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Common pitfalls in leasing litigation

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1. Leasing disputes and litigation has a number of potential traps for those who don't practice regularly in the area. Key amongst these are:
    a. Choosing the correct jurisdiction for the claim;
    b. Failing to consider the conflict between lease terms and statutory terms; and
    c. Failing to follow correct termination protocols;
    d. Failure to advise clients on applicable costs regimes.

CORRECT JURISDICTION FOR THE CLAIM

2. Whether or not a dispute regarding a lease can be brought in the Courts or must be brought in VCAT depends on the type of lease in question.

3. The *Retail Leases Act* 2003 (**the RL Act**) applies to all leases of "retail premises" entered into or renewed after 1 May 2003.

4. The RL Act:
    a. sets out a range of requirements for landlords of retail premises over and above the contractual requirements of a standard lease including obligations to provide written leases,[1] disclosure statements,[2] written estimates of outgoings[3] and minimum terms;[4]
    b. deems certain provisions into leases, such obligations regarding security deposits[5] and requirements for market reviews;[6]
    c. prevents certain conduct or lease provisions such as demands for key-money,[7] the collection of land-tax from tenants[8] or ratchet clauses (clauses that prevent a decrease in rent on a review);[9]

[1] Section 15.
[2] Section 17.
[3] Section 46.
[4] Section 21.
[5] Section 24.
[6] Section 37.
[7] Section 23.
[8] Section 50.
[9] Section 35(3).

d. provides for a dispute resolution mechanism of mediation at the Small Business Commissioner[10] and provides jurisdiction to the VCAT to determine retail tenancy disputes.[11]

5. The dispute resolution and jurisdictional sections of the RL Act must be considered by practitioners considering commencing litigation regarding a lease. Section 89(1) of the RL Act provides jurisdiction to VCAT, as set out below:

The Tribunal has jurisdiction to hear and determine an application by any of the following persons seeking resolution of a retail tenancy dispute—

(a) a landlord or tenant under a retail premises lease;

(b) a guarantor of a tenant's obligations under a retail premises lease;

(c) a person who has given an indemnity to a landlord for loss or damage arising as a result of a breach by a tenant of a retail premises lease;

(d) a specialist retail valuer.

6. Importantly, section 89(4) provides:

Subject to section 23(4) (key-money and goodwill payments prohibited), a retail tenancy dispute other than—

(a) an application for relief against forfeiture; or

(b) a claim under Part 9 (Unconscionable Conduct); or

(c) a retail tenancy dispute referred to in section 81(1A)—

is not justiciable before any other tribunal or a court or person acting judicially within the meaning of the Evidence (Miscellaneous Provisions) Act 1958.

7. As such, when it comes to a "retail tenancy dispute", the claim must be brought in VCAT (other than the exceptions in 89(4)) and can be struck out for want of jurisdiction or stayed (with costs) if brought in a Court. A "retail tenancy dispute" is defined in section 81 of the RL Act as:

(1) In this Part, retail tenancy dispute means a dispute between a landlord and tenant—

(a) arising under or in relation to a retail premises lease to which—

[10] Section 85.
[11] Section 89.

(i) this Act applies or applied because of Part 3; or

(ii) the Retail Tenancies Reform Act 1998 or the Retail Tenancies Act 1986 applies or applied; or

(b) arising under a provision of the Retail Tenancies Reform Act 1998 or the Retail Tenancies Act 1986 in relation to a lease to which that Act applies or applied; or

(c) arising under a lease that provides for the occupation of retail premises in Victoria to which none of those Acts apply or applied—

despite anything to the contrary in this Act (apart from subsection (2) and section 119(2)).

(1A) In addition, a retail tenancy dispute includes—

(a) a dispute between a landlord and a guarantor of a tenant's obligations under a lease arising in circumstances referred to in subsection (1)(a), (b) or (c); and

(b) a dispute between a landlord and a person who has given an indemnity to the landlord for loss or damage arising as a result of a breach by a tenant of a lease in circumstances referred to in subsection (1)(a), (b) or (c).

(2) However, retail tenancy dispute does not include a dispute solely relating to the payment of rent or a dispute that is capable of being determined by a specialist retail valuer under section 34, 35 or 37 of this Act or under section 12A or 13A of the Retail Tenancies Reform Act 1998 or section 10 or 11A of the Retail Tenancies Act 1986.

8. Applications to have a matter stayed or struck out on the basis of section 81(4) are routinely brought in the Magistrates and County Courts but are rarely the subject of published decision. Interestingly, section 81(1) excludes "*a dispute solely relating to the payment of rent"* from the definition of "retail tenancy dispute" but this exception should not be read to include claims for rent and outgoings.

