Civil and Administrative Tribunal

New South Wales

Case Name:	Cornucopia (Young) Pty Ltd v Ward
Medium Neutral Citation:	[2023] NSWCATCD 149
Hearing Date(s):	21 July 2023 (last submissions 23 August 2023)
Date of Orders:	8 September 2023
Decision Date:	8 September 2023
Jurisdiction:	Consumer and Commercial Division
Before:	G Ellis SC, Senior Member
Decision:	1 The respondents are to pay the applicant $72,797.15 immediately. 2 The respondents are to pay the costs of the applicant, on the ordinary basis, as agreed or assessed. 3 If either party wishes to contend that a different costs order should be made, order 2 ceases to have effect and the following orders apply: (a) Any application for a different costs order, supported by submissions (not exceeding five pages in length) and evidence, is to be filed and served within 14 days of the date of these orders. (b) Any submissions (not exceeding five pages in length) and evidence in response are to be filed and served with the following 14 days. (c) Any submissions in reply (not exceeding two pages in length) and evidence in reply are to be filed and served within the following 7 days. (d) Each party's submissions should indicate whether they agree that costs should be determined on the

	papers, ie without the need for a further hearing.
Catchwords:	RETAIL LEASE - Whether arrears of rent waived - whether breach of disclosure requirement proved - status of related agreement for electricity costs - assessment of make good claim - running account
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Retail Leases Act 1994 (NSW) Retail Leases Amendment (Review) Act 2017 (NSW)
Cases Cited:	Ashby v Slipper [2014] FCAFC 15 Blatch v Archer [1774] Eng R 2; 1 Cowper 63 Bonita v Shen [2016] NSWCATAP 159 Browne v Dunn (1893) 6 R 67, HL Fox v Percy [2003] HCA 22 Latoudis v Casey [1990] HCA 59 L'Estrange v F Graucob Ltd [1934] 2 KB 394 Left Bank Investments Pty Ltd v Ngunya Jarjum [2019] NSWSC 1352 News v Cotes [2019] NSWCATAP 186 Oshlak v Richmond River Council [1998] HCA 11 Precision Plastics Pty Ltd v Demir [1975] HCA 27; 132 CLR 372 Thompson v Chapman [2016] NSWCATAP 6 Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd [2010] NSWSC 963 Watson v Foxman (1995) 49 NSWLR 315 at 319 Zisis v Knighton [2008] NSWCA 42
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Applicant – Cornucopia (Young) Pty Ltd Respondents – Ian Ward and Denise Ward
Representation:	Solicitors: Applicant – L Macinnis, Stevens Vuaran Lawyers
File Number(s):	COM 22/55616

REASONS FOR DECISION

Outline

1 In an application lodged on 15 December 2022, the applicant claimed $109,435.42 plus costs from the respondents, for unpaid rent and outgoings, default interest, the costs of make good works and legal costs, in relation to their lease of a shop in Kotara.

2 Having considered the evidence and submissions, the Tribunal determined that the applicant is entitled to recover $72,797.15 from the respondents.

Hearing

3 Documents tendered and admitted as evidence were as follows:

Exhibit 1 Affidavit of Sally Walker, dated 24 March 2023

Exhibit 2 Ms Walker's affidavit in reply, dated 7 July 2023

Exhibit 3 Affidavit of Clive Nicols, dated 7 July 2023

Exhibit 4 Statement of Ian Ward, dated "*June 2023*"

4 The accompanying documents were included in those exhibits, the first three being the evidence for the applicant and the fourth being the evidence for the respondents.

5 The following documents were marked for identification during and after the hearing:

MFI 1 Applicant's submissions, dated 20 July 2023

MFI 2 Respondents' submissions, dated 4 August 2023

MFI 3 Submissions in reply, dated 18 August 2023

6 No notice to be available for cross-examination was given. Ms Walker was available, but Mr Nichols was not. Mr Ward was not required for cross-examination.

7 After the cross-examination of Ms Walker, Mr Macinnis supplemented his written submissions (MFI 1) with oral submissions. As there was insufficient

time for further oral submissions, provision was made for written submissions for the respondents followed by any submissions in reply for the applicant.

8 The directions hearing on 9 March 2023 did not include the provision of Points of Claim and Points of Defence. As a result, the nature of the respondents' defence to the applicants' claims was not known beyond the matters raised in the statement of Mr Ward and the cross-examination of Ms Walker. That was another reason for permitting the applicants to lodge submissions in reply.

Jurisdiction

9 It is clear there was a retail lease between the applicant as lessor and the respondents as lessees with the consequence that the Tribunal has jurisdiction to hear and determine this claim under the provisions of the *Retail Leases Act* 1994 (NSW), which will be abbreviated in these reasons to RLA.

Applicant's evidence

10 The initial affidavit of Ms Walker (Exhibit 1) was accompanied by a copy of the subject lease which is dated 1 July 2015 (1/1, ie from page one in the annexures to the affidavit which is Exhibit 1).

11 It was indicated that the applicant purchased the property which is the subject of that lease in 2016. A copy of an ASIC search for the respondents' business name, Newcastle Model Autosports Center, was also provided (1/38).

12 It was the evidence of Ms Walker that there were "*numerous occasions*" when the respondents failed to pay rent and outgoings, either in full or at all, and that Mr Nicols had been engaged to manage the premises. At [8] it was indicated that rent relief of $10,620 was provided in respect of the period from April to September 2020 and was not claimed in these proceedings.

13 A copy of the six pages sent by the managing agent to the respondents after they vacated the premises on 28 February 2022 were also annexed (1/39) as was a copy of the bank guarantee (1/45). An invoice for legal fees incurred by the applicant was also annexed (1/46) together with a copy of a letter of demand dated 29 June 2022 (1/49).

14 The affidavit of Ms Walker went on to say that, following termination of the subject lease, the respondents moved their business to new premises, in

Charlestown, and a copy of a 21 January 2023 Facebook post was annexed (1/51). It was suggested that Mr Ward, the first respondent, was observed at those premises on the afternoon of 24 January 2023 and that Mr Nicols spoke with Mr Ward the following afternoon.

15 In her affidavit in reply (Exhibit 2), Ms Walker responded to the statement of Mr Ward (Exhibit 4) by denying that Nr Nicols was ever authorised to waive rent due to the applicant company. It was her evidence that arrears of rent and outgoings in relation to the subject lease were a problem prior to the Covid-19 pandemic and a copy of a 3 September 2019 letter from the respondents' then solicitor to the applicant's then solicitor (2/4) was provided in support of that proposition. Further, it was said that the respondents did not carry out any 'make good' works or discuss that either that topic or arrears prior to vacating the premises. Ms Walker also noted that clause 49.1 of the subject lease contained an acknowledgement by the respondents that they had received a disclosure statement prior to entering the lease.

16 When cross-examined, it was suggested there was a lack of detail for the 30 hours claimed by the managing agents (1/43) in an invoice addressed to the applicant and Ms Walker conceded time sheets had not been obtained for that work. It was note that the same description was used invoice address to the respondents (1/39). As to the charges for electricity, Ms Walker said there was a separate agreement whereby the applicant installed solar panels and the respondent agreed to pay the applicant for electricity. Ms Walker conceded that agreement was not before the Tribunal but noted that the respondents had paid many bills for electricity.

17 Ms Walker said she had checked the amount of rent a long time ago and believed the amounts claimed were correct. She said she thought the claim for penalty interest was in accordance with the provisions of the lease and maintained she had never agreed to let the agent, Mr Nicols, waive rent. It was her evidence that the position in relation to rent relief for the pandemic was for Mr Nicols to obtain information from the respondents and bring that information to her so that a decision could then be made in relation to rent relief. Ms Walker maintained that she knew there were arrears of rent but did not waive

those arrears. She indicated that she believed there was a time when the applicant was not permitted to terminate the respondents' lease.

18 It was accepted that no competitive costings were provided in support of the 'make good' claim. She said that was a matter for Mr Nicols but it was to applicant's practice to obtain competitive quotes. The suggestion that the applicant carried out a refurbishment was denied but it was accepted that the new lessee did that. Ms Walker said that the amounts claimed were not all the 'make good' costs incurred. There was also reference to the three-month period for the respondents to paint, considered below.

19 In re-examination, Ms Walker was referred to letters from the then solicitors for the respondents (2/5) and the applicant (1/49). She reasserted that no authority was given to anyone to waive arrears of rent or provide rent relief.

20 Mr Nichols provided an affidavit (Exhibit 3) in which he recalled having dealt with the respondents in relation to the subject premises since the early 2000s. He replied to Mr Ward's statement, suggesting that Mr Ward made numerous complaints about not being able to pay rent but that his experience was that "*as long as sufficient pressure was put on Ian Ward, he would eventually make at least some payments of rent*". Mr Nicols denied ever saying anything to either of the respondents to suggest that rent was waived and annexed copies of an email dated 2 August 2021 (3/7) which referred to a recent conversation with Mr Ward.

21 Mr Nicols also gave evidence of a 22 December 2021 text message which referred to him providing Mr Ward with an invoice for rent for January 2022 which showed arrears exceeding $73,000 and set out details of his conversation with Mr Ward earlier that day.

22 It was the evidence of Mr Nicols that he told Mr Ward the carpets were being changed and that the amount claimed in these proceedings did not include any amount for carpet. He replied to what Mr Ward said in relation to the 'make good' claim and said that, when he visited the new premises occupied by the respondents in Charlestown, Mr Ward said the business was "*travelling OK*".

Respondents' evidence

23 Mr Ward submitted a statement (Exhibit 4) in which he made a claim, in indirect speech, relating to what he suggested Mr Nicols said to him, on a date or dates not specified: *"He told me that owners were happy to take whatever I could pay, as having a tenant was better than a vacant shop.*" Mr Ward annexed a statement of his daughter who claims that when her father said: *"We are doing our best with payments*" to which Mr Nicols replied: *"as long as you are paying what you can".*

24 Further, Mr Ward suggested there had been no requests for back rent, that no letters of demand had been sent, and that *"the monthly statement showed arrears which I believed were for accounting purposes"*. In relation to the 'make good' claim, Mr Ward's evidence was that after he commenced "*painting, carpet cleaning, and general repairs*", "*the Agent*" informed him that there was no need for such work as the premises were "*being completely renovation and basically gutted*". Mr Ward went on to suggest (1) that *"The new fit out was confirmed by the Designer/Architect for the new tenants",* and (2) that he had been quoted $2,000 for the painting work. However, there was no supporting evidence for either of those two matters.

25 In response to the 'make good' claim, there were 25 photos which accompanied the statement of Mr Ward and copies of the invoices upon which the applicant relied with the handwriting "*PREV TEN*" added to some items.

26 Mr Ward also suggested he had never received the required disclosure statement, with the contended result that the respondents were not entitled to recover *"undisclosed outgoings*" and that the respondents were entitled to a refund for all outgoings they had paid. It was also suggested that the amount claimed for electricity cannot be justified since electricity is provided by solar panels on the roof of the building. There was also a bare reference to the $506 claim for withdrawing the bond but there was no indication of any defence to that claim.

Submissions for the applicant

27 In the written submissions for the applicant (MFI 1), there was reference to clauses 12, 15, 19.3, 30, 32, 43 and 49 of the lease which is the subject of

these proceedings. It was noted that the respondents had never suggested they were "*impacted lessees*", as defined in the National Cabinet's Mandatory Code of Conduct, and that rent relief of $10,620 had been granted to the respondents by the applicant. Reasons were advanced for rejecting (1) the waiver defence raised by the respondent, (2) the response to the 'make good' claim, and (3) the alleged failure to provide a disclosure statement.

28 The amount claimed by the applicant was said to be:

(1) $101,855.69 as indicated by the managing agent on 17 May 2022 (1/39),

(2) $19,110.17 for interest up to 21 July 2023 for late payment,

(3) $4,118.40 for legal costs incurred prior to these proceedings, and

(4) the costs of these proceedings.

29 Additional matters raised in oral submissions were that, apart from what was apparent from the statement of Mr Ward, the only indication of what was the respondent's defence came at the hearing. It was suggested there was no valid defence except for the fact that the agreement in relation to electricity was outside the scope of the lease. Reference was made to *Watson v Foxman* and the suggestion that the applicant was willing to accept whatever the respondent could afford to pay was said to be commercially unrealistic.

30 In relation to the evidence of Mr Nicols, his email (3/7) was said to be inconsistent with waiver as was the text message (3/3-4 in [6]) and it was noted that the evidence of Mr Nicols was not challenged. On the issue of waiver, it was also noted that there was no correspondence from the respondents on that issue which was said to have not been raised prior to the statement of Mr Ward.

31 On the question of whether clause 14 of the lease, referring to "*within three (3) months of expiry of the lease*", related to the three-month period immediately before or after the expiry of the lease, it was submitted the prior construction was the former alternative. In response to any suggestion the 'make good' work could have been done more cheaply, it was noted that was a claim made after the event, and that there was nothing preventing the respondents from carrying out that work prior to the expiry of the lease. Further, since the 'make

good' costs had been paid, this was a claim for costs which had been incurred. As to the alleged failure to comply with any disclosure requirements, it was suggested that if estoppel operated, it operated against the respondents because of the express acknowledgement in their lease. It was also noted that s 12A of the RLA post-dated the commencement of the subject lease.

Submissions for the respondents

32 The respondents' submissions (MFI 2) began by referring to s 11 of the RLA, being the provision that was in force at the time when the lease commenced, on 1 July 2015.

