VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R62/2014

RETAIL TENANCIES LIST

CATCHWORDS

Section 75 application – whether arguable that lease subject to the *Retail Leases Act 2003*. Whether evidence of prior negotiations relevant to determine the meaning of certain terms in the lease.

APPLICANT	CB Cold Storage Pty Ltd (ACN 005 031 265)
RESPONDENT	Morgan Street Investments Pty Ltd (ACN 128 995 693)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	23 June 2014
DATE OF ORDER	25 June 2014
CITATION	CB Cold Storage Pty Ltd v Morgan Street Investments Pty Ltd (Retail Tenancies) [2014] VCAT 773

ORDERS

1. The Respondent's application pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. **This proceeding is listed for a directions hearing at 9.30 on 25 July 2014 at 55 King Street, Melbourne**.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr R Hay of counsel
For the Respondent	Mr R Peters of counsel

REASONS

The application

1. This proceeding concerns an application by the Respondent seeking orders that paragraphs 5 to 19 of the Applicant's *Amended Points of Claim* be struck out pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*. In addition, the Respondent seeks further orders that the costs of and incidental to this application be paid by the Applicant.

2. The Applicant's claim concerns a dispute between the parties relating to premises leased by the Applicant from the Respondent. Those premises (**'the Premises'**) were originally owned by the Applicant but sold to the Respondent on condition that they were 'leased back' by the Applicant (**'the Tenant'**). The relief sought by the Tenant in this proceeding relies, in part, on the contention that the lease between the parties (**'the Lease'**) is governed by the *Retail Leases Act 2003* (**'the Act'**).

3. The Respondent (**'the Landlord'**) contends that the Lease is not governed by the *Retail Leases Act 2003* and as a consequence, those paragraphs of the Applicant's *Amended Points of Claim*, which rely upon the Act, should be struck out.

Section 75

4. Section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* empowers the Tribunal to strike out a claim found in a pleading: *Yim v State of Victoria*.[1] The test to be applied in determining an application under s 75 is one that should be exercised with great care and should never be exercised unless it is clear that there is no question to be tried: *Fancourt v Mercantile Credits Ltd*.[2]

5. Section 75 does not allow the Tribunal to strike out a pleading that merely displays poor drafting: *West Homes (Australia) Pty Ltd v Crebar Pty Ltd & Ors*.[3] Therefore, s 75 is not to be used as a mechanism to have a 'pleadings' summons only: *Barbon v West Homes Australia Pty Ltd*.[4] It must be exercised when there are no merits to the claim, rather than when the pleadings have not been sufficiently detailed. In *West Homes* the Tribunal stated:

> [11] It is basic that the Tribunal should require that this duty be observed. Otherwise, natural justice will be denied. Often, though, it is quite possible for a party to make its case known sufficiently without having to resort to fine legalese. Indeed, fine legalese can

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[1] [2000] VCAT 821.
[2] (1983) 154 CLR 87 at [99].
[3] [2001] VCAT 46.
[4] [2001] VSC 405.

often obscure. Moreover, the Tribunal is not bound to proceed with all technicality and undue formality. A so-called *"pleading"* summons invites excessive semantical debate. Ideally, Points of Claim, or of Defence, should normally be able to be understood by the average person.

6. The general principles applicable to applications made under s 75 of the Act were succinctly set out in *Norman v Australian Red Cross Society*.[5] Those principles are summarised as follows:

   (a) The application is for the summary termination of the proceeding; it is not the full hearing of the proceeding.

   (b) The Tribunal's procedure on the application is in its discretion. The application may be determined on the pleadings or by way of submissions, or by allowing the parties to put forward affidavit material or oral evidence.

   (c) If a party indicates to the Tribunal that the whole of their case is contained in the material put before the Tribunal, the Tribunal is entitled to determine the matter by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing.

   (d) The Tribunal should exercise caution before summarily terminating a proceeding.

   (e) For a dismissal or strike out to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, can on no reasonable view justify relief, or be bound to fail.

   (f) A complaint cannot be struck out as lacking in substance merely because it does not in itself contain the evidence supporting the claims made.

7. Further, in *Forrester v AIMS Corporation*,[6] Kay J stated that:

> It was not for the Tribunal, at least at an interlocutory stage of the proceedings, to conduct a pre-trial assessment of the complainant's evidence to determine whether the complainant can prove his case. Such an approach is incorrect and inappropriate unless the complainant clearly concedes that the material he or she has placed before the Tribunal contains the whole of the complainant's case.

8. Indeed, the correct approach to adopt on an application under s 75 is to assume that the applicant will be able to prove each fact alleged in the claim in question: *Boek v Australian Casualty and Life*.[7] In other words, a proceeding should not be dismissed or struck out under s 75 if the ultimate fate of the proceeding depends upon contested questions of fact

[5] (1998) 14 VAR 243.
[6] (2004) 22 VAR 97.
[7] [2001] VCAT 39.

that would be established or eliminated by cross-examination: *Evans v Douglas*.[8]

Is there an arguable case that the Act applies?

