

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S CI 2016 04984

KOGA NOMINEES PTY LTD (ACN 005 167 779) Plaintiff

v

LOSCAM AUSTRALIA PTY LTD (ACN 006 440 991) Defendant

and

PACIFIC METAL GROUP PTY LTD (ACN 130 588 546) Third Party

and

HAYSAM MOURAD Third Party

VCAT Reference: BP 208/2018

FIRST APPLICANT: PACIFIC METAL GROUP PTY LTD (ACN 130 588 546)

SECOND APPLICANT: HAYSAM MOURAD

FIRST RESPONDENT: KOGA NOMINEES PTY LTD (ACN 005 167 779)

SECOND RESPONDENT: LOSCAM AUSTRALIA PTY LTD (ACN 006 440 991)

JUDGE: CROFT J

WHERE HELD: Melbourne

DATE OF HEARING: 13 August 2018

DATE OF JUDGMENT: 28 August 2018

SUPREME COURT CASE MAY BE CITED AS: Koga Nominees Pty Ltd v Loscam Australia Pty Ltd & ors

VCAT CASE MAY BE CITED AS: Pacific Metal Group Pty Ltd & anor v Koga Nominees Pty Ltd & anor

MEDIUM NEUTRAL CITATION: [2018] VSC 455; (Building and Property) [2018] VCAT 1274

LEASES AND TENANCIES - Whether retail premises lease - Effect of permitted use provisions under head-lease and sub-lease - *Sofos v Coburn* (1992) V ConvR ¶54-439 - *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd* [2013] VSC 344 - *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178 - *Access Solutions International Pty Ltd v Gamet Pty Ltd* [2017] VCC 1563 - *Retail Leases Act 2003*, ss 4, 81 and 94.

PRACTICE AND PROCEDURE - Determination of preliminary questions - *Supreme Court (General Civil Procedure) Rules 2015*, r 47.04 - *Murphy v State of Victoria and Linking Melbourne Authority* (2014) 45 VR 119.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr S Hopper

RMS Lawyers

For the Defendant

Ms M B Loughnan QC with
Mr S Dyrenfurth

HLW Ebsworth Lawyers

For the Third Parties

Mr B J Murphy

Mansour Lawyers

HIS HONOUR:

Introduction

1 This is an application by the Third Parties to the Supreme Court proceeding,¹ Pacific Metal Group Pty Ltd (ACN 130 588 546) and Mr Haysam Mourad, pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* for determination of the following questions by the Court:

- (a) is the Sub-Lease between the Defendant and the First Third Party dated 24 May 2012 a lease of “retail premises” under the *Retail Leases Act 2003* (“the Act”); and
- (b) is the dispute between the Defendant and the Third Parties a “retail tenancy dispute” under the Act.

2 The Third Parties rely on the affidavits of:

- (a) Haysam Mourad sworn on 21 June 2018 (“Mourad affidavit”);
- (b) Jerry Jalal Kassab sworn on 20 June 2018 (“Kassab affidavit”); and
- (c) Brett William Lopez sworn on 25 July 2018 (“Lopez affidavit”).

3 The Defendant relies on the affidavit of Mr Daniel Bunnett sworn on 12 July 2018 (“Bunnett affidavit”) and some documents separately tendered at the hearing of this application. These further documents are a bundle of invoices, being Pacific Metal Group Recipient Created Tax Invoices; extracts from the Wyndham Planning Scheme dated 23 September 2011; and a print of various pages from the Liberty OneSteel website with respect to Liberty OneSteel recycling.

4 This proceeding was issued in the Supreme Court but, having regard to the possibility that the provisions of the Act are applicable, thus producing a “retail tenancy dispute” under the Act within the exclusive jurisdiction of the Victorian

¹ The third parties to the Supreme Court proceeding are the Applicants in the Victorian Civil and Administrative Tribunal proceeding. I will refer to the parties in accordance with the Supreme Court proceeding: see below [4].

Civil and Administrative Tribunal (“VCAT”), “mirror” proceedings were also issued in that Tribunal. Accordingly, in order to avoid potential jurisdictional issues depending upon the application or otherwise of the Act, I heard this application and will hear the trial of the matter as an Acting Member of VCAT, as a Judge of the Supreme Court, and also as a Supreme Court proceeding. Unless otherwise indicated, in the reasons which follow, any reference to the Court is a reference to both the Court and VCAT; before both of which these proceedings, including this application, are being heard.

