VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP640/2015

CATCHWORDS

LANDLORD AND TENANT – Interpretation of lease terms – whether extrinsic material can be relied upon in interpreting the terms of the lease – whether the terms of the lease are ambiguous.

FIRST APPLICANT	Denis Liubinas
SECOND APPLICANT	Matthew Liubinas
RESPONDENT	Vicport Fisheries Pty Ltd (ACN 006 845 736)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Preliminary Hearing
DATE OF HEARING	21 October 2016
DATE OF ORDER	9 November 2016
CITATION	Liubinas v Vicport Fisheries Pty Ltd (No 2) (Building and Property) [2016] VCAT 1893

ORDER

1. I find and declare that clause AP6 of the lease between the parties is to be read and construed as follows:

> At the expiration or sooner determination of the said term the [Applicants are] to remove [their] partitions, fixtures and fittings and so far as the premises are affected by any such removal to reinstate the same in their condition when first occupied by Craig Jamieson [on 1 January 1994] and make good any damage or injury to the premises at the expense in all things of [the Applicants] and to deliver up possession to the [Respondent] of the premises together with all the [Respondent's] fixtures and fittings in such repair, order and condition required to be maintained by [the Applicants] in accordance with the [Applicants'] covenants herein contained.

2. By **25 November 2016** and subject to Order 3 of these orders, the parties must file short minutes of consent orders setting out:

(a) what remaining interlocutory steps are required to be undertaken, prior to the proceeding being listed for hearing;

(b) the estimated hearing time; and

(c) any dates after March 2017 where counsel or witnesses are not available.

3. In the event that the parties are unable to agree on minutes of consent orders, they shall request that the Principal Registrar list the proceeding for a directions hearing, at which time the Tribunal will make further orders as to the future conduct of the proceeding.

4. Cost reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr P Best of counsel
For the Respondent	Mr N Frenkel of counsel

REASONS

INTRODUCTION

1. On 7 June 2016, I published orders and *Reasons*,[1] in answer to a preliminary question concerning the rights and obligations of the parties under a lease of retail premises located in Romsey, Victoria (**'the Premises'**).

2. The background facts of the dispute between the parties are set out in detail in my *Reasons* dated 7 June 2016. In summary, the dispute between the parties concerns the removal of fixtures and chattels by the Applicants, being the former tenants of the Premises (**'the Tenants'**), which the Respondent, being the former landlord of the Premises (**'the Landlord'**), contends should not have been removed when the Tenant vacated in late December 2014. The question, which was the subject of the preliminary hearing, was:

> Who owns or owned the fixtures, fittings and fit out of the Premises as at the date or dates which the Tribunal determines to be relevant?

3. At the conclusion of the preliminary hearing, I found and declared that:

> As at the date that the Applicants vacated the demised premises, the subject of this proceeding (**'the Premises'**), the Applicants owned the fixtures and fittings and fit-out within and attached to the Premises as listed in Schedule 1 to the Sale of Business Agreement dated 15 February 2001 between Romsey Pharmaceuticals Pty Ltd and Romsey Services Pty Ltd and others; together with any additional fixtures, fittings and fit-out installed in or to the Premises by Romsey Services Pty Ltd or the Applicants after 1 January 2001.

4. In essence, I found that the Tenants owned many, but not all, of the fixtures, fittings and fit-out which previously existed within the Premises and which were removed by the Tenants when they vacated. The corollary of my determination was that some of the fixtures, fittings and fit-out that were removed from the Premises were not owned by the Tenants when they removed them.

5. The parties' rights and obligations under the lease were further complicated by clause AP6 of the lease, which required the Tenants to remove certain *partitions, fixtures and fittings* upon vacating the Premises. The reach of that Clause AP6 was said to be unclear, as each party had a differing view as to how that clause was to be construed. The clause is expressed in the lease as follows:

> At the expiration or sooner determination of the said term the Tenant is to remove the Tenant's partitions, fixtures and fittings insofar as the

[1] *Liubinas v Vicport Fisheries Pty Ltd* [2016] VCAT 927.

> premises are affected by any such removal to reinstate the same in their condition when first occupied by Craig Jamieson and make good any damage or injury to the premises at the expense in all things of the Tenant and to deliver up possession to the Landlord of the Premises together with all of the Landlord's fixtures and fittings in such repair, order and condition required to be maintained by the Tenant in accordance with the Tenant's covenants herein contained. [Underlining added]

6. The reference to *Craig Jamieson* is a reference to the first tenant, who originally undertook the fit-out works to enable the Premises to be used to conduct his pharmacy business. Those original fit-out works occurred in January and February 1995 and since that time, the tenancy has changed on a number of occasions, but always operated as a pharmacy business. According to the Tenants, title to the fit-out works was transferred from tenant to tenant, with the result that they owned all of the fixtures and fittings, which comprised the fit-out works.

7. According to the Landlord, the chain of title in the fixtures and fittings, was severed in 2001, with the result that title in those fixtures and fittings reverted to the Landlord. As I have indicated, I ultimately found that only some of the fixtures and fittings were transferred from tenant to tenant, and that ownership of the remaining fixtures and fittings, reverted to the Landlord.

8. At the conclusion of the preliminary hearing, which was conducted over three days commencing on 9 May 2016, I formed the view that it would be improper for me to make any finding as to the construction of clause AP6, given that this would be beyond the scope of the preliminary hearing and therefore, deprive the parties of being able to comprehensively address me as to its construction. Accordingly, I left the determination as to the construction of clause AP6 open, pending further submissions or hearing.

9. A directions hearing was convened on 22 July 2016, at which time Mr Best of counsel, who appeared on behalf of the Tenants, moved for the Tribunal to conduct a further preliminary hearing as to the construction of clause AP6. This was despite the fact that the Tenants had, at that time already issued an originating process in the Supreme Court of Victoria, seeking leave to appeal my determination dated 7 June 2016. Ultimately, I acceded to the Tenants' request for a further preliminary hearing, which was then conducted on 21 October 2016. Comprehensive submissions and affidavit material were filed by the parties, in support of their respective positions.

10. At the conclusion of that second preliminary hearing, both Mr Best and Mr Frenkel of counsel, who appeared on behalf the Landlord, advised that the Tenants' application for leave to appeal was to be heard on 3

November 2016 and on that basis, it was appropriate for me to wait until the Supreme Court had determined that application, before I handed down my ruling in relation to the interpretation of clause AP6.

11. However, I have now been provided with a transcript of the Tenants' leave application, which was heard before his Honour, Croft J, on 3 November 2016. His Honour adjourned the leave application *sine die*, so as to allow all matters before the Tribunal to be determined before hearing of any application for leave to appeal.

12. Accordingly and with that in mind, I have determined how clause AP6 is to be construed, which I have now extrapolated in Order 1, attached to these *Reasons*. What follows is the reasoning behind my determination of this issue.

THE TENANTS SUBMISSIONS

Admissibility of extrinsic material

13. At the commencement of the second preliminary hearing, Mr Best objected to the filing of an affidavit sworn by the director of the Landlord, Stephanie Wylaars, dated 6 September 2016. His objection was made on the basis that the parole evidence rule prohibits extrinsic material being relied upon to construe an agreement which has been reduced into writing. Reference was made to the judgment of Mason J in *Godelfa Construction v State Railway Authority of New South Wales*.[2]

14. Mr Best submitted that the affidavit of Stephanie Wylaars was wholly inadmissible because it offended the *parole evidence rule* as it:

    (a) referred to negotiations with respect to the 2001 lease and specifically clause AP6; and

    (b) included her own subjective opinion as to the meaning of clause AP6.

15. Mr Frenkel of counsel, who again appeared on behalf of the Landlord, conceded that there were parts of the affidavit which were inadmissible, if the rules of evidence applied to proceedings before the Tribunal. However, he argued that there were other parts which were relevant and admissible.

16. Mr Frenkel, correctly, submitted that s 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* expressly provides that the Tribunal is not bound by the rules of evidence. Therefore, he argued that it was ultimately a matter for the Tribunal to receive and rely upon the affidavit or parts of the affidavit and to exclude those parts of the affidavit which the Tribunal considered irrelevant.

