VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1473 OF 2018

CATCHWORDS

RETAIL LEASES–**CONSTRUCTION**–Construction of outgoings provisions in a lease–one clause arguably imposing a lesser liability on the tenant in respect of payment of an outgoing than that purported to be imposed by a latter clause–construction adopted in accordance with the principle that all parts of a commercial contract should be given effect where possible, and that no part of it should be treated as inoperative or surplus–finding that the lease provisions have a plain meaning, and that both clauses could work harmoniously.

APPLICANT	Forestfield Corporation Pty Ltd (ACN 094 823 775)
RESPONDENT	Vanessa Flegg Pty Ltd (ACN 007 264 879)
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Hearing
DATE OF HEARING	5 June 2019
DATE OF ORDER AND REASONS	25 September 2019
CITATION	Forestfield Corporation Pty Ltd v Vanessa Flegg Pty Ltd (Building and Property) [2019] VCAT 1503

ORDER

1. It is declared that pursuant to the lease between the applicant and the respondent dated 11 January 2017, the respondent must pay its proportion of the common area cleaning costs from the commencement of the lease on 1 January 2017.
2. Costs reserved. Any application for costs must be made within 14 days of the date of this order. Should there be any application for costs, the principal registrar is directed to list the matter before Member Kincaid, allow 2 hours.

A T Kincaid
Member

APPEARANCES:

For Applicant	Ms Xuelin Teo of Counsel.
For Respondents	Mr Luke Virgona of Counsel.

REASONS

1 The applicant landlord and the respondent tenant entered into a lease of premises located on level 2, 224-236 Queen Street, Melbourne on 11 January 2017 (the "**lease**"). The lease is for a 3-year term from 1 January 2017, with an option to renew for a further term of 3 years.

2 The parties are in dispute over whether the terms of the lease require the tenant to pay its proportion of cleaning costs in regard to the common area of the premises incurred from the date the lease commenced (as contended by the landlord), or only its proportion of any increases in such costs from the "base year" ending 30 June 2017 (as contended by the tenant).

Structure of the lease

3 Additional Provision ("**AP**") 19 of the lease provides:

> **Operating Costs of the Building**
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> The tenant shall in respect of each year or part of a year of the lease ending on 30 June reimburse and pay to the landlord the tenant's proportion of any Increase in the **Operating Costs of the Building** (as hereinafter defined) relative to such year or part. Such proportion calculated as follows shall be payable on demand and the following provisions shall apply to the determination thereof:
>
> (a) The tenant's proportion is the proportion set out in Item 10.
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> (b) The "Operating Costs of the Building" means (to the extent to which the same are not specifically payable from time to time by any tenant or licensee of any part of the building under the terms of his occupancy thereof) the total cost of all outgoings, costs and expenses of the landlord now or hereafter properly assessed, charged or chargeable, paid or payable or otherwise incurred on or in respect of the land, the building or any part thereof or upon the landlord in relation thereto or in the conduct management and maintenance of the building or any part thereof and to the use and occupation of the same as a high-class office and commercial building together with parking and/or other facilities pertaining thereto **and in particular but without limiting the generality of the foregoing** includes:
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> [(i)-(ix) inclusive, which are not presently relevant]
>
> (xi) Any other expenditure properly incurred by the landlord in the management, operation and maintenance of the building and the land generally…

4 Item 10 of the lease provides:

> Tenant's proportion of Operating Costs of the Building
>
> (a) in relation to Operating Costs of the Building that benefit all of the premises in the building: the proportion that the lettable area

of the premises bears to the total lettable area of the building, which at present is 3.36%;

(b) in relation to Operating Costs of the Building that benefit the premises and other premises but not all of the premises in the building: the proportion that the lettable area of the premises bears to the total lettable area of all premises (including the premises) that benefit from the outgoing; and

(c) in relation to Operating Costs of the Building that benefit only the premises: 100%

5 AP 20 of the lease provides:

> **Cleaning Contractors**
>
> The tenant shall, if so required by the landlord, use the contractors used by the landlord to clean the common areas, to clean the premises and the tenant shall permit such cleaning contractors to have access to the premises at all reasonable times for the purpose of carrying out regular cleaning and shall pay to the landlord or such contractor upon demand by the landlord or such contractor the charges imposed by such contractor for providing a cleaning service for the premises or, in the event of no such charge being separately imposed for the cleaning of the premises, shall pay to the landlord upon demand by the landlord such proportion of the overall costs of the said cleaning service as shall be determined by the landlord to be attributable to the premises having regard to the net lettable floor area thereof in proportion to the net lettable floor area of office premises in the building as a whole and the nature of the occupancy of the premises **AND** to the extent to which the same shall not be covered by payments made by the tenant pursuant to the foregoing provisions of these additional provisions, to pay to the landlord upon demand by the landlord the tenant's proportion (being the proportion set out in Item 10) of the costs and expenses of cleaning the entrance hall, lifts, lift lobbies, stairways, passages, corridors, toilet areas, car park, plant and equipment rooms and other common areas and amenities of the building, the windows of the building (both internal and external) and the cost of providing toilet rolls, paper towels and other toilet and cleaning requisites.

The parties' respective positions

6 It common ground that Clause 19 of the lease requires the tenant to pay only the *increases* only in relevant "outgoings, costs and expenses" (as more fully described in AP 19) from the base year, and that the base year is the year that ended on 30 June 2017.[1]

7 In the case of common area cleaning costs, however, the landlord submits that AP 20 imposes an obligation on the tenant to pay its proportion (the calculation for which is set out in Item 10 of the lease), not just increases.

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[1] See Clauses 12.1 and 12.2 of the Disclosure Statement at Respondent's Tribunal Book pp 8-23.

8 It is also accepted that if AP 20 applies to common area cleaning costs, as contended by the landlord, then the tenant must pay its proportion of such costs from the commencement of the lease on 1 January 2017 (and not just any increases from the base year ended 30 June 2017).

9 On this basis, the landlord claims that the tenant is therefore liable to pay the following amounts to the landlord:

Period	**Amount**	**Source**
1 January 2017-30 June 2017	$1,096.82 (plus GST)	Letter dated 24 November 2017 from Knight Frank to the tenant.
1 July 2017-30 June 2018	$2,078.18 (plus GST)	Letter dated 26 March 2019 from Knight Frank to tenant.
1 July 2018-30 June 2019	$2,911.44 (plus GST) (Estimated)	Letter dated 18 June 2018 from Knight Frank to tenant enclosing outgoings budget for full year 2019.
1 July 2019-31 December 2019	$1,342.50 (plus GST) (Estimated)	Letter dated 31 May 2019 from Knight Frank to tenant enclosing outgoings budget for full year 2020.

10 The tenant denies that it is liable to pay its proportion of common area cleaning costs pursuant to AP 20 of the lease. It submits that AP 19, properly construed, contains its entire obligation in respect of common area cleaning costs, which is to pay only any increases in such costs beyond the 30 June 2017 base year.

The parties' submissions

11 Both parties agree that the first part of AP 20, being the words prior to the capitalised word "AND", deals with cleaning of the tenant's premises, and that it therefore does not bear on liability in respect of cleaning the common area.

12 The landlord contends that the words of AP 20 from the words "…to pay to the landlord…" appearing 6 lines from the bottom are plain. That is to say, they plainly relate to common area cleaning costs, and that, upon demand, the tenant must pay its proportion of such costs

13 The tenant, on the other hand, contends that the parties have chosen in AP 19 to include a broad definition of the costs which are to be included in the definition of "Operating Costs of the Building". The tenant further contends that the words "outgoings, costs and expenses" in AP 19, in their natural and ordinary meaning, encompass the cleaning costs of the common areas, that therefore AP 19 applies exclusively to common area cleaning costs, and AP 20 can have no application.

14 Critical to the tenant's contention that AP 20 does not apply to common area cleaning costs are the words "…to the extent to which the same shall not be covered by payments made by the tenant pursuant to the foregoing provisions of these additional provisions". The tenant submits that if therefore, by a proper consideration of AP 19, common area cleaning costs fall within the expression "…all outgoings, costs and expenses...", then the words in AP 20 "…to pay to the landlord…" do not operate so as to impose any liability on the tenant to pay common area cleaning costs.