33 It was suggested that it was not open to contradict the evidence of Mr Ward because it was not challenged by cross-examination and that, if there had been a disclosure statement, it could and should have been produced, especially since Mr Nicols gave evidence of being involved in the subject property since the "*early 2000s*". It was contended that the inclusion of words in clause 49.1 of the lease, suggesting the provision of a disclosure statement, was not evidence that such a statement either existed or was served.

34 The suggested consequence of such non-disclosure was that the applicant is not entitled to claim for outgoings which, based on a document provided by Ms Walker (2/7), were said to include: *"insurance, electricity, fire protection, repairs & maintenance (plumbing), repairs & maintenance (general), management fee, landscape gardening and air-conditioning*".

35 The respondents referred to s 28 of the RLA, entitled "*Outgoings statements*", and submitted that "*none of the outgoings calculations was properly prepared or audited. While this does not, of itself, exclude an entitlement to outgoings, it adds doubt as to the Applicant's calculation of its claim …".* The respondents' case was that, although the claims for outgoings may contain amounts for which the respondents are liable, the Tribunal should not make the respondents liable for those amounts in the absence of supporting evidence.

36 As to the waiver of rent, it was again suggested that the failure to cross-examine Mr Ward meant that the applicant was "*bound by his evidence*". Further, that Ms Walker had failed to indicate that any lack of authority of Mr Nicols to negotiate rent had never been communicated to the respondents (a

submission which purports to reverse the onus of proof in relation to the waiver defence). It was also submitted the applicant could not lead the respondents to believe rent had been waived and then later evict them and claim arrears of rent.

37 In relation to the claimed arrears of rent, submissions based on clause 10 of the lease and the Consumer Price Index (CPI) were said to suggest the base rent of $7,500 per month increased to $7,943.20 plus GST, ie $8,737.52, which differed from the amount of $8,849.72 in the applicant's schedule (1/44).

38 It was also suggested that it was necessary to go back, prior to 1 December 2019 when that running account commenced.

39 The position in relation to electricity was said to be that Ms Walker conceded there was a separate agreement which was not covered by the subject lease and was not able to be claimed in these proceedings.

40 In relation to the 'make good' claim, after referring to clause 29 of the lease, the Tribunal's attention was directed to the applicant's supporting documents (1/40-42) and to the evidence of Mr Ward. Reasons were advanced as to why it was contended the 'make good' claim should fail. It was also asserted there was insufficient evidence that the amounts claimed had been paid (despite the clear evidence of Ms Walker that those amounts had been paid.).

41 The final submission for the respondents was that the application should be dismissed.

Submissions in reply

42 Submissions in reply (MFI 3) suggested the respondent had sought to engage in *"trial by ambush*" by raising defences for the first time in closing submissions and noted the issue of the relevance of cross-examination, or lack of it, at the hearing.

43 After quoting from *Zisis v Knighton* [2008] NSWCA 42, at [49]-[50], and other decisions expressing similar sentiments, it was observed that significant parts of the respondent's case did not emerge until after Mr Ward's statement was filed (as to the claim of waiver), until the cross-examination of Ms Walker (as to

outgoings), and until written submissions were provided after the hearing (as to miscalculation of rent and what may be termed the running account defence).

44 It was noted there had been no complaint about any failure to disclose outgoings at any time during the lengthy period of the lease. Further, that the Tribunal had not required the respondents to file Points of Defence.

45 In such circumstances, it was submitted that any claim not indicated by Mr Ward's evidence should be treated with caution by reason of (1) procedural fairness, and (2) the doubt which should be placed on any claim raised for the first time at the 'heel of the hunt' unless there is a good reason why that claim was not indicated earlier.

46 On the question of the status of evidence when a witness was not cross-examined, it was noted that it was not just Mr Ward who was not cross-examined as Mr Nicols was also not cross-examined. The applicant's submissions were that (1) the waiver case advanced by Mr Ward had been rebutted, (2) the position in relation to the disclosure statement was inconsistent with clause 49 of the lease, and (3) evidence of the condition of the premises at the commencement of the lease was not within the knowledge of the applicant who purchased the premises from the company which entered into the lease with the respondent.

47 It was suggested there was no requirement to cross-examine Mr Ward, such as the so-called rule in *Browne v Dunn* (1893) 6 R 67 HL, and that regard should be had to matters such as the presence or absence of contemporaneous documents and any relevant commercial unreality.

48 As to the alleged failure to disclose, it was said that the absence of evidence did not constitute evidence of absence and that promissory estoppel created a position from which Mr Ward could not resile.

49 In relation to the waiver defence, after referring to *Left Bank Investments Pty Ltd v Ngunya Jarjum* [2019] NSWSC 1352 (*Left Bank*) at [111] (a passage expressly approved on appeal), it was submitted there could be no waiver and no estoppel as there was no representation. It was said that the respondents' claim was for an entirely oral waiver and reliance was placed on what was said

in *Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd* [2010] NSWSC 963 (*Ventouris*) at [87].

50 It was noted that miscalculation of rent was raised for the first time after the hearing, in written submissions and that there had been no evidence of any complaint in relation to the amount of rent charged.

51 Likewise, it was contended that the 'running account' defence should be rejected, and the Tribunal was reminded that the date of 1 December 2019 followed closely after the last occasion on which the respondents were up to date with their rent, following the sale of the property to the applicant.

52 The submissions in relation to the 'make good' claim, to the extent that they were made for the first time in written submissions after the hearing, were said to have deprived the applicant of the opportunity to lead more detailed evidence. It was also noted that Ms Walker gave evidence, during her cross-examination, that the amounts claimed had been paid by the applicant.

53 Turning to the claim for electricity charges under a separate agreement, reliance was placed on s 63 and s 70 of the RLA. Finally, it was suggested the applicant would need to provide updated interest calculations to (1) bring that calculation up to date, and (2) remove any claim for interest in relation to the electricity charges.

Consideration

Assessment of evidence

54 It is well recognised that human memory of what was said in a conversation is fallible for a variety of reasons and may be expected to decrease with time: *Watson v Foxman* (1995) 49 NSWLR 315 at 319. The Tribunal considers the preferable approach is to give priority to contemporaneous documents, which carry greater weight than documents prepared for the purpose of litigation, and to base conclusions on contemporary materials, objectively established facts, and the apparent logic of events, consistent with what McHugh J said in *Fox v Percy* [2003] HCA 22 at [30]-[31].

55 The Tribunal is also entitled to take into consideration not only the evidence that was led but also the evidence that was not led. As Lord Mansfield said in *Blatch v Archer* [1774] Eng R 2; 1 Cowper 63 at 65:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.

56 It is not the case that evidence which is not the subject of cross-examination must be accepted. In *Ashby v Slipper* [2014] FCAFC 15 (*Ashby*) at [77] it was said that:

> … as a general proposition, evidence, which is not inherently incredible and which is unchallenged, ought to be accepted: *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 372 at 370-371 (per Gibbs J, Stephen J agreeing, Murphy J generally agreeing). The evidence may of course be rejected if it is contradicted by facts otherwise established by the evidence or the particular circumstances point to its rejection.

