishwasher and $5280 for a deep fryer as the lessor afforded insufficient time

to remove these. Mr Eisenhut has provided evidence of purchase of a cooker and a deep fryer but those items appear to have been purchased for the lessee's new premises at XX Pittwater Road as is apparent from the invoices contained at pp 934-6 of the CB. I am satisfied that the invoices speak for themselves. I find that the invoices for the electric fryer and the dishwasher were items ordered and placed at the new Pizza Pocket premises at XX Pittwater Road which coincides with the lessee moving its business to new premises around 31 January 2019.

70 The lessor disputes the value of the remaining items and provided expert evidence from a licensed valuer, Mr Price. On balance I find the evidence of Mr Price, expert valuer is to be preferred. I accept that Mr Price is an independent expert and where he and Mr Eisenhut's recollection of the items differ, I prefer that of the independent expert and give it more weight.

71 For the reasons set out above I find that the lessee had failed to comply with its obligations under the clause 11.1 or 11.2 and the landlord was entitled to treat the goods as abandoned and was entitled to sell the lessee's property and did not have to account to the lessees' for the proceeds and was entitled to apply them as she saw fit (clause 11.4.2.(b). I dismiss this claim.

Silver Chef claim

72 In respect of the Silver Chef claim, the same principles apply. The lessee did not remove any "goods on finance" after it was given notice to do so. The lessee was required to remove those items in the seven days provided under the lease. There is no implied obligation on the lessor to treat those items differently or to offer more time because of an "implication that the property was to remain its property and did not transmit to the cross-defendant" (see pleadings at page 42 of the CB) . This claim for loss and damage is dismissed.

73 As a result of these findings the lessee's application COM 20/39312 is dismissed.

COSTS

74 The lessor was wholly successful in its claim. Costs ordinarily follow the event and I have made orders in accordance with paragraph 4 above.

75 If the parties wish to be heard on the question of costs the orders in paragraph 4 above cease to have effect and the parties must file submissions on costs as follows:

76 The lessee is to file and serve written submissions on the question of costs within 7 days of publication of these orders.

77 The lessor is to file and serve written submissions on the question of costs within 14 days of publication of these orders.

78 Subject to the parties' submission on this issue, the Tribunal proposes to determine any costs application without a hearing on the basis of the written material provided.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar