DISTRICT COURT OF QUEENSLAND

CITATION:	*Ant Projects Pty Ltd v Morgan Brooks Direct Pty Ltd & Ors* [2019] QDC 81
PARTIES:	**ANT PROJECTS PTY LTD ACN 089 585 642 AS TRUSTEE FOR THE YEUNG INVESTMENTS TRUST** (Plaintiff) **v** **MORGAN BROOKS DIRECT PTY LTD ACN 112 625 288** (First Defendant) **and** **RICHARD WILLIAM AULSEBROOK** (Second Defendant) **and** **MORGAN ASHLEIGH BROOKS** (Third Defendant)
FILE NO/S:	BD 767/17
DIVISION:	
PROCEEDING:	Civil Trial
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	27 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20 and 21 September, 29, 30 and 31 October 2018 and written submissions to 25 November 2018.
JUDGE:	Andrews SC DCJ
ORDER:	**Judgment for the plaintiff against the defendants in the sum of $635,478.74.** **The defendants' counterclaims are dismissed.**
CATCHWORDS:	LEASES – where a notice to remedy breach was served by email – whether the notice was not served LEASES – where a notice to remedy breach – where breach remediable by payment of $18,353.64 – whether 11 and 14 days were reasonable times to remedy LEASES – where a notice to remedy breach specified one amount claimed in respect of five covenants – where it failed to specify an amount claimed in respect of each covenant – whether it failed to comply with s 124(1) of the *Property Law Act 1974*

LEASES – where the lessor had access to the lessee's security deposit – where the lessee was in arrears – whether there was no breach if the security deposit exceeded the arrears – whether the lessee was obliged to use the security deposit before providing a notice to remedy breach

LEASES – INTERPRETATION – where the lease referred to a plan attached – where the plan was marked "Cancelled" – whether the lease is interpreted by reference to the plan

LEASES – whether the lessee repudiated or the lessor

LEASES – quantum of damages for repudiation – whether the lessor mitigated its loss

Property Law Act 1974 sections 117, 118 and 124(1).

Residential Tenancies and Rooming Accommodation Act 2008 (Qld)

Residential Tenancies and Rooming Accommodation Regulation 2009 (Qld)

COUNSEL: Hogg for the Plaintiff

First Defendant by its Director, the Second Defendant

Second Defendant for himself

Third Defendant for herself

SOLICITORS: Anderssen Lawyers Pty Ltd for the Plaintiff

The claim and counterclaims

[1] When there were about 32 months left in the term of a commercial lease for 5 years, the lessor alleges that its lessee repudiated the lease. The lessor purported to terminate and changed the lock. The lessor alleges that there were two months arrears owing when the lease was terminated and that since termination it has been unable to relet most of the space and will continue to be unable until the end of the term. It claims substantial damages arising from that. The lessee alleges that it did not repudiate but that the lessor did.

[2] The plaintiff, as lessor, claims against the first defendant, as lessee pursuant to a lease (**lease**) which is registered and claims against the second and third defendants as sureties for the lessee. The plaintiff's claim, abandoning any excess above $750,000,[1] is for:

1. $36,707.28 as moneys due and payable pursuant to the terms of the lease and/or a guarantee;
2. Damages in the sum of $670,809.97;
3. Advertising costs in the sum of $7,928.40;
4. Legal costs on an indemnity basis;
5. Interest to the date of judgment pursuant to s 58 of the *Civil Proceedings Act*.

[3] The first defendant (**lessee**) counterclaims for:

1. A declaration that the lease is void and unenforceable as between the plaintiff and the lessee; alternatively

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1 T1-20.

2. A declaration that the lease was terminated by the lessee by notice in writing to the plaintiff on 10 February 2017 amounting to repudiation by the plaintiff; and
3. An order that the plaintiff pay to the lessee the sum of $67,439.84 as a debt due pursuant to clause 4.4 of the lease or alternatively as damages for breach thereof;
4. A declaration that the lessee has no liability to the plaintiff under the lease that the plaintiff has failed to mitigate any loss that would reasonably be expected of it;
5. An order that the plaintiff pay the lessee $67,439.84 as moneys had and received to the use of the lessee (as an alternative to 3.);
6. An order that the plaintiff pay to the lessee $6,763.11 being an Overpayment as moneys had and received to the use of the lessee;
7. An order that the plaintiff pay the defendants associated legal costs up until 15 December 2017 on the standard basis.

[4] The second and third defendants counterclaim for similar relief in favour of the lessee and for declarations that:

1. The Guarantee is void and unenforceable as between the plaintiff and the second and third defendants;
2. The second and third defendants have no liability to the plaintiff under the guarantee;
3. The first and second defendants are entitled to set off the Security Amount of $67,439.84 and Overpayment of $6,763.11 against any liability they may have to the plaintiff.

The relevant pleadings

[5] The relevant pleadings are:

1. Amended statement of claim filed 19 September 2018 (further amended 21 September 2018 by the addition of the words "as trustee of the Yeung Investments Trust");
2. Amended defence (of the first defendant);[2]
3. Amended defence (of the second defendant);[3]
4. Amended defence (of the third defendant);[4]
5. Further amended reply and answer (to the defence of the first defendant);[5]
6. Further amended reply and answer (to the defence of the second defendant);[6]
7. Further amended reply and answer (to the defence of the third defendant).[7]

Each amended defence includes a counterclaim.

The relevant written submissions

[6] The written submissions are the:

1. "Amended Defendants Closing Submissions", dated 15 November 2018 (**defendants' submissions**);

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2 Tendered 21 September 2018 and marked exhibit 29.
3 Tendered 21 September 2018 and marked exhibit 30.
4 Tendered 21 September 2018 and marked exhibit 31
5 Filed by leave 21 September 2018.
6 Filed by leave 30 October 2018.
7 Filed by leave 30 October 2018.

2. Plaintiff's Submissions Following Trial, dated 23 November 2018 (**plaintiff's submissions**); and
3. The third defendant's email of 25 November 2018 submitting, in essence, that "the responsibility remains with Plaintiffs' Counsel to prove to the Court, the Plaintiff is a legal entity in the eyes of the law, that can sue and be sued and be held responsible for its actions".

Definitions

[7] Various entities, persons and property referred to in the reasons are described as follows:

1. The **plaintiff** is Ant Projects Pty Ltd ACN 089 585 642 as trustee for the Yeung Investments Trust. The plaintiff did not include in the title of its court documents that it sues in its capacity as trustee for the Yeung Investments Trust. The plaintiff omitted to allege in its pleadings that it sues as trustee. The plaintiff obtained leave[8] to amend the title of its documents and to prove that it acted in the capacity of trustee for the Yeung Investments Trust.[9] The defendants did not oppose leave. The plaintiff has not made the amendments for which it obtained leave. That creates no practical difficulty. There is no dispute about the capacity in which the plaintiff became the registered proprietor of the land at 8 Byers Street, Newstead (**the land**) on **8 September 2016**. Each defendant alleged in the respective defences that the plaintiff's capacity was as trustee for the Yeung Investments Trust.[10] The allegation of the plaintiff's capacity as trustee of that trust was not disputed by the plaintiff in its respective replies to those defences. Though the plaintiff's capacity was not in issue, the plaintiff's identity became the subject of submissions by the defendants. The plaintiff's director, Mr Yeung, gave evidence that the plaintiff acted in its capacity as trustee.[11] The plaintiff is registered for goods and services tax and was so registered as a trustee.
2. At all material times the land has had a building (**the building**) erected on it. The building has a ground floor, first floor and second floor.
3. Morgan Brookes Direct Pty Ltd ACN 112 625 288 (**the lessee**) is the first defendant and at material times was the lessee of part of the land. The lessee operated a mortgage broking business at all material times.
4. The lessee is to be distinguished from Ashleigh Morgan Pty Ltd ACN 086 173 462 as trustee (**the seller**) which sold the land to the plaintiff by a Contract for Commercial Land and Buildings dated 1 July 2016.[12]
5. **Mr Aulsebrook** is Richard William Aulsebrook, the second defendant and a surety for the lessee's liability to the plaintiff and was at all material times a director of the lessee. Mr Aulsebrook was able to conduct the lessee's mortgage broking business by telephone and by computer connected to the internet and he did so from the building;
6. **Ms Brooks** is Morgan Ashleigh Brooks, the third defendant and a surety for the lessee's liability to the plaintiff and was at all material times a director of the lessee until her directorship ceased on 30 November 2016;[13]

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8 T3-32 line 5.
9 T3-31 line 20.
10 At paragraph 1 (c).
11 T1-72.
12 A copy is Exhibit 1.
13 T1-7 line 18.

7. **Mr Yeung** is David Yeung, at all material times the director of the plaintiff. Mr Yeung had the day to day control of the plaintiff;
8. **Mr Deane** is Andrew Edward Deane, a property agent and property developer;
9. **Mr O'Brien** is Matthew James O'Brien, a commercial real estate agent and a sales and leasing executive, employed at all material times by Elders Commercial Brisbane.

Issues

[8] The submissions raised some issues not adequately raised in the pleadings. The questions raised in submissions for resolution and which are also issues adequately appearing in the pleadings, are:

1. Is the plaintiff a legal entity and the correct party to enforce the lease?[14] (Yes)
2. Did the plaintiff acquire the right to enforce the lease against the lessee? (Yes)
3. Was the lessee in credit because of overpayment of a security deposit? (No)
4. Is the lease void for uncertainty because a plan in the lease of the caretaker's residence was marked "cancelled"? (No)
5. Is the lease void for uncertainty about carparks? (No)
6. Did the lessee repudiate the lease by breach of clause 5.2 of the lease? (No)
7. Did the notice to remedy breach fail to comply with s124 of the *Property Law Act 1974*? (No)
8. Were 11 days or 14 days a reasonable time within which to remedy a breach by payment of $18,353.64? (Yes)
9. Did the lessee repudiate the lease by failing to remedy breach of covenant to pay rent etcetera before the plaintiff purported to terminate the lease on 10 February 2017? (Yes)
10. If the plaintiff validly terminated the lease, did the plaintiff fail to mitigate its loss? (No)
11. What is the quantum of the plaintiff's loss?

[9] The defendants did not make submissions about some legal arguments appearing in their amended defences. As a result, I need not set them out, analyse them, speculate as to what the submissions would have been and rule upon them. The defendants raised in their submissions some issues which did not meet the precondition of having been adequately raised in their pleadings. The defendants may not have a determination of those issues which were not pleaded against the plaintiff. I must pass over the defendants' submissions that:

1. The plaintiff did not supply toilet requisites;
2. The plaintiff failed to prove that it paid for electricity supplied to the lessee;
3. The plaintiff failed to audit outgoings accounts and its agents' invoices;
4. The plaintiff failed to demonstrate authority to appoint two agents or claim management fees for duplicate management work (implying that the plaintiff was charged for and has claimed for unnecessary work by a managing agent);
5. The plaintiff failed to insure the premises until 26 October 2016 and billed the lessee for premiums the plaintiff did not pay;
6. The plaintiff required the lessee to pay for insurance for contents overvalued at $250,000;

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[14] Defendants' submissions paragraphs 1-3.

7. The plaintiff requested the lessee to pay 87% of an insurance premium for the cost to replace another tenant's sign;
8. The lease was not amended on 17 August 2016;
9. The lessee overpaid for outgoings and is entitled to a reimbursement for the overpayment;
10. The plaintiff offered the tenant, 1300 Loveit, a carpark for $500 per month.

Facts

[10] Ms Brooks, Mr Aulsebrook and their daughter resided in the building from **2008**. In 2008 their daughter was about 17 years of age. Ms Brooks and Mr Aulsebrook are married but were estranged at the time of the hearing.

[11] Ms Brooks and Mr Aulsebrook were operating the lessee's business together in **September 2016**. Ms Brooks stood down from the business on medical grounds soon after. Ms Brooks was mentally unfit to operate as a director of the lessee's business.

[12] On about **29 September 2015** first defendant as lessee entered into the lease of a part of the land with the seller as lessor for a term commencing **26 September 2015** and expiring 25 September 2020. Mr Aulsebrook and Ms Brooks each signed the lease as guarantors.[15] As guarantors, Mr Aulsebrook and Ms Brooks agreed to clause 14 in the schedule to the lease. Clause 14 provides, so far as is relevant:

> 14.2 Terms of guarantee and indemnity
> In consideration of the Landlord agreeing to grant this Lease to the Tenant at the request of the Guarantor, the Guarantor agrees:
> (a) to guarantee the observance and performance of the Tenant's obligations under the Lease throughout the Term…
> …
> (f) this guarantee is not discharged and the Guarantor is liable under this Guarantee:
> …
> (vi) even if the Lease is varied;
> …
> 14.3 Assignment by Landlord
> The Landlord may assign the benefit of the Guarantor's obligations under this clause 14 if it sells the Building…

[13] The Landlord, within the meaning of the lease, was identified as the seller.

[14] The schedule to the lease[16] also provides, so far as is relevant to the issues:

> 1.1 Definitions
> …
> Car Park means 4 onsite car parks …
> 3.1 Outgoings Expenditure Statement
> On or before the Commencement Date and before the start of each Financial Year, the Landlord may give the Tenant an estimate of the Outgoings for that Financial Year and an estimate of the Outgoings Contribution and the monthly instalments payable by the Tenant on account of the Outgoings Contribution. … The Landlord may revise an estimate at any time giving the Tenant written notice …
> 3.2 Payment of Outgoings Contribution

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15 Exhibit 5 p 394.
16 Exhibit 5.

… the Tenant must pay the estimated Outgoings Contribution for each Financial Year to the Landlord by equal monthly instalments, in advance, on each Rent Day.

…

3.4 Statement of Outgoings

After the end of each Financial Year, the Landlord must give the Tenant a statement detailing the actual Outgoings and the actual Outgoings Contribution for that Financial Year.

3.5 Yearly Adjustment

If the Outgoings Contribution exceeds amounts paid by the Tenant on account, the Tenant must pay the deficiency on the next Rent Day after the Tenant receives the statement under clause 3.4. If it is less, the Landlord must refund the excess or credit the excess against future payments on account of the Outgoings Contribution.

…

3.10 Costs of Lease

The Tenant must pay the Landlord or its solicitors when asked:

…

(e) the Landlord's reasonable legal costs for considering, approving and supervising anything requiring the Landlord's consent, any dealing arising out of this Lease, preparing and negotiating any document required under clause 12.5(b)(ii) any default by the Tenant, any termination of this Lease, the re-entry by the Landlord to the Premises, the surrender of this Lease (including any stamp duty and registration fees), the enforcement of any term or condition or the exercise of any power, and any litigation commenced by or against the Tenant concerning the Tenant's occupation of the Premises.

…

3.11 Supply of Electricity

The Landlord may supply electricity to the Tenant but it may not charge the Tenant more than the Tenant would have paid a supplier for a direct supply. The Landlord must give the Tenant an account and the Tenant must pay the account within seven days of receiving it. If the Tenant does not pay on time, the Landlord may disconnect the electricity supplied to the Premises. The Tenant must pay the cost of any disconnection or reconnection of electricity supply.

3.12 Goods and Services Tax

(a) If GST is payable by a supplier (or by the representative member for a GST group of which the supplier is a member) on any supply made under or in relation to this document, the recipient will pay to the supplier an amount (GST Amount) equal to the GST payable on the supply. The GST Amount is payable by the recipient in addition to and at the same time as the net consideration for the supply, subject to receipt of a tax invoice.

…

4.1 Tenant to Provide Security

On the Commencement Date, the Tenant must provide the amount in item 3 as security for the performance of the Tenant's obligations under this Lease. The security must be in the form of …:

…

(b) a cash deposit paid to the Landlord's nominated account or Managing Agent's trust account.

4.2 Right to apply security

If the Tenant does not comply with its obligations under this Lease the Landlord may use this security to compensate the Landlord for loss or damage due to the Tenant's breach. The Landlord does not waive the Tenant's breach by using the security and no other rights of the Landlord arising from that breach are affected.

4.4 Return of security

If the Tenant complies with its obligations under this Lease, the security must be returned to the Tenant when the Tenant vacates the Premises.

…

5.1 **Permitted Use**

The Tenant may only use the Premises for the purpose in **item 4**.

5.2 **Tenant's Obligations**

The Tenant must at its cost, during the term:

(a) **Business Standard** operate its business competently, efficiently and in a reputable manner and ensure that no material adverse change occurs to the Tenant's financial position or the financial position of the Tenant's business;

…

5.3 **Restrictions on use**

The Tenant must not:

…

(g) **Living in Premises** use the Premises as a residence, other than that area to be shaded blue on the plan attached in Annexure "A" and otherwise referred to as the "Caretakers Residence", or for any unlawful purpose;

…

8.1 Car Park and Common Area

(a) The Tenant has the exclusive right to occupy the Car Park …

8.2 Alterations and Additions to the Building

(a) The Landlord may, subject to clause 8.1 … vary, modify, alter ... redesign … the Building and may, for example:

…

(vi) … move or change the … number or location of the … car park on the Land;

(vii) vary the number or composition of car parking spaces in the car park on the Land;

…

13.1 Default

The Tenant is in default under this Lease if:

(a) **Failure to Pay Money** any money payable by the Tenant to the Landlord is not paid within 30 days of the due date;

…

17.6 Notice to Tenant

An invoice, notice, demand or other communication given by the Landlord to the Tenant under the Lease must be in writing and may be left for the Tenant at the Premises or may be sent by post or facsimile transmission to the Tenant at Premises or the Tenant's registered office or last known address."

[15] Clause 5.1 of the schedule to the lease refers to "item 4." Item 4 of the schedule to the lease provides that the permitted use is: "Shop/Office, Commercial Office, Warehouse/Showroom, Caretakers Residence".

[16] Mr Yeung saw the land on 9 and 10 May 2016. The plaintiff expressed its interest in purchasing the land. It did so to the seller's agent on **11 May 2016**.

[17] The lease between the seller and the lessee was registered on **23 June 2016**. A copy of the registered lease in the form in which it is now registered is exhibit 5.

[18] The plaintiff purchased the land from the seller on **1 July 2016**. The Contract for Commercial Land and Buildings was in writing and a copy is in evidence.[17] The description of the plaintiff in the reference schedule to the contract was "Ant Projects Pty Ltd ACN 189 585 642 as trustee for The Yeung Investments Trust". The purchase price was $2,410,000. The land was sold subject to leases described

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17 Exhibit 1.

in annexure 1 to the contract.[18] The plaintiff would not have purchased if there had not been a lease between the seller and the lessee. The tenants described in annexure 1 to the Contract are as follows:

1. 1300 Love It Pty Ltd ACN 154 538 851 Trading as Renaissance Cosmetic Clinics;
2. Morgan Brooks Direct Pty Ltd ACN 112 625 288; and
3. Sublease to Alchemy Recruitment Consulting Pty Ltd IOR & ATF Alchemy Recruitment Consulting Unit Trust. (**Alchemy**)

[19] Alchemy was subletting some or all of the second floor of the building from the lessee.

[20] The seller assigned to the plaintiff the benefit of the guarantee and indemnity it held from Ms Brooks and Mr Aulsebrook. The assignment was agreed by clause 16.3 of the Standard Commercial Terms of the Contract for Commercial Land and Buildings.[19] The clause is set out below.

[21] The lease registered on 23 June was, on **5 July 2016**, the subject of requisition by the Department of Natural resources and Mines.[20] The requisition asserted that the lease did not meet Land Registry requirements for registration and that to meet the requirement "The description of the area being leased must be fully described and agree with that shown on the lease sketch, including the relevant floor level and any lease identifiers). The minimum outline of the building must be shown on the sketch to enable unambiguous location of the leased area. Measured connections from the corner of the building to a corner of the base parcel to locate the building and clarify that the lease does not encroach onto adjoining land must be shown. The leased area is to be connected to a corner of the building by measured connections." The requisition noted that "When a sketch is deficient it should be replaced by a new one, with the original sketch marked as 'cancelled' and initialled by all parties. The new sketch should be signed by all parties and both sketches re-lodged with the dealing." The Department advised that the lease was liable to be rejected if the requisition notice was not complied with by **30 August 2016.**

[22] The requisition was practical and predictable. The three plans which showed each of the three floors were not drawn to scale, did not show any measurements, were for illustration purposes only and were not related to any boundary of the parcel of land.

[23] The requisition contemplated that any sketch which was marked "cancelled" because of a deficiency was nevertheless to be re-lodged. Five plans in the registered lease were subsequently marked "cancelled" and were re-lodged.

[24] The schedule to the lease which was the subject of the Department's requisition on 5 July 2016, subsequently had four pages inserted.[21] Each of the four pages contained a plan drawn by Cardno (Qld)Pty Ltd (**Cardno**). They are respectively a Locality Plan, a Ground Floor Plan, a First Floor Plan and a Second Floor Plan. Cardno certified on each plan on **18 July 2016** that it was correct.

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18 Exhibit 1 p 558.
19 Exhibit 1.
20 Exhibit 35.
21 Exhibit 5 the four pages marked in the bottom left hand corner, respectively, 430, 431, 432 and 433.

[25] The four new pages containing Cardno's plans each carries signatures of Ms Brooks and Mr Aulsebrook, which is consistent with compliance with the Department's request that all parties sign the new sketch.

[26] Five plans in the schedule to the lease[22] were marked "CANCELLED" above parallel lines drawn diagonally across each of the five plans. The five plans were respectively marked "GROUND FLOOR", "FIRST FLOOR", "SECOND FLOOR", "BUILDING CARPARK PLAN" and "Annexure "A" [Caretaker's Residence]". Each of these five plans was initialled in two places, one of the initials being that of Ms Brooks and the other of Mr Auslebrook. That is consistent with compliance by the seller and the lessee with the Department's request that all parties initial any sketch marked as "cancelled". This happened at the Department.

[27] I infer that Ms Brooks applied her signatures to the four new plans and her initials to the five plans marked "CANCELLED" on the same date. It was on about 18 July 2016.[23]

[28] It is notable that:

1. The five plans marked "CANCELLED" were marked that way by the seller and lessee in response to a request of the Department;
2. The plans of the ground floor, first floor and second floor which were the subject of requisitions and which later were marked as cancelled, each carried before and after the requisition, the warning "ILLUSTRATION PURPOSES ONLY Not to scale" and the plans had no dimensions marked on them.
3. The plan which identified the "Caretaker's Residence" incorporates on one page, side by side, the miniaturised plans of the first and second floors which carry the miniaturised warning about "ILLUSTRATION PURPOSES ONLY Not to scale" and which have no measurements.
4. The plan which identified the "Caretaker's Residence" marked the boundaries of the "Caretaker's Residence" on each floor by reference to the sketches of the first and second floors in a way which was objectively obvious, notwithstanding that the floor plans were not to scale and have no measurements;
5. The substitution of two plans, being of the first and second floors, drawn to scale and with dimensions, for the two plans which had not been drawn to scale causes no objective doubt about the boundaries of the "Caretaker's Residence";
6. There was no evidence led that the lessee agreed with either the seller or the plaintiff that the plans marked "CANCELLED" were to be irrelevant to the terms of the lease and there is no express term of the lease that plans marked "CANCELLED" are irrelevant for the purpose of interpretation of the lease;
7. By a comparison of the plan marked "CANCELLED" which identified the "Caretaker's Residence" with the two plans to scale for the ground floor and first floor, one can objectively identify the parts of the first and second floors which the parties to the lease originally intended as capable of use for a "Caretaker's Residence";

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22 Exhibit 5 the five pages marked in the bottom left hand corner, respectively, 435, 436, 437 438 and 439.

23 T30 Oct p 35.

8. The plan which identified the "Caretaker's Residence" was marked "CANCELLED" but not replaced by and other plan purporting to identify the area of a "Caretaker's Residence".

[29] Ms Brooks and Mr Aulsebrook had resided in the area designated "Caretaker's Residence" in the sketch plan before it was marked cancelled and continued to reside there after it was marked cancelled. Ms Brooks was regularly sleeping on a couch in the area designated "Caretaker's Residence" until she left the building for Melbourne in February 2017.

[30] Mr Aulsebrook gave evidence that the caretaker's residence at 8 Byers Street occupied less space than the commercial tenancies and that it was represented by the rectangles marked on Annexure "A"[24] in the schedule to the lease. Mr Aulsebrook accepted that the plans on Annexure "A" showing the caretaker's residence accurately reflected where the caretaker's residence was. I accept this evidence.

[31] Mr Yeung wanted some amendments made to other parts of the lease to include certain expenses as outgoings. A Form 13 containing amendments to the lease was prepared by Gadens Solicitors (**Gadens**). The Form 13 containing amendments was executed by the seller and by the lessee on **17 August 2016** and sent by Gadens to Shand Taylor Solicitors (**Shand Taylor**) for the plaintiff. The person who signed for the seller was Ms Brooks. The person who signed for the lessee was Mr Aulsebrook. A copy of that Form 13 was identified by Mr Yeung.[25] That copy was then tendered by Ms Brooks and became exhibit 28. The Form 13 and a Form 20 together became exhibit 28. They contain the terms of amendments to the lease with effect from **30 August 2016**. The security amount was varied from the original "$41,250" and became "an amount equivalent to four months' rent plus outgoings plus GST". Another consequence of the amendment was to expand the definition of outgoings to include "reasonable management fees". The original Form 13 was executed again on **26 August 2016** by Ms Brooks in her capacity as a director of the lessee. A copy[26] of the first page of the original Form 13 showing that Ms Brooks signed on 17 and 26 August was tendered by the defendants[27] but not as evidence that there were further negotiations between the parties after 17 August 2016.[28]

[32] Settlement of the Contract for Commercial Land and Buildings took place on either **1 or 8 September 2016**.

[33] The Contract for Commercial Land and Buildings incorporated terms entitled "Standard Commercial Terms". Clause 16.3 of the Standard Commercial Terms provided, so far as is relevant:

> "16.3 The Seller assigns to the Buyer…:
>
> …
>
> (c) the benefit of all Guarantees… held by the Seller in respect of the Leases which are capable of assignment…"

[34] By that clause, the seller assigned to the plaintiff the benefit of guarantees held by the seller in respect of leases set out in annexure 1 of the contract.[29] Included

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24 Exhibit 5 p 439.
25 T1-87 line 45.
26 Exhibit 34.
27 T29 Oct p14 line 40.
28 T29 Oct p13 lines 14-20.
29 Annexure 1 is at p 558 of exhibit 1.

among the leases identified by annexure 1 is a lease naming the first defendant as tenant for a term commencing 26 September 2015 expiring 25 September 2020. That is the lease[30] and is the lease upon which the plaintiff brings its claims in this proceeding.

[35] The plaintiff appointed Beacon Property (**Beacon**) as its agent in respect of the land on **19 September 2016**.[31]

[36] On **29 September 2016** the seller gave notice[32] to the lessee that the property which contained the premises leased to the lessee had been transferred to the plaintiff with effect from 30 August 2016 and that all rent, contributions to outgoings and other amounts owing from time to time under the lease were from that date payable to or as directed by the plaintiff. The notice is dated 29 September 2015. The year "2015" was obviously an error in drafting.

[37] Beacon provided a tax invoice dated **1 October 2016** for $18,353.64 to the lessee. The components of the amount claimed were $14,162.50 for rent, $1,146.25 for GST on rent, $2,522.63 for outgoings and $252.26 for GST on outgoings for the period 26/09/16 to 25/10/16.[33]

[38] Ms Brooks and Mr Aulsebrook were estranged from **October 2016**. At material times, at least from that date, Mr Aulsebrook had an apartment which is a couple of blocks away from 8 Byers Street and on the river near and which he occupied with his father. He had lived, on and off, at 8 Byers Street. I infer that since his estrangement from Ms Brooks, Mr Aulsebrook had resided at his apartment until 10 February 2017 when the plaintiff gave notice to quit to the lessee.

[39] On **6 October 2016**, Rouse Lawyers for the plaintiff wrote[34] to Mr Aulsebrook about three issues being car parking, the property manager and its fees and the quantum of outgoings.

[40] Beacon provided a tax invoice dated **1 November 2016** for $18,353.64 to the lessee. The components of the amount claimed were $14,162.50 for rent, $1,146.25 for GST on rent, $2,522.63 for outgoings and $252.26 for GST on outgoings for the period 26/10/16 to 25/11/16.[35] Those were the components for rent and outgoings which were owing for that period.

[41] Ms Brooks had been a director of the seller and of the lessee. Her directorship of the seller ceased on **23 November 2016**. Her directorship of the lessee ceased on **30 November 2016.**

[42] The plaintiff appointed Retailspace Pty Ltd (**Retailspace**) as its property manager in respect of the land on **2 December 2016**.[36] When Retailspace took over the management it adopted the budget for outgoings which had been set by the previous managing agent, Beacon. It is possible that the plaintiff had not terminated the

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30 Exhibit 5.
31 T1-90 line 26.
32 Exhibit 62.
33 Exhibit 19.
34 Exhibit 27 and exhibit 60.
35 Exhibit 20.
36 T1-91 line 34.

agency of Beacon at that date and it is possible that Beacon's agency may have endured for another six weeks.

[43] Mr Deane was the licensee for Retailspace. Mr Yeung asked Mr Deane to act as agent for the plaintiff with respect to the property. Mr Yeung signed a letter advising that Retailspace was appointed to act as agent as at 7 December 2016. A copy of that was forwarded by Mr Deane to Mr Aulsebrook by email on **8 December 2016**.[37]

[44] Mr Deane emailed Mr Aulsebrook on 8 December 2016 to advise that Retailspace had been appointed to manage 8 Byres Street and to express his understanding that there were a number of issues relating to the tenancy including "1. Outgoings unpaid and in dispute. 2. Car parking allocation …" There is no evidence to establish that the outgoings were unpaid or that Mr Deane's understanding about unpaid outgoings was correct.

[45] Mr Deane met with Mr Aulsebrook on **12 December 2016** when Mr Deane told Mr Aulsebrook that he would look further into the car parking arrangement for the premises.

[46] On **14 December 2016**, by email,[38] Mr Deane invited comment on what Mr Deane understood to be the car parking arrangement for the premises.

[47] A written document appointing Retailspace was prepared and the document provided for Retailspace's agency to commence on 1 December 2016. Mr Deane later altered the document to show 9 January 2017 as the commencement date of Retailspace's agency.[39] Mr Deane made the amendment because he believed that the agency of Beacons did not expire until 8 January 2017. Notwithstanding Mr Deane's concern for the possibility that Beacon was also the plaintiff's agent, the fact is that Retailspace, was an agent for the plaintiff on and from 2 December 2016 and in that capacity issued a tax invoice[40] to the lessee on 19 December 2016.

[48] Beacon provided Mr Deane with the outgoings budget Beacon had prepared for the property. On **19 December 2016** Retailspace issued a tax invoice to the lessee for $18,353.64. Mr Aulsebrook accepted that the demand for $18,353.64 which was made in December was for an amount identical with the amounts which had been demanded by Beacons in November and October.

[49] The components of the amount claimed were $14,162.50 for rent, $1,146.25 for GST on rent, $2,522.63 for outgoings and $252.26 for GST on outgoings for the period 26/12/16 to 25/01/17.[41] Those components were unchanged from the components of the invoices rendered for the two preceding months.

[50] Rent was payable pursuant to clause 2.1 of the schedule to the lease, monthly in advance. The amount included for outgoings and for GST on outgoings was adopted from the budget of Beacon Property. The sum demanded by the invoice has not been paid. The tax invoice was sent by email to Mr Aulsebrook. The email which attached the tax invoice also provided:

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37 Exhibit 44.
38 Exhibit 27.
39 Exhibit 26 p 2.
40 Exhibit 2.
41 Exhibit 2.

> Thanks for your recent emails.
>
> 1. Tax Invoice. We have attached our invoice for the next rent period. Please ensure payment is made on or before the due date.
> 2. Outgoings. Your recent comments are noted, and we had also had a handover meeting from Beacon in the last few days. We are more fully briefed and I believe there may be a resolution.
> 3. Car parking. Again, your recent comments are noted. It appears the parties have widely differing opinions.
>
> I am suggesting that you and I have a further meeting with a view to resolve the outgoings and car parking issues. I am about to go on leave, and will then be available the w/c 9 January. Would you let me know if such a meeting is of interest to you, and possible dates.

[51] On **20 December 2016** Mr Aulsebrook emailed Mr Deane.[42] The email provided:

> WITHOUT PREJUDICE
> Andrew,
>
> Just to be clear, I understand there is still confusion as to what the quantum of the alleged outgoings are to date. Kindly confirm you and the landlord are not seeking demand on said alleged outgoings before we mutually resolve them in the new year.
>
> Alternatively, and as previously requested, define them and let's resolve them and the Christmas break or; absent either your/the landlord's agreement; as sought above; or a pre-Christmas mutual agreement on the quantum, we entirely rely on Johnathon Tett's verbal assurances "we could continue paying outgoings as we have noting there would be an accounting in or about May/June 2017".

[52] On **22 December 2016** Mr Deane emailed Mr Aulsebrook[43] writing:

> Morning Richard,
>
> Regarding the outgoings, I agree there is still confusion.
>
> I understand that you have been paying the majority of the outgoings as charged, however you have deduced an amount each month.
>
> For December, I expect that you will continue this practice when you make your payment on or before 26th.
>
> In respect to a potential meeting in January, I await your response on dates. …

[53] On 29 December 2016 Mr Tett of Beacon emailed Mr Aulsebrook at 9.13am attaching a tax invoice[44] (**Beacon invoice**) addressed to the lessee and dated **26 December 2016.** It was in substantially the same terms as the invoice sent by Retail Space on 19 December 2016. That is, it was for the same rent, the same GST on rent, the same outgoings and the same GST on outgoings for the same period being 26 December 2016 to 25 January 2017. One difference was that it requested payment to the bank account of Beacon Real Estate while the tax invoice issued 10 days before by Retail Space requested payment to the bank account of Retail Space.

[54] In his email Mr Tett asked Mr Aulsebrook to give him 'an update in relation to your rent that was due on the 26/12/2016".

[55] The lessee did not pay the $18,353.64 demanded for the plaintiff by Beacon, or any of it on.

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42 Exhibit 57.
43 Exhibit 59.
44 Exhibit 56.

[56] Retailspace sent a letter of demand dated **5 January 2017**.[45] It provided:

> The following monies are overdue and are payable in full within seven (7) days to avoid legal action.
> Rent and other charges in relation to your lease at 8 Byres Street, Newstead - $21,905.95.
> This matter is serious and requires your urgent attention.

[57] The amount demanded on 5 January 2017 exceeded the amount demanded by Retailspace by its tax invoice dated 19 December. The letter of 5 January 2017 attached a demand under the heading "Sundry" for $18,353.64 and under the heading "Rent" for $3,552.31. Mr Aulsebrook gave evidence that he was very confused by those figures. I do not accept that he was very confused by the demand for $18,353.64, notwithstanding the agent's error in putting that amount in a column headed "Sundry". Mr Aulsebrook had seen the plaintiff's agents' tax invoices demanding an identical monthly sum in the months of October, November and December 2016. Mr Aulsebrook had charge of the lessee's payments. For the lessee, Mr Aulsebrook had paid an identical amount demanded in October and in November 2016 and had seen an identical amount demanded for the month commencing 26 December 2017.

[58] Mr Deane met Mr Aulsebrook again in **early January 2017** to talk about payment of rent and outgoings. Mr Deane then saw that the premises were well furnished and that Mr Aulsebrook was trading from them.[46]

[59] On **13 January 2017** Mr Aulsebrook demonstrated an interest on behalf of the lessee in determining the cost to make some information technology upgrades at the lessee's premises and obtained an estimate[47] of a cost of between four and six thousand dollars.

[60] On **26 January 2017** the next payment for rent, outgoings and GST became due and owing. The amount was not paid.

[61] Mr Grealy of Anderssen Lawyers, was acting at material times in 2017 for the plaintiff. Mr Grealy caused to be sent two letters signed by another solicitor, Ms Huggins, dated **27 January 2017**. One was to the lessee[48] and the other to Mr Aulsebrook and Ms Brooks.[49] Mr Grealy caused them to be posted by express post on 27 January. He also emailed both to 'richard@morganbrooks.com.au'. That was then an email address then in use by Mr Aulsebrook. The defendants admit[50] receipt on **30 January 2017** of the paper letters addressed to them but the defendants deny that either of the two emails were received at Mr Aulsebrook's email address at any date.

[62] The letter addressed to Mr Aulsebrook and Ms Brooks provided, so far as is relevant:

> Please find enclosed, by way of service upon you, Notice to Remedy Breach of Covenant pursuant to Section 124 of the Property Law Act 1974.
> Under the Guarantee that you signed in respect of the obligations of Morgan Brooks Direct Pty Ltd, you must rectify the breaches specified in the notice in a

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45 Exhibit 46.
46 T2-96 line 24.
47 Exhibit 53.
48 See a copy of an email copy at exhibit 32.
49 Exhibit 4.
50 Defendants' submissions page 7 at (xi) and (xii).

> reasonable period of time. We consider a period of 14 days from the date of the notice to be reasonable.
> Therefore, you have until **close of business on 10 February 2017** to make a payment of the amount specified in the Notice to Remedy Breach of Covenant, failing which, the Landlord will be able to terminate Morgan Brooks Direct Pty Ltd's Lease without any further notice to you.
> Should the Landlord be compelled to terminate the lease due to your failure to rectify the breaches in the Notice, we confirm that you will be liable for payment of all outstanding rental charges, along with damages for the premature termination of the Lease, any legal costs incurred and default interest.
> …

[63] The letter addressed to the lessee provided, so far as is relevant:

> Please find enclosed, by way of service upon you, Notice to Remedy Breach of Covenant pursuant to Section 124 of the Property Law Act 1974.
> To comply with the *Property Law Act 1974* you must rectify the breaches specified in the notice in a reasonable period of time. We consider a period of 14 days from the date of the notice to be reasonable.
> Therefore, you have until **close of business on 10 February 2017** to make a payment of the amount specified in the Notice to Remedy Breach of Covenant, failing which, the Landlord will be able to terminate Morgan Brooks Direct Pty Ltd's Lease without any further notice to you.
> Should the Landlord be compelled to terminate the lease due to your failure to rectify the breaches in the Notice, we confirm that you will be liable for payment of all outstanding rental charges, along with damages for the premature termination of the Lease, any legal costs incurred and default interest.
> …

[64] A notice to remedy breach of covenant dated **27 January 2017** was prepared for enclosure with each letter. Each notice was in slightly different terms to take account of whether it was for the lessee or for the sureties. The notice to Mr Aulsebrook and Ms Brooks as sureties was attached to the letter addressed to them. The notice to the lessee was attached to the letter addressed to it.

[65] The notice to the lessee was dated 27 January 2017 and provided, so far as is relevant:

> **Property Law Act Form 7**
> **Notice to Remedy Breach of Covenant**
> *Property Law Act 1974*, Section 124
> To: Morgan Brooks Direct Pty Ltd (**Lessee**) of 8 Byres Street, Newstead in the State of Queensland.
>
> Being the Lessee of premises described as part of the ground floor, first floor and second floor of the building (the **Building**) situated at 8 Byres Street, Newstead in the State of Queensland (the **Premises**).
>
> With reference to the lease of the Premises between Ashleigh Morgan Pty Ltd (ACN 086 173 462) and the Lessee for a term of 5 years commencing on 26 September 2015 and expiring on 25 September 2020 (the **Lease**), and the Amendment of Lease dated 17 August 2016, and the transfer of the Building to ANT Projects Pty Ltd (ACN 089 586 642) as trustee for the Yeung Investments Trust (the Lessor) (whereby all right, title and interest in the Lease and Guarantee passed to the Lessor with the reversionary estate) and the covenants by the Lessee to:
> 1. pay the monthly rental for the Premises on the first day of each month in advance pursuant to clause 2.1 of the Lease;
> 2. pay outgoings pursuant to clause 3.2 of the Lease;
> 3. pay electricity charges pursuant to clause 3.1 of the Lease;
> 4. pay legal costs in accordance with clause 3.10 of the Lease; and
> 5. pay goods and services tax in accordance with clause 3.12 of the Lease,

and for the breach by the Lessee of the aforesaid covenants, and the consequent breach of the Guarantee by the Guarantor, insofar as the Guarantor has failed to ensure the payment of a totality of the amounts due, owing and payable under the terms and conditions of the Lease as and when they became due and payable, the Lessor hereby provides notice and requires the Guarantor to meet the payment of the sum of $18,353.64 within a reasonable period of time from the date of this Notice.

Dated this 27th day of January 2017.

…

Note: The Lessor will be entitled to re-enter or forfeit the lease in the event of the lessee failing to comply with this notice within a reasonable time – see Section 124 of the Property Law Act 1974.

[66] The notice to Mr Aulsebrook and to Ms Brooks provided, so far as is relevant:

Property Law Act Form 7
Notice to Remedy Breach of Covenant
Property Law Act 1974, Section 124

To: Richard William Aulsebrook and Morgan Ashleigh Brooks (Guarantors) of 8 Byres Street, Newstead in the State of Queensland.

Being the Guarantors of the obligations of Morgan Brooks Direct Pty Ltd **(Lessee)** under its lease of premises described as part of the ground floor, first floor and second floor of the building (the **Building**) situated at 8 Byres Street, Newstead in the State of Queensland (**Premises**).

With reference to the lease of the Premises by the Lessee for a term of 5 years commencing on 26 September 2015 and expiring on 25 September 2020 (the Lease), the Guarantee signed by the Guarantors (the Guarantee), the Amendment of Lease dated 17 August 2016, and the transfer of the Building to Ant Projects Pty Ltd (ACN 089 586 642) as trustee for the Yeung Investments Trust (the Lessor) (whereby all right, title and interest in the Lease and Guarantee passed to the Lessor with the reversionary estate) and the covenants by the Lessee to:

1. pay the monthly rental for the Premises on the first day of each month in advance pursuant to clause 2.1 of the Lease;
2. pay outgoings pursuant to clause 3.2 of the Lease;
3. pay electricity charges pursuant to clause 3.1 of the Lease;
4. pay legal costs in accordance with clause 3.10 of the Lease; and
5. pay goods and services tax in accordance with clause 3.12 of the Lease,

and for the breach by the Lessee of the aforesaid covenants, and the consequent breach of the Guarantee by the Guarantor, insofar as the Guarantor has failed to ensure the payment of a totality of the amounts due, owing and payable under the terms and conditions of the Lease as and when they became due and payable, the Lessor hereby provides notice and requires the Guarantor to meet the payment of the sum of $18,353.64 within a reasonable period of time from the date of this Notice.

Dated this 27th day of January 2017.

…

Note: The Lessor will be entitled to re-enter or forfeit the lease in the event of the lessee failing to comply with this notice within a reasonable time – see Section 124 of the Property Law Act 1974.

[67] Five features of the letters and notices were noted by the defendants and became the subject of submissions. They were:

1. The description of the plaintiff as lessor in each of the notices to remedy breach of covenant includes the Australian Corporation Number 089 586 642. That can be contrasted with the ACN used to identify the plaintiff in the pleadings and in the Contract for Commercial Land and Buildings which

is 089 585 642. The sixth integer in one number differs from the sixth integer in the other. The plaintiff, identified by ACN 089 585 642, is admitted to exist. There is no evidence that a corporation of the same name but with an ACN 089 586 642 exists. The defendants' solicitor saw that the number was in error.[51]

2. The letters, in their third paragraphs advised "you have until **close of business on 10 February 2017** to make a payment" while the letters in their second paragraphs advised "you must rectify the breaches specified in the notice in a reasonable period of time. We consider a period of 14 days from the date of the notice to be reasonable." The date marked on the notices was 27 January. The date the paper copies of the notices was received was 30 January. 14 days from 27 January 2017 was 10 February 2017.
3. The notice referred to breach of covenant to pay rent, outgoings, electricity;
4. The notice referred to breach of covenant to pay GST;
5. The notice referred to breach of covenant to pay legal costs.

[68] I am satisfied that Mr Grealy emailed both letters and their attachments on 27 January 2018. I accept the evidence of Mr Grealy that he did so. I am fortified in my finding by the fact that exhibits 32 and 33 each are marked as having been sent from Mr Grealy to 'richard@morganbrooks.com.au' and are marked as having been sent on Friday, 27 January 2017 at 4:17PM. The factual issue agitated by the parties is not whether they were sent but whether they were received at Mr Aulsebrook's email address on 27 January 2017.

[69] Mr Grealy received no notification that either email was not received or that it was sent to the wrong address. Mr Grealy did not request or receive a 'read receipt' notice.

[70] The email address to which Mr Grealy sent the two emails was an address which Mr Aulsebrook had long used for personal and professional email correspondence. It was the only address he used. Mr Aulsebrook received on 10 February the notice to quit sent by Mr Grealy by email to that same address on 10 February 2017.[52]

[71] Mr Aulsebrook's habit was to check for emails regularly and at least ten times every day. Mr Aulsebrook did not give evidence that there was any malfunction on 27 January 2017 with respect to receipt of emails to his address. I infer that there was no appearance of a malfunction on 27 January 2017.

[72] Mr Aulsebrook did not give evidence about his habits in January 2017 with respect to deleting emails and emptying the folder which holds deleted emails. Mr Aulsebrook gave evidence that he searched extensively for the two emails of 27 January 2017 in his Outlook records, junk and spam and looked for the various folders in which he would file such things. Having made such searches, Mr Aulsebrook gave evidence that "I swear on the Bible that I did never, ever, ever receive the email".

[73] Litigation has revealed regularly that even honest witnesses may be convinced that their memories are accurate and yet be mistaken. The fact that Mr Aulsebrook searched his electronic files is consistent with his having a concern that he may have received such emails. The lessee admits receipt of the letter of demand to it on 30

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51 T 30 Oct 2018 page 38 ln 27.

52 Exhibit 39.

January. Having received the letters dated 27 January by express post on 30 January 2017, Mr Aulsebrook emailed them to his solicitor. I assume that he first scanned them, making electronic copies and emailed those copies. If copies had been received 3 days before, any need to retain those earlier electronic copies would lessen. The imperative to retain or to file electronic copies received on 27 January would not have been so great after receipt and scanning and retention of paper and scanned versions on 30 January. A methodical person might deliberately delete one set or the other.

[74] Mr Aulsebrook did not say when he searched for the two emails which ought to have been received by him on 27 January 2017. There would have been no point in searching for them before litigation was in prospect. The search for emails was probably done after the building was locked on 10 February 2017. It was probably done after the proceeding was commenced by the plaintiff in March 2017. It was probably done during the period when the defendants considered what defences existed against the case pleaded in the statement of claim. There was ample time to forget the deletion of two electronic messages which were repeated in paper form scanned into electronic form three days later.

[75] Mr Aulsebrook's evidence on this issue is consistent with an honest mistake caused by inability to remember. That mistake is more plausible than the failure of two emails to arrive on 27 January 2017, despite being directed to the correct address and in the absence of any evidence of malfunction.

[76] I am satisfied on the balance of probabilities that the two emails sent by Mr Grealy on 27 January 2017 to Mr Aulsebrook's email address were received at Mr Aulsebrook's email address on 27 January 2017 and that Mr Aulsebrook saw them on that date. He saw them as agent for the lessee and in his personal capacity. I am satisfied that he promptly drew them to the attention of Ms Brooks.

[77] On **30 January 2017** the two letters dated 27 January 2017 and their respective attached notices were received by the defendants. Ms Brooks gave evidence that she was not in a fit mental state on that date to consider documents, legal or otherwise. I infer that she did not concern herself with the letters. I reject the evidence that she was not in a fit mental state to consider documents. In the absence of more compelling evidence, that evidence is not sufficient to satisfy me.

[78] The defendants each admit that they did not pay the sum of $18,353.64 demanded in the attached notices by the time for payment stipulated in them.[53] The notices required the payment "within a reasonable time" and the defendants thereby appear to have admitted that they did not make payment within a reasonable time. However, the ambiguity of that admission is obvious from the defendants' denial that the time stipulated in each notice was a reasonable time.[54] The defendants' case is that the time stipulated in the covering letter enclosing the notice, namely by close of business on 10 February 2017, was not a reasonable time within which the lessee should pay arrears.

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53 Amended defences paragraph 41.

54 Amended defences par 41(c) and 41(iii).

[79] On 30 January 2017 at 3.10 pm Mr Aulsebrook emailed[55] his former solicitor attaching electronic copies of the plaintiff's solicitors' two letters letter of 27 January 2017 and their respective attachments.

[80] On **31 January 2017**, Anderssen Lawyers provided a tax invoice[56] to the plaintiff for $837.35 in respect of its debt recovery services for sending notices to remedy to the defendants. The plaintiff paid it.

[81] On **7 February 2017** Mr Deane visited the premises. He saw a removal van there. He took a photograph of it at about 11.27am. He saw people moving items into the back of the van. It was being loaded. Mr Deane saw that the items were coming from the lessee's part of the building. He took and emailed a photograph to Mr Yeung at 11.27am. at 2.33pm Mr Deane emailed the plaintiff's solicitor saying "the gutless wonder is doing a runner" and asked when he could change the locks. It was a large removal van. It was reasonable for Mr Deane to suspect that the lessee was proposing to remove its chattels from the building. I accept as a correct generalisation for what was occurring, Mr Aulsebrook's evidence that Ms Brooks wanted everything out.

[82] Ms Brooks gave evidence that she was at the premises at some time on **6 or 7 February 2017**, that she was not there on 9 February but that a dog carrier from a dog courier company was at the premises that day to collect her daughter's dog; that the dog was to accompany her daughter and herself while they had to deal with; that before 9 February Ms Brooks was removing out of the premises all of the furniture owned by her, by Mr Aulsebrook and various other entities or persons for whom Ms Brooks voluntarily held furniture and items. Ms Brooks did not accept that she removed items belonging to the lessee. Desks were removed, but Ms Brooks asserted that other desks were brought in, and ceiling and wall paint. I make no finding about whether desks were brought in. If furniture belonging to persons other than the lessee was removed, I am satisfied that it had been in the portion of the building occupied by the lessee and with the consent of the lessee. In this respect I treat the caretaker's residence as a portion of the building occupied by the lessee.

[83] Origin Energy provided a demand[57] issued on **9 February 2017** to the seller relating to the Byres Street property. It was entitled "your final natural gas bill" and was for the period 2 December 16 - **7 Feb 17**. Mr Aulsebrook did not request a final account for gas but gave evidence that he believed it was either his daughter, Ms Brooks or one of the staff of the lessee.

[84] Mr Aulsebrook explained that the removal van had been present on either 6, 7 or 8 February 2017. I accept that it was there on 7 February 2016. He said it was there because Ms Brooks wanted "all the stuff removed because of her phobia about this airborne bacteria thingy in her mouth, and the fact that Renaissance…were impinging on our space downstairs and Brooks,' phobia or otherwise, believed…some sort of bacteria in her mouth and an aerobic bacteria…because it's airborne came into contact with what these Renaissance guys were doing, mixing blood and injecting Botox…that's why she said "Get everything out" much of which was…my daughter's… But…none of it was required by Morgan Brooks Direct to conduct its day-to-day business." Mr Aulsebrook agreed that one could

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55 Exhibit 47.
56 Exhibit 16.
57 Exhibit 54.

run the business off a laptop computer and a mobile phone but explained "we didn't but – but you could…Wouldn't be very professional."

[85] Mr Aulsebrook took photographs on **9 February 2017** of internal spaces in the lessee's portion of the building. It was put to him by the plaintiff's counsel that the photos were taken to provide evidence to demonstrate for the purposes of potential litigation that there were still items on the premises. Mr Aulsebrook denied that and explained that Mr Brooks wanted him to do certain jobs, including painting inside the building and that his relationship with Ms Brooks at that time was acrimonious and that he wanted to avoid arguments with her so he did what he was directed by Ms Brooks and he took photographs to prove to her that he had done what she had directed. Among the requests from Ms Brooks had been requests to decontaminate areas. He took a photograph of the inside of cupboards to demonstrate his compliance. He explained that telephones which were wrapped with cords around them had previously, occasionally been used by the lessee. He explained that they were in their stored state because Ms Brooks and her helpers had cleaned them with sterile wipes, wrapped cords around them and that he and others put the telephones away. I accept Mr Aulsebrook's evidence about why he took the photos on 9 February 2017.

[86] Ms Brooks was in Melbourne by **10 February 2017**. She gave evidence that she was there "on personal family and medical matters, but I was still residing – occupying." Ms Brooks did not explain what she meant. Ms Brooks did not give evidence of the living arrangements in Melbourne, of whether she intended to return to Brisbane to live or when she intended to return or for how long or where she intended to live if she returned. Although Ms brooks was not at the building on 10 February 2017, she asserted that the lessee was trading until the door was locked. She gave no evidence of what the lessee was doing. Her unexplained assertion that the lessee was trading at 8 Byers Street was unpersuasive. Her daughter was obviously moving to Melbourne; the gas bill was a final bill until 7 February; her husband was then estranged and living in his own apartment; the dog was being sent to Melbourne. Whatever Ms Brooks intended to convey by her evidence that she "was still residing – occupying" I am not satisfied that Ms Brooks intended to return to use the building as a permanent place of residence or that she intended to return in the short term.

[87] There was a financial incentive to maintain a residential component within the building. Ms Brooks gave evidence that electricity, rubbish bins and land tax were each cheaper than they would otherwise have been in a commercial building. That does not assist me to determine whether Ms Brooks intended to return.

[88] Ms Brooks gave evidence that she had desks in storage which she intended to put into the building, but only after some internal repainting, because she wanted it to be perfect.

[89] Mr Aulsebrook tendered a bundle[58] of email correspondence to and from him which was consistent with his trading on behalf of the lessee as a mortgage broker until **9 February 2017**.

[90] On **10 February 2017** at 11:21am Mr Grealy emailed Mr Aulsebrook attaching a letter dated 9 February 2017 and a notice to quit. Each was addressed to the lessee.

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58 Exhibit 51.

The notice to quit was dated 10 February 2017.[59] The email advised that the original had been sent by express post. The plaintiff sent by express post an almost identical letter and notice to quit and tendered a copy.[60] One inconsequential difference exists between the letter as posted and the letter as emailed. The difference is in the date appearing on the letter. The copy of the letter tendered by the plaintiff was dated 10 February rather than 9 February. I infer that the plaintiff's solicitor, on 10 February 2017, after emailing the version bearing the date of 9 February, amended the date before printing a paper copy which he caused to be sent by express post.

[91] A telephone bill[61] to the lessee includes a bill for charges on 10 February 2017 for use of a landline with the number 3620 5636. Mr Aulsebrook explained that he used that landline for the lessee. In particular, it reveals three calls made on 10 February 2016 which were not simply to mobiles but were to "13 Numbers". Those three calls were at 10:54am, 12:41pm and 2:49pm. Mr Aulsebrook offered those three calls as evidence that he was present in the building and that he, on behalf of the lessee, was trading. He did not explain the significance of calling "13 Numbers". I reject the plaintiff's submission that the bill shows that the number was used on subsequent days when Mr Aulsebrook had been locked out.

[92] Other email correspondence from January 2017[62] is consistent with Mr Aulsebrook, as agent for the lessee, acting as mortgage broker in respect of a settlement anticipated to occur on 10 February 2017. It is unhelpful on the issue of whether the lessee intended before the lockout that it would permanently vacate the premises in February 2017.

[93] Mr Deane returned to the premises on 10 February 2017 at 5.00pm with a locksmith. He saw Mr Aulsebrook at the premises. From what Mr Deane saw of the lessee's premises they were empty of furniture save for a few items. He saw a globe mounted on a stand, a computer server rack and high on a wall some artefacts. Mr Deane was present as the lock was changed at his instruction. When the lock had been changed Mr Deane posted a notice on glass at the front of the premises with sticky tape indicating that the lease was terminated.

[94] Mr Aulsebrook gave evidence that on 10 February 2017 he was trading until about 5pm. He remained in the building during the day and had lunch with personnel from Alchemy that day. Such a lunch occurred only about once each month. This lunch is as consistent with saying farewells as with normality. I accept Mr Aulsebrook's evidence that he was sitting at his desk "on the middle floor in what might otherwise be referred to as the caretaker's residence on – on the plan…and…I had a split screen scenario and so I could be looking at my computer and then I could also be looking at the external security cameras. And at almost 5pm precisely I noticed Deane arrive…followed by…the locksmith…we'd sought of been given a heads up that this might happen, although I – I never expected for a second that they'd act upon it. So then I rushed upstairs quickly, because I had a very expensive, new laptop, I had a brand new server up there; I had confidential files up there, I had clothes up there – and grabbed what I could as quickly as I could…". Mr Aulsebrook explained that earlier that day he "was contacting clients, sending

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59 See Exhibit 39.
60 Exhibit 6.
61 Exhibit 50.
62 Exhibit 52.

emails, conversing with various solicitors regarding loans that were due to settle, just regular day-to-day business". Mr Aulsebrook would have liked to have taken his computer screen but he could not carry it. He got the impression from Mr Deane that he was to leave promptly and so he did. Mr Aulsebrook removed a new server, his laptop and a few bits and pieces that he could gather up and took them to his two-seater sports car.

[95] Mr Aulsebrook exited the building through a fire door. Mr Deane asked Mr Aulsebrook to leave. He saw Mr Aulsebrook leaving on foot. Mr Aulsebrook went to his car and drove away.

[96] I am satisfied that the lessee's failure to pay $18,353.64 by 5.00pm was a repudiation the lease. The plaintiff terminated the lease shortly after that repudiation, by fixing a notice to quit to the door and changing the lock.

[97] The dishwasher which was left behind was faulty. Everything in the kitchenette in the caretaker's residence belonged to the lessee: microwave, bar fridge, cutlery, wine glasses, drinking glasses, kettle, coffee cups and dishwasher. They were not removed on 10 February 2017. Mr Aulsebrook left behind an air-conditioned server cabinet, telephone equipment, some of his clothing, some plates, cutlery and swords, a desk, computer screen and computer keyboard.

[98] Mr Aulsebrook left a number of other things at the building. They were tins of ceiling and wall paint, cleaning products and replacement faux marble and some ground floor tiles and a number of light bulbs. Mr Aulsebrook had received instructions from Ms Brooks to paint parts of the interior of the lessee's premises. The paint was required for that purpose. There was no evidence given of whether any proposed painting or cleaning was intended to be for the lessee's future enjoyment of the premises or for Ms Brook's future enjoyment of the premises or to make good the premises in a way which was consistent with the lessee's permanent departure.

[99] Mr Aulsebrook needed only a computer, a server, telephones, connection to the internet, files and a desk to run the lessee's mortgage broking business.

[100] The lessee also owned a number of items of furniture used by the tenant Alchemy in the area it occupied pursuant to its sub-tenancy. The fact that they were left behind does not assist me to determine the lessee's intention about quitting the building.

[101] Mr Aulsebrook advised Ms Brooks of the lockout by telephone at 8pm or 9pm on 10 February 2017.

[102] Mr Deane is a property agent and property developer who has been involved with leasing commercial buildings for 35 years. He was familiar with the premises and the building's tenants from the middle of 2016 until February 2017.

[103] Mr Deane's opinion at trial was that it would be very challenging for the plaintiff to find a tenant for the part of the building occupied by the lessee at any time between trial and September 2020. He explained that it was a tenant's market because of an oversupply of space similar to the space at the building. He had regard to the disadvantages that the three-level building did not have a lift, that it had a limited frontage and that the electricity was not apportioned across the different levels

correctly. He gave the example of the space occupied by the sub-tenant, Alchemy on the top level which did not have its own electricity meter. I accept his opinion.

[104] On **11 February 2017** Mr Deane made arrangements with Alchemy to ensure that it received keys so that it could continue to occupy the space it used pursuant to a subtenancy. Mr Deane arranged with Alchemy to take a month-to-month tenancy of the top floor of the building. He met Mr Yeung and Mr Regan Baker on site to discuss the best way to market the property and may have discussed the removal of an internal wall to make the property as presentable as possible. A formal commercial tenancy agreement was made with Alchemy on 27 February 2017.[63] Alchemy paid rent and its share of the outgoings for the building to Retailspace as agent for the plaintiff for the period from 11 February until to 20 April 2018.[64] Alchemy stayed on after 20 April 2017. The plaintiff's agents changed.

[105] Regan Baker was from Baker Property (Qld). He gave Mr Yeung a quote[65] for marketing the premises. The plaintiff paid the $4,405.10 for photographs to be taken, for online listing with Real Commercial, for mail marketing and for a large sign.

[106] Mr Deane gave evidence that any work done at the premises was with a view to improving the chance of finding replacement tenants. There was no suggestion put to Mr Deane that any more could have been done by Retailspace or the plaintiff to obtain a replacement tenant during the time that Retailspace continued as managing agent and no suggestion that any expenses incurred during the duration of Retailspace's agency were wasted expenses.

[107] On **1 March 2017** Anderssen Lawyers provided a tax invoice[66] to the plaintiff for $8,588.98 in respect of its debt recovery services against the defendants. The plaintiff paid it. It attaches a schedule of the services performed by the firm. I accept that they were performed and were reasonably necessary because of the lessee's breaches.

[108] Mr Deane created a statement[67] of the operating expenses for the premises for the 10 months from 1 September 2016 to 30 June 2017 from his computer cashbook. They were $23,846.17.

[109] On the **18th of August 2017** the plaintiff paid $2,995.30 to renew the online listing with Real Commercial.[68]

[110] Mr Yeung was so concerned at the failure to find a replacement tenant that he engaged Baker Property (Qld) from **2 October 2017** until 18 April 2018 to sell or let the premises.[69] That engagement produced no results so Mr Deane engaged another agent for sale on **31 March 2018**.[70] That agent was Cushman & Wakefield Agency (Qld) Pty Ltd. The term of that agency was until 30 June 2018. That agency advertised online, on its own website and put up a sign. That produced no sale.

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63 Exhibit 10.
64 Exhibit 24.
65 Exhibit 9.
66 Exhibit 17.
67 Exhibit 22.
68 Exhibit 11.
69 Exhibit 12.
70 Exhibit 13.

[111] The operating expenses incurred from 1 July 2017 to 11 April 2018 for the building while Retailspace was managing agent were $49,726.18 inclusive of GST.[71] Net of GST the amount was $47,924.50. Net of another two items described under a heading as "Owners Capital Expenditure" for repair and demolition works and for the supply and installation of an airconditioner, the total would have fallen to $43,293.40. I note that the total of $43,293.40 for outgoings for the period 1 July 2017 to 11 April 2018 was such that the lessee's agreed contribution of 83% would have justified a claim against the lessee for outgoings for those months of about $3,600 per month, before adding more for GST. My calculation assumes 10 months when the period was 9 months and 11 days. My assumption serves to reduce the average monthly amount of outgoings.

[112] Mr O'Brien is a commercial real estate agent and employed by Elders Commercial Brisbane (**Elders**). He has worked for Elders for 7 years. He is a sales and leasing executive. On **17 March 2018** the plaintiff's engagement of Elders as a letting agent for the building was signed.[72]

[113] As soon as Mr Yeung approached Elders, Mr O'Brien inspected the building. He thought that it presented well but that it needed to have some untidy data cabling removed, needed painting and a few things to be "fixed up". The cabling he remembered was "Cat 5" which was blue. Ms Brooks put a series of questions to Mr O'Brien seeking concessions that he saw a different and specialised type of cabling. Mr O'Brien did not concede it. The potential relevance of the presence of specialised cabling would be to an argument that some hypothetical potential tenants may have preferred it, that the costs of removing the cables were wasted or that the building would have let more readily with the alternative cables. The defendants led no evidence of such things. I am satisfied by the evidence of Mr O'Brien that the cabling was untidy and the prospect of letting the premises improved with the removal of the untidy cabling and with completion of his other suggestions.

[114] On **28 February 2018** Elders provided a tax invoice to the plaintiff for $473 for further online listing with Real Commercial and for a metal signboard. Each was used to advertise that the premises were available for lease. Photographs were taken to display with advertisements on Real Commercial. The plaintiff paid the invoice.

[115] Twin Tech Electrical was engaged to deal with electrical issues identified by Mr O'Brien's suggestions for marketing the premises for lease. It did and rendered a tax invoice[73] to the plaintiff on **31 May 2018** for $5,743.10. The plaintiff paid it on 5 July 2018.

[116] Mr O'Brien canvassed tenants in the precinct to encourage them to come to the property. He mailed other agents in the area to see if they had clients who would be interested in the property. He did pamphlet drops to local businesses and made phone calls to local businesses to encourage interest in renting the property. Elders' database included the names of tenants who had made enquiries about properties over a period of 10 years. Information about the property was sent to almost all of them. There were more than 3,000 on the database.

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71 Exhibit 25.
72 Exhibit 14.
73 Exhibit 18.

[117] Elders spent on marketing about $3,000 between March 2018 and the time of trial. Mr O'Brien's opinion was that it was a very good marketing campaign and that everything had been done that was possible to ensure a good leasing campaign. I accept Mr O'Brien's opinion.

[118] Mr O'Brien was concerned to find a commercial tenant for the building.

[119] In **June 2018** Mr Yeung was concerned that the premises were not attractive enough to attract tenants. The plaintiff had a skylight installed to allow natural light into the first floor. It paid about $6,000 for that. So that the first floor could be more available for rent to a commercial tenant on a stand-alone basis, the plaintiff had partitions and doors installed. It paid about $25,000 to Randall Maintenance for that work and to remove and dispose of the server cabinet the lessee had abandoned at the premises.

[120] In June 2018 the plaintiff sought to encourage letting of vacant space through Airbnb and prepared for that by spending $10,000 on furnishing. His plan was for the plaintiff to earn from short term stays while still offering the premises for commercial lease.

[121] In **August 2018** there was some income generated from letting through Airbnb. It was rented for up to fifteen nights. It generated about $200 per night. There were expenses. Mr Yeung estimates that the plaintiff made about $1,000 clear of expenses. The Brisbane City Council made contact with the plaintiff about the Airbnb business. That source of earnings was promptly stopped out of concern over its legality.

[122] At the time he gave evidence Mr Yeung believed that the plaintiff could not lawfully use the premises for such a purpose. The defendants did not suggest that the plaintiff can.

[123] At the time of trial, Alchemy then occupied some or all of the second floor. Mr Yeung estimated that Alchemy had paid about $30,000 to the plaintiff by the time he was giving evidence on 20 September 2018. That date was about 19 months after 11 February 2017. He must have included in that sum the GST, Outgoings and electricity items for which the plaintiff charged Alchemy. The net rent which the plaintiff was receiving from Alchemy was then about $1,414.83 per month. The first floor was then unoccupied. On the ground floor, a cosmetic clinic occupied about 30m² of the building. At the time of trial, there was a sign on the land advertising that space was available for commercial lease from 200m² to approximately 540m². The entire building was available for rent. I infer that the tenancies of Alchemy and of the cosmetic clinic were each short term. Mr O'Brien made clear that if a tenant wanted a particular area on the ground floor, such as 200m², a surveyor would have been engaged to certify the area and such a request would have been accommodated.

Is the plaintiff a legal entity?

[124] The defendant's submit[74] that they have established that the plaintiff is not a legal entity and that the proceeding should be struck out on that basis. By the amended statement of claim at paragraph 1a, the plaintiff alleged that all material times "The

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74 Defendants' submissions par 3.

Plaintiff was, and is, a company duly incorporated according to law and capable of suing in its own corporate name". The first defendant admitted that allegation.[75] Mr Aulsebrook admitted that allegation.[76] Ms Brooks admitted that allegation.[77] It follows that the plaintiff's status as a legal entity is not in issue. The plaintiff was not required to call evidence to establish that it is a legal entity. I reject the submission.

Did the plaintiff acquire the right to enforce the lease against the lessee?

[125] Plaintiff pleaded[78] that when it purchased the building, "all rights and entitlement in the enforcement of the provisions of the Lease passed to the Plaintiff with the reversionary estate in the Building pursuant to Section 118 of the *Property Law Act 1974*." The defendants denied it.[79] The denial was appropriate because section 118 does not deal with the rights of the lessor. But section 117 does. The plaintiff repeated the allegation in its submissions.[80] I reject the plaintiff's submission. But that does not assist the defendants. The plaintiff's relevant rights are derived from section 117 of the *Property Law Act 1974*. The defendants did not make submissions on this matter. It was not an issue they could win. The lessee's obligations under the lease to pay rent and comply with the lessee's covenants in the lease are obligations which run with the reversion and may be enforced against the lessee by the plaintiff, notwithstanding that the lease named the seller as lessor.

Was the lessee in credit because of overpayment of a security deposit?

[126] The amount which was described in item 3 of the schedule to the lease for "Security Amount" is $41,250.[81] But the lease has been amended. Before amendment, the lessee's obligation under the terms of clause 4.1 of the schedule to the lease to pay a security deposit was an obligation to pay only $41,250. The defendants submit[82] and the plaintiff accepts that the security amount paid by the lessee was $67,439.84. That sum is $26,189.84 more than the amount of $41,250 described in item 3. The defendants further submitted[83] that $26,189.84 was an overpayment by mistake. It was not alleged by the defendants in their pleadings that the payment by the lessee of $67,439.84 had been by mistake. The evidence led at trial, consistent with the defendants' pleadings, was that there was an amendment to the security amount which initially appeared in the lease. Each defendant's defence alleged that the lessee's obligation was to pay an amount equivalent to four month's rent plus outgoings plus GST, being $67,439.84.[84] The factual hypothesis of overpayment of the amount of the security deposit by the lessee by mistake was first raised in the defendants' submissions after the evidence. The allegation of a mistake was not explored in evidence as "mistake" was not in issue. It would be unfair to the plaintiff to permit the defendants to rely on this argument. The plaintiff accepts that it received $67,439.84 which should be brought to account in the defendant's favour

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75 Exhibit 29 par 22.
76 Exhibit 30 par 22.
77 Exhibit 31 par 22.
78 ASOC para 4.
79 See e.g. Amended defence of the first defendant at par 27.
80 Plaintiff's submissions pars 20 and 21.
81 Exhibit 5 p 396.
82 Defendants' submissions page 21 sub paragraph (b).
83 Defendants' submissions page 6 paragraph 12 (a).
84 See for example the lessee's amended defence paragraph 4 (e).

in reduction of any award in favour of the plaintiff. It is this sum for which the lessee claims by counterclaim.

[127] There was no allegation in the defences to the effect that the plaintiff was obliged to bring $26,189.84 or $67,439.84 into account in the lessee's favour when giving to the lessee any notice to remedy breach.

[128] The fact that $67,439.84 was provided by the lessee as security was raised in several places by the defendants in their written submissions. The purpose for raising the fact was primarily set out in the defendants' submissions at page 12 at (xi) a, b and c and page 21 at (ix), (a) and (b) but is to be drawn from other places too. The defendants' combined submissions are essentially that:

1. $26,194.84 of the amount paid by the lessee as security was a mistaken overpayment;
2. The lease was not amended;
3. When calculating whether the lessee was in arrears at the date of any relevant notice to remedy breach, that overpayment must be brought into account;
4. Once $26,194.84 is brought into account, the lessee was not in arrears at any relevant date and not when the plaintiff changed the locks on the premises;
5. Alternatively all $67,439.84 should be brought into account so that the lessee was not in arrears at any relevant date.

[129] I accept the substance of the plaintiff's submission.[85] The defendants may not raise the argument. Further, the plaintiff's liberty to use any security to compensate itself for loss due to the lessee's breach did not oblige the plaintiff to treat the security as a pre-payment for rent, or for outgoings or for GST. If the lessee had paid $26,194.84 under a mistaken belief that it was to be retained by the plaintiff as security and if the plaintiff accepted it on that basis, the plaintiff would have been obliged to hold the sum as security and would not have been at liberty to treat it as rent or outgoings or GST unless the lessee was first in default. If the lessee was in default for failure to pay rent, outgoings and GST, the plaintiff would not have been obliged to apply that sum to a shortfall of rent, outgoings or GST. If the plaintiff had elected to use the security to pay itself for arrears, clause 4.2 of the schedule to the lease applied and would have been a complete answer to the defendants' submission. The relevant words of clause 4.2 are: *The Landlord does not waive the Tenant's breach by using the security and no other rights of the Landlord arising from that breach are affected.*

[130] I reject the defendants' submission. I do not accept that the lessee paid more by way of security than was agreed. I do not accept that $26,194.84 or $67,439.84 must be brought to account when considering whether the lessee was in arrears at any relevant date.

[131] I accept the plaintiff's submission that the security deposit may be applied to items other than arrears of outgoings or rent, such as loss of bargain damages, legal costs payable and default interest. The lessee's security deposit account was in credit at all material times but that did not amount to a prepayment of rent, or of outgoings or of GST. If the lessee breached the lease by falling into arrears, the existence of funds held as security does not nullify the breach.

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85 Plaintiff's submissions par 16.

Is the lease void for uncertainty because the plan of the caretaker's residence was marked "cancelled"?

[132] The defendants pleaded that the lease was void for "uncertainty and incompleteness" in the premises of paragraphs 6 and 7 of their defences. The lessee and Mr Aulsebrook each alleged:

> 6. There was no plan attached in Annexure A to the Lease as contemplated by clause 5.3(g) of the Lease
>
> 7. The part or parts of the Premises that the First Defendant was permitted (under clause 5.1) and not permitted (under clause 5.3(g) to use as a "Caretaker's Residence" under the Lease were not identified, at all or with reasonable certainty.

[133] Ms Brooks alleged in her slightly different amended defence:

> 6. There was, and is, no plan attached in Annexure A to the Lease as contemplated by clause 5.3(g) of the Lease. The plan referenced in clause 5.3(g) of the Lease from the Lease was not attached to the Lease at the time of the formation thereof, alternatively, was agreed by the parties thereto to be deleted prior to the registration of the said Lease pursuant to the Land Title Act 1994 (Qld) (**LTA**).
>
> **Particulars**
>
> The parties agreed to delete the said plan through Gadens Lawyers, who acted for both parties in registering the Lease.
>
> 7. The part or parts of the Premises that the First Defendant was permitted (under clause 5.1) and not permitted (under clause 5.3(g) to use as a "Caretaker's Residence" under the Lease were not identified, at all or with reasonable certainty.

[134] The defendants explained in their reply to notice to admit facts[86] that a plan showing the caretaker's residence in the building was in the lease when it was lodged with the Department of Natural Resources and at "their" request was cancelled. The plaintiff's submissions referred to that answer. Unfortunately, the reply to notice to admit facts was not tendered. It seems to me that it is unsafe for me to rely on that evidence. Fortunately, it emerges elsewhere in the evidence that the defendants' explanation is accurate.

[135] The defendants submitted that: "the plans that would show the areas in the lease marked in 'blue' are crossed with two parallel lines and marked cancelled". A copy of the lease became exhibit 5. It was not coloured. The defendants' submission is intended to refer to the page marked 439 in exhibit 5. That page is marked 'Annexure "A" Caretaker's Residence'. Plans of the "First Floor" and "Second Floor" are attached. Those three plans and two others have a pair of parallel lines drawn across them diagonally with the word "CANCELLED" handwritten above the upper of the two lines.

[136] On this issue the plaintiff submitted:

> 23. The Defendants plead at paragraph 6 of the defences that there was no Annexure A to the Lease as contemplated by clause 5.3(g) of the Lease. This is wrong. Page 38 of the Lease is Annexure A, showing the Caretaker's Residence. The Defendants admit that Annexure A was appended to the Lease at the time the Lease was lodged with the Department of Natural Resources and Mines.

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86 Court Book tab 25 page 295 item 24.

[137] I accept that the lease contained Annexure A with a plan of the caretaker's residence. The plaintiff fails to address the complicating fact that the plan was later marked "Cancelled" as a result of a requisition and reinserted into the lease with that marking.

[138] On this issue the defendants submitted:[87]

> there is no certainty as to which areas the First Defendant or the Second or Third Defendant through it could occupy as its residence as the Plaintiff was aware the Defendants used the premises substantially as their residence - the plans that would show the areas in the lease marked in 'blue' are crossed with two parallel lines and marked cancelled.
>
> The lease makes direct reference to those plans, inclusive of 'cancelled plans at Annexure "A" yet they are not the surviving plans which are attached to the Lease, and there are no amendment plans attached to the Plaintiffs Form 13, and or Form 20 version 2 that would identify with certainty each of those areas referred to in the Lease

[139] The defendants are correct that the relevant plan of the caretaker's residence is marked as cancelled.

[140] The Department ensured that the cancelled documents were re-lodged with any further plans. Anyone perusing the registered lease to interpret it can see the cancelled documents included with the rest of the lease. When interpreting the lease, one has available the whole of the registered lease including the documents marked as cancelled. When interpreting the lease one sees that it is a commercial lease, that annexure "A", though marked cancelled, is included with the documents forming the lease and is the only document which purports to show the boundaries of the caretaker's residence on two floors, that the lease refers to the very same annexure "A" for determining the caretaker's residence and one can determine that the word cancelled applied to several documents is consistent with their lack of scale and measurements.

[141] In interpreting this commercial lease the court proceeds on the assumption that the parties intended to achieve a commercial result and seeks to construe the contract to avoid it making commercial nonsense or causing commercial inconvenience. I can objectively see that the purpose for writing "cancelled" on the Annexure "A" was not because the parties had chosen to identify the caretaker's residence in another way and was not because the parties had agreed that there would be no residential use. The purpose was because the plans incorporated in Annexure "A" had no measurements and were not drawn to scale. The objective intention of the parties to the lease as to the position of the caretaker's residence is discerned by reference to the Cardno plans showing accurate plans for the first and second floors and also by reference to the Annexure "A".

[142] The plaintiff also submitted that the defendants knew which part of the premises they were entitled to use. The defendant's belief about the part of the building which was the caretaker's residence is irrelevant to the interpretation of the lease. The document must be interpreted according to its terms rather than according to the belief of the defendants. But it is an unsurprising coincidence that upon a proper interpretation of the lease, the caretaker's residence is precisely where Mr Aulsebrook thought it was. It is clear by looking at Annexure "A' in the lease and

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87 Defendants' submissions page 24.

the other plans in the lease that when interpreting the lease Annexure "A" should be read to show where the caretaker's residence is intended to be.

[143] I reject the submission that "there is no certainty as to which areas the First Defendant or the Second or Third Defendant through it could occupy as its residence" and the submission that the lease is void as a result.

Is the lease void for uncertainty about carparks?

[144] The defendants submitted:

(f) Further, despite the First Defendants right under its lease to use the carparks in the manner it was permitted to under its lease, Exhibit 5, Clause 8.l(a) Deane produced new plans on 14 December 2016;

(g) The Deane altered plans are identified at Exhibit 60 p323 and do not resemble the cancelled car plans attached to the Lease, dated 14 December 2016;

(h) At Exhibit 60 p320-322 on 14 December 2016, Deane questions the First Defendants car parks referring to a letter from the Plaintiffs Solicitors Rouse Lawyers dated 6 October 2016, which had previously been addressed by the First Defendant with the Plaintiffs Agent Beacon in October 2016; and

…

(v) The First Defendant, and the Second and Third Defendants through it occupied the premises at 8 Byres St, Newstead QLD 4006 and 1/8 Byres Street Newstead QLD 4006, under the terms of a commercial lease dated 29 September 2015, and also a Residential Tenancy Agreement signed in or about August 2014, which did not expire until July 2019 which enabled the Defendants use of the premises as follows:-

…

(ii) Rights to use the car parks defined in the Commercial Lease and the Residential Tenancy Agreement;

(iii) The Plaintiff knew at all material times which of the four onsite carparks and the BCC Parking Permits and the manner all the tenants used the loading bay (in de-facto) the First Defendant and through it the Second and Third Defendants were entitled to use;

(iv) The Plaintiff contends the Defendants asserted a right to use a fifth car park, and the Plaintiff has failed to establish the fifth car park, there were at all material times only five (5) designated car parks on site, and a 2 minute loading bay. 4 car parks were used by the First Defendant, with the other one used by1300 Loveit in their CTA. All tenants used the 2 min Loading bay;

…

the Plaintiff challenged the car parks the Defendants were permitted to use in accordance with the lease at clause 8.1 (a); The First Defendant used the car parks in the manner it thought it was entitled to enjoy with its tenancy when it first signed the lease, however

By the Plaintiffs conduct following settlement on 1September 2016, one of the first steps the Plaintiff did as Landlord was to set about and change the car parking arrangements afforded to the Defendants, the Plaintiff through its various Agents, and Solicitors offered other tenants in the building such as 1300 Loveit Pty Ltd who only had the use of one car park in their CTA, an additional car park used by the First Defendant for a Fee of $500.00 plus GST, a car park the Plaintiff had no right to treat with or derive any financial gain from to the direct benefit of the Plaintiff;

The surviving plans do not identify what areas in the lease that the First, Second and Third Defendants could use as the residence and identify the carparks the First Defendant was permitted to use ;

[145] Among other things the plaintiff submitted:

24. The Defendants also assert the Lease is void for uncertainty because the car parks available for use were not properly described. Again, this is wrong. The car parks are clearly designated at p 37 of the Lease. …

25. The undated plans the Defendants tendered that are exhibits 40 and 41 seem to show some discrepancy about which car parks the Defendants could use, but this does not matter. Clause 8.1 of the Lease says the First Defendant was entitled to use the Car Park. Car Park is defined at clause 1.1 as being '*4 onsite car parks*

> …'. On the terms of the Lease, it does not matter which four car parks the First Defendant was entitled to use.