15 The landlord replies that if, as contended by the tenant, common area cleaning costs fall within the meaning of "Operating Costs of the Building" in AP 19, then AP 20 has no work to do in respect of common area cleaning costs, notwithstanding its express reference to "the costs and expenses of cleaning". The tenant's construction, the landlord contends, would therefore not produce a commercial result where both parties must be taken to have intended that all the words in the lease were to have effect.

16 The tenant contends that if the word "outgoings" in AP 19 is held to include cleaning costs, it may well be that AP 20 has little work to do in the circumstances, but this consideration alone does not entitle the landlord to the declaration sought.

Principles of construction

17 It is necessary to address the parties' contentions by reference to relevant principles of contractual construction, which I summarise as follows:[2]

(a) a commercial contract should be interpreted as having the meaning that would be given to it by a reasonable businessperson in the position of the parties at the time the contract was made;[3]

(b) if the words of the contract are clear, the court must give effect to them even if they have no discernible commercial purpose;[4]

(c) in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole document;[5]

(d) in construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus;[6]

(e) the court is reluctant to hold that parts of a contract are inconsistent with each other, and will give effect to any reasonable construction which harmonises such clauses;[7]

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

3 See ICA paragraph 1.02. See also *Ecosse Property Holdings Pty Ltd v Gee Deed Nominees* (2017) 261 CLR 544 at [16]-[17]; *Pacific Carriers v BNP Parabas* (2004) 218 CLR 451 at [22]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104

4 See ICA paragraph 2.07.

5 See ICA paragraph 7.02.

6 See ICA paragraph 7.03.

(f) 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;[8]

(g) 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;[9]

(h) evidence of pre-contractual negotiations is not generally admissible to interpret a concluded written agreement;[10] and

(i) words and even whole clauses may be rejected if they are inconsistent with the main object of the contract, as ascertained from a reading of it as a whole.[11]

Finding

18 I find that AP 19 and AP 20, properly construed, respectively make a distinction between:

(a) the costs included in the total Operating Costs of the Building, including the costs of cleaning the common areas, in respect of which the tenant is liable to pay only the increases in such costs; and

(b) the costs of cleaning the common areas, in respect of which the tenant is also liable to pay its proportion of such costs from 1 January 2017.

Analysis

19 I have come to this conclusion because, in my view, AP 19 and AP 20, when both are read as a whole, are properly construed harmoniously in the following fashion:

(a) AP 19 makes plain that the total "Operating Costs of the Building" include both the "Base Operating Costs of the Building" and any increases in such costs;

(b) it is clear from the words of AP 19 (particularly AP 19 (b)(xi) and the expressly non-exclusive nature of the types of costs stated to fall within its terms) that the parties intended that AP 19 should be of the broadest nature and, consistent with the tenant's submissions, I therefore agree that the expression "Operating Costs of the Building" in AP 19 therefore includes "the costs and expenses of cleaning the [common areas, and as those areas are more specifically described in the second part of AP 20 after the word "AND"];

(c) however, in respect of the "Operating Costs of the Building", AP 19 only imposes a liability on the tenant to pay "the tenant's proportion

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7 See ICA paragraphs 9.13

8 See ICA paragraph 1.03.

9 See ICA paragraph 5.01.

10 An exclusionary rule. See ICA paragraph 3.08.

11 See ICA paragraph 9.09

[as set out in item 10] ***of any increase*** in the costs and expenses of cleaning the [common areas] incurred by the landlord relative to any year ended 30 June (or in the case of the year to 30 June 2017, only increases relative to the part year);

(d) in contrast with AP 19, by the words appearing in the second part of AP 20 after the word "AND", AP 20 imposes an obligation upon the tenant to pay something further than what it is required to pay under AP 19, being "***the tenant's proportion*** (the proportion set out in Item 10) of ***the costs and expenses*** of cleaning the [common areas] in addition to "the tenant's proportion *of* ***any increase*** in the costs and expenses of cleaning the [common areas] (my emphasis);

(e) the obligation imposed on the tenant by AP 20 to pay something further applies only to the extent that "the same" (viz. "***the tenant's proportion*** (the proportion set out in Item 10) of the costs and expenses of cleaning the [common areas]" "[is] not…covered by payments made by the tenant pursuant to [AP 19]";

(f) AP 19 does not cover payments made by the tenant referable to "***the tenant's proportion*** (being the proportion set out in Item 10) of the costs and expenses of cleaning the [common areas, but only ***any increase*** in the costs and expenses of cleaning the [common areas].

20 It follows, in my view, that AP19 and AP 20 can reasonably be construed harmoniously, by imposing an obligation under AP 20 on the tenant to pay its proportion of common area cleaning costs and, by AP 19, also to pay its proportion of the increase in such costs.

21 The construction of AP 20 contended for on behalf of the tenant leaves the words in AP 20 after the capitalised word "AND" with no work to do in respect of common area cleaning costs. It is difficult to accept that reasonable business persons in the position of the parties would have intended this to have been the case.

Other materials available to assist the process of construction

22 I am of the view, for the reasons I have expressed, that the provisions of AP 20 are plain in respect of the tenant's liability to pay its proportion of the costs of common area cleaning, including increases in such costs in common with increases in other Operating Costs of the Building.

23 If I am incorrect, and there is ambiguity in the terms of the lease as to whether the tenant is liable to pay its proportion of the common area cleaning costs, and not just increases in such costs, I am entitled to have regard to:

> "…objective background facts which were known to both parties [at the time the contract was made]"[12]

to assist in resolving the ambiguity.

24 By a letter dated 8 November 2016, the landlord's agent Knight Frank recorded the terms of the tenant's then proposed offer to the landlord, in which was stated:

Outgoings	The [tenant] must pay increases in statutory and building outgoings payable for the base year ending 30 June 2017 The [tenant] is additionally responsible for all tenant operating costs, including but not limited to electricity, telephone, public liability insurance etc
Cleaning	The [tenant] will be responsible for the cost of common area cleaning.

25 The offer was signed on behalf of the then proposed tenant.

26 In the event of there being any ambiguity, I find that at the date of the execution of the lease on 11 January 2019 an objective background fact, known to the parties, was the signed offer of the tenant to pay the costs of common area cleaning from the date of commencement of the lease, and not only increases in the costs of common area cleaning from the base year.

27 With respect to payment obligations for the cleaning of common areas, the tenant submits that the terms of the statutory disclosure statement signed by the landlord on 9 December 2016 and by the tenant on 21 December 2016 (that is to say, after the date of the signed offer) is also a subsequent objective background fact that assists in resolving any ambiguity in the terms of the lease. The disclosure statement indicates, the tenant submits, that the parties intended that the tenant should be liable only for increases in "the landlord's outgoings", and that it does not draw any distinction between common area cleaning costs and other outgoings.[13] The tenant also submits that the "building budget for the year ended 30 June 2017" attached to the disclosure statement plainly includes a number of line items that would incorporate, or include, cleaning services performed on, and to, the common areas.[14] To this extent, the tenant submitted, the obligations set out in the signed offer, to which I have referred, were altered.

28 For the following reasons, I am not satisfied that the contents of the disclosure statement stand as an objective background fact known to the parties at the date of the lease, sufficient to inform the question of

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12 See *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24 at [22]-[23]. See also *Electricity Generation Corporation v Woodside Energy and Ors* [2014] HCA 7 at [35]; *Mt Bruce Mining Pty Limited v Wright Prospecting Pty Ltd and Anor* [2015] HCA 37 at [50].

13 See Applicant's TB 14.

14 Being a "contract fee" of $24,400; window cleaning of $5,100; toilet requisites of $14,400; rubbish removal of $7,200; miscellaneous of $3,600 and sanitary service of $1,400.

construction of AP 19 and AP 20 of the lease. First, it is a document that must be regarded as having been executed contemporaneously with the lease and, to that extent must also be read harmoniously with the lease[15] which, as I have found, imposes a different obligation on the tenant with regard to cleaning. Secondly, although the disclosure statement purports to "[reflect] all agreements that have been made by the parties"[16], the disclosure statement plainly does not do so; the terms of the lease contain further agreements between the parties. Thirdly, none of the other documents in evidence demonstrate any desire by the tenant to deviate from its obligations with respect to outgoings as set out in the heads of agreement.

29 Were it accepted, contrary to my finding, that there is an ambiguity concerning the contested obligation, the mutually known objective background facts to the lease do not, in my consideration, assist the tenant.

30 I make the declaration attached, and will reserve costs.

A T Kincaid
Member

15 See ICA chapter 3.03.
16 See TB 18.