9. As mentioned above, the Tenant claims relief under the Act. Obviously, its claim, insofar as it relates to relief under the Act, is dependent on establishing that the Premises fall within the meaning of *retail premises,* as defined in s 4 of the Act:

> (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 predominately for –
>
> (a) the sale or hire of goods by retail or the retail provision of services, or …

10. Item 15 of the Schedule to the Lease states that the permitted use of the Premises is:

> Subject to clause 16.1, the use in connection with the conduct of a cold storage business, office, warehouse, transport facility and food processing plant by the Tenant. [emphasis added]

11. The Tenant contends that the express words of the Lease: *use in connection with the conduct of a cold storage business* means that the Lease permits the retail provision of services, namely; providing a cold storage facility to consumers. Mr Hay of counsel, who appeared on behalf of the Tenant, referred me to *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor*[9] in support of his submission that the words: *conduct of a cold storage business*, could only be interpreted to mean using the Premises for a retail purpose.

12. In *Fitzroy Dental Pty Ltd*, Croft J considered whether the permitted use of premises as a function and conference centre, was to be categorised as retail premises. After reviewing a number of authorities, Croft J found support for the 'ultimate consumer' test as being the touchstone of retailing, which he explained by way of the following example:

> 17. … Thus a sale of "widget type A" from premises by A to B who, in turn, "converts" the good "widget type A" to "widget type B for sale to C would not involve the sale of "widget type A" to C as the ultimate consumer of that good. Depending on the nature of the goods involved these transactions may involve sale by wholesale to B and retail sale to C – or, alternatively, two retail sales of different goods: "widget type A" to B and "widget type B" to C.

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[8] [2003] VCAT 377 at [9].
[9] [2013] VSC 344.

> 18. It follows, in my view, from the application of the "ultimate consumer" test on the authority to which reference has been made, particularly *Wellington's* case,[10] that the fact that a good or a service is provided to a person who uses the good or service as an "input" in that person's business for the purpose of producing or providing a different good or service to another person does not detract from the possible characterisation of the first person (and perhaps also the second person, depending on all the circumstances) as the "ultimate consumer" of the original good or service.

13. In *Fitzroy Dental*, Croft J determined that the supply of the function and conference centre by the tenant to third parties, who then used the function and conference centre to host functions and conferences to other parties under separate contracts, was to be characterised as use for a retail purpose. Consequently, the lease between the tenant and landlord was held to be governed by the Act.

14. Mr Hay relies on *Fitzroy Dental* in submitting that the description of the permitted use being for *the conduct of a cold storage business* characterises the permitted use as a retail supply of services.

15. It is not in contention that the actual use of the Premises is the provision of a cold storage facility to consumers. This is borne out in the affidavit of Richard Ralph dated 16 June 2014. However, the Landlord contends that this is not a permitted use under the Lease.

16. The Landlord argues, correctly in my view, that the mere fact that the Premises are currently being used for the provision of retail services does not bring the Lease within the provisions of the Act if that use is not permitted under the terms of the Lease. In that respect, Mr Peters of counsel, who appeared on behalf of the Landlord, referred me to a number of authorities establishing that proposition. In particular, in *Sofos & Anor v Coburn & Anor*, Nathan J stated:

> In my view, the words are unequivocal, crystal-clear and absolutely certain. No matter what may have been the intention of Messrs. Fellows and Coburn, that is, to reserve in their own minds the prospect that they may sell to members of the public, they chose the words and executed an instrument which bound them to using the premises for wholesale and export purposes and no other. The fact that the premises might have been used in contravention of the terms of the lease to retail sales does not convert this lease from being restricted to wholesale purposes to being expanded to retail purposes.[11]

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[10] *Wellington v Norwich Union* [1991] 1 VR 333.
[11] (1992) V ConvR 54-439 at 65,150. See also *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* [1994] 2 VR 505 at 512.

17. In the present case, however, the words in the Lease are not *crystal clear*. Although the Lease speaks of use *in connection with the conduct of a cold storage business*, that expression is capable of two meanings. In particular, it may mean the provision of a cold storage facility (the Tenant's interpretation). Alternatively, it may mean that the Premises can, in some other way, be used in connection to the Tenant's cold storage business but unconnected with the actual demise. For example, storing plant and equipment used in a cold storage business which is being operated elsewhere by the Tenant.

18. Mr Peters submitted that the words *in connection with the conduct of a cold storage business* need to be read in context with other clauses in the Lease. He argued that those words, when read in context, are not to be construed in the manner suggested by the Tenant.

