VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP939/2016

CATCHWORDS

RETAIL LEASES-Whether, on a proper construction of a retail lease, certain items of property at the leased premises form part of the premises leased, or were sold to the tenant under a sale of business agreement entered into at the time of the lease between the tenant and a related company of the landlord-determined that the items form part of the premises leased.

CONTRACT-Construction-general principles discussed-the approach to construction of commercial contracts restated in *Electricity Generation Corporation v Woodside Energy and Ors* and *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited and Anor* cited and applied.

INJUNCTIONS-whether damages is an inadequate remedy-final injunction ordered in favour of the landlord

APPLICANT	Bimem Nominees Pty Ltd (ACN 005 109 722)
RESPONDENT	Methven Croydon Pty Ltd (ACN 079 122 900)
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Hearing
DATE OF HEARING	14 February-15 February 2017
DATE OF ORDER AND REASONS	19 May 2017
CITATION	Bimem Nominees Pty Ltd v Methven Croydon Pty Ltd (Building and Property) [2017] VCAT 727

ORDER

1. The respondent is restrained by itself its servants and agents from moving altering or otherwise interfering with the items described in the affidavit of Kurt Gerhad Friedrich Gunther sworn 15 July 2016 as:

   (a) fixed partitioning;

   (b) the fixed work stations;

   (c) the reception desk; and

   (d) the cabling-

   or any part thereof at 2 Croydon Road, Croydon in the State of Victoria other than with the applicant's written consent, and otherwise in accordance

with the rights of the parties contained in the provisions of the lease dated 30 April 2015.

2. It is declared that the premises leased to the respondent by the applicant include the items referred to in order 1(a)-(d) above.

3. It is declared that by reason of the inclusion of the items referred to in order 1(a)-(d) in the premises leased to the respondent by the applicant, the market review of the rent is required to be conducted on the basis that those items are included in the premises so leased to the respondent.

4. Costs reserved.

A T Kincaid
Member

APPEARANCES:

For Applicant	Mr David Robertson QC, with Ms Anastasia Smietanka of Counsel
For Respondents	Mr Philip Solomon QC, with Mr P Duggan of Counsel

REASONS

1 This case arises from a dispute between a landlord and tenant as to who owns certain items of property at the leased premises.

2 For the reasons that follow, I have found in favour of the landlord, which contends that it owns them.

BACKGROUND

3 By a lease dated 30 April 2015 Bimem Nominees Pty Ltd (the "**landlord**") leased premises at 2 Croydon Road, Croydon (the "**premises**") to Methven Croydon Pty Ltd (the "**tenant**") for a 1 year term from 1 May 2015 to 30 April 2016 (the "**Lease**").

4 The Lease granted to the tenant one further 2 year option, and four successive 5 year options to 31 April 2038.

5 The parties renewed the Lease for a further term from 1 May 2016.

6 The Lease provides for a market review of the rent at the commencement of each further term.

7 The parties are now in dispute over whether partitioning, work stations, a reception desk and cabling located in the premises (the "**disputed items**") form part of the premises leased.

8 The cabling is for telephone, electricity and computer connections to approximately 20 work stations. It is threaded through the partitions and work stations.

9 The landlord contends that the market review of the rent is required to be conducted on the basis that the disputed items are included in the premises, and seeks a declaration to that effect. It relies on a valuation that it has obtained, to the effect that the amortised cost of the disputed items over a "straight line" 10 year period is $5,704 per annum which, when added to a proposed current market rent of $53,000 for the 2 year period after 1 May 2016, amounts to a proposed rental of $58,704 per annum from 1 May 2016.[1]

10 The tenant contends that Rosier Real Estate Pty Ltd (now Rosier Owners Corporation Management Pty Ltd) ("**the Seller**"), a company related to the landlord, sold the items to the tenant pursuant to the terms of a Sale of Business Agreement dated 12 March 2015 (the "**SOB Agreement**"), entered into at the same time as the Lease. It says that it now owns the disputed items, that the terms of the Lease are consistent with it having ownership of them and that they are therefore to be regarded as "tenant's fixtures and fittings" within the meaning of section 37(2) of the *Retail Leases Act 2003* (the "**Act**"). The tenant therefore submits that the value of

[1] See Rental Valuation Certificate of Damien Giles, Certified Practising Valuer, dated "as at 23 February 2016", relied on by the landlord.

the items is not to be taken into account when assessing the current market rent under the market review.

11 The dispute first came before the Tribunal on the landlord's application for an interlocutory injunction on 15 July 2016 to restrain the tenant from removing the disputed items, and installing its own partitions and workstations. Mr Earney on behalf of the tenant then deposed that early in 2016, the tenant engaged a company to design and re-fit the interior of the premises with new custom-built furniture to bring the premises up to date and so that the tenant could grow its newly-acquired business. He deposed that the cost of the new furniture is about $67,000 plus installation, and that the tenant has paid a deposit of $22,000 with an agreement to pay the balance upon installation.

12 The Tribunal did not grant the injunction and, on appeal, by orders of the Supreme Court dated 12 August 2016, the tenant was restrained from removing, altering or otherwise interfering with the disputed items until the final determination of the application of the Tribunal, or until further order.[2]

THE SALE OF BUSINESS AGREEMENT AND LEASE

13 The Seller conducted both a real estate agency and an owners' corporations' management business from the premises for about 40 years until 30 April 2015, the Completion Date under the SOB Agreement.

14 The Seller leased the premises until that date from the landlord.

15 In the course of various meetings between Mr Gunther of the Seller (and also a director of the landlord) and Mr Earney of the tenant, the parties agreed that the tenant would buy the real estate business from the Seller. This business was a residential and commercial real estate leasing and management business ("**the business**"), and was valued by the parties at $2.8 million.

16 In addition, the tenant paid $20,000 to the Seller for certain plant and equipment at the premises.

17 The parties also agreed that the tenant would lease the premises from the landlord from 1 May 2015, and conduct the purchased business from the premises.

18 The relevant terms of the SOB Agreement and the Lease (which is contained in Schedule 7 to the SOB Agreement) are reproduced in Appendix 1 to these Reasons.

THE LANDLORD'S SUBMISSIONS

19 In summary, the landlord seeks a final injunction restraining the tenant from removing, altering or otherwise interfering with the disputed items.

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[2] See Order dated 12 August 2016 in *Bimem Nominees Pty Ltd v Methven Croydon Pty Ltd* [2016] VSC 473.