Assessment of witnesses

57 Mr Ward is not considered to be a reliable witness. His suggestion that *"At no stage prior to me being asked to vacate the premises had the agent requested back rent or interest on back rent be paid …*" was contradicted by contemporaneous, pre-litigation documents dated 2 August 2019 (3/7) and 3 September 2019 (2/5-6). The former document indicated he said he was obtaining a loan to pay arrears of rent. The latter documents show he was willing to sign an irrevocable authority to pay *"all arrears, accrued interest and legal costs …*". In other words, the statement Mr Ward signed in June 2023 in support of his claims in these proceedings is contradicted by a document he signed on 3 September 2019.

58 Further, Mr Ward's suggestion that the applicant was willing to accept whatever rent the respondents felt they were able to pay is commercially unrealistic, other than during the pandemic. Likewise, the suggestion that *"the monthly statement showed arrears which I believed were for accounting purposes*" strains credibility. Indeed, Mr Ward's suggestions that the agent did not request back rent and that the monthly statements showed arrears are inconsistent.

59 Ms Danielle Ward also signed a brief statement in June 2023 in which she attributed words to Mr Nicols at times that were not indicated beyond her

evidence that she has worked in the respondents' business since 2009. While there does to appear to be reason why her evidence should not be accepted, her evidence does not provide adequate support for the respondents' case on waiver for the reasons set out below.

60 Ms Walker gave evidence that was tested by cross-examination, and made admissions against the applicant's interest, such as in relation to electricity and rent relief provided in response to the pandemic. There was no submission from the respondents that she should not be disbelieved, and the Tribunal is unable to discern any reason why her evidence should not be considered reliable.

61 Mr Nicols provided evidence that was not challenged in that, despite the respondents being legally represented by an experienced practitioner, no notice was given for him to be available for cross-examination was provided. Applying what was said in *Ashby*, his evidence is accepted.

62 To the extent that there is a contest between the evidence of Mr Ward in the respondents' case and the evidence of Ms Walker and Mr Nicols in the applicant's case, their evidence is clearly to be preferred. The Tribunal does not consider any evidence of Mr Ward should be accepted unless reliably corroborated, such as by a contemporaneous, pre-litigation document.

Issues

63 From the evidence and submissions, it appears that the following issues require determination by the Tribunal:

(1) Was there a waiver of rent by the applicant?
(2) If not, what amount is payable in respect of rent?
(3) Was there a failure to disclose which prevents recovery of outgoings?
(4) If not, what amount is payable in respect of outgoings?
(5) Is the respondent entitled to recover charges for electricity?
(6) If so, what amount is payable for electricity?
(7) What amount, if any, is payable in respect of the 'make good' claim?
(8) What amount, if any, is payable in respect of legal expenses?
(9) What amount, if any, is payable in respect of interest?

Chronology

64 It is necessary to go through the sequence of relevant events, as set out in the evidence, then make findings of fact upon which a determination of the issues depends, before considering the issues which require determination. Appendix A sets out a chronology of events, as suggested by the evidence.

Findings of fact

65 Having regard to that chronology, and to the submissions of both parties, the Tribunal makes the following findings of fact:

(1) Prior to the commencement of the subject lease, Mr Nicols was the managing agent for the premises the subject of that lease.

(2) On 1 July 2015 the respondents signed a lease with Tardem Pty Ltd.

(3) During 2016 the applicant's purchased the subject premises.

(4) Prior to the completion of that purchase, Mr Nicols obtained confirmation from the solicitor who prepared the subject lease that there had been compliance with the provisions of the RLA at that time.

(5) The subject lease provided for an initial monthly rent of $7,500 plus GST.

(6) The CPI Sydney (All Groups) for June in each of the years from 2015 to 2020 was as set out in the second column of Appendix B.

(7) On 8 August 2017 the applicant's agent provided the respondent with an Outgoings Reconciliation which showed that (a) for 2016/2017 an amount of $25,725.75 was payable for the respondent's share of outgoings, (b) $24,655.20 ($2,054.60 multiplied by 12) was paid by the respondent in respect of those outgoings, and (c) the amount that would be charged for 2017/2018 was $25,757.30 ($2,146.44 per month).

(8) On 3 September 2019 the applicant signed an Irrevocable Authority which instructed his solicitor to *"pay all outstanding arrears, accrued interest and legal costs relating to the Lease of the premises*".

(9) The applicant provided the respondent rent relief of $10,620 in respect of the period from April to September in 2020.

(10) Shortly prior to 2 August 2021 the first respondent sought to obtain a loan for the purpose of paying the arrears owned to the applicant.

(11) On or shortly before 2 August 2021 Mr Nicols advised Ms Walker that *"Ian Ward is continuing with his endeavours to arrange a loan for working capital so as to address his arrears situation and has confirmed that he has now provided the Sydney based finance broker with most of the particulars he is seeking."*

(12) On 28 February 2022 the respondents vacated the premises.

(13) The applicant then recovered the bank guarantee of $24,750 but incurred legal costs of $506 in so doing.

(14) Between 9 March 2022 and 12 May 2022 invoices for a total of $15,007.85 were sent to the applicant and were paid by the applicant.

(15) That amount was included in an invoice sent by the applicant to the respondents on 17 May 2022 which sought $101,855.69, comprising (a) arrears of rent and outgoings of $102,293.40 less the net proceeds of the bank guarantee of $24,244, giving $78,049.40, (b) interest for the period from 1 December 2019 to 28 February 2022 of $8,798.44, and (c) $15,007.85 for 'make good' costs and the costs of the applicant's agent.

(16) On 29 June 2022 the applicant's solicitor sent a letter of demand to the respondents.

(17) After leaving the subject premises, the respondents continued their business from premises in Charlestown.

(18) At some time during the period from when the applicant's purchased the premises (in 2016) and when the respondent's vacated the premises (on 28 February 2022) solar panels were installed, and the parties reached a new agreement in relation to electricity charges.

Was there a waiver of rent by the applicant?

66 The respondent claim that arrears of rent were waived is rejected for the following reasons. First, since the Tribunal accepts the evidence of Ms Walker that she never waived arrears of rent. Secondly, Mr Nicols' denial of a waiver is accepted. Thirdly, there is no evidence of the applicant giving Mr Nicols the authority to do so or advising the respondents that he had that authority, ie applying what was said in *Left Bank*, there was no "holding out". Fourthly, since the evidence of Mr Ward, which is not considered reliable, does not provide a sufficient basis for a finding of waiver. Fifthly, there are documents which contradict a waiver, as indicated in findings (8) and (11) above. Sixthly, there is no evidence in writing which supports the waiver defence of the respondents who bear the onus of proof on this issue. Seventhly, even if words of the kind suggested by Ms Ward were used, they are not sufficient to preclude the applicant from claiming arrears of rent.

