**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1289/2018

## CATCHWORDS

**Sale of business involving transfer of leases of retail premises**; claim for rectification of contract; mutual claims of repudiation; dependency and concurrency of the obligations of each party on settlement; readiness of applicant to perform its own obligations under the contract; separate claim by vendor or breach of a management agreement; findings made regarding repudiation and breach of the management agreement; further hearing to be held regarding assessment of damages and costs

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| **APPLICANT:** | Beaumont Kew Hotel Pty Ltd (ACN: 167 512 825) as trustee for Beaumont Kew Unit Trust |
| **FIRST RESPONDENT:** | APlus Capital Pty Ltd (ACN: 607 163 806) as trustee for APlus Management Trust |
| **SECOND RESPONDENT:** | Yixing Yang |
| **THIRD RESPONDENT:** | Ximeng Zhao |
| **FOURTH RESPONDENT:** | Robert Dunstan |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Member C Edquist |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 30 July 2019 |
| **DATE OF ORDER:** | 19 December 2019 |
| **CITATION** | Beaumont Kew Hotel Pty Ltd v APlus Capital Pty Ltd (Building and Property) [2019] VCAT 2006 |

## ORDERS

1 The Tribunal declares that the applicant lawfully terminated the sale of business contract made between it and the respondent on or about 23 November 2016 and varied by a supplemental deed.

2 The Tribunal declares that the respondent breached the management agreement made between the parties dated 6 January 2017.

3 The Tribunal, noting that there will be a further hearing concerning assessment of damages and costs and reimbursement of fees, directs the parties to file and serve by **17 January 2020** short submissions addressing:

a. the matters to be determined at the further hearing; and

b. the estimated length of the further hearing.

C Edquist
**Member**

## APPEARANCES:

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| For Applicant | Mr I Virgona, of counsel |
| For Respondents | Mr J McKay, of counsel |

## REASONS

## THE PARTIES AND THE AGREEMENTS

1 In Studley Park Road, just up the hill from Kew Junction in Melbourne, is a short-stay accommodation business known as Quality Suites Beaumont Kew. From the middle of 2014 until late 2016 the business was run by Beaumont Kew Hotel Pty Ltd.

2 On 23 November 2016 Beaumont contracted to sell the business to APlus Capital Pty Ltd. The sale of business contract (**the contract**) was initially conditional, while APlus undertook due diligence. It was amended shortly after by a supplemental deed which dealt with arrangements for Beaumont's proposed exit from a franchise agreement it had with Choice Hotels Australasia Pty Ltd (**Choice**).

3 The contract became unconditional by Christmas, and settlement was planned for January in the new year. A transitional agreement was reached that Beaumont would proceed with transfers of some of the leases that were part of the assets of the business on the basis that a director of APlus or her nominee would be appointed as manager and take full control of the business on 16 January 2017. If there was any issue with APlus's bank, or the transfer of leases, the balance of 50% of the total purchase price (stated to be $425,000) was to be placed into a trust account on 16 January 2017. A condition of this transitional arrangement was that the parties would enter into a formal management agreement deed, to be prepared by Beaumont's solicitors.[1]

4 The parties entered into a formal management agreement dated 6 January 2017 (**the management agreement**) under which APlus became entitled to manage the business until the completion date under the contract. The manager was entitled to occupation of the premises, stock and plant of the business, and was to be entitled to 100% of the revenue and profit of the business during the term of the management agreement, to Beaumont's complete exclusion. The manager was also be liable to pay 100% of the expenses of the business during the term.

5 The management agreement did not refer to any further tranche of the purchase price payable under the contract being paid, but it is common ground between the parties that further monies were paid in several instalments over January 2017.

6 Settlement had still not occurred by April 2017. It had become clear by this time that the contract had been imperfectly drawn and that there were several impediments to its completion.

7 One impediment was that two leases had not been included in the schedule of leases appended to the contract.

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[1] The agreement was evidenced by an emails from APlus's solicitor dated 22 December and a response from Beaumont's Jiang Zhang dated 23 December 2016

8 Another impediment related to Owners Corporation PS423870, which controlled common areas in the building in which the business was located. Beaumont had occupied those common areas including the office and the reception area under an agreement with the Owners Corporation (the licence agreement).

9 Ultimately, that licence agreement was not transferred. A stalemate developed. In July 2018 Beaumont purported to terminate the contract. Much later, APlus also purported to terminate the contract.

## THE THREE VCAT PROCEEDINGS

10 Beaumont initiated this proceeding in September 2018, and APlus counterclaimed. The Owners Corporation initiated a separate proceeding against Beaumont (OC 242/2018) and Beaumont brought APlus into that action. APlus brought its own proceeding against the Owners Corporation (OC 1849/2018) and Beaumont was joined in that proceeding.

11 The three proceedings were listed for hearing together on 18 June 2019. On the morning of the hearing, the proceeding initiated by APlus against the Owner's Corporation (OC 1849/2018) settled. The action between the Owners Corporation and Beaumont (OC 242/2019) also settled, but the claim brought by Beaumont against APlus in that proceeding remains on foot. The unresolved issue is which party carries the responsibility to pay licence fees to the Owners Corporation after 16 January 2017.

12 The present proceeding (BP 1289/2018) remains very much alive. The parties accept that once this dispute has been resolved by the Tribunal, orders can be made in the remaining dispute between Beaumont and APlus in OC 242/2019. The parties also agree that all issues of liability must be determined first, and that it was appropriate that there be a further hearing regarding quantum once liability issues have been resolved.

## THE HEARING

13 Beaumont acts as trustee for a unit trust. It is the corporate vehicle for a partnership between Mr Yixing (Darren)Yang, (the sole director of Beaumont), Mr Jiang Zhang and Mr Yao Chao Liu. Each of these partners gave evidence at the hearing. A fourth witness for Beaumont was Mr Sonny Wang, the accountant for the business. Mr Luke Virgona of Counsel appeared for Beaumont.

14 APlus is also a trustee for a trust. It represents the interests of Ms Ximeng (Evangeline or Eva) Zhao and her husband Mr Robert Dunstan. They gave evidence on the company's behalf. The company was represented by Mr James McKay of Counsel.

## THE ASSETS OF THE BUSINESS AND THE CONTRACT

15 The assets of the business operated by Beaumont included individual leases over 47 apartments, a lease over a commercial kitchen (**the S4 lease**) and a lease over a conference room (**the S5 lease**), and a licence agreement with

the Owners Corporation. The contact was in the form of a sale of business contract prepared by the applicant's lawyers. Under clause 5.2 of the contract, Beaumont was to transfer "the Business, the Assets and the Stock" to APlus not later than the "Date of Settlement subject only to encumbrances agreed to by the Parties". These capitalised terms were defined in the contract.

16 Critically, the assets were defined in schedule 1 as including Beaumont's rights pursuant to "the Lease", the plant and equipment, the business name, quotas and franchises, services connected with the "Business Premises" licences, permits, approvals registration necessary for the "Business", and "Vendors's intellectual property."

17 The Lease was defined as "The lease of the Business Premises, the particulars of which are specified in Schedule 3." This schedule in turn referred back to an attached lease summary which was annexed to schedule 1. Critically, this list of leases included 47 individual apartment leases, but did not include either the S4 lease relating to the kitchen nor the S5 lease over the conference room.

18 The plant and equipment referred to in schedule 1 were also listed in an attachment. Despite the fact that S4 lease and the S5 lease were not included in the schedule of leases, items of kitchen equipment and conference room equipment were listed in the schedule of plant and equipment.

19 Importantly, no particulars of any licence were given in schedule 1 or anywhere else in the contract.

20 The "Date of Settlement" specified in the particulars of sale in the contract was "30 days after the request for transfer of lease was sent by the Vendors to the Landlord". The context for this definition is to be found in special condition 12 of the contract, which is headed "The Apartment Leases". Under special condition.12.4, Beaumont was to provide to APlus an assignment of the "Apartment Leases" signed by the respective landlords and Beaumont together with copies of the respective leases and deeds of renewal, if applicable." The term "Apartment Leases" was not defined in the contract, but it is clear that it refers to the 47 individual apartment leases contained in the lease summary.

21 The "Price" was defined as the price in item 11, plus or minus adjustments. The price referred to was $1,250,000 exclusive of GST, of which a deposit of $150,000 had been paid.

### Imperfections in the drafting of the contract

22 A quick comparison of the description of the assets of the business and the contents of the contract is sufficient to identify some potential issues. Specifically, the contract did not expressly refer to the S4 lease nor the S5 lease and did not provide any particulars of the licence agreement with the Owners Corporation.

## BEAUMONT'S CLAIMS FOR RECTIFICATION OF THE CONTRACT, REPUDIATION, DAMAGES AND RESTITUTION

23 Beaumont contends:

a. that it is entitled to an order for rectification of the contract to include the S4 lease and the S5 lease;

b. once the contract is rectified, APlus's refusal to take a transfer of those leases constituted a repudiation of the contract, and that the repudiation has been accepted;

c. that APlus also repudiated the contract by terminating or purporting to terminate various of the apartment leases in late 2018;

d. it is entitled to damages for breach of the contract by APLus;

e. it is separately entitled to damages for breach of the management agreement;

f. as a fallback, Beaumont contends that it is entitled to restitution.

## APLUS'S DEFENCES

24 APlus contends:

(a) that it did not repudiate the contract and thereby justify Beaumont terminating the contract, as it was not required to take transfers of the S4 lease nor the S5 lease;

b. the contract only required Beaumont to transfer, and APlus to take, the leases and other assets recorded in the schedules to the contract;

c. by virtue of the parol evidence rule and the objective theory of contract formation, where the parties have reduced their agreement to a written form, the written terms prevail over terms outside the contract, unless the party seeking to rely on those terms can have resort to some equitable doctrine such as rectification, or some statutory provision, that prevails over the written contract ;

d. the contract cannot be rectified to impose upon APlus an obligation to accept the S4 lease and S5 lease due to a mutual or common mistake, as no such mistake existed;

e. rectification for unilateral mistake is not available in the circumstances, as it involves a finding of unconscionability against the defending party-*Casquash Pty Ltd v NSW Squash Ltd (No 2)*[2]

f. even if the technical elements of mistake and rectification are established by Beaumont, the remedy of rectification ought to be refused on the basis of laches or estoppel;

g. the alternative claim of repudiation on the basis that APlus purported to terminate some apartment leases is rejected;

[2] [2012] NSWSC 522 at [6].

h. even if the contract was rectified in the manner sought by Beaumont, Beaumont has not established that it was ready, willing and able to settle at the relevant time, or that it lawfully called for settlement at the relevant time, and its purported termination is accordingly ineffective;

i. in any event, it is entitled to restitution.

25 In addition, APlus asserts that it is the party that has lawfully terminated the contract due to Beaumont's repudiation, and that it is the party entitled to damages.

26 APlus's fallback position is that neither party has validly terminated the contract, and that the contract ended by implied mutual rescission or abandonment.

27 With respect to the management agreement, APlus says that it is not required to pay the licence fees, as Beaumont never conferred on it a lawful right of occupancy with respect to the office and the reception areas.