20 It submits that the SOB Agreement does not provide for the sale of the disputed items to the tenant, because the disputed items:

(a) (other than an express reference to the cabling) appear in a plan of the leased premises contained in Schedule 7[3] to the SOB Agreement, and also after page 8 of a Disclosure Statement also contained in Schedule 7[4] to the SOB Agreement ("**the plan**");

(b) do not fall within the definition of "Business Assets" (as defined in clause 1.1 of the SOB Agreement) sold pursuant to clause 2 of the SOB Agreement, in particular, they do not fall within the definition of "Plant and Equipment" referred to in sub-paragraph (a) of the definition of "Business Assets";

(c) otherwise fall within the definition of the "premises" leased to the tenant, being:

(i) "fixed improvements" within the meaning of that expression in the definition of "premises" contained in clause 1.1 of the Lease; and

(ii) "landlord's installations" within the meaning of that expression as also defined in clause 1.1 of the Lease; and

(d) fall within the definition of "Excluded Assets" (as defined in clause 1.1 of the SOB Agreement) retained by the Seller and listed in Schedule 5 to the SOB Agreement.

21 The landlord also relies on the contents of a handwritten list that Mr Gunther, acting on behalf of the Seller, prepared prior to a meeting with Mr Earney of the tenant on 6 February 2015 during negotiations that took place before the SOB Agreement was entered into (the "**handwritten list**"). Mr Gunther gave evidence that he listed in it items of plant and equipment that he thought the tenant would be interested in purchasing, which excludes the disputed items. The landlord also relies also on the contents of a list typed by Mr Gunther's daughter on 7 February 2015,[5] which appears to be a reflection of the handwritten list, but also purports to be a summary of the negotiations on 6 February 2017 (the "**typed list**").

22 The landlord also submits, in support of its application for a final injunction, for the reasons I address below, that damages would not be an adequate remedy.

TENANT'S SUBMISSIONS

23 In summary, the tenant submits that the SOB Agreement provides for the sale of the disputed items to the tenant, because the disputed items:

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3 Or, arguably, immediately after Schedule 7.
4 Or, arguably, immediately after Schedule 7.
5 But in error dated by manuscript addition "07/03/15".

(a) insofar as they appear in the plan, appear in a document that is intended only to portray the internal layout of the premises, having no contractual effect with regard to such of the disputed items as are shown;

(b) fall within the definition of "Business Assets" (as defined in clause 1.1 of the SOB Agreement) sold pursuant to clause 2 of the SOB Agreement, in particular, they fall within the definition of "Plant and Equipment" referred to in sub-paragraph (a) of the definition of "Business Assets":

(c) do not otherwise fall within the definition of the "premises" leased to the tenant, being:

(i) "fixed improvements" within the meaning of that expression in the definition of "premises" contained in clause 1.1 of the Lease; and

(ii) "landlord's installations" within the meaning of that expression as also defined in clause 1.1 of the Lease; and

(d) do not fall within the definition of "Excluded Assets" (as defined in clause 1.1 of the SOB Agreement) retained by the Seller and listed in Schedule 5 to the SOB Agreement.

24 The tenant also relies on:

(a) the terms of the SOB Agreement to the effect that the Seller owned other businesses,[6] and that it wished to sell the business only;

(b) the terms of the SOB Agreement to the effect that the tenant was going to continue to conduct the business at the premises;

(c) the definitions of "Business", "Business Assets", "Premises Lease" and "Plant and Equipment" in the SOB Agreement; and

(d) Schedule 5 to the SOB Agreement, being the only assets not required by the tenant as the result of negotiations between the parties,[7] or which assets were otherwise excluded by the Seller for clarity[8]

as supporting its proposition that, on their proper construction, the words and expressions in the SOB Agreement and the Lease, reflect the purpose and object of a "walk-in walk-out" agreement. That is to say, it submits, all of the disputed items, being necessary for the carrying on of the business by the tenant, should be regarded as falling within the category of items sold to the tenant.

25 The tenant says that to the extent that there is any ambiguity in the words and expressions in the SOB Agreement and the Lease, the Tribunal should

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6 One of which businesses was the owners' corporations' business.

7 Such as "six (6) franking machines".

8 Such as the Seller's remote offices at Yarra Glen and Montrose, and the directors' vehicles.

employ a "business common sense" approach to its task, and construe the SOB Agreement on the basis of a "walk-in walk-out" agreement.

26 The tenant also relies on a depreciation schedule of the Seller for the year ended 30 June 2015, taken to have been prepared subsequent to the entry by the parties into the SOB Agreement and the Lease, showing that the disputed items were listed as having been purchased in about 2002-2003. It shows a written down value ascribed to the disputed items at 1 July 2014 considerably lower than their opening values, having been depreciated over the years for the benefit of the Seller. In the case of "telephone & data cabling" and the 'front desk", the book values have been depreciated over the years to zero. The tenant submits that the SOB Agreement and the Lease should not be construed in such a way as results in the tenant continuing to pay for property which, it may be said, the landlord now regards as having little or no value.

27 The tenant also says that if the Tribunal finds that any or all of the disputed items have not been sold pursuant to the SOB Agreement, as contended by the landlord, they therefore remain the property of the Seller and:

(a) it is therefore not competent for the landlord (in the absence of proving that it is the owner of the disputed items) to obtain the final injunction sought; and

(b) having regard to depreciation schedules of the Seller, the Tribunal should not, in any event, make any order that has the effect of "rubber stamping" the values ascribed to the disputed items in the Rental Valuation Certificate of Damien Giles, Certified Practising Valuer, dated "as at 23 February 2016", relied on by the landlord.

PRINCIPLES OF CONSTRUCTION

28 I will need to address some of the parties' contentions by reference to relevant principles of contractual construction, which I summarise as follows:[9]

(a) a contract should be interpreted as having the meaning that would be given to it by a reasonable reader in the position of the parties at the time the contract was made;[10]

(b) evidence of pre-contractual negotiations is [therefore] not generally admissible to interpret the concluded written agreement;[11]

(c) the court may generally not look to the subsequent conduct of the parties to interpret a written agreement;[12]

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9 For these propositions, I have used the chapter headings of *The Interpretation of Contracts in Australia* (2012) by Lewison and Hughes ("**ICA**").

