VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP462/2016

CATCHWORDS

Retail Leases Act 2003 – section 4 – meaning of "retail Premises" – used or to be used wholly or predominantly for the retail provision of services – use must be "under the lease"– meaning of "retail"– indicia of a retail provision of services – relevance of whether Premises open to members of the public – "ultimate consumer" test – applicability to provision of services – whether Premises used predominantly for retail provision of services is a question of fact – Premises must be used for the provision of the services – retail services must be the whole or predominant use – refrigerated warehouse – whether the provision of refrigerated storage to commercial customers is a retail provision of services

APPLICANT	CB Cold Storage Pty Ltd (ACN 005 031 265)
RESPONDENT	IMCC Group (Australia) Pty Ltd (ACN 148 954 345)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing and determination of Preliminary Issue
DATE OF HEARING	26 October 2016
DATE OF ORDER	7 November 2016
CITATION	CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd (Building and Property) [2016] VCAT 1866

ORDERS

1. The preliminary issue: "Are the subject premises retail premises under the *Retail Leases Act* 2003? is determined: "No".
2. Direct that the proceeding be fixed for directions to determine its future conduct as soon as practicable.
3. Cost are reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr Hay QC with Miss Papaelia of counsel
For the Respondent	Mr G Clarke QC with Mr P Little of counsel

REASONS

Background

1. The respondent ("the Landlord") is the owner of a large refrigerated storage warehouse in North Laverton ("the Premises"). By a lease commencing 1 September 2012 ("the Lease"), the Landlord's predecessor in title leased the Premises to the applicant ("the Tenant") for a period of 10 years.

2. On 30 October 2013 the Landlord became the owner of the Premises and entitled to the reversion.

3. The Tenant asserts that the Premises are retail Premises within the meaning of the *Retail Leases Act* 2003 ("the Act"). The Landlord denies that the Premises are retail Premises.

4. On 18 April 2016 the Tenant brought this proceeding seeking to recover various sums that it had paid to the Landlord, on the ground that, because the Premises are retail Premises, those monies were not payable. Certain other relief is also sought.

5. On 19 August 2016 the following preliminary issue was ordered to be determined:

   "Are the subject Premises retail Premises under the *Retail Leases Act* 2003?

   Directions were given for the filing and service of submissions and supporting material.

The hearing

6. The preliminary issue came before me for hearing and determination on 26 October 2016. Mr Hay of Her Majesty's counsel with Miss Papaelia of counsel appeared on behalf of the Tenant and Mr G Clark of Her Majesty's counsel with Mr P Little of counsel appeared on behalf of the Landlord.

7. Two affidavits were filed on behalf of the applicant's director, Mr Ralph and an affidavit was also filed by a director of the respondent, Mr Fekry. There was no significant dispute as to the facts and neither witness was cross-examined.

8. Following submissions I informed the parties that I would provide a written decision.

Retail Premises

9. The term "retail Premises" is defined in section 4 of the act. The relevant part of that section is subsection (1)(a), which is as follows:

   "(1) In this Act, *retail Premises* means Premises, not including any area intended for use as a residence, that under the terms of the lease relating to the Premises are used, or are to be used, wholly or predominantly for—

   (a) the sale or hire of goods by retail or the retail provision of services;"

10. There is no suggestion that the Premises were ever to be used under the terms of the lease for the sale or hire of goods. The issue is whether, under the terms of

the lease, they were used or to be used wholly or predominantly for the retail provision of services.

The relevant provisions of the lease

11. Clause 4(a)(i) and (ii) of the lease provide as follows:

> "4. The lessee hereby covenants with the lessor that the lessee will:
>
> (a) (i) not use or permit to be used the Demised Premises or any part thereof for any purpose other than as set out in item 11 of the reference schedule or for any residential purpose whether temporary or permanent or as retail premises (as defined in the *Retail Tenancies Reform Act* 1998) nor permit or suffer any storage space forming part of the Demised Premises to be used for any purpose other than storage.
>
> (ii) use the Demised Premises solely for the purpose of conducting the business or businesses permitted under this Lease."

12. Item 11 of the schedule states next to the words "Use of Premises":

> "Cold and cool storage warehouse and transport facility"

The Premises

13. In his affidavit, Mr Fekry described the Premises in the following terms.

(a) There are two freezer warehouses of approximately 2,653 m². Each freezer is approximately 40.3 m x 30.6 m with a ceiling height of 9.5 m.