## HOW EVENTS UNFOLDED

28 Before I turn to an examination of the issues in turn, I set the scene further by examining events between the time the parties met and until shortly after Beaumont asserted that APlus had repudiated the contract in June 2018.

### The meeting on 27 September 2016

29 The parties agree that the first meeting concerning the sale of the business occurred at the premises between Jiang Zhang of Beaumont, Eva Zhou and the broker Amin Badawi[3] on 27 September 2016.

### The schedule of leases

30 After the initial meeting, Ms Zhou asked for a number of documents from the broker. She was provided with a copy of the rental schedule of the apartment leases and with some financial information about the business in previous financial years. When Ms Zhou received a schedule of leases to be included in the contract on 29 September 2016, it did not include the S4 lease nor the S5 lease.

### Heads of agreement 6 October 2016

31 The parties signed a document prepared by the broker described as "Binding Heads of Agreement Between Vendor and Purchaser" on 6 October 2016. Although that document was described as "binding" the only certain things appeared to be the subject matter, namely "Quality Suites Beaumont Kew", the price of $1,160,000, and the standard terms incorporated by reference. The equipmemt and the settlement date were to be agreed, and the offer was subject to finance and also subject to the purchaser being satisfied about a number of things.

[3] Amin Badawi was identified as Beaumont's selling agent/broker in the particulars contained in the contract. Ms Zhou referred to him as Amin Baldwin in her evidence, at Transcript at page 334 line 1 ([334/1]).

### The meeting on 18 October 2016

32 A meeting took place at Pablo Honey Bar in St Kilda on 18 October 2016 attended by Ms Zhou, Mr Dunstan, APlus's solicitor Mr Milicevic, Mr Jiang and Beaumont's solicitor Mr Cyngler, together with the broker Amin Badawi. Ms Zhou gave evidence that one purpose of the meeting was to discuss how the contract could proceed. One option was to sell the business by way of share transfer, "as that will save us a lot of hassle of the lease transfer, which has to be done independently with individual landlord…" [4] As the possibility of such a transfer needed to be checked, Mr Cyngler agreed to do this.[5]

### Provision of the S4 and S5 leases

33 On 19 October 2016 Mr Cyngler's firm provided under cover of 2 emails 4 different leases including unsigned versions of the S4 lease and S5 lease.

### The supplemental deed

34 After the execution of the contract in November 2016, but before the end of the year, the parties entered in to a deed which was expressed to be supplemental to the contract. The preamble indicates that Beaumont proposed to exit from its obligations under the franchise agreement with Choice upon APlus taking possession of the business. The deed recorded that Beaumont should cancel the franchise agreement with Choice by giving notice when settlement took place. The deed required APlus to pay a further amount of $100,000 against the purchase price which was to be retained in APlus's lawyers' trust account after the settlement date "for the sole purpose of payment of any liquidated damages arising from early exit from [Beaumont's] Franchise Agreement with Choice…"

35 It is to be noted that payment of this $100,000 brought the total amount paid against the purchase price to $250,000.

### The contract became unconditional on 22 December 2016

36 The intention of the parties was that the contract was conditional pending APlus getting finance approved by 12 December 2019 (special condition 6). During this period APlus carried out due diligence, as is apparent from correspondence passing between the respective solicitors.

37 On 15 December APLus's solicitors sent a further email to Beaumont's solicitor seeking an "extension of finance" to 19 December 2016.

38 On 22 December 2019 APlus's solicitors confirmed by email to Beaumont's solicitors that the contract was unconditional. This email went on to say that APlus was agreeable to the release of the deposit subject to four conditions, namely:

[4] Transcript [387/10-13].
[5] Transcript [387/17-19].

a. Beaumont agreed to proceed with the deed of transfer provided by Eva (Ms Zhou);

b. Eva (or nominee) is appointed as manager of the business on 16 January 2017 to take full control (including accounts, rights, liabilities) of the business including the financials until all leases are transferred;

c. If there is any issue with APlus's bank or transfer of leases, Beaumont will deposit the rest of the 50% of the total purchase price ($425,000) into the brokers trust account on 16 January, on the basis that these funds are to be released to Beaumont once the transfer of leases are all signed;

d. The deposit and any amounts paid into the trust account are to be refunded in full to APlus if settlement/purchase does not proceed.

39 On 23 December 2016, Jiang Zhang on behalf Beaumont sent an email directly to Eva Zhou confirming agreement to these conditions, subject to a management agreement, which was to be prepared by Beaumont's solicitor, if APlus could not get funds from its bank (NAB) on 16 January 2017.

### Transfer of management

40 The arrangement contemplated by the exchange of emails of 22 and 23 December 2016 was, broadly speaking, implemented. However, there must have been further negotiations, because an agreement was reached to the effect that APlus would be appointed as manager of the business on 16 January 2017, thereby enabling it to run the business and retain profits from this date, in exchange for a further instalment of the purchase price of $300,000 (not $425,000). This agreement was evidenced by an email from APlus's solicitors to Beaumont's solicitors dated 6 January 2017.

41 To confirm these arrangements, the parties on 6 January 2017 executed the management agreement under which Beaumont appointed APlus and/or its nominee as manager of the business from 16 January 2017 until the date of completion under the contract. APlus was to be entitled to 100% of the revenue and profit from the business during the term, to the complete exclusion of Beaumont. On the other side of the ledger, APlus was to approve, and be liable to pay, 100% of the expenses of the business during the term.

### Payment of outstanding rent

42 Jiang Zhang advised Ms Zhou by email dated 2 February 2017 that all rent had been cleared. The rent referred to was the rent payable under the apartment leases. Ms Zhou was requested to contact all landlords and request that they sign transfers. Ms Zhou replied on the next day that she was "currently working on each landlord".

### The emergence of problems

43 Signs that completion of the contract was in jeopardy had become apparent by 20 February 2017 when APlus's solicitors sent an email to Beaumont's solicitors raising a number of issues. Firstly, although APlus had been in possession of the business for more than five weeks, and at this stage a majority of transfers of individual apartment leases had been signed by the landlords, it was not clear whether mortgagees' consents to the transfer had been obtained. Secondly, APlus would not accept the business or any assets subject to PPSR registration or any other encumbrances. Thirdly, APlus was concerned about debts owed by Beaumont after settlement including franchise fees, water bills, agents commission and other unknown debts. Fourthly, a number of breaches of the supplemental deed were asserted.

### The S4 and S5 landlord comes into the picture

44 On 6 March 2017 Mr Wang on behalf of Beaumont wrote to Mr Dang Quach, a solicitor, requesting a copy of the "current lease agreement or sales of contract".

45 Ms Zhou explained that the context of this email was that about 10 days after she took over the business in January, the landlord of S4 and S5 called her asking for transfers of lease. It was this contact that prompted Ms Zhou to seek legal advice, and this ultimately led Ms Zhou to the realisation that the content of sale did not include the S4 lease and S5 lease. APlus declared its position on 11 April 2019.

### Beaumont's solicitor's email of 26 February 2018

46 The record discloses a significant gap in correspondence between solicitors after March 2017. On 26 February 2018, Beaumont's solicitors emailed the solicitors for APlus advising that Beaumont wished to finalise all matters, and proposed a settlement date of 28 February 2018.

### Beaumont's solicitor's letter of 22 March 2018

47 Beaumont's solicitors sent a letter to APlus's solicitors dated 22 March 2018 demanding payment of the outstanding settlement amount of $610,000 (calculated as $1,160,000 net sale price less payments received of $550,000) together with interest of $72,681.02. The letter enclosed a notice of default in respect of the contract. A notice in similar terms was sent directly to APlus by Beaumont's lawyers on the following day. This letter also enclosed the notice of default dated 22 March 2018 that had been sent to APlus's solicitors.

48 Beaumont then elected to drop the claim for interest. By a letter dated 18 April 2018, it sent a notice to complete to APlus. In the notice to complete, Beaumont represented that it had been ready, willing and able to effect settlement of the contract on 9 April 2018. APlus was put on notice that if it did not attend the settlement of the contract on 24 April 2018, Beaumont might accept APlus's repudiation of the contract.

### APlus's letter of 8 June 2018

49 APlus did not back down. On a June 2018, Ms Zhou emailed Beaumont's solicitors directly, bypassing her lawyer Mr Milicevic. This email referred to the purchase of the S4 and S5 premises by a new landlord, and to a new disclosure statement that in respect of each lease showed a different arrangement regarding outgoings to that previously in place. (The previous arrangement was that outgoings were not charged by the landlord.) APlus refused to take a transfer of the S4 lease and S5 lease unless the previous arrangement applied.

### Beaumont's notice of default dated 22 June 2018

50 Beaumont did not proceed to terminate the contract on the basis of the notice to complete dated 18 April 2018. However, it did send a further notice of default dated 22 June 2018, advising that unless stated defaults were remedied within five business days, the contract may be terminated by Beaumont.

### Termination

51 As Beaumont did not receive what it regarded as a satisfactory response, it served a notice of termination in respect of the contract and in respect of the management agreement on dated 27 July 2018. The notice of termination issued in respect of the contract was expressly based upon the notice of default dated 22 June 2018.

### APlus did not vacate the premises

52 Although it received these notices, APlus did not vacate the premises. On the contrary, it appeared to proceed as if the contract and the management agreement were both still on foot. For instance, on 8 August 2018 it put forward a proposal to settle on 20 August 2018 together with a proposal for settlement of the ongoing dispute about the transfer of the S4 and S5 leases Beaumont notified APlus on the same day that it was trespassing on the premises, and advised that proceedings were about to be issued.

## RECTIFICATION

### Rectification for common mistake

53 Beaumont's primary submission regarding rectification is that it is entitled to an order under the doctrine of rectification for common mistake, or common intention. The doctrine applies where the parties know of and share each other's intentions, but also share a mistaken belief or assumption that the written instrument purportedly recording their intentions corresponds with those intentions. Beaumont relies on the following passage from the decision of Croft J of the Supreme Court of Victoria in *Patrick Stevedores Operations (No 2) Pty Ltd versus Melbourne Port Lessor Pty Ltd*[6], at [38]

[6] [2016] VSC 528 (9 September 2016)

> The principles regarding the remedy of rectification are well settled, at least in general terms. A written document executed by the parties is presumed to be a true record of the parties' agreement. However, if there is clear evidence of a mistake in the recording of the parties' agreement, the equitable remedy of rectification is available to reform the parties' document. The rationale of rectification in equity is that it is unconscientious for a party to seek to apply the contract inconsistently with what that party knows to be the common intention of the parties at the time the written contract was entered into. A party seeking rectification must adduce "clear and convincing evidence" the actual or true common intention of the parties has failed to be embodied in the written contract. This may be satisfied by an outward expression of accord. However, it is not a requirement for a grant of rectification that there be an external manifestation of the parties' intention, provided that the party seeking rectification can prove that both parties shared the necessary common intention. The principles require that there must be an intention, common to both parties, to include in their bargain a term which, by mutual mistake, is omitted. That intention must prevail until the time of execution of the contract. (Citations omitted):

54 APlus acknowledges this principle, but highlights that "(T)he clearest and strongest proof of such an agreement or common intention must be adduced", citing *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd*[7]. It also asserts that the common intention must be manifested in the words and conduct of the parties, and in this connection refers to the decision of the Supreme Court of Victoria in *Re Streamline Fashions Pty Ltd*[8]

55 APlus contends that Beaumont has not proved common intention. Its primary point here is that "The evidence shows that APlus' directors did not intend to take an assignment of the leases for S4 and S5."[9] Certainly Ms Zhou confirmed that at the time the contract was created she did not understand that APlus was being asked to take a transfer of the S4 lease and S5 lease.[10] Mr Dunstan was also adamant that he did not know that there were leases applicable to lots S4 and S5 prior to 23 November 2016 (the date of execution of the contract).[11]

### Rectification for unilateral mistake

56 Beaumont's secondary submission is that if the Tribunal finds that APlus did not have the requisite intention to have the kitchen lease or the conference room lease included in the contract, it should find that Beaumont is still entitled to an order for rectification on the grounds of unilateral mistake. Beaumont relies on a decision of the Court of Appeal of

[7] [1981) 1 NSWLR 429.
[8] [1965] VR 418 420.
[9] APlus's written submissions, at [12].
[10] Transcript [398/18-22].
[11] Transcript for 31 July 2019 [7/10-14].

