QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*GSE Enterprises Pty Ltd trading as Café 20 v ACSC Investments Pty Ltd* [2019] QCAT 27
PARTIES:	**GSE ENTERPRISES PTY LTD TRADING AS CAFÉ 20** (applicant) **v** **ACSC INVESTMENTS PTY LTD** (respondent)
APPLICATION NO/S:	RSL102-18
MATTER TYPE:	Retail shop leases matter
DELIVERED ON:	13 February 2019
HEARING DATE:	25 January 2019
HEARD AT:	Brisbane
DECISION OF:	Member Kanowski (Presiding) Member McBryde Member Judge
ORDERS:	**1. The claims of GSE Enterprises Pty Ltd trading as Cafe 20 for refunds, compensation, and termination of the tenancy are dismissed.** **2. The application for costs by ACSC Investments Pty Ltd is refused.**
CATCHWORDS:	LANDLORD AND TENANT – RETAIL AND COMMERCIAL TENANCIES LEGISLATION – OBLIGATIONS, PROHIBITED TERMS AND PROTECTION FOR LESSEES – OUTGOINGS – where dispute about gross lettable area of shopping centre – whether lessee entitled to refund of outgoings contributions LANDLORD AND TENANT – RETAIL AND COMMERCIAL TENANCIES LEGISLATION – OBLIGATIONS, PROHIBITED TERMS AND PROTECTION FOR LESSEES – OTHER MATTERS – where lessee contends that lessor mismanaged shopping centre and used promotion funds inappropriately – whether lessee entitled to compensation or refund *Retail Shop Leases Act* 1994 (Qld), s 38, s 43

APPEARANCES &
REPRESENTATION:

Applicant:	Mr Gerhard Erasmus, Director of Applicant
Respondent:	S Eustace, solicitor of Hickey Lawyers

REASONS FOR DECISION

Introduction

[1] The applicant runs a café in a shopping centre on the Gold Coast. The respondent is the owner of the centre. The applicant argues that it has lost a significant amount of trade because of the way the respondent has run the centre. According to the applicant, the number of shoppers visiting the centre has fallen considerably. The applicant also disputes the way the respondent has calculated the contributions that the applicant must make to the centre's outgoings. The applicant also criticises the way that promotion funds for the centre, to which it is required to contribute, have been spent.

[2] At the Tribunal's hearing, Mr Gerhard Erasmus, who is the director of the applicant, represented the applicant. Mr Scott Eustace, a solicitor with Hickey Lawyers, represented the respondent. There were five exhibits. Mr Erasmus gave oral evidence for the applicant. Ms Kim Campbell, the centre manager, gave oral evidence for the respondent. Ms Campbell works for First Asset Management, which manages the centre on behalf of the respondent. Mr Eustace also handed up written submissions.

Outcomes sought by the parties

[3] As directed by the Tribunal, Mr Erasmus on 30 October 2018 had filed a schedule listing the outcomes he seeks. In summary, the outcomes sought are:

(a) an order that the monthly centre outgoings contributions made by the applicant between July 2016 and October 2018, in the amount of $30,613, must be refunded by the respondent to the applicant;

(b) an order that the centre promotion contributions made by the applicant during the same period, in the amount of $11,400, must be refunded by the respondent to the applicant;

(c) an order that the respondent compensate the applicant for loss of trading during the period, in the amount of $245,747; and

(d) an order that the lease be terminated without a $70,000 make good fee being imposed.

[4] The respondent argues that none of the orders sought by the applicant should be made. The respondent seeks an award of costs.

Further background information

[5] The applicant has held its lease since mid-2011. The lease will expire on 31 August 2019.

[6] The respondent has owned the centre since 20 December 2016. The previous owners had fallen into financial distress, and receivers and managers had been appointed. The respondent became the lessor of the leases in the shopping centre by way of assignment from the previous owner. At the time of the change of ownership, First Asset Management took over the management functions from the previous manager, Savills.

[7] It is undisputed that the lease is regulated by the *Retail Shop Leases Act* 1994 (Qld) ('Retail Shop Leases Act'). The Act implies several terms and restrictions into the lease.

Outgoings

[8] Under the lease, the applicant must pay a contribution to the respondent's outgoings for the centre, such as for electricity for the common areas, insurance, rates, cleaning, and management. The applicant's contribution is calculated using a percentage ofthe respondent's outgoings. The percentage is based on the proportion of the area of the shop to the lettable area of the centre. Before the start of each financial year, the respondent must give the applicant an estimate of the centre's outgoings and the applicant's contributions for the year. The applicant must then pay monthly instalments during the year. After the year has ended, the respondent must give the applicant an audited statement of outgoings and contributions for the year. Any positive or negative adjustment is then made to the contributions.

[9] There is no dispute that the applicant has paid contributions as directed by the respondent or the previous owner during the period in question. As has been mentioned, the applicant seeks a refund of its contributions, amounting to $30,613. This is on the basis that the contributions were not properly calculated because, the applicant argues, the area of the centre has not been ascertained.