67 Eighthly, the suggestion that the applicant was willing to accept whatever the respondents considered they were able to pay is commercially unrealistic and, consistent with what was said in *Ventouris*, the Tribunal considers the inherent unlikelihood of that suggestion in deciding that it is not persuaded that any

representation was ever made on behalf of the applicant to the respondents that arrears of rent had been waived. That suggestion, if adopted, would mean the applicant permitted the respondent to pay what it liked whenever it wished.

68 Finally, clause 43 of the lease, set out below, operates against finding that arrears of rent or outgoings was waived:

> 43 No waiver
>
> After Lessee is in default or breach under this Lease, including in breach of an essential term of this Lease, the demand or acceptance from Lessee by Lessor or arrears or of any late payment of rent, taxes, outgoings, or other financial obligations does not:
>
> (a) preclude Lessor from exercising any rights or remedies under this Lease, including enforcing or terminating this Lease;
>
> (b) constitute a waiver of the essential nature of Lessee's obligations to make those payments;
>
> (c) waive Lessee's continuing obligation to make those payments during the lease term.

69 It is convenient to here note that if any words of the form suggested by Ms Ward were ever used by Mr Nicols, the Tribunal considers words to that effect may have been used during the pandemic. In short, tolerating arrears of rent and outgoings cannot be elevated to abandoning the entitlement to be paid such amounts. The defence of waiver fails.

If not, what amount is payable in respect of rent?

70 The amount claimed by the applicant is in accordance with a schedule (1/44) that was provided to the respondent under cover of a 17 May 2022 letter to the respondent from the applicant's agent. While there is no evidence of any amount in that schedule having ever been disputed by the respondents, that schedule does not set out the basis of calculation nor have supporting documents been provided by the applicant prior to or during the hearing.

71 As a result, the Tribunal is unable to verify the amounts claimed, either by undertaking calculations or by reference to documents. In such circumstances, since the obligation to pay rent was imposed by the lease, the Tribunal considers the preferable course is to calculate the rent payable by reference to the provisions of the lease. Having undertaken that calculation in Appendix B,

the Tribunal considers the applicant's entitlement to rent for the 26 months from an including January 2020 to February 2022 was $230,588.51.

72 As it was conceded by Ms Walker that rent relief of $10,620.00 was provided in respect of the period from April to September in 2020, that amount should be deducted, giving a balance of $219,968.51.

73 It is convenient to here note that the amounts paid were shown in two columns in the schedule (1/44). In each case, the amounts total $206,919.00. The respondents, who have had ample opportunity since 17 May 2022 to suggest that additional amounts were paid, did not do so. As a result, the Tribunal is satisfied that the respondent made payments to the applicant in respect of the subject lease totalling $206,919.00 during the period from 1 December 2019.

Was there a failure to disclose which prevents recovery of outgoings?

74 Although Mr Ward, in his statement, suggested there had been a failure on the part of the applicant to comply with the disclosure requirements of s 12A of the RLA, that overlooks the fact that s 12A was added to the RLA by the *Retail Leases Amendment (Review) Act* 2017 (NSW) and did not take effect until 1 July 2017, after the respondents signed the subject lease.

75 The relevant provisions in the RLA at the time when the subject lease commenced, on 1 July 2015, were s 11, s 11A, and s 12 which, for the sake of completeness, are set out below:

> **11 Lessor's disclosure statement**
>
> (1) At least 7 days before a retail shop lease is entered into, the lessee must be given a disclosure statement for the lease. A disclosure statement is a statement in writing that contains the information, and is accompanied by the material, that is contained in or required to complete or accompany the form of disclosure statement set out in the prescribed form (but only to the extent that is relevant to the lease concerned). The layout of the disclosure statement need not comply with that of the prescribed form. However, a lessor's disclosure statement is complete for the purposes of this section only if it has attached to it a form to be completed by the lessee in the form prescribed for the purposes of section 11A.
>
> (2) If a lessee was not given a disclosure statement as required by subsection (1) or if the disclosure statement that was given to the lessee was incomplete or contained information that at the time it was given was materially false or misleading, the lessee may terminate the lease

by notice in writing to the lessor at any time within 6 months after the lease was entered into, unless subsection (3) prevents termination.

(3) The lessee cannot terminate the lease under this section on the ground that the disclosure statement is incomplete or contains information that is materially false or misleading if:

(a) the lessor has acted honestly and reasonably and ought reasonably to be excused for the failure concerned, and

(b) the lessee is in substantially as good a position as the lessee would have been if the failure had not occurred.

(4) If a lease is entered into by way of the renewal of a lease, a written statement (a ***lessor's disclosure update***) that updates the provisions of an earlier disclosure statement given to the lessee is, in conjunction with that earlier disclosure statement, considered to be a disclosure statement given for the purposes of this section at the time the lessor's disclosure update is given.

(5) The termination of a lease under this section does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the lease in respect of any period before its termination.

(6) A lessor under a retail shop lease is guilty of an offence if subsection (1) is not complied with in relation to the lease.

Maximum penalty: 50 penalty units.

11A Lessee's disclosure statement

(1) Not later than 7 days after receiving a lessor's disclosure statement, or within such further period as may be agreed with the prospective lessor, the lessor must be given a lessee's disclosure statement. A lessee's disclosure statement is a statement in writing that contains the information that is contained in or required to complete the form of lessee's disclosure statement set out in the prescribed form (but only to the extent that it is relevant to the lease concerned). The layout of the lessee's disclosure statement need not comply with that of the prescribed form.

(2) If a lease is entered into by way of the renewal of a lease, a written statement (a ***lessee's disclosure update***) that updates the provisions of an earlier lessee's disclosure statement given to the lessor is, in conjunction with that earlier lessee's disclosure statement, considered to be the lessee's disclosure statement given for the purposes of this section at the time the lessee's disclosure update is given.

(3) A lessee under a retail shop lease is guilty of an offence if subsection (1) is not complied with in relation to the lease.

Maximum penalty: 50 penalty units.

(4) The regulations may prescribe additional matters to be included in the form of lessee's disclosure statement for the purposes of this section.

12 Lessee not required to pay undisclosed contributions

A provision of a retail shop lease that requires the lessee to pay or contribute towards the cost of any finishes, fixtures, fittings, equipment or services is void unless the liability to make the payment or contribution was disclosed in a disclosure statement given to the lessee in accordance with this Part.

76 There are three reasons why the respondents' claim there was a failure to provide the required disclosure statement is rejected. First, that claim is only made by Mr Ward whose evidence is not considered to provide a reliable basis for such a finding. Secondly, that claim was rebutted by the unchallenged evidence of Mr Nicols that he checked with the solicitor who prepared the subject lease. Thirdly, the lease itself contains the following acknowledgement in clause 49.1:

> The Lessee acknowledges that the Lessee received a disclosure statement in the form prescribed by the act from the Lessors at least seven (7) days before this Lease was entered into, which it read and understood.

77 It has long been the law that a person is bound by the terms of a signed contract: *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 and none of the exceptions to that rule are applicable in this instance.