Background

5 This proceeding concerns premises located at 22–28 Plummer Road, Laverton North (“the Premises”).

6 The Plaintiff, Koga Nominees Pty Ltd (ACN 005 167 779) (“Koga”), leased the Premises to the Defendant, Loscam Australia Pty Ltd (ACN 006 440 991) (“Loscam”), for a term of ten years commencing on 1 September 2005 (“the Head-Lease”). The Defendant, Loscam, sub-leased the Premises to the First Third Party, Pacific Metal Group Pty Ltd (ACN 130 588 546) (“PMG”) commencing on 16 January 2012 (“the Sub-Lease”).² The Second Third Party, Mr Haysam Mourad, is the guarantor under the Sub-Lease. The Sub-Lease expired on 30 August 2015. The Third Parties claim that PMG and Koga have entered into a new lease and that PMG remains a tenant of the Premises.³

7 Koga alleges in its statement of claim that in breach of the provisions of the Head-Lease, Loscam delivered up the Premises to Koga in 2015 with dilapidations.⁴

8 The most significant item of damage claimed is in relation to the replacement of the concrete hardstand at the Premises, including the hardstand in the warehouse area. The estimated cost of rectification is significant, with the quantification of that cost to

² Exhibit HM-2 to the Affidavit of Haysam Mourad (21 June 2018).

³ See *Outline of Submissions filed on behalf of the Third Parties* (7 August 2018) [7], with reference to the Affidavit of Haysam Mourad (21 June 2018), [7].

⁴ Statement of Claim (6 December 2016), [6], Schedule 1.

be determined at trial, as necessary. In this respect, there is a dispute between the parties as to which parts of the concrete hardstand area require rectification and fitness for purpose of the concrete hardstand more generally.

9 Loscam have joined the Third Parties to the proceeding, alleging that if the Premises were damaged, it was the Third Parties who damaged the Premises during the term of the Sub-Lease. The Third Parties, on the other hand, allege that many of the items of dilapidation were already present when PMG entered into the Sub-Lease and, otherwise, many of the dilapidations – in particular to the concrete hardstand area – were caused as a result of fair wear and tear. The Third Parties also allege that, on the basis of expert evidence filed in the proceedings by Loscam and the Third Parties, there is a strong case that the concrete hardstand area was not suitable for the permitted use of the Premises.

10 These issues with respect to dilapidations are not relevant to the determination of the answers to the preliminary questions. However, the answers to the preliminary questions are of potential relevance to the obligations of the parties in relation to the state of the Premises, its condition, state of repair and obligations with respect to any dilapidations. This follows because a number of provisions of the Act may impinge upon these matters in the event that the Premises are the subject of a demise under a lease the subject of the operation of the provisions of the lease; as a retail premises lease.

11 Having regard to the potential effect of the provisions of the Act in relation to the obligations of parties under the Head-Lease and Sub-Lease, the procedure by way of preliminary questions was accepted by the Court as a means of simplifying and expediting the hearing of these proceedings so that the parties would not have to conduct their substantive cases in the alternative, depending whether or not it was ultimately found that the Act applied.

Retail Leases Act 2003

12 Section 4 of the Act defines the expression “retail premises” (insofar as is relevant to

the present application):

4 Meaning of *retail premises*

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

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

...

...

13 Section 81 of the Act provides, in effect, a definition of “retail tenancy dispute” with reference to Part 3 of the Act and also under previous pieces of retail leases legislation:

81 Meaning of *retail tenancy dispute*

(1) In this Part, *retail tenancy dispute* means a dispute between a landlord and tenant –

(a) arising under or in relation to a retail premises lease to which –

(i) this Act applies or applied because of Part 3; or

(ii) the *Retail Tenancies Reform Act 1998* or the *Retail Tenancies Act 1986* applies or applied; or

(b) arising under a provision of the *Retail Tenancies Reform Act 1998* or the *Retail Tenancies Act 1986* in relation to a lease to which that Act applies or applied; or

(c) arising under a lease that provides for the occupation of retail premises in Victoria to which none of those Acts apply or applied –

despite anything to the contrary in this Act (apart from subsection (2) and section 119(2)).

...

...

14 Other provisions of the Act are also of some relevance with respect to the present application, namely, ss 3, 7, 11 and 94, relevantly as now set out.

15 Section 3 of the Act defines “lease” as follows:

3 Definitions

In this Act –

...

lease –

- (a) means a lease, sub-lease, or an agreement for a lease or sub-lease, whether or not in writing; and
- (b) in Part 10, includes a former lease (because of section 83);

...

16 Section 7 of the Act makes express provision as to the time a retail premises lease is entered into or assigned. It provides:

7 When retail premises lease is entered into or assigned

For the purposes of this Act, a retail premises lease is entered into or assigned when–

- (a) under the lease or assignment, the tenant enters into possession of the premises with the consent of the landlord; or
- (b) under the lease or assignment, the tenant begins to pay rent for the premises; or
- (c) the lease or assignment has been signed by all of the parties to it –

whichever first occurs.