(b) There is a chiller, which is approximately 11 m x 17 m and a height of 5 m;

(c) There is a forklift charging area of approximately 90 m²;

(d) There is a ramp down to the loading dock area for the refrigerated semitrailers to back up and down and to load or unload pallets to an anteroom of approximately 525 m² before being put into the freezers. The parking area allows for five refrigerated semitrailers. The semitrailers back down the ramp to the loading and unloading area and a forklift either takes the foodstuffs that already sit on pallets from the semitrailer into one of the two freezer rooms or takes a pallet from one of the freezer rooms and loads it on to a semitrailer;

(e) There is an office area of approximately 170 m²;

(f) There are a number of car parking spots and a significant area is kept free to allow space for the semitrailers to back into the loading bay ramp; and

(g) There is also a plant room.

The accuracy of this description was not disputed.

14. A number of photographs are exhibited to Mr Fekry's affidavit showing the interior of the Premises. These show very high racking extending up towards the ceiling with large quantities of goods in boxes. It is apparent that to reach most of the goods on these racks one would need a forklift or similar device. The goods depicted in the photographs appear to be substantial quantities of goods of

a similar appearance rather than many items having a different appearance, suggesting that the various items stored are in bulk quantities.

15. A photograph that is included In Mr Ralph's first affidavit shows the front of the Premises. There is a large picture window with a glass entrance door to the left as one faces the front. There is no signage on the window but on the door the words "Administration Office" are painted. A canopy projects above the picture window and the doorway with a parapet above that, upon which the words "Laverton COLD STORAGE" are painted next to what appears to be a picture of a box. Apart from that, there is no point-of-sale advertising or invitation to the public to enter the Premises shown in the photograph. There are some bays in front of the building for the parking of cars.

The applicant's business

16. Mr Ralph described the applicant's business in his first witness statement in the following terms:

> "27. The Applicant provides: cool storage services to customers by storing customers products in the warehouse for a fee. For large deliveries that arrive in a container the Applicant will also for a fee load and unload pallets into the warehouse. While not a core part of its business, upon request, the Applicant will also arrange for third-party transport companies to transport customers' products to and from the warehouse.
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> 28. The Applicant's services are available to any individuals or companies wishing to use them and willing to pay the fee. During the term of the lease, the Applicant has provided its services to both individuals and companies. The Applicant's customers are usually companies involved in the food industry, including producers, manufacturers, distributors, importers and exporters. The Applicant's customers range from large primary production enterprises to very small owner operated businesses. The items commonly stored by customers are food products such as dairy products, small goods and seafood.
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> 29. If an individual or company wishes to use the Applicant's services and is willing to pay the fees, the Applicant loads the customer's products into the warehouse. The Applicant then issues weekly invoices to the customer until the customer retrieves their products.
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> 30. During the term of the lease, the Applicant has provided services to hundreds of different customers. The Applicant currently has approximately 20 primary customers storing products in the warehouse on the Premises.
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> 31. During business hours, the office is open and staffed by a receptionist. In addition several sales representatives work in the office. Members of the public are entitled to, and do, walk into the office from the street. The office is commonly attended by customers and used for customers and staff to discuss the services offered by the Applicant and the customers' or prospective customers' needs. Prospective customers are given the opportunity to take a guided tour of the Premises."

The Tenant's submissions

17. Mr Hay submitted that I should give section 4 of the Act a broad interpretation. He referred to comments made by Croft J in *Fitzroy Dental Pty Ltd v. Metropole Management Pty Ltd* [2013] VSC 344. He said that the definition was intended to bring as many leases as possible within the ambit of the Act. I do not accept that submission. The definition was designed to include only leases falling within its terms. However I accept that the Act is remedial legislation and I should give it a beneficial interpretation.

18. He submitted that, in order to fall within the Act, the use made or to be made of the Premises must be "under the lease", which he said meant "in accordance with" the terms of the Lease (*Cambridge Coordinates Pty Ltd v. Vikings press Pty Ltd* [2001] V ConvR 58-553). I accept that submission.

19. He pointed out that the Tenant was and is required by the terms of the Lease to use the Premises solely for the purpose of conducting the business described in item 11 of the schedule, which is described as a "Cold and cool storage warehouse and transport facility". That is correct.