[10] Section 38(1) of the Retail Shop Leases Act caps the amount of outgoings contributions payable by a lessee at the proportion that the area of the shop in question bears to the 'total area' of all premises in the centre available to be leased to or occupied by lessees. The definitions in section 38(2) must be used:

> In this section—
>
> ***prescribed purpose*** means 1 or more of the following purposes—
>
> (a) information, entertainment, community or leisure facilities;
>
> (b) telecommunication equipment;
>
> (c) automatic teller machines;
>
> (d) vending machines;
>
> (e) advertisement displays;
>
> (f) seating, tables and other furniture;

(g) trade out areas;

(h) storage;

(i) parking.

total area, of all premises in a retail shopping centre or leased building, does not include areas of premises that, if the areas were not leased or licensed, would be areas within a common area of the centre or building but only if the areas are used for a prescribed purpose.

[11] The evident purpose of the subsection is to not count in the 'total area' any portion of the common area that is used for a prescribed purpose. We interpret the provision accordingly. Accordingly, we do not accept Mr Erasmus's submission that any portion of the common area that is used for a prescribed purpose is to be added in to the 'total area'.

[12] The term 'gross lettable area' is used in the industry, and has been used by the parties in their submissions in this case, for 'total area'. Accordingly, we too will use the term 'gross lettable area' or 'GLA'.

[13] It is undisputed that the area of the applicant's shop is 100.5 square metres. There is, however, a dispute about the gross lettable area of the centre. The figure used in the period in question was 8,863.05 square metres, resulting in a requirement for the applicant to contribute 1.1339% of centre outgoings. These figures match those set out in the lessor's disclosure statement given to the applicant in 2011 by the then-owner.

[14] Mr Erasmus points to a figure for 'Total Centre GLA' of 9,295.30 square metres given in a 2014/2015 document, and has referred to a figure of 9,305.30 used in another year. However, a close examination of the 2014/2015 document indicates that the figure of 9,295.30 square metres must be made up of 'Centre GLA' of 8,795.30 square metres plus 'Common Area GLA' of 500.00 square metres. So, despite the confusing reference to 'Total Centre GLA' as 9,295.30 square metres, which actually includes some non-lettable areas, the relevant figure is 8,795.30 square metres.

[15] It perhaps should also be noted at this point that the gross lettable area of a centre can change over time, for various reasons.

[16] Mr Erasmus argues that the parts of the common area used for 'ambush marketing' – or 'casual mall licensing' to use the term preferred by the respondent – should be, but have not been, included in the gross lettable area. Similarly, an external cold room that was used by a fruit shop until it ceased trading, and a basement storage area used by Drakes supermarket, should be included according to Mr Erasmus. By 'ambush marketers', Mr Erasmus is referring to organisations who are allowed to operate from temporary stalls in common areas in order to promote causes, solicit donations, sell subscriptions and so on. The term 'ambush marketers' does evoke the frustration that Mr Erasmus feels with what he regards as a nuisance element for shoppers. However, we will use the term 'casual mall licensing' as that aligns with the terminology used in the disclosure statement and because it also encompasses other spaces in common areas that Mr Erasmus argues should be included in the gross lettable area: spaces used for automatic teller machines, a pay telephone, an internet kiosk, and children's

rides, as well as 'internal and external marketing on the facades of the building'[1] (which is apparently a reference to advertising signage).

[17] Mr Erasmus says, and we accept, that casual mall licensing has become more prevalent under the current ownership.

[18] Mr Erasmus also objects to the respondent permitting some tenants to trade beyond the boundary lines of their shops. Examples mentioned in the evidence are a fruit shop being permitted to put out displays of fruit, and a bakery being allowed to place tables and chairs in a mall. Mr Erasmus submits that if, contrary to his submissions, such conduct is allowable, the spaces in question should be added to the gross lettable area.

[19] Ms Campbell of First Asset Management says that she has performed a calculation of the gross lettable area, using the surveyed areas of each shop, and reached the figure of 8,819.60 square metres. Ms Campbell says that although this is less than the figure of 8,863.05 square metres used during the period in question, the respondent has not sought to recalculate (upwards) the applicant's liability. Ms Campbell acknowledges that her calculations exclude the cold room, the Drakes storage area, and casual mall licensing areas. She contends that those areas do not form part of the gross lettable area. She says they are not leased, but licensed, and they serve 'prescribed purposes'. Ms Campbell also says that the power for the cold room comes from the associated tenant's power source, and that the basement storage area is used by the supermarket for old or rarely-used items.

[20] Mr Erasmus challenges Ms Campbell's calculation on various bases. He argues that there is a 198 square metre discrepancy between the two versions of the master lease table used by Ms Campbell in performing her calculations, and he points to the differing figures used in some earlier years that we have discussed. Mr Erasmus also points to clause 19.25 of the lease. It provides that the lessor's surveyor must calculate the area of the shop and the centre, and that a certificate signed by the lessor's architect or surveyor is conclusive evidence of the area. Mr Erasmus points out that the master lease tables used by Ms Campbell are not certified. Further, Mr Erasmus maintains that the casual mall licensing areas, the cold room and the supermarket storage area should be included in the gross lettable area, yet these areas have not been surveyed let alone counted. Overall, Mr Erasmus submits that so much uncertainty surrounds the methodology and calculations that the gross lettable area is simply unknown, so no basis exists for imposing a contribution on the applicant.

[21] While it would have been preferable to have a 'conclusive' certificate from a surveyor of the gross lettable area, we accept that Ms Campbell has performed a careful calculation to total up the areas of the shops as individually surveyed. That there is a difference between the figure Ms Campbell reached and the figures used in earlier years does not establish that Ms Campbell's figure must be wrong, as we are not in a position to determine whether the earlier figures were accurate or if there has since been some material change in the number or configuration of areas to be counted. Similarly, it is unremarkable that there might be differences in figures from version to version of the master lease table. Overall, then, we are not persuaded that there has been any arithmetical error on Ms Campbell's part.

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1 Mr Erasmus's statement filed 31 August 2018 (Exhibit 2), [2.1.5].

[22] Whether the casual mall licensing areas, the cold room, and the supermarket storage area should be counted in the gross lettable area requires a consideration of the nature and purposes of these areas. The rationale for Mr Erasmus's argument that they should be included is readily understandable: if they are not included, lessors are paying for the electricity consumed by the licensees (except in the cold room), the insurance from which they benefit, and so on, without a contribution from those licensees. So far as the cold room and the supermarket storage area are concerned, if those areas were included in the gross lettable area, the proportion of contributions to be paid by a shop using the cold room and by the supermarket benefitting from the storage area would increase, while the contributions of other tenants would decrease.

[23] However, of course, whether those areas are to be included in the gross lettable area turns on the terms of the lease and the Retail Shop Leases Act.

[24] Mr Erasmus argues that casual mall licensing is not even permitted. He points to some references in the 2011 disclosure statement which he interprets as indicating that casual mall licensing is 'not applicable' in the centre. However, those references merely establish that the lessor disclosed that it has not agreed to adhere to the Shopping Centre Council of Australia's *Casual Mall Licensing Code of Practice*. They do not amount to any sort of undertaking not to have casual mall licensing areas in the centre. We note that the Code would oblige the lessor to transfer some of the outgoings costs to licensees. However, as the Code is voluntary, this obligation does not attach to the respondent.

[25] Mr Erasmus also points to the definition of 'common area' in the lease:

> … that part of the Centre intended by the Landlord for common use by tenants, occupants, invitees and contractors and not leased or intended to be leased to any tenant.

Mr Erasmus submits that this indicates that the respondent is not permitted to allow organisations to set up stalls, kiosks, rides etc. in the malls. Ms Campbell's evidence is that these organisations operate under licences rather than leases. In our view, that would be normal practice, and we accept that evidence. We do not read the definition of 'common area' as precluding the granting of such licences. The definition envisages that there may be 'occupants' and 'contractors' in addition to invitees (such as shoppers) and tenants using the common area.

[26] Mr Erasmus also points to the definition of 'common areas' in section 6 of the Retail Shop Leases Act. That definition refers to such areas as ones intended for use by the public or in common by lessees. Taken in isolation, that could be seen as inconsistent with the use of common areas for vending machines, advertisement displays, and so on. However, it is apparent from the terms of section 38(2), which we set out in paragraph 10 above, that Parliament envisaged that such uses might be made of common areas.

[27] Ms Campbell describes the casual mall licensees as including, or having included:

(a) the company which operates the children's rides;

(b) charities for fundraising;

(c) service organisations such as Rotary;

(d) the company which operates the internet kiosk;

(e) Telstra, for the pay phone;

(f) banks, for automatic teller machines;

(g) a gym; and

(h) the National Broadcasting Network.

[28] Some of these licensees, Ms Campbell says, may operate a stall for only a few days, while others are more frequent or long-term. Ms Campbell also says that some lessees are licensed to display goods or place tables and chairs in malls, and some are licensed to advertise on signs in malls or on the exterior of the building.

[29] Ms Campbell's evidence about these licenses is consistent with ordinary business practice, and we accept her evidence. Clearly, some of the activities come within the 'prescribed purposes' in section 38(2) of the Retail Shop Leases Act. Automatic teller machines, seating and tables, and advertisement displays are expressly provided for. The display of goods in malls would be in 'trade out areas'. The rides provide 'entertainment'. Charities and service organisations carry out 'community' functions. The pay phone and the internet kiosk constitute 'telecommunication equipment'. The cold room provides 'storage', as does the basement storage area used by the supermarket. As these spaces are used for prescribed purposes, the areas of those spaces do not, by virtue of section 38, form part of the gross lettable area.

[30] Stalls such as ones promoting a gym or the National Broadband Network, however, may not serve, or predominantly serve, prescribed purposes. While they might provide 'information' or constitute 'advertisement displays', they presumably serve mainly a sales purpose. Mr Eustace, for the respondent, submits that to the extent that such spaces do not serve a prescribed purpose, the limited space involved, of some six square metres, would not push the gross lettable area over the threshold of 8,863.05 square metres. We accept that submission.

[31] Accordingly, we find that the gross lettable area of 8,863.05 square metres used by the respondent during the period in question is slightly greater than the correct gross lettable area. It follows that we are not persuaded that the applicant has been over-billed for outgoings.

[32] Mr Erasmus also takes issue with aspects of the 2016/2017 outgoings contribution estimate and the audit process for that year. The estimate was issued by the previous owner. As it was not the responsibility of the respondent, we do not propose to discuss it further. The audit, however, occurred after the respondent took ownership. As a result of the audit, the applicant was credited with a $160.74 overpayment.