10 See ICA paragraph 1.02.

11 An exclusionary rule. See ICA paragraph 3.08.

12 Another exclusionary rule. See ICA paragraph 3.15.

(d) the text of the contract should be given its natural and ordinary meaning. The court should only depart from that natural and ordinary meaning so far as is necessary to avoid an inconsistency or absurdity;[13]

(e) the words of a contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy;[14]

(f) where a court does not understand the language of a written instrument it may look at dictionaries and other instruments in order to elucidate the meaning of the words;[15]

(g) the text of the contract must be understood in its context. This requires that the text of the contract be read as a whole, and, ordinarily, that it be read against the background surrounding circumstances known to the parties, and the purpose or object of the transaction;[16]

(h) in addition to the words of the instrument, and the particular facts proved in evidence admitted in aid of construction, the court may also be admitted by the commercial purpose of the contract, and in considering that purpose may rely upon its own experience of contracts of a similar character to that under consideration;[17]

(i) if the words of the contract are clear, the court must give effect to them even if they have no discernible commercial purpose;[18] and

(j) the court may not generally look at the subsequent conduct of the parties to interpret a written agreement.[19]

29 I should add to these the more recent formulation of the required approach by the High Court in *Electricity Generation Corporation v Woodside Energy and Ors*,[20] (without references to footnotes):

> [The parties] recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of the parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable business person would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require a consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary

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13 See ICA paragraph 1.03.
14 See ICA paragraph 5.01.
15 See ICA paragraph 5.03.
16 See ICA paragraphs 1.04 and 7.02.
17 See ICA paragraph 2.06.
18 See ICA paragraph 2.07.
19 See ICA paragraph 3.15.
20 [2014] HCA 7.

intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties…intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".[21]

30 And in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited and Anor*,[22] a judgment delivered by the High Court a short time after *Electricity Generation Corporation*, it stated (again, without references to footnotes):

> The rights and liabilities of the parties under a provision of a contract are determined objectively, by reference to its text, context, (**the entire text of the contract** as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean. **That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract**.
>
> Ordinarily, **this process of construction is possible by reference to the contract alone**. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things **external** to the contract) cannot be adduced to contradict its plain meaning.
>
> However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> **Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction**, which may include its history, background and context and the market in which the parties are operating. What is inadmissible is evidence of the parties' statements and actions regarding their actual intentions and expectations.
>
> Other principles are relevant in the construction of commercial contracts. **Unless a contrary intention is indicated in the contract**,[23] a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that

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21 Ibid (per French CJ, Hayne, Crennan and Kiefel JJ) at [35].

22 [2015] HCA 37.

23 Thus reinforcing the proposition that court is not justified in having regard to producing a "commercial result" if the plain words of the contract do not allow for it.

> the parties …intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".
>
> These observation are not intended to state any departure from the law set out in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* and *Electricity Generation Corporation*...[**emphasis added**].

31 I now consider each construction issue in turn.

CONSTRUCTION OF THE AGREEMENTS-ANALYSIS

Whether the disputed items appear in the plan and, if so, to what legal effect.

32 I deal with this question first because, as will be seen, the existence of the plan in the SOB Agreement (including the Lease and the Disclosure Statement) provides in my view a primary source for ascertaining the meaning of words and expressions used in the SOB Agreement and the Lease. Absent the plan, there would otherwise be real questions as to the meanings of the various words and expressions that I am required to construe.

33 As I have indicated, the plan appears in Schedule 7 to the SOB Agreement (as part of the Lease that comprises Schedule 7), and also after page 8 of a Disclosure Statement appearing in schedule 7 immediately after the Lease.

34 Evidence was given by the applicant of the circumstances surrounding how the plan came to be included.[24] I need have no regard to these circumstances when construing the meaning and effect of the plan forming part of the contractual documentation, when determining the rights and obligations of the parties.

35 I find that the plan depicts all the partitioning and the workstations, and also the front desk.

36 An unusual feature of the plan is that its significance to the parties is not otherwise referred to in the SOB Agreement or the lease. In this respect, I find that the reference to "Plan of premises (see item 1.2)" in Part 11 of the Disclosure Statement[25] is not to the plan (which appears on the immediately following page of the Disclosure Statement), but the plan contained in the Lands Register Search Statement (which appears in the 3 pages thereafter). This is because the 3 page plan meets the description of the plan referred to in item 1.2 of the Disclosure Statement.

37 Given that I must construe the text of the SOB Agreement and attached Lease and Disclosure Statement as a whole, I must have regard to the plan when construing the SOB Agreement and the Lease. In other words, the

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[24] Paragraph 7(b) of the affidavit of Mr Gunther (as amended during Mr Gunther's oral testimony).
[25] At paragraph 23.1.

fact of its incorporation by the parties means that they must have considered that it had work to do.

38 In accordance with the principle of construction that I have set out above, I must interpret the contents of the plan as having the meaning that would be given to it by a reasonable business person in the position of the parties at the time the contract was made.

39 I have concluded that the plan was included by the parties as showing not only the fact that the tenant leased the ground and first floor areas shown on the plan, but also the work stations, partitions and front desk shown on the plan.

40 In addition, I find that a reasonable business person in the position of the parties would also have considered that cabling, being generally incorporated into the partitions and work stations, was also part of the premises leased to the tenant.

Whether the disputed items fall within the definition of "Business Assets" (as defined in clause 1.1 of the SOB Agreement) sold pursuant to clause 2 of the SOB Agreement.

41 The "Business Assets" bought by the tenant pursuant to clause 2 of the SOB Agreement are defined in clause 1.1 of the SOB Agreement. The definition includes "Plant and Equipment" as that expression is in turn defined in clause 1.1 of the SOB Agreement, by reference to the list of "Plant, Equipment and Intellectual Property" listed in Schedule 3 to the SOB Agreement.

42 It is common ground that the disputed items must be found to fall within the category "All office furniture including carpets and blinds" appearing in Schedule 3 in order for them to be considered as having been sold to the tenant.

43 The landlord submits that the disputed items cannot be regarded as "furniture" in the ordinary meaning of that word.

44 It also submits that the meaning of the word "furniture" as used in Schedule 3 cannot be also ascertained by the words that immediately follow it "including carpets and blinds" which, it submits, "merely adds those further two items to the category of 'furniture'".

45 In seeking to establish the ordinary meaning of the word "furniture", the landlord relies on the following dictionary definitions of the word (emphases added):

Macquarie Dictionary, 2015	"the movable articles, such as tables, chairs, beds, desks, cabinets, etc required for use or ornament in a house, office, or the like"
Collins English Dictionary-Complete	"…the **movable**, generally functional, articles that equip a

and Unabridged, 12th edition, 2014	room, house, etc"
Collins COBUILD English Usage, Harper Collins 2012	"…consists of the large **moveable** objects in a room, such as tables and chairs"
American Heritage Dictionary of the English Language, 5th edition, 2016	"…the **movable** articles in a room or an establishment that make it fit for living or working"
Random House Kernerman Webster's College Dictionary, 2010	"…the **movable** articles, such as tables, chairs, or cabinets, required for use or ornament in a house, office, or the like."
Unspecified dictionary, handed up during submissions	"(The prevailing sense) **Moveable** articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings

46 Relying on these definitions, the landlord submits that the disputed items are not "movable", and are therefore not furniture.