20. As to the meaning of the term "retail", which is not defined in the Act, he referred me to a number of authorities.

21. In *Wellington v. Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333 Nathan J considered a similar definition found in the *Retail Tenancies Act* 1986. The relevant premises in that case were used by patent attorneys who provided advice to foreign companies and had few people visiting their offices but the lease was nonetheless found to be within the act. His Honour said (at page 336):

> "The essential feature of retailing, is to my mind, the provision of an item or service to the ultimate consumer for fee or reward. The end user may be a member of the public, but not necessarily so. In support of this conclusion, I call in aid not only common sense but the Macquarie Australian Dictionary which defines retail as being a sale to an ultimate consumer, usually in small quantities. When the verb is used in the transitive form, it is to sell directly to the consumer."

22. Reliance was placed in that case upon an earlier decision of Kaye J in *Swanson Street Pty Ltd v. Harbut Pty Ltd* [1983] V ConvR 54-324. That case concerned a discotheque and in determining that they were retail premises within the meaning of the legislation that was then current, his Honour said:

> "I have been referred to several definitions by authorities of what is described as retail shop and retail trade. Perhaps the most succinct statement from which assistance is to be derived is from that made by Viscount Dunedin in his speech in *Turpin v Middlesbrough Assessment Committee and Kaye & Eyre Brothers Ltd* [1931] AC 451 at 474. His Lordship then said, referring to buildings, that they were buildings to which the public can resort for the purpose of having particular wants supplied and services rendered to them. It is, in my view, clear that the demised premises fall within that description of being available to members of the public for the purposes of having their food and drink requirements supplied and services of discotheque

entertainment provided to them. Accordingly, in my view, the demised premises are retail premises within the meaning of the act."

23. In that case, the entertainment services were provided directly to members of the public.

24. The principal authority relied upon by Mr Hay was *Fitzroy Dental Pty Ltd v. Metropole Management Pty Ltd* where the authorities were comprehensively examined and discussed by Croft J. In that case the permitted use was:

"Conference centre, cafe/restaurant area and associated office and storage space."

25. The premises in that case consisted of a café/restaurant at the front and a conference centre and facilities at the rear. They adjoined serviced apartments on which a café, hotel, serviced and conference centre business was operated. The premises were not continually open to the public but rooms in the conference centre were available to be booked by any member of the public wishing to have a conference there. The café/restaurant was only used for the purpose of providing refreshment to conference participants in conjunction with that conference.

26. It was clear from the evidence that the services supplied in the premises, whether by way of instruction, education, refreshment or otherwise, were supplied to persons attending a conference and that those persons were the ultimate consumers of those services. The learned judge found that the supply of those services was a retail provision of services within the meaning of the act and hence the premises were retail premises.

27. Mr Hay drew my attention to a number of paragraphs in the judgement and, ultimately, he suggested that, on the basis of the learned judge's comments, any supply of services at all will be a retail provision of services within the meaning of the Act. He referred to a number of passages but the principal passages for the purpose of his argument were as follows:

"35. The other basis of the Plaintiff's submission in opposition to the application is that as a hallmark of retailing is the provision of goods or services to the ultimate consumer the services provided in the present circumstances are not retail in nature. The Plaintiff submits that the service provided by the Defendants to a person or entity booking the conference or function facilities in the Premises is merely the provision of a space within which a conference or function can be held for the benefit of the attendees. Accordingly, the Plaintiffs submit that the provision of the service, being the provision of a space, is not provided to the "ultimate consumer". Rather it says that the "ultimate consumer" is a person who attends a conference or function at the Premises.

36 More particularly, the Plaintiff submits that if a convention centre is hired by a person or entity for the purpose of providing a conference, the "ultimate consumer" of the service is each of the persons who ultimately attend the conference. On this basis the relevant service is thereby passed on to the "ultimate consumer" – hence there is then, and only then, a retail provision of services. Thus, the Plaintiff contends that the person or entity who contracts with the Defendants for the hire of a function or

convention centre is not the "ultimate consumer" of the relevant service. The Plaintiff further submits that characterisation of the provision of relevant services to the hirer of a function or convention centre as the "retail" provision of services would result in an unwarranted extension of the operation of the act. The Defendants contend that in the present circumstances the provision of services to the hirer of the premises, the conference or function provider or organiser, is properly characterised as the "retail" provision of services – and that the operation of the act is intended to be broad rather than narrow.