[146] I need not rule on the defendants' submission that the plaintiff offered $1300 Loveit Pty Ltd an additional car park used by the lessee. It is not an issue raised in the defendants' pleadings. At best for the defendants, if it had been raised in the pleadings and if evidence of it had been received during the trial, it may have been relevant to another issue which was not raised, namely, whether the plaintiff had caused loss and damage to the lessee for breach of the terms of the lease. However, the issue raised by the defendants at paragraph 8 of their amended defence was different. It was not about whether there had been a breach of contract by the plaintiff. It alleged:

> 8. The part or parts of the Premises that the First Defendant was entitled to use as a Car Park, and in respect of which it was granted exclusive occupation pursuant to clause 8.1(a) of the Lease were not identified, at all or with reasonable certainty.
> 9. In the premises of paragraphs … 8, the Lease was void for uncertainty and incompleteness.

[147] The defendants' reference in their submission to "cancelled car plans attached to the Lease" is a reference to a "Building Car Parking Plan" attached to the registered lease.[88] That plan carries the word "Cancelled" written across it. The cancellation of that floor plan occurred in the same way in which the seller and the lessee had responded to a requisition from the Department. They withdrew, initialled and marked as cancelled this and four other plans in the registered lease which are marked as "illustration purposes only/not to scale".

[148] The defendants' submission that the plaintiff contends the defendants asserted a right to use a fifth car park is not matched by any allegation in the pleadings. So far as the plaintiff is concerned, the issue relating to car parks is an issue about the interpretation of the Lease to determine whether it is void for uncertainty.

[149] The defendants submit that "4 car parks were used by the First Defendant". They submit that onsite there were five designated car parks and a loading bay.

[150] The defendants' submissions do not maintain the argument raised by their amended defence at paragraph 8. On the contrary, the defendants submit that the plaintiff knew which of the four onsite car parks the lessee was entitled to use. The defendants themselves make submissions consistent with the premise that the lessee's right under the lease was identifiable and was being interfered with by the plaintiff.

[151] I accept the plaintiff's submission that by a combination of clauses 8.1 and 1.1 the lessee had an entitlement to use four onsite car parks and that on the terms of the lease it did not matter which four the lessee used.

[152] I am not satisfied that the lease was void for uncertainty about car parks.

Did the lessee repudiate the lease by breach of clause 5.2 of the lease?

[153] The plaintiff submits that it relies on the lessee's conduct in moving out in the week commencing 6 February 2017 as evidence of the lessee's repudiation of the lease.

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88 Exhibit 5 marked at the bottom right hand corner as page 438.

To better understand the substance of that submission, one can read the amended statement of claim at paragraphs 11 and 12. The plaintiff there alleged:

> 11. Further, during the week commencing 6 February 2017, the First Defendant's representatives began moving property out of the Premises in a clear indication that the First Defendant no longer intended to be bound by the terms of the Lease, which required, inter alia, the First Defendant to carry on its operations from the Premises competently, efficiently and in a reputable manner pursuant to clause 5.2 of the lease.
>
> 12. The First Defendant's actions in removing the property from the Premises in the face of the Notice to Remedy amounted to a repudiation of the Lease by the First Defendant.

[154] For the allegation that the defendant has repudiated the lease by a breach of clause 5.2 of the schedule to the lease the plaintiff bears the onus of proof. By its submissions[89] the plaintiff implies that the factual issues are whether the lessee had moved from the building or whether the lessee was using the building to trade.

[155] A reference to clause 5.2(a) and to paragraphs 11 and 12 of the plaintiff's amended statement of claim demonstrates:

1. clause 5.2(a) does not expressly prohibit the lessee from vacating the building;
2. clause 5.2(a) does not expressly require the lessee to trade continuously from the building or to trade at all from the building;
3. the plaintiff has not alleged that there is an implied term in the lease that the lessee must trade only from the building or continuously or that it may not remove its chattels from the premises.

[156] The terms of the lease did not require the lessee to use part of the premises as a residence. On the contrary, the lessee was prohibited from using the premises as a residence other than the area identified as a caretaker's residence. The lessee was at liberty to use those parts of the premises as a residence, but it was under no obligation to do so. It was at liberty to use them for any other lawful purpose. The parts identified as the caretaker's residence occupied less than half of each of two of the three floors. By my rough calculation, it approximated a little less than one third of the interior of the building. The space taken up by the caretakers' residence can be seen also at the plans annexed to exhibit 37. Those plans show that the caretaker's residence takes up 131m^2 of a total of 442.1m^2.

[157] There was no exploration in the trial of the issues of whether the lessee was carrying out its operations competently or efficiently or in a reputable manner. That was the trio of requirements found in clause 5.2(a) of the schedule to the lease.

[158] I am not satisfied that it would be a repudiation of the lease for breach of clause 5.2(a) for the lessee to remove all or most of its chattels from the building and the land or for the lessee to discontinue trading in the building or on the land or for the lessee to do both. Mr Aulsebrook could have carried on the business of the lessee elsewhere. There was no evidence that he would have been incompetent, inefficient or disreputable if he had tried to conduct the operations elsewhere.

[159] I may be incorrect in finding that to discontinue trading in the building was not a repudiation. Accordingly, it is necessary to consider whether the lessee had discontinued trading at the building.

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89 Plaintiff's submissions paragraphs 49-60.

[160] I accept the evidence of Mr Auselbrook that he was still trading at the building on 10 February 2017. There remains the possibility that Mr Auselbrook intended to permanently discontinue trading at the building at some time or date after 5.00 pm on 10 February 2017. But the plaintiff did not allege that as an issue and Mr Auselbrook was not required to give evidence about that possibility.

[161] I am not satisfied that the lessee repudiated the lease by breach of clause 5.2(a) of the schedule to the lease before the plaintiff purported to terminate the lease on 10 February 2017.

Did the notice to remedy breach fail to comply with s124 of the Property Law Act 1974?

[162] Alleged deficiencies of the notice to remedy breach are set out in paragraph 40 of each defendant's amended defence. The deficiencies alleged in those three pleadings are:

(i) It did not particularise the amount claimed to be owing with respect to each of the covenants in the lease alleged to have been breached by the lessee;

(ii) Alleged that the lessee had failed to pay electricity charges when none were in fact owing under the lease;

(iii) Further or alternatively failed to provide particulars of the amount claimed to be owing with respect to electricity charges sufficient to enable the lessee to determine the amount claimed with respect to such costs;

(iv) Failed to provide particulars of the alleged failure to pay to legal costs sufficient to enable the lessee to determine the amount claimed with respect to such costs in circumstances where the lessee's only obligation was to pay the reasonable costs of the Plaintiff;

(v) Failed to particularise the amount claimed for monthly rental or the period to which such rental related;

(vi) Failed to particularise the amount claimed for outgoings or the period to which such claim related;

(vii) Made claim for a global amount which did not permit the First Defendant to determine on the face of the notice how the amount claimed was calculated by reference to the breach of covenants alleged in the notice;

(viii) Did not enable the lessee to understand what the lessee was required to do in order to remedy each of the breaches of covenants alleged in the notice;

(ix) In the premises was not in accordance with the approved Form 7 pursuant to section 124(8) of the PLA.

[163] The defendants included in their submissions seven other alleged deficiencies in the notice, namely that:

1. The plaintiff failed to consider the *Residential Tenancies and Rooming Accommodation Regulation 2009 (Qld)* (RTRAR) when issuing the notice;
2. The notice used the incorrect ACN for the plaintiff;
3. The ACN of the lessee was not included;

4. The notice failed to describe the lessee's capacity as trustee under instrument 71082626;
5. The lessee was not in breach because of the security deposit it had paid;
6. Ms Brooks was not sent an email;
7. The letters were signed by Ms Huggins who was not called to give evidence.

[164] Further, the defendants pleaded one argument to refute that 14 days was a reasonable time within which to remedy the breach and added a second argument in submissions. Those arguments are:

1. A reasonable time for compliance with the notice was more than 14 days from the date of service because the lessee could not be satisfied of the payment required to discharge its obligations pursuant to each of the covenants identified in the PLA notice until proper particulars of the each of the amounts claimed were provided by the plaintiff
2. The close of business on 13 February 2017 was not before midnight.

[165] The defendants also submitted that if the court finds there was service of the notice by email on 27 January 2017 it would be invalid because of the plaintiff's noncompliance with correct procedures specified in clause 17.6 of the special conditions of the lease. The notice allegedly sent on 27 January was submitted to be ineffective because clause 17.6 does not provide for notices by email. The mode of service of the notice received by letter on 30 January was accepted by the defendants as being a proper mode.

[166] Section 124 of the Property Law Act 1974 provides so far as is relevant:

> **124 Restriction on and relief against forfeiture**
>
> (1) A right of re-entry … under any proviso or stipulation in a lease, for a breach of any covenant … in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice—
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) in case the lessor claims compensation in money for the breach, requiring the lessee to pay the same;
>
> and the lessee fails within a reasonable time after service of the notice to remedy the breach, if it is capable of remedy, and, where compensation in money is required, to pay reasonable compensation to the satisfaction of the lessor for the breach.

[167] I reject the submission that service of the notice by email is invalid. Clause 17.6 of the special conditions of the lease uses the word "may" in respect of sending by post and by facsimile. I contrast the use of the word "must" in respect of the need to be in writing. I find that the lease does not prohibit service of a notice by email. If the plaintiff can prove that the emailed notice was served on the lessee, the fact that

service was by email will not invalidate that service. For reasons given above, I am satisfied that the notice was received by the lessee by email on 27 January 2017.

[168] I do not accept the defendants' submissions that the notice was invalid because the lessee's ACN was omitted, because Ms Brooks was not sent an email, because the letters were signed by Ms Huggins who was not called to give evidence, because the notice failed to describe the lessee's capacity as trustee or because the plaintiff's ACN was incorrect in one of its integers. Those matters are not requirements of the *Property Law Act* for a notice given under section 124.

[169] The defendants' submission that the plaintiff failed to consider the RTRAR when issuing the notice was not explained. I am not satisfied that a failure to consider the RTRAR invalidated the notice to remedy breach. If there is a factual premise for legal arguments about the RTRAR, I assume it is that the premises were intended to be used mainly as a place of residence. The defendants would bear the onus of proof of that fact. I am not satisfied of this fact. I am not satisfied that the lessee was obliged to use the premises as a residence, for reasons explained above. If the lessee elected to use part of the premises as a residence, its liberty to do so was a liberty to use less than a third of the area of the building as a residence. That proportion of the area of the building makes it difficult to support the argument that the building was used mainly as a place of residence. Save for evidence of the area of the caretaker's residence, there was no exploration by either side of the factual premise that the building was mainly used for residential purposes.

[170] The notice referred to several covenants including the covenant to pay electricity charges pursuant to clause 3.1 of the lease and the legal costs in accordance with clause 3.10 of the lease. If the obligation to pay electricity charges had arisen it would have been pursuant to clause 3.11 (not 3.1) of the schedule to the lease.

[171] The allegation that the notice "made claim for a global amount which did not permit the First Defendant to determine on the face of the notice how the amount claimed was calculated by reference to the breach of covenants alleged in the notice" is accurate. I am not satisfied that it rendered the notice invalid.

[172] In fact, the sum of $18,353.64 compensation demanded was an amount appropriate for breach of the covenants to pay rent, outgoings and GST. That sum included nothing under covenants about electricity charges or legal costs. The amount was identical with the three consecutive monthly invoices for rent, outgoings and GST which Mr Aulsebrook had received in October, November and December. The history of those invoices and the demand for an identical amount created an objective appearance that the amount claimed was for the rent, outgoings and GST which had been the subject of the Retailspace invoice delivered in December and the Beacon Invoice delivered in December each of which were for the rent outgoings and GST payable in advance on 26 December 2016. Mr Aulsebrook accepted that when he received the notice he knew the amount stated in the Notice to Remedy was the same as the amount that had been claimed in those invoices. Mr Aulsebrook gave evidence that his issue with the notice was whether for rent, outgoings and GST the lessee then owed $18,353.64. The plaintiff adverted to these matters in its submissions and I accept the accuracy of them. But section 124 describes what is to be in a notice as opposed to what a lessee must know. The contents of the notice, rather than the state of mind of Mr Aulsebrook as the lessee's director, are to be analysed.

[173] The claim for a global amount of $18,353.64 did not permit the lessee to determine on the face of the notice how the amount claimed was calculated by reference to the breach of each covenant alleged in the notice. But the section does not expressly require that. In a case where a lessee requires compensation, the section requires that the notice state that the lessee is required to pay the compensation. The section implies that the plaintiff must specify the compensation to be paid. It is a step too far to imply that the section requires that the notice specify the compensation required for each covenant allegedly breached. That requirement does not appear expressly in the section. Such a requirement would be very proscriptive for a lessor. If the legislature intended such a requirement it would have expressed that intention more clearly.

[174] The notice correctly specified the three covenants whose breaches the plaintiff had good grounds to complain of, notwithstanding that it nominated two other covenants as well. The notice specified the compensation to be paid.

[175] Section 124 relevantly requires that the notice specify the particular breach complained of and the compensation claimed. The notice complied. It was not an invalid notice.

Was the time after service of the notice to remedy the breach a reasonable time?

[176] Service was on 27 January 2017. What is reasonable depends on the circumstances. The breach was capable of remedy merely by payment of money. That is relatively easily done, for example by electronic transfer. The quantum was not disproportionate to the obligation to pay which the lessee should have anticipated. The quantum was the amount due monthly and was identical with the amounts demanded in October, November and December 2016. I contrast this obligation with one in a mortgage agreement which commonly makes the entire loan repayable upon failure to pay one monthly repayment. The sum required was 32 days overdue when the notice was served by email. Further, the lessee should have been in funds to pay the compensation demanded bearing in mind that it had an obligation to pay an identical amount on 26 January 2017 which it also failed to pay. Payment by close of business on 10 February allowed reasonable time to assemble the sum and pay, whether service was on 27 January as I find, or whether it was on 30 January as the defendants submitted.

[177] I reject the submission that close of business is midnight on 10 February 2010. It was 5.00pm. Mr Aulsebrook was not confused by the notice. Mr Aulsebrook gave evidence that when he saw Mr Deane arrive with a locksmith at 5.00pm he thought it might happen.

[178] I am satisfied that the plaintiff gave the lessee a reasonable time within which to remedy the breach and that the notice was not invalid for failure to give the lessee a reasonable time.

[179] Was $18,353.64 due?

[180] The defendants raised no issue in their defences,[90] evidence or submissions about the accuracy of the claim in the invoice for rent, subject to their arguments about

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[90] Amended statement of claim pars 8 and each defendant's amended defence par 38(f).

enforceability of the lease and the payment of the security deposit and alleged mistaken overpayment of security deposit. The one exception is that the defences seemed to set up the basis of an argument that the lease was a residential lease and that the lessor was, in that circumstance, prohibited from claiming for outgoings. The submission was not made. The premise for the argument was not established. I am not satisfied that this commercial lease was a residential lease.

[181] At trial the defendants were keen to expand the issues to run an argument that the outgoings paid by the lessee had been too high with the consequence that the amount claimed by the plaintiff in the notice to remedy breach had been too. I refused to permit those new issues to be introduced. The lessee's obligation to pay a proportion of outgoings and other charges was provided for in clause 3 of the schedule to the lease. The terms of clause 3.1 permitted the lessor to give the lessee an estimate of outgoings and the terms of clause 3.2 required the lessee to pay the estimated outgoings contribution by equal monthly instalments in advance. The lessor was obliged at the end of the financial year to give the lessee an account of the actual outgoings[91] and an obligation to thereafter make an adjustment was provided for by clause 3.5 of the schedule to the lease, in the event that actual outgoings differed from the estimate and established that the lessee had paid too much or too little. It follows that, subject to the defendants' arguments, the plaintiff as lessor was at liberty to issue to the lessee a tax invoice for outgoings monthly in advance and that the lessee was obliged to pay outgoings on account monthly in advance. It follows that if the outgoings paid by the lessee on account exceeded actual outgoings, the lease provided a mechanism for the lessee to be refunded the excess or to have it credited against future outgoings. The terms of the schedule to the lease contemplated that if any such adjustment was required, it would occur after a statement of actual outgoings was provided by the plaintiff to the lessee at the end of the financial year.

[182] The defendants did not plead a defence that or argue that the plaintiff had failed to give the lessee its estimate of outgoings or that the monthly claim for outgoings was inconsistent with a lessee's estimate of outgoings.

[183] That protocol for paying outgoings had a practical consequence. The lessee had an obligation to pay outgoings monthly, subject to its right to seek an adjustment at a later date. The lessee's right to seek an adjustment in respect of outgoings was capable of exercise on receipt of the statement of actual outgoings after the end of the financial year, but not before.

[184] Mr Aulsebrook acknowledged that process in his email to Mr Deane on 20 December 2016, although he then wrote as if he contemplated that any adjustments to outgoings would be done in May 2017.

[185] About GST, the defendants submitted[92] only that the notice to remedy breach of covenant failed to identify what the quantum was for the goods and services tax in the global sum of $18,353.64. That submission correctly recites a fact about the notice. It is not a defence against the lessee's obligation[93] to pay GST. The defendants made no submission about the quantification of GST or preconditions for its liability to pay.

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91 Exhibit 5 schedule to the lease clause 3.4.

92 Defendants' submissions page 15 at (xxxi) and page 18 at (l).

93 Exhibit 5 schedule to the lease clause 3.12.

[186] I am satisfied that rent in the sum of $14,162.50 and outgoings in the sum of $2,522.63 were payable in advance on 26 December 2016 for the period 26/12/16 to 25/01/17. I am satisfied that the lessee was liable to pay GST on those items in the amounts claimed in the tax invoice bringing the total to $18,353.64.

[187] I am satisfied that the sum claimed was due. In making that finding, I rely upon my findings above that the plaintiff was not obliged to apply the security deposit to payment of the demand and that any adjustment in respect of outgoings was to be made at the end of the financial year. The lessee's demand for payment of $18,353.64 was reasonable.

Failure to mitigate

[188] The defendants submitted that the plaintiff failed to mitigate its loss. The defendants did not submit how this occurred. The defendants bear the onus of proof that the plaintiff failed to mitigate its loss. There was no evidence led for the defendants critical of the plaintiff's conduct in marketing or maintaining the premises.

[189] I am satisfied that the plaintiff's conduct since 5.00pm on 10 February 2017 in respect of taking steps to mitigate its loss was reasonable. That conduct is set out in the chronology of factual findings above from 10 February 2017 to August 2018.

Loss and damage

[190] The lessee failed to pay the plaintiff for rent, outgoings and GST due and payable in advance on 26 December 2016 and 26 January 2017. Those sums are $14,162.50 for rent, $1,146.25 for GST on rent, $2,522.63 for outgoings and $252.26 for GST on outgoings for the period 26/12/16 to 25/01/17 and identical amounts for the period 26/01/17 to 25/02/17. The total including GST is **$36,707.28.** I find it is payable as **money owing pursuant to the lease**.

[191] The lessee's obligations pursuant to the lease included the obligation to pay 83% of the expenses payable by the landlord in connection with the land or the building.

[192] If the lease had not been terminated on 10 February 2017, I am satisfied that the plaintiff would have been entitled to receive for rent and outgoings pursuant to the lease further sums as follows:

1.	Rent - 26/03/17 to 25/09/17 - $14,162.50 x 6	= $84,975.00
2.	Outgoings - 26/03/17 to 25/09/17 - $2,522.63 x 6	= $15,135.78
3.	Rent 26/09/17 to 25/09/18	$175,048.50
4.	Outgoings - 26/09/17 to 25/09/18	$30,271.56
5.	Rent 26/09/18 to 25/09/19	$180,299.96
6.	Outgoings 26/09/19 to 25/09/20	$30,271.56
7.	Rent 26/09/19 to 25/09/20	$185,708.96
	Total	$701,711.32

[193] In respect of its damages claim, the plaintiff has not included a claim for GST on the amounts it would have received as rent and outgoings. It did not seek to be indemnified pursuant to clause 13.4 of the schedule to the lease but claimed damages instead.

[194] The sums for rent in the table above increase each September because of the 3% per annum rent review to which the plaintiff would have been entitled under the lease.

[195] The sums for outgoings in the table above remain static in spite of the probability that they would increase with time. I accept the evidence of Mr Deane that outgoings generally rise 3% to 4% per annum. Further, I note that the outgoings for the period 1 July 2017 to 11 April 2018 were such that the lessee's agreed contribution of 83% would have justified a claim for those months of almost $3,600 per month, before adding more for GST. I regard the plaintiff's assumption in the above table of static outgoings of $2,522.63 per month as modest and find that the combined figures for outgoings to 25 September 2020 are reasonable.

[196] That sum of $701,711.32 is a combination of money which the plaintiff has failed and will fail to receive because of the lessee's repudiation of the lease and the plaintiff is entitled to be compensated for those losses subject to deductions from that sum on account of:

1. rent and contributions to outgoings which the plaintiff has received since 10 February 2011 for letting any of the space which the lessee had rented pursuant to the lease;
2. rent and outgoings which the plaintiff will receive if it lets the space in future;
3. the accelerated receipt of sums payable in respect of the period from 27 May 2019 to 25 September 2020.

[197] The lessee had been subletting part of its space on the second floor of the building to Alchemy. The plaintiff has received rent and outgoings from Alchemy for its use of space which the lessee was entitled to occupy under the lease.

[198] The plaintiff received money for rent and outgoings from Alchemy from 11 February 2017 and was still doing so at the time of trial. The rent and outgoings received from Alchemy until the hearing were at the rate of no more than about $1,658.33 per month. The number of months between 11 February 2017 and 25 September 2020 is 43.5. At $1,658.33 per month the plaintiff may receive as much as $72,137.35 by 25 September 2020. The plaintiff submitted that that the damages should be assessed on the assumption that the plaintiff would receive rent and outgoings from Alchemy at the same rate for 43 months but that the amount notionally to be received from Alchemy should be discounted by 30% for vicissitudes. Such a discount would increase the plaintiff's damages. I assume the submission implies that there is a risk that Alchemy will leave. There are also the possibilities that Alchemy will stay for the entire term or that another tenant will take its space or the vacant space on the first floor or rent the entire building. I call those matters possibilities because past history and the opinion of Mr Deane each support the probability that the space unlet at trial will remain unlet until September 2020. I propose to reduce damages on the assumption that the space let at the date of the hearing will continue to be let at much the same rates. The plaintiff also received, after expenses, $1,000 from using space for Airbnb letting. It follows that in calculating the amount of rent and outgoings which the plaintiff has failed to receive and will fail to receive because of the lessee's repudiation, the total will be reduced by $73,137.35 to an amount of $628,573.97.

[199] The parties made no submissions in respect of the discounting on account of early receipt of 16 months of future losses. The component of $701,711.32 for rent and outgoings which relates to the sixteen month period from 27 May 2019 to 25

September 2020 is about $276,080.52. Hypothetical future earnings on account of the possibility of continuing to receive rent and outgoings for 16 months at about $1,658.33 per months is about $26,533.28. $276,080.52 future rent and outgoings from the lessee foregone less $26,533.28 future rent and outgoings to be received results in about $250,000 for future losses.

[200] It is appropriate when assessing a lump sum as damages to compensate for the plaintiff's future losses that the sum be discounted to account for its being received up to 16 months early. Projections for the monies which would have been received in respect of the period from 27 May 2019 to 25 September 2020 should be discounted to account for the receipt of $250,000 in June 2019 rather than over the course of the next 16 months.

[201] To account for early receipt of $250,000 of damages on account of future losses I reduce the component for damages for future losses by $10,000.

[202] I assess the plaintiff's **damage on account of lost rent and outgoings** past and future ($628,573.97-$10,000=$618,573.97) at **$618,573.97**.

[203] The plaintiff claims its **legal fees** of $837.35 and $8,588.98 being a total of **$9,426.33** incurred in **January and February 2017** in connection with the lessee's breach of the lease and the termination of the lease. They claim is justified under the special conditions of the lease at clause 13.4 against the lessee and at clause 14 against Mr Aulsebrook and Ms Brooks.

[204] The plaintiff paid **advertising and promotion fees** recoverable as damages being **$3,468** comprised of:

1. To Baker Property of $2,995;[94]and
2. Elders of $473.[95]

[205] The plaintiff incurred expenses to **Twin Tech Electrical** for cleaning up cables, removing the server cabinet and other work at Mr O'Brien's suggestion to make the premises easier to let. They were **$5,743** which was a loss caused by the lessee and is recoverable as damages.

[206] The plaintiff has the benefit of a **security deposit of $67,439.84**.

[207] The plaintiff is entitled to **damages in the sum of $606,478.74** comprised of:

1. $36,707.28 as money owing pursuant to the lease;
2. $618,573.97 damages for lost rent and outgoings;
3. $9,426.33 owing pursuant to the lease for legal fees or alternatively as damages for breach of lease;
4. $3,468 as advertising and promotion fees as damages for breach of lease;
5. $5,743 as damages for breach of lease; less
6. ($67,439.84) security deposit.

[208] The plaintiff incurred capital costs incurred in its attempts to mitigate loss. An example was the construction of a skylight. Capital costs were not claimed by the plaintiff and are not included in the damages.

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94 Exhibit 11.

95 Exhibit 15.

[209] The counterclaims are premised upon a finding that the plaintiff repudiated the lease. It did not. The counterclaims fail.

[210] The plaintiff also claims interest and costs.

[211] There were no submissions about interest. The claim in respect of interest is in the amended statement of claim at paragraph 17. It is a claim pursuant to section 58 of the *Civil Proceedings Act* from 2 March 2017. The court may order that there be included in the amount for which judgment is given interest at the rate the court considers appropriate for all or part of the amount and for all or part of the period between the date when the cause of action arose and the date of judgment. I abide by the plaintiff's election to seek interest only from 2 March 2017.

[212] The damages include a sum on account of future losses. Interest should not be allowed on damages for future losses. Excluding future losses, damages comprise about $366,000. It is appropriate to allow interest on past losses on the basis that about 7.5%pa interest is appropriate but that the rate should be halved to account for the fact that the losses were not all accrued when the claim was filed but accrued generally continuously over a period of almost 26 months since the claim was filed. I assess **interest in the sum of $29,000**. (3.75%pa x $366,000 x 26/12 = $29,737.50)

[213] Apart from the defendants' submissions for the benefit of all defendants that the lessee has defences against the plaintiff's claims the defendants did not submit that Mr Aulsebrook or Ms Brooks have defences to the claim against each of them that each of them is liable to the plaintiff as sureties for the lessee for any judgment which the plaintiff obtains against the lessee.

[214] They are liable as sureties.

[215] The plaintiff is entitled to judgment against the defendants in the sum of $635,478.74 inclusive of interest.

[216] I will hear the parties in respect of costs. Ordinarily, the costs should follow the event and be assessed on the standard basis. That would mean that the defendants should pay the plaintiff's costs of the proceeding on the standard basis. The plaintiff's submissions contain a submission that the plaintiff reserves its right to make submissions on costs pending the outcome of the trial and a submission that the plaintiff is entitled to indemnity costs because the lessee vacated the premises without good reason and relied upon legal arguments doomed to fail.

[217] I have not found that the lessee vacated the premises.

[218] The defendants' arguments were generally weak. Some of the defendants' arguments were plausible. I am not yet satisfied by the plaintiff's submissions that indemnity costs are appropriate.