47 The landlord says that the expression "office furniture" refers to items that were at the premises on 12 March 2015, when the SOB Agreement was entered into, being:

(a) an adjustable green ergonomic chair to each work station, totalling approximately 20 chairs;

(b) 6 additional slightly worn spare ergonomic chairs;

(c) green plastic desk protection mats for each work station;

(d) rubbish bins for each work station and table;

(e) 10 brown vinyl chairs for clients in the reception area; and

(f) a table and 3 chairs in each of the 4 interview rooms ("**the left items**").

48 The tenant contends that neither the partitioning nor the work stations are fixed, but are "demountable", and that they can "easily be disassembled." They are therefore to be regarded as movable, it submits, and therefore furniture within the ordinary meaning of that word.

49 I conducted a view on the morning of the second day of the hearing.

50 I was able to observe that the partitions are in substance "wall" or "part-wall" structures, made up of 4 polystyrene pieces fixed together side-by-side, and most of them have what appears to a grey carpet-like external cosmetic surface on both sides.

51 The polystyrene pieces making up these wall structures are restrained vertically and horizontally by what appears to be aluminium edging, in a "u" shaped profile around the carpet-like external surface of the structure.

52 The "u" shape profile forming the external vertical edge of a partition, furthest from the wall to which the partition is "fixed", is designed to envelop a horizontal steel profile screwed to the wooden floor of the premises, through the existing carpet, purchased by the tenant under the SOB Agreement. The partition is thus rendered immobile at the floor by being restrained by the horizontal steel profile.

53 At the other end of each partition, the partition is "fixed" into the wall by a system of bolts or screws into vertically fixed profiled aluminium elements attached to the wall.

54 Some partitions are only about 1-2 metres high, simply providing a divider between work stations.[26] Some of these partitions are a little higher, and also support a see-though component (possibly glass).[27]

55 Other partitions rise to almost full wall height, so as to create an office. Some of these office partitions also support a see-through barrier (possibly glass).[28]

56 During the view, the tenant was able to demonstrate how the partitions are, to use its word, "demounted". It is fair to say that it is not a complex procedure, and can be performed by two people in a short space of time, with the assistance of minimal tools.

57 The work stations are fixed into the partitions, and they too can be detached from the partitions without undue complexity.

58 I have nevertheless concluded that the partitions, by force of their degree of annexation to the walls and the floor of the premises do not fall within the term "furniture" as used in schedule 3 to the SOB Agreement, as that word is understood in its ordinary meaning, and as defined above. In other words, in order to be considered as office "furniture", I consider that the partitions should have qualities similar to "tables", "chairs", "desks", and "cabinets", each of which are understood in usual parlance to be able to be readily moved about a room so as to suit the desires of the occupant.

59 To the extent that there is any ambiguity in the word "furniture", as used in the SOB Agreement, I am entitled to construe it having regard to the "circumstances and things external to the contract which [were] known to the parties".[29] One such circumstance is the uncontested fact that, at the date of the SOB Agreement, the left items were at the premises, the nature of each of which would in my view plainly be regarded as being included in

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26 See TB 489.
27 See TB 498, 499, 501, 502, 505.
28 Seen in photographs at TB 490, 491 and 492.
29 See *Mount Bruce Mining Pty Ltd* (ibid fn 22).

the word "furniture" on its plain meaning, and that the left items were intended by the parties to be referred to by the word "furniture".

60 I also find that the expression "including carpets and blinds" appearing directly after the words "office furniture" in item 7 of Schedule 3, are not items of "furniture" as that word is ordinarily understood. I have concluded, however, that this does not have the effect of altering the ordinary meaning of the word "furniture" as used in item 7 of Schedule 3, when read in the context of the SOB Agreement as a whole. This is because I am not satisfied, particularly having regard to the contents of the plan (and, to the extent that there is any ambiguity, the existence of the left items), that there are sufficient indications that the word "furniture" is to be understood here other than in its primary and natural signification.[30]

61 I should add that the reference to "fittings" in the definition of "Plant and Equipment" in the SOB Agreement does not have the effect of altering the way in which I have construed the natural and ordinary meaning of the word "furniture". This is because the word 'fittings" is capable of describing items other than "furniture" in Schedule 3 to the SOB Agreement, such as 'carpets", "blinds" and "office clock".

Are the disputed items fixtures?

62 I also accept the landlord's further submission that "furniture", as ordinarily understood, comprises "chattels", and that the partitions and work stations (at least), by force of their degree of annexation to the premises, are "fixtures".

63 The landlord relies on the statements of the law in *Belgrave Nominees Pty ltd and Ors v Barlin-Scott Airconditioning (Aust) Pty Ltd*[31] when Kaye J cited, with approval, the following propositions of law of the New South Wales Court of Appeal in *Australian Provincial Assurance Co Ltd v Coroneo*[32]:

> A fixture is a thing once a chattel which has become in law land through having been fixed to the land. The question whether a chattel has become a fixture depends upon whether it has been fixed to the land, and for what purpose. If a chattel is actually fixed to the land to any extent, by any means other than its own weight, then prima facie it is a fixture; and the burden of proof is upon anyone who asserts that it is not: if it is not otherwise fixed but is kept in position by its own weight, then prima facie it is not a fixture; and the burden of proof is on anyone who asserts that it is: *Holland v Hodgson*. The test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the **intention** that it shall remain in position permanently or for an indefinite or substantial period: *Holland v Hodgson*, or whether it has been fixed with the **intent** that it shall remain in position only for some temporary purpose: *Vaudeville*

30 See *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 at 647 and 649 (per Dixon J).
31 [1984] VR 947 at 950-951.
32 (1938) 38 SR (NSW) 700 at 712-713.

> *Electric Cinema Ltd v Muriset* ([1923] 2 Ch 74 at p 87). In the former case, it is a fixture, whether it has been fixed for the better enjoyment of the land or building, or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed: *Holland v Hodgson*; *Reynolds v Ashby & Son* [[1904] AC 466]; *Colledge v HC Curlett Construction Co Ltd* [[1932] NZLR 1060]; *Benger v Quartermain* [1934] NZLR s 13]. If it is proved to have been fixed merely for a temporary purpose it is not a fixture: *Holland v Hodgson; Vaudeville Electric Cinema Ltd v Muriset.* The **intention** of the person fixing it must be gathered from the purpose for which and the time during which user in the fixed position is contemplated: *Hobson v Gorringe* [[1987] 1 Ch 182]; *Pukuweka Sawmills Ltd v Winger* [1917] NZLR 81]. If a thing has been securely fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury to the thing itself or to that to which it is attached, this supplies strong but not necessarily conclusive evidence that a permanent fixing was intended: *Holland v Hodgson*; *Spyer v Phillipson* [[1931] 2 Ch 183 at pp 209-10]. On the other hand the fact that the fixing is very slight helps support an inference that was not intended to be permanent (**emphasis added**).

64 His Honour continued:

> Whether the **intention** of the party fixing the chattel was to make it a permanent accession to the freehold is to be inferred from the matters and circumstances including the following: the nature of the chattel; the relation and situation of the party making the annexation vis-a-vis the owner of the freehold or the person in possession; the mode of annexation; and the purpose for which the chattel was fixed: *Reid v Shaw* (1906) 3 CLR 656 at p 667 per Griffiths CJ (emphasis added).

65 In *Reid v Shaw*[33] the High Court of Australia accepted the test adopted by Blackburn J in *Holland v Hodgson*[34] as to the circumstances when what is annexed to the land becomes part of the land. In his Honour's words:

> It is a question which must depend on the circumstances of the case, and mainly on two circumstances, as indicating the intention, viz. the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel.

66 Whether the actual intention of the owner of a chattel may also be considered was addressed by the New South Wales Court of Appeal in *NH Dunn Pty Limited v LM Ericsson Pty Ltd.*[35] Mahoney JA stated:

> Whether the question of whether chattels have become part of the realty is a question of fact…or a question of law, various matters have been seen as of assistance in the final determination of it. The period of time for which the chattel was to be in position, the degree of its annexation to the land, what was to be done with it, and the function to be served by its annexation, are all matters which have been seen to be relevant for this purpose. In particular

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33 (1906) 3 CLR 656.
34 LR 7 CP 328 at 334.
35 (1979) 2 BPR 9241.

> circumstances, statements made by the owner of the chattel or of the realty as to his intention that the chattel shall or shall not be part of the realty may, if appropriately proved and evidenced, be relevant as facts probative of such matters and therefore relevant in the determination of the ultimate fact to be proved…

67 In summary, the test is whether it was the intention of the parties, viewed objectively, that a chattel placed upon the land by one of them, in this case the Seller, has become a fixture. "Intention" in this context is the presumed or imputed intention of the parties arising from all relevant facts, including any acceptable evidence of actual intention. Two particular circumstances will indicate the intention-the degree of annexation and the object of annexation, but these are not exclusive.[36] There was no evidence before me of the actual intention of the Seller with regard to its fixing of the work stations and partitions.

68 This case does not, however, concern a dispute between a tenant who has installed relevant items[37] and the landlord of the premises as to who owns the items. It is a dispute between a tenant and a landlord of premises as to who owns items that were installed by a previous tenant. In such a case, it is the presumed intention of the parties to the lease as to whether a relevant item is to be considered as a chattel or a fixture.

69 The importance to such an enquiry of the intention of the parties to the lease, as imputed or presumed from the terms of the lease, was emphasised by Walsh J in *Anthony v The Commonwealth*.[38] His Honour said:

> If the question to be considered was whether an actual intention could be inferred that the poles and the lines should become the property of the landowner, it seems to me in the circumstances that that question would be answered 'No'. But, in my opinion the question is not one of ascertaining the actual intention but one of determining on the circumstances of the case, and in particular from the degree of annexation and the object of the annexation, what is the intention that ought to be imputed or presumed…**I think it is proper to have regard to the terms of the lease…and to draw from [it] such inferences as to the intention of the parties as to relevant matters as may be drawn from them [emphasis added]**.[39]

70 The plan forms part of the Lease. I have considered above as to what meaning and effect should be given to it.

71 Construing the Lease as a whole, I am also entitled to have regard to the plan in order to draw such inferences concerning the intention of the parties as to whether the partitions, the work stations and the reception desk were

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36 See also *Bella Barista Pty Ltd v Jolen Holdings Pty Ltd* [2014] VCAT 56, in which the Tribunal found that building module, portable shelters and signage erected by the tenant at the landlord's premises had not become fixtures.

37 Or its assignee, as was the case in *Liubinas v Vicport Fisheries Pty Ltd* (Building and Property) [2016] VCAT 927.

38 (1973) 47 ALJR 83.

39 (supra) at 89.

chattels (and therefore more likely to be items of "furniture"), or whether they were regarded as fixtures.

72 The plan clearly depicts the partitions, the work stations and the reception desk. I have concluded from this that the presumed or imputed intention of the parties to the Lease was that they should be regarded as fixtures, and not chattels that can be readily moved about the premises to suit the desires of the tenant.

Whether the disputed items are "fixed improvements" within the meaning of that expression in the definition of "premises" contained in clause 1.1 of the Lease.

73 The expression "fixed improvements" is not defined in the Lease. The landlord submits that the expression is, however, apt to include the disputed items in this case. I find that, particularly when read in conjunction with the plan, the expression refers to the disputed items.

Whether the disputed items are "landlord's installations" within the meaning of that expression as also defined in clause 1.1 of the Lease.

74 The expression "landlord's installations" is defined in clause 1.1 of the Lease, with reference to the items set out in item 5 of the Schedule to the lease. The reference to those items is expressly non-exhaustive (the definition in clause 1.1 states that it *includes* those items). I find that the expression is also apt to include the disputed items.

Whether the disputed items fall within the definition of "Excluded Assets" (as defined in clause 1.1 of the SOB Agreement) retained by the Seller and listed in Schedule 5 of the SOB Agreement.

75 It is common ground that the "Business Assets" bought by the tenant pursuant to the SOB Agreement do not include the "Excluded Assets" as defined, being those listed in Schedule 5 to the SOB Agreement.

76 I find that the expression "The [landlord's] plant, equipment and software other than as set out in Schedule 3" appearing in Schedule 5 is also apt to include the disputed items.

Whether regard may be had to the handwritten list and the typed list and, if so, to what legal effect.

77 I find that both the handwritten list and the typed list are documents emanated from one party (the landlord) during the course of negotiations with the other party (the tenant). As such, they do not constitute a circumstance external to the contract known to both parties. Having regard to the general rule preventing such pre-contractual negotiations being admissible to interpret the concluded written agreement, and being also satisfied that none of the recognised exceptions to the rule apply in this case, I find that this evidence is inadmissible on the question of construction both of the SOB Agreement and the Lease.

78 Therefore I have had no regard to the handwritten list or the typed list in the process of construction of the SOB Agreement and the Lease.

Whether the failure by the landlord to insert a cross in the box marked "other (please specify)" is a sufficient signification of the parties' intentions that the disputed items were not to form part of the premises leased to the tenant.

79 I have concluded that, having regard to the contents of the plan, also attached to the Disclosure Statement, that the failure by the landlord to tick the box besides the description "other (please specify)" does not signify that the landlord had not provided "existing structures, fixtures, plant and equipment in the premises" *other* than those against which a "cross" appears in the Disclosure Statement. I find that upon an objective reading of the Disclosure Statement as a whole, the annexing of the plan to the Disclosure Statement would have made it sufficiently clear that the disputed items were also comprised in the "existing structures, fixtures, plant and equipment in the premises".

CONSTRUCTION OF THE AGREEMENTS-OTHER ISSUES

Whether, there is any basis for finding, as contended for by the tenant, that the lease properly construed reflects a "walk-in walk out" agreement and that therefore the disputed items were sold to the tenant.

80 In accordance with the principles of construction restated by the High Court in *Mount Bruce Mining Pty Limited*,[40] in order to determine the meaning of the SOB Agreement and the Lease, I am entitled to refer only to the terms of the agreements to determine "the circumstances addressed by them, and the commercial purpose or objects to be secured" by them.

81 True it is that the SOB Agreement defines the "Business" of the Seller in broad terms. Given however the lengths to which I have found the parties have plainly gone to define the "Business Assets" being sold to the tenant, to define the "Excluded Assets" not being sold to the tenant, and to otherwise define the premises being let under the Lease (including by reference to the plan in which the disputed items appear), I am not persuaded that I am able to construe the SOB Agreement and the Lease as a "walk-in walk-out" agreement as contended by the tenant. In my view, the conclusion contended for–that the disputed items were sold to the tenant–is not open on an objective construction of the agreements as a whole.

82 It follows that I do not find that there is such an ambiguity in the express words of the SOB Agreement or the Lease, as to whether the disputed items were sold to the tenant (and I have found that they were not) as to warrant my adopting a "business common-sense" approach to the construction issues. Neither do I find there to be a warrant for my considering events, circumstances and things external to the contract which were known to the

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40 Ibid, footnote 22.

parties and which may have otherwise assisted in identifying the purpose or object of the transaction. I did not understand the tenant to have led any such evidence in any event.

The Seller's own depreciation schedules

83 I reject the submission on behalf of the tenant to the effect that there is a legal basis for construing the agreements having regard to the Seller's treatment of the disputed items in its own financial statements, prepared after the SOB Agreement and the Lease were entered into. One of the principles of construction to which I have referred is that the subsequent conduct of the parties may not be looked at to interpret the terms of a written agreement, and therefore I have had no regard to them in the process of construction.

84 Whether these matters are relevant in the context of a valuation of the disputed items may be a matter for valuation expertise, if and when the tenant seeks to challenge the values given to by Mr Giles, Certified Practising Valuer, relied on by the landlord.

INJUNCTION ISSUES

Whether, if it is found that the disputed items were not sold by the seller to the tenant, the landlord has standing to seek an injunction.

85 I apprehend the tenant's further submission that the landlord is not able to contend that the disputed items were part of the property leased to the tenant because either:

(a) the landlord did not own the disputed items on the date the lease was entered into (if the disputed items were not sold to the tenant, as I have found, the Seller continues to own them); or

(b) the landlord has not, by evidence, excluded the possibility that, as between the landlord and some third person (for example, the Seller), that third person may have an interest in the disputed items.

86 I accept the landlord's submission in response that the landlord does not need to establish its ownership of the disputed items, and that it need only prove that, on a true construction of the lease, the disputed items are part of the property leased to the tenant. A tenant is estopped from disputing the title of its landlord.[41]

87 I also consider that it would not be correct to construe the expression in clause 1.1 of the Lease "the installations of the landlord in the premises" as if it required proof that the landlord itself or its agents had installed the disputed items, as distinct from its predecessor in title or previous tenant of the landlord. I find that the expression is apt to include any installation of

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41 See *Create Invest Develop Pty Ltd v Cooma Clothing Pty Ltd & Ors* (Retail Tenancies) [2012] VCAT 1907 at [31]; *Cooma Clothing Pty Ltd v Create Invest Develop Pty Ltd* [2013] 46 VR 447 at [21].

the landlord in the premises at the date of commencement of the Lease in respect of which possession is to pass to the tenant.

88 I also accept that, in any event, the former tenant the Seller, cannot now contend that the landlord had no right to lease the disputed items, since pursuant to clause 6 of the SOB Agreement and Schedule 7 to the SOB Agreement, the Seller proferred the Lease to the tenant, and cannot now derogate from it.[42]

89 Given also my conclusion that the disputed items are fixtures, it follows that upon the surrender of the premises by the Seller, they vested in the landlord as registered proprietor of the fee simple estate, free of any right that the Seller may have had to remove the items as tenant's property. In circumstances where fixtures can be said to be "tenant's fixtures", those fixtures will be taken to have been abandoned by the tenant, if the tenant surrenders the lease and vacates the premises without removing the fixtures.[43]

Whether the landlord has shown that damages would not be an adequate remedy.

90 On general principles, in order that a final injunction be granted, I need to be satisfied that damages would not be an adequate remedy. The landlord relies on the reasons given by his Honour Justice Croft[44] for the proposition that they would not be in this case. His Honour stated:

> 36. …I accept that, as submitted by the [landlord], the circumstances do show that damages would not be an adequate remedy:
>
> (a) the removal of the items in dispute would change the character of the [premises] from being fitted out office premises as depicted in the [Plan] included in the lease to being a bare shell;
>
> (b) the operation of the [lease] and the commercial advantages and disadvantages associated with the rent review provisions, the exercise of the successive options to renew and the prohibition of any alteration or addition to the [premises] without the consent of the landlord contained in clause 2.2.11 of the Lease would be radically changed by the removal of the items in dispute;
>
> (c) the presence or absence of the [dispute items] would have a substantial effect on the assessment of market rent as at 1 May 2016, which is the first rent review date (approximately 11%);
>
> (d) the removal of the items in dispute would affect the assessment of the current market rent, not only as at 1 May 2016 but as at each of the four succeeding review dates, 1 May 2018, 1 May 2013, 1 May 2028 and 1 May 2033 (in the event that the succeeding options to renew were exercised). It is

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42 See *Bimem Nominees Pty Ltd v Methven Croydon Pty Ltd* [2016] VSC 473 at [33], where Croft J appears to have adopted this approach.

43 *New Zealand Government Property Corp v HM & S Ltd* [1982] QB 1134, 1161 per Dunn LJ.

44 Ibid, footnote 2.

not reasonable to attempt to assess now what the possible rent review circumstances might be in those future years; and

(e) the removal of the items in dispute would result in them becoming worthless.

37. A further aspect of these matters discussed in the course of the appeal hearing was the inherent difficulty in assessing damages if it should be that it is established that removal of the dispute fittings would have an impact on rent reviews under the Lease or any further, renewed, terms. If this proves to be an element in the assessment of damages a failure to maintain the status quo now is likely to have the effect of transforming the proceedings from determination of entitlements by reference to the Lease and [SOB Agreement] provisions and, perhaps, some other factual matters into a proceeding involving valuation evidence as to probable rent consequences.

38. For these reasons, I do not accept the [tenant's] submissions that damages would be readily and precisely calculable by the [landlord] and that damages would be a perfectly adequate remedy for a commercial landlord in the [landlord's position].

91 There has been no evidence led before me as would cause me to depart from the views of his Honour, and therefore I am satisfied that the landlord has demonstrated that in the circumstances, damages would not provide it with an adequate remedy.

92 I make the orders attached.

A T Kincaid
Member

Appendix 1

Relevant terms of the SOB Agreement (certain words and expressions are italicised in bold for emphasis)

THIS BUSINESS SALE AGREEMENT is made on 12/3/2015

PARTIES:

Rosier Real Estate Pty Ltd A.C.N. 005 131 126
2 Croydon Road Croydon VIC 3136 ATF THE GUNTHER BUSINESS TRUST

(Seller)

[The tenant, and other companies associated with the tenant] **(Buyer)**

RECITALS

A. The Seller is the owner of the Goodwill and the Plant and Equipment, has entered into the Contracts and employs the Employees.

B. The Seller has agreed to sell and the Buyer has agreed to buy the Business Assets.

C. The Guarantors have agreed to guarantee the due and punctual performance of the obligations of the Buyer…

E. The Seller is the owner of the Business Assets and carries on Business from the Business Premises and uses the Business Trading Name at such Business Premises.

OPERATIVE PROVISIONS

In consideration of, among other things, the mutual promises contained in this Agreement:

1. DEFINITIONS AND INTERPRETATION

1.1 **Definitions**…

Business means the residential and commercial real estate leasing and management business conducted by the Seller in Victoria;

Business Assets means the following assets owned by Seller and used in the Business:

a) ***the Plant and Equipment***; and
b) the Goodwill;
c) the Business Records;
d) the Contracts;
e) the Premises Lease;

f) PO Box 888 at the Croydon Post Office.

Completion Date means the 30 April 2015;

Excluded Assets means the assets currently used by the Seller in the Business which are retained by the Seller listed in Schedule 5;

Premises Lease means the proposed lease of the Business Premises between [the landlord] as Landlord and [the tenant] as Tenant attached to Schedule 7;

Plant and Equipment means the plant, equipment, machinery, tools, furniture, fittings and motor vehicles owned by the Seller as at the Completion Date and used in the Business listed in Schedule 3;

2. SALE AND PURCHASE

On Completion the Seller must sell and the Buyer must buy the Business Assets free of Encumbrances for the Price.

3. PRICE

3.1 **Price**

3.1.1 The Price is the total of

3.1.1.1 The amount of $20,000.00 for the ***plant and equipment*** set out in Schedule 3; and

3.1.1.2 The goodwill of the rent roll being the aggregate of the value of each Property with an Authority which is assigned, transferred or otherwise placed in the control of the Buyer at Completion with the value of each Property calculated by the multiplying of the annual management fees of each Property X $3.1041.

6.2 **Delivery of Documents executed by the Seller**

At Completion the seller must give the Buyer the following documents executed by the Seller:

…(c) the Premises Lease…

Appendix 1 (continued)

Relevant terms of the SOB Agreement continued (certain words and expressions are italicised in bold for emphasis)

Schedule [3]—Plant, Equipment and Intellectual Property

1 Thirteen (13) desktop computers.

2 Twenty-nine (29) filing cabinets.

3 Five (5) New 128GB grey 4G tablet ipads and 3 used ipads.

4 Rockend-REST software licenses for rent roll management for each of the computers supplied to the Buyer.

5 My Desktop client base software and cabinet of manual master cards.

6 One (1) printer.

7 ***All office furniture including carpets and blinds.***

8 Office clock.

9 Staff indicator.

10 Vacuum cleaner.

11 Stationary cupboard and stationary.

12 All boards and sign boards, flags, poles, lights, auctioneers bell, key safes.

13 Upstairs, wall unit, desk and sideboard.

14 Boardroom table and 10 chairs.

15 Upstairs desk and cabinet, kitchen table, chairs and refrigerator.

16 Current sales listings.

17 The Logo herewith:

[logo reproduced]

Appendix 1 (continued)

Relevant terms of the SOB Agreement continued (certain words and expressions are italicised in bold for emphasis)

Schedule [5] – Excluded Assets

1 The goodwill of the business conducted by the Seller as managing agent of Owners Corporations.

2 ***The Seller's plant, equipment and software other than as set out in Schedule 3.***

3 Logo attached.

4 Croydon office telephone system, five (5) office shredders, six (6) franking machines.

5 One (1) Sharp MX-2640 copying machine.

6 One (1) Brother desktop HL 5450DN Printer.

7 Five (5) Rosier smart cars.

8 Office contents at 25-27 Bell Street, Yarra Glen.

9 Contents of Montrose Home Office.

10 Vehicles for use of KGF Gunther and GF Gunther.

Appendix 1 (continued)

Relevant terms of the SOB Agreement continued (certain words and expressions are italicised in bold for emphasis)

Schedule [7] – The Premises Lease

LEASE OF REAL ESTATE

(WITH GUARANTEE & INDEMNITY)

(Commercial Property)

The landlord leases the **premises** to the tenant for the term and at the rent and on the conditions set out in this lease together with all necessary access over any common areas.

EXECUTED AS A DEED on 30th (handwritten) day of APRIL (handwritten) 2015

[execution clauses completed by the parties]

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1. DEFINITIONS AND INTERPRETATION

1.1

landlord's installations	the installations of the landlord in the premises or the building or on the land…and including the installations listed in item 5 [of the schedule to the lease].
premises	the premises described in item 4(a) ***and fixed improvements*** and the ***landlord's installations*** within the premises

2. **TENANT'S PAYMENT, USE AND INSURANCE OBLIGATIONS**

2.2 The tenant must not, and must not let anyone else-

2.2.11 make any alteration or addition to the **premises** without the landlord's written consent. Consent is entirely at the **landlord's** discretion.