9. It should also be noted that prior to issuing in VCAT, parties are required to obtain a certificate from the Office of Small Business Commissioner indicating that they have "mediation or another appropriate form of alternative dispute resolution … has failed, or is unlikely, to resolve" the dispute.[12]

[12] Section 87(1).

What is a retail premises?

10. Clearly, the first question to determine on the question of jurisdiction is whether the property the subject of the dispute is a "retail premises". "Retail premises" is defined in the RL Act as:[13]

    In this Act, retail premises means premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—

    a. *the sale or hire of goods by retail or the retail provision of services; or*
    b. *the carrying on of a specified business or a specified kind of business that the Minister*
    c. *determines under section 5 is a business to which this paragraph applies.*

11. The RL Act excludes premises where the tenant's "occupancy costs" (defined as rent, outgoings[14] and other advertising/marketing contributions due under the lease[15]) are over $1million per annum. It also excludes leases where the tenant is a listed corporation.[16] By Ministerial determination, the RL Act does not apply to premises on the 4th floor or above of a multi-story building (other than shopping centres) where those premises are used for retail provision of services, or to premises used for certain charitable or community[17] leases which from 1 January 2015 is limited to leases where the rent is under $10,000.00 per annum.[18]

12. As such, the key questions to determine the applicability of the RL Act to a lease is whether the premises are used predominately for the retail provision of goods or services.

13. Whilst in many cases, the question of whether the premises are used for the provision of "retail provision of goods or services" is obvious, the scope of that definition is significantly wider than the shops and cafes that probably spring to mind. Croft J recently stated that reference to the dictionary definitions of retail is "really simplistic and unhelpful" in considering the question under the RL Act.[19]

[13] Section 4(1).
[14] Section 4(3).
[15] Regulation 6 of the *Retail Leases Regulations* 2013.
[16] Section 4(3)(d).
[17] Ministerial determination dated 22 July 2008 for leases commenced before 1 January 2015.
[18] Ministerial determinations dated 6 October 2014 for leases commenced after 1 January 2015.
[19] CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd [2017] VSC 2 at [22].

14. The key concept in considering the question of what constitutes a retail premises was discussed by Nathan J in *Wellington v Norwich Union Life Insurance Society Limited* [1991] VicRp 27; [1991] 1 VR 333 when he stated:

The essential feature of retailing, is to my mind, the provision of an item or service to the ultimate consumer for fee or reward. The end user may be a member of the public, but not necessarily so. In support of this conclusion, I call in aid not only commonsense but the Macquarie Australian Dictionary which defines retail as being a sale to an ultimate consumer, usually in small quantities. When the verb is used in the transitive form, it is to sell directly to the consumer.

15. The "ultimate consumer" test has been used consistently by the VCAT and Courts over the years – see *Stringer v Gilandos Pty Ltd* [2012] V ConvR 54-818; [2012] VSC 361; *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd* [2013] VSC 344; *CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd* [2017] VSC 2.

16. In *Stringer v Gilandos Pty Ltd* [2012] V ConvR 54-818; [2012] VSC 361, Croft J considered the question of what constitutes the retail provision of services with regards to a "serviced apartments" and other such accommodation businesses and considered whether they are providing retail services analogous to hotels. Croft J determined that a building containing strata-titled units leased to a common operator who then operated the building as a "resort complex" was a retail premises lease. His Honour made clear that the question of whether the use of a building is predominately used for the provision of retail services turns on its own facts. His Honour stated:[20]

I should, however, sound a note of caution in relation to this finding by emphasising that whether or not premises described as "serviced apartments" is to be characterised as "retail premises" depends upon the particular circumstances, including the nature of the premises, the manner of in which occupancy is provided and the nature of that occupancy. As I have said, the term or description, "serviced apartments", is not a term of art. Rather, it is a term or description of premises which connotes a range of possibilities. At one end of the range one would find premises managed and occupied in a manner indistinguishable from a motel

[20] At [68].

or hotel and at the other end premises indistinguishable from long term residential accommodation, separately let but with the attribute of being serviced. In the former case it would be expected that the Acts would apply on the basis that the premises are "retail premises" and in the latter case they would not, any more than they would to any block of residential units. In between there are a range of possibilities each of which may have different consequences in terms of the application of the Acts.

17. In *CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd* [2016] VCAT 1866 the Tribunal (purporting to apply the ultimate consumer test) found that a company providing cold storage services to customers ranging from "large primary production enterprises to very small owner operated businesses" was not providing retail services because the business utilizing the service were not "consumers" in the ordinary sense. The decision went on appeal to the Supreme Court[21] where at [27], Croft J stated:

Turning then to the particular circumstances of these proceedings, it is clear that the Plaintiff, as Tenant, provided only services. The proposition contained in paragraph 62 of the Tribunal's reasons that the "cases" exclude from the meaning of "consumer" a person who uses a service for a business or a purpose other than for personal needs is simply not supported by the authorities. The authorities do, in my view, expressly support the proposition that "consumers" can be persons <u>who use a service for business or a purpose other than for personal needs</u>. (emphasis added)

18. It is now often said that the provision of a service from a premises will almost certainly be a retail provision as the party using that service is the ultimate consumer of that service.[22]

Disputes "arising under or in relation to a retail premises lease"

19. The phraseology of section 81 of claims "*arising under or in relation to a retail premises lease*" is deliberately broad and the use of the phraseology "*in relation to*" extends retail leasing provisions beyond just claims "under" the lease.[23]

[21] *CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd* [2017] VSC 2.
[22] *Global Tiger Logistics Pty Ltd v Chapel Street Trust* (unreported, VCAT, Member L Rowland, 8 November 2012) at [17]; *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor* [2013] VSC 344 at [18].
[23] *Klewet Pty Ltd v Lansdown* [1989] VicRp 85; [1989] VR 969.

20. In *Australian Liquor Marketers Pty Ltd v Twenty 12 Pty Ltd & Ors* [2014] VCC 688 Judge McNamara, when considering whether a dispute regarding a loan arrangement to pay for a fit out was a "retail tenancies dispute", stated:[24]

    Nevertheless, those considerations, to my mind, lead to the conclusion that there is so close a relationship between the alleged loan agreement or fit out agreement and the retail premises lease that one should be regarded as relating to the other and a dispute as to one should be regarded as in relation to the other. Certainly, the principal obligation here is the sub-lease. The loan agreement is, if you will, appurtenant to it; a dispute under the appurtenant agreement, albeit a separate and distinct one, in my view, should be regarded as in relation to the retail premises lease. Therefore, the dispute that is before the Court now falls within the inclusive terms of the definition of `retail tenancy dispute' in s81 and it is not suggested that any of the specific exclusions relates to it.

21. For similar considerations of that issue by the County Court see *Coles Group Property Developments Ltd v Hill* [2011] VCC 683 and *Ampron Australia Pty Ltd v Quan Yang Investments Pty Ltd & Ors* [2016] VCC 1138.

22. Before considering whether to issue in Court for a dispute "*a dispute solely relating to the payment of rent"* practitioners should be cognisant of the risk that a tenant may bring a counterclaim leading to a stay of proceedings[25] – see for example *Covarno v Melbourne Liquidation & Anor* [2012] VCC 1599.

Other issues arising from jurisdiction

23. As demonstrated above, the issue of what is a "retail premises lease" is not always clear. Practitioners should be aware of this not only when commencing litigation but also when drafting or advising on entry into or interpreting leases. This is primarily because of the mandatory lease provisions, discussed below.

MANDATORY PROVISIONS UNDER THE RETAIL LEASES ACT

24. The RL Act provides for a range of mandatory lease terms as well as prohibitions on previously standard lease terms.

[24] at [23].
[25] *Zambelis v Nahas* (1991) V ConvR 54-396.

25. Some of the mandatory terms added to a retail lease by the RL Act are:
    a. A requirement that the landlord notify the tenant 6 months prior to the due date for exercise of an option[26] with additional time added to the lease if notice is not given;[27]
    b. A requirement for the landlord to give notification of refurbishments;[28]
    c. A requirement for the landlord to compensate the tenant for interference;[29]
    d. Restrictions on the landlord's right to relocate the tenant (if the lease contains a right to relocate the tenant);[30]
    e. An obligation on the landlord to keep the premises in a condition consistent with the condition of the premises when the lease was entered into.[31]

26. Conduct that is prohibited (much of which was standard under old leases and continues to be standard under non-retail leases) includes:
    a. A prohibition on "key-money"[32] (amounts paid as a premium in order to secure a lease[33]);
    b. A prohibition on recovering Land Tax from a tenant;[34]
    c. A prohibition on recovering costs associated with preparing the lease.[35]

How are conflicts between lease provisions and the RL Act resolved?

27. Section 94 of the RL Act provides:

    A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

[26] Section 28.
[27] Section 28(2)(b).
[28] Section 53.
[29] Section 54.
[30] Section 55.
[31] Section52.
[32] Section 23.
[33] Section 3 – definition of "key money".
[34] Section 50.
[35] Section 51 .

28. The RL Act overrides the terms of a lease where they conflict. However, it has been held that that parties can agree a "higher standard" and such a term may not be inconsistent with the RL Act.[36]

Repair and maintenance – a common conflict

29. The obligation to repair and maintain arises from both the Act and, often, the provisions of the lease.

30. All retail leases are subject to the following provision, pursuant to section 52 of the Act:

> *The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into—*
>
> *(a) the structure of, and fixtures in, the retail premises; and*
>
> *(b) plant and equipment at the retail premises; and*
>
> *(c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.*
>
> *However, the landlord is not responsible for maintaining those things if—*
>
> *(a) the need for the repair arises out of misuse by the tenant; or*
>
> *(b) the tenant is entitled or required to remove the thing at the end of the lease.*

31. Leases, especially leases that have been renewed from pre-2003 leases, often have repair and maintenance provisions that conflict with section 52 of the RL Act.

32. Like all the clauses listed above, section 52 of the RL Act is a mandatory provision[37] and applies to the Lease regardless of any inconsistent provisions in the lease. As such, many of the provisions in older leases, or leases prepared from older precedents contain provisions that are rendered null and void by section 52(2).

33. For example, numerous older precedents require the Tenant to keep "… *sewerage and plumbing fixtures, fittings, installations and facilities, lifts, machinery"* in good repair. Such

[36] *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2015] VSC 515 at [59]; *Computer & Parts Land Pty Ltd v Aust-China Yan Tai Pty Ltd & Ors* [2010] VCAT 2054 (23 December 2010).
[37] Section 52(1), section 94 of the RLA.

provisions are overruled by the requirement in clause 52(2)(b) that the landlord repair plant and equipment and the requirement in clause 52(2)(c) that the landlord maintain and repair fixtures relating to gas, electricity and water.

34. However, while the parties cannot contract out of the obligations in section 52, they can agree a higher standard between themselves.[38] As such, section 52 does not affect the any lease provisions which require the landlord to upgrade or repair matters outside section 52 or repair items to a higher standard.[39]

Prohibition on recovery of land tax

35. One of the primary financial differences for a landlord between a retail lease and an ordinary commercial lease is the prohibition on the recovery of land tax.

36. While tenants cannot generally recover amounts paid for rent and outgoings which they did not realise they were able to withhold under the RL Act,[40] the VCAT has ordered repayment of land tax in a situation where they parties has not realized that they were subject to the RL Act and the tenant had paid land tax.[41]

TERMINATION UPON BREACH BY THE TENANT

37. It is not unusual for well-drawn leases to include clauses which allow the landlord to forfeit the lease upon default by the tenant. Such default may be constituted by:
    a. breach of a covenant which gives rise to the right to forfeit and re-enter expressly provided by the lease; or
    b. breach of an essential or fundamental term as agreed by the parties giving rise to repudiation by the tenant.

38. The landlord may also accrue a right to forfeit and re-entry by reason of the tenant's repudiation at common law.[42]

[38] *Computer & Parts Land Pty Ltd v Aust-China Yan Tai Pty Ltd & Ors* (Retail Tenancies) [2010] VCAT 2054.
[39] *Computer & Parts Land Pty Ltd v Aust-China Yan Tai Pty Ltd & Ors* (Retail Tenancies) [2010] VCAT 2054.
[40] *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6 (8 February 2006).
[41] *Richmond Football Club Limited v Verraty Pty Ltd* (ACN 076 360 079) [2011] VCAT 2104.
[42] *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 and *Natwest Markets Australia Pty Ltd v Tenth Vandy Pty Ltd* [2008] VSCA 207.

39. Legislation exists in all Australian jurisdictions, except the Australian Capital Territory, which provides that the issue of statutory notice to remedy breach is a necessary where the landlord purports to forfeit the lease as result of a breach by the tenant of "any covenant or condition in the lease". In Victoria, section 146(1) of the *Property Law Act 1958* (**the PL Act**) includes a breach which amounts to repudiation.[43]

40. Section 146(1) provides:

> *A right of re-entry or forfeiture under any proviso or stipulation in a lease or otherwise arising by operation of law for a breach of any covenant or condition in the lease, including a breach amounting to repudiation, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice –*
>
> *(a) specifying the particular breach complained of; and*
> *(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and*
> *(c) in any case, requiring the lessee to make compensation in money for the breach –*
>
> *and the lessee fails, within a reasonable time thereafter, or the time not being less than fourteen days fixed by the lease to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach.*
>
> *This subsection shall not extend to a breach of any covenant or condition whereby or by means whereof either alone or with other circumstances any licence or permit under the* ***Liquor Control Reform Act 1998*** *is or may be endangered or is or may be liable to expire or forfeited, surrendered, taken away or refused.*[44]

41. It is therefore readily apparent that, whatever the nature of the breach, the notice requirement set out in the PLA is mandatory, subject to the exception in relation to a liquor licence or permit, or forfeiture for non-payment of rent as discussed below.

[43] Notwithstanding that, for example, in New South Wales section 129(1) of the *Conveyancing Act 1919* does not provide for breaches which amount to repudiation, it has been found that the terms "proviso or stipulation in a lease" are sufficiently broad to capture termination by reason of a tenant's repudiation this requiring compliance with the statutory notice procedure. See *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at 292-302 (***Macquarie***).

[44] Compliance with the *Liquor Control Reform Act 1998* and the associated exemption from compliance with s. 146(1) is not within the scope of this paper.

Non-payment of Rent

42. By operation of s. 146(12) of the PL Act the notice requirements provided by s. 146(1) do not apply in relation to forfeiture only for the non-payment of rent.

43. However, care must be taken in seeking to assert forfeiture on this basis. Landlords must be careful to ensure that the non-payment of "rent" is within the definition of "rent" provided in the PL Act. This is because relief against forfeiture in this circumstance is pursuant to s. 85 of the *Supreme Court Act 1986*. Section 85 provides that relief against forfeiture may be granted in a summary manner.

44. Rent is defined by s. 18 of the PL Act as including

    a rent service, or rentcharge, or other rent toll, duty, royalty, or annual or periodical payment in money or money's worth, reserved or issuing out of or charged upon land, but does not include mortgage interest; rentcharge …; fine includes a premium or foregift and any payment consideration, or benefit in the nature of a fine, premium or foregift.

45. In Macquarie, Hodgson J contemplated payments which the lease in question required the tenant to pay to the landlord upon the tenant's completion of the construction of a carpark. In considering the definition of rent in s. 7 of the *Conveyancing Act 1919* (NSW), which is analogous to definition in s. 18 of the PL Act, His Honour said:

    I accept that provision of consideration other than monetary payment could be rent under s. 129(8).

    …

    As regards cl 2.2, it is true that construction of the car park by Macquarie was part of the consideration for the grant by Area Health of possession of Lot 11 and Lot 12 for 103 years. However, I do not think the construction of the car park, or the car park itself, when constructed, can properly be called rent: they constitute consideration for the grant of leases, rather than for the possession of land under the leases. And on that basis, in my opinion compensation to Area Health for some shortcomings in the car park as constructed would

likewise not be rent. The circumstances that cl 2.2 appears under the heading "Rent" does not in my opinion alter this.[45]

46. Likewiseoutgoings paid by the tenant may not constitute "rent" within the meaning of s. 146, although this will depend on the terms of the lease.

Nature of Breach

47. The nature of the breach which gives rise to a right of forfeiture and re-entry will depend on the terms of the lease and the circumstances of each case.

48. That said, the breach must give rise to a right to termination, as not all breaches found a right of forfeiture and re-entry.

49. For the landlord to claim forfeiture and claim possession the breach must satisfy one of the following:

    a. it triggers a right of re-entry or termination under the express terms of the lease:
    b. it is fundamental or essential:
    c. it constitutes a repudiation.

50. Importantly, and in accordance with the principles of repudiation, where a landlord purports to terminate for repudiation and the tenant's conduct is not in fact repudiatory, the landlord may itself have repudiated and the tenant may be entitled to terminate the lease and sue for damages.[46]

Waiver

51. Once a landlord accrues a right to terminate by reason of the tenant's breach, it may elect whether to allow the lease to remain on foot or to forfeit the lease. However, upon an election by the landlord to allow the lease to continue it cannot then seek to terminate the lease for that same breach at a later date.

[45] *Macquarie* at [288] – [290].
[46] Peter Butt, *Land Law* (Thomson Reuters, 6th ed, 2010) 15 185.

52. A typical example of where waiver occurs is where the landlord, or the landlord's agent, accepts or demands payment of rent with knowledge that the right to claim forfeiture and re-entry has arisen.[47]

53. This paper is, however, focused on the matter of process of forfeiture and re-entry and further analysis of waiver is beyond its scope.

Notice of Breach

54. The notice required by s. 146 must set out:
    a. the breach complained of with enough specificity for the tenant to identify that breach;
    b. what is required by the landlord for it not to forfeit the lease, that is either:
        i. that the tenant remedy the breach, if possible; and/or
        ii. payment of compensation for that breach; and
    c. a reasonable time, not less than 14 days, for compliance to the satisfaction of the landlord.

