VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP366/2014

CATCHWORDS

LEASE; commercial or retail; proper construction of Ministerial Direction s 184 dated 23 August 2004; proper construction of lease; application for costs; issue of costs determined under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANT	Luchio Nominees Pty Ltd (ACN 059 495 992)
RESPONDENT	Epping Fresh Food Market Pty Ltd (ACN 127 544 049)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	13 April 2016
DATE OF ORDER	7 June 2016
DATE OF REASONS	7 June 2016
REVISED	14 June 2016
CITATION	Luchio Nominees Pty Ltd v Epping Fresh Food Market Pty Ltd (Building and Property) [2016] VCAT 937 (Revised)

ORDERS

Declaration

1 The Tribunal declares that the Lease is not a lease of *retail premises* within the meaning of the *Retail Leases Act 2003*.

Orders in respect of costs

2 Luchio must pay Epping's costs of this proceeding, save for the costs of or associated with the following:

(a) any costs incurred by Epping up to the directions hearing on 12 November 2014, including without limitation, any costs of or associated with the hearing on that date, or the injunction hearing on 30 September 2014; or
(b) the hearing on 16 April 2015;

(c) the first hour of the hearing on 17 April 2015;
(d) the hearing on 13 April 2016.

3 Epping's costs pursuant to this order are, in the absence of agreement, to be assessed by the Costs Court on the standard basis using the Scale of Costs in Appendix A of Chapter 1 of the Rules of the County Court.

4 The order that Epping must pay Luchio's costs of the directions hearing on 13 April 2015, fixed in the sum of $750.00, stands. Those costs may be set off against the costs to which Epping is entitled pursuant to order 2 above.

Final Disposition of the Proceeding

5 The proceeding is otherwise dismissed.

MEMBER C EDQUIST

APPEARANCES:

For Applicant:	Mr R Peters of Counsel
For Respondents:	Mr R Hay QC with Mr L Hawas of Counsel

REASONS

Introduction

1 There is a dispute between the parties concerning a lease ('the Lease') granted by the Applicant ('Luchio') in respect of its property at 551 High Street, Epping ('the Premises') to the Respondent ('Epping'). The parties have been involved in this proceeding in the Tribunal since September 2014.

2 When Luchio issued its application initially, it was seeking orders for possession, and damages. After some days of hearing, and a number of interlocutory skirmishes, Luchio abandoned its attempt in this proceeding to gain an order for possession, but continued with a claim it had made in its points of claim dated 16 March 2015 for a declaration that the Lease is not subject to the *Retail Leases Act 2003* ('RLA').

3 In this way, a hearing limited to two issues, namely the characterisation of the Lease, and costs, came on before me on 13 April 2016. I had received written submissions from the parties beforehand. At the hearing Mr R Peters of Counsel appeared for Luchio and Mr R Hays QC leading Mr L Hawas appeared for Epping. I was addressed by the parties, and both sides submitted further materials for my consideration. I reserved my decision. I now set out my decision together with my reasons.

4 My decision regarding costs must be made following a determination of whether the Lease relates to *retail premises* within the meaning of the RLA. If the RLA applies, then neither party will be entitled to costs, even if they are successful, unless they can get through the relevant gateway in s 92. They will have to demonstrate that it is fair that the other party should pay all or part of their costs because the other party conducted the proceeding in a vexatious way that unnecessarily disadvantaged them. If the RLA does not apply, then costs will have to be determined in accordance with the provisions of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'). My decision regarding costs is to be found in the final section of these reasons for decision, starting at paragraph 118.

BP1496/2015

5 The hearing in this proceeding was followed by a hearing in a related matter, BP1496/ 2015. In that proceeding, Luchio had also sought an order for possession of the Premises, based on a notice issued under s 146 of the *Property Law Act 1958* ('PLA') that had been issued on 19 June 2015. Luchio had, on 7 March 2015, indicated its intention to withdraw the application before its determination by the Tribunal. That intention was confirmed by Luchio on 13 April 2016, and Epping sought an order for its costs. Epping's entitlement to costs is the only issue to be determined in

proceeding BP1496/2015. As the lease under consideration in BP1496/2015 is the Lease in the present proceeding, my decision regarding the application of the RLA to the Lease will govern the issue of costs in BP1496/2015 also. My decision regarding costs in BP1496/2015 will be published separately.

Is the Lease is a lease of *retail premises* for the purposes of the RLA

6 The term *retail premises* has the meaning given by s 4 of the Act. Section 4(1) of the Act provides:

> (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; or
>
> (b) the carrying on of a specified business or a specified kind of business that the Minister determines under section 5 is a business to which this paragraph applies.

7 Section 4(2) of the Act relevantly provides:

> However, ***retail premises*** does not include the following premises—
>
> …
>
> (f) premises of a kind that the Minister determines under section 5 are premises to which this paragraph applies;

8 Pursuant to s 5 of the Act:

> (1) The Minister may, by notice published in the Government Gazette—
>
> …
>
> (c) determine that a kind of premises are premises to which section 4(2)(f) applies; …

9 The Minister made a determination No. S 184 under s 5(1)(c) of the RLA on 23 August 2004 which had the effect of excluding as ***retail premises*** certain types of premises ('the Determination').[1] Both parties accept that unless the Determination applies to the Lease, the RLA will apply to the Lease.[2]

The text of the Determination

10 In order to understand some of the key issues to be determined it is necessary to have regard to the precise wording of the Determination. It relevantly provides:

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1 Minister's determination No. S 184 gazetted on 23 August 2004.

2 See Luchio's primary contentions dated 30 March 2016, paragraph 8; and Epping's contentions dated 8 April 2016, paragraph 7.

Retail Leases Act 2003

PREMISES NOT CONSTITUTING RETAIL PREMISES

This determination is made under Section 5(1)(c) of the **Retail Leases Act 2003**.

A Acting under section 5(1)(c) of the **Retail Leases Act 2003**, I determine that the following kind of premises are premises to which section 4(2)(f) applies:

Premises which are Leased under a Lease:

(a) the term of which (excluding any options for renewal) is 15 years or longer; or

(b) the term of which (excluding any options for renewal) is less than 15 years which was granted by way of renewal (as provided in section 9 of the **Retail Leases Act 2003**) of a lease to which paragraph (a) applies or applied or a lease to which paragraph (a) would have applied had the lease been entered into after the date upon which this determination comes into effect; or

(c) the term of which (excluding any options for renewal) is less than 15 years which was granted expressly or by operation of law by way of or as a result of the variation of a lease to which paragraph (a) applies or applied or a lease to which paragraph (a) would have applied had the lease been entered into after the date upon which this determination comes into effect provided that the terms of lease so granted are substantially the same as the terms of the lease which was varied -

and which contains any provisions that -

(d) impose an obligation on the tenant or any other person to carry out any substantial work on the Premises which involves the building, installation, repair or maintenance of:-

(i) the structure of, or fixtures in, the Premises; or

(ii) the plant or equipment at the Premises; or

(iii) the appliances, fittings or fixtures relating to a gas, electricity, water, drainage or other services; or

(e) impose an obligation on the tenant or any other person to pay any substantial amount in respect of the cost of any of the matters set out in sub-paragraphs (d)(i), (ii) or (iii); or

(f) in any significant respect disentitles the tenant or any other person to remove any of the things specified in

paragraph (d) at or at any time after the end of any of the leases to which paragraphs (a), (b) or (c) apply.

B This determination does not exclude from the operation of the Retail Leases Act 2003 any sub-lease of the Premises or any part of the Premises which is a lease of retail premises under sections 3 and 4 of the Retail Leases Act 2003 by reason only of the application of this determination to a lease from or through which title to the sub-lease is derived from time to time.

C A certificate signed by the Small Business Commissioner shall be prima facie evidence that a lease is a lease which satisfies the provisions of paragraph A of this determination.

D This determination only applies with respect to Premises the subject of a lease (including any renewal of a lease) which is entered into on or after the date upon which this determination comes into effect.

E This determination is an addition to and does not replace any other determination.

This determination comes into effect on 24 August 2004.

Dated 20 August 2004

The issues to be determined

11 Luchio says:

(a) the Lease, having a term of 20 years, engages paragraph A(a) of the Determination;

(b) applying the relevant rules of construction to the Determination, consideration may be given to extrinsic materials, but there are no relevant extrinsic materials, and in particular the Small Business Commissioner's *Guidelines to the Retail Leases Act 2003* dated May 2014 ('the Small Business Commissioner's Guidelines') are not relevant extrinsic materials;

(c) furthermore, the letter from the Small Business Commissioner dated 1 February 2007 ('the Small Business Commissioner's letter') is irrelevant;[3]

(d) on its proper construction, for the Determination to be enlivened, only one of paragraphs A(d), (e) or (f) need to be engaged;

(e) paragraph A(d) of the Determination is engaged because the Lease contains in clause 2 of Item 22 of the Schedule ('Special Condition 2') a provision:

(i) that imposes an obligation on the tenant;

(ii) to carry out substantial work on the Premises;

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[3] Luchio's Supplementary contentions dated 8 April 2016, paragraphs 3-8.

(iii) which work involves building;

(iv) the structure of or fixtures etc in the Premises.[4]

(f) as the Determination is enlivened, the premises are of a kind referred to in s 4(2)(f) of the RLA, and are accordingly under s 4(2) not *retail premises* within the meaning of the RLA.

12 Epping agrees that the Lease engages paragraph A(a) of the Determination, but in contradiction to Luchio, says three key things about the operation of the Determination. Its points are:

(a) paragraph A(d) of the Determination is not engaged by the Lease;

(b) even if paragraph A(d) of the Determination is engaged, on a proper analysis of the Determination in accordance with the relevant principles of construction, the Determination does not come into operation because paragraph A(f) is not *also* engaged;

(c) this conclusion is consistent with the Small Business Commissioner's Guidelines, which are relevant extrinsic materials.

13 This summary of the parties' respective high level issues throws up the following issues concerning the Determination for consideration:

(a) What principles of interpretation should be applied to the construction of the Determination?

(b) Are the Small Business Commissioner's Guidelines relevant extrinsic materials?

(c) What is the relevance, if any, of the Small Business Commissioner's letter?

(d) Is it sufficient, in order for the Determination to be enlivened, that any one of paragraphs A(d), (e) or (f) should be found to be engaged, as contended by Luchio, or must either one of paragraphs A(d) or (e) *together* with (f) be engaged, as Epping insists?

14 Turning to the Lease, the issues are:

(a) What is the point at which the question of the characterisation of the Lease is to be determined?

(b) What obligations, if any, regarding building, installation, repair or maintenance of the Premises are placed on the tenant by the Lease?

15 I now proceed to examine these issues in turn.

What principles of interpretation should be applied to the construction of the Determination?

16 Luchio's position can be summarised as follows:

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[4] Luchio's primary contentions, paragraphs 22 and 23.

(a) The Determination is an instrument that is of a legislative character and is therefore a subordinate instrument under s 3 of the *Interpretation of Legislation Act 1984* (Vic) ('ILA').[5]

(b) As a subordinate instrument, it is subject to s 35 of the ILA.[6]

17 Epping says that the Minister made the Determination under the 'legislated' (sic) power conferred on the Minister by s 5(1)(c) of the RLA, and that the Determination carries legislative force and should be construed in the same way as legislation.[7] It accordingly is governed by s 35 of the ILA.

18 I comment that although Epping reaches the conclusion that the Determination should be interpreted as it were legislation by a slightly different route than Luchio, there is agreement as to this conclusion. It is in respect of the implications of this conclusion that the parties differ.

19 Section 35 of the ILA provides:

> **Principles of and aids to interpretation**
>
> In the interpretation of a provision of an Act or
>
> subordinate instrument—
>
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and
>
> (b) consideration may be given to any matter or document that is relevant including but not limited to—
>
> (i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;
>
> (ii) reports of proceedings in any House of the Parliament;
>
> (iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and
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> (iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry, Formal Reviews or other similar bodies.

20 Both parties agree that under s 35(a) of the ILA, a construction which would promote the purpose of the Determination is to be preferred.[8] And both parties agree that under s 35(b) of the ILA, extrinsic material may be considered when interpreting the Determination.[9]

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5 Luchio's primary contentions, paragraphs 10 and 13.
6 Luchio's primary contentions, paragraph 14(a).
7 Epping's contentions, paragraph 13.
8 Luchio's primary contentions, paragraph 14(a); Epping's contentions, paragraph 14(c).
9 Luchio's primary contentions, paragraph 14(b); Epping's contentions, paragraphs 25-28.

21 The practical difference between the parties regarding the use of extrinsic material is whether the Small Business Commissioner's Guidelines are relevant.

Are the Small Business Commissioner's guidelines relevant extrinsic material?

22 Luchio says that as far as it can ascertain:

> the Determination has not been considered by the Tribunal or a Court and there is no extrinsic material relating to it.[10]

23 Epping, on the other hand, submits that the Small Business Commissioner's Guidelines are:

> highly persuasive, especially given that the Determination charges the Small Business Commissioner with the responsibility of construing the Determination and giving it effect. The Tribunal should not depart easily from the construction that the Small Business Commissioner has applied to the Determination. The Commissioner's construction has never been the subject of serious challenge or found to have been incorrect by either the Tribunal or a Court.[11]

24 In its contentions, Luchio points out that a Ministerial determination made under s 5(1) of the RLA can be reviewed by Parliament, and may be disallowed under ss 5(2) and 5(3).[12] At the hearing, Mr Peters on behalf of Luchio, conceded that guidelines published by the Small Business Commissioner contemporaneously with the Determination might have been relevant extrinsic material because Parliament would have had an opportunity to take those guidelines into account when reviewing the Determination.

25 It was submitted that in contrast, the Guidelines, having been published by the Small Business Commissioner 10 years after the publication of the Determination, should be given no weight. Furthermore, it was noted that the Guidelines were subject to an express disclaimer that the opinions in the Guidelines are those of the Small Business Commissioner and are not legally conclusive or binding. Readers are told to take their own legal advice.[13]

26 I agree with Luchio's position. Although the Small Business Commissioner is tasked under s 84(1)(f) of the RLA with publishing guidelines about retail leases that may be purchased on demand by members of the public, it is hard to see how guidelines published in May 2014 can be seen as an authoritative explanation of the purpose or proper construction of a Ministerial determination made in August 2004, under the hand of a

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10 Luchio's primary contentions, paragraph 15.
11 Luchio's primary contentions, paragraph 28.
12 Luchio's primary contentions, paragraph 12(c).
13 Small Business Commissioner's *Guidelines to the Retail Leases Act 2003* dated May 2014, paragraph 3.0.

Minister who had long since gone out of office. This conclusion is reinforced by the disclaimer that the Guidelines express the opinions of the Small Business Commissioner and are not legally binding.

27 I accordingly find that the Guidelines in this particular case are not relevant extrinsic materials and should not be looked at for guidance regarding either the purpose or the proper construction of the Determination.

What is the relevance, if any, of the letter issued by the Small Business Commissioner dated 1 February 2007?

28 Luchio contends that the Small Business Commissioner's letter is irrelevant.[14]

29 The issue arises because paragraph C of the Determination provides:

> A certificate signed by the Small Business Commissioner shall be prima facie evidence that a lease is a lease which satisfies the provisions of paragraph A of this determination.

30 Luchio makes four points. First of all, the Small Business Commissioner's letter is not a certificate. Secondly, paragraph C of the Determination empowers the Small Business Commissioner to make only a positive certificate. The Commissioner can certify that the Lease 'is a lease which satisfies the provisions of paragraph A of this determination', but cannot certify to the contrary. Thirdly, a positive certificate from the Commissioner is 'prima facie evidence'. This means that in the absence of contrary evidence, it is conclusive proof of the fact.[15] The final, but related, point is that in the event of a dispute, the certificate can be challenged. It is the Tribunal, not the Commissioner, which ultimately determines whether the Lease is subject to the RLA.

31 Epping's position is articulated as follows:

> By his letter to Luchio dated 1 February 2007, the Small Business Commissioner concluded that the Lease did not impose an obligation on Epping to construct the '*Buildings*', and the Determination therefore did not apply to the Premises. The Commissioner's conclusion is prima facie evidence that the Determination does not apply to the Lease and the Tribunal should not depart from that conclusion lightly.[16]

32 Although Epping refers to the Small Business Commissioner's 'conclusion' rather than 'certificate', it is clear that Epping considers that the letter should be treated as a certification that the Determination does not apply to the Lease, because Epping contends that the conclusion is prima facie evidence of that matter.

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14 Luchio's Supplementary contentions, paragraph 3.

15 Luchio justifiably cited *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) VR 303 at [46].

16 Epping's contentions, paragraph 54.

33 Several points may be made. The first is that it is the clear intention of paragraph C of the Determination that the Small Business Commissioner is to be empowered to assist parties to a lease to determine whether the lease satisfies the provisions of paragraph A of the Determination by issuing a positive certificate to that effect. It may well be that the Small Business Commissioner is implicitly empowered to make a certificate that the Lease does not satisfy those provisions, because that would be consistent with the intention of paragraph C. However, it is not necessary for me to decide this particular issue in this proceeding, because the Commissioner did not purport to make such a certificate.

34 Furthermore, the Small Business Commissioner merely said that he was:

> not satisfied that the lease is one to which the provisions of Paragraph A of the Determination applies (sic).[17]

35 The upshot is that, even if the letter is to be regarded as prima facie evidence of anything, it is not prima facie evidence that *the Lease does not satisfy* the provisions of paragraph A of the Determination, but merely prima facie evidence that *the Commissioner is not satisfied* that it satisfies those provisions.

36 A further point is that, in urging the Tribunal not to depart from the Small Business Commissioner's conclusion lightly, Epping in effect concedes that the Tribunal has jurisdiction to determine the matter and thereby displace the Commissioner's conclusion.

37 I accordingly find that the Small Business Commissioner's Letter is not relevant to the question of whether the Premises fall within the Determination.

Is it sufficient for the operation of the Determination to be enlivened that any one of paragraphs A(d), (e) or (f) should be found to be engaged?

38 Luchio contends that:

> the task of interpreting the Determination, being as it is a legislative instrument, is the same as interpreting a statute…[18]

39 Luchio goes on to say that this means giving the words used their natural or ordinary meaning bearing in mind the statutory purpose and context in which they appear.[19] Luchio further says that the purpose of the Determination is clear, namely, it is to exclude premises from the operation of the RLA.[20]

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17 The letter issued by the Small Business Commissioner dated 1 February 2007, paragraph 2.

18 Luchio's contentions, paragraph 16, citing *Park Holdings Pty Ltd v Chief Executive of Customs* [2004] FCA 820 at [87].

19 Luchio's contentions, paragraph 16, citing *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22-23].

20 Luchio's contentions, paragraph 16.

40 Epping says that the principles of legislative interpretation relevant to the proper construction of the Determination include the following:[21]

(a) the *golden rule* of statutory interpretation requires that the grammatical or ordinary sense of the words is to be adhered to, unless this would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further;[22]

(b) complementing the *golden rule*, the *purposive approach* to statutory interpretation requires the determining of the purpose of the Act or the relevant provision (or the mischief with which it was intended to deal) and adopting an interpretation of the words that is consistent with that purpose;[23]

(c) in construing a statute, and in order to give effect to the *golden rule* and to the *purposive approach*, context takes precedence over text;[24]

(d) an Act (or determination made under an Act) is to be read as a whole and construed accordingly;[25]

(e) *noscitur a sociis* - the meaning of a word or phrase is to be derived from its context in the Act - gives expression to the approach of reading the Act (or determination) as a whole;[26]

(f) in order to give effect to those principles, '*or*' in a statute (or determination) must sometimes be read conjunctively and cumulatively such that all of the matters listed must be satisfied (and sometimes '*and*' must be read disjunctively and dispersively). The matter must ultimately be determined by the principles set out above and not an application of the strict text of the statute.[27]

41 In further support of the proposition that in the appropriate circumstances '*or*' could be construed as '*and*', Epping cited a number of cases including *Ormerod v Blaslov*,[28] *Pileggi v Australian Sports Drug Agency*[29] and *Jaber v Minister for Immigration and Multicultural Affairs*[30] where the Courts had been prepared to take such a step.

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21 Epping's contentions, paragraph 14(a)-(f).
22 Epping's contentions, paragraph 14(a), citing *Grey v Pearson* (1857) 6H LC 61 at 106, per Lord Wensleydale, and also D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, 8th edition, 2014 at [2.4].
23 Epping cites Pearce & Geddes generally at [2.5].
24 Citing Pearce & Geddes generally at [2.6].
25 Citing Pearce & Geddes generally at [4.2]-[4.3].
26 Citing Pearce & Geddes generally at [4.24].
27 Citing Pearce & Geddes generally at [2.30]-[2.31].
28 (9089) 52 SASR 263.
29 [2004] FCA 955.
30 [2001] FCA 1878.

Epping's key submission on the proper construction of the Determination

42 Having set up as a theoretical proposition that, in the interpretation of a statute (or determination) '*or'* must sometimes be read as '*and'*, Epping goes on to say the following about the construction of the Determination:

> Here, reading the '*or'* between sub-paragraphs A(d) and (e) in the Determination disjunctively as a list of alternatives does not give rise to any difficulty. Sub-paragraph (d) requires the relevant lease to *'impose an obligation'* on the tenant to perform the substantial work described, and (e) requires the lease to '*impose an obligation*' on the tenant to pay any substantial amount in respect of the cost of that work. Plainly, (d) and (e) belong to the same class in that they require the lease to impose substantial work obligations on the tenant. A lease that imposes the substantial work obligations described in (d) or (e) will enliven one or both of the sub-paragraphs.
>
> However, when the determination is construed as a whole, sub-paragraph A(f) does not belong to the class of alternatives in (d) and (e).
>
> Sub-paragraphs (d) and (e) contain positive stipulations - the relevant lease must impose obligations on the tenant to carry out substantial work or incur the cost of substantial work being carried out. Sub-paragraph (f) contains a negative stipulation - the lease must disentitle the tenant from removing the benefit of the substantial work that (d) or (f) impose on the tenant, which the tenant would otherwise have the right to remove under s 154 of the *Property Law Act 1958* for example.
>
> So sub-paragraph (f) deals with the obligations that (d) and (e) require the lease to impose on the tenant and is not an alternative to them. Sub-paragraph (f) assumes the prior application of either (d) or (e). Those sub-paragraphs must be satisfied before (f) can operate.[31]

Discussion

43 The authorities demonstrate the correctness of Epping's contention that the Courts have on occasion been prepared to construe '*or*' as '*and*'. However, this is not to say that this construction must be placed on the word '*or*' in every situation. As Hill, Heerey and Hely JJ explained:[32]

> Ordinarily the word "or" where used in a statute will be disjunctive. But whether this is the case will depend upon the context in which the word appears, context including for this purpose the legislative intention.