2.2.12 install any fixtures or fittings, except those necessary for the **permitted use**, without the **landlord's** written consent.

SCHEDULE [TO LEASE]

ITEM 4
[1.1]

(a) **PREMISES**:

2 Croydon Road Croydon VIC 3136

(b) **LAND**:

Lot 1 on Plan of Subdivision 006894 and comprising the whole of the land on certificate of title volume 7496 folio 186

ITEM 5
[1.1]

LANDLORD'S INSTALLATIONS:

Air conditioning
Hot water Service
Ceiling lighting
Toilet Mechanical exhausts
Painted Walls
Electrical distribution load (3 phase)
Electrical distribution load (single phase)
Water meter
Electricity meter
Shop front
Sink
Suspended ceilings
Water supply

ITEM 7
[1.1]

TENANT'S INSTALLATIONS:

Those fixtures and fittings not owned or installed by the **landlord**.

ITEM 15
[2.2.1]

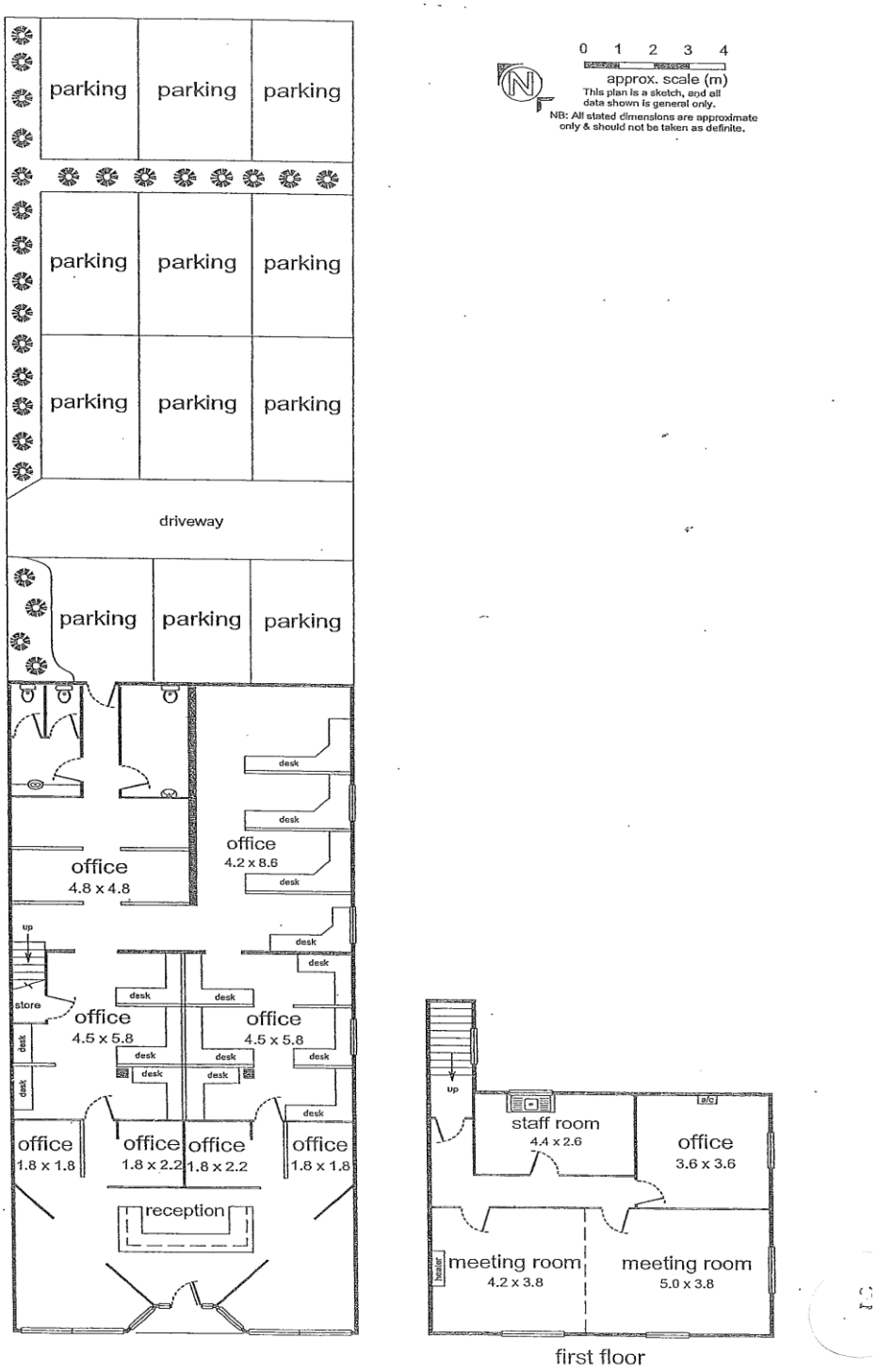
PERMITTED USE:

Real Estate Agency office or such other use approved by the Landlord

Appendix 1 (continued)

Relevant terms of the SOB Agreement continued

Plan appearing immediately after **Schedule [7] – The Premises Lease**



Appendix 1 (continued)

Relevant terms of the SOB Agreement continued (certain words and expressions are italicised for emphasis)

DISCLOSURE STATEMENT
by the **Landlord**

[pursuant to sections 17(1)(a) and 61(5) of the Retail Leases Act 2003]

[signed on behalf of the tenant and the landlord on 12 March 2015]

1.2	Plan of premises (if available)	Lot 1 of Plan of Subdivision 006894 described in Certificate of Title Volume 7496 Folio 186

1.4 Existing structures, fixtures, plant and equipment in the premises, provided by the landlord (excluding any works, fit out and refurbishment described in Part 3)

☒	air conditioning	☐	separate utility meter – gas
☐	cool room	☒	separate utility meter – water
☐	floor coverage	☒	separate utility meter – electricity
☐	grease tap	☒	shop front
	electrical distribution load (single phase)	☒	sink
☒	hot water service	☐	sprinklers
☒	lighting	☒	suspended ceilings
☒	mechanical exhaust	☐	telephone
☒	painted walls	☒	water supply
☒	electrical distribution load (3 phase)	☐	waste
☒	electrical distribution load (single phase)	☐	***other (please specify)***
☐	plastered wall		

23 LIST OF ATTACHMENTS

23.1	***Plan of premises (see item 1.2)***	☒	Yes

Appendix 1 (continued)

Relevant terms of the SOB Agreement continued

Plan appearing immediately after **the Landlord's Disclosure Statement**