[33] Mr Erasmus submits that the $160.74 credit is far too small for a year in which minimal repairs and maintenance occurred due to the insolvency of the former owner and the frugal attitude of the new owner. The audit is therefore not credible, in Mr Erasmus's submission. However, in the absence of any particular error having been demonstrated, and bearing in mind that the outgoings budget consists of numerous lines of expenditure in addition to repairs and maintenance, we are not persuaded that the audit is flawed.

[34] Mr Erasmus argues that two separate audit reports should have been prepared for 2016/2017: one for the previous owner's part of the financial year, and the other for the respondent's. However, in our view there is no requirement in the lease or the Retail Shop Leases Act for that approach. Section 38B(8) of the Retail Shop Leases Act permits but does not compel a new owner to provide a part-year audit statement.

[35] Mr Erasmus points to the requirement in section 38B of the Retail Shop Leases Act for the auditor's statement to itemise outgoings so that, subject to certain exceptions, the amount shown for each item is not more than 5% of the total outgoings. Mr Erasmus argues that 'cleaning' costs should have been itemised to distinguish between cleaning functions and 'management' functions of the cleaners such as meeting contractors to let them into the centre, taking out tables for temporary stalls, and so on. Mr Erasmus submits that failing to so distinguish allows a portion of management costs to be hidden. However, we consider that these additional functions are incidental ones that would commonly be undertaken by cleaners in shopping centres such as the one in question. We are not persuaded that it requires itemisation.

[36] Mr Erasmus also points to a discrepancy of $3,539.86 which he says has been shown in the audit report. However, on examination of the various documents, we are satisfied that the error in question was made by Ms Campbell in correspondence, and that it did not affect the figures shown in the auditor's report.

[37] Accordingly, we are not satisfied that any of the criticisms made by Mr Erasmus of the 2016/2017 documents would warrant any refund or any additional credit adjustment.

[38] In relation to the 2017/2018 outgoings estimate provided by the respondent, Mr Erasmus also takes issue with the degree of itemisation. However, as Mr Eustace points out in his submissions, even if it were accepted that the estimate document was defective, no financial loss to the applicant has been demonstrated. Section 38C of the Retail Shop Leases Act provides a remedy for a tenant who is not given an outgoings estimate: the tenant may withhold payments of their outgoings contributions. It is not necessary for us to determine whether that remedy applies also in the case of a defective estimate.

[39] In his cross-examination of Ms Campbell, Mr Erasmus suggested that there have been breaches of trust requirements by herself and others in First Asset Management in relation to the handling of funds. However, the basis for such allegations was vague and quite possibly misconceived. In any event, the suggestions were denied.

[40] Overall, we are not satisfied that Mr Erasmus has established a case for the applicant for compensation or a refund in relation to outgoings.

Promotion contributions

[41] Under the lease, the applicant is required to make a monthly contribution to the promotion fund, and the respondent 'must spend the promotion fund on advertising and promotion of the Centre'. Under section 40A of the Retail Shop Leases Act, where a lease requires such a contribution, the lessor must provide lessees with a marketing plan before the start of each financial year. The plan must give details of the proposed spending on promotion and advertising. Under section 41(2), a lessor must only apply promotion funds for 'promotion and advertising directly attributable to the centre'.

[42] As noted earlier, Mr Erasmus seeks a refund for the applicant of the contributions it made during the period in question, in the amount of $11,400. The basis of the claim is that promotion funds were used to promote only a handful of tenants rather than the centre itself. Mr Erasmus says that after the respondent took ownership, internal radio promoted only some of the tenants, not including the applicant. Further, the respondent has refused to hand over transcripts that would confirm this allegation. Mr Erasmus also says that in-centre promotions such as for Father's Day or Easter benefitted existing customers rather than drawing in new customers. Other promotions which involved giving out food samples to shoppers hurt the applicant's business. Mr Erasmus says that at one point First Asset Management promised to take out a newspaper advertisement for the café but this never eventuated. Mr Erasmus also contends that the respondent failed to provide an adequate marketing plan for 2017/2018.

[43] Additionally, Mr Erasmus says that the respondent used an external LED sign to invite outside businesses to advertise by way of that sign. Ms Campbell acknowledged that this had occurred but said it was stopped because the local Council advised that such advertising was not allowed.

[44] Mr Erasmus also draws attention to a magazine advertisement which he says made false claims about the features of the centre. The respondent denies that any false claims were made, contending that Mr Erasmus misinterpreted an adjacent discussion about shopping centres in general as relating to the centre in particular. It is unnecessary for us to adjudicate on this because it is apparent that, on either view, the advertisement was intended to promote the centre.

[45] Ms Campbell's statement describes a variety of promotions run by First Asset Management on behalf of the respondent. It attaches excerpts from the advertising material. Ms Campbell does not deny that some advertising promoted particular tenants. She says those tenants included the applicant on occasions, such as through a social media campaign and through promotion on the LED sign. Ms Campbell's statement also indicates that a summary of proposed marketing was given to tenants.