55. To what extent must the notice particularise the breach? Hollingworth J said in *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd & Ors* (***Beamer***) that:[48]

    Such a default notice is intended to give the person whose interest it is sought to forfeit the opportunity of considering the position before an action is brought to effect that result.

56. Hodgson J held in *Macquarie*:[49]

    In my opinion, a proper opportunity is not afforded unless the lessee is alerted to the particular breaches on which the lessor proposes to rely and what the lessor requires in order to bring about a position where the termination would not occur.

57. His Honour continued, described the purpose and content of the statutory notice:[50]

[47] See generally *David Blackstone Ltd v Burnetts (West End) Ltd* [1973] 1 WLR 1487, *Finley v Russell-Jones* (1949) 49 SR (NSW) 96, *Argyle Art Centre Pty Ltd v Argyle Bond & Free Stores CO Pty Ltd* [1976] 1 NSWLR 377.
[48] [2005] VSC 236 at 414.
[49] [2010] NSWCA 268 at 309.

In my opinion, the above authorities clearly indicate that a notice under s 129 must not only allege breach, but must also describe the particular acts or omissions constituting the alleged breach, and the notice must indicate the acts of the tenant which the landlord would consider sufficient for the lease to continue, and upon completion of which the landlord would abandon its claim to forfeit. The standard of particulars or degree of specificity depends upon the circumstances, including the nature of the covenant alleged to be breached, the tenant's actual or constructive knowledge, and whether the landlord claims reasonable compensation. To use the example of Lord Buckmaster LC, where there are several options open to a tenant to waterproof a leaking ceiling, then that choice is at the tenant's discretion. Thus s 129 is, in my opinion, directed at allowing the tenant to bring about (with reasonable time) a state of affairs under which the landlord would not pursue forfeiture.

In particular, the lessee should not be left to speculate as to whether, if it took whatever action it could to remedy the specified breaches, the lessor might nevertheless proceed to terminate the lease on the basis that the breaches were not capable of remedy or that, because what the lessee did was insufficient to eliminate loss cause to the lessor by the late performance of the lessee's obligations, the lessee was still in breach.

58. The extent to which a landlord must particularise the breach was also a matter of dispute in *Primary RE Limited v Great Southern Property Holdings Limited & Ors* (***Great Southern***). It was accepted by the landlords in this matter that they were required to bring the attention of the tenant to the specific term of the lease alleged to have been broken and the manner in which it was said to have been broken. The landlords, however, "distinguished between a requirement to specify the particular breach and the need to go that step further and give particulars of the breach."[51] It was the tenant's view that the alleged imprecise language of the terms of the lease itself lead to the supposed ambiguity in the notice of default.

59. Judd J said:[52]

[50] At 323-4.
[51] [2011] VSC 242 at 115.
[52] At 120.

Quite obviously, where there is a statutory requirement that something be included with a compliant notice, that requirement may not be overlooked on the basis that the recipient would have understood the missing ingredient.

60. However, ultimately the Court was not required to determine the extent of the necessary particularisation, stating:

This was not a case where the tenant was expected to read between the lines in order to understand what the landlords required should be done to remedy the breach…

There was an air of unreality about Primary's submission concerning the extent to which the allegations of breach were vague or uncertain, and its rejection of the knowledge of the tenant as a relevant consideration.

61. Where a notice particularises multiple breaches notice is not invalidated merely because a court later finds that it contains breaches which were not committed,[53] or that the quantification of the loss following a breach was incorrect[54] so long as it the notice contains breaches which did in fact occur or calculations of loss by reason of other breaches were accurate.

62. This does not excuse a landlord from imprecision in the drafting of a notice of default, rather it draws one's attention to the fact that care must be taken.

63. The authorities demonstrate that the extent to which the alleged breach set out in a notice of default is to be particularised depends on the circumstances of the case.

64. At a minimum, the term of the lease which has been broken must be clearly set out. If it is necessary in the circumstances to further particularise the breach, for example in the case of the breach of a repair covenant, that which requires repair should be particularised.

65. Once the landlord has sufficiently identified the alleged breach, it is not necessary for it to go further and identify what the tenant must do to remedy the breach, indeed:[55]

[53] *Macquarie* at 327,
[54] *Beamar* at 417.
[55] *Gerraty v McGavin* (1914) 18 CLR 152 at 164-5).

[The Landlord] is not bound to go further and instruct the tenant how to repair it. That would not only be an undue burden on the landlord, but, if effectual at all, would tie the tenant down to one particular mode of repairing his fault.

