

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Golden Vision Gold Coast Pty Ltd v Orchid Avenue Pty Ltd* [2020] QCAT 215

PARTIES: **GOLDEN VISION GOLD COAST PTY LTD**  
(applicant)

v

**ORCHID AVENUE PTY LTD**  
(respondent)

APPLICATION NO/S: RSL169-18

MATTER TYPE: Retail shop leases matter

DELIVERED ON: 17 June 2020

HEARING DATE: 14 & 15 November 2019; 3 February 2020

HEARD AT: Brisbane

DECISION OF: Member Browne, Presiding  
Member McBryde  
Member Norling

ORDERS: **Golden Vision Gold Coast Pty Ltd must pay Orchid Avenue Pty Ltd the sum of TWENTY EIGHT THOUSAND, TWO HUNDRED AND SIXTY SEVEN DOLLARS AND EIGHTY ONE CENTS (\$28,267.81) within 28 days of the date of this decision.**

CATCHWORDS: LANDLORD AND TENANT – LEASES AND TENANCY AGREEMENTS – LESSOR DISCLOSURE NOTICE – whether agreement to lease and the lease are to be construed as one lease – whether lessor disclosure notice provided within seven days under s 21B of the *Retail Shop Leases Act 1994* (Qld) – whether notice of termination given – where obligations for lessor and lessee to complete works – where works not completed before handover or completion – whether creates an essential term – whether breach of the lease – where lessee failed to pay rent – whether breach of the lease – whether lease properly terminated by the lessor

*Corporations Act 2001* (Cth), s 127  
*Retail Shop Leases Act 1994* (Qld), s 11, s 21B, s 21F, s 103(1)(b)(i)  
*Retail Shop Leases Amendment Act 2016* (Qld), s 57  
*Retail Shop Leases Regulation 2016* (Qld), s 2

*Al Jadeed TV v United Broadcasting International Pty*

*Ltd* [2011] FCA 983  
*Dee-Tech Pty Ltd v Neddham Holdings Pty Ltd* [2010] NSWCA 374  
*Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal & Anor* [2007] 1 Qd R 246  
*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749  
*Pozzan v Gibbons* (2006) 200 FLR 287  
*Robert McGill Freier and Anor v Australian Postal Corporation (No 2)* [2012] NSWSC 61  
*To v Choi* [2011] QSC 2  
*Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632  
*YJ Pty Ltd & Ors v Huang's Properties Pty Ltd* [2018] QDC 240

**APPEARANCES &  
 REPRESENTATION:**

Applicant: J Green of Counsel instructed by Cooper Grace Ward Lawyers  
 Respondent: A Trevor, Solicitor, Clayton Utz

**REASONS FOR DECISION**

- [1] Golden Vision Gold Coast Pty Ltd as the lessee signed an agreement to lease and a lease with Orchid Avenue Pty Ltd as the lessor to operate a bar in a retail shop premises on the Gold Coast, Queensland.
- [2] There are many related agreements as between the parties and associated parties concerning the management and operation of the leased premises identified as an '8 Street' precinct.
- [3] Prior to signing the lease, the parties discussed certain fit out works and base build works to be completed by the lessor and lessee to get the premises ready for business. As events transpired, however, Golden Vision never commenced trading despite its intentions to do so before the Chinese New Year, or at the latest, before the Commonwealth Games due to commence on 4 April 2018.
- [4] Proceedings commenced in the Tribunal and the matter was listed for a hearing.<sup>1</sup> At the commencement of the hearing, the Tribunal refused Golden Vision's application to adjourn the matter.<sup>2</sup> Golden Vision abandoned its claim against Orchid Avenue

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<sup>1</sup> See Notice of Dispute filed by the applicant on 3 July 2018 and response and counter-application filed by the respondent on 19 October 2019.

<sup>2</sup> See Tribunal's decision dated 14 November 2019 (*ex tempore* reasons delivered). See also Tribunal directions dated 15 November 2019 listing the matter (part-heard) for a further hearing.

that it was an essential term of the lease that the tenancy or leased premises be an ‘8 Street’ precinct.<sup>3</sup>

- [5] Golden Vision now contends that Orchid Avenue failed to provide a lessor disclosure statement (‘LDS’) within seven days as required under s 21B of the *Retail Shop Leases Act 1994* (Qld) (‘the Act’). Golden Vision also contends that the premises was not in a condition to run a business as at the date of handover, or the estimated completion date because Orchid Avenue failed to carry out certain works contrary to its obligations to do so under the agreement to lease.<sup>4</sup> Further to that, Golden Vision says that it properly terminated the lease and agreement to lease and seeks compensation from Orchid Avenue in the amount of \$29,094.10.<sup>5</sup>
- [6] Orchid Avenue counter-claims against Golden Vision for compensation for breach of an essential term of the lease. Orchid Avenue says that Golden Vision failed to pay rent and the security deposit as required under the lease.<sup>6</sup> Orchid Avenue says that it completed its works by 31 January 2018 with the exception of three discrete items of work, that is, ceiling installation, fire sprinkler installed to the approved plan and floor waste (the ‘excluded or deferred works’). Orchid Avenue says that it used all reasonable endeavours to complete the excluded works and any delay in completion of these works was attributable to Golden Vision.
- [7] Orchid Avenue submits that the LDS was provided to Golden Vision in 2017 and further to that, disputes that Golden Vision has properly terminated the lease. Orchid Avenue now seeks final orders from the Tribunal that Golden Vision’s claims against it be dismissed and Golden Vision be ordered to pay Orchid Avenue compensation in the amount of \$44,120.44 together with pre-judgment interest.<sup>7</sup>
- [8] In this matter, the Tribunal is required to determine the following issues:
- (a) Did Orchid Avenue fail to provide to Golden Vision a LDS as required under s 21B of the Act?
  - (b) Did Orchid Avenue fail to complete certain works required of it under the agreement to lease by:
    - (i) The handover date of 21 February 2018; or
    - (ii) The completion date of 23 March 2018?
  - (c) Did Golden Vision fail to pay rent under the agreement to lease and/or lease? and

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<sup>3</sup> The application was abandoned, by consent, on the basis that a determination of the claim requires the resolution of disputes involving matters and other parties outside the jurisdiction of the Tribunal and on the basis that Orchid Avenue no longer relies upon alleged breaches of the Centre Precinct Management Agreement dated 10 August 2017 or the Trademark Licence Deed dated 10 August 2017 in these proceedings. The applicant also abandoned its application made on 15 November 2019 for the Tribunal to determine as a preliminary issue the question of whether the applicant has the right to terminate the lease under s 21(f) of the *Retail Shop Leases Act 1994* (Qld) (‘the Act’).

<sup>4</sup> Applicant’s submissions filed 25 February 2020 and submissions in reply filed 1 April 2020.

<sup>5</sup> Ibid.

<sup>6</sup> Outline of submissions for the respondent filed 4 March 2020.

<sup>7</sup> Ibid.

(d) Are there any other amounts owing or compensation payable in respect of the lease and/or agreement to lease?

[9] There is a preliminary issue to be determined by the Tribunal as to what constitutes the ‘lease’ for the purposes of the Act. More importantly, whether the agreement to lease and the lease are to be construed together when considering the respective parties’ obligations such as to perform certain works as provided under the agreement to lease and for Golden Vision to pay rent and a security deposit as provided under the lease.

**What is the ‘lease’ for the purposes of the Act?**

[10] Golden Vision invites us to adopt a broad interpretation of ‘lease’ for the purposes of the Act and submits that the agreement to lease and lease should be construed together as a single agreement.<sup>8</sup>

[11] In *To v Choi*<sup>9</sup> Fryberg J adopted a wide interpretation of the word ‘lease’ and the expression ‘lease of a retail shop’ in the definition of ‘retail shop lease’ under s 5A of the Act. Fryberg J found that the word ‘lease’ is used in a wider sense to describe the nature of the arrangement between the parties and said that ‘it is apt to refer to an agreement to lease’.<sup>10</sup> Fryberg J said (footnotes omitted):

That conclusion highlights the ambiguity in the common acceptance by the parties that the lease in this case was a retail shop lease. If the expression “lease of a retail shop” in the definition of “retail shop lease” referred only to the lease document, I would be doubtful that this dispute was truly one about a retail shop lease. However, in my judgment “lease” should not be given such a narrow meaning. I am satisfied that the word is used in a wider sense, to describe the nature of the arrangement between the parties. In that sense it is apt to refer to an agreement for a lease. Putting it another way, the statutory term embodies the principles developed in equity on this topic.<sup>11</sup>

[12] We agree with the approach taken by Fryberg J in *To* and find that the ‘lease’ for the purposes of this dispute should be construed in a wider sense to describe the nature of the arrangement between the parties.

[13] In this matter, Orchid Avenue emailed to Golden Vision on 20 February 2018, certain documents including an amended agreement to lease, lease and LDS.<sup>12</sup> David Wu, Managing Director, of Golden Vision gave evidence at the hearing, that he signed both the agreement to lease and the lease at the same time on 22 February 2018, after he received the lessor’s email.<sup>13</sup> We accept Mr Wu’s unchallenged evidence and find that the agreement to lease and lease were signed by the lessee on 22 February 2018.

[14] The agreement to lease and lease refers to each of the parties’ respective rights and obligations such that the documents must be read together. For example, there is no

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<sup>8</sup> Applicant’s outline of submissions filed 25 February 2020. See also s 5A of the Act and the meaning of retail shop lease.

<sup>9</sup> [2011] QSC 2.

<sup>10</sup> Ibid, [22].

<sup>11</sup> Ibid.

<sup>12</sup> Exhibit 28, attachment 13, p 483. See also exhibits 2 and 3.

<sup>13</sup> Exhibit 9 and T2-27.

commencement date stipulated within the lease but there is a commencement date listed in the agreement to lease for the purposes of determining the date upon which any rent alleged to be payable becomes owing. Further, there are no ‘lessor’s works’ to be completed by Orchid Avenue or ‘fit out works’ to be completed by Golden Vision provided for in the lease. It follows, therefore, that Golden Vision, as the lessee, would not be able to rely upon a failure to complete certain works by the estimated handover date or the estimated completion date without relying upon the agreement to lease and lease together. Further to that, Orchid Avenue would not be able to claim any outstanding rentals said to be owing by the lessee under the lease without reference to the commencement date as stipulated in the agreement to lease.

- [15] We find that the agreement to lease and lease clearly describes the nature of the relationship between the parties in this matter and should be read together as a single agreement.

**Did Orchid Avenue as the landlord fail to provide a lessor disclosure statement (LDS) to Golden Vision as required under s 21B of the Act?**

- [16] Section 21B of the Act provides that, in certain circumstances, the lessor must give a disclosure statement to a prospective lessee at least seven days before the prospective lessee, of a retail shop, enters into a retail shop lease (‘the prescribed disclosure date’). The LDS means a statement in the approved form containing certain ‘prescribed particulars’ such as, for example, the names of the lessor and lessee, the address of the retail shop, the plan of the premises, if any, details about the rent and details of payments to be made by the lessee.<sup>14</sup>
- [17] Section 22E of the Act provides that the Tribunal may in certain circumstances and upon application being made, order the provision of a disclosure statement.
- [18] A lessor’s failure to comply with s 21B of the Act, gives the lessee a right to terminate the retail shop lease in certain circumstances by giving written notice to the lessor.<sup>15</sup> Relevantly, s 21F of the Act provides that a lessee may terminate a retail shop lease by giving written notice to a lessor within six months after the lessee enters into the lease if:
- (a) The lessor does not comply with s 21B or 21E; or
  - (b) A disclosure statement when given to the lessee under s 21B or 21E is a defective statement.
- [19] A disclosure statement is a ‘defective statement’, for the purposes of s 21B(2) of the Act, if it is incomplete in a material particular or contains information that is false or misleading in a material particular.<sup>16</sup>

*Did the lessor provide the LDS to the lessee in 2017 or 2018?*

- [20] In this matter, Golden Vision contends that Orchid Avenue failed to provide the LDS at least seven days before entering into the lease and agreement to lease as

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<sup>14</sup> See definition of ‘disclosure statement’ under the schedule and the *Retail Shop Leases Regulation* 2016 (Qld), s 2.

<sup>15</sup> The Act, s 21F.

<sup>16</sup> *Ibid*, s 21F(2).

required under the Act.<sup>17</sup> Golden Vision says that Orchid Avenue provided the LDS together with the lease and agreement to lease to Mr Wu, as the lessee, on 20 February 2018. Golden Vision says that the date of commencement of the lease, as accepted by Orchid Avenue at the hearing, is 21 February 2018.<sup>18</sup>

- [21] On the other hand, Orchid Avenue submits that, in compliance with s 21B of the Act, the LDS was provided to the lessee on 10 October 2017 ('the 2017 LDS') together with the draft lease, agreement for lease, and other associated documents.<sup>19</sup> Orchid Avenue submits that following 10 October 2017, Golden Vision sought to negotiate, for its benefit, a number of changes to the draft lease and agreement for lease.<sup>20</sup> Orchid Avenue submits that at the insistence of Golden Vision, it re-issued the 2017 LDS on 20 February 2018 ('the 2018 LDS'), amended to incorporate the requests made by Golden Vision on 3 February 2018.<sup>21</sup> Orchid Avenue denies that the LDS is defective and submits that Golden Vision had no right of termination under s 21F of the Act.<sup>22</sup>
- [22] Grace Irvine, General Manager Commercial and Legal, gave evidence on behalf of Orchid Avenue about the lease documents and the 2017 LDS and the 2018 LDS provided to the lessee. Ms Irvine was cross-examined about the changes made to the 2018 LDS by comparing it to the 2017 LDS. Ms Irvine's evidence is that the changes made to the 2017 LDS were requested by Mr Wu and there are 'minor differences' in the 2018 LDS as compared to the 2017 LDS.
- [23] During cross-examination, Ms Irvine was referred to, amongst other things, the date of commencement of rent as it appears in clause 10.3 in the 2018 LDS as compared to the date of commencement of the rent in the 2017 LDS, that was effectively a four-month change. Ms Irvine was also referred to the costs of advertising as it appears in clause 15.1 in the 2018 LDS as compared to the 2017 LDS, the effect of the change being that the lessee is no longer required to contribute towards advertising and promotional costs.
- [24] Ms Irvine's evidence is that the changes to the costs of advertising were to benefit the tenant. Ms Irvine accepted, however, when referred to the plan of the leased premises attached to the 2018 LDS as compared to the plan attached to the 2017 LDS, that the plan in the 2018 LDS was different. Ms Irvine's stated, however, that the plan in the 2018 LDS had been 'updated' and maintained her evidence that the changes to the plan were 'minor changes'. Ms Irvine also accepted during cross-examination that the lessee would not sign the lease until the changes were made.<sup>23</sup>
- [25] We do not accept Ms Irvine's evidence that the changes to the 2018 LDS as compared to the 2017 LDS are minor. The evidence shows that Mr Wu negotiated changes to the lease after the 2017 LDS was issued by the lessor. The lessor issued the 2018 LDS to reflect the lessee's requested changed 'at the insistence of Mr

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<sup>17</sup> Applicant's outline of submissions filed 25 February 2020.

<sup>18</sup> See T2-49, L38-43 and applicant's submissions in reply dated 1 April 2020.

<sup>19</sup> Outline of submissions for the respondent filed on 4 March 2020, p 10. See Exhibit 28.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid, p 10-11. See Exhibit 28.

<sup>22</sup> Outline of submissions for the respondent filed on 4 March 2020, p 10.

<sup>23</sup> T3-47, L45-47.

Wu'.<sup>24</sup> Indeed, Ms Irvine's evidence given at the hearing is that the lessee would not sign the lease until the changes were made.<sup>25</sup>

- [26] It is open for us to find on the evidence that some of the requested changes by Mr Wu were important to the lessee. Mr Wu gave evidence at the hearing about the commencement date of the lease that he said was not disclosed in item 5 of the 2017 LDS. Mr Wu stated that his understanding as to the meaning of the commencement date of the lease is that the landlord work is finished and the premises is ready and the lessee is ready to come in and do its fit out work.<sup>26</sup> During re-examination, Mr Wu was asked if there were 'negotiations on foot' in relation to the lease during the period from 10 October 2017 until the lease was signed in February 2018. Mr Wu stated 'absolutely'.<sup>27</sup> Mr Wu stated that, amongst other things, there is 'a lot of difference between the two negotiation[s]' meaning the negotiations that took place between the lessee and lessor during the period from 2017 to when the lease was signed by the lessee in 2018.
- [27] It matters not, as contended by Orchid Avenue, that Mr Wu's requested changes to the lease that were reflected in the 2018 LDS were to benefit the lessee. Indeed some of the changes reflected in the 2018 LDS such as, for example, the date from when rent is payable under the lease, the details of payments to be made by the lessee under the lease (i.e. the costs of advertising) and details of any works to be carried out by the lessor, are 'prescribed particulars' for a disclosure statement, as provided under s 2 of the *Retail Shop Leases Regulation* 2016 (Qld).
- [28] It is not necessary for us to consider whether the 2017 LDS was 'defective' pursuant to s 21F of the Act because, for reasons discussed below, we have found that the lessor issued the LDS to the lessee on 20 February 2018. Further to that, it is not necessary for us to consider whether, as contended by Orchid Avenue, the lessee complied with s 22A of the Act, that provides for the giving of a disclosure statement to the lessor, at least seven days before the prospective lessee enters into a retail shop lease. Certain rights may flow from a party's failure to comply with relevant sections of the Act. In this matter, it is apparent from the evidence before us that neither party has chosen to exercise its rights in relation to any purported failure by the lessee to issue a disclosure statement under s 22A of the Act.
- [29] The evidence shows that after the lessor issued the 2017 LDS together with the agreement to lease and lease, Mr Wu requested changes to the lease. Mr Wu, on behalf of the lessee would not sign the lease until the changes were made. The lessor issued an amended agreement to lease and lease together with the 2018 LDS that incorporated the lessee's negotiated changes. We find that the lessor has, by issuing the amended lease documents together with the 2018 LDS, effectively accepted Mr Wu's negotiated changes. Mr Wu signed the amended agreement to lease and lease, that was provided to him with the 2018 LDS, on 22 February 2018. We reject the lessor's submission that the LDS was provided to Golden Vision on 10 October

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<sup>24</sup> Outline of submissions for the respondent filed on 4 March 2020, p 10. See Exhibit 28, attachment 12.

<sup>25</sup> T3-47.

<sup>26</sup> T2-29, L35-45.

<sup>27</sup> T2-99.

2017. We find that, for the purposes of s 21B of the Act, Orchid Avenue provided to the lessee the LDS on 20 February 2018.

*What is 'the prescribed disclosure date' for the purposes of s 21B of the Act and the giving of the LDS?*

- [30] Section 21B requires the lessor to give to a prospective lessee a LDS at least seven days before the lessee 'enters into a retail shop lease' ('the prescribed disclosure date'). Section 11 of the Act provides that a retail shop lease is 'entered into' on the earliest of the following dates (emphasis added):
- (a) being the **first date** by which the **lease** is **signed by all of the parties** to the lease;
  - (b) the date the lessee enters into possession of the retail shop under the lease;
  - (c) the date the lessee first pays rent under the lease, other than as a deposit to secure the premises for the lease.
- [31] We accept the approach taken to s 11 of the Act by the Supreme Court of Queensland in *Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal & Anor*<sup>28</sup> in which McMurdo J said that the intended purpose of s 11 is to define, when read with other sections, the scope of the operation of the Act.<sup>29</sup>
- [32] We find that the date the lease was 'entered into' for the purposes of determining 'the prescribed disclosure date' for the giving of a LDS, is to be construed with reference to s 11 of the Act. Relevantly, s 11 provides that a lease is 'entered into' on the earliest of the first date by which the lease was signed by all of the parties, or the lessee enters into possession of the retail shop, or the date the lessee pays rent.
- [33] In this matter, there is no evidence before us to support a finding, nor is it contended by the parties, that the lessee took possession of the retail shop under the lease. Further to that, there is no evidence before us, nor is it contended by the parties, that the lessee has paid any rent under the lease, other than a deposit to secure the premises for the lease, for the purposes of s 11(c) of the Act.
- [34] The issue to be determined now, for the purposes of s 21B of the Act and the giving of a LDS, is 'when the lease is entered into'. Further to that, and when the lease is 'entered into' is, as provided under s 11, the first date by which the lease was signed by all of the parties. Orchid Avenue says that the parties did not enter into the agreement to lease and lease within the meaning of s 11 of the Act until 18 April 2018, being the date of execution of the agreement to lease and lease by the landlord.<sup>30</sup> On the other hand, Golden Vision says that the lease commenced on 21 February 2018, as agreed between the parties at the hearing.
- [35] We have found that the lessee signed the lease documents on 22 February 2018. No evidence was adduced by either party at the hearing, nor was it raised as an issue at the hearing, as to the date the lessor executed the lease documents. There is, however, no assertion raised in this matter that the lease has not been properly

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<sup>28</sup> [2007] 1 Qd R 246.

<sup>29</sup> *Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal & Anor* [2007] 1 Qd R 246.