[2] (1982) 149 CLR 337 at 347-8.

17. Mr Frenkel further submitted that it was open for the Tribunal to look at extrinsic evidence, such as prior negotiations, where the clause under consideration was ambiguous. He referred me to the judgment of French CJ, Hayne, Crennan and Kiefel JJ in *Electricity Generation Corporation v Woodside Energy Ltd*,[3] where their Honours stated:

> [T]his 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 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 Limited (in rec)*, unless a contrary 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'.[4]

18. In my view, regard can be had to the affidavit of Ms Wylaars, notwithstanding that it contains some irrelevant material. In that regard, the Tribunal is well placed to ignore such irrelevant material and only have regard to matters which facilitate *an understanding of the genesis of the transaction, the background, the context [and] the market in which the parties are operating.*

Interpretation of clause AP6

19. Mr Best submitted that clause AP6 requires the Tenants to reinstate the premises to the same condition when *first occupied by Craig Jamieson*. He argued that the words *first occupied* should be given their ordinary meaning; namely, the point when Mr Jamieson first entered into the Premises and exercised control over the Premises. Mr Best submitted that Mr Jamieson first occupied the Premises when he was given possession pursuant to the lease on 1 January 1995. According to Mr Jamieson, the fit-out works undertaken by him had not commenced until after that date:

> 5. As at 1 January 1995 the premises had an internal ceiling with suspended fluorescent lights, the floor was bare concrete, a bathroom and shower plumbing had been installed, electrical such as lights and power points had been

[3] (2014) 251 CLR 640.
[4] Ibid at 656-7.

> installed in the premises had an air conditioner. The premises had glass entrance doors at the front and rear. One wall was of new brick and the other was the outside of the old National Bank which had not been rendered or restored but was in its existing unpainted state. The premises was otherwise an empty shell.[5]

20. Mr Best submitted that an ordinary, plain reading of clause AP6 therefore required the Tenants to remove the partitions, fixtures and fittings originally installed by Craig Jamieson, so that the Premises could be reinstated into the same condition that they were in on the first day that Craig Jamieson took possession, being a date prior to the commencement of the fit-out works.

21. Mr Best further submitted that clause AP6 needs to be read in context with other provisions within the lease. He argued that AP6 reflects clause 5.1.2 of the lease which stipulates that:

> When the term ends, the tenant must -
>
> …
>
> 5.1.2 remove the tenant's installations and other property from the premises and make good any damage caused in removing it.

22. The *Tenant's Installations* are defined in Item 7 of the lease schedule as being:

> Such fixtures, fittings, plant and equipment including any display counters, shelving and office machinery which may with the consent of the Landlord have been brought on to the premises by the Tenant prior to the commencing date of this Lease.

23. Mr Best submitted that Item 7, read literally, is nonsensical because there were no *fixtures, fittings, plant and equipment, including any display counters, shelving and office machinery* brought onto the premises by the Tenant prior to the commencement date of the lease. This is because Romsey Services Pty Ltd, being the original tenant under the 2001 lease:

    (a) was not incorporated as at the commencement of the 2001 lease. Therefore, it could not have brought anything onto the premises prior to the commencement date of the lease; and

    (b) was a new tenant and not a continuing tenant.

24. Therefore, Mr Best submitted that the expression *Tenant's Installations* must mean what was brought onto the premises by Mr Linton and Mr Jamieson (being the former tenant of the previous lease) prior to the commencement of the 1 January 2001 lease and clause AP6 means the

[5] Amended Witness Statement of Craig Jamieson dated 29 April 2016 previously tendered as evidence.

fit-out and any additional items added after the commencement of the lease.

LANDLORD'S SUBMISSIONS

25. Mr Frenkel drew my attention to the definitions section of the lease. The word *Tenant* is defined in clause 1.1 of the lease as:

> [T]he person named in item 2, or any person to whom the lease has been transferred.