17 The application of the Act is provided for in s 11:

11 Application generally

- (1) This Act applies to a retail premises lease that is–
 - (a) entered into after the commencement of this section;⁵ or
 - (b) renewed after the commencement of this section, whether the lease was entered into before or after that commencement.
- (2) Except as provided by Part 10 (Dispute Resolution), this Act only applies to a lease of premises if the premises are retail

⁵ (Footnote added: s 11 came into operation on 1 May 2003.)

premises (as defined in section 4) at the time the lease is entered into or renewed.

...

18 The provisions of s 94 of the Act are designed to prevent contracting out of its provisions that are cast in the following terms:

94 The Act prevails over retail premises leases, agreements etc.

- (1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).
- (2) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it purports –
 - (a) to exclude the application of a provision of this Act; or
 - (b) to limit the right of a party to the lease to seek resolution of a retail tenancy dispute under Part 10 or otherwise to limit the application of that Part.
- (3) A provision contained in any other agreement or arrangement (whether or not between parties to a retail premises lease) is void if that provision would be void under this Act if it were contained in a retail premises lease.

As to the test for determining relevant inconsistency for the purpose of these provisions, see *Small Business Commissioner: reference for advisory opinion (Building and Property)*.⁶

Sub-lease and head-lease provisions

19 The critical provisions of the Sub-Lease are, in the present context, as follows:

1 Definitions and Interpretation

1.1 Definitions

In this sub-lease:

...

⁶ [2015] VCAT 478; and see Clyde Croft, Robert Hay and Luke Virgona, LexisNexis Butterworths, *Retail Leases Victoria*, (at Service 34) at 12,267, [30,030].

Permitted Use means the use described in item 12.

...

11 Use of premises

11.1 Permitted Use

The Premises must only be used for the Permitted Use.

11.2 Tenant's representation

The Tenant represents to the Landlord that its chosen business is suitable for the Permitted Use of the Premises and can be lawfully carried on from the Premises.

...

...

24 Retail Leases Act

24.1 Act does not apply

The Tenant represents and warrants to the Landlord that the *Retail Leases Act 2003* (Vic) does not apply to the Tenant or to this Sub-lease for the reason that the Premises are not, and will not become, 'retail premises' as defined in that Act.

24.2 Tenant's indemnity

The Tenant agrees to indemnify the Landlord for any loss or damage incurred or suffered by the Landlord as a result of the breach of any or all of the Tenant's warranties or representations under this Sub-lease.

...

The critical provision of the Schedule to the Sub-lease, in the present context, is item 12 which provides as follows:

Schedule

...

12 Item 12 - Permitted Use

Warehouse (and ancillary or associated office use) and repair, storage, hiring and dehiring of pallets and related equipment, commercial and industrial metal recycling which includes the storage, warehousing and transportation of scrap metal material, but expressly excluding the use by the Tenant for any retail purpose.

20 Issues were raised in the course of the hearing of this application in relation to the

relationship between the permitted use under the Sub-Lease and the permitted use under the Head-Lease. Under the Head-Lease, the permitted use is stated in the following terms:⁷

7 Use

Warehouse (and ancillary or associated office use) and repair, storage, hiring and de-hiring of pallets and related equipment but expressly excluding the use by the Tenant for any retail purpose.

Thus, the permitted use under the Sub-Lease appears to be broader than the permitted use under the Head-Lease having regard to the omission of the words “commercial and industrial metal recycling, which includes the storage, warehousing and transportation of scrap metal” which appear in the Sub-Lease permitted use, but not in the Head-Lease permitted use.

21 As is clear, the usual position with respect to the relationship between a head-lease and a sub-lease is that the permitted use under the sub-lease must be accommodated within the ambit of the permitted use under the head-lease. In the present circumstances, the parties have clearly directed their attention to this issue, because the Sub-Lease – which is executed by all parties, including the Head Landlord, the Plaintiff Koga – contains the following provisions:⁸

...

3 Sub-lease

...

3.3 Head Landlord consent

The Head Landlord:

- (a) consents to this Sub-lease without prejudice to its rights, powers and remedies under the Lease; and
- (b) acknowledges and agrees that the Tenant may use the Premises for commercial and industrial metal recycling which includes the storage, warehousing and transportation of scrap metal material, subject to the Tenant procuring planning permission and all required

⁷ Exhibit HM-2 to the Affidavit of Haysam Mourad (21 June 2018), Schedule A (Head-Lease), Reference Schedule, [7].

⁸ Exhibit HM-2 to the Affidavit of Haysam Mourad (21 June 2018).

consents and approvals from any relevant Government Authority to such a use, at the Tenant's expense.

...

...

19 Sub-Lease and Lease

19.1 Terms of Sub-lease and Lease

- (a) The terms, covenants and conditions contained in this Sub-lease are in addition to and not in derogation of the terms, covenants and conditions contained in the Lease, whether incorporated by reference or otherwise by this Sub-Lease.
- (b) Where the terms of this Sub-lease and the terms of the Lease are inconsistent, the terms of this Sub-lease will prevail.
- (c) Without limiting the generality of clause 19.1(b), the Tenant agrees that where the terms of this Sub-lease or any one or more of them cover, encompass, refer to or effect the same factors, circumstances, events, matters, things, objects, conditions or situations referred to in the terms of the Lease, the Tenant will be bound by and comply with both the terms of this Sub-lease and the terms of the Lease as if the Tenant was the tenant under that Lease so far as is reasonably possible.