78 Hence, the respondents were liable to pay outgoings under clause 11 of the lease, head *"Outgoings*", was in the following terms:

> 11.1 Lessee's liability for Outgoings
>
> (a) The Lessee shall pay to the Lessee the Lessee's percentage of Outgoings specified in Item 11.1 in the reference schedule for the term of the Lease.
>
> (b) The amount of Outgoings shall be assessed by the Lessor, for each annual period ending on 30th June (called "annual period"), on the basis of the previous annual period's Outgoings and reasonably anticipated changes.
>
> (c) For the purpose of the assessment and the itemised statement of Outgoings, those expenses shall be calculated on an accrual and prepayment basis by the Lessor, so that:
>
> (i) the Lessor's obligation arises on the date when it is under legal liability to pay for an Outgoing;
>
> (ii) when an Outgoing relates to a particular annual or other period, the proportion attributed to the annual period shall be included, apportioned

on a daily basis, whether payment is required before, during or after the annual period.

(d) The proportion payable by the Lessee for Outgoings attributable to part of an annual period shall be calculated on the basis of the Lessor's assessment of Outgoings for that annual period and is payable by monthly instalments.

11.2 Outgoings

In this clause, "outgoings" includes:

(a) all rates, taxes, charges and impositions, currently and in the future, payable to any Federal, State or local government, statutory or public authority or corporation, in respect of the property, the Building or the Leased Premises including:

(i) municipal, local and other rates and charges payable to a local authority;

(ii) rates and charges for the supply, reticulation or discharge of water (including excess water), sewerage, drainage but excluding the removal of waste;

(iii) land tax or any similar tax, at the rate payable if the land on which the Leased Premises is situated was the only land owned by the Lessor;

(iv) but not including any income tax, capital gains tax or similar tax payable by the Lessor.

(b) the insurance costs and charges paid by the Lessor in respect of risks to or in connection with the property and Building and its use, control and management including loss of rents, which the Lessor considers reasonably necessary to cover by insurance.

(c) Costs and expenses relating to operating, maintaining, servicing and repairing plant and equipment, services and facilities provided by the Lessor, including air conditioning, ventilating, heating or cooling the Premises, and fees paid for service contracts and to specialist contractors.

(d) The Lessor's costs of management and administration of the Building, including:

(i) The Lessor's costs of management and administration of the Building, including management fees, commission and remuneration paid to managing agents;

(e) Costs and expenses relating to:

(i) painting, repair, renewal and maintenance of the Building and Common Areas of the Building;

(ii) maintaining, repairing and replacing notice boards and signs;

(iii) maintenance and provision of landscaping, gardens, outdoor plants and cleaning of the Common Areas of the Building; and

(iv) the supply of electricity for lighting the common areas;

(v) trade waste;

(f) When the property is under strata title, contributions and payments made by the Lessor to the body corporate except sinking fund levies for structural repairs to the Building.

(g) Costs and expenses relating to operating, maintaining, servicing and repairing fire protection plant and equipment in the common area, and fees paid for service contracts and to specialist contractors.

11.3 Payment of Lessee's Contributions

(a) At least 30 days before the commencement of an annual period the lessor shall provide to the lessee an itemised estimate of the outgoings payable during or attributable to the next annual period, and calculations of the lessee's percentage and the monthly instalments payable by the Lessee.

(b) When during an annual period some additional item of operating expense is incurred, the lessor may reassess the lessee's contribution and require the lessee to pay it by monthly instalments during that annual period.

(c) The lessee's contribution to outgoings is payable monthly together with the rent.

(d) Within 90 days after the end of the annual period the lessor shall provide to the lessee an outgoings statement for that annual period, accompanied by an auditor's report.

(e) The lessor's outgoings statement, when accompanied by an auditor's report, in accordance with paragraph (d), is prima facie evidence of the outgoings during an annual period.

(f) Within 1 month after the lessor has provided to the lessee the outgoings statement, and within 4 months of the end of an annual period, the parties shall adjust and pay any balance due from the lessee or overpayment for contributions paid to the lessor for the previous annual period.

(g) The lessee's liability to pay for outgoings during the lease term shall not be extinguished merely because the lease term has expired or has been terminated, subject to any other agreement between the parties.

79 Item 11 in the Reference Schedule provided as follows:

11.1 Percentage of outgoings

17.98% of the outgoings set out in clause 11.2(a) and 11.2(g);
28.89% of the outgoings set out in clause 11.2(d) and 11.2(e);
35.96% of the outgoings set out in clause 11.2(b); and
100% of the outgoings set out in clause 11.2(c) and 11.2(f).

80 Therefore, the Tribunal determines that the respondents were obligated to pay outgoings to the applicant, and it is necessary to consider what amount the applicant is entitled to recover in respect of that obligation.

If not, what amount is payable in respect of outgoings?

81 The Outgoings Reconciliation dated 8 August 2017 (2/7) is a document prepared by the applicant's agent and accords with the provisions of the lease quoted above. It sets out detailed calculations which provide the basis for the following annual amounts in relation to the respondents' share of outgoings:

(1) an actual amount of $25,725.75 for the 2016-2017 financial year;
(2) payment of $24,655.20 by the respondents during that year, and
(3) a budgeted amount of $25,757.30 for the 2017-2018 financial year.

82 While the schedule provided (1/44) suggested amounts of $2,397.93 for 2019-2020 (with an adjusting payment of $2,835.02 in August 2020), $2,427.94 for 2020-2021, and $2,313.27 for 2021-2022, there are no supporting documents for those amounts although they have been prepared by the applicant's agent and communicated to the respondents with a letter dated 17 May 2022 (1/39).

83 Had there been similar documents to the Outgoings Reconciliation dated 8 August 2017 for the 2019-2020, 2020-2021, and 2021-2022 financial years then the Tribunal would have awarded an amount based on those documents. In the absence of such documents, the Tribunal cannot determine the precise amount payable by the respondents in respect of outgoings for the period from 1 December 2019 to 28 February 2022.

84 However, it is clear (1) there was an obligation on the part of the respondents to pay outgoings, (2) they paid $2,054.60 per month during the 2016-2017 financial year, (3) they were required to pay $2,146.44 per month ($25,757.30 divided by 12) during the 2017-2018 financial year, and (4) the agent had calculated monthly amounts in excess of $2,146.44 for the months in issue in these proceedings (1/44).

85 A court or tribunal is entitled to determine issues based on not only the evidence but also the reasonable inferences available from that evidence. Since(1) there is an obligation for the respondent to pay outgoings, (2) the respondents paid a monthly amount of $2,054.60 during the 2016-2017 financial year, and (3) the respondents were charged a monthly amount of $2,146.44 during the 2017-2018 financial year, it is a reasonable inference that the amount which the respondents would have been charged during each of the 26 months from January 2020 to February 2022 would have been more than $2,146.44.