26. Item 2 of the Schedule names the tenant as Romsey Services Pty Ltd. As stated above, this is the former tenant and the entity which transferred the lease to the current Tenants. With that in mind, Mr Frenkel interpolated the words *Romsey Services Pty Ltd and any person to whom the lease has been transferred* into the text of clause AP6, so that it reads:

> … the Tenant is to remove [Romsey Services Pty Ltd or any person to whom the lease has been transferred]'s partitions, fixtures and fittings and so far as the premises are affected by any such removal to reinstate the same in their condition when first occupied by Craig Jamieson …

27. Mr Frenkel submitted that when one has regard to the definitions section of the lease, only those *partitions, fixtures and fittings* which belonged to *Romsey Services Pty Ltd or any person to whom the lease has been transferred* (which in this case, is the current Tenants) were to be removed.

28. Mr Frenkel submitted that the interpretation advanced by the Tenants would require words to be imported into clause AP6 which simply are not there. In particular, for the Tenants' argument to succeed, clause AP6 would need to be re-written as follows:

> … The Tenant is to remove the ~~Tenant's~~ partitions, fixtures and fittings <u>installed by Craig Jamieson</u> and so far as the premises are affected by any such removal to reinstate the same in their condition when first occupied by Craig Jamieson ...

29. Mr Frenkel argued that a plain reading of clause AP6 does not require the Tenant to remove all of the partitions, fixtures and fittings installed by Craig Jamieson. Clause AP6 is confined to only requiring the Tenants to remove partitions, fixtures and fittings <u>which belong to them</u> and not those remaining partitions, fixtures and fittings originally installed by Craig Jamieson.

30. Mr Frenkel submitted that this interpretation is consistent with clause 5.1.2 of the lease. He contended that the fit-out originally installed by Craig Jamieson was not included within the expression *Tenant's*

Installations and that neither the Tenants nor their predecessors; namely, Romsey Services Pty Ltd, brought that fit out onto the Premises prior to the lease commencing on 1 January 2001.

31. Therefore, the objective of clause AP6 was essentially to fill the gap left by clause 5.1.2 and to require the Tenants to remove their partitions, fixtures and fittings and to reinstate the Premises to a condition commensurate with the condition after the original fit-out had been installed by Craig Jamieson.

CONCLUSION

32. Both counsel have referred to a number of authorities to guide me in the construction of clause AP6. In *Mount Bruce Mining Pty Ltd v Right Prospecting Pty Ltd*,[6] French CJ, Nettle and Gordon JJ said:

> 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 enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or object 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.[7] [Underlining added]

33. Therefore, the starting point in construing clause AP6 is to look at the language used by the parties. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,[8] Gleeson CJ, Gummow, Hayne, Callinan and Hayden JJ said:

> References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean.[9]

34. However, in construing the words of a particular document, recourse may be had to the context in which those words appear and where there is ambiguity, to surrounding circumstances. In *Toll*, the joint judgment stated further:

[6] (2015) 256 CLR 104.
[7] Ibid at 116-17.
[8] (2004) 219 CLR 165.
[9] Ibid at [40].

> The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[10]

35. In my view, the plain reading of clause AP6 does not render the clause ambiguous. In particular, I accept, at least in part, Mr Frenkel's submission as to how the clause should be read. By reference to the definition of *Tenant* in clause 1.1 of the lease, the current Tenants are to be interpolated into the text of clause AP6 to give that clause clear meaning, so that it reads:

> … [Messrs Liubinas] are to remove [their] partitions, fixtures and fittings and so far as the premises are affected by any such removal to reinstate the same in their condition when first occupied by Craig Jamieson …

36. In my view this approach accords with authority. In *Kelly v The Queen*,[11] McHugh J said of a definition clause in the statute:

> [O]nce … the definition applies … the only proper … course is to read the words of the definition into the substantive enactment and then construe the substantive enactment … To construe the definition before its text has been inserted into the fabric of the substantive enactment invite error as to the meaning of the substantive enactment … [T]he true purpose of an interpretation or definition clause [is that it] shortens, but is part of, the text of the substantive enactment to which it applies.[12]

37. Plainly, clause AP6 requires the current Tenants to remove whatever partitions, fixtures and fittings which are owned by them and then reinstate the Premises to a condition commensurate with its condition at the time when Craig Jamieson first occupied the Premises. Clause AP6 does not require the Tenants to remove any partitions, fixtures and fittings which they do not own.

38. In my view, reinstating the Premises to a condition commensurate with its condition at the time when Craig Jamieson first occupied the Premises reflects the condition as at the commencement date of the 1994 lease, being 1 January 1995, which is prior to Craig Jamieson undertaking the fit-out works. In that respect, I accept Mr Best's submissions that the word *occupied* should be given its usual meaning – that is, the date when Craig Jamieson, either personally or by his servants or agents, was permitted to occupy the Premises and exercise

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10 Ibid at [40].
11 (2004) 218 CLR 216 at [103].
12 Ibid at [103], cited in Lewison & Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co. 2012) at 197.

control over the Premises, irrespective of whether that was to undertake fit-out works or to commence business operations.

39. Therefore, the Tenants were entitled to, and indeed required to, remove their own partitions, fixtures or fittings. Further, under clause AP6, the Tenants were required to then to reinstate that part of the Premises so affected by such removal, to a condition commensurate with the condition of the Premises after Craig Jamieson first occupied the Premises but prior to the fit-out works being undertaken.

40. In my view, clause AP6 is confined to the removal of partitions, fixtures or fittings which are owned by the Tenants. The clause does not address the situation where partitions or other installations, which belong to the Landlord, have been removed by the Tenants.

41. Further, I do not accept Mr Best's submission that clause 5.1.2 in some way 'reflects' clause AP6. This submission assumes that clause 5.1.2 (in conjunction with Item 7) means something different to what it literally says. In particular, Mr Best submits that clause 5.1.2 and Item 7 are to be construed such that the words in Item 7 should be read as follows:

> … have been brought on to the premises by ~~the Tenant~~ Craig Jamieson and Gary Linton prior to the commencement date of this Lease.

42. Mr Best contended that such an interpretation was necessary to avoid a *nonsensical* interpretation of Item 7. This is because the original tenant; namely, Romsey Services Pty Ltd, is said not to have been incorporated as at the commencement date of the 2001 lease.

43. The difficulty in accepting Mr Best's interpretation is that it requires words to be imported into the 2001 lease which simply are not there. Had the parties intended to include the fixtures, fittings and fit-out brought onto the Premises by Mr Linton and Mr Jamieson prior to the commencement of the 1 January 2001 lease, they would have stated that when Item 7 was engrossed. It is not suggested, nor was it ever submitted, that the reference to Romsey Services Pty Ltd in Item 7 was a mistake.

44. In my view, the mere fact that clause 5.1.2, in conjunction with Item 7, may ultimately have no work to do (because no fixtures, fittings, plant and equipment *et cetera* were brought onto the Premises by Romsey Services Pty Ltd) does not necessarily render that clause *nonsensical*.

45. In that sense, I am guided by the often quoted dicta of Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:[13]

[13] (1973) 129 CLR 99.

> If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke v Dunlop*, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's Case*. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in *Hillas & Co Ltd v Arcos Ltd*, that the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects', should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance…[14]

46. In any event, to the extent that a literal interpretation of clause 5.1.2 (in conjunction with Item 7) may have created a lacuna in respect of the Tenants' fixtures and fittings, clause AP6 remedies that situation because it deals with the Tenants' assets brought onto the Premises after the 2001 lease commenced. In that sense, it has a different function to clause 5.1.2 and Item 7. Clause AP6 covers the situation which requires the tenant (or any assignee) to remove their *partitions, fixtures and fittings* at the expiration of the lease term. Therefore, even if Romsey Services Pty Ltd (or any assignee) brought fixtures and fittings onto the Premises after the commencement date of the 2001 lease, they would be required to remove those fixtures and fittings at the expiration of the lease term.

47. Accordingly, the two clauses sit side-by-side, one dealing with fixtures and fittings brought onto the Premises prior to the commencement of the lease and the other dealing with fixtures and fittings brought onto the Premises after the commencement of the lease.

SENIOR MEMBER E. RIEGLER

[14] Ibid at 109-10 (footnotes omitted).