<sup>30</sup> *Ibid*, p 12.

executed. Indeed, it is common ground as between the parties that the lease commenced on 21 February 2018 and both parties have proceeded in this matter on the basis that the lessee and lessor are bound by the lease. Notwithstanding, and whilst there is no evidence of who signed the lease, it is open for us to draw the reasonable inference that the lease was signed by two attorneys for Orchid Avenue pursuant to registered Power of Attorney No. 716949515 and the lease was validly executed by Orchid Avenue on 18 April 2018.<sup>31</sup>

- [36] We take guidance from a summary of the relevant law in *YJ Pty Ltd & Ors v Huang's Properties Pty Ltd*<sup>32</sup> as to the methods of execution of a lease or deed by a corporation. In *Huang*, Muir DCJ helpfully sets out the requirements under s 127 of the *Corporations Act* 2001 (Cth) and observes that the section does not limit the way in which a company may execute a document.<sup>33</sup> In *Huang*, Muir DCJ refers to a number of cases including *Pozzan v Gibbons*<sup>34</sup> to support the proposition that a company may execute a document in any way other than that prescribed in s 127(1) of the *Corporations Act*. The relevant extract from *Pozzan* summarised in *Huang* is now set out as follows (footnotes omitted):

In *Pozzan v Gibbons*, Perry J observed that s 127(4) of the *Corporations Act* makes it plain that a company may execute a document in any way other than that prescribed in s 127(1) so long as it is “legally efficacious”. In doing so, he held that a loan agreement which had not been “executed as a deed” contrary to s 127(3) of the *Corporations Act*, was nevertheless binding because another statute provided that notwithstanding the defective execution, the execution would be taken to be valid if it appeared from evidence external to the deed that the party intended to be bound by it.<sup>35</sup>

- [37] We agree with the approach taken by Perry J in *Pozzan* as to the requirements under s 127 of the *Corporations Act* and the execution of a document. We find that Orchid Avenue may execute a document in any way other than that prescribed in s 127(1) of the *Corporations Act*. We find that based on the evidence before us both parties have acted in a way that they intended to be bound by the agreement for lease and lease and more importantly each of the parties have proceeded to exercise their respective rights under the lease on the basis that the lease was properly executed by the lessee and lessor.
- [38] Golden Vision’s contention that there has been a substantial departure by Orchid Avenue from its acknowledgment that the lease commenced on 21 February 2018, as agreed between the parties at the hearing, matters not. It may be, as is the case here, that the commencement date of the lease is different from the date when the ‘lease is entered into’ for the purposes of s 11 of the Act and in determining ‘the prescribed disclosure date’ for the giving of a LDS under s 21B.
- [39] We find that each party has obligations under the Act such as, as is relevant to the present matter before us, an obligation by the lessor to provide, in certain

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<sup>31</sup> Exhibits 2 and 3. See also s 127 of the *Corporations Act* 2001 (Cth). See also Exhibit 3 and clause 15.5 that refers to any document or notice as being valid when, amongst other things, it is signed under the lessor’s power of attorney.

<sup>32</sup> [2018] QDC 240.

<sup>33</sup> *Ibid*, [28].

<sup>34</sup> (2006) 200 FLR 287, [60] – [65].

<sup>35</sup> *Ibid*, [29].

circumstances and amongst other things, a LDS to the lessee. Further to that, the lessee is required to, amongst other things, give a lessee disclosure statement to the lessor at least seven days before the prospective lessee enters into a retail shop lease.<sup>36</sup> Certain rights may flow from each of the parties' respective failures to comply with relevant sections of the Act.

- [40] In addition to each of the parties' obligations under the Act, the lease documents that have been duly accepted by both the lessee and lessor, contain each of the parties' respective obligations and entitlements under the lease as well as, amongst other things, the critical date as to the commencement of the lease.
- [41] In this matter we find that the lease was 'entered into', as defined under s 11 of the Act, on the first date by which the lease was signed by all of the parties. We have found that the lease was signed by the lessee on 22 February 2018. It is apparent from the lease documents tendered at the hearing, and for reasons discussed above, that the lessor executed the lease on 18 April 2018. We find that the prescribed disclosure date for the purposes of s 21B of the Act and the giving of a LDS is 11 April 2018, being seven days before the first date by which the lease is signed by all of the parties to the lease (i.e. on 18 April 2018).
- [42] For completeness we have considered the question of whether Golden Vision has otherwise properly terminated the lease pursuant to s 21F of the Act. This is on the basis that our interpretation of s 21B of the Act for the purposes of determining 'the prescribed disclosure date' is wrong. Further to that and more importantly, if we accept Golden Vision's contention that the lease was entered into on 22 February 2018 on the basis that it would be unfair to permit Orchid Avenue to now assert that it signed the lease documents on 18 April 2018 on the basis that no evidence was led at the hearing to prove that fact (i.e. the date the lessor executed the lease) and it is no longer possible for Golden Vision to challenge it. For reasons discussed below, we have found that Golden Vision has not properly terminated the lease under s 21F of the Act.

*Was notice of termination of the lease given by the lessee?*

- [43] Section 21F of the Act provides that a lessee may terminate a retail shop lease by giving written notice to the lessor within six months after the lessee enters into the lease if the lessor does not comply with s 21B or 21E, or a disclosure statement when given to the lessee under s 21B or 21E is a defective statement. Other than a requirement to give written notice to the lessor within six months, the Act is silent as to the form of any notice of termination to be given for the purposes of s 21F.
- [44] The agreement for lease and lease also specifies when a party is in breach of the lease and when the lessor may terminate the deed or agreement to lease.<sup>37</sup> More generally, there are provisions for the giving of 'notices' under the agreement to lease and lease such as, amongst other things, a requirement that a notice be in writing<sup>38</sup> and that the lessee may serve a notice on the lessor by leaving it at, posting

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<sup>36</sup> The Act, s 22A.

<sup>37</sup> See Exhibits 2 and 3.

<sup>38</sup> See Exhibit 2 and clause 20 of the lease.

it, faxing or emailing it to Orchid Avenue's registered office.<sup>39</sup> The agreement to lease and lease does not, however, specify the content of any notice to be given.

- [45] Golden Vision contends that proceedings were filed on 3 July 2018 within six months of the lessee entering the lease on 21 February 2018.<sup>40</sup> Golden Vision refers us to the notice of dispute which provides, under the heading 'remedy you are seeking to resolve the dispute' at annexure 2, as follows:

To terminate the lease with Golden Vision Gold Coast Pty Ltd and for each party to release each other.<sup>41</sup>

- [46] Golden Vision contends that the notice of dispute operated as the relevant 'notice' by which it terminated the lease and agreement for lease.<sup>42</sup> Golden Vision relies on a number of authorities to support its submission that a reasonable person in the position of Ms Irvine, having received the notice of dispute, must have understood that Golden Vision was, by issuing the notice of dispute, terminating the lease.<sup>43</sup> Golden Vision submits that the commencement and service of proceedings was therefore the relevant notice under s 21F of the Act for terminating the lease and agreement for lease.<sup>44</sup>

- [47] It is non-contentious that the notice of dispute ('Notice') was filed in the Tribunal on 3 July 2018 being a date that is within six months of Golden Vision entering into the lease, that is, on 18 April 2018. Further to that, the lessor received the Notice on or about 25 July 2018.