Victoria in *Leibler v Air New Zealand Ltd*[12], and in particular the following passage from the judgement of Kenny JA:

> If (1) one party, A, makes an agreement under a misapprehension that the agreement contains a particular provision which the agreement does not in fact contain; and (2) the other party, B, knows of the omission and that it is due to a mistake on A's part; and (3) lets A remain under the misapprehension and concludes the agreement on that mistaken basis in circumstances where equity would require B to take some steps or steps, depending on those circumstances, to bring the mistake to A's attention; then (4) B will be precluded from relying upon A's execution of the agreement to resist A's claim for rectification to give effect to A's intention.

## DISCUSSION

57 In order to form a view as to whether the parties had a common intention to include the S4 lease and the S5 lease in the contract, it is necessary to undertake a granular examination of the evidence.

### The meeting on 27 September 2016 revisited

58 Ms Zhou gave evidence that the first meeting concerning the sale of the business was on 27 September 2017. At this meeting she went to the property but she did not inspect the conference facility. She saw it only at a later meeting. [13] She also said that she did not look into the kitchen area but she knew it was connected to the dining area.[14] She deposed that she was not told that the kitchen of the conference room were subject to separate leases at this meeting.[15] On the contrary, she said that there was no mention of a lease with respect to the kitchen and the dining room areas. Furthermore, she said that the broker referred to the conference room and the kitchen as "common area".[16]

59 Mr Zhang, when asked about this, said "I can't remember".[17]

### The profit and loss statements

60 Ms Zhou was asked about the profit and loss statement she had been given by the broker. She confirmed that she had read it very carefully[18] and she relied on it when making the decision to purchase the business[19]. However, I consider this evidence sits uneasily with her subsequent evidence that only one quarter of the period covered by the profit and loss statement involved 47 leases. The bulk of the period covered by the profit and loss statement was concerned with the period in which the business involved 77

[12] [1999] 1VR 1
[13] Transcript [337/12-17]
[14] Transcript [336/4-6]. e
[15] Transcript [336/ 21-24].
[16] Transcript [336/21-27].
[17] Transcript [354/14-16].
[18] Transcript [346/2].
[19] Transcript [346/4-5].

apartments.[20] In these circumstances it is hard to understand how reliance could be placed on the profit and loss statement.

### The parties' respective states of knowledge as at 6 October 2016

61 Heads of Agreement were signed on 6 October 2016. Ms Zhou's evidence is that at this time she was not aware of the existence of leases concerning lots S4 and S5.[21] Later, she deposed that the kitchen/dining and conference facilities were part of the common areas.[22]

62 Mr Zhang's response to a question about his state of knowledge when he met Ms Zhou in late October or early November 2016, was that the kitchen and the conference room were not part of the common areas, but were subject to separate leases.[23]

### Ms Zhou's confusion about the leases received the day after the meeting at Pablo Honey Bar

63 The leases for S4 and S5 were sent to APlus on 19 October 2016. Ms Zhou gave evidence that she was "quite confused" when she received two emails from Beaumont's solicitors office because there were "four leases attached to the common property" and she was not sure what buildings they belonged to.[24]

64 I find this evidence unconvincing for the following reasons. The first email sent by Beaumont's solicitors on 19 October 2016 attached an LIV May 2013 standard form lease that was used for all units other than unit 119, together with a separate lease for unit 119 which had been prepared by Quest. Ms Zhou expressly acknowledged these leases in her evidence.[25]

65 The second email sent on 19 October 2016 by Beaumont's lawyers attached "Leases in relation to the Common Property". This statement might have been confusing, but the attached leases referred on their respective front pages to Lot S4 and Lot S5. Moreover, the permitted use of Lot S4 was "Restaurant and related usages" and the permitted use of Lot S5 was "Conference and Meeting Room". Ms Zhou confirmed in her evidence that she looked at the unsigned S4 and S5 documents and had further questions.[26] However, there is no written communication from her to Beaumont's solicitors raising any question. And when Ms Zhou's solicitor later on 19 October 2016 acknowledged receipt "of the leases", no questions were raised.

[20] Transcript [346//14-31].
[21] Transcript [345/15-16].
[22] Transcript [345/17-22].
[23] Transcript [355/10-16].
[24] Transcript [388/ 6-15].
[25] Transcript [387/25-27].
[26] Transcript [387/29-30 and 388/28-31 and 389/1-14].

66 Ms Zhou later deposed that it was because of her queries that "we went back during the due diligence period and had a chance to meet with Beaumont Kew's director, Darren Yang, who used to be the manager" [27]

## Ms Zhou's meeting with Darren Yang

### Ms Zhou's evidence

67 Ms Zhou gave evidence that there were multiple meetings in October 2016. The meeting at which the questions concerning the S4 and S5 leases occurred was with Darren Yang.[28] The date of the meeting was not stated. She deposed as follows:

> [W]hat has been said in that meeting is Darren Yang told me the reception area, office, dining room and the kitchen was formed under a lot title S3 and is part of the common area, and the common area is managed by the body corporate, and we are liable to full, like, a contribution of the admin fund only…[29]

68 Ms Zhou later clarified that her understanding regarding outgoings payable for Lots S4 and S5 was that she was not aware that any were payable.[30]

### Mr Yang's evidence

69 Mr Yang's evidence about his meeting with Ms Zhou does not match the evidence given by her. He deposed that in September/October 2016 he had met with her and discussed a number of things including who was responsible for the common area, the kitchen, the office, and who owned the kitchen and meeting room.[31]

### Discussion

70 It is contended on behalf of APlus that Ms Zhou did not understand that she had been asked to take the S4 and S5 leases, and did not intend to take them.[32] I have read the passage in the transcript which is said to justify this statement, and I do not think it clearly gives rise to the conclusion stated. The context was that Ms Zhou was asked why she had not brought it to the attention of Sonny Wang that there was no reference in the schedule of leases to Lots S4 and S5. Her answer was that her concerns had already been "explained" by Darren Yang[33]. Darren Yang had confirmed that those areas "were used as the common facilities" and were "managed by the body corporate and the tenants make a contribution to maintain them, so in return we can use it."[34] I consider this explanation to be unconvincing as it does not address the fact that the S4 and S5 leases had been sent to APlus well before the contract was executed.

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[27] Transcript [389/15-19].
[28] Transcript [390/3-4 and 390 12-15].
[29] Transcript [390/22-26].
[30] Transcript [391/14-23].
[31] Transcript [94/ 5-8].
[32] Transcript [401/1-12].
[33] Transcript [400/29-30].
[34] Transcript [401/4-12].

### Mr Dunstan's evidence about the S4 lease and S5 lease

71 Mr Dunstan said that the S4 lease and the S5 lease meant nothing to him at the time the contract was signed on 23 November 2016. When he was asked about Beaumonts' solicitor's email of 19 October 2016, he said[35]:

> "I saw the email came in. But to be frank I didn't know about the attachments".

72 I find this evidence surprising, as his response to this email starkly contrasts with his earlier evidence that he read the contract "cover to cover" [36]and that he read the schedule of the contract "in detail"[37].

### The lack of correspondence from Beaumont about the kitchen and conference centre leases

73 APlus relies on Ms Zhou's evidence that no word whatsoever was received from Beaumont in the seven days prior to the contract being assigned that would have indicated there was an error in the schedule of leases because S4 and S5 had been omitted.[38] I do not accept that this is indicative of anything, as it is entirely consistent with the fact that Beaumont was not aware of the problem, and was proceeding on the basis of the S4 and S5 leases were to be assigned.

### The reference to cooking facilities in the S4 lease

74 Ms Zhou was asked whether there was anything about the unsigned leases for lots S4 and S5 that caused her to have concerns. The first part of her response was that one of the leases referred to cooking facilities. This was presumably a reference to the lease for Lot S4, as in item 7 of the schedule to that lease the following tenant's installations are identified:

> Fridges, Cook tops, Stoves, ovens, Dishwashers, Tables, Chairs and Cutlery and Crockery situated in the Premises

75 Ms Zhou went on to say:

> because it's a serviced apartment, my understanding is 47 apartments leases also have the kitchenette, but one of them actually doesn't come with- I think doesn't come with any cooking facilities. So I was wondering, like, is that referring to a special area which doesn't have kitchen.[39]

76 I find this answer lacks credibility. I note that in the business plan prepared by APlus, Ms Zhao is described at [3.2.1] "Highly intelligent, commercially astute, motivated and focused…" Her biography in the business plan went on to describe her as setting an example to colleagues in respect of various matters including "attention to detail". She was said to be a licensed Real Estate Agent in 2 Australian states and "as a result of that experience is

[35] Transcript 31 July 2019 [7/4-5].
[36] Transcript 31 July 2019 [5/2-3].
[37] Transcript 31 July 2019 [5/7].
[38] Transcript [401/25-29 and 402/17-18].
[39] Transcript [389/4-14].

skilled in… all aspects of property management". On the basis of my observation of Ms Zhao in the witness box I have little doubt that she is highly intelligent, astute, and motivated. If she is as focused and as capable of attention to detail as her biography suggests, and if she is as experienced in all aspects of property management as claimed, it is not possible that she was telling the truth when she suggested that Lot S4 was a serviced apartment. It is clearly not. It is clearly a kitchen. Her rhetorical question as to whether the lease was referring to a special area which didn't have a kitchen, beggars belief, in my view,

### The business plan

77 Ms Zhou confirmed that the business plan had been prepared by Mr Dunstan.[40] She confirmed it had been submitted to the financier.[41] When she was questioned regarding the representation that the kitchen and reception areas were included as part of the business, she gave a longwinded answer culminating in the statement "it's just a general description of the business rather than a legal explanation [of] what the title will be."[42]

78 When pressed about Beaumont's contention that by 7 November 2016 she must have been be aware that she was taking a transfer of leases for lots S4 and S5, she responded that it was made very clear that she was only taking lease management rights of 47 apartments. She said that the reference to the conference room and reception office, kitchen and car parks was a separate description of the facilities coming with the business.[43]

79 Mr Dunstan was also asked about the business plan. He deposed that when he wrote the business plan he thought he had only had one very quick site visit. He said it was hastily prepared, and was "a first draft of what we thought we might do with the business".[44]

80 I do not accept this evidence. The business plan is 25 pages long. It is detailed. It was prepared after APlus had received financial statements from Beaumont for the 2014/2015 and 2015/2016 financial years, and refers to those financial years. And it was prepared in order to be presented to APlus's financier.