44 Luchio challenged the proposition that the *golden rule* still prevailed as the primary guide to statutory interpretation. The judgment of Warren CJ cited.[33] Because this proceeding turns on an issue of interpretation of a

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31 Epping's contentions, paragraphs 20-23 inclusive.
32 *Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573, 577 at [19].
33 *Lowe v The Queen* [2015] VSCA 327.

Ministerial determination it is in my view appropriate to quote at length from this judgment. At [at 9-18] Warren CJ said:

> *Principles of statutory construction*
>
> 9 The primary object of statutory construction is to ascertain the intention of the enacting parliament and construe the provision consistently with the language and purpose of the statute as a whole.[34] As the plurality in Project Blue Sky Inc v Australian Broadcasting Authority[35] explained:
>
> > [T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.
>
> 10 According to the plurality, the process must begin with an examination of the context of the provision.[36] It is well settled that 'context' in this regard extends to the existing state of the law, the history of the legislative scheme and the mischief which the statute sought to remedy, and 'imports all legitimate means by which the legislative intent may be ascertained'.[37]
>
> 11 These principles are reflected in s 35 of the Interpretation of Legislation Act 1984…
>
> **[Section 35 was set out]**
>
> 12 More recent High Court authority has, however, placed renewed emphasis on the actual text used in provisions. This Court in Commissioner of State Revenue v EHL Burgess Properties Pty Ltd referred to a number of examples.[38] I need only mention a few to illustrate this trend. In Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT),[39] Hayne, Heydon, Crennan and Kiefel JJ stated:
>
> > Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose

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34 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 198 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).
35 (1998) 198 CLR 355 ('*Project Blue Sky'*).
36 Ibid 381 [69].
37 *DPP v Leys* (2012) 296 ALR 96, 125 [94] (Redlich and Tate JJA and T Forrest AJA).
38 Ibid [56]-[63] (Tate and Kyrou JJA and Robson AJA).
39 (2009) 239 CLR 27 ('*Alcan*').

and policy of a provision, in particular the mischief it is seeking to remedy.[40]

13 Subsequently, in Federal Commissioner of Taxation v Consolidated Media Holdings Ltd,[41] the High Court, quoting Alcan, said:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.[42]

14 Similarly, in Saeed v Minister for Immigration and Citizenship,[43] French CJ, Gummow, Hayne, Crennan and Kiefel JJ stated:

> Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.[44]

15 In Certain Lloyd's Underwriters v Cross,[45] French CJ and Hayne J warned against the danger of overlooking the words used:

> A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.[46]

16 Recently, this Court adopted similar language in DPP v Walters[47];

> Interpreting statutory provisions requires consideration of the legislative context and — where relevant — the legislative history. But, as the High Court has repeatedly emphasised, the task of statutory interpretation begins, and ends, with the words which Parliament has used. For it is through the statutory text that the legislature expresses, and communicates, its intention.
>
> As this Court said in The Treasurer of Victoria v Tabcorp Holdings Ltd, there are powerful reasons of principle for giving

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40 Ibid 47 [47] (citations omitted).
41 (2012) 250 CLR 503.
42 Ibid 519[39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
43 (2010) 241 CLR 252 ('*Saeed*').
44 Ibid 264-5 [31].
45 (2012) 248 CLR 378 ('*Certain Lloyd's*').
46 Ibid 390 [26] (citations omitted).
47 [2015] VSCA 303.

> primacy to the statutory text. First, the separation of powers requires nothing less. Axiomatically, it is for the Parliament to legislate and for the courts to interpret. Close adherence to the text, and to the natural and ordinary meaning of the words used, avoids the twin dangers of a court 'constructing its own idea of a desirable policy', or making 'some a priori assumption about its purpose'.
>
> Secondly, giving the text its natural and ordinary meaning maximises the comprehensibility and accessibility of statute law, and the accountability of the legislature.
>
> The duty to give primacy to the statutory text has two important corollaries. First, a court construing a statutory provision must strive to give meaning to every word of the provision, and to the provision(s) as a whole. Secondly, except in extremely limited circumstances, the court has no power to fill a gap in a statute or otherwise to read in words which the legislature has not used. The limits of the judicial role require that courts 'abstain from any course which might have the appearance of judicial legislation.[48]…
>
> 18 The practical effect, if any, of these more recent formulations is yet to be clarified. Nonetheless, these cases have not displaced the principles laid down in Project Blue Sky and CIC Insurance Ltd v Bankstown Football Club Ltd,[49]which continue to be cited with approval by the High Court. Considerations of context and statutory purpose clearly remain integral to statutory interpretation,[50]and the purposive approach directed by s 35 of the Interpretation of Legislation Act cannot be overlooked.

45 The effect of *Lowe v The Queen* and the many authorities cited by Warren CJ is that, in looking at the Determination, it is necessary for me to give primacy to its text. Although the purpose of the Determination is clearly relevant by reason both of the authorities and s 35 of the ILA, the purpose of the Determination, to adopt the approach of the High Court in *Certain Lloyd's*, must be derived from what the Determination says, and not 'from any assumption about the desired or desirable reach or operation of the relevant provisions'.[51]

46 Furthermore, to paraphrase the Victorian Court of Appeal in *The Treasurer of Victoria v Tabcorp Holdings Ltd*,[52] I must give the text its natural and ordinary meaning, striving to give meaning to every word of the provision, and to the provisions as a whole.

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48 Ibid [2]-[4] (Maxwell P and Redlich, Tate and Priest JJA) (citations omitted).
49 (1987) 187 CLR 384.
50 *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664, 671 [22].
51 (2012) 248 CLR 378, 390 [26].
52 [2014] VSCA 143, [101]-[102].

Finding regarding the construction of the Determination

47 Having regard to the actual text employed in the Determination and its context, I find that Epping's proposition that sub-paragraph (f) assumes the prior application of either (d) or (e), in other words that the word 'or' after sub-paragraph A(e) must be read as an 'and', is not sustainable.

48 I have reached this conclusion for a number of reasons.

49 Firstly, when the Determination is read as a whole, it appears that the Minister was well aware that 'or' and 'and' have different meanings. This appears from the fact that after paragraph A(a) the word 'or' is employed. Similarly, after paragraph A(b) 'or' is used. However, after paragraph A(c), the word 'and' is used. The Minister's clear intention here is to indicate that sub-paragraphs A(a), (b) and (c) are alternatives. But each of those sub-paragraphs are not alternatives to sub-paragraphs A(d), (e) or (f).

50 Secondly, the phrase that links sub-paragraphs A(a), (b) and (c), as a group, with sub-paragraphs A(d), (e) and (f), as a group, is 'and which contains any provisions that - '. I consider the reference to '*any* provisions' to be significant, because 'any' suggests that only one of the three identified possible types of provision need be present.

51 Thirdly, Epping's position is based on the proposition that sub-paragraph A(f) relates back to either (d) or (e). This much is clear from its submission that:

> Sub-paragraph (f) assumes the prior application of either (d) or (e).

52 I do not agree that sub-paragraph (f) in the Determination assumes the prior application of either sub-paragraph (d) or sub-paragraph (e). This is because sub-paragraph (f), which defines the breadth of the prohibition against removal of things, is expressed to relate back to 'any of the things specified in paragraph (d)', rather than 'any of the things specified in paragraphs (d) or (e)'.

53 I consider this distinction is not trivial. If sub-paragraph (f) had been expressed to relate back to 'any of the things specified sub-paragraphs (d) or (e)', then the relation back might have been construed as referring to either:

(a) *a provision* that imposes an obligation on the tenant, or any other person, to carry out any substantial work on the Premises involving building, installation, repair or maintenance of:

(i) the structure of, or the fixtures in, the Premises; or

(ii) the plant and equipment at the Premises; or

(iii) the appliances, fittings or fixtures relating to services;

or;

(b) *a provision* that imposes an obligation on the tenant, or any other person, to pay any substantial amount in respect of any of (i), (ii) or (iii).

54 Such a construction is not a possibility in circumstances where sub-paragraph (f) has been expressed to relate back only to 'any of the things specified in sub-paragraph (d)'. This fact leads me to the conclusion that the relation back cannot be intended to refer to the provision that imposes an obligation on the tenant to build, install, repair or maintain. Rather, the relation back must be intended to refer to:

(i) the structure of, or the fixtures in, the Premises; or

(ii) the plant and equipment at the Premises; or

(iii) the appliances, fittings or fixtures relating to services.

55 I am reinforced in this view because it would make no sense for the Minister to express the prohibition against removal in sub-paragraph A(f) as relating back to the matters referred to in (i), (ii) and (iii) only if they were constructed by the tenant, or someone on behalf the tenant, but not if they were paid for by the tenant, or someone on behalf the tenant.

56 If this conclusion is right, then sub-paragraph (f) can be seen to have some work to do in isolation from sub-paragraphs (d) and (e). This is because, as pointed out by Counsel for Luchio at the hearing, a tenant might voluntarily construct the structure of premises, or install fixtures, or plant or equipment in premises, rather than do any of these things as a result of being obligated to do so under a lease.

57 I am accordingly of the view that there is no reason, arising from a reading of the Determination as a whole, why the word 'or' after sub-paragraph A(e) must be read as the word 'and'.

58 I do not think this conclusion is inconsistent with a purposive reading of the Determination, as is required by the authorities and also by s 35 of the ILA. The purpose of the Determination is, in my view, to clarify that certain long term leases of *retail premises* are to be deemed not to be covered by the RLA. That purpose does not require a meaning to be given to 'or' after sub-paragraph A(e) that is inconsistent with its ordinary meaning. On the contrary, a construction of the Determination which requires the word 'or', where it appears between sub-paragraph (e) and sub-paragraph (f), to be read disjunctively, is consistent with both the original text, and with my view of the purpose of the Determination.

59 On the other hand, a construction of the Determination which requires the existence of *both* a provision of the type identified by sub-paragraph (d) *and* sub-paragraph (f), or *both* a provision of the type identified by sub-paragraph (e) *and* sub-paragraph (f), would necessarily reduce, potentially substantially, the number of leases caught by the Determination. Such a construction would, in my view, be inconsistent with the presumed purpose of the Determination.

60 For these reasons, I find that Luchio's construction of paragraph A of the Determination is to be preferred, namely, the word 'or' where it appears between sub-paragraph (e) and sub-paragraph (f) is to be read as 'or', not as 'and'.

61 I accordingly find that paragraph A of the Determination will be engaged even if only one of the provisions identified in sub-paragraphs A(d), (e) or (f) is found to be present.

62 I now turn my attention to the construction of the Lease.

At what point is the question of the characterisation of the Lease to be determined?

63 Luchio's contention is that, pursuant to s 11(2) of the RLA, the time at which a decision is to be made as to whether the Premises are *retail premises* is the time that the Lease was entered into.[53]

64 The Lease was entered into, pursuant to s 7 of the RLA, when the first of the following three events occurred:

(a) the tenant entered into possession with the consent of the landlord; or

(b) the tenant began to pay rent; or

(c) the lease was signed by all parties.

65 As the Lease specified that rent was to commence on 1 July 2006,[54] Luchio says this was the date the Lease was entered into.[55]

66 Luchio acknowledges that the Lease was assigned to Epping in December 2007. However, it contends that, because under s 8 of the RLA, an assignment is not the making of a new lease, the combined effect of s 8 and s 11(2) of the RLA is that the assignment has nothing to do with whether the Lease is a 'retail premises lease'. This means, Luchio contends, that the Tribunal can ignore Epping's argument about the effect of terms inserted into the Lease by the Deed of Transfer and Variation of Lease dated 21 December 2007 ('Deed of Transfer and Variation').[56] Counsel for Luchio emphasised these points at the hearing.

67 Epping expresses a different view. From the outset of the case, it has contended that the characterisation of the Lease is to be determined by reference to the Lease as varied.[57] It pleaded in its Points of Defence dated 20 May 2015 that Deed of Transfer and Variation contained provisions which varied the Lease.

68 According to this pleading, the effect of the Deed of Transfer and Variation was that Luchio as landlord, PMTV Australia Pty Ltd ('PMTV') as the old tenant, and Epping as the new tenant, agreed that:

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53 Luchio's contentions, paragraph 3.
54 Lease, clause 2.1.1 read with item 9 of the Schedule.
55 Luchio's contentions, paragraph 3.
56 Luchio's contentions, paragraph 4.
57 Epping's submissions dated 12 November 2014, paragraphs 6 and 17.

(a) PMTV would transfer the Lease and all options to Epping, with Luchio's consent (clauses 1.1 and 7.3);

(b) Epping would commence to hold the Lease from the Transfer Date (clause 1.1);

(c) the Lease will be varied by deleting clause 4.7, and inserting new clauses 8, 9, and 10 in the additional provisions in Item 22 of the Lease.[58]

69 In its submissions dated 8 April 2016, Epping maintains the argument that the Deed of Transfer and Variation is relevant. It refers to special condition 8, which was added by that Deed. Special condition 8 provides:

> The Tenant may complete the development of a retail market on the Property at its own cost, subject to the Tenant obtaining all necessary consents and approvals from all relevant authorities.

70 Epping then argues that special condition 8 is directly relevant to the construction of the Lease.[59]

71 At the hearing, Senior Counsel for Epping conceded that the nature of the Lease is to be determined at the time the Lease is entered into. However, he contended that the variation of the Lease introduced by the Deed of Transfer and Variation applied back to the start of the Lease. Accordingly, it is appropriate, in assessing the nature of the Lease to have regard to the special conditions introduced by the Deed.

72 In summary, the parties are agreed that the time for determining whether the Lease is a lease of *retail premises* is at the time the lease is entered into. Luchio says that it follows that regard must be had to the Lease as it read on 1 July 2006. Epping appears to agree with that statement, but its position differs to that of Luchio because it says that the state of the Lease as at 1 July 2006 has been affected by the Deed of Transfer and Variation.

73 I consider that Epping's contention fails on a factual basis. Reference to clause 18 of the Deed of Transfer and Variation provides that the Lease is varied 'as from the Transfer Date' by the insertion of clauses 8, 9 and 10 into Item 22 of the Schedule of the Lease, and by the deletion of clause 4.7 of the Lease. The Transfer Date is not defined in the interpretation clause (clause 12), nor is it stated on the face page of the Deed. The parties have proceeded on the basis that the Deed of Transfer and Variation came into effect on or about its date of 21 December 2007. At the hearing I received no submissions, and was not referred to any evidence, that suggested that this was not the Transfer Date. If the matter had been a real issue, this might have been a case where it would have been legitimate to have recourse to 'events, circumstances and things external to the contract' in order to identify 'the commercial purpose or objects of the contract', to paraphrase the judgment of French CJ, Nettle and Gordon JJ in *Mount*

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58 Epping's points of defence dated 20 May 2015, paragraph 12.

59 Epping's contentions, paragraph 51.

Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd.[60] However, whatever such external matters might have demonstrated the Transfer Date to be, it cannot, as a matter of logic, have been the date of commencement of the Lease which was being transferred and varied.

74 For these reasons, I do not accept Epping's contention that it is legitimate, when endeavouring to ascertain whether the Lease is a lease of *retail premises,* to have regard to the text of the Lease as it stood at its commencement on 1 July 2006, and then proceed on the basis that the text has been amended with effect from 1 July 2006 by special conditions introduced by a Deed of Transfer and Variation dated 21 December 2007. I find that the relevant terms of the Lease are to be found in the document as it read as at 1 July 2006.

What obligations regarding building, installation, repair or maintenance, if any, were placed on Epping by the Lease?

75 The question of what obligations regarding building, installation, repair or maintenance ('construction obligations'), if any, were placed on the tenant by the Lease became critical when I found above, at paragraph 61, that paragraph A of the Determination will be engaged even if only one of the provisions identified in sub-paragraph A(d), (e) or (f) is found to be present.

76 The question became critical because the parties agreed that special condition 3, introduced by paragraph 3 of Item 22 in the Schedule, expressly allows the tenant to remove any buildings, fixtures and fittings constructed on the land, and accordingly is not a provision of the type referred to in sub-paragraph A(f) of the Determination.

77 The significance of special condition 3 is this. If the proper construction of the paragraph A is that, in order to be engaged, a provision of the type referred to in sub-paragraph A(f) has to be present *as well as* a provision of the type referred to in either sub-paragraph A(d) or sub-paragraph A(e), then the fact that a provision of the type referred to in sub-paragraph A(f) is *not* present would of itself mean that the Determination is not enlivened.

78 However, my finding that the presence of only one of the types of provision identified in sub-paragraphs A(d), (e) or (f) is necessary in order for the Determination to apply means that the Determination will be enlivened if either of sub-paragraph A(d) or sub-paragraph A(b) is engaged.

79 In practical terms, this means there must be an enquiry as to whether a provision of the type described in sub-paragraph A(d) is present, which requires the tenant or any other person to carry out substantial works on the Premises. This is because it is common ground that there is no provision in the Lease that requires the tenant, or any other person, to pay any substantial amount in respect of the matters set out in sub-paragraphs (d)(i), (ii) or (iii), and so the parties agree that a provision of the type described in sub-paragraph A(e) is not present.

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60 [2015] HCA 37.

80 Before attention is given to the construction obligations placed on Epping by the Lease, it is convenient to note a controversy had developed between the parties as to the true identity of the Lease. In particular, in paragraph 4(c)(v) of its points of defence to Luchio's further amended points of claim, Epping said that several boilerplate clauses of the standard 2003 LIV lease had been crossed through so that they did not operate. The clauses struck out included clause 7.1.7. For the purpose only of determining whether the Determination applies to the Premises, Epping did not press this position, but it continued to maintain that for all other purposes clause 7.1.7 has been crossed through. This concession meant that the hearing on 13 April 2016 could proceed on the basis that the terms of the Lease were agreed (save for the issue of whether the Lease had been amended by the Deed of Transfer and Variation). A copy of the Lease, as agreed, was handed up during the hearing.

81 It is also convenient to note that Luchio's Counsel handed a very recent High Court authority concerning the approach to be taken to the interpretation of the Lease, namely, *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*.[61] This case was also referred to, amongst others, by Epping in its contentions,[62] and a copy is contained in the Tribunal Book submitted by Epping. As the parties agree that the principles expressed in *Mount Bruce Mining* are relevant, I quote French CJ, Nettle and Gordon JJ at [46-47]:

> The rights and liabilities of parties under a provision of the contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson 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 objects to be secured by the contract.

82 It is now convenient to set out a number of clauses in the Lease which are relevant to the question of what construction obligations were placed on Epping.

83 The Lease, on its title page, is disclosed to be a Lease of Real Estate (With Guarantee & Indemnity) (Commercial Property) prepared by the Law Institute of Victoria (May 2003 revision).

84 In the Schedule to the Lease:

(a) the land is defined in Item 4 as:

Vacant Land

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61 [2015] HCA 37.

62 Epping's contentions, footnote 20.

The Land in Certificate of Title

Volume 8816 and Folio 871;

(b) the term of the Lease was expressed in Item 8 to be 20 years commencing on 1 July 2006;

(c) the permitted use was defined in Item 15.

85 Clause 19 provides that the Lease contains the additional provisions or special conditions set out in Item 22 (an Item having been previously defined as 'an item in the Schedule to this Lease').

86 Special condition 2 set out in Item 22 reads as follows:

> The Tenant agrees and undertakes that it will construct a stall for the exclusive use of the Landlord within the buildings ("the Buildings") to be constructed by the Tenant on the demised land, to be approximately 42.9 square metres in size and generally in accordance with the location of stall 14 (marked as "Delis") on the ground floor of the Buildings as indicated on the plan attached hereto. The Landlord shall have the exclusive use and occupation of the stall, free of rental for the duration of the term of the Lease and any option. The Landlord shall pay all outgoings in proportion to the area that the Stall bears towards the total buildings constructed by the Tenant on the demised land.

87 The plan referred to in special condition 2 was attached to the Lease. It depicted a fresh food market with at least 27 stalls, including stall 14.

Does the Lease engage paragraph A(d) of the Determination?

88 Luchio says that special provision 2 satisfies each of the requirements of the Determination because:

(a) it is described as an 'additional **provision**';

(b) it imposes an **obligation** on the tenant i.e. Epping '**agrees** and **undertakes**'); and

(c) the obligation is to '**construct**' the buildings and within them to construct the stall. The stall was not to be built in an open field, but 'within the Buildings';

(d) the buildings were enormous. The plan in the Lease shows their size;

(e) the stall itself was to be very large - 42.9 m². When constructed, it was to have power and water connected.[63]

89 Epping concedes that 'arguably special condition 2 obliges the tenant to construct a stall on the Premises (as opposed to a retail market)'. However, it says that the condition cannot be construed in isolation. It argues the condition is incomplete and incapable of operating alone and that the

[63] Luchio's primary contentions, paragraph 22.

fundamental canons of construction compel that it be construed with the rest of the Lease.[64]

90 Epping then refers to Item 15 of the Schedule, which describes the permitted use as follows:

> The Landlord leases vacant land to the tenant. The tenant is responsible for obtaining all necessary permits with respect to any proposed use.

91 Epping says that this confirms the description of the Premises in Item 4 as 'Vacant Land', but observes the permitted use is qualified by 'any proposed use' being rendered lawful by the obtaining of permits.

92 The central proposition in Epping's argument is that:

> Read with item 4 and special condition 2, item 15 probably contemplates that the tenant would develop and operate a fresh food market on the Premises. But by its express terms, item 15 does not compel the contemplated use. Ultimately, item 15 leaves the use at large for the tenant to choose subject to obtaining the necessary permits. Read together, item 2, item 15, and special condition to do not impose on the tenant an obligation to construct a retail market on the Premises. They contemplate that the tenant would (or could) do so but ultimately leave it to the tenant's discretion.[65]

93 Epping says that this construction is supported by the amendments which were made to the Lease, where a number of boilerplate clauses were crossed out. Epping contends that a number of these deletions were relevant as it meant that the following standard clauses did not operate as terms of the Lease:

(a) clause 2.2.1, which provided that the tenant must not, and must not let anyone else, use the Premises except for the permitted use stated in Item 15;

(b) clause 2.2.10, which provided that the tenant must not, and must not let anyone else, make any alteration or addition to the Premises without the Landlord's written consent;

(c) clause 2.2.11, which provided that the tenant must not, and must not let anyone else, install any fixtures or fittings, except those necessary for the permitted use, without the Landlord's written consent.

(d) the whole of clause 3, which required the tenant to repair and maintain the Premises; and

(e) the whole of clause 8, which related to destruction of and damage to the Premises.[66]

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64 Epping's contentions, paragraph 44.
65 Epping's contentions, paragraph 46.
66 Epping's contentions, paragraph 47.

94 Epping says that if the Lease imposed an obligation on it to construct a retail market and to use the Premises for that purpose, Item 15 would have mandated that permitted use clearly and clause 2.2.1 - which contained a covenant not to use the Premises in any way other than that specified in Item 15 - would not have been crossed through. This argument concluded:

> The crossing through of boilerplate clause 2.2.1 is consistent only with the tenant remaining free to put the Premises to any legal use (including leaving the Premises vacant). The crossing through of the clause is not consistent with an obligation requiring the tenant to construct a retail market on the Premises and continue to use the Premises for that purpose. The same argument can be mounted around the crossing through of the other boilerplate clauses.[67]

95 Having argued that the construction of a retail market was an option for it, but not a mandatory obligation, Epping went on to argue that only if it did construct a retail market on the Premises would it be obligated by special condition 2 to construct the stall in the market for Luchio's use.[68] It developed this argument by stating:

> A stall cannot be constructed independently of the market (or the '*Buildings*'). It follows that the Lease did not impose an outright obligation on the tenant to construct a stall on the Premises independently of the market.[69]

96 This construction of the Lease, Epping contends, is the reverse of that contended for by Luchio, which argues the Lease required the tenant to construct the market only because it contained an obligation to construct the stall.[70]

Discussion

97 I consider that this summation of Luchio's argument does it the disservice of oversimplifying it. As I understand Epping's argument, it says that Luchio points to the positive obligation on the tenant contained in special condition 2 to construct a stall, and that it is this obligation alone which implies the need for a market to be constructed.

98 On my reading of Luchio's contentions, they go further than this. When Luchio quotes special condition 2, it does so in this way, highlighting certain key words:

> [EFFM] agrees and undertakes that it will <u>construct</u> a stall for the exclusive use of 'Luchio' within the buildings ("**Buildings**") <u>to be constructed</u> on the demised land to be approximately 42.9 square metres in size and generally in accordance with the location of stall 14

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67 Epping's contentions, paragraph 48.
68 Epping's contentions, paragraph 49(b).
69 Epping's contentions, paragraph 56.
70 Epping's contentions, paragraph 58.

> (marked as "Delis") on the ground floor of the Buildings as indicated on the Plan attached hereto. …[71]

99 As I read this contention, Luchio is emphasising that the stall is to be constructed within the buildings to be constructed on the land. I understand Luchio to be saying that there is an obligation to instruct both a stall, and the buildings in which the stall is to be located. In other words, the obligation to construct the buildings is not merely to be inferred from the obligation to construct a stall. It is a standalone obligation.

100 I consider that such an interpretation is consistent with a number of other provisions in the Lease. For instance, the 'Land' is described in Item 4 as vacant land, subject to 'Special Condition 2'. Consistent with this, the tenant is to have the right under special condition 7 to demolish at its own cost all buildings presently existing on the land.

101 The yearly rental payable during the term of the Lease was, in the first year commencing on 1 July 2006, to be $104,160 plus GST, and was to be increased by 12% on the first anniversary, and thereafter by 12% every three years. I consider it would not make commercial sense for a tenant to pay such substantial rent for vacant land.

102 In my view, it is clear that the land was to be developed in some way. Hence, the definition of permitted use in Item 15 of the Schedule contemplated that:

> The tenant is responsible for obtaining all necessary permits with respect to any proposed use.

103 The obligation in special condition 2 on the tenant to construct a stall for the exclusive use of the landlord within the buildings to be constructed by the tenant is consistent with this obligation to develop the land.

104 Not much was speculative about the nature of the buildings to be constructed by the tenant. The floor plan of the building was set out in a detailed plan which was attached to the Lease. This plan disclosed that there were 27 separate stalls including stalls for a flower seller, a fruit and vegetable shop, 4 butchers, a bakery and a cake and pastry shop, 3 fishmongers, 3 poultry sellers, a café, another coffee shop, a pizza and takeaway shop, a tobacconist, and 2 of delicatessens. The proposed occupants of 4 stalls were not identified. Dimensions for all stalls were given, and the overall dimensions of the building were shown. Truck loading and parking spaces were also shown.

105 It is true that the floor plan was not a specification. It did not set out the materials out of which the building was to be constructed. Nor did it disclose the hydraulic plan, or where power points and lights were to be placed. And it certainly did not disclose a budget. All these matters would appear to have been left in the discretion of the tenant. And no doubt the

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[71] Luchio's contentions, paragraph 21.

tenant's decisions regarding these matters would, in part, have been driven by the outcome of its town planning and building applications. These are perhaps good reasons why a clear obligation to construct a fully designed and specified, and costed, fresh food market building was not set out in the Lease.

106 But this is not to say that there was no obligation at all on the tenant to construct something pursuant to special condition 2. A conclusion that the tenant's obligations with respect to the construction of the proposed market were entirely discretionary defies the commercial reality, and it is not consistent with the contents of the Lease when read as a whole.

107 In this connection it is to be noted that each of the amendments to the LIV standard lease contained in the original Lease, which were referred to by Epping as being consistent with its case, are equally consistent with an interpretation of special condition 2 that required the tenant to construct a fresh food market.

108 Other amendments to the Lease, which were not highlighted by Epping, are also consistent with a positive obligation to construct a fresh food market. These other amendments include the deletion of the landlord's obligation to take out a policy of insurance in respect of certain risks specified in Item 11, arising from the crossing out of clause 6.2, and the striking out of clauses 2.1.7(a), (b), (c) and (d), which required the tenant to reimburse the landlord in respect of premiums and charges in connection with certain insurance policies.

Finding regarding the issue of whether the Lease engaged paragraph A(d) of the Determination

109 For the reasons outlined above, I find that on its true construction, special condition 2 obligated Epping to construct a building containing a fresh food market. On any view of the meaning of the word 'substantial', such an undertaking would be substantial.

110 I accordingly find that that the Lease contained a provision which obligated the tenant to construct a substantial building, and that paragraph A(d) of the Determination is accordingly engaged.

111 Although in the light of this finding it is not necessary that I do so, I now, by way of completeness, turn to the requirement contained in special condition 2 that the tenant should construct a stall of 42.9 m² for the exclusive use of the landlord within the buildings to be constructed by the tenant.

112 I consider that in the present context, which is the consideration of a Ministerial determination affecting whether a lease is to be construed as a lease over *retail premises* within the meaning of the RLA, the construction of such a stall entails the construction of a substantial building. A relevant consideration is that the stall is to be capable of being used for retail purposes. Also, it is to have an area of 42.9 m², so it is roughly equivalent

in size to a small one bedroom apartment. Furthermore, the construction required is not the construction of part of retail Premises, such as an internal wall, or a doorway, or a bench. It involved the construction of complete retail Premises.

113 I do not accept Epping's argument that the requirement that the tenant must build a stall for the exclusive use of the landlord was non-binding because the obligation only arose if the tenant elected to construct a retail market. In the first place, this argument is premised on the assumption that there was *not* a binding obligation on the tenant to construct a retail market of some sort. I have already indicated that I do not accept that assumption. It flies in the face of the words of special condition 2 which required the tenant to construct buildings on the land. Secondly, the argument is fundamentally inconsistent with the clear language employed in special condition 2 that the tenant 'agrees and undertakes that it will construct a stall for the exclusive use of the Landlord *within* the buildings… to be constructed'. (Emphasis added)

114 I accordingly find that the obligation on Epping to construct a stall for the exclusive use of the landlord operates as a separate obligation on it to construct a substantial building, and this separate obligation itself engages paragraph A(d) of the Determination.

Summary

115 I have found, at paragraphs 60 and 61 above, that the word 'or' where it appears between sub-paragraph (e) and sub-paragraph (f) of paragraph A of the Determination is to be read as 'or', not 'and', and that this means that paragraph A will be engaged where any one of the provisions described in sub-paragraphs A(d), (e) or (f) is found to be present.

116 When these findings are coupled with my findings in paragraphs 110 and 114 that special condition 2 in two respects obligated Epping to construct a substantial building, it follows that paragraph A(d) of the Determination is engaged.

Finding regarding whether Premises are retail premises

117 I accordingly make a finding that the Premises are premises to which s 4(2)(f) applies. The upshot, under s 4(2) of the RLA, is that the Premises are not *retail premises* for the purposes of the RLA. I will make a formal declaration to this effect.

Costs

118 As the RLA does not apply to the Lease the issue of costs is to be determined pursuant to the provisions of the VCAT Act.

119 I consider the following facts are relevant to the issue of costs:

(a) When Luchio commenced this proceeding it sought orders for possession and damages, but did not seek a declaration that the Lease

is not a lease of retail premises within the meaning of the *Retail Leases Act 2003*.

(b) Luchio first asked for a declaration that the Lease is not a lease under the *Retail Leases Act 2003* in its points of claim dated 16 March 2015.

(c) Epping filed submissions dated 12 November 2014 ('November Submissions') for the purposes of the directions hearing held on that day.

(d) In the November Submissions, Epping:

(i) referred to the Notice of Forfeiture of Lease & Re-Entry dated 12 March 2014 ('Forfeiture Notice') which Luchio was relying upon as the act constituting forfeiture or termination of the Lease; and

(ii) referred to in s 146 of the *Property Law Act* (PLA); and

(iii) contended that Luchio did not serve a proper s 146 notice on it before purporting to forfeit the Lease; and

(iv) argued the Forfeiture Notice was defective as a notice under s 146.

(e) Luchio was accordingly on notice about problems with the Forfeiture Notice upon which it relied from as early as 12 November 2014.

(f) Luchio conducted the hearing on 17 April 2015 and 20 April 2015 running repudiation of the Lease as its principal argument.

120 I consider that Luchio's argument that it was entitled to possession because the Lease had been repudiated even though it had not given notice of repudiation in its Forfeiture Notice was doomed from the start, because the authority upon which Luchio relied, *Apriaden Pty Ltd v Seacrest* [2005] VSCA 139, had been rendered irrelevant by legislative amendment of s 146 of the PLA.

Findings

121 I find that Luchio's conduct in persisting with a case principally relying on repudiation in circumstances where its case was fatally flawed from the start, and where it had been given notice in general terms that its case was flawed as early as 12 November 2014, was conduct which from 12 November 2014 necessarily disadvantaged Epping, and accordingly enlivens the Tribunal's discretion to award costs under s 109(3)(c) of the VCAT Act.[72]

122 Furthermore, I find that Luchio's conduct in persisting with its case for possession and damages after it was informed specifically at the directions hearing on 25 May 2015 that the repudiation claim was 'dead' on the basis

[72] Section 109(3)(c) of the VCAT Act enables the Tribunal to look at the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law.

that *Apriaden Pty Ltd v Seacrest* had been reversed by legislation, amounted to conduct that necessarily disadvantaged Epping because it prolonged unnecessarily the time taken to complete the proceeding, and which enlivens the Tribunal's discretion to award costs pursuant to s 109(3)(b) of the VCAT Act.

123 It is appropriate to make an order under s 109(2) of the VCAT Act that the Applicant should pay part of the costs of the proceeding of the Respondent, as I find that it is fair to do so having regard to the matters set out in findings 121 and 122 above.

124 I now turn to an assessment of which parts of the proceeding should attract an order for costs in favour of Epping.

125 I find that Epping is not entitled to an order that Luchio should pay its costs up to or including the directions hearing on 12 November 2014, as until that date, Luchio was not on notice about the weakness of its Forfeiture Notice.

126 Epping is not entitled to an order that Luchio should pay its costs of or associated with the vacated hearing on 16 April 2015, because it was responsible for the vacation of that hearing date.

127 Epping is not entitled to an order that Luchio should pay its costs of or associated with the first hour of the hearing on 17 April 2015, because it was responsible for the loss of that hour because of its unsuccessful further application for an adjournment.

128 Epping is not entitled to an order that Luchio should pay its costs of or associated with the hearing on 13 April 2016, because that hearing substantially dealt with the question of whether Luchio was entitled to a declaration that the Lease is not a lease of *retail premises* within the meaning of the RLA, and Luchio has been successful on that issue.

Epping's applications to adjourn

129 Luchio is not entitled to an order that Epping should pay its costs of or associated with the vacated hearing on 16 April 2015, because Luchio would have conducted a fatally flawed case on that day had the hearing proceeded.

130 Luchio is not entitled to an order that Epping should pay its costs of the lost hour of hearing on 17 April 2015, because Luchio would have conducted a fatally flawed case during that hour had the hearing proceeded.

Costs

131 I will make the following orders in respect of costs:

(a) Luchio must pay Epping's costs of this proceeding, save for the costs of or associated with the following:

(i) any costs incurred by Epping up to the directions hearing on 12 November 2014, including without limitation any costs of or

associated with the hearing on that date, or the injunction hearing on 30 September 2014; or

(ii) the vacated hearing on 16 April 2015;

(iii) the first hour of the hearing on 17 April 2015;

(iv) the hearing on 13 April 2016.

(b) Epping's costs pursuant to this order are, in the absence of agreement, to be assessed by the Costs Court on the standard basis using the Scale of Costs in Appendix A of Chapter 1 of the Rules of the County Court.

(c) The order that Epping must pay Luchio's costs of the directions hearing on 13 April 2015, fixed in the sum of $750.00, stands. Those costs may be set off against the costs to which Epping is entitled pursuant to the order set out above.

Final Disposition of the Proceeding

132 As Luchio as at 13 April 2016 was seeking no relief other than a declaration that the Lease is not subject to the RLA, the proceeding will be otherwise dismissed.

MEMBER C EDQUIST