- [48] We accept that, consistent with established authority, the question of whether the Notice was effective should be determined by reference to what a reasonable person exercising his or her common sense in the context and in the circumstances of the particular case, would understand the Notice to mean.<sup>45</sup> In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*<sup>46</sup> the House of Lords said:

The standard of reference is that of the reasonable man exercising his common sense in the context and in the circumstances of the particular case. It is not an absolute clarity or an absolute absence of any possible ambiguity which is desiderated. To demand a perfect precision in matters which are not within the formal requirements of the relevant power would in my view impose an unduly high standard in the framing of notices such as those in issue here.<sup>47</sup>

- [49] In this matter and for reasons discussed below, we cannot be satisfied based on the evidence before us that the lessee has, by filing the Notice of dispute, 'given written notice' to the lessor within six months after the lessee enters into the lease, as

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<sup>39</sup> Exhibit 3, clause 15.3 and see Exhibit 2, clause 20.

<sup>40</sup> Applicant's outline of submissions filed 25 February 2020.

<sup>41</sup> *Ibid*, p 4.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*, p 5.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 767; *Al Jadeed TV v United Broadcasting International Pty Ltd* [2011] FCA 983, [21]; *Robert McGill Freier and Anor v Australian Postal Corporation (No 2)* [2012] NSWSC 61, [18]; and see applicant's outline of submissions filed 25 February 2020, p 4-5.

<sup>46</sup> [1997] AC 749.

<sup>47</sup> *Mannai*, 782.

required under s 21F(1) of the Act that the lease is terminated. Further to that, we are not satisfied that a reasonable recipient of the Notice, such as Ms Irvine on behalf of the lessor, would understand the Notice to convey notice of termination of the lease.

[50] Ms Irvine's evidence is that the lessor received the Notice directly from the Tribunal registry on 25 July 2018.<sup>48</sup> Mr Irvine gave evidence at the hearing that she did not understand the Notice to be a notice of termination of the lease.<sup>49</sup> Ms Irvine's evidence is that up until the time when the lease was terminated by the lessor on 26 October 2018, Golden Vision did not convey to the lessor that the lease had already been terminated.<sup>50</sup>

[51] We accept Ms Irvine's evidence about receipt of the Notice and that she did not understand the Notice to be a notice of termination. Ms Irvine's evidence about the Notice is supported by her email sent to the Tribunal dated 23 July 2018.<sup>51</sup> Relevantly, Ms Irvine states in her email to the Tribunal dated 23 July 2018, the following:

...Could you please advise if proceedings have been commenced in the name of Golden Vision GC P/L v Orchid Avenue P/L? We have been provided with a copy of a payment receipt by Golden Vision GC P/L but have not been served with any documents.<sup>52</sup>

[52] Mr Wu's initial evidence about the giving of the Notice to the lessor is that he sent the Notice to the lessor on the same day that he filed it (i.e. on 3 July 2018) or the next day.<sup>53</sup> In his further statement filed during the hearing, Mr Wu recalls that he lodged the Notice in the Tribunal on the understanding that the Tribunal would serve the notice on the lessor.<sup>54</sup> It is open for us to find that Mr Wu did not send the Notice to the lessor. We find that Orchid Avenue was given the Notice by the Tribunal on 25 July 2018.

[53] We accept Ms Irvine's evidence that she did not understand the Notice to be a notice of termination of the lease. The evidence shows that after the lease documents were signed by the lessee on 22 February 2018, Golden Vision took steps to get the premises ready for trading. Golden Vision obtained, amongst other things, a quote for construction of the fit out works on 9 April 2018, applied for building approval of the work on 11 April 2018 and signed a contract for the completion of the fit out works with Altran Project Management Pty Ltd ('the Altran contract') on 18 April 2018.<sup>55</sup> Practical completion was reached for the Altran contracted works on 14 June 2018, being a date after Mr Wu filed the Notice in the Tribunal.<sup>56</sup>

[54] Mr Wu was cross-examined at the hearing about his intentions in relation to filing the Notice and commencing proceedings in the Tribunal. Mr Wu stated 'I like to terminate the lease because the dispute I mentioned in my statement and also

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<sup>48</sup> Exhibit 28, [13].

<sup>49</sup> T3-57.

<sup>50</sup> T3-57, L24-31.

<sup>51</sup> Exhibit 28, attachment 16, p 666.

<sup>52</sup> Ibid.

<sup>53</sup> T2-53, L30-35.

<sup>54</sup> See further statement of Mr Wu tendered at the hearing, exhibit 25.

<sup>55</sup> Respondent's submissions filed 4 March 2020 and see Exhibit 26, attachments 1-6.

<sup>56</sup> Exhibit 6, attachment 2, T2-83.

according to the law'.<sup>57</sup> Mr Wu also stated that he would like to seek compensation for the deposit and amongst other things, referred to the money he had spent such as the 'fit-out work'.<sup>58</sup> In relation to Altran's notice of practical completion for the works that was emailed to Mr Wu on 31 June 2018, Mr Wu accepted during cross-examination that he received an email on 31 June 2018 but stated that he did not remember seeing the notice.<sup>59</sup>

[55] Although Golden Vision refers to the 'remedy' it is seeking under Annexure 2 of the Notice as being, amongst other things, '[t]o terminate the lease' with Golden Vision, there is no reference to the lessor's alleged failure to provide to the lessee the LDS within the prescribed time under s 21B of the Act, nor does the Notice state that the lease is terminated. The Notice does, however, refer to the reimbursement of specified amounts from Orchid Avenue such as, amongst other things, amounts of money plus GST for fit out payments to Altran Project Management Pty Ltd, liquor licence fees, legal costs involved with going through the lease, signs, fire consulting works, hydraulic consulting works and building approvals.<sup>60</sup>

[56] We find that when read as a whole, the Notice was not an unequivocal statement that Golden Vision was treating the lease as at an end.<sup>61</sup> The Notice does not expressly state that the lease is terminated. At best the Notice specifies an intention to terminate the lease. The Notice refers to a number of remedies sought by the lessee such as it claims 'reimbursement' of specific amounts from Orchid Avenue. Despite the particularity of certain amounts referred to in the Notice, the lessee does not specify a failure by the lessor to provide a LDS under s 21B or state that the lease is terminated or at an end.

[57] We find that a reasonable recipient of the Notice, such as Ms Irvine on behalf of the lessor, would not understand the Notice to convey notice of termination of the lease.<sup>62</sup> We do not accept Golden Vision's submission that it properly terminated the lease and agreement for lease under s 21F of the Act, or otherwise, by the filing of the Notice in the Tribunal on 3 July 2018 or as at 25 July 2018 when the lessor received the Notice.

### **Did Orchid Avenue fail to complete the works required of it under the agreement to lease?**

[58] Orchid Avenue were required to perform certain works as provided under the agreement to lease. Relevantly, clauses 3 and 5.1 of the agreement for lease provides as follows:

#### **3. Intentions**

##### 3.1 We must carry out Our Works

...

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<sup>57</sup> T2-53.

<sup>58</sup> Ibid.

<sup>59</sup> T3-9.

<sup>60</sup> Exhibit 28, p 674.

<sup>61</sup> *Dee-Tech Pty Ltd v Neddham Holdings Pty Ltd* [2010] NSWCA 374, [56].