86 Accordingly, the Tribunal considers the applicant entitled to recover $55,807.44, being 26 months at $2,146.44 per month, in respect of their obligation under the lease in relation to outgoings.

Is the respondent entitled to recover charges for electricity?

87 There is no doubt that the respondents were obligated to pay electricity under the terms of the lease. There is also no doubt that, due to the installation of solar panels, a new agreement was reached between the applicant and the respondents in relation to electricity. That agreement could have been either a variation of the lease or a separate, collateral agreement.

88 It is noted that s 63 of the RLA, which defines a "*retail tenancy dispute*" would enable the Tribunal to consider a claim for electricity under that new agreement because that claim, to quote the relevant words in that section, *"arose in connection with the use or occupation of the retail shop to which the lease or former lease relates*". Similar support is provided by the definition of a "*retail tenancy claim"* in s 70.

89 However, there is no evidence of that agreement and that is the first reason why the applicant's claim for electricity fails.

If so, what amount is payable for electricity?

90 Even if the applicant had proved that new agreement, the only evidence as to the amount claimed is the schedule which accompanied the 17 May 2022 letter to the respondents and there is no supporting evidence for the monthly amounts ranging from a low of $220.67 to a high of $933.72 shown in that

document. That is the second reason why the applicant's claim for electricity fails.

What amount, if any, is payable in respect of the 'make good' claim?

91 Clause 30 of the lease and item 14 in the Reference Schedule obligated the respondents to 'make good' the subject premises *"within three (3) months of the expiry of the Lease*".

92 The suggestion those words apply to three months after the lease is rejected as being a commercially unrealistic interpretation and the Tribunal considers those words apply to the last three months of the lease.

93 As (1) the evidence of Mr Nicols is preferred to that of Mr Ward, (2) Mr Nicols has been involved as an agent in relation to the subject premises over a period which commenced prior to the commencement of the subject lease, and (3) he gave unchallenged evidence not only that the respondents failed to carry out 'make good' works but also that the costs charged were reasonable, the Tribunal consider the applicant is entitled to recover each of the three amounts invoiced by UrbanOps, namely $6,666.00 and $1,304.60 on 9 March 2022 (1/41 and 1/42 respectively) and $1,757.25 on 12 May 2022 (1/40). The total of those three amounts is $9,727.85.

94 Contrary to the respondents' submission, there was evidence that those amounts were paid, being evidence from Ms Walker which the Tribunal accepts.

95 There was also a claim by the applicant to be reimbursed $5,280, being the amount invoiced by the agent on 10 May 2022 (1/43) which invoice contained the following details:

> Costs associated with identifying, supervising and coordinating lessee's 'make good works' following their vacation of the premises and in calculating lessee's penalty interest charges on overdue payments for the period 1/12/19 to 28/2/22 (involving 418 separate calculations)
>
> 30 hours at $176.00 per hour

96 To the extent that the work the subject of that invoice related to the 'make good' claim, clause 30.3 of the lease only entitles the lessor to recover *"the reasonable cost*". To the extent that the calculation of interest may be said to

be damages, it is clear the applicant is only entitled to recover a reasonable amount. Even if the calculation of interest by the agent could be considered a disbursement covered by clause 12 of the lease, again the liability of the respondents only extends to *"reasonable … disbursements*".

97 The Tribunal considers a reasonable time to allow for identifying, supervising, and coordinating the 'make good' works to be 12 working hours and that a calculation of interest should not take more than one day of eight working hours. As the hourly rate of $160 plus GST is considered reasonable, the Tribunal allows $3,520 ($176 multiplied by 20) in respect of the agent's invoice and it is convenient to include that amount under the 'make good' claim.

98 Hence, the total amount allowed for the 'make good' claim is $13,247.85 (ie $9,727.85 plus $3,520.00)

What amount, if any, is payable in respect of legal expenses?

99 Clause 12 of the lease operates to make the respondents *"responsible for payment of the [applicant's] reasonable legal costs and disbursements in connection with the Lease*" and specifically includes costs incurred due to the respondent's default.

100 The amount of $506 that was incurred in relation to obtaining the proceeds of the bank guarantee is considered reasonable, noting that amount was discounted from $646.80.

101 A further amount of $4,118.40 was claimed and a supporting invoice for that amount was attached to the written submissions of the applicant dated 20 July 2023 (MFI 1) which were filed and served prior to the hearing. By reason of (1) that invoice not providing details of the work the subject of that invoice, and (2) its inclusion with submissions dated the day before the hearing, the Tribunal declines to assess that claim.

102 It is noted that (1) clause 12 obliges the respondents to pay the applicant's *"reasonable costs and disbursements in connection with the lease*", and (2) s 60(5)(a) of the Civil and Administrative Tribunal Act 2013 (the CATA) defines costs as including *"the costs of, or incidental to, proceedings in the Tribunal*".

103 The Tribunal considers the preferable course is to provide for the work the subject of that invoice for $4,118.40 to form part of the applicant's costs that will, if not agreed between the parties, become part of the costs assessment process.

104 Accordingly, it is sufficient for the Tribunal to record a finding that the 22 December 2022 invoice for legal fees of $4,118.40 forms part of the costs of or incidental to these proceedings.

What amount, if any, is payable in respect of interest?

105 The applicant suggested that an opportunity be provided for interest to be recalculated but that process would only add time and cost and may well give rise to further disputation. Interest of $8,798.44 was calculated on arrears of $102,293.40 as at 28 February 2022, excluding the bank guarantee (1/39). The Tribunal has instead determined that an amount of $68,856.95 ($219,968.51 plus $55,807.44 less $206,919.00) was payable as at that date.

106 Reducing $8,798.44 by the ratio of $55,807.44 to $102,293.40 gives $5,922.51 as the imputed interest payable under clause 15.2 of the lease up to and including 28 February 2022.

107 It remains to consider the interest payable from 1 March 2023 to the date of the orders made in these proceedings. That calculation is set out in Appendix C.

108 Adding the amount of $5,922.51 (determined above) and $9,013.84 (determined in Appendix C) gives an amount of $14,936.35 which the Tribunal considers should be awarded for interest. While the Tribunal's calculation of interest may not be precise, it is considered a preferable approach, given the Tribunal's guiding principle of the just, quick, and cheap resolution of issues, to redoing a calculation which may take hours of the time of the applicant's agent.

Summary

109 The amounts determined above are collected in the following table:

Rent (net of Covid relief)	219,968.51
Outgoings	55,807.44

Electricity	0
Make good costs	13,247.85
Legal fees	506.00
Interest	14,936.35
Less payments made	-206,919.00
Less bank guarantee	-24,750.00
Total	$72,797.15

110 Accordingly, the Tribunal considers that the respondents should be ordered to pay the applicant $72,797.15.

111 For the sake of completeness, the Tribunal rejects the claim for $3,958.52 which was the opening balance on the agent's schedule (1/44) on the basis that there are no supporting documents provided in relation to that amount.