37 As discussed previously with reference to the authorities it is critical to identify the service or services for which leased premises are being used to provide and the extent to which, if at all, that service or services are being "on sold" or merely passed on to a third party.

38 In the present circumstances I am of the opinion that the evidence establishes that the premises are used, under the terms of the Lease and in actual fact, for the provision of a conference centre with an ancillary café/restaurant which are provided, on a commercial basis, to a person, persons, or some corporate or other entity which uses the space and any attendant services provided at the premises, such as café/restaurant facilities, for the purposes of a conference or function. It appears from the evidence that third parties attend conferences or functions for the purpose of education, training, general edification or enjoyment – or a combination of these things. Thus the attendees, the third parties, receive a service which is both different in nature and extent from that which is provided to the conference or function promoter or organiser. They do not receive the space, the whole of the Premises, to utilise for the provision of a conference or function, whether for profit or other reasons, indirectly commercial – such as business promotion or employee or contractor training – or for social purposes. The service the attendees, the third parties receive, involves enjoyment of the "space", the premises, and its services, but it includes more than this alone – and , in any event, their enjoyment of the "space", the premises, is constrained by the extent to which it is enjoyed by other attendees, third parties. The conference or function provider, on the other hand, enjoys the whole space for his, her or its particular purposes.

39 Consequently it follows, in my view, that by analogy with the authorities considered the conference or function provider is properly characterised as an "ultimate consumer" of the services provided to him, her or it at the Premises by the Tenant of the Premises. These services are, in turn, an "input" into the different services provided to attendees at the conference or function but, for the preceding reasons, these are to be characterised as services of a different nature. Thus there are two transactions involving the retail provision of services – first the provision of services to the conference or function provider or organiser and then the provision of different services to the attendee; though the retail characterisation of the second transaction may be affected if it is gratuitous, an issue to which I now turn."

28. In these passages, his Honour accepts that the attendees of the conferences were supplied with services on a retail basis which is, with respect, clearly right and it was unnecessary for his Honour to go any further. The premises were retail

premises within the meaning of the act because they were used for the retail provision of services.

29. However his Honour then went on to say in paragraph 39 of the judgement that the supply of the use of part of the premises to a conference organiser was also the provision of a service namely, the provision of space in which to conduct a conference. That is, with respect, also true, but it is not clear that the premises were used for the purpose of providing that service in that case. Since what we are concerned with for the purpose of applying the definition in section 4 of the Act, is the use to which the Premises themselves are put, it is unnecessary to consider this second type of service. If the lessee of a building licenses the use of it, or part of it, the act of granting the licence is not a use to which the building itself is put. A licensor does not "use" the building in order to grant the licence. The building is the subject of the grant of the license. The licence in turn permits the licensee to make use of the building or, in that case, part of the building. The relevant use for the purpose of the Act is the use to which the licensee then puts the building and that was for the purposes described in his Honour's judgement. The initial supply of the license by the tenant to the conference holder was an input to the services supplied to the conference attendees. His Honour makes it clear in paragraph 37 of the judgement that it is critical to identify the service or services for which the leased premises are being used.

30. Mr Hay provided me with an extract from Bradbrook, Croft and a Hay opened the last page is a matter told *"Commercial Tenancy Law"*. Mr Hay is one of the authors of the book and he adopted the following statement that is to be found at paragraph 20,005 concerning this decision:

> "The consequence of *Fitzroy Dental Pty Ltd v. Metropole Management Pty Ltd* is that the provision of any service is likely to constitute the retail provision of services and therefore the 2003 act will apply.'

31. I do not accept the correctness of this proposition. The learned judge does not go that far in the case referred to. For example, in paragraph 18, when he talks about the "on-supply" of goods and services, he talks about the possible characterisation of the first person to whom the goods or services are supplied as being an ultimate consumer. He does not say that that conclusion is inevitable in regard to services.

32. Mr Hay submitted that, since the Tenant's services were available to anyone seeking them during business hours it could be said that its business was "open to the public". I accept that submission. The term "open to the public" is a broad one and, in a number of the authorities I was referred to, premises that were not available for people to walk into and out of at any time without prior arrangement were nonetheless found to be retail premises.

33. Mr Hay submitted that the actual use made of the Premises by the Tenant was in accordance with the terms of the Lease. That is established on the evidence and it is also acknowledged by counsel for the Landlord.