[46] Having regard to the evidence provided by Ms Campbell, we are satisfied that the respondent had a very active marketing campaign. We are also satisfied that tenants were informed of the plan for the purposes of section 40A. There are, of course, many ways of promoting a centre. Views will differ on which ways are likely to be most effective for a particular centre. It can be legitimate to try new techniques. It is apparent that the respondent used a variety of strategies. Also, in our view, the promotion of a centre can involve highlighting particular tenants as a way of drawing more shoppers to the centre. This has the potential to benefit the other tenants. We do not accept Mr Erasmus's criticism that promotion merely benefitted existing customers rather than drawing in new customers. In any event, marketing to existing customers visitors can play a role in fostering loyalty. It is also apparent from Ms Campbell's evidence that the in-centre activities were promoted externally in an effort to attract new visitors to the centre.

[47] On the other hand, Mr Erasmus's criticism of the use of the external LED sign to invite outside advertisers has force, as presumably that exercise was made possible by the use of promotion funds. It did not involve a promotion of the centre. However, it does seem to have been short-lived.

[48] By and large, then, we are not persuaded that the respondent misused promotion funds. The exception relates to the LED sign but that was of short duration. We have no reason to conclude that it resulted in any substantial or identifiable financial loss to the applicant. Accordingly, therefore, we are not persuaded that there is any basis for ordering that the respondent must refund the applicant's advertising and promotion contributions.

Trading losses

[49] Mr Erasmus contends that various actions of the respondent have combined to deter shoppers from visiting the centre. He says this has inflicted substantial trading losses on the applicant. He has calculated the figure of $245,747 for the period in question. He says this is the amount of lost sales, compared with the average for previous years, adjusted downward by a correction factor of approximately 5%. That adjustment is based on Australian Bureau of Statistics figures for sales in similar enterprises in Queensland. The adjustment, Mr Erasmus argues, eliminates the influence of external factors such as a general reduction in consumer spending on café products.

[50] We will discuss the various matters relied on by Mr Erasmus, before considering issues such as whether a causal connection with the trading losses has been established and whether the amount of any damage has been appropriately quantified.

Air conditioning

[51] Mr Erasmus says that the air conditioning system has failed to adequately cool the café, especially in summer. He says that he and his wife repeatedly brought the problem to the attention of First Asset Management but the response has been slow and ineffective. He says that during the lease there has always been a unit for the café, and he acknowledges that the respondent did eventually add a second unit in March 2018. However, the current summer has shown that this has still not solved the problem. Further, air conditioning in the adjacent mall is yet to be restored to function. There is no substantial physical barrier between the café and the mall. The result, Mr Erasmus says, is that he has to meet the cost of running two units which serve not only his shop but which also cool, to some extent, the adjacent mall.

[52] Mr Erasmus adds that the respondent failed to use registered engineers in addressing the problem. However, we note that the requirement for registration applies only in respect of 'professional engineering services' as defined.[2] On the limited information available, we are not in a position to form a view on whether such services were provided. In any event, the question is somewhat peripheral.

[53] Compensation is payable by a lessor where the lessor causes loss or damage to a lessee by not rectifying as soon as is practicable a breakdown of plant or equipment under the lessor's care or maintenance.[3]

[54] So far as air conditioning in the adjacent mall is concerned, Ms Campbell said in her statement that the mall has never been air conditioned in the time she has been centre manager (effectively, then, the time that the respondent has owned the centre). In cross-examination, however, Ms Campbell acknowledged that there are vents in the ceiling of the mall but she said that PBS Mechanical Services, the air conditioning

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2 *Professional Engineers Act* 2002 (Qld), s 115, Schedule 2.

3 Retail Shop Leases Act, s 43(1)(d)(i).

contractor normally used for the centre, has not been able to locate an air conditioning unit for the mall. PBS had been servicing the centre for some time under the previous owner, Ms Campbell says, and advised that there had been no air conditioning in the mall during the period of their involvement.

[55] We infer that there was air conditioning in the mall but it ceased functioning some time before the respondent became the owner. It follows, in our view, that the obligation to rectify the mall air conditioning fell upon the owner at the time of the breakdown, rather than on the respondent. Accordingly, we do not consider that liability for compensation can arise for the respondent under section 43(1)(d)(i) of the Retail Shop Leases Act in respect of the mall air conditioning.

[56] We have considered whether liability might arise under section 43(1)(d)(ii) of the Retail Shop Leases Act, for failure to rectify a defect. However, there is insufficient evidence for us to draw a conclusion that the lack of air conditioning in the mall constitutes a defect.

[57] So far as the café's air conditioning is concerned, Mr Eustace, for the respondent, points to Ms Campbell's evidence about the steps taken by First Asset Management, on behalf of the respondent, to assess and rectify the problem. This started with a quote from PBS in April 2017, and then two sets of work by PBS up to August 2017. After that, a report was obtained from AC-TEC Services in December 2017 which recommended the installation of a second unit. The respondent had the second unit installed in March 2018. Mr Eustace also argues that the obligation to maintain the air conditioning for the shop falls upon the applicant under clause 6(3)(o) of the lease. That provision requires the tenant to arrange for the servicing of an air conditioning unit where a shop is serviced by a separate unit.

[58] It is therefore arguable that section 43(1)(d)(i) does not apply on the basis that the unit was not under the respondent's 'care or maintenance' at the time of the breakdown because of the lease term requiring the tenant to arrange maintenance. However, some of the evidence suggests that a 'main centre chiller plant'[4] forms the principal part of the system. This suggests that the unit is not a separate unit for the café. The exact situation is not clear, so we will assume in the applicant's favour that an obligation to rectify does attach to the respondent under section 43(1)(d)(i). The question then to be answered is whether the respondent rectified as soon as was practicable.