112 Finally, in relation to the schedule submitted by the applicant (1/44), it is commonly the case in residential tenancy matters that the Tribunal makes decisions based on a rent ledger produced in a recognised form that reflects the use of standard software and which is considered a business record, prepared under circumstances where there is an obligation to maintain accurate records. However, in this case, the schedule presents as a stand-alone document and the Tribunal has not used that document other than as indicating the amounts paid by the respondents. It is noted that, if that document had been accepted as accurately indicting the amounts owed to the applicant, the figures set out above (at [109]) would have been different in three respects: (1) the amount for rent (net of Covid relief) would have been $230,092.72 (instead of $219,968.51), (2) the amount for outgoings would have been $62,520.76 (instead of $55,807.44), and (3) the figure for interest would be different.

Costs

113 In the CATA, the effect of s 60 is that each party is to bear their own costs unless there are special circumstances which warrant an order for costs.

114 However, s 35 of the CATA operates to make s 60 subject to r 38 of the *Civil and Administrative Tribunal Rules 2014* which provides as follows:

> (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
>
> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:
>
> (a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or
>
> (b) the amount claimed or in dispute in the proceedings is more than $30,000.

115 When rule 38 applies there is a general discretion to award costs and it is well established, by decisions such as *News v Cotes* [2019] NSWCATAP 186, *Bonita v Shen* [2016] NSWCATAP 159 and *Thompson v Chapman* [2016] NSWCATAP 6, that (1) the starting point is that the usual order for costs should be in favour of the successful party, (2) the award is not to punish the unsuccessful party but to compensate the successful party for the costs incurred in the proceedings, and (3) departure from the usual order is permissible if the circumstances favour that course of action.

116 Simply stated, when rule 38 applies it is not necessary to establish special circumstances and the usual order is that costs follow the event (ie follow the outcome of the case) unless there is disentitling behaviour by the successful party: *Latoudis v Casey* [1990] HCA 59, *Oshlak v Richmond River Council* [1998] HCA 11.

117 These proceedings appear to be a case where costs follow the event. However, it is sometimes the case that the successful party wishes to claim costs on an indemnity basis or that the unsuccessful party wishes to contend that a settlement offer was unreasonably refused. Further, neither solicitor

made submissions as to the costs of these proceedings either during the hearing or in their written submissions.

118 The practical course is to make an order for the respondents to pay the costs of the applicant, but to make provision for written submissions to be made in the event either party wishes to seek a different costs order.

Orders

119 For the reasons set out above, the following orders are made:

(1) The respondents are to pay the applicant $72,797.15 immediately.

(2) The respondents are to pay the costs of the applicant, on the ordinary basis, as agreed or assessed.

(3) If either party wishes to contend that a different costs order should be made, order (2) ceases to have effect and the following orders apply:

(a) Any application for a different costs order is to be filed and served, supported by submissions (not exceeding five pages in length) and evidence, within 14 days of the date of these orders.

(b) Any submissions (not exceeding five pages in length) and evidence in response are to be filed and served with the following 14 days.

(c) Any submissions in reply (not exceeding two pages in length) and evidence in reply are to be filed and served within the following 7 days.

(d) Each party's submissions should indicate whether they agree that costs should be determined on the papers, ie without the need for a further hearing, under s 50(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW).

Appendix A

Date	*Description*	*Reference*
31 Jul 90	Respondents registered the name of their business	1/38
After	Mr Nicols became the managing agent for the	3 at [2]

2000	subject premises	
2001	Respondent commenced occupation of the subject premises	4 at [3]
Oct 14	Mr Nicols began working for the applicant's agent	3 at [2]
01 Jul 15	Respondents signed subject lease with Tardem Pty Ltd	1/1
2016	The applicant purchases the subject premises	1 at [5]
01 Jul 17	Section 12A of the RLA came into effect	2 at [9]
08 Aug 17	Applicant's agent sent respondents an Outgoings Reconciliation	2/7
03 Sep 19	Respondents' lawyer sent applicant an Irrevocable Authority	2/5
2020	Covid rent relief of $10,620 provided for April to September	1 at [8]
02 Aug 21	Agent sent email to applicant, referring to loan to pay arrears	3/7
22 Dec	Mr Nicols spoke to Mr Ward then texted Ms Walker	3 at [6]

21		
28 Feb 22	Respondents vacated the premises	1 at [9]
Later	The applicant recovered the bank guarantee of $24,750	1/45
28 Apr 22	The discounted legal costs of achieving that recovery were $506	1/46
09 Mar 22	Urban Ops issued invoices for $6,666 and $1,304.60	1/41-42
10 May 22	Applicant's agent sent them an invoice for $5,280	1/43
12 May 22	Urban Ops issued invoice for $1,757.25	1/40
17 May 22	Applicant's agent sent invoice to the respondents	1/39
29 Jun 22	The applicant's solicitor sent the respondents a letter of demand	1/49
Later	There was an unsuccessful attempt to resolve by mediation	1 at [16]

Sep 22	Mr Nicols cease working for the applicant's agent	3 at [2]
21 Jan 23	Respondents posted on Facebook in relation to their business	1 at [17]
24 Jan 23	First respondent observed at that business in Charlestown	1 at [20]
25 Jan 23	Mr Nicols spoke to first respondent at those premises	3 at [12]

Appendix B

Jun	*CPI*	*Rent payable*	*Applicable period*	*Months claimed*	*No of months*	*Amount due*
2015	108.3	7,500.00	Jul 15 - Jun 16			
2016	109.3		Jul 16 - Jun 17			
2	11		Jul 17			

017	1.7		- Jun 18			
2018	114.0		Jul 18 - Jun 19			
2019	115.9	8,026.32	Jul 19 - Jun 20	Jan 20 – Jun 20	6	48,157.92
2020	114.7	7,943.20	Jul 20 - Jun 21	Jul 20 – Jun 21	12	95,318.40
2021	119.4	8,268.70	Jul 21 - Jun 22	Jul 21 – Feb 22	8	66,149.60
Sub-total						209,625.92
Add GST						20,962.59

Total						230,588.51

Appendix C

Description	*Amount*	*Date*	*Days (3)*	*Interest (4)*
Rent + Outgoings - Payments	68,856.95	1 Mar 22	557	10,507.76
‘Make good’ costs (1)	1,304.60 6,666.00 1,757.25 3,520.00	1 Apr 22 1 Apr 22 1 Jun 22 1 Jun 22	526 526 465 465	188.01 960.63 223.87 448.44
Legal fees (1)	506.00	1 May 22	496	68.76
Bank guarantee (2)	(24,750.00)	28 Apr 22	499	(3,383.63)

			Total	$9,013.84

(1) Assumed to have been paid at the end of the month the invoice was sent

(2) Assumed to have been received on the date when the invoice for $506 was sent

(3) From and including date shown in "*Date*" column up to and including 08 Sep 23

(4) Amount x 10% x Days / 365

****

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