<sup>62</sup> Outline of submissions for the respondent filed 4 March 2020, p 15.

### 3.2 You must carry out Your Works

You must carry out Your Works in accordance with the Fit out Manual and the requirements of this Deed and the Tenancy Coordinator.

...

### 5.1 Handover

We must use reasonable endeavours to complete Our Works to a stage sufficient for you to occupy the Premises for the purpose of conducting Your Works on or before the Estimated Handover Date [21 February 2018].<sup>63</sup>

...

[59] Clause 6.1(a) of the agreement for lease provides that:<sup>64</sup>

#### 6. Our Works

##### 6.1 When we will complete Our Works

(a) We must use reasonable endeavours to complete Our Works, except for minor matters which will not prevent you occupying the Premises to conduct Your Business by the Estimated Completion Date [23 March 2018].

(b) A certificate signed by the Tenancy Coordinator will be conclusive evidence of the status of Our Works and as to any minor matters which need to be attended to.

...

(d) Subject to the Act, you must not make any claims against us, or attempt to terminate this Deed, if:

(i) changes are made to Our Works under clause 6.1(c);

(ii) we do not comply with clause 6.1(a)

...

[60] The agreement to lease defines 'Our Works' as the works in schedule 3 indicated as both 'works by lessor at lessor's costs' and 'works by lessor at lessee's cost' and notwithstanding anything contrary in the agreement, also includes certain base build and category one works as provided under the agreement.<sup>65</sup> The agreement to lease also provides that 'time is of the essence'.<sup>66</sup>

[61] Orchid Avenue says that the landlord's works were completed by 31 January 2018 with the exception of ceiling installation, fire sprinkler installed to the approved plan and floor waste ('the excluded works').<sup>67</sup> Orchid Avenue says that it used all reasonable endeavours to complete the excluded works and any delay in completion of these works was attributable to Golden Vision.<sup>68</sup>

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<sup>63</sup> Exhibit 3. See 'Our Works' as defined on page 2.

<sup>64</sup> Exhibit 3.

<sup>65</sup> Exhibit 3.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid, p 3.

<sup>68</sup> Outline of submissions for the respondent filed 4 March 2020.

- [62] On the other hand Golden Vision contends that the lessor, on its own evidence, failed to comply with its obligations in clauses 5.1 or 6.1, respectively, of the agreement to lease.<sup>69</sup> Golden Vision says that whether there was an agreement between the parties prior to the lease being signed by the lessee, to extend the date for completion of the excluded works, is ultimately irrelevant.<sup>70</sup> Golden Vision contends that the lease documents were signed on 22 February 2018 being a date well after any such alleged agreement as to the deferring of the excluded works.<sup>71</sup> Golden Vision says that the agreement to lease clearly replaces any prior agreement between the parties. Further to that, Golden Vision says that the completion of ‘Our Works’ by the lessor in a timely fashion was an essential term of the agreement to lease which was capable of giving rise to a right to terminate if breached.<sup>72</sup>
- [63] Craig Blackstone, General Manager, gave evidence on behalf of Orchid Avenue stating that the excluded works were completed by Orchid Avenue ‘on completion’ of Mr Wu’s tenant fit-out works which would have been on 14 June 2018.<sup>73</sup> Mr Blackstone’s evidence is that the excluded works were of a minor nature and did not preclude Golden Vision from occupying the premises or completing its fit-out.<sup>74</sup> Mr Blackstone accepted during cross-examination that the sprinklers were to be fitted at the lessor’s costs to the approved plan.<sup>75</sup> Mr Blackstone stated, however, that there was no approved plan so the lessor could not install the sprinkler prior to 14 June 2018.<sup>76</sup> In relation to the floor waste installation, Mr Blackstone’s evidence is that it was agreed between Mr Wu and the lessor that the works would be deferred until the lessor received the approved plans.<sup>77</sup> Mr Blackstone’s evidence is that there was an intention to have the fit out works done at the same time as the base build works.<sup>78</sup>
- [64] Golden Vision says in response that there is nothing in the agreement to lease or lease documents that the lessor’s works described as ‘our works’, to be completed by the lessor, are to await finalisation of the lessee’s fit-out works.<sup>79</sup> Notwithstanding, Mr Wu’s evidence is that the plan for the leased premises was complete in or about October 2017.<sup>80</sup> Mr Wu’s evidence is that any changes to the plan after October 2017 were minor and did not prevent the installation of sprinklers, floor wastes, trade wastes or an internal ceiling.<sup>81</sup> Mr Wu maintained his evidence about the plan during cross-examination. Mr Wu stated that the plan had been issued for approval on 8 November 2017.<sup>82</sup> Mr Wu’s evidence is that although the plan is stamped, meaning approved, on 9 April 2018, the plan was approved earlier by the lessor.<sup>83</sup>

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<sup>69</sup> Applicant’s outline of submissions filed 25 February 2020, p 5.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> T1-52, L5-12.

<sup>74</sup> T1-53.

<sup>75</sup> T1-55.

<sup>76</sup> T1-56.

<sup>77</sup> Ibid.

<sup>78</sup> T1-58.

<sup>79</sup> Applicant’s outline of submissions filed 25 February 2020, p 7.

<sup>80</sup> Ibid. See also T2-35.

<sup>81</sup> T2-35.

<sup>82</sup> T2-36.

<sup>83</sup> T2-36.

*Is clause 5.1 of the agreement to lease an essential term?*

- [65] Before we consider the evidence about the excluded works, there is a preliminary issue to be determined, as raised by Golden Vision, as to whether clause 5.1 is an essential term that the lessor complete the works under the agreement to lease. Further to that, we must determine whether there was an exclusion of liability, as raised by Orchid Avenue, by virtue of clause 6.1(a) of the agreement to lease.
- [66] We accept, as submitted by Orchid Avenue, that properly construed clause 5.1 requires the lessor to use ‘reasonable endeavours’ to complete the owner’s works to a stage that is sufficient to enable the lessee to complete its fit out works.<sup>84</sup> We accept, as contended by Golden Vision, that if a contract is silent as to whether a term is essential, the test of essentiality applies. In *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*<sup>85</sup> Jordan CJ said:

The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor ... If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge.<sup>86</sup>

- [67] In this matter, the agreement to lease clearly contemplates the completion of works by the both the lessor and lessee. As discussed above, Mr Wu’s evidence is that it was not possible to run a bar without some of the works identified as excluded works such as the floor waste, fire sprinkler system or ceiling. Mr Wu gave evidence at the hearing that he would not have entered into the lease or agreement to lease if he had known that the works described as ‘Our Works’ would not be completed by 21 February or 23 March 2018.<sup>87</sup> Mr Wu’s evidence is that it was important to trade before the Commonwealth Games on the Gold Coast.<sup>88</sup>
- [68] Further to Mr Wu’s evidence about signing the agreement to lease and the parties’ understanding as to each of their respective obligations under the agreement to lease and the completion of certain works, there is evidence before us that the parties had a discussion about deferring the work to the floor waste to allow for the tenancy hydraulic design and approval to be obtained.<sup>89</sup> Mr Blackstone sent an email to Mr Wu dated 10 November 2017 confirming ‘points and action items’ agreed at a meeting including all work within the areas of the base build hydraulic works to be

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<sup>84</sup> Outline of submissions for the respondent filed 4 March 2020, p 7.