34. Mr Hay said that the Tenant has assumed that the reference in Clause 4(a)(i) of the Lease to the *Retail Tenancies Reform Act* 1998 is assumed to be intended to be a reference to the Act. I think that is as sensible assumption. He submitted that when the Lease was entered into the Tenant incorrectly assumed that the services to be provided by from the premises were not retail. That may well be so, but the covenant is still there and it binds the Tenant.

35. Mr Hay referred me to the Tribunal's decision is in *CB Cold Storage v. Morgan Street Investments Proprietor Limited* [2014] VCAT 773 and in particular, to paragraph 27 where the learned member said:

> "Mr Hay submitted, correctly in my view, that it is of no consequence what the parties believed was the correct categorisation of the intended use of the premises. Even if the parties intended that the act would not apply, the fact that they have agreed to a permitted use, which unknowingly entailed the retail provision of services, means that the act will apply."

36. That statement of principle is, with respect, undoubtedly correct. The decision concerned an application under section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 and the Tribunal found that it was arguable that the covenant by the tenant not to do anything on the premises that would cause the act to apply might be inconsistent with the permitted use of the premises, which included the conduct of a cold storage business. It was not finally determined in that case whether the predominant use of the premises was the retail provision of services. It was only necessary for that position to be arguable.

37. As Mr Hay pointed out, a party cannot contract out of the Act (s.94(1)). That is true but it is within the contractual competence of a tenant to covenant that he will not engage in conduct of a particular description and there is no reason why that should not include conducting a retail sale from the demised premises if that covenant is not inconsistent with the permitted use. Mr Hay submitted that there was such an inconsistency with the permitted use in the present case but since it was not argued on behalf of the Landlord that Clause 4(a)(i) provides an immediate answer to the question before me I do not need to consider this matter further.

38. Mr Hay also submitted that the Landlord was estopped from denying that the Tenant is entitled to use the Premises for the permitted use. I do not need to consider that submission because it was not suggested on behalf of the Landlord that the Tenant was not entitled to use premises for the permitted use.

The Landlord's submissions

39. Mr Clarke said that there was nothing in the wording of the permitted use which suggests any retail activity. He said that the words: "Cold and cool storage warehouse and transport facility" do not include any element of retail use. He said that the permitted use of the Premises was a commercial use, namely, the warehousing and storage of goods and for its use as a transport facility. I think that is established on the evidence.

40. He pointed out that the customers of the business are food companies which store goods in large quantities and remove them later to be on-supplied to other commercial organisations in Australia or overseas for processing or on-supply. The goods, he submitted, are not in any sense consumed by the customers of the Tenant who store goods in the warehouse. He said that consumption occurs later by others and not at the Premises. That is so, but I am not concerned with the retail supply of the goods that are stored in the warehouse but rather, whether the supply by the Tenant of its storage and other services to its customers amounts to a retail supply of services within the meaning of section 4.

41. Mr Clarke submitted that the Tenant's customers and their principals are users of the facility for a fee but that the provision by the Tenant of the Premises to its customers for such use is not in any sense a retail use of the Premises by the Tenant. He said that there was nothing retail about the temporary use of the Premises to stall foodstuffs, that the Tenant's customers do not use the Premises as consumers, nor in any sense are they end users of the goods stored there.

42. He pointed out that the Premises were zoned for Industrial 2 use by the Council and were not licensed to the Tenant for retail use because the sole permitted use under the lease was as a cold and cool storage warehouse and transport facility.

43. He said that there were no indicia of any retail of services and in fact, the following pointed to the contrary:

    (a) What the subject Premises comprise;

    (b) What the business conducted by the Tenant at the subject Premises is;

    (c) What are the permitted uses of the subject Premises under the applicable planning laws;

    (d) The quantities of the goods stored;

    (e) The nature of the goods stored;

    (f) Access to the subject Premises;

    (g) The purpose for which the customers of the Tenants store the goods and use the transport facilities of the Premises;

    (h) The nature of the businesses conducted by the Tenant's customers in storing goods in the warehouse and their use of the transport facilities;

    (i) What happens to the goods after the storage is completed and the goods are taken away.

44. Mr Clark said that there was no characteristic of the supply of the services by the Tenant to its customers that indicated a retail supply. All the indicia are to the contrary.

Other authorities

45. I was referred to a number of authorities concerning the interpretation of the definition in the Act and in the equivalent earlier legislation.