19. In particular, Mr Peters referred me to Clause 16.1 of the Lease in support of his argument. That clause states:

    The Tenant must:

    16.1.1 use the Premises for the Permitted Use;

    16.1.2 not use the Premises for any other purpose; and

    16.1.3 not use the Premises in such a way that the Act would apply to this Lease if the Act did not apply to this Lease at the Commencement Date.

20. In my view, Clause 16.1 does not assist in establishing whether the Act applies or does not apply. It simply states that if the permitted use did not give rise to the operation of the Act at the commencement of the Lease, then subsequent use cannot convert the restricted purpose to being expanded to retail purposes.

21. Mr Peter's submission might have more strength if the word 'as' was inserted before the word 'if' in Clause 16.1.3. In those circumstances, Clause 16.1 might be interpreted to mean that any use of the Premises which would bring the Lease under the operation of the Act is prohibited. However, the clause has not been expressed in that way.

22. Mr Peters next referred to Item 17 of the Schedule, which states:

Item 17.	Application of the Act Reason	No the Tenant will not use the Premises wholly or predominantly for the sale or hire of goods by retail or the retail provision of services.

23. There is an obvious inconsistency between Item 17 and Item 15 of the Schedule, if the reference to a *cold storage business* is categorised as a retail purpose. On one hand, the Lease expressly allows use *in*

connection with the conduct of a cold storage business, while on the other hand, the Lease provides an explanation as to why the Act does not apply. In my view, Item 17 is subordinate to Item 15. This is because Item 17 is expressed by way of an explanation to a legal conclusion. By contrast, Item 15 is referenced to a mandatory provision in the Lease.

24. Item 17 is, however, tied to Clause 24.6, which states:

> 24.6 Application of the Act
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> 24.6.1 Tenant's Warranties
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> 24.6.1.1 The Tenant represents and warrants to the Landlord that the Act does or does not apply to the Tenant for the reasons (s) set out in Item 17.
>
> 24.6.1.2 If the Tenant has warranted that the Act does not apply to this Lease, the Tenant covenants that it will not do anything on the Premises that will cause the Act to apply.

25. Again, there is inconsistency between Clause 24.6.1 and Item 15 of the Schedule. Mr Hay sought to explain this inconsistency by referring to the affidavit of Mr Ralph, wherein he deposed to the following:

> 14. At the time, as representative of the Applicant in the negotiations leading up to the Contract of Sale and the Lease I proceeded on the assumption that the provision of cold storage facilities to a range of commercial customers was not a retail activity but I have since been advised by my legal practitioners that it was.

26. In essence, Mr Hay submitted that the parties were not aware, at the time when they entered into the Lease, that the intended and permitted use of the Premises *in connection with the conduct of a cold storage business* constituted the retail provision of services. He argued, however, that the current use of the Premises was always contemplated by the terms of the Lease, as expressed by those words.

27. 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.[12]

[12] *Commonwealth Bank of Australia v Figgins Holdings Pty Ltd* [1994] 2 VR 505 at 512.

Evidence relating to prior negotiations

28. In my view, the difficulty with the present application is that more needs to be said of the background facts concerning matters *in connection with the conduct of the cold storage business*. As I indicated above, the words *in connection with the conduct of the cold storage business* are open to two different interpretations, which turn on whether the reference to a *cold storage business* is a reference to the business being operated from the Premises or a business that is not directly connected to the Premises.

29. However, Mr Peters submitted that it was not open for the Tribunal to admit evidence of any pre-contractual surrounding circumstances. To do so would offend the parole evidence rule.[13]

30. Although I accept that the parole evidence rule may exclude evidence of pre-contractual negotiations, there are exceptions to that rule, as described by Mason J in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales*:

> Prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable.[14]

31. This principle was re-stated by Heydon JA in *Brambles Holdings Ltd v Bathurst City Council:*

> Pre-contractual conduct is only admissible on questions of construction if the contract is ambiguous and if the pre-contractual conduct casts light on the genesis of the contract, its objective aim, or the meaning of any descriptive term.[15]

32. Having regard to the ambiguity of the words *in connection with the conduct of a cold storage business*, I am of the opinion that evidence of pre-contractual conduct would be admissible in the present case in order to resolve that ambiguity.

33. That being the case, any finding made at this interlocutory stage would deprive the Tribunal of hearing evidence, which may further illuminate the background facts concerning the subject matter of the Lease in order to determine what the parties objectively intended by using those words.

34. Put another way, I am not satisfied that at this early stage in the proceeding, the Applicant's interpretation of Item 15 of the Schedule is not arguable, notwithstanding the inconsistency with that interpretation and other terms of the Lease.

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[13] See judgment of Finn J in *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501 at [118].

[14] (1982) 149 CLR 337 at 352.

[15] (2001) 53 NSWLR 153 at 163.

35. For that reason, the Landlord's strike out application is dismissed.

SENIOR MEMBER E. RIEGLER