19.2 Limited application of Sub-lease Terms

Despite any other provision of this Sub-lease, the terms of this Sub-lease:

- (a) have effect only for the purpose of this Sub-lease; and
- (b) do not affect the rights and obligations of the Head Landlord and the Landlord under the Lease.

...

22 Loscam submits the effect of a finding that the Sub-Lease is a lease of "retail premises" under the Act would be to produce a surrender and re-grant of the Head Lease.⁹ The Defendant says there would be a substantive change that would be effected in obligations of the parties under the Sub-Lease and thereby, as I understand the submissions, under the Head-Lease—in the latter case, particularly

⁹ *Defendant's Outline of Submissions* (6 August 2018), [99].

with respect to the permitted use.¹⁰ Loscam also contends that it follows that if the Sub-Lease is found to be a lease of “retail premises”, then it must follow that the Head-Lease is also a lease of “retail premises” under the Act.¹¹ Having regard to the provisions of the Sub-Lease which are set out in the preceding paragraph, my preliminary view is that this position is not as clear as contended by Loscam. In any event, both these issues are, for the reasons which follow, matters for trial.

Application of the Retail Leases Act 2003

23 The Third Parties contend that in order to answer the first preliminary question, it is necessary to determine whether PMG used the Premises during the term of the Sub-Lease for the sale of goods by retail or the retail provision of services.¹² Thus, they say that if the answer to that question is “yes”, then what follows is that the dispute between Loscam and the Third Parties is a retail lease dispute.¹³

24 The Third Parties provided evidence in relation to the use of the Premises, which is a large site covering an area of approximately 1.5 hectares comprising a warehouse building, offices and a large concrete hardstand.¹⁴

25 The nature of PMG’s business, the recycling services provided by PMG and the manner in which it sorts and prepares scrap metal for sale to customers are set out in some detail in the Mourad affidavit.¹⁵ This evidence goes into detail in relation to the nature of this business, particularly as follows:¹⁶

19 Between 2012 and 2015 and to current date, PMG used and continues to use the Premises to provide scrap metal recycling services to its customers for a fee, including:

- (a) the collection of metal product/material referred to in paragraphs 13 and 14 herein;
- (b) the sorting and separation of metals (where more than one metal is present in an item);

¹⁰ *Defendant’s Outline of Submissions* (6 August 2018), [94]–[96].

¹¹ See *Defendant’s Outline of Submissions* (6 August 2018), [97]–[102].

¹² *Outline of Submissions Filed on Behalf of the Third Parties* (7 August 2018), [13].

¹³ *Outline of Submissions Filed on Behalf of the Third Parties* (7 August 2018), [13].

¹⁴ Affidavit of Haysam Mourad (21 June 2018), [8].

¹⁵ Affidavit of Haysam Mourad (21 June 2018), [14], [17]–[20].

¹⁶ Affidavit of Haysam Mourad (21 June 2018), [19]–[20].

- (c) the vetting and inspection of product/material received by customers including, identifying contaminants and hazardous material;
- (d) the supply of bins (free of cost), which are utilised by and delivered to large customers who provide large amounts of metal product/material to PMG;
- (e) the processing of metal product/material either by oxy cutting, shearing, compaction, baling or sorting by hand, subject to each metal product/material;
- (f) the storing, stockpiling and monitoring of metal product/material in the storage areas on the Premises;
- (g) the weighing and collation of information obtained by using the weighbridge on the Premises;
- (h) the weekly stocktake of metal product/material on the Premises, including re-weighing of stock, provision of estimates for large stockpiles, ensuring stock is free of hazardous material and contaminants, removing debris, rubbish and dirt;
- (i) visits to some of PMG's customers' sites by a procurement officer employed by PMG to inspect metal product/material being offered to PMG and set pricing, (collectively, "**the Services**"). Now produced and shown to me and marked "**HM-07**" are copies of Website pages relating to some of the Services.

20 Between 2012 and 2015, PMG purchased metal products/materials from its customers. Depending on the size of the loads, PMG handled receipt and payment as follows:

- (a) If it was a large load brought by a truck, PMG would:
 - (i) weigh the load with the weighbridge;
 - (ii) identify quality, contaminants and hazardous material;
 - (iii) issue the driver of the truck a grading sheet by the weighbridge operator employed by PMG;
 - (iv) direct the driver to where the load could be unloaded;
 - (v) have a yard supervisor employed by PMG grade the load once unloaded;
 - (vi) weigh the truck without the load upon exiting the Premises;
 - (vii) adjust the load weight accordingly and issue the customer with payment via an electronic funds transfer; and

- (viii) email a remittance and invoice to the customer shortly thereafter;
- (b) If it was a small load, PMG would:
 - (i) unload the material with a forklift into a PMG bin;
 - (ii) weigh the material in the warehouse with an industrial scale;
 - (iii) inspect the material for quality, contaminants and hazardous material;
 - (iv) possibly conduct an analytical analysis of the material to determine composition;
 - (v) issue a grading sheet to the customer;
 - (vi) direct the customer to the cashier window (attended by an employee of PMG) located on the Premises for payment; and
 - (vii) remit payment and issue the customer a receipt instantly.

26 In relation to the customer base and, to use a neutral expression, access to the business, the evidence is as follows:¹⁷

25 I have reviewed the breakdowns referred to in paragraph 24. The breakdowns reveal a majority of the Services between 2012 and 2015 were provided to individuals and sole traders, amounting to on average between 1,500 to 2,000 (per annum). Now produced and shown to me and marked "HM-08" is a copy of a non-exhaustive PMG customer list that it provided Services to between 2011 and 2012, which I note does not include all individuals given the large total amount.

26 Between 2012 and 2015 and to current date, PMG's scrap metal recycling operation being conducted from the Premises has been open to its customers and the public in general between normal business hours and Saturdays.

27 Between 2012 and 2015 and to current date, PMG has and continues to assist various local community groups and sporting clubs in Victoria with sponsorship and fundraising, including, but not limited to:

- (a) MyCentre Broadmeadows;
- (b) the Plenty Valley Lions-Lerin Football Club;
- (c) the Keilor Wolves Soccer Club; and

¹⁷ Affidavit of Haysam Mourad (21 June 2018), [25]-[27].

(d) The Preston Makedonia Football Club.

In exchange for PMG's assistance, the above groups and clubs have advertised PMG's business at public functions and events.

27 In the course of the hearing of this application, a number of objections were raised by Loscam in relation to this affidavit evidence.¹⁸ These included objection to the words "and the public in general" as appearing in paragraph [26] of the Mourad affidavit, set out above. In summary, the gravamen of this objection was that these words are conclusionary with respect to an element going to the issue whether or not there were sales of goods by retail or the retail provision of services. On this basis, I upheld the objection and these words were deleted from the Mourad affidavit as tendered.

28 In any event, Loscam submits that the question whether or not the Sub-Lease is a retail premises lease is a matter which, in the present circumstances, is entirely dependent upon the proper construction of the permitted use under the Sub-Lease terms; construed according to the usual principles of construction of contracts.¹⁹ Moreover, it is submitted that as the Sub-Lease was entered into no later than 16 January 2012 – at a time when the Premises may not actually have been in use²⁰ – the terms of the Sub-Lease alone govern the matter in any event,²¹ because as a result of the operation of ss 7 and 11 of the Act (which are set out above), the time at which the question whether or not the Sub-Lease is a retail premises lease is to be determined is at the time it was entered into. On this basis, Loscam contends that the manner in which the Premises was used by the Third Parties is irrelevant to the question whether or not the Sub-Lease is a retail premises lease. Thus, it submitted as follows:²²

82 Further or alternatively, PMG asserts that it provides 'services to its customers for a fee'²³. Loscam disputes that PMG was providing

¹⁸ Transcript, 1–16.

¹⁹ Defendant's Outline of Submissions (6 August 2018), [38]; referring to *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104.

²⁰ See Affidavit of Daniel Bunnett (12 July 2018), [26], [27] which does not appear to be entirely clear on the point.

²¹ Defendant's Outline of Submissions (6 August 2018), [81].

²² Defendant's Outline of Submissions (13 August 2018), [82]-[83].

²³ Paragraph 19 of the Mourad Affidavit.

services and that they were for a fee. PMG's business is one of the purchase, processing and sale of scrap metal. The asserted services were for the benefit of PMG. Even if PMG was providing services, the customers were not paying PMG for the services. PMG was paying the customers and, in particular, for the sale of the customer's metal to PMG. This metal was an input into PMG's business - the metal purchased by PMG was to be later sold by it at a profit. It follows that, PMG not providing services, alternatively not being paid for any service supplied by it, there was no 'retail provision of services'.

83 In relation to the sale of goods by PMG:

- (a) there is no evidence that the clients of PMG came onto the Premises to buy or collect the metal;
- (b) there is no evidence of any signage at the Premises displaying the metals on offer for sale by PMG or the prices of the metal for sale by PMG;
- (c) PMG was not selling metal to members of the public;
- (d) PMG was not selling the metal to its clients in small quantities;
- (e) there is no proper and/or insufficient evidence as to how the clients used the metal purchased from PMG;
- (f) a number of PMG's clients merely on-sell the metal they purchase from PMG; and
- (g) PMG's clients intended to re-sell the metal.

Thus, PMG has not discharged its onus of showing that it used the Premises for the sale of scrap metal by retail. Further PMG as a matter of fact did not use the Premises for the sale of scrap metal by retail (the sale was by wholesale and export).²⁴

It will be noted that these Loscam submissions refer to the sale of goods by PMG, whereas the details with respect to the business as contained in the Mourad affidavit define the business activities of PMG on the Premises as "collectively, 'the Services'".²⁵ In any event, counsel for the Third Parties clarified the position that the definition of these activities as "services" was in the nature of a convenient collective reference and not a reference intended to detract from the position, which was accepted by the Third Parties, that the business activities are, so far as is relevant to

²⁴ Note that PMG calls the people who it buys metal from its 'customers' (paragraph 20 of the Mourad Affidavit), and it calls the people it sells the metal to its 'clients' (paragraphs 29 and 31 of the Mourad Affidavit).

²⁵ Affidavit of Haysam Mourad (21 June 2018), [19], set out above at [25].

this application, the sale of goods and not the provision of services.²⁶

29 It will be appreciated from the broad review of the evidence and issues put before the Court for the purposes of this application that the matters which the parties have put before the Court range well beyond arguments based on a process of construction of the permitted use provisions and related provisions of the Sub-Lease to be considered within the bounds of the Sub-Lease document itself. Rather, they are a combination of that process together with issues in relation to the actual use of the Premises and the significance of that use in the context of the provisions of the Act to which reference has been made. There has been no opportunity for the evidence relied upon by the parties to be tested in cross-examination or supplemented orally should that be required. The deficiencies in this respect became very clear in the course of the discussion of objections to the Third Parties' affidavit evidence raised by Loscam early in the course of the hearing of the application.²⁷ The parties have not, for the purposes of the present application, provided a statement of agreed facts and so the actual basis upon which the preliminary questions are to be decided has been left for determination in the course of the application but absent the usual means of testing and evaluating such evidence. In the present circumstances, this is most unsatisfactory and will not, in my view, provide a proper process in the answering of these preliminary questions. Indeed, issues of this nature arose in *Murphy v State of Victoria and Linking Melbourne Authority*,²⁸ where it was made clear that this would not be a proper basis to hear and determine the preliminary questions.

30 As I have indicated, Loscam would have it that the preliminary questions are to be answered simply and solely on the basis of the proper construction of the permitted use provisions contained in the Sub-Lease. In this respect, reliance is placed upon decisions such as *Sofos v Coburn*²⁹ and *Cambridge Co-ordinates Pty Ltd v Viking Press*

²⁶ Transcript, 13–4.

²⁷ Transcript, 1–16.

²⁸ (2014) 45 VR 119.

²⁹ (1992) V Conv R ¶54-439.

Pty Ltd,³⁰ and extrinsic Parliamentary³¹ and also Small Business Commission Guidelines³² as to the critical and decisive effect of the words “under the terms of the lease” in the “retail premises” definitional provisions of s 34(1) of the Act. Turning to the Sub-Lease permitted use provisions themselves, Loscam says that, on this basis, the words “... but expressly excluding the use by the Tenant for any retail purpose” is therefore decisive against the position of the Third Parties.³³

31 The Third Parties, on the other hand, do not dissent from this position but rather contend that proper construction of these permitted use provisions involves more than simply having regard to the words themselves in isolation from the permissible consideration of their factual matrix.³⁴ Thus they focus on the actual use of the Premises in the context of the permission provisions, rather than the (retail use) exclusionary provision of the permitted use provisions under the Sub-Lease.³⁵ In so doing, reliance is placed on the decision of the Court of Appeal in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* (“*CB Cold Storage*”),³⁶ the passage where the Court said:³⁷

23 What can be seen from the authorities is that the concept of the ‘retail provision of services’ in the *Retail Leases Act* and its predecessor legislation is that it involves close consideration of the service that is offered, whether a fee is paid, whether it is a service that is generally available to anyone who is willing to pay the fee and whether the persons who use the service are the ‘ultimate consumer’. On one view, to talk of an ultimate consumer of services may appear strained. Most services that are purchased are not susceptible to being passed on to a third person. This may be contrasted with a sale of goods where the difference between wholesale and retail is easily discernible. Nevertheless, the authorities that apply an ultimate consumer test as one indicia of the retail provision of services, are of long standing.

³⁰ (2001) V ConvR ¶58-533.

³¹ Retail Tenancies Bill 1986; Retail Tenancies Bill (No 2) 1986; Victoria, *Parliamentary Debates*, Legislative Assembly, 23 October 1986, 1511-2 (Robert Fordham, Minister for Industry, Technology and Resources).

³² Victorian Small Business Commissioner, *Guidelines to the Retail Leases Act 2003 – What are “Retail Premises”* (2006).

³³ See *Defendant’s Outline of Submissions* (6 August 2018), [70] and following.

³⁴ *Outline of Submissions Filed on Behalf of the Third Parties* (7 August 2018), [13]–[16].

³⁵ See *Transcript*, 22–3; *Outline of Submissions Filed on Behalf of the Third Parties* (7 August 2018), [17]–[28].

³⁶ [2017] VSCA 178.

³⁷ [2017] VSCA 178, [23].

32 Although *CB Cold Storage* was a case concerning “services”, the Third Parties submit that this statement is equally applicable to “goods” for the purposes of s 4(1) of the Act.³⁸ Reliance was also placed by the Third Parties on the statements in cases such as *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd*³⁹ and *Access Solutions International Pty Ltd v Gamet Pty Ltd* (“*Access Solutions*”).⁴⁰ The position which, in essence, the Third Parties seek to put in this application is, as I understand it, that it is necessary first to analyse and properly construe the permitted use provisions of the Sub-Lease to determine whether they do, on a proper construction, permit the sale of goods by retail and then to consider whether, having thus permitted retail sales, the exclusionary provisions are rendered void by the operation of s 94 of the Act.⁴¹ Thus, the process of determining that which is permitted “under the terms of the lease” is not as simple as Loscam would have it.

33 In relation to the appropriate analysis of considering the effect of the permitted use provisions of the Sub-Lease, I could no better than make reference to the analysis set out in the *Access Solutions* case by Judge Macnamara:⁴²

142 In *Victorian Frozen Food Distributors Pty Ltd v Anassis* (Unreported, 16 July 2009) as a Deputy President of VCAT, I considered whether a lease of premises to the applicant company was governed by the *Retail Leases Act*. While there were some over-the-counter fish sales, presumably to ordinary consuming members of the public, more typically and predominantly the company’s sales were to other enterprises such as hotels, restaurants, vineyards, clubs and so forth. Counsel for the applicant tenant submitted that there was here no wholesale sale, that is, a sale to a person who intended to on-sell to an ‘ultimate consumer’. The fish were ‘consumed’ by the hotel, kitchen or vineyard or club and a different commodity was supplied by wholesale to the customer of the hotel, club, etc. I said:

“The question is whether ... where for instance bulk fish items are delivered to the kitchen of an hotel, motel or club the kitchen can be regarded as the ultimate consumer. In my view this cannot be. It would lead to bizarre results if this were correct. On this view a factory which manufactures plastic and/or rubber items such as body trims or windscreen wiper blades for supply to a car manufacture such as Holden or Ford would be regarded as in the

³⁸ *Outline of Submissions Filed on Behalf of the Third Parties* (7 August 2018), [15]–[16].

³⁹ [2013] VSC 344.

⁴⁰ [2017] VCC 1563.

⁴¹ *Cf Defendant’s Outline of Submissions* (6 August 2018), [73]–[85].

⁴² *Access Solutions International Pty Ltd v Gamet Pty Ltd* [2017] VCC 1463, [142]–[153].

retail trade because Holden or Ford in the hypothetical example 'consume' the plastic and rubber items by incorporating them as trim or wiper blades in the final motor vehicle construction. An ordinary person would be astonished and bemused at the suggestion that such an enterprise was a retailer.

Again, on the same reasoning, BHP Steel would be regarded as a 'retailer' if it delivered raw sheets of metal to be pressed into car bodies by one of the major car manufacturers. Again, an astonishing proposition." [75]-[76]

143 I reached this conclusion and adopted that reasoning without the benefit of the later authoritative statements from Croft J in *Fitzroy Dental* and the Court of Appeal in *CB Cold Storage*. I now turn to those authorities.

144 In *Fitzroy Dental*, Croft J was concerned with an application for a declaration that a lease of premises in Brunswick Street, Fitzroy was a retail lease and the dispute relative to it was a retail tenancy dispute within the meaning of the *Retail Leases Act*. His Honour reviewed various authorities and remarked:

"... the authorities do indicate strong support for the "ultimate consumer" test as the touchstone of retailing. The cases tend to be concerned with whether or not goods are being sold by retail and although the same characterisation issues as apply to services do exist, they tend not to be focused upon as the position is likely to be more obvious with goods. Thus a sale of 'widget type A' from premises by A to B who, in turn, 'converts' the good 'widget type A' to 'widget type B' for sale to C would not involve the sale of 'widget type A' to C as the ultimate consumer of that type of good. Depending on the nature of the goods involved these transactions may involve sale by wholesale to B and a retail sale to C - or, alternatively, two retail sales of different goods, 'widget type A' to B and 'widget type B' to C." [17]

145 His Honour continued:

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

146 His Honour found that the premises in question had been used "predominantly as a conference centre and café/restaurant". [23] He said:

"The Defendants acknowledge that other than when used in conjunction with bookings, the Premises is not otherwise 'open' to the public, at least in a physical sense; but there is nothing in the evidence to suggest that it could not be booked at any time,

during business hours, for use at any time. The Defendants also say that the café restaurant is only used for the purpose of providing refreshment to conference participants as an adjunct to a booked conference in conjunction with that conference. " [29]

- 147 Finding that the premises were retail premises in accordance with the relevant definition, his Honour said at paragraphs 38 and 39:

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

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

- 148 In *CB Cold Storage*, the Court of Appeal, Warren CJ, Ferguson JA (as she then was) and Kaye JA heard an appeal from a determination of Croft J that a lease by IMCC to CB Cold Storage of premises in Laverton was regulated by the *Retail Leases Act*. According to their Honours:

"IMCC Group (Australia) Pty Ltd ('the Landlord') leases a property at Laverton to CB Cold Storage Pty Ltd ('the Tenant'). The Tenant operates a cool storage business using freezer

warehouses and related facilities that are built on the property. The Tenant's customers (usually companies involved in the food industry) pay it fees to store their dairy products, small goods, seafood and the like. The Tenant's customers range from large primary production enterprises to very small owner operated businesses and include producers, manufacturers, distributors, importers and exporters. The Tenant also provides ancillary services to its customers such as loading and unloading pallets into the warehouses and arranging the transportation of products to and from the warehouses. [1]

149 Croft J had held that the lease was regulated and the court dismissed the appeal from his determination. The court said at paragraph 5:

"Here, there is nothing in the nature of the services provided that would exclude them from being considered retail services. The services were used by the Tenant's customers who paid a fee. Any person may purchase the services if the fee is paid. The Tenant's customers do not pass on the services to anyone else. They are the ultimate consumers of the Tenant's services."

150 The court said at [23]:

"What can be seen from the authorities is that the concept of the 'retail provision of services' in the *Retail Leases Act* and its predecessor legislation is that it involves close consideration of the service that is offered, whether a fee is paid, whether it is a service that is generally available to anyone who is willing to pay the fee and whether the persons who use the service are the 'ultimate consumer'. On one view, to talk of an ultimate consumer of services may appear strained. Most services that are purchased are not susceptible to being passed on to a third person. This may be contrasted with a sale of goods where the difference between wholesale and retail is easily discernible. Nevertheless, the authorities that apply an ultimate consumer test as one indicia of the retail provision of services, are of long standing."

151 The court also remarked at [45]:

"The Landlord's focus on what happens to the goods that are stored after they leave the premises is not relevant in this case. That may have been relevant if the question was whether there was a sale of goods by retail. But it is not. It is not a question of consumption of the goods. Rather, the focus must be on the service that is provided by the Tenant."

152 The court was unwilling to upset what it regarded as a judicially settled meaning of the phrase 'retail provision of services' [24].

153 These cases do, as Ms Marcus correctly submitted, deal with the phrase 'retail provision of services', not with the meaning of the phrase 'the sale or hire of goods by retail'. Nevertheless, the analysis by Croft J in *Fitzroy Dental* extends to sales of goods as well as services. It remains possible, based on those authorities, to argue a narrower approach to the concept of retailing relative to goods. It

might be, therefore, that my own decision in *Anassis'* case, which seems to fit ill with these cases, could still be justified based upon its dealing with sales of goods rather than the retail provision of services.

It may assist that I indicate that, with respect, this is an analysis with which, on the basis of the matters presently before me, I agree and endorse. This does not, however, pre-empt any position ultimately reached in these proceedings.

34 It follows that, having regard to these issues as raised by the parties, there is no sound basis in the presently untested evidence to determine critical questions with respect to the application of the retail leases legislation. Particularly, there is no basis to assess the possible application of the case law to which reference has been made in relation to the application of the Act. Absent relevant agreed facts, these issues must be argued at trial on the basis of comprehensive and properly tested evidence.

35 Ordinarily, the question whether a particular lease is a retail premises lease or not would have jurisdictional consequences in that a retail lease dispute is within the exclusive jurisdiction of VCAT under the provisions of the Act. As this application has been heard by me as a Judge of the Supreme Court sitting both as the Supreme Court and as a Member of the Tribunal, no jurisdictional issue arises in the present circumstances and hence there is no utility in that context in striving nevertheless to answer the preliminary questions.

Conclusions and orders

36 For the preceding reasons, it is not appropriate for the Court in the present circumstances to answer the preliminary questions and, accordingly, these matters will be determined at trial.

37 The parties are to bring in orders to give effect to these reasons. I otherwise reserve the question of costs and will hear the parties in relation to this issue.

CERTIFICATE

I certify that this and the twenty one preceding pages are a true copy of the reasons for Judgment of Croft J of the Supreme Court of Victoria delivered on 28 August 2018.

DATED this twenty eighth day of August 2018.

.....
Associate