[59] The rectification, or attempted rectification, took a long time but, on balance, we find that it was done as soon as was practicable. Time was needed to obtain quotes and reports, and to consider them. There are many factors to be considered in fixing an air conditioning problem in a shopping centre setting. There is rarely an obvious quick fix. It was reasonable for the respondent to take a staged approach, especially with a system with which it was not familiar, and to try incremental repairs and augmentation to see if they would solve the problem. Accordingly, we are not satisfied that a liability for compensation arises in relation to air conditioning.

Furniture

[60] Mr Erasmus has provided a photograph of a couch in a common area on which duct tape has been used to cover extensive tearing. Mr Erasmus submits that the state of

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4 This term was used by AC-TEC in an email set out in Annexure KC-19 to Ms Campbell's statement (Exhibit 5).

this furniture represents a failure by the respondent to meet its obligation under the lease to keep the common area in good repair.

[61] Ms Campbell in cross-examination said that such furniture has since been replaced. She acknowledged that this took more than a year (from, presumably, the change of ownership).

[62] Mr Eustace for the respondent argues that none of the paragraphs of section 43(1) of the Retail Shop Leases Act applies, so no liability for compensation can arise. However, we are of the view that a failure to replace or re-cover furniture is a failure to rectify a 'defect' in the centre under section 43(1)(d)(ii). Unlike air conditioning, the solution to such a problem is readily identifiable. In our view, taking more than a year to fix such a problem is not rectification 'as soon as is practicable'. Accordingly, a liability to compensate arises, provided of course that a connection with loss or damage to the applicant is established.

Parking

[63] Mr Erasmus submits that First Asset Management has mismanaged the parking on behalf of the respondent in several ways. In summary:

(a) it has allowed students from a nearby school to park in the centre car parks;

(b) it has allowed staff and contractors undertaking work at the centre to park in prime positions; and

(c) it has recently reintroduced a fine system for offenders, which will deter visitors as there are no other centres on the Gold Coast using that system.

[64] Further, Mr Erasmus says that the fine system was previously trialled and it was met with strong disapproval from tenants.

[65] A lessor will be liable to pay compensation for loss suffered by a lessee because the lessor or its agent has taken action that substantially restricts access by customers to the lessee's shop or the flow of potential customers past the shop.[5]

[66] In response to Mr Erasmus's arguments, Ms Campbell says that there has always been enough parking for shoppers. Further, she says that the option of towing cars away has been investigated but is not feasible. We accept this evidence.

[67] The above discussion illustrates that parking problems in shopping centres are not easy to solve. Different people will have different views on how parking problems are best approached. Different methods may need to be trialled or re-trialled. In our view, there is nothing remarkable or obviously flawed in the approach taken by First Asset Management on behalf of the respondent. Whether parking problems have had any appreciable effect on the number of visitors to the café or the centre generally is unknown. The applicant has not shown that any action taken by the respondent or First Asset Management in relation to parking has substantially restricted access by customers to the café or the flow of potential customers past the café.

[5] Retail Shop Leases Act, s 43(1)(b).

Refurbishment

[68] It is undisputed that the respondent is planning a major refurbishment, and that since taking ownership it has already undertaken some initial refurbishment measures including repainting, upgrading the electrical switch board, and installing a new lighting system.

[69] Mr Erasmus says, in summary:

(a) the presence of contractors measuring for quotes and undertaking work has disrupted shoppers;

(b) painting drop sheets were spread on walkways;

(c) certain parking areas were blocked off while work was being done;

(d) the applicant received only three days' notice of painting in the car parks;

(e) that notice said that work would continue for four to five days, but in fact it continued for eight weeks;

(f) sales figures in September and October 2017 were particularly down, and this is attributable to the painting works;

(g) when First Asset Management gave notice of upcoming electrical outages associated with the switchboard works, it expected tenants to remove all perishable items from refrigerators and freezers;

(h) that expectation was totally unrealistic for a café; and

(i) notice of works given by way of general memoranda to tenants is not sufficient.

[70] Overall, Mr Erasmus submits, shoppers will avoid a centre that looks like a construction site. There have been, Mr Erasmus submits, breaches of the applicant's right under the lease to quiet enjoyment of the shop.

[71] In cross-examination, Mr Erasmus said he had not seen an earlier memorandum about upcoming painting works, until he saw it attached to Ms Campbell's statement. He conceded that a drop in sales in September 2017 was unlikely to be associated with painting works that started only late in the month, on the 25th.

[72] Ms Campbell, in response to Mr Erasmus's evidence, says that a series of notices were sent out about the painting works; adequate car parking remained during works; contractors' cars shown in a photograph produced by Mr Erasmus were at the rear of the centre; and generators were arranged for tenants who needed to keep refrigerators and freezers running during the switchboard works. We accept this evidence. We also note that the memoranda about the painting works attached to Ms Campbell's statement indicated that painting works in 'high traffic areas' would be done in the late afternoon, night or early morning to minimise disruption to shoppers. We accept that this occurred.