<sup>85</sup> (1938) 38 SR (NSW) 632. Decision overturned, for other reasons, in *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286.

<sup>86</sup> (1938) 38 SR (NSW) 632, 641 – 642.

<sup>87</sup> T2-63.

<sup>88</sup> T2-43.

<sup>89</sup> Exhibit 6, [12].

‘pushed back’ to allow for the tenancy hydraulic design and approval to be obtained.<sup>90</sup>

- [69] Although Mr Blackstone conceded during cross-examination that there was no agreement for the works to be completed later than 23 March 2018, his evidence about deferring the work is relevant because it shows that there was a discussion about the completion of the works. Further to that, it is open for us to draw the reasonable inference that the parties intended to have the fit out works completed at the same time as the base build works.<sup>91</sup> Indeed, clause 8.1(d)(ii) of the agreement to lease requires Golden Vision to complete its fit out works by the end of the fit out period being 23 March 2018. The fit out plans were not finalised until 18 April 2018 and the fit out works were not completed until 14 June 2018.<sup>92</sup>
- [70] It is not necessary for us to consider whether, as contended by Orchid Avenue, there is an exclusion of liability by virtue of clause 6.1(a) of the agreement to lease. It is open for us to find on a plain reading of the agreement to lease as a whole and based on the evidence before us that it was not an essential term of the agreement to lease that the lessor complete the works by the estimated handover date and to complete the works ‘except for minor matters’ by the estimated completion date. Clause 5.1 of the agreement to lease requires the lessor to use ‘all reasonable endeavours’ to complete the works to a stage sufficient for the lessee to occupy the premises for the purposes of conducting the lessee works on or before handover. Clauses 5.1 and 6.1 must be read together with clause 3 which contains the intentions of the parties with respect to the works to be performed. Further to that, clause 8.1 requires Golden Vision to provide all drawings and specifications for its works which must be of a high standard. We find that the agreement to lease contemplates that both the lessee and lessor would undertake certain work. Clause 5.1 requires the lessor to use all reasonable endeavours to complete the work except for minor matters that would not prevent Golden Vision from occupying the premises.
- [71] Mr Wu signed the lease documents on 22 February 2018 knowing that the fit out plans had not been approved and that it was Golden Vision’s responsibility under the agreement to lease, as the lessee and tenancy coordinator, to approve the plans. Mr Wu on his own evidence has 25 years’ experience in business in which time he has opened many retail outlets and overseen their fit out and operations.<sup>93</sup> We find that Mr Wu, as a person with experience in opening retail outlets, signed the lease documents in circumstances where he had negotiated changes to the lease documents with the lessor to benefit the lessee. Mr Wu was clearly aware as at 18 February 2018, being a date prior to signing the agreement to lease and lease that some of the important base build services, namely, floor waste were not complete and that Golden Vision was responsible for approval of the plans.<sup>94</sup> As events transpired, Golden Vision’s plans were approved on 9 April 2018 and the fit out works and excluded works were completed by Altran in accordance with a contract signed by the lessee on 18 April 2018.

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<sup>90</sup> Ibid.

<sup>91</sup> T1-58 to 59.

<sup>92</sup> Exhibit 3; Exhibit 6; and T2-68, L20.

<sup>93</sup> Exhibit 9, [2].

<sup>94</sup> Ibid, p 3.

*Did the lessor use 'all reasonable endeavours' to complete the works?*

- [72] We are satisfied based on the evidence that the lessor could not, using reasonable endeavours, have completed the deferred works by 21 February 2018 or 23 March 2018. The evidence shows and we find that the lessor could not complete the excluded works until the lessee had finalised its drawings and specifications for the works in accordance with its obligations under clause 8.1(b) of the agreement for lease. Relevantly, clause 8.1(b) of the agreement for lease requires the lessee to provide to the tenancy coordinator all 'drawings and specifications' for the lessee works which must be of a 'high standard' and, amongst other things, obtain the approval of the tenancy coordinator to those drawings, specifications and timeframe.<sup>95</sup> It is non-contentious in this matter that the lessee was also the tenancy coordinator.
- [73] Golden Vision first provided the fit out plans to the lessor which had been stamped with the approval of the tenancy coordinator on 9 April 2018.<sup>96</sup> We accept Mr Blackstone's evidence that the lessor could not complete the excluded works until Golden Vision as the tenancy coordinator had finalised its drawings in accordance with its obligations under the agreement to lease.
- [74] The fit out plans included variations made as late as 24 January 2018. The final plans that were amended by Golden Vision on 17 April 2018 and approved by the tenancy coordinator were provided to the lessor on 18 April 2018.<sup>97</sup>
- [75] Mr Blackstone's evidence is that the floor waste could not be installed until the plans were complete and relevant authority approvals had been obtained including plumbing and services approval.<sup>98</sup> In relation to the ceiling installation, Mr Blackstone stated that it was necessary for the lessor to know the locations for services bulkheads, together with concealed services, before it could install the ceiling. Mr Blackstone's evidence is that those locations were subject to change until the lessee finalised its plans and obtained approvals from relevant service authorities.<sup>99</sup> In relation to the fire sprinkler, Mr Blackstone stated that the fire sprinkler could not be installed to the approved plans until the plans had been finalised and more importantly, until the ceiling had been installed.<sup>100</sup>
- [76] We do not accept Mr Wu's evidence that Golden Vision was denied access by the lessor in about April or May 2018.<sup>101</sup> Mr Wu's evidence given at the hearing is that he had access to the premises after signing the lease to perform his fit out works.<sup>102</sup> As we understand Mr Wu's evidence given at the hearing to be, the lessee started the fit out works on the understanding that the lessor would complete their works by 23 March 2018 but at some point after signing the lease, Mr Wu realised that the lessor works would not be completed by 23 March 2018. After signing the lease Altran were engaged to complete the fit out works that were finalised on 14 June 2018. It is

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<sup>95</sup> Exhibit 3.

<sup>96</sup> T2-67; Exhibit 26, [4]-[5]; T3-29.

<sup>97</sup> Exhibit 26, attachment 5. See T3-26.

<sup>98</sup> Ibid.

<sup>99</sup> Exhibit 6, [15].

<sup>100</sup> Exhibit 6, [15] – [16].

<sup>101</sup> Exhibit 8; T2-51 to T2-52.

<sup>102</sup> T2-50.

open for us to find on the evidence that Mr Wu had access to the premises after he signed the agreement to lease and lease.<sup>103</sup>

- [77] The unchallenged evidence of Mr Wu given at the hearing is that he planned to operate a bar within the food precinct. Mr Wu stated and we accept that he could not operate the bar without the floor waste installed and a completed fire sprinkler system, or ceiling.<sup>104</sup> Mr Wu accepted during cross-examination, however, that it would not have been legal for the lessor to install the floor waste before plumbing and drainage services approval.<sup>105</sup> That approval was not obtained from the Council of the City of Gold Coast until 23 March 2018.<sup>106</sup> It follows therefore that Orchid Avenue could not install the floor waste until a date after 23 March 2018.
- [78] We find that Orchid Avenue did not breach its obligations under the agreement to lease to complete certain works by the handover date of 21 February 2018 or the completion date of 23 March 2018.
- [79] For completeness, we have also made some observations about Golden Vision's claim for damages in the event that we are wrong as to our findings about termination of the lease by the lessee. We cannot be satisfied based on the evidence that Golden Vision has established its loss and more importantly that Golden Vision as the lessee incurred the loss. Golden Vision relies on a number of invoices addressed to various entities to support its claim for loss suffered by reason of the lessor's conduct including the costs of completing the works.<sup>107</sup> Mr Wu, during cross-examination, does not dispute that various invoices were addressed to entities including Golden Vision Retail other than Golden Vision and that the invoices were paid by the other entities.<sup>108</sup>

#### **Did Golden Vision fail to pay rent under the agreement to lease or lease?**

- [80] Orchid Avenue claims the amount of \$44,120.44 as rent owing during the period from 24 March 2018 to 19 October 2018, inclusive. More importantly, Orchid Avenue claims damages pursuant to s 83(2)(b) of the Act for breach of an essential term in that Golden Vision failed to pay rent.<sup>109</sup> Further to that, Orchid Avenue says that rent was payable from 21 February 2018 but it has permitted Golden Vision the benefit of the 30-day rent free incentive provided under clause 5.2(a) of the lease by not invoicing Golden Vision until 24 March 2018.<sup>110</sup> Further to that, Orchid Avenue issued to Golden Vision notices to remedy breach by reason of the alleged failure to pay rent and, amongst other things, the security deposit.<sup>111</sup> Orchid Avenue elected to terminate the lease on 26 October 2018 for breach of an essential term of the lease.<sup>112</sup>

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<sup>103</sup> T2-51.

<sup>104</sup> T2-31 and T3-7 to T3-8.

<sup>105</sup> T2-72, L28-43.

<sup>106</sup> Exhibit 19, p 2; T2-72, L32-35.

<sup>107</sup> Exhibit 13. See also the applicant's submissions filed 25 February 2020.

<sup>108</sup> T2-97.

<sup>109</sup> Outline of submissions for the respondent filed 4 March 2020. See response filed 19 October 2018.

<sup>110</sup> Ibid, p 16.

<sup>111</sup> See Exhibit 21, [33].

<sup>112</sup> Exhibit 21, attachment 23.

[81] Firstly, we do not accept, as contended by Golden Vision, that we do not have power to award compensation under s 83(2) of the Act. The Tribunal has jurisdiction to hear retail tenancy disputes other than certain matters as provided under s 103(1). By virtue of the *Retail Shop Lease Amendment Act 2016 (Qld)* the Tribunal's jurisdiction was expanded to include arrears of rent payable under a retail shop lease in a retail tenancy dispute.<sup>113</sup>

[82] We are satisfied that there exists between the parties a retail tenancy dispute and that the parties have complied with the requirements of Part 8 of the Act and participated in a mediation process prior to the Tribunal proceedings. We are satisfied that the Tribunal has jurisdiction to hear and decide this dispute that includes Orchid Avenue's counter-claim against the lessee for breach of an essential term of the lease by reason of the lessee's failure to pay rent.

*Are there any other amounts owing or compensation payable in respect of the lease and/or agreement to lease?*

[83] The lease clearly requires the lessee to pay rent to the lessor. We have found that the agreement to lease and lease requires both the lessee and lessor to complete certain works and that on a fair reading of the deed as a whole and on the evidence before us, it was intended by the parties that the fit out works and lessor's excluded works be completed at the same time to enable the lessee to operate the bar in the premises. We have found that the lessor used all reasonable endeavours to complete its works as required under the agreement to lease and that the works were completed after the date of handover or commencement on 14 June 2018.

[84] It is non-contentious that Golden Vision never commenced trading, nor did it pay any money towards rent. We have rejected the lessee's submission that it properly terminated the lease by the filing of the Notice in the Tribunal. Further to that, we found that the lessor used all reasonable endeavours to complete its works as required under the agreement to lease.

[85] We find that the lessee failed to pay rent in breach of its obligation under the lease. We also find that the agreement to lease and lease were properly terminated by the lessor on 26 October 2018. We accept, however, Golden Vision's contention that the premises was not complete and ready for occupation and use until 14 June 2018 and if it is accepted that the parties reached an agreement to defer completion of the works, as contended by the lessor, then it is implicit that rent should also be deferred.<sup>114</sup> We accept that, and having found that the lessee and lessor's excluded works were to be completed together, Golden Vision could not commence trading until all of the works were completed. In those circumstances, it would not be fair to require Golden Vision to pay rent before the completion of the lessor's works, that is before 14 June 2018. Further to that, Golden Vision says, and we accept, that the lessor ought not to recover any rent from Golden Vision in respect of any period during which it was recovering rent from another operator of the premises.<sup>115</sup>

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<sup>113</sup> *Retail Shop Lease Amendment Act 2016 (Qld)*, s 57.

<sup>114</sup> Applicant's submissions filed 25 February 2020, p 11.

<sup>115</sup> T1-4 and see Applicant's outline of submissions filed 25 February 2020, p 11.

[86] Ms Irvine's evidence given at the hearing is that Orchid Avenue paid \$70,000 to Altran toward Golden Vision's fit out works.<sup>116</sup> Ms Irvine accepted during cross-examination that another operator of the premises now has the benefit of the fit out works and stated that the premises was leased to another operator in or about August 2019.<sup>117</sup> Ms Irvine stated that Mr Wu removed certain items and equipment that he had installed such as CCTV cameras, fridges and kegs but 'broadly speaking' some of the fit out would be used by the current operator.<sup>118</sup> We accept Ms Irvine's evidence and find that any equipment or items belonging to the lessee were removed prior to another operator taking over the lease in or about August 2019.

[87] We are satisfied that Orchid Avenue has established its loss by reason of Golden Vision's failure to pay rent as required under the lease. The damages to be awarded to Orchid Avenue include rent payable from 14 June 2018 to 26 October 2018, inclusive.

[88] We have calculated the amount owing, based upon the annual rent set out in the Lease of \$70,000 plus GST, as follows:

(a)	14 June 2018 to 30 June 2018	\$ 3,305.55
(b)	1 July 2018 to 31 July 2018	\$ 5,833.33
(c)	1 August 2018 to 31 August 2018	\$ 5,833.33
(d)	1 September 2018 to 30 September 2018	\$ 5,833.33
(e)	1 October 2018 to 26 October 2018	<u>\$ 4,892.47</u>
(f)	Sub-Total	\$ 25,698.01
(g)	Plus GST	<u>\$ 2,569.80</u>
	<b>Total (including GST)</b>	<b>\$ 28,267.81</b>

[89] In addition to rent, Orchid Avenue claims interest without reference to how the lessor is entitled to an award of interest, the rate of interest or how the calculation of any amount claimed for interest should be undertaken. Further to that, the Tribunal has no power to award interest under the Act. We find that no interest is awarded to Orchid Avenue on the amount found to be owing by Golden Vision.

[90] We order that Golden Vision pay the amount of \$28,267.81, including GST, to Orchid Avenue within 28 days of the date of this decision.

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<sup>116</sup> T3-35.

<sup>117</sup> T3-36.

<sup>118</sup> T3-36.