46. In *FP Shine (Vic) Pty Ltd v. Gothic logs Pty Ltd* [1994] 1VR 194 Ashley J found that the provision of serviced caravan sites with necessary ancillaries of kiosk, amenities block and recreation room had:

> "…a retail characteristic, being provision of services to members of the public wishing to avail themselves of the services in return for payment of money."

47. His Honour said (at p. 198):

> "In 536 Swanston Street, Kaye J had to consider a lease of Premises used as a restaurant, cabaret and discotheque. Members of the public could enter the Premises upon payment of an admission fee. Having paid that fee, any such person could enjoy the music and entertainment provided and could use the facilities for dancing and so on. In addition, food and drink could be purchased.
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> His Honour held that: (1) the Premises were used wholly or predominantly for carrying on a business - that is, the business of provision of entertainment; (2) the business included both sale of goods (that is, sale of food and drink) and provision of services (that is, the services of the discotheque); and (3) that the provision of goods and services were properly characterised as "retail".
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> In my respectful opinion his Honour's conclusions were correct and may be applied to the facts now under consideration. In the present situation the business involving the retail provision of services is the provision of serviced caravan sites with necessary ancillaries of kiosk, amenities block and recreation room. It has a retail characteristic, being provision of services to members of the public wishing to avail themselves of the services in return for payment of money. It is no less retail provision of services because they are provided by way of site hire. No doubt, by analogy, the admission to the discotheque in 536 Swanston Street was only for some limited period."

48. In *Cambridge Coordinates Proprietary Limited v. Vikings Press Proprietary Limited* [2001] V ConvR 58-553 Macnamara DP said at paragraph 26 that the sale of goods directly to members of the public as consumers at a factory outlet would amount to a sale of goods by retail.

49. In *Humphries & Cooke Proprietary Limited v. Essendon Airport Ltd* [2001] VCAT 2439, the Tribunal found that an aircraft hangar used to accommodate an aircraft that was in turn used to carry the Tenant's staff and materials to various locations for the purpose of its business did not fall within the definition of retail Premises under the earlier act. The learned member said at para 31:

> "Here the purpose of this hangar is storage and in my view it does not enjoy the necessary use which the definition requires to render it retail premises. If I were wrong in that there is another element of the definition which in my view is sufficient in itself to exclude these premises from the purview of the definition. The premises to be within the definition must be used in the relevant manner, not merely used simpliciter but so used *"under the terms of the lease relating to them"*. The permitted use which we find expressed in the present lease is *"aircraft hangar"*. There is nothing at all about the retail provision of goods and services to anyone."

50. In *Melbourne Gourmet Foods v. Lawther* [2016] VCAT 160, the permitted use was "Food factory warehouse". I found that the premises were not retail premises within the meaning of the Act. The characteristics of the premises in that case are set out in paragraphs 41 to 44 of the decision, as follows:

> "41. The single photograph of the Warehouse that I have, on page 4 of Mr Courtney's valuation, shows that it has a frontage to the street but no signage and no door allowing passenger access from the street. There is a roller door at the front to allow truck access to a loading bay but this loading bay is at ground level and there are no steps from the loading bay up to the internal floor level of the Warehouse. According to the evidence of Mr Melhem, a pedestrian seeking access to the Warehouse must walk down the driveway to a door which has no signage other than the name of the Applicant. In order to gain entry it is necessary to ring a bell to attract the attention of the occupants. Upon being admitted to the building it is then necessary to walk up stairs to the floor level of the Warehouse. There is no counter and no display of stock for sale and no cash register. It is not possible to pay for anything by credit card. Rather, payment must be in cash or by cheque.
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> 43.In these circumstances it is quite clear that the Applicant's business would attract no passing trade. The only retail customers who would visit the Warehouse to purchase anything would be persons with prior knowledge that goods were there for sale and that, although they were retail customers, they would be able to purchase them. There is no evidence of any advertising directed to retail customers or other measures taken to bring these matters to the attention of the public and attract people to the warehouse.
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> 44.In his witness statement dated 11 December 2015, Mr Melhem said that he operated "a wholesale and food outlet" but that the public can come to purchase food as well. However in his earlier supplementary affidavit dated 3 June 2015, he described the Applicant's use of the Warehouse in the following terms:
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> > 'The Applicant company operates a food distribution business from the Premises. It sells frozen and chilled food and pre-packaged meals such as pasta meals, poultry meals and pieces and pizzas and pastry products to cafes, small takeaway food businesses, supermarkets and delis on a daily basis. Those businesses then use the food that the company sells to cook and prepare food for sale to the public. The Applicant company also uses a small part of the Premises as an office.'
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> 45.That is not a description of a retail business. In his oral evidence at the hearing Mr Melhem said that approximately 5% of his business was to retail customers. He acknowledged that he had no permit from the council to conduct a shop in the Warehouse."