[73] Notification to tenants by way of memorandum does not appear to be contrary to any requirement of the lease or the Retail Shop Leases Act.

[74] We therefore accept that the respondent took steps to minimise the impact of refurbishment works on shoppers. We are not satisfied that there has been a breach of the applicant's right to quiet enjoyment of the shop.

[75] However, it is important to note that liability under section 43(1)(b) of the Retail Shop Leases Act, for restriction of access or the flow of potential customers, is not related to whether there is fault on the part of the lessor. A lessor might take all reasonable steps to minimise impact but a reduction in access or customer flows might still inevitably result. In that situation, a lessor would still be liable for loss caused to a lessee.

[76] It stands to reason that there may well have been some detrimental effect on customer numbers during at least some of the refurbishment works discussed above. Accordingly, compensation will be payable if a connection is established with loss or damage suffered by the applicant.

Vacancies and short-term tenancies

[77] Mr Erasmus says that there is a low and diminishing level of occupancy in the centre. We accept this evidence. Further, Mr Erasmus points to efforts by First Asset Management to attract pop up and casual tenants. He says that any new tenancies during the respondent's ownership have been under short-term arrangements only. This evidence has not been challenged, and we accept it.

[78] Mr Erasmus contends that the respondent is implementing a deliberate strategy of getting rid of long-term tenants and replacing them, if at all, with short-term occupants who can be easily dispensed with during the upcoming major refurbishment.

[79] We regard the contention of such a strategy as speculative. Promotion by the respondent to potential short-term tenants or licensees is also consistent with a recognition that long-term tenancies are unlikely at this point in an ageing centre with an uncertain future and the prospect of refurbishment disruption.

[80] We are not persuaded that any action by the respondent or First Asset Management in relation to the occupancy rates and tenure has diminished the flow of potential shoppers.

Activity in the malls

[81] Mr Erasmus says that increasing numbers of stalls, marketers and rides in common areas, the placement of goods, tables and chairs in malls, and the consequent intrusion of sofas etc. into thoroughfares, has obstructed sight lines to the café to the detriment of the applicant's business. Further, these activities are nuisances to shoppers, submits Mr Erasmus, and deter people from coming back.

[82] We are not satisfied that Mr Erasmus has established a basis for liability in this respect. Crowded, busy spaces are no doubt annoying to some people, just as they are attractive to others. Whether they have been sufficiently annoying to those who dislike them to drive them away from the centre is not known. Whether there has actually been any overall impact of these factors on the applicant's business is unknown.

Is compensation payable?

[83] In the discussion above, we have indicated that we are not persuaded by some of the points raised by Mr Erasmus, or that they would not lead to liability on the part of the respondent. However, we have accepted some of his points: the one about the furniture, and the likelihood that the preliminary refurbishment works would have deterred some shoppers.

[84] The next question is whether the applicant has established loss or damage flowing from those factors.

[85] Mr Erasmus has provided figures indicating a loss of trade. A decline in sales figures does not necessarily reflect a reduced flow of customers into the centre. Sales in a particular store can be affected by a range of factors such as consumer trends, product range, pricing and store management.

[86] Mr Erasmus has requested door count figures from the respondent, which would indicate the number of people entering the centre, but the respondent has declined to provide them. In light of all of the circumstances discussed above, however, it can reasonably be inferred that visitor numbers to the centre may well have dropped. For present purposes we will assume that they have.

[87] A difficulty for the applicant in establishing a link between a particular factor and detriment to its business is that a range of factors impact on how many shoppers go to a shopping centre. The respondent has pointed to some external factors that are likely to have impacted: certain local roadworks and the closure of a nearby Department of Health centre. Other factors can readily be inferred from the evidence, such as the likely declining appeal of an ageing mid-size centre, and the likely attraction of shoppers to new or newer centres nearby with higher occupancy rates, or to larger centres further afield. Accordingly, attributing a decline in shopper numbers to any particular cause is inevitably difficult.

[88] Mr Eustace submits that any causal connection between any particular action on the part of the respondent and the flow of customers past the café is a matter about which expert evidence would be required. We are inclined to agree, though presumably even an expert would have trouble making confident linkages in many instances. In the present case, there is no expert evidence and no other basis for reliably attributing the decline in the applicant's business to any conduct of the respondent that could give rise to liability.

[89] An additional and significant problem for the applicant in establishing loss or damage is that the evidence it has provided on this issue is merely of lost sales. That is not equivalent to the loss or damage suffered by the applicant because there would necessarily have been expenditure occurred in generating such sales. We accept Mr Eustace's submission that the appropriate measure of compensation, if awarded, would be loss of profit rather than loss of sales. There is no evidence of loss of profit.

[90] In light of the lack of evidence linking relevant conduct of the respondent to the decline in the applicant's business, and the lack of evidence about loss, we consider that the applicant has not established a basis for compensation. Accordingly, the claim for compensation should be dismissed.

Termination

[91] Mr Erasmus asks the Tribunal to terminate the lease. While the Tribunal does have broad powers under section 83 of the Retail Shop Leases Act, there is no explicit statutory power to terminate a lease. In our view, termination is really a matter for a party to do, if the party is satisfied that a proper ground for termination exists.