66. However, the notice must contain a requirement to do something, either to remedy the breach or to pay compensation of some form. That is, the notice must convey to the tenant what must be done by the tenant to avoid the exercise of the landlord's right of re-entry or forfeiture.[56]

67. *Great Southern* described the "true purpose" of the notice as:[57]

[To] give the tenant an opportunity to consider its position and give a response. If the breach is capable of remedy, that response may be to admit the breach and propose a course of remediation. If compensation is sought, that response may involve agreement to pay reasonable compensation to be assessed. If the breach is not admitted, or the landlord rejected a proposal for remediation, the tenant may then apply for relief against forfeiture. In the present case, having received the notices of default, a sufficient response from the tenant to avoid forfeiture, re-entry or termination, would have been to recommence the management of the plantations in compliance with its obligations under each lease and forestry agreement, coupled with a proposal to pay reasonable compensation for any injury to the reversion. In my view it would not have been necessary for the tenant to do more in order to avoid the risk of termination, provided the tenant had the capacity and communicated a genuine intention to do as proposed… The fact that the remediation work, identified in the notices, might take one or more years was not a determining factor in the calculation of a reasonable time within which to respond.

68. When viewed in this way, the statutory notice is analogous to a "show cause" notice.

69. Section 146(1) provides that the notice must allow a "reasonable time" for the tenant to satisfy the notice to the satisfaction of the landlord. Such time is not less than 14 days. However, reasonable time will depend on the circumstances of the case looking to the nature of the breaches, what must be done by the tenant to avoid forfeiture.[58]

[56] *Macquarie* at 326 and *Great Southern* at 147.
[57] *Great Southern* at 147.
[58] *Great Southern* at 140.

70. In *Beamar* the tenant was allowed 14 days to remedy the defects, including the payment of outstanding outgoings. Hollingworth J stated:[59]

    It is for the court to determine what is or is not a reasonable time, taking into account those things that are necessary to remedy the breach.

71. As the total of the outstanding outgoings were "relatively insignificant" Her Honour found that the time specified was reasonable.

72. Further, that a contract prescribes a time by which the tenant must respond to the default notice is not determinative if the response, sum claimed or proposed remedy is not capable of being performed in that time. The court, in carrying out this analysis, will look to the circumstances of the case to find what is reasonable.[60]

Relief against forfeiture

73. Pursuant to s. 146(2), a tenant may apply to the court, or VCAT in the case of a retail lease, for relief against re-entry or forfeiture.

74. The grant of relief is discretionary exercised in the court's equitable jurisdiction. The rights and powers conferred by s. 146(2) are in addition to the court's inherent jurisdiction.[61]

75. Hollingworth J described it thus:[62]

    The grant of this relief is not to be constrained by precedent. Case in this area will generally turn on their particular circumstances. The court will also take into account the general justice of the situation.

76. Her Honour succinctly set out the task of the court in considering an application for relief from forfeiture:[63]

[59] *Beamar* at 421.
[60] *Macquarie* at 328.
[61] *Beamar* at 438.
[62] *Beamar* at 439.
[63] *Beamar* at 442-4.

The test to be applied is one of unconscionability – that is, whether in the light of the tenant's remedying breach of covenant, resort by the landlord to the strict legal right of re-entry would be unconscionable. Various cases illustrate that even if the breach is remediable because of its minor nature, it is not always unconscionable for a landlord to rely on strict legal rights. The court must be satisfied in relieving against forfeiture that there is a reasonable expectation that the tenant will honour the lease obligations in the future. Certain circumstances may arise where the court cannot be so satisfied. In particular, the tenant may be guilty of serious misconduct beyond the breach of covenant. This being conduct of such gravity that, even accepting the default for which the right of re-entry as security has been satisfied, it would not be unconscionable on the landlord's part to insist on strict legal rights.

Therefore, much of the court's consideration of whether or not to grant relief will focus on the conduct of the tenant. A tenant must, so far as possible, attempt to remedy the breach or breaches alleged in the notice served and pay reasonable compensation for the breaches which cannot be remedied. The tenant must come to the court with clean hands and ought not be relieved if evincing an intention to continue or to repeat the breach of the covenant. Where the conduct of the tenant reveals a clear history of wilful breaches of more than one covenant, a case of contumacious disregard by the tenant of the landlord's ability to speedily and adequately make good the consequences of the default, relief against forfeiture will not be granted.

Equally so, if the essentials of the bargain can be secured for the landlord, it is fair and just to prevent the landlord from exercising strict legal rights. Thus, if the landlord has suffered no appreciable damage from a breach, if the breach was not wilful, or if the breach was otherwise remediable because of its minor nature, consideration will be granted to granting relief.

77. Consistent with this test, generally a landlord may not rely on breaches that were not the subject of the statutory notice in opposing an exercise of the court's discretion. However, where extraneous breaches may be taken into account by the court where there are special or exceptional circumstances.[64]

[64] *Beamar* at 461, *Great Southern* at 189.

78. In *Beamer*, the tenant was in continuing and wilful disregard of statutory fire safety obligations. As a result, the tenant had "not demonstrated a capacity or willingness to respond to and rectify serious breaches… At times their conduct demonstrated a reckless indifference to the safety of residence."[65]

79. Upon the grant of the relief, despite the landlord's exercise of re-entry and forfeiture, the lease is restored. The landlord is precluded from exercising any rights that gave rise to the relief, but is entitled to pursue damages for those breaches.

COSTS REGIMES

80. Costs will always play a significant part in the decision whether to bring a claim or not. In circumstances where the lease in question is a retail lease, the special costs provisions need to be considered.

81. The RL Act contains an exception to the usual rule on costs contained in section 109 of the *Victorian Civil and Administrative Tribunal Act*. Section 92 of the RL provides:

(1) Despite anything to the contrary in Division 8 of Part 4 of the Victorian Civil and Administrative Tribunal Act 1998, each party to a proceeding before the Tribunal under this Part is to bear its own costs in the proceeding.

(2) However, at any time the Tribunal may make an order that a party pay all or a specified part of the costs of another party in the proceeding but only if the Tribunal is satisfied that it is fair to do so because—

(a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or

(b) the party refused to take part in or withdrew from mediation or other form of alternative

dispute resolution under this Part.

(3) In this section, costs includes fees, charges and disbursements.

[65] *Beamar* at 464.

82. The practical result of the introduction of section 92 is that costs are almost never awarded and that most matters which go to the Small Business Commissioner settle not necessarily on their merits but due to costs pressures.

83. The scope of the rule in section 92 has generally be read narrowly by the Tribunal, in line with an early Tribunal decision in *State of Victoria v Bradto Pty Ltd and Tymbook Pty Ltd* [2006] VCAT 1813 where Bowman J stated:

I am also of the view that, pursuant to the frequently cited test in Oceanic Sun Line, a proceeding is conducted in a vexatious manner if it is conducted in a way productive of serious and unjustified trouble or harassment, or if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging. A similar approach was adopted by Gobbo J in J&C Cabot, although it could be said that the tests there set out relate more to the bringing of or nature of the proceeding in question, rather than the manner in which it was conducted. Indeed, if one looks at the factual and statutory context in which the decision in J&C Cabot was taken, that distinction is underlined. Section 150(4) of the Administrative Appeals Tribunal Act 1984 refers to "... proceedings (that) have been brought vexatiously or frivolously ...". (My emphasis). Furthermore, the tests adopted by Gobbo J are those previously expressed by Roden J in Attorney-General (Vic) v Wentworth (1988) 14 NSW LR 481, and are worded as "... Proceedings are vexatious if they are instituted ... if they are brought ... if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless". (Again my emphasis). This is to be contrasted with the wording of s.92 which specifically refers to a proceeding being "conducted ... in a vexatious way". (Again my emphasis).

84. One of the few occasions where costs have been awarded by the Tribunal in a RL Act matter was *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VCAT 596 where the Tribunal awarded costs on the basis of a range of factors, including the fact that the claim was bound to fail and the fact the applicant had persisted with the claim in circumstances where it ought have, on proper consideration, seen that it had a hopeless case. The Tribunal determined that, notwithstanding the wording of section 92, the merits of the case can be considered as part of determining whether the case has been conducted in a vexatious way. The Court of Appeal upheld that reasoning and stated:[66]

[66] *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216 at [28] – [29].

True it is that the Tribunal also considered the hopelessness of the applicant's claim, but there is no error in that. The strength of the applicant's claim for damages was a relevant factor to take into account.

It would be artificial to attempt to evaluate the manner in which the proceeding was conducted by a party without having any regard to the strength of that party's case. In the present circumstances, it was relevant that the applicant pursued the damages claim, in circumstances where it was bound to fail. The applicant's argument that its case was not hopeless must be rejected.

85. In *24 Hour Fitness*, the Tribunal relied on 14 different factors to support its finding that the applicant had conducted its proceeding in a vexatious manner, showing just how high a hurdle section 92 is. The Tribunal has more recently awarded costs in the case of *Staples Super Pty Ltd v Australian Asset Consulting Pty Ltd* [2016] VCAT 1788 against a tenant who remained in possession after losing an injunction to restrain the landlord from terminating the lease. Similarly, in that case, the Tribunal relied on a range of factors.