81 Mr Dunstan was asked about Clause 1.1 which states:

> The purchase consists of the lease management rights of 47 apartments, the conference room and associated perception, office, kitchen, dining area, car parks etc.

He insisted that at the time he prepared the business plan he was buying 47 apartment leases. When it was put to him that clause 1.1 involved the purchase also of lease management rights to the conference room and the

[40] Transcript [396/30-1].
[41] Transcript [397/1-2].
[42] Transcript [397/7-21].
[43] Transcript [398/1-10
[44] Transcript 31 July 2019 [9/5-9].

office and the kitchen and the dining area and the car parks, he responded that he wasn't aware that there were any leases for the dining room and kitchen. When pressed, he agreed that there was more than one interpretation of the clause.

82 The evidence of both Ms Zhou and Mr Dunstan to the effect of the business plan contemplated only the purchase of 47 leases sits uneasily with the financial information incorporated within the business plan, because the profit and loss statements for 2014/15 and 2015-616 both refer to substantial food revenue and conference food revenue. This evidence is also surprising in the light of the fact that the business plan was dated 7 November 2016, and almost 3 weeks beforehand the S4 and S5 leases had been provided to them.

### The contract

83 Ms Zhou was asked why, if APlus was not taking leases for Lots S4 for an S5, the contract referred to chattels and equipment pertaining to those areas. Ms Zhou's answer was:

> Yes, because they are obviously when you're looking at outdoor area, those areas is actually owned by body corporate, but they do have outdoor furnitures stored in those areas. These documents to me is pretty much to indicate that sort of assets they have and equipment they have and where they are located rather than-because I obviously not taking of any lease with outdoor areas, I'm not taking up any lease with common areas, so I'm just more like to indicate where I can find those equipments.[45]

84 In my view, this answer is essentially non-responsive to the question. Ms Zhou was being asked why the contract referred to kitchen equipment and conference room equipment, not outdoor furniture. She did not address the key issue of why the relevant equipment was being assigned if the relevant leases were not also being assigned.

85 Ms Zhou's later clarification that she expected to have the right to use any conference room equipment listed in the contact of sale[46] did not advance APlus's case, as this statement merely spelt out the consequence of the equipment being included in the contract. It certainly is not in evidence that the conference room lease was not to be assigned.

### Ms Zhou's response to the approach from the S4 and S5 landlord.

85 As noted at [25] above, Ms Zhou deposed that about 10 days after she took over the business, the landlord of S4 on S5 called asking for a transfer of lease. Ms Zhou's evidence about her response is revealing. She deposes that she said:

[45] Transcript [403/13-22].
[46] Transcript [403/23-28].

> Mmm, all of these transfers should be already been sent out from the vendors side and I got a copy of the sent receipt here. You should receive that if you are one of our landlord.[47]

86 Ms Zhou went on to say that after the landlord indicated that he had not received transfers from the vendor that "I started to realise is not any of our landlord in the list".[48]

87 I regard this evidence as critical, as it suggests that on or around 25 January 2017 Ms Zhou did not have a clear understanding that the S4 lease and the S5 lease had not been assigned. On the contrary, the evidence suggests that she thought that the landlord of S4 and S5 should have received a transfer from the vendor.

88 Ms Zhou deposes that when she realised the landlord of S4 and S5 was not "in the list", the landlord arranged a meeting with her so he could bring a hard copy of the signed lease agreements for S4 and S5. She called Sonny Wang (of Beaumont) and asked why he had not provided the lease. He said that was because he had not got the lease. He said he would ask "Jack" (clearly his solicitor Mr Cyngler) for a copy, but a few days later advised that "Jack" could not provide a signed copy.[49]

### Ms Zhou's email of 11 April 2017

89 Ms Zhou identified an email she had sent to David D'Orazio at Portelli & Co, who she explained was the solicitor for the landlord of S4 lease and S5 lease. The email read:

> Hi David:
>
> I just had a chat with my solicitor.
>
> My purchase of the business doesn't include S4 & S5 lease.
>
> So I won't sign the lease transfer deed since the outgoings is not clarified.
>
> Beaumont Kew Hotel Pty Ltd will still be his tenant though and they will be the party liable for his future rent.
>
> If he is happy with the current outgoing arrangement then I'm happy to draft and the new lease with him.

90 The wording of this email is instructive. Firstly, it strongly suggests that prior to talking to her solicitor Ms Zhou did not have an appreciation that the contract did not include the S4 and S5 leases. This is consistent with the evidence referred to above that when she was contacted initially by the landlord for Lots S4 and S5 she understood that that landlord should have received assignments of those leases from Beaumont. Secondly, the email indicates that Ms Zhou was seeking to take advantage of the fact that the contract did not include the S4 and S5 leases as a negotiating tool in order to strike an advantageous deal regarding outgoings. (It came clear

[47] Transcript [427/22-25].
[48] Transcript [427/27-28].
[49] Transcript 427/28-31 and 428/1-10].

elsewhere that the "current outgoing arrangement" referred to was that the landlord would pay the outgoings.[50])

### Ms Zhou's email of 13 April 2017 to Portelli and Co

91 Ms Zhou identified a further email to Portelli and Co, addressed to a different solicitor, dated 13 April 2017 confirming her position about the S4 and S5 leases.

92 The relevance of this email is that it demonstrates that, having belatedly come to an understanding that the content of sale did not include the S4 and S5 leases, Ms Zhou was now repeating the refrain.

93 Her change of position is also illustrated in an email she sent to the real estate agents acting for the landlord of S4 and S5, Harcourt's, on 19 April 2017. This confirmed that she would not take up the leases for S4 and S5 if she had to pay the rates. This confirms that she was now seeking to exploit the situation created by the omission of the S4 and S5 leases from the contract to her commercial advantage.

### Ms Zhou's email of 8 June 2018

94 More than a year later, settlement had not occurred. Beaumont made a final attempt on 6 June to have APlus comply with its obligations regarding the S4 and S5 leases by forwarding transfers of the leases. This prompted a lengthy response from Ms Zhou on 8 June 2018. The following passages are relevant as they indicate APlus's understanding of the history:

> Please note before we signed the Contract of the business we've confirmed that Beaumont Kew Hotel Pty Ltd and Beaumontprop Pty Ltd has reached the agreement that the tenant are liable for the Admin Fund only re the outgoings.
>
> The evidence of post-contractual conduct also proved the agreement has been reached between the two parties. The new landlord has purchased the S4 and also the S5 and his agent has provided the disclosure statement, which shows different agreement regarding to the outgoings….
>
> Alternatively we are happy to transfer the lease based on we paying admin fund only just like what we've been advised before we get into the Contract of business.
>
> At this moment APlus would not agree with the proposed transfer of lease since there is dispute of the outgoings.

95 The import of this email is clear. It demonstrates that Ms Zhou's concern was not that the S4 and S5 leases were part of the business, but that at the time the contract was made outgoings were not being charged by the then landlord. It was the insistence of the new landlord of S4 and S5 that at outgoings be paid by the tenant that generated the sticking point.

[50] Transcript [432/26-31

### APlus's open offer dated 5 October 2018

96 Beaumont relies on this document, although it was sent well after the termination of the contract, as evidence of the intentions of Mr Dunstan and Ms Zhou. The relevance of the letter is that it enumerates three items that are "currently unresolved". The third item is the transfer of leases of S4 and S5.

### APlus's arguments

Beaumont assisted APlus

97 APlus argues that Beaumont's witnesses conceded that they assisted Ms Zhou in attempting to negotiate a new lease with the landlord of S4 and S5, instead of simply demanding that APlus, take transfers of the relevant leases. I examine the evidence highlighted in APlus's submissions in turn.

98 When Mr Yang wrote on 4 July 2017 to the landlord of the S4 and S5 leases acknowledging liability for rent[51], that was reflecting the legal reality at that point, as APlus had refused to accept an assignment of the leases. Mr Liu agreed to assist Ms Zhou to communicate with the landlord of the two areas to reach an agreement so that the transfer could occur.[52] Again, this was a rational response to the situation Beaumont found itself in. When Mr Zhang acknowledged the leases were not in the contract [53] he was confronted with the fact that APlus would not take a transfer of the S4 and S5 leases. He deposed:

> She [Ms Zhou] very strong said "I'm not take this one. Whatever you say, whatever you do, I'm not taking it"[54]

99 Obviously, Beaumont's representatives could have argued with APlus and insisted that it take the leases. However, Mr Zhang's evidence makes it clear that they were concerned to get the deal wrapped up in a hurry.[55] He was also concerned about "a huge legal fee"[56]

100 As noted, Mr Liu also indicated that his motive in helping Ms Zhou communicate with the landlord was get the transfer done as soon as possible.[57]

101 For these reasons, I do not accept that Beaumont's willingness to assist APlus negotiate with the landlord of S4 and S5 leases constitutes an admission that the original intention was that S4 and S5 were not to be included in the contract.

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[51] Transcript [439/45].
[52] Transcript [89/15-18].
[53] Transcript [223/26-27 and 204/2/3].
[54] Transcript [224/25-27].
[55] Transcript [225/8-12].
[56] Transcript [226/2].
[57] Transcript [89/15-18].

APlus would have rejected the deal if the S4 and S5 leases were included

102 APlus's next argument is that the "evidence established that it would not likely have agreed to purchase the business, or to release the additional deposit monies, had Beaumont made it known that it was insisting on APlus taking the leases for S4 and S5". There is a fallacy in this argument. Having purchased the business with lease S4 and S5 lease included, APlus may well have had buyer's remorse. However, evidence that demonstrates that Ms Zhao and Mr Dunstan respectively realised after the event that the leases were burdensome is not indicative of their state of mind at the time the contract was signed. I accordingly reject this argument.

APlus's controllers lacked the requisite intention

103 APlus's third argument is that Beaumont has not established that its controllers possessed the requisite intention to transfer the leases for S4 and S5. This argument is misconceived. Mr Liu had little involvement in the sale, which is understandable given his lack of English. The fact that Mr Zhang and Mr Yang did not read the contract and, in particular, did not check the lease schedule, is not conclusive as to their intention. They had hired a broker to negotiate the deal, and they had engaged lawyers to draft the contract. I consider they were entitled to rely on these professionals d to implement their intention. Their lawyers certainly turned their minds to the S4 lease and S5 lease, as they sent the leases to APlus's lawyers on 19 October 2016. The clear intent of the controllers of Beaumont was to sell the business. It would have made no sense to sell the right to manage the 47 apartments, and to sell the kitchen equipment and to sell the conference room equipment, but to retain liability under the S4 and S5 leases.