[92] Mr Erasmus has also proposed that termination should be on the basis that the applicant is not subject to a $70,000 make good fee at the end of the lease as foreshadowed by the respondent's lawyers.

[93] The circumstances at the end of the lease are yet to unfold, and so in our view it would be premature and inappropriate for us to express any view or make any orders about the rights of the parties at that time.

Costs

[94] The respondent seeks an award of costs on the District Court scale.[6]

[95] Other than as provided for by legislation, each party to a proceeding in QCAT must bear its own costs.[7]

[96] Relevantly, under section 102 of the QCAT Act the Tribunal may order costs if it considers that the interests of justice so require. The Tribunal may have regard to factors such as whether a party has unnecessarily disadvantaged another party; the nature and complexity of the dispute; the relative strengths of the competing claims; and the financial circumstances of the parties.[8]

[97] In support of the costs application, Mr Eustace submits, in summary:

(a) the matter is complex, and so legal representation for the respondent was appropriate;

(b) the applicant's case was weak, including a lack of evidence for several of the claims made;

(c) part of the claim relates to periods before the respondent became the owner;

(d) the applicant has had several opportunities to 'properly detail and quantify its claim'[9] but has failed to do so;

(e) the amounts claimed have expanded as the matter has progressed;

(f) the respondent has been put to the expense of defending an expanding claim which was largely unquantifiable; and

(g) Mr Erasmus's evidence 'has been selective and riddled with inaccuracies'.[10]

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6 Respondent's written submissions [8.12].
7 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), s100.
8 Ibid, s 102(3).
9 Respondent's written submissions [8.6.1].
10 Ibid, [8.10].

[98] Mr Eustace draws our attention to the case of *Fitzpatrick as trustee for the Fitzpatrick Discretionary Trust v Young*[11] in which QCAT, in a retail shop lease matter, ordered that the applicant pay the respondent's costs on the District Court scale. The Tribunal commented in that case that the claim, for $140,000 in compensation, was an ambit claim. It lacked substance on several grounds. It was a claim which 'simply should not have been brought'.[12] The Tribunal observed that defending a claim of this amount without the assistance of a lawyer would have been beyond the capacity of the respondent, who was described as 'a widow with impaired hearing and reading'.[13] The Tribunal found that legal representation was warranted.[14]

[99] In the present case, the respondent is not under the same sort of disadvantage, and so the need for legal representation is less compelling. However, the engagement of lawyers by the respondent was quite reasonable and understandable. We would not, though, place the present case in the category of one which simply should never have been brought. In our view, Mr Erasmus had legitimate concerns about the state ofthe shopping centre and the applicant brought a claim which potentially had some prospects of success. There was no lack of effort on the part of Mr Erasmus in preparing and presenting the applicant's case. He attempted to particularise and quantify the applicant's claims to the best of his ability. The reach of the claim back to mid-2016, some six months before the respondent became the owner, had a rational basis at least so far as the question of refunds is concerned, because of the respondent's obligation, or assumed obligation, to audit and adjust outgoings for the entire 2016/2017 year.

[100] Mr Erasmus does not have legal training. Like many self-represented parties, he pursued numerous arguments and grievances at the expense of focussing on key points and gathering the strongest possible evidence on those issues. This, in our view, was due to lack of skill and insight rather than to some desire to inconvenience the respondent. No doubt the case could have been better prepared and presented for the applicant by a competent lawyer. However, there is no obligation on a party in QCAT to obtain representation,[15] and indeed the main purpose of section 43 of the QCAT Act is to have parties represent themselves unless the interests of justice require representation.[16]

[101] We also regard the submission that Mr Erasmus's evidence has been selective and riddled with inaccuracies as a rather harsh appraisal. We accept that in some respects Mr Erasmus was unduly selective. For example when discussing in his statement the expectation of centre management that tenants would empty their refrigerators and freezers during the switchboard works, he did not volunteer the fact that management had then arranged for generators in response to a protest he made. When he discussed the air conditioning issues, he said that 'nothing transpired' until he filed the proceeding in QCAT.[17] He should have mentioned the earlier efforts to fix the first system, even if he regarded them as a waste of time. In fairness, it could be said that Ms Campbell was selective in her statement about the air conditioning in that she said that during her time as managing agent the common area mall had not been air

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11 [2010] QCAT 408.
12 Ibid, 4[5].
13 Ibid 3[4(a)].
14 Ibid 4[5].
15 QCAT Act, s 43(2)(a).
16 QCAT Act, s 43(1).
17 Mr Erasmus's statement filed 31 August 2018 (Exhibit 2), [2.2.1].

conditioned, without volunteering the information that there were vents in the ceiling suggestive of a failed system. However, it would be fair to say that there are more instances of selectivity in Mr Erasmus's evidence. Nonetheless, we do not consider that most of his evidence can be described as selective, or as being riddled with inaccuracies. It may be, for example, that he did not see the earlier memorandum about the painting works for some reason. It appears to us that, overall, Mr Erasmus gave an honest account of the facts as he perceives them.

[102] While we understand that the respondent has been put to the expense of defending a failed claim, in light of the various considerations discussed above we are not persuaded that the interests of justice require an award of costs.

Conclusion

[103] We have decided to dismiss the applicant's claims for refunds, compensation and termination of the lease. However, we have decided not to award costs.