51. A similar fact situation arose in *Segment Woods Pty Ltd v. Brockbridge & ors* [2009] VCC 1531. The Premises in that case were a two-storey warehouse building and offices with a double garage at the rear. The Tenant was an importer and wholesaler of children's apparel and there was very little retail activity at the premises. Sales to consumers were effected on eBay but pick up of goods at the premises was discouraged. There was to be little sign of retail

activity. The learned judge found on the evidence that the predominant use the premises was not retail.

52. In *Sofos & anor v. Coburn & anor* [1992] V ConvR 54–439 the sole permitted use under a lease was "Wholesale and export fish supply". Nathan J considered that the words were "unequivocal, crystal-clear and absolutely certain" and that although it was the intention of the Tenants to sell by retail, the clause bound them to use the premises for wholesale and export purposes only. The learned judge held that the fact that the premises had been used for retail sales in contravention of the terms of the lease did not convert the lease to one for retail purposes. As to the meaning of the term "retail premises", the learned judge said (at page 65,150):

> "The term "retail" is not defined; it means "sale to the ultimate consumer" and by necessary implication, it excludes sale by wholesale. The terms which attract the jurisdiction relate to the terms of the lease, in this instance, as I have already said, the terms of the lease are clear and no amount of quibbling can introduce into them any confusion or any suggestion that they are now related to retail premises. Seldom does one see a legal expression less free of doubt.
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> In this instance, Clause 13 relating to wholesale and export premises could not be more precise. An export sale cannot relate here to a sale to an "ultimate consumer" nor can a wholesale sale."

53. In *Stringer& ors v. Gilandos PtyLtd* [2012] VSC 361, Croft J held that serviced apartments were retail premises, although he added (at para 68):

> "I should, however, sound a note of caution in relation to this finding by emphasising that whether or not premises described as "serviced apartments" is to be characterised as retail premises depends upon the particular circumstances, including the nature of the premises, the manner in which occupancy is provided and the nature of the occupancy. As I have said, the term or description, "serviced apartments", is not a term of art. Rather, it is a term or description of premises which promotes a range of possibilities. At one end of the range one would find premises managed and occupied in the manner indistinguishable from a motel or hotel and at the other end, premises indistinguishable from long-term residential accommodation, separately let but with the attribute of being serviced. In the former case it would be expected that the Acts will apply on the basis that the premises are "retail premises" and in the latter case they would not, any more than they would to any block of residential flats. In between there are a range of possibilities each of which may have different consequences in terms of the application of the acts."

Discussion

54. In each of the cases referred to, the court or tribunal carefully examined the nature of the premises, the permitted use and the activity concerned. Recourse was had to dictionary definitions and earlier cases for guidance as to how the section should be applied.

55. The phrase "…the retail provision of services…" is not defined in the Act and those words have no special meaning. The words bear their ordinary meaning as

English words and the word "retail" in the section must be taken to bear the meaning that it is commonly understood to have.

56. The word retail is defined in the Macquarie Dictionary as:

> "*n*. 1. the sale of commodities to household or ultimate consumers, usually in small quantities (opposed to wholesale), *adj*. 2. Pertaining to, connected with, or engaged on sale at retail"

57. In the concise Oxford dictionary it is defined as:

> "sale of goods in small quantities at a time and usually not for resale"

58. In the Collins Dictionary and Thesaurus it is defined as:

> "*n*. 1. The sale of goods individually or in small quantities to consumers".

59. In applying the definition the courts and the tribunal have looked to various indicia of "retail", such as "ultimate consumer" and "open to the public" and these have been found to provide a valuable guide. However no indicium can be substituted for the words of the Act. In each case it is a mixed question of fact and law whether the predominant use of the premises under the lease is such that the Act applies. The question must be answered afresh each time.