## Summary and conclusion

104 The following factors compel me to find that the mutual intention of the parties was that the S4 and S5 leases were to be assigned under the contract:

(a) the kitchen and the conference room were referred to in the business plan and the business plan was evidently drawn with care[58];

(b) the S4 lease and S5 lease were sent to APlus more than a month before the contract was signed;

(c) the contract itself listed items of equipment included in the kitchen and on the conference room;

(d) when Ms Zhou was first contacted by the new landlord of the S4 and S5 leases she clearly thought he should have already received transfers of the leases;

(e) Ms Zhou only realised that the S4 and S5 leases were not included in the contract when she took legal advice after she had been contacted by the new landlord;

[58] See the discussion at [79-80] above.

(f) for the many reasons I have given above, I found Ms Zhou to be an unreliable witness;

(g) Mr Dunstan unconvincingly downplayed the importance of the business plan even though it had been carefully drafted, and presented to APlus's financiers, and his evidence that he was not aware that the S4 lease and the S5 lease had been sent to APlus was surprising given the attention he said he had paid to other documents,[59]with the result that ultimately I formed the view that much of his evidence was self-serving;

(h) none of the arguments presented by APlus regarding the behaviour of Beaumont's witnesses convince me that they had not initially believed the S4 lease and the S5 lease were included in the contract.

105 Considering all these factors together, I regard as overwhelming the evidence that the S4 and S5 lease were to be included in the contract, and I so find.

## APLUS'S FALLBACK POSITION

106 It follows that Beaumont will be entitled to an order for rectification of the contract, unless APlus's fallback position is ascepted. This is that even if the technical elements of rectification have been established, the remedy of rectification ought to be refused on the basis of laches or estoppel.

107 I now turn to consider laches and estoppel in turn.

### Laches

108 APlus relies on two passages from *Meagher Gummow & Lehane's Equity: Doctrines and Remedies* (4th Edition, Meager. Heydon and Leeming). The first, is "(Laches is available where) the defendant (or third parties) had acted to their detriment in reliance on the plaintiffs delay."[60] The second is "Equitable relief will be refused on the grounds of laches in any circumstances where the plaintiff's delay would make it unjust to grant the relief which he seeks"[61]

109 The nature of this equitable defence is thus easily described. The difficulty A plus faces is in establishing that Beaumont's delay in some way relied on Beaumont's delay in pressing its rights to its detriment. APlus contends "that it would be unjust for Beaumont to succeed in obtaining equitable relief by way rectification given its delay in raising that claim".[62]Several reasons are advanced.

[59] See the discussion at [72] above.

[60] Paragraph 36-020, page 1033.

[61] Paragraph 36-020, page 1035.

[62] APlus's written submissions at [26].

APlus would not have proceeded with the contract at all had Beaumont made it clear that the leases for S4 and S5 were included in the sale

110 The first argument is that "the evidence demonstrates that APlus would not likely have proceeded with the contract at all had Beaumont made it clear that the leases for S4 and S5 were included in the sale". This argument has been discussed above at [61] in a different context, and rejected it is the proposition is not made out on the evidence.

APlus agreed to amend the contract

111 The second argument is that APlus agreed to amend the contract so that the (apartment) leases were to be assigned immediately rather than upon completion. It is argued that:

> On the basis of the amendment, it entered into numerous new contractual relationships with third parties. The amendment was agreed to on the understanding that the leases to be transferred were those in the schedule.

112 Is implicit in this argument that it was Beaumont that asked APlus to take an immediate assignment of the apartment leases. In connection with this, it is to be noted that:

(a) it was APlus whch suggested that Ms Zhou should be appointed as manager of the business on 16 January 2017 "to take full control (including accounts, rights, liabilities) of the business including the financials until all leases are transferred"[63] That proposal was agreed to by return email, subject to a Management agreement, to be prepared by Beaumont's solicitors, being signed.

(b) as at 30 December 2016 APlus's position was that settlement would not take place until the transfers of lease had been fully signed[64];

(c) as at 6 January 2017 the transfers of the leases and mortgagee consents were to be ready by 6 February 2017,[65] which was the date suggested by Beaumont's lawyers on 29 December 2016.

(d) the key provision in the Management agreement which is executed by the parties on 6 December 2017 was [2.3] which provided:

> The Manager (previously defined as APlus and/or nominee) shall be entitled to occupation of the Premises, Stock and Plant of the Business the purposes of carrying out his/her duties under this Agreement.

113 As it was APlus which suggested that it take full control of the business prior to settlement, it cannot be said to have been Beaumont's idea that the leases be transferred at that point rather than upon completion. Accordingly, APlus must take responsibility for the fact that entered into contractual relationships with third parties even though settlement had not occurred

[63] Email from Ms Zhou to Mr Zhang dated 22 December 2016
[64] Email from a plus's lawyer to Beaumont's lawyer dated 30 December 2016
[65] Email from APlus's lawyer.r to Beaumont's lawyer dated 6 January 2017

this, indeed, was a natural corollary of taking over the business before settlement.

APlus believed that it had taken a transfer of each of the leases to be assigned under the contract

114 APlus, in addition, says that when it agreed to release a further instalment of the deposit it did so in the belief that it had taken a transfer of each of the leases to be assigned under the contract. I reject this because I have found that when it signed the contract APlus's controllers MS Zhou and Mr Dunstan intended to take a transfer of the S4 and S5 leases. Furthermore, an email from APlus's lawyer to Beaumont's lawyer demonstrates that APlus paid a further instalment of the purchase price of $300,000 pursuant to the arrangement it had struck with Beaumont that it was to take over as manager of the business on from 16 January 2017. In other words, the payment of the further $300,000 was not directly linked to the transfer of S4 and S5 lease but to a separate substantial benefit for APlus not contemplated by the contract.

Beaumont did not dispute that APlus's was obligated to take an assignment of the S4 and S5 leases

115 APlus's next argument is that it denied that it was obligated to take an assignment of the S4 and S5 leases, and Beaumont did not dispute this assertion. This argument does not assist APlus, because it only articulated its position that it was not under an obligation to take the S4 and S5 leases in April 2017. At this stage, APlus had already taken an assignment of some of the apartment leases, and had paid the further tranche of the contract price of $300,000. APlus is not identified any other action it took to its detriment after the point declared his position about the S4 and S5 leases.

The contract imposed no obligation on APlus to take the S4 and S5 leases

116 APlus's next point is that Beaumont attempted to compel it to take steps to procure the assignment of the S4 and S5 leases, and later purported to terminate the contract for its non-performance, without adverting to the fact that the contract imposed no obligation on it to take the leases, and without explaining that this demand for compliance was prefaced on a claim for rectification. APlus asserts that Beaumont's change of position in now insisting that APlus should have taken the S4 lease and S5 lease would operate unfairly to APlus, who assessed the legality of Beaumont's position in 2018 by reference to the printed contract and the parties shared understanding and conduct "throughout 2017".

117 This argument is misconceived, as I have found that the common intention of the parties at the time the contract was formed was that the S4 and S5 is were to be transferred. The common understanding continued until April 2017 when, as a result of taking legal advice in response to the approach from the S4 and S5 landlord, Ms Zhou declared that APlus was not obligated to accept the kitchen and conference room leases. There was accordingly no shared understanding and conduct throughout 2017.

Beaumont changed its case after the hearing started

118 APlus's final argument is that the parties prepared and conduct of their cases up until the second day of the hearing on the basis of Beaumont's original contractual argument. It was only at this point that Beaumont changed its position and took the rectification point. In my view, even if this argument is made out, it is not relevant to the issue of whether the remedy of rectification should be applied. However, it may well be a matter which is relevant to questions of costs and reimbursement of fees.

## Conclusion

119 For all these reasons, I find that APlus's argument that because of laches, Beaumont should be denied the remedy of rectification, fails.

## Estoppel

120 APlus also asserts that the "well-known principles of equitable estoppel outlined in *Walton's Stores (Interstate) Ltd v Maher*[66] operate in a similar way to bar equitable relief".[67] Promissory estoppel had prior to this decision been seen as a defensive equity. In *Walton's Stores (Interstate) Ltd v Maher* the High Court took promissory estoppel a step further by enforcing directly, in the absence of a pre-existing relationship of any kind, a non-contractual promise on which the representee had relied to his detriment.

121 I do not find APlus's general reference to the case helpful. However, the principles of equitable estoppel are certainly spelt out in the decision. For instance, Brennan J said:

> In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

122 APlus's argument, presumably, is that the particular legal relationship which it relied on was the existence of a contract that did not include the S4 and S5 leases.

123 If that is the case, APlus's argument fails as it does not show how, after April 2017, it acted in reliance on the assumed relationship or what

[66] (9088) 164 CLR 387
[67] APlus's written submissions at {26]

detriment it suffered after that time by relying on the existence of that particular legal relationship.

### Conclusion about rectification

124 I have found above that Beaumont has established it has a basis to have the contact of sale rectified so as to include the S4 lease and S5 lease. APlus argued that because of laches and principles of equitable estoppel Beaumont should not be granted that remedy. I have found above that these arguments fail. I accordingly find that Beaumont is entitled to have the contract rectified so that the schedule of leases is deemed to include the S4 lease and S5 lease, and APlus is obligated to accept a transfer of those leases.

125 Despite its obligation to accept the transfer of the S4 and S5 leases, on 11 April 2017 APlus indicated for the first time that it would not take a transfer of the S4 and S5 leases until such time as those leases had been varied so that the terms were more favourable to APlus. In particular, APlus required that the arrangement regarding nonpayment of outgoings that had been enjoyed by Beaumont should be continued. This refusal sets up Beaumont's claim that APlus repudiated the contract.

## BEAUMONT'S CLAIM THAT APLUS REPUDIATED THE CONTRACT

126 Beaumont referred to the discussion of repudiation contained in the High Court decision in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*, in which Gleeson CJ, Gummow,, Haydon and Crennan JJ said in their joint judgement (citations omitted):

> The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations[1] . It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.

127 The finding above that APlus was obligated to accept a transfer of the S4 and S5 leases sets up Beaumont's argument that APlus repudiated the contract by failing to provide the information necessary to effect the transfer of the leases.

128 Clearly, in refusing to accept unconditionally the transfer of the S4 and S5 leases, Aplus was not renouncing the entire contract, but only a term of it. However, this term was essential, because the kitchen and the conference centre were constituent parts of the business. The sale of the business without them would have been only a partial sale.

129 What then, flowed from APlus's refusal to accept a transfer of the S4 and S5 leases? In these circumstances, it is relevant to have regard to a further

passage from the joint judgement of Gleeson CJ, Gummow, Haydon and Crennan JJ in *Koompahtoo*:

> [T]here are two relevant circumstances in which a breach of contract by one party may entitle the other to terminate. The first is where the obligation with which there has been failure to comply has been agreed by the contracting parties to be essential. Such an obligation is sometimes described as a condition.

130 The mere performance of a repudiatory act by APlus, of itself, was not sufficient to bring the contract to an end. Termination will only occur where the innocent party accepts the repudiation and rescinds the contract. In *Koompahtoo* the High Court confirmed the point by quoting the following well-known passage in the judgement of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*[68]:

> If it is a condition that is broken, ie, an essential promise, the innocent party, when he becomes aware of the breach, has ordinarily the right at his option either to treat himself as discharged from the contract and to recover damages for loss of the contract, or else to keep the contract on foot and recover damages for the particular breach.

131 The question of repudiation accordingly comes down to the issue of whether APlus's repudiation of the contract was accepted by Beaumont.

## WAS APLUS'S REPUDIATION ACCEPTED BY BEAUMONT

132 As noted, the representatives of Beaumont responded to Ms Zhou's refusal to accept a transfer of the S4 and S5 leases by attempting to assist in negotiations. After September 2017, other issues came to the fore, such as the dispute with Choice Hotels, which issued a statutory demand against Beaumont. It was only on 26 February 2018 that Beaumont, through its lawyers, again pressed for settlement by proposing a settlement date of 28 February 2018.

133 Settlement did not occur on 28 February 2018, and on 22 March 2018 Beaumont's lawyers issued a letter addressed to APlus's lawyers advising that Beaumont had satisfied all conditions precedent to settlement including transfer of leases, and asserted that in contravention of the contract and the supplemental deed, APlus had refused to effect settlement. The total amount of money asserted to be due at settlement was $610,000, calculated by subtracting from the sale price of $1,160,000 the $550,000 already paid. Interest was also claimed of $72,681.92. A notice of default was issued with the letter, calling for settlement on 9 April 2018. A letter in identical terms was sent directly to APlus on the following day, also with a notice of default.

134 On 18 April 2018 Beaumont's lawyers sent a letter enclosing a notice to complete to APlus, advising that reliance was no longer placed on the notice of breach dated 22 March 2018, and that interest was no longer

[68] (1938) 38 SR (NSW) 632 at 641-642.

demanded. The letter notified that Beaumont was ready, willing and able to perform settlement on 24 April 2018.

135 APlus contended that this notice was defective because it did not afford the five business days' notice required under the contract. That this point was well founded was conceded by Mr Virgona on behalf of Beaumont. However, he added said the point was not important. This notice was not relied on as Beaumont's case was that APlus's refused to accept a transfer of the S4 and S5 leases.

136 In the light of this clarification of Beaumont's case, it is important to establish precisely when APlus is said to have refused to accept the S4 and S5 transfers. APlus contended that the first evidence that someone from Beaumont's camp had written to the landlord with a view to formalising the assignment of the leases was a letter from Beaumont's lawyers dated 18 May 2018. Mr Yang confirmed this was right.[69]

137 On 6 June 2018 Beaumont sent APlus an application form in respect of the transfer of the two leases. This communication was followed a letter dated 22 June 2018 which enclosed a notice of default bearing the same date. This notified APlus that it was in default under the contract as amended by the supplemental deed in so far as it had failed to provide two current business references and a statement of its assets and liabilities and those of its guarantors. The notice called for the remedy of the default within five business days, that is to say by 29 June 2018. The notice did not refer directly to the failure of APlus to accept transfers of the S4 and S5 leases.

138 Nonetheless, the contract as amended by the supplemental deed was terminated by notice dated 27 July 2018.

## APlus's position regarding repudiation

### Time ceased to be of the essence

139 APlus dealt with the difficultly arising from its failure to complete on time, in circumstances where the contract provides (in clause 13.1) that time is of the essence of the contract, by referring to the judgement of Pape J in *Thorton v Basset*[70], who said:

> [I]f the time is once allowed to pass, and the party go on negotiating for completion of the purchase, then time is no longer of the essence of the contract.

140 APlus also referred to the decision of the Full Court in *Poort v Development Underwriting (Victoria) Pty Ltd.*[71], where the Full Court, approving *Thorton v Basset,* observed when the "essence" provision has been waived, a notice can operate to fix a new time for performance, but if the notice is to have such an operation the time allowed by it must be reasonable.

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[69] Transcript [118/1-4, 15-16].
[70] [1975) VR 407.
[71] [1977] VR 454.

141 APlus in this way implicitly acknowledged that although time ceased to be of the essence because the time for completion had been allowed to pass while the parties kept on negotiating, it was legitimate for Beaumont to set a new, reasonable, time limit by which settlement had to be achieved.

The obligations of the parties were interdependent

142 However, APlus does not accept that it repudiated the contract. Its contention here is that its obligation to perform the contract was interdependent with Beaumont's obligation. It relies on the observation of Holland J of the Supreme Court of New South Wales in *Frankcombe v Foster Investments Pty Ltd*[72] that:

> the obligations of each party on settlement are dependent and concurrent, that is, a party failing on his part to perform is not in breach unless the other party has tendered performance of his obligations:

143 APlus might equally have referred to the following words of Gaudron J in *Foran v Wight*:

> Settlement of a contract for sale of land ordinarily involves…the contemporaneous performance by vendor and purchaser of their obligations under the contract. Those obligations are concurrent and dependent. Thus, there is no actual breach by one party of an obligation to settle unless the other party tenders performance of his or her obligation to settle. [73]

144 Accordingly, it is clear that the obligations Beaumont and APlus under the Contract were interdependent.

Beaumont was not ready, willing and able to complete

145 Relying on this foundation, APlus goes on to contend that a party can only serve a notice fixing a new date for completion, and later terminate for non-compliance with the notice, if it was itself ready willing and able to comply with the terms of the bargain. They referred to a passage from the decision of Barwick CJ and Jacobs J in the High Court in *Neeta (Epping) Pty Ltd v Phillips*[74]

> In cases where the contract contains a stipulation as to time but that stipulation is not an essential term then before a notice can be given fixing a time for performance, not only must one party be in breach or guilty of unreasonable delay, but also the party giving the notice must himself be free of default by way of breach or antecedent relevant delay. Only then may a notice be given fixing a day a reasonable time ahead for performance and making that time of the essence of the contract.

[72] [1978] two NSW LR 41
[73] (1989) 168 CLR 385:
[74] (1974) 131 CLR 236.

Relevant enquiries

146 The inquiries to be made regarding such a notice given by a vendor to a purchaser were conveniently summarised by Barwick CJ and Jacobs J in *Neeta (Epping) Pty Ltd v Phillips* as follows*:*

(i) Was the purchaser in breach of any term of the contract or guilty of unreasonable delay?

(ii) Was the vendor himself in default by breach of any term of the contract or guilty of any antecedent relevant delay?

(iii) Was the time fixed a reasonable time in all the circumstances?

147 The first question is to be answered in the affirmative. I have found that APlus was in breach of the contract because it refused to accept the transfer of the S4 and S5 leases. The contracted date for settlement came and went, but Beaumont took no step to rescind the contract. Beaumont only began to put pressure on APlus to settle again in March 2018, and then issued a notice to complete the settlement by 24 April 2018. Beaumont sent transfers of the leases to APlus on 6 June 2018, with a request that they be to be completed and returned within seven days. Beaumont followed up by sending a default notice dated 22 June 2018 requiring the provision of relevant information within 5 business days.

148 As to the third question, I find that in stipulating the date for the completion and return of the S4 and S5 lease information by 29 June 2019[75], Beaumont was acting reasonably. Indeed, because the date was about 16 months after the contracted settlement date, it was very reasonable.

149 The legality of Beaumont's termination of the contract accordingly comes down to the second question: was Beaumont itself in default by breach of any term of the contract or guilty of relevant delay.

150 APlus contends that it was necessary for Beaumont to prove at the hearing that it was ready, willing and able to perform its own obligations under the agreement, relying on *Foran v White*[76]. Reference to that case indicates that Mason CJ accepted that 'that proof of readiness and willingness went to the existence of the cause of action; its materiality was not confined to the recovery of substantial damages". Brennan[77], Dawson[78] and Gaudron JJ[79] in separate judgements essentially agreed with this view. Mason CJ later observed that in a case of termination for actual breach:

> the time for determining whether or not the purchasers would have been ready and willing to perform the contract had it not been for the dispensing conduct of the vendors is therefore the time for performance[80].

[75] See the discussion at [151] below.
[76] (1989) 168 CLR 385.
[77] (1989) 168 CLR 385 at 422-423.
[78] (1989) 168 CLR 385 at 451.
[79] (1989) 168 CLR 385 at 455.
[80] (1989) 168 CLR 385 at 409.

151 It becomes necessary, accordingly, for me to determine whether Beaumont was a position to settle on **29 June 2018**. I find that this is the relevant date because the notice dated 22 June 2018 called for the remedy of the stipulated default within five business days. I adopt this date in preference to the dates proposed by APlus in its submissions at [43] which are respectively 22 June being the date of the notice of default, and 17 July being the date of termination.

## WAS BEAUMONT READY WILLING AND ABLE TO SETTLE ON 29 JUNE 2018?

152 APlus, in submissions, spent some time chronicling Beaumont's apparent inability to settle at various times in 2017. These matters are not relevant. However, APlus contends that Beaumont did not prove that it was ready, willing and able to perform the contract (even if rectified) in June or July 2018.

153 APlus's submissions on this point focus on three issues, namely:

(a) the charge over the assets securing the interest of ANZ;

(b) the failure of Beaumont to prove that it had the ability to procure the transfer of the S4 and S5 leases; and

(c) the failure of Beaumont to transfer the license with the Owners Corporation.

I now deal with these issues in turn.

### The charge

154 Beaumont's obligation under clause 5.2 of the contract was to transfer the business, the assets and the stock to the purchaser not later than the date of settlement, subject only to encumbrances agreed to by the parties. By an email dated 20 February 2019 APlus's lawyers advised Beaumont's lawyers that it would not accept the business or any assets subject to PPSR registration or any other encumbrances. Beaumont accepts that it was under an obligation to discharge the charge given in favour of ANZ over assets of the business at the time of settlement. It was not established whether the charge related solely to the chattels of the business, or also covered the leases. However, the existence of the charge certainly did not prevent the transfer of a number of the apartment leases to APlus early in 2017. However, in its written submissions, Beaumont at [178] accepts that the amount secured under the charge was a factor that prevented settlement occurring as originally envisaged by the contract.

155 There is agreement between the parties that the best evidence that Beaumont could produce regarding its indebtedness to the ANZ bank was a loan statement showing that the sum owed was $481,890.68 as at July 2017. APlus contended, at [43]:

> This was a major lacuna in Beaumont's evidence, as it bore the burden of establishing at trial that was ready, willing and able to complete as

> of the date it issued the notice of default in June 2018 (and the date it purported to terminate in July 2018).

156 APlus made much of the fact that documents relevant to the charge were never produced during the hearing despite formal requests, and despite leave been granted to file and serve those documents as soon as practicable after the hearing.[81] APlus highlighted that Beaumont had presented no evidence that the loan amount had been reduced by any significant degree, or at all, after July 2017. However, APlus did not ask the Tribunal to draw an adverse inference under *Jones v Dunkel*[82] to the effect that the mortgage documents would not have assisted Beaumont's case.

157 On 26 April 2018 Mr Wang met with Ms Zhou[83]and together they agreed the adjustments to be made to the contract sum. The balance of the contract sum was agreed at $442,408.18. The difference between this and the amount owed to the ANZ bank in July 2017 ($481,890.68) was less than $40,000. Beaumont contended at [180] of its submissions:

> Given the relatively negligible difference (between) the amount owing under the Loan and the amount owing to Beaumont under the Contract, the Tribunal should be reluctant to find that the existence of the 'charge' was any real impediment to settlement under the Contract.

158 In considering this argument, I bear two points in mind. The first is that the adjustments were agreed in April 2018, whereas the amount owed to the ANZ bank was established in July 2017. Because the mortgage documents were not made available, there is no direct evidence as to the state of indebtedness to the bank in April 2018, let alone July 2018, when the termination of the Contract occurred. It is possible that Beaumont's indebtedness of the bank had actually grown in the year between July 2017 and the date of termination. However, I put this possibility to one side, on the basis that I have found that it was APlus's refusal to take a transfer of the S4 and S5 leases, in breach of its obligation under the contract, that was a principal factor in the delay in settlement. To hold any increase in Beaumont's indebtedness to the ANZ bank (if such an increase existed) against it would be to allow APlus to benefit from its own breach of the contract.

159 The second point is that I am not satisfied that there is a relevant nexus between the balance of the contract sum agreed to be due in April 2018 and the amount to be paid out to the ANZ bank. A more relevant fact, in my view, is that the bank was owed in June 2017 well under $500,000, whereas the price payable under the contract was $1,250,000.

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[81] Order made 30 July 2009
[82] (1959) 101 CLR 298
[83] Transcript [313/28-315/1]

Finding regarding the charge

160 For these reasons, I find that the existence of the charge was not an impediment to settlement under the contract.

**The arrangement to retain $110,000 from the proceeds of the purchase price in a trust account**

161 APlus bolstered its argument concerning Beaumont's inability to settle because of the shortfall between the money owed to the ANZ bank and the balance of the contract sum by referring to an email from its lawyers to Beaumont's lawyers dated 20 February 2017, which contains the following passages:

> I am instructed that our clients have reached an agreement in relation to the payment of debts owed by your client after settlement. Such debts include franchise fees, water bills, other debts unknown at this stage, agents commission etc. The arrangement is that $110,000 from the proceeds of the purchase price are to be paid into the trust account of your client's agent. This amount will then be drawn down on and used to pay for debts and liabilities owned by your client that are not paid out at settlement. The agent is to pay out these amounts based on written instructions (including by email) for my client.
>
> Could you please seek your client's instructions and, if agreeable, provide a document so that the above arrangement may be properly recorded in writing.

162 APlus contends that this email constituted an agreement, and refers to evidence from Ms Zhou that the $110,000 was never deposited into trust.

163 Reference to Ms Zhao's evidence on this point[84] was that the email was sent by her lawyer in circumstances where Beaumont had proposed settlement without first removing the ANZ charge. Later, she deposed that because she could not "walk away" because she would not recover the money she had paid, she proposed to her lawyer that $110,000 be withheld from the purchase money to cover debts potentially owed to the Owners Corporation and to the sales agent, and others.[85]

164 According to this evidence, there was no agreement, merely a proposal coming from APlus. This is consistent with the request from APlus's lawyers to Beaumont's lawyer that they should "seek [their] client's instructions and, if agreeable, provide a document so that the above arrangement may be properly recorded in writing".

Finding

165 I conclude accordingly that the $110,000 was not paid into the trust account because the proposed agreement was not concluded. The mere proposal to lodge that sum to secure payment by Beaumont of future debts is irrelevant to the question of Beaumont's ability to settle.

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[84] Transcript [423/1-30]
[85] Transcript [4245-18

### The failure of Beaumont to prove that it had the ability to procure the transfer of the S4 and S5 leases

166 APlus's next argument was that (on the assumption that the S4 and S5 leases were part of the arrangement) APlus could not be required to complete the contract until Beaumont could secure transfers of the S4 and S5 leases. APlus contended that Beaumont had called no evidence regarding its ability to procure the transfer of the leases, and observed that the landlord may not have consented to the transfer. In support of the point, it was suggested:

There may have been no grounds upon which the landlord could have been compelled to give his consent, given that the landlord could lawfully have refused an assignment on the grounds permitted under s 60(1) of the Retail Leases Act 2003 (Vic)…

167 Section 60(1) of the *Retail Leases Act 2003* (Vic) provides:

> (1) A landlord is only entitled to withhold consent to the assignment of a retail premises lease if one or more of the following applies—
>
> (a) the proposed assignee proposes to use the retail premises in a way that is not permitted under the lease;
>
> (b) the landlord considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease;
>
> (c) the proposed assignor has not complied with reasonable assignment provisions of the lease;
>
> (d) the assignment is in connection with a lease of retail premises that will continue to be used for the carrying on of an ongoing business and the proposed assignor has not provided the proposed assignee with business records for the previous 3 years or such shorter period as the proposed assignor has carried on business at the retail premises.

168 The right of a landlord to withhold consent to an assignment of a retail premises lease is limited to the circumstances set out in the sub-section. I address the provisions of the sub-section in turn. Sub-section 60(1)(a) is not relevant because the proposed use of the premises by APlus was identical to the existing use. It is not suggested that ss 60(1)(c) has been enlivened because Beaumont has failed to comply with the reasonable assignment provisions of either the S4 or the S5 lease. Nor is it suggested that ss 60(1)(d) is relevant because of a failure by Beaumont to provide APlus with the required business records.

169 This leaves ss 60(1)(b) as potentially relevant. This gives the landlord a right of veto over an assignment if the landlord entertains concerns about the proposed assignee's financial standing or business experience. APlus attacks Beaumont's case, asserting at [48] that:

> No evidence was called from the landlord as to how he would have assessed any application for assignment by APlus, it is therefore impossible to determine this question favourably to Beaumont.

170 I think this attack is misconceived. If the landlord of the S4 and S5 leases had a concern about APlus's financial resources or business experience, then those are matters for which APlus is responsible. If APlus actually lacked appropriate financial resources or relevant business experience, so that the landlord would have been entitled to veto the transfers of lease to APlus, then that would, I consider, constitute an issue for APLus. Accordingly, I find that APlus cannot, in the context of an argument as to whether Beaumont was in a position to assign the S4 and S5 leases, rely on its own lack of financial resources or business experience as factors which might give rise to the landlord arguing that APlus might have been an unsuitable assignee of the leases.

### The licence agreement

171 No mention is expressly made in the Contract to the licence agreement which existed between the Owners Corporation ((Plan No. PS432870J) and Beaumont. However, there is no doubt that this agreement was one of the "licences, permits, approvals administration necessary for the Business, referred to in item 6 of schedule 1 of the Contract," and this was conceded by Beaumont's counsel.[86]

172 Ms Zhao said that she became aware of the licence when a manager of the Owners Corporation, Stephen Martin, came to the premises a few days after the management agreement had been signed and handed her a licence agreement which he asked her to sign as the new operator.[87] She later clarified that this event took place on 3 February 2017.[88] However, Ms Zhou said that she suspected that there would be a body corporate agreement that would be required to be transferred by Beaumont, and that it could be a caretaking agreement, or it could be a licence agreement. [89]

173 Mr Yang's evidence about the topic was inconclusive. For instance, he deposed he could not be sure whether it was he or Mr Ziang, but said "I'm pretty sure we made it clear that they have to pay to use [the desk and office]."[90] Later, when he was asked whether he had given APlus a written document that gave Beaumont the right to use the office, he answered that he could not specifically remember whether he gave that document to Ms Zhou, but said "I'm sure we did".[91]

### The demand for payment of arrears leading to the alleged stalemate

174 On 16 August 2017 Beaumont's lawyers demanded that APlus pay arrears of $39,535.24 due under the licence agreement.

175 It is written submissions, at [51], APlus complains that the sum was demanded:

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[86] Transcript [45/6-13].
[87] Transcript [415/9-30].
[88] Transcript [456/16].
[89] Transcript [419/20-24].
[90] Transcript [116/6-10].
[91] Transcript [116/ 23-27].

> in circumstances where there was no evidence that the owners corporation had agreed to assign the licence. Accordingly, Beaumont was demanding that APlus meet the burdens of the licence without it also having the benefits of that instrument.

176 This was one of two reasons that APlus advanced to assert that the demand was unlawful and unjust. The other reason was that the sum demanded included arrears attributable to the period prior to APlus going into possession of the business early in 2017. The demand, in APlus's view, created a stalemate between the parties, because APlus was not willing to pay the licence fee without a transfer of the licence, and the Owners Corporation would not agree to any transfer unless the arrears were paid.

## Discussion of the arrears issue

177 I think APlus's attempt to blame Beaumont for its failure to secure a transfer of the licence fails because of Ms Zhou's evidence that a few days after APlus went into possession under the management agreement, Mr Martin came to her and asked her to sign a new licence agreement. If APlus had executed the licence agreement at that time, there would have been no later issue about the licence. The linking of the transfer of the licence with the payment of the arrears of licence fees came later.[92]

178 I consider the dispute with the Owners Corporation about the outstanding licence fees to be irrelevant, for two reasons. Firstly, Mr Martin, the Owners Corporation manager, on 26 June 2017 emailed Mr Yang stating "please confirm that you want the $36,130.59 to be paid towards the current outstanding licence fees owed to the owners corporation". If this had occurred, the arrears of licence fees owed by Beaumont would mostly have been expunged. The arrangement as to set off was ultimately concluded as part of the settlement of Tribunal proceeding OC 242.

179 Secondly, the demand made by Beaumont in August 2017 that APlus pay arrears of $39,535.24 due under the licence agreement was made pursuant to the management agreement, which in clause 3.1 required APlus to perform "all such acts as are reasonably necessary to the Management, operation and conduct of the Business", in circumstances where APlus had been in occupation since 16 January 2017 under that agreement, and where it was made aware by Mr Martin of the need for it to sign a new licence agreement within a few days of taking up its management role.

180 In these circumstances, APlus should not have been surprised that ultimately the Owners Corporation would question of the legality of its occupation and cause its lawyers to send a letter on 17 July 2017 demanding that the occupation of the common property cease.

[92] For instance, in the Owners' Corporation's solicitor's letter of 17 July 2017.

## APlus's own agenda

The requirement to exclude the public toilets from the licence agreement

181 In its written submissions, at [57], APlus contends that Ms Zhou gave evidence that APlus would have accepted a transfer of the licence had it not been conditional upon payment of arrears that pre-dated APlus's occupancy. The transcript reveals a more complex situation. Certainly Ms Zhou said that she wanted a licence, but was not obligated to pay any of Beaumont's debts incurred beforehand.[93] However, she also said that she wanted a licence that was beyond doubt or challenge, and had clear boundaries and responsibilities.[94] Elsewhere, she referred to the current licence agreement as having a lot of unclear areas including the public toilets "and that sort of thing"[95]

182 APlus also contends that Mr Dunstan also gave clear evidence linking the transfer of the licence and the payment of arrears. I disagree. When counsel for APlus put it to Mr Dunstan and that there is a connection between the demand for payment of the significant arrears, and his choice to assert the invalidity of the licence, he answered "M'mm." When pressed, he went on to say:

> I wanted to arrive a place where I had a-a clear and [un]ambiguous right to occupy these areas, for clarity on what the costs were going to be.[96]

183 It is clear that Mr Dunstan also had other matters in mind. When he was asked whether he would take a transfer of the existing licence if it had not been for the demand for arrears, he answered "We would've preferred not to have the public toilets in it".[97]

184 I have focused on this evidence of Ms Zhou and Mr Dunstan in order to demonstrate that the refusal of APlus to accept a transfer of the licence was not merely linked to Beaumont's insistence that APlus pay all past arrears in the licence fee, including fees incurred while Beaumont was occupation, but to show that APlus had a wider agenda of improving the terms of the licence agreement.

The attack on the validity of the licence agreement

185 That APlus had its own agenda is vividly demonstrated by their efforts to challenge the validity of the existing licence agreement. The challenge in question came in the form of a letter on Beaumont's letterhead dated 27 June 2017.

186 Before looking closely at the evidence of Ms Zhou and Mr Dunstan about this challenge, it must be noted that APlus in its written submissions at [59], in connection with an observation that the Owners Corporation did not

[93] Transcript [463/16-18].
[94] Transcript [463/7-10]"
[95] Transcript [462/7-11].
[96] Transcript 31 July 2019 [20/13-17 and 20-22]
[97] Transcript 31 July 2019 [20/24-27]

accept that the licence was void, conceded that the licence was "plainly valid". This clearly suggests that the attack on the ability of the licence agreement was a contrivance.

Ms Zhou's evidence about the letter on Beaumont's letterhead dated 27 June 2017.

187 Ms Zhou gave evidence that the letter was written after a meeting at Beaumont's office attended by her and Mr Dunstan and also Jiang, Sonny Wang and a Mr Wan at which the harassment of APlus by the Owners Corporation was discussed. She described it as "minutes from the meeting."[98] She later said that she sent a "note for Darren to review" explaining:

> I want to draft up something to summarise what we been discussed (sic) today and no matter what your position is you should send a letter to OC as a formal response or try to resolve the dispute. [99]

188 Reference to the letter in question indicates that it is a well drafted letter disputing the validity of the licence agreement and accordingly challenging the status of the amounts claimed to be owed by Beaumont to the Owners Corporation. Significantly, the letter asks the Owners Corporation to cease harassing APlus.

189 I reject Ms Zhou's evidence that the letter was merely "a note" summarising what had been discussed at the meeting. The evidence of Ms Zhou that she drafted "the note" does not sit easily with the evidence of Mr Mr Dunstan, who confirmed that he volunteered to draft the letter because he was the only English-speaking person at the meeting.[100] He added that Beaumont could choose to change the draft. When asked about his motive, he explained that he was "trying to get the deal across the line".[101] When pressed, he also conceded that if the validity of the licence was established, it would get "the OC off my back".[102]

190 Beaumont, in its written submissions at [154-155] suggests that it was Ms Zhou who first raised the question of the validity of the licence. Beaumont referred to Ms Zhou's evidence about her response when she received the licence agreement from Stuart Martin on 3 February 2017. From this evidence it is clear that Ms Zhou developed a view that the licence agreement was invalid because it had been made without the necessary OC resolution. This was about five months before the issue of invalidity was raised with the Owners Corporation in Beaumont's letter of 27 June 2017.

191 For these reasons, I find that APlus had reasons for not accepting the licence agreement other than the dispute about payment of the arrears in licence fees.

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[98] Transcript [460/27-30]
[99] Transcript [460/23 - 461/23].
[100] Transcript 31 July 2019 [19/20-30].
[101] Transcript 31 July 2019 [20/4-6].
[102] Transcript 31 July 2019 [20/7-10].

## Conclusion

192 APlus argues, at [61] of its written submissions, that that the conclusion flows that "in no way could APlus be taken as having unconditionally excused Beaumont from the obligation to transfer the licence." I do not accept that this conclusion is justified on the facts. Nor do I not think that the transfer of the licence remained a relevant factor. I say this because after APlus went into possession under the management agreement, Mr Martin of the Owners Corporation came to Ms Zhou and asked her to sign the licence agreement. If APlus had accepted this invitation, Beaumont would have discharged its obligation regarding the licence agreement. Furthermore, as I have just found, APlus had its own reasons for not accepting a transfer of the licence agreement in unamended form. For these reasons, I find that Beaumont was not itself in breach of the contract for failing to transfer the licence agreement to APlus.

## Conclusion regarding the issue as to whether Beaumont was in a position to settle on 29 June 2018

193 APlus raised three issues which it said stood in the way of a conclusion that Beaumont was a position to settle the contract in July 2018. The issues were the charge over the assets securing the interest of ANZ, Beaumont's inability to prove that it was able to procure the transfer of the S4 and S5 leases, and the failure of Beaumont to transfer the licence agreement with the Owners Corporation. For the reasons outlined above, I have found against APlus in respect of each of these issues. I accordingly find that Beaumont was in position to settle the contract on 29 June 2018.

## Conclusion regarding repudiation

194 I have found that it was APlus that repudiated the contract. Beaumont accepted the repudiation and terminated the contract in July 2018. At the time it called for settlement of the contract-on 29 June- Beaumont was itself able to settle the contract, and I find that the termination is accordingly valid.

195 This finding makes it unnecessary for me to say anything about Beaumont's contention that APlus repudiated the contract by terminating some of the apartment leases. However, for completeness, I note that following the transfer of the leases, APlus was entitled to deal with them in accordance with the law. The arguments about the legality of the termination of some of the residential leases were the subject of separate claims in this Tribunal that had, at the time of the hearing of this proceeding, yet to be determined. No evidence on the topic has since the hearing been submitted. In these circumstances, it is not for the Tribunal here to make any determination about the legality of the lease terminations. At present, this particular set of issues can be taken no further.

196 The finding that Beaumont validly terminated the contract upon APLus's repudiation of it renders APlus liable for damages. I will say more about the assessment of damages shortly.

## THE MANAGEMENT AGREEMENT

197 The management agreement was entered into on 6 January 2016. There is a dispute as to whether Beaumont is entitled to damages for breach of the management agreement by APlus. Beaumont highlights three clauses, namely clauses 2.3, 4 and 5.1.

198 Clause 2.3 of the management agreement provides:

> The Manager (defined as being APlus or nominee) shall be entitled to occupation of the Premises, Stock and Plant of the Business for the purposes of carrying out his/her duties under this Agreement.
>
> Clause 4 reads:
>
> The Manager shall be entitled to 100% of the revenue and profit of the Business during the Term, to the complete exclusion of Beaumont.
>
> Clause 5.1 of the management agreement provides:
>
> The Manager shall approve and be liable to pay 100% of the expenses of the Business during the Term.

199 The dispute between the parties under the management agreement relates to the obligation of APlus to pay any amount in respect of the licence agreement.

200 APlus's defence, in overview, is that as Beaumont never transferred the licence, it had no right to occupy the area, and accordingly had no obligation to pay for its use. In its written submissions, at [73], the argument is articulated as follows:

(a) the licence agreement conferred an exclusive licence on Beaumont to occupy the reception and office areas;

(b) Beaumont was permitted under clause 4.9 of the licence agreement to permit another licencee to occupy the areas, provided consent was obtained from the Owners Corporation;

(c) such consent was not obtained; and

(d) as a consequence, the Owners Corporation challenged APlus's occupancy, and ultimately evicted it from the areas.

201 APlus acknowledges that clause 5.1 of the management agreement requires it to pay 100% of the expenses of the business, but contends that the expenses to which the clause extends is limited to those "associated with the usage and occupancy referred to in clause 2.3". The argument concludes that as APlus:

> was not given the use and/or occupancy of a particular asset or space in accordance with clause 2.3, it should not have to pay the expenses associated with that usage or occupancy under clause 5.1.

202 APlus contends that Beaumont was required to ensure that APlus's use and occupation of the relevant spaces was lawful, either as a result of the principle that a contractual obligation is implicitly required to be performed lawfully (citing *Fitzgerald v FJ Leonhardt Pty Ltd*[103]) alternatively, as a result of the obligation of the Tribunal to construe the management agreement in a 'businesslike' manner that produces a 'commercial' result (*Eureka Operations v Viva Energy*[104]). The argument concludes at [74]that as APlus had, "both in technical terms and substance, no right to occupy the office and reception areas to any greater degree than any other tenant or invitee", it received no benefit from the business asset for which it was being asked to pay, namely an exclusive licence to occupy the areas.

203 Beaumont's responses include the contention that neither the creation of a sub-licence nor the assignment of the licence agreement without consent will automatically terminate the licence itself. The relevance of this argument is that under clause 2.3 of the management agreement Beaumont in effect granted a sub-licence to occupy the office and reception areas to APlus. Beaumont's point, presumably is that because the licence agreement remained on foot until it was terminated, the sub-license also remained on foot until either the licence was terminated or the sublicence was terminated. This contention must be correct. It follows that Aplus did for a time receive an effective sub-licence to occupy the areas.

204 Beaumont's alternative argument rests on APlus's entitlement to occupy arising from the management agreement rather than from any assignment of the licence. I accept this argument because, as observed, by clause 2.3 Beaumont in effect granted a sub-licence to occupy the office and reception areas to APlus, and APlus accepted occupation under this clause. Having accepted occupation on these terms, APlus became obligated to pay the expenses associated with the occupation under clause 5.1. That the sub-licence was terminable by the Owners Corporation at will is beside the point.

205 In any event, another argument is available to Beaumont to meet APlus's contention that the sub-licencing arrangement had to be legal, but was not. This arises from the evidence of Ms Zhou that Stephen Martin on behalf of the Owners Corporation on 3 February 2017 asked APlus to sign a new licence agreement. The point here is that Beaumont must be taken to have at that time done what was necessary to procure the Owners Corporation to offer a new licence agreement to APlus. Having refused to execute the new licence agreement at that point, APlus cannot now argue that Beaumont failed to secure for it a legal title to occupy the office and reception areas.

206 For these reasons, I find that the obligations of APlus under the management agreement extend to reimbursing Beaumont for the licence fees paid or allowed by Beaumont to the Owners Corporation in respect of the period for which APlus's occupied the office and reception areas under

[103] (1987) 189 CLR 215
[104] [2016] VSCA 95 at [43-45]

the management agreement. In failing to pay those licence fees to Beaumont, APlus has breached the management agreement, and is liable to Beaumont for damages.

## FURTHER HEARING

207 Having regard to this finding about the management agreement, and to my finding that APlus is liable to Beaumont for breach of the contract, it is appropriate that the matter be listed for a further hearing at which an assessment of damages can take place. Once damages have been assessed, final orders can be made disposing of this proceeding and the remaining dispute between Beaumont and APlus in OC 242/2019.

### Costs

208 I had ordered at the end of the hearing that when making submissions the parties must include submissions about costs. Beaumont made limited submissions, but APlus contended that it was "unable say anything meaningful regarding costs at this time". In these circumstances, the appropriate course is to give leave to the parties to make submissions as to costs after the damages hearing.

### Submissions required

209 Before fixing a date for the further hearing, the Tribunal would be assisted by estimates from the parties as to its appropriate length. I accordingly will direct the parties to submit short submissions addressing:

a. the matters to be determined at the further hearing; and

b. the estimated length of the further hearing.

**C Edquist**
**Member**