60. In *Maunsell v. Olins* [1974] 3 WLR 835, Lord Reid said , concerning reliance upon rules of construction of legislation, (at p.837):

> "They are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction, presumptions or pointers. Not infrequently one 'rule' points in the one direction, another in a different direction. In each case we must look at all relevant circumstances, and decide as a matter of judgement what weight to attach to any particular 'rule'."

61. The indicia regarded as significant for decisive are not the same in all cases. In *Swanson Street Pty Ltd v. Harbut Pty Ltd*, premises to which the public could resort for the purpose of having particular wants supplied and services rendered to them were considered to be retail premises. In *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor* premises used for conferences, albeit on an occasional basis are considered to be retail premises, notwithstanding that they were not constantly open to the public. In *Wellington v. Norwich Union Life Insurance Society Ltd* Nathan J considered that the term "retail" applied to the provision of an item or service to the ultimate consumer for fee or reward. In *FP Shine (Vic) Pty Ltd v. Gothic logs Pty Ltd* [1994] 1VR 194 the retail characteristics, which Ashley J found were the provision of services to members of the public wishing to avail themselves of the services in return for payment of money. In *Turpin v Middlesbrough* the premises were "buildings to which the public can resort for the purpose of having particular wants supplied and services rendered to them".

62. In all of these cases the goods or services are rendered to persons variously described as members of the public or the ultimate consumer. The term "consumer" is nowhere defined in dictionary definitions are unhelpful but in the sense in which it has been used in the cases I think it means the person who uses

the goods or services to satisfy his own personal needs rather than for some business or other purpose. The other characteristic is that the supply in each instance is usually in small quantities for use or consumption by the person to whom they are directly supplied.

63. That accords with the way I think the word "retail" is used in normal speech. As was pointed out in some of the cases, it is possible for a company or business to be involved in a retail supply of goods or services. For example, a company officer might purchase stationary at a local newsagency and that would be a retail supply. However if the company acquired a large quantity of stationery for on-supply to various purchases in smaller quantities, that would generally be regarded as a wholesale supply.

64. The situation is more difficult to categorise in regard to services where one cannot talk about retail or wholesale quantities. Nevertheless, most people would have no difficulty in categorising a particular supply of services as retail if such were the case.

65. For example, if a mining company, wishing to sell coal to a power station in India, dispatched a large shipment of coal by rail to a port, the rail operator would be providing a service of transport to the mining company but that service would not generally be regarded, in normal parlance, as being provided on a retail basis. Similarly, when the coal is loaded onto a ship by the Port authority, that again is a service rendered to the mining company but again, that would not generally be regarded as being provided on a retail basis. The same can be said of the services provided by the shipowner. In each case, the service that is provided is a necessary step in a supply chain of a commodity to a commercial customer, being the power station in India, and neither the mining company nor the customer can be regarded as an "ultimate consumer" or "a member of the public" in the sense in which those words appear to have been used in the authorities referred to. One does not get to an "ultimate consumer" or a "member of the public" until the coal is burnt to produce electricity which is then supplied to the power company's customers in India.

Conclusion

66. I do not accept Mr Hay' submission that, virtually any supply of services will fall within section 4. The definition is not simply the provision of services but rather, the retail provision of services. Parliament has limited the application of the definition by the addition of the word "retail" and that word must have some meaning.

67. In applying the definition one must look carefully at the facts of the particular case and decide as a matter of mixed fact and law whether, under the lease, the predominant use of the premises is, or is to be, the retail provision of services. The starting point will be to examine the lease to see what the permitted use of the premises in question is. In *Humphries & Cooke* the permitted use was that of an aircraft hangar and the tribunal said that there was nothing at all in that use about the retail provision of goods or services to anyone. Similarly, in *Sofos v.*

Coburn the use was wholesale and export fish supply and Nathan J said that there was nothing in that use relating to the retail provision of goods or services.

68. In the present case the use is that of cold and cool storage warehouse and transport facility, involving the receipt, storage and trans-shipment of goods for producers, manufacturers, distributors, importers and exporters. The customers to which the Tenant provides these services range from large primary production enterprises to very small owner operated businesses. Mr Clarke submitted that there was nothing about the provision of these services that would give it a retail character and I think that is right. That is not the ordinary meaning of "retail". The Tenant's services to those customers cannot sensibly be regarded as being a retail supply of services. Indeed, such an interpretation would give the word "retail" in the section no meeting at all.

69. I therefore find that the Premises are not retail premises under the Act. The proceeding will be listed for directions to determine its future conduct. Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER