VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP410/2018

CATCHWORDS

LANDLORD AND TENANT – Section 4(1) of the *Retail Leases Act 2003* - whether retail premises includes bare land – the meaning of 'premises'- whether selling sand from a quarry constitutes the provision of retail goods and services; s 46(4) of the *Retail Leases Act 2003* – whether liability to pay outgoings incurred prior to the giving of a statement of outgoings is revived once the statement of outgoings is given to the tenant.

APPLICANT	Grant Phillips
RESPONDENT	Peter Abel
WHERE HELD	Melbourne
BEFORE	Deputy President E. Riegler
HEARING TYPE	Preliminary Hearing
LAST DATE FOR FILING WRITTEN SUBMISSIONS	22 May 2019
DATE OF ORDER	10 July 2019
CITATION	Phillips v Abel (Building and Property) [2019] VCAT 1031

ORDERS

1. In answer to the first preliminary question set out in the Tribunal's orders dated 12 November 2018, the Tribunal finds and declares that the subject lease is a lease of retail premises under the *Retail Leases Act 2003*.
2. In answer to the second preliminary question set out in the Tribunal's orders dated 12 November 2018, the Tribunal finds and declares that giving of notice under s 46(2) of the *Retail Leases Act 2003* does not revive or establish liability for outgoings to which the Applicant was not otherwise liable to contribute under s 46(4) of the *Retail Leases Act 2003*.
3. **This proceeding is listed for a directions hearing before Deputy President E. Riegler on 9 August 2019 at 9.30 am at 55 King Street, Melbourne, 3000, with 30 minutes allocated, at which time further orders will be made for the future conduct of the proceeding.**

4. Liberty to apply.

5. Costs reserved.

DEPUTY PRESIDENT E. RIEGLER

APPEARANCES:

For the Applicant	Mr S Hopper of Counsel
For the Respondent	Ms S Porter of Counsel

REASONS

INTRODUCTION

1. The Respondent (**'the Landlord'**) is the registered owner of land comprising 497 hectares of rural property close to Warragul, Victoria (**'the Property'**). The Property is predominately open pasture, with a homestead, four sheds and other improvements ancillary to agricultural and pastoral usage. The area surrounding the Property is also predominately open pasture used for agricultural and pastoral purposes.

2. A part of the Property comprising 249.65 hectares was subject to *Work Authority 521* and *523* issued in or about 1997 and under the now repealed *Extractive Industry Development Act 1995* (**'the Land'**). The *Work Authorities* entitled the holder to carry out an *extractive industry*, which was defined under the *Extractive Industry Development Act 1995* as:

> **extractive industry** means the extraction or removal of stone from land if the primary purpose of the extraction or removal is the sale or commercial use of the stone or the use of the stone in construction, building, road or manufacturing works and includes …

3. On or about 21 February 2007, the previous registered proprietors of the Property (which included the Land) leased the Land to the Applicant (**'the Tenant'**) for a term of five years with options for five further terms of five years each ('**the Initial Lease'**). In January 2012, the Landlord became the sole registered proprietor of the Property (including the Land).

4. In 2011, the Tenant exercised his option to renew the Initial Lease. Consequently, a renewed lease was entered for a further term of five years commencing 21 February 2012 with four further terms of five years each (**'the Lease'**). Since that time, the Tenant has been carrying on business as an extractive industry, extracting sand and selling that sand to its customers.[1]

5. By letter dated 16 August 2016, the Tenant purported to exercise his option for a further term commencing 21 February 2018. However, by correspondence dated 14 September 2017 (or 7 November 2016), the Landlord denied that the Tenant had validly exercised his option for a further term, relying on Clause 14 of the Lease which provided, in part:

> 14.1 The Lessor will grant to the Lessee a new lease ("the New Lease") of the Land for the Second Option Term from the Expiry Date if:
>
> …

[1] Agreed Statement of Facts the Hearing of Preliminary Questions, paragraph 12.

(ii) at the time the notice is given by the Lessee at the Expiry Date there is no unremedied breach or default under this Lease in respect of which the Lessor has given written notice to the Lessee.

6. The Landlord contends that the Tenant was in default; and remains in default, under the terms of the Lease because, inter alia, he has failed to pay land tax and failed to pay outgoings.

7. In response, the Tenant contends that he was not liable to pay land tax or any outgoings incurred prior to being given a *statement of outgoings* because the Lease is governed by the *Retail Leases Act 2003* (**'the RLA'**), which provides, in part:

> **46 Estimate of outgoings**
>
> …
>
> (2) The landlord must give the tenant a written estimate of the outgoings to which the tenant is liable to contribute under the lease that itemises those outgoings.
>
> …
>
> (4) The tenant is not liable to contribute to any outgoings of which an estimate is required to be given to the tenant as set out in this section until the tenant is given that estimate.
>
> **50 Recovery of land tax**
>
> (1) A provision of a retail premises lease is void to the extent that it makes the tenant liable to pay an amount for tax for which the landlord or head landlord is liable under the **Land Tax Act 2005**.

8. The Tenant further contends that belatedly serving the *statement of outgoings* would not revive or establish any entitlement to claim unpaid outgoings which accrued prior to service of that document. It would only crystallise its obligation to pay outgoings from that time on.

9. Critically, two questions arise which ultimately impact on the Tenant's right to renew the Lease. By orders dated 12 November 2018, those questions were set aside for preliminary hearing as follows:

> 1. **This proceeding is listed for a preliminary hearing on 12 March 2019 commencing at 10:00 AM at 55 King Street, Melbourne with an estimated hearing time of one day to consider the following questions:**
>
> (a) Is the Lease referred to in paragraph 2 of the Applicant's *Points of Claim* dated 8 March 2018 a

lease of retail premises under the *Retail Leases Act 2003 (Vic)* (**RLA 2003**); and

(b) If yes to (a), does giving notice under sub-s 46(2) of the RLA 2003 revive [or establish] liability for outgoings to which the tenant [the Applicant] was otherwise not liable to contribute under sub-s 46(4) of the RLA 2003?

10. Comprehensive written submissions, including submissions in reply, together with oral argument and affidavit material has been filed and advanced by both parties. Mr Hopper of counsel appeared on behalf of the Tenant. Ms Porter of counsel appeared on behalf of the Landlord. The submissions, affidavit material and the authorities referred to by both counsel have been considered in my determination of the preliminary questions.

QUESTION 1: IS THE LEASE A LEASE OF RETAIL PREMISES UNDER THE RLA?

11. It is common ground that the Tenant extracts sand from the Land and sells that sand to its customers. According to the Tenant, he also extracts clay and gravel. In his affidavit dated 20 December 2018, he states, in part:

> 5. … Most of my customers use the sand, gravel and clay to create other products, such as bitumen, concrete, roof tiles or building blocks. Alternatively, they combined the sand with services that they supply to their customers.
>
> 6. The Lease was entered into on or about 21 February 2012. Examples of some of our clients from around that time are:
>
> (a) Bristile, roofing tile company. Bristle purchased and continues to purchase around 300 tonnes of sand per day from my quarry. Bristile uses that sand to make roof tiles;
>
> (b) Boral, also a roofing tile company. It has typically purchased about 300 tonnes of sand per day from me. It also uses the sand to make roof tiles;
>
> (c) Holcim, a multi-national road construction company. It purchases sand to produce bitumen which is then used to build roads. They typically purchase about 200-300 tonnes of sand per day;
>
> (d) Fulton/Hogan, a road construction and maintenance company. They also make bitumen to sell to the customers. They usually purchase 200 tonnes of sand per day from me;

(e) the Department of Sustainability and Environment has engaged me from time to time to deliver sand to various beaches around Victoria for beach re-nourishment and rehabilitation. I am engaged on a tender basis, so the amounts they purchase vary from year to year;

(f) various contractors purchase sand from me for use by them to fulfil contracts with Melbourne Water. The sand is used by those contractors to install water barriers and retarding basins in and around dams owned or controlled by Melbourne Water. The amount they purchase varies from year to year;

(g) various owners of horse arenas have purchased around 10,000 tonnes of sand per year from me. They typically purchase the sand to place it on the floor of their horse arenas. Most of those customers are private owners, some of which own and train racehorses. I sometimes supply sand to their contractors engaged to build or maintain the horse arenas;

(h) Austral Brick purchases sand to make building blocks. They have typically purchased from me around 100 to 150 tonnes per day;

(i) various garden supply companies purchase sand which is on-supplied by them in smaller quantities to their customers. Those garden supply companies were typically buying around 10,000 tonnes per year; and

(j) subcontractors who on-supply sand to their customers. Some of those contractors on-supply the sand directly, others altered the sand before it is on supplied. Those contractors typically acquire around 20,000 tonnes per year from me.

12. Section 4 of the RLA states, in part:

> (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

13. In *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd*,[2] the Victorian Court of Appeal considered whether the lease of a cold storage

[2] [2017] VSCA 178.

facility fell within the definition of s 4 of the RLA. The Court observed that the *ultimate consumer test* was a significant factor in determining whether the business conducted under the lease was the provision of retail services:

> 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 to use the service are the 'ultimate consumer'.
>
> …
>
> 44. As noted above, the phrase 'retail provision of services' has long been interpreted by reference (at least in part) to an ultimate consumer test; that is, are the services used by the person to whom they are sold or are the services passed on by the purchaser in an unaltered state to some third person?[3]

14. In the present case, the evidence indicates, and I find, that the sand and possibly other material quarried by the Tenant is sold to its customers who, in the large part, use that sand for their own purposes. This constitutes the retail sale of goods or services.

15. However, the Landlord contends that the Lease is not a lease of *retail premises* under the RLA as the Land is not *premises* within the meaning and intent of s 4(1) of the RLA. This is because what was originally leased is bare land. The Landlord argues that the meaning and intent of *premises* in s 4(1) of the RLA requires not just vacant or bare land, but land with a building of some sort erected on it.

16. Ms Porter drew my attention to the Landlord's affidavit dated 30 January 2019, where he states, in part:

> 21. At the time of the commencement of the Original Lease on 21 February 2007:-
>
> a) the Land had no buildings on it;
>
> b) there were no telephone lines or electricity lines to the Land;
>
> c) the access to the Land was a gravel track…
>
> d) there were no other tracks located within the Land;
>
> e) there were 5 man made dams on the Land …
>
> f) an electricity line to service the Homestead on the Property traversed the Land.

[3] *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178, 16.

17. It is common ground that the Tenant installed buildings and other infrastructure on the Land after it commenced occupation under the Initial Lease and continued to make improvements to the Land under the Lease:

> 24. In or about the first year of the Initial Lease, the Applicant brought onto the Land a transportable building (approximately 6 m x 9 m) to use as an office, next to which he constructed a weighbridge….
>
> 25. During the term of the Initial Lease, the Applicant also:
>
> a) in around 2007, brought onto the Land, plant and equipment to wash the sand which comprised water pumps, pumping plant and a radial stacker ("the washing plant"), with connecting pipes…
>
> b) brought onto the Land 2 more transportable buildings (approximately 3 m x 12 m) to use as a lunchroom and a switch room…
>
> c) constructed a pump shed (approximately 2 m x 3 m)…
>
> 26. During the term of the Lease, at various times after 21 February 2012, the Applicant:
>
> a) brought onto the Land another transportable building (approximately 3.5 m x 3.5 m) to use as a plant operator's room...
>
> b) brought onto the land a 12 m container to use for fuel bowsers…
>
> c) constructed a shed, for which a building permit was required..
>
> d) brought onto the Land another small transportable building to use as a site office…[4]

18. However, Ms Porter submitted that all improvements made to the Land occurred after occupation under the Initial Lease. Moreover, she referred to Clause 10.1 of the Initial Lease and the Lease, which each state:

> Within three months of the expiry date or the date of early termination of this lease the Lessee must:
>
> (i) remove all of the Lessees plant, buildings and equipment from the Land;
>
> (ii) deliver up the Land with all pits, quarries, fences and roads in a reasonable state of repair, free from rubbish and debris, and in a safe condition which complies with the

[4] Affidavit of Peter Able dated 30 January 2019.

> requirements of authorities legally entitled to regulate such matters.

19. The term *premises* is not defined in the RLA; nor has it been judicially considered in the context of the RLA. It is common ground that the general approach to statutory interpretation is set out in *Project Blue Sky Inc v Australian Broadcasting Authority*,[5] where the High Court stated:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute. The meaning of the provisions must be determined "by reference to the language of the instrument viewed as a whole".[6]

20. Further reference was made to the judgment of Ierodiaconou AsJ in *Daicos v Daicos*,[7] where her Honour stated:

> The High Court has summarised the current approach to interpretation as follows:
>
> The starting point for the ascertainment of the meaning of the statutory provision is the text of the statute whilst, at the same time, having regard to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical another context, some other meaning of the word may be suggested, and so too, if it is ordinary meaning is not consistent with the statutory purpose, that must be rejected.[8]

21. In ordinary parlance the word *premises* can mean either bare land or land with some improvements erected upon it, as illustrated by the following definition in *Osborne's Concise Law Dictionary (Eighth Edition)*:

> Premises... (2) In a conveyance, when the property has been fully described, it is commonly referred to in the subsequent parts of the deed as "the premises hereinbefore described." From this, "premises" has acquired the sense of land or land and buildings.

22. Therefore, simply looking at the text of the RLA provides little guidance to resolve the uncertainty. One must look at the context and the purpose of the RLA in order to ascertain whether the reference to *premises* also includes bare land.

[5] (1998) 194 CLR 355.
[6] Ibid, 381.
[7] [2018] VSC 18.
[8] Ibid, [22].

Landlord's submissions

23. Ms Porter referred to *Turner and Ors v York Motors Pty Ltd*,[9] a decision of the High Court, where Dixon J said:

> The word "premises" is no doubt a vague one but in legislation of this sort there are great advantages in a test of its application which is objective and consists in a readily ascertainable physical fact. Having regard to the history of the provision and the dictionary meaning of the word 'premises', I think that we should adhere to the rule laid down that bare land without buildings, if let for the purpose of occupation as bare land, does not constitute premises. If land is let upon terms that the tenant shall or may erect buildings which are not removable by him but will pass with the freehold, then I would say that the land and buildings when erected would form premises. Here I think that the land was to be occupied as bare land and that what the defendants did concerning the caravans is irrelevant….
>
> I am therefore of the opinion that recovery of possession of the land in question is not a matter governed by Part III of the *Landlord and Tenant (Amendment) Act* 1948-1949 (N.S.W).[10]

24. Further reference was made to *McNamara v Quinn*,[11] where the Victorian Supreme Court considered whether the lease of vacant land used as a car park was 'prescribed premises', within the meaning of the *National Security (Landlord and Tenant) Regulations*.[12] The Court held that 'prescribed premises' under the regulations was limited and did not include land without buildings. Adopting the remarks of Roper J in *Sims v Lee*,[13] Duffy J stated:

> … definition of 'prescribed premises" contains a strong indication that the word "premises" does not include land without more.[14]

25. Similarly, in *Manly Council v Malouf*,[15] the Court considered whether the footpath areas licensed from the council and used for outdoor dining outside of Malouf's restaurant were premises within the meaning of a 'retail shop' under s 3 of the *Retail Leases Act 1994* (NSW). The Court of Appeal upheld the appeal and held that the subject land was not premises within the meaning of a 'retail shop' and the lease was, therefore, not a *retail shop lease*.

[9] (1951) 85 CLR 55.
[10] Ibid, 75.
[11] (1947) VLR 123.
[12] Made under the *National Security Act* 1939-1946.
[13] [1945] 45 SR (NSW) 352.
[14] (1947) VLR 123,125.
[15] [2004] NSWCA 299.

26. Ms Porter drew my attention to several other provisions of the RLA, which she said reinforced the notion that the word *premises* required a building, not just vacant or bare land. In particular:

(a) Section 3 – the definition of outgoings, which made reference to the *operation, maintenance and repair of the building in which the retail premises are located*. Similarly, the reference to *rates, taxes, levies, premiums or charges payable by the landlord because the landlord is the owner or occupier of the building referred to in paragraph (a) or of the land on which such a building is erected*…

(b) Section 41(1), which relates to the *capital costs of a building, areas used in association with a building;* or *plant used in a building.*

(c) Section 45, which relates to an obligation to pay rent or other costs associated with any other land *including land on which the building of which the retail premises forms part is located.*

(d) Section 49(1), which relates to an obligation to pay an amount for management fees, unless the management fees relate to the management of *the building in which the retail premises are located*.

27. Ms Porter further contended that there are many other provisions within the RLA which contemplate some form of building being part of the demised premises in order to give those provisions meaning. For example, the reference to *fitting out* premises under s 30 of the RLA, the *maintenance* of premises under s 52 of the RLA, the *alteration or refurbishment* of a building under s 53 of the RLA and the *demolition* of a building under s 56 of the RLA.

28. Ms Porter made further reference to the various Minister's Determinations made under s 5(1)(c) of the RLA, most of which contemplate some form of physical structure being part of the demised premises. In her written submissions, she concludes:

> 38. To suggest that Parliament intended the RLA 2003 to extend to leases of bare agricultural land surrounded by acres or hundreds of acres of grazing and agricultural land, kilometres from any town or shop just because the produce from that land is sold to businesses who consume it in their own business and/or are open to the public, leads to an absurd outcome, and is an interpretation that would not promote the purpose or object as is required by s 35(a) of the *Interpretation of Legislation Act 1984*.

Tenant's submissions

29. By contrast, Mr Hopper submitted that to determine whether leased premises fall within the ambit of the RLA, the Tribunal must closely examine the business activities that are or were to be undertaken under the terms of the lease when the lease was entered into. Further, Mr Hopper submitted that the definition of retail premises under s 4 of the RLA makes no reference to buildings or other structures and does not expressly exclude ground leases. He argued that as the word *premises* is not defined in the RLA, the Tribunal should interpret that word in accordance with its accepted popular meaning, which could include bare land.[16]

30. Mr Hopper referred to *Mowling v Justices of Hawthorn*,[17] where Higginbotham CJ held that the word *premises*:

> … includes at common law houses or lands, the definition probably being derived from reference to lands or houses, or both, indeed some grants as being sold or conveyed, and afterwards referred to in the conveyance or deed of grant as "premises".[18]

31. Mr Hopper submitted that there was no reason why the RLA was not intended to apply to a form of retail business that was not conducted in a building. He gave the example of caravan parks, open-air car parks; nurseries; car sales yards and market stalls.

32. Further reference was made to *Sorbara & Ors v D.J. and A.J. McCallum Pty Ltd*,[19] a case where the Victorian Court of Appeal considered the meaning or ambit of floor area, as it related to the former *Retail Tenancies Act 1986*. Under that Act, the definition of retail premises did not include premises that had a floor area that exceeded 1000 m². A question arose whether the 1000 m² rule was restricted to the floor area of a building within the demised land or alternatively, all of the land leased. Phillips JA stated:

> On this approach what is relevant floor area will vary from case to case, according to the nature of the business for the carrying on of which the premises "under the terms of the lease relating to them are used, or are to be used, wholly or predominantly". Thus, for the purposes of para (a) the "floor area" of an indoor retail shop in a shopping mall will presumably be that which is constructed as floor in the narrowest sense, appropriate to a building. (If the shop is multi-storeyed, more than one level may have to be counted." The relevant "floor area" of an outdoor car yard will be different, being the area of

[16] See definition in paragraph 21 above.
[17] (1891) 17 VLR 150.
[18] Ibid, 154.
[19] [1999] 2 VR 1.

> a type commonly dedicated to such an activity - perhaps constructed, perhaps not…
>
> It will now be appreciated that in the case of a motel, relevant "floor area", on the approach just explained, may involve some areas which are constructed (as floor space within a building or as an apron to a building as constructed), some which are merely shaped or formed and some which may not be constructed in any sense at all; the areas comprising the "floor" of the motel are commonly very diverse in kind…
>
> In short, I would now adopt the view, to which some years ago I was first inclined, that "the nature and extent of the relevant floor area [will] depend upon the retail business being conducted on the premises", in order to give the word "floor" its proper context. On that approach, relevant "floor area" of the Paruna Motel included all of the area which was demised, the nature of the "floor" of a motel tending to be diverse. In another case, however, even that fluctuating concept of "floor area" in para (a) might not be sufficient to include, for instance, a paddock which was fenced off at the side of the motel and which, though forming part of the demised premises, was left for pasture and perhaps sublet for the grazing of the horse by a local rider. The paddock would be excluded, not directly because the business was not being carried on there, but because the nature of the ground surface was such that it was foreign to what could reasonably be regarded as "floor area" even in the context of a motel business.[20]

33. The judgment of Phillips JA in *Sorbara* is interesting because it appears, at least on one view, that his Honour was not inclined to incorporate bare land as falling within the meaning of "floor area", insofar as that term defined the ambit of what was retail premises. However, the judgment must be considered in context, having regard to the Act under consideration. In that case, significance was attached to the connection between "floor area" and the use to which that "floor area" was put. Therefore, if the bare land was connected to the retail business, such as a car park ancillary to the motel business, then the car park would be measured as part of the "floor area". On the other hand, if an open and fenced off paddock was located next to the motel and was not used or ancillary to the business of the motel, then it would not form part of the "floor area", notwithstanding that it may still form part of the demise.

34. Mr Hopper submitted that the abolition of the 1000 m² floor area rule, and the introduction of the current RLA, removed the uncertainty associated with the rule. Mr Hopper argued that under the RLA, all land included within the demised land now formed part of the retail premises,

[20] Ibid, 8-9.

irrespective of whether any infrastructure was on the demised land at the time when the lease was made.

Findings

35. In my view, the references to a *building* in various parts of the RLA does not necessarily mean that the word *premises* is to be construed as land having some form of infrastructure built on it. Each of the provisions of the RLA that reference a *building* have their own purpose, which deal with a circumstance that might arise where there is a building or plant and equipment located on the demised land. For example, where the building is damaged. However, that, of itself, does not mean that the word *premises* must be defined as only including land that includes some form of building. In my view, the fact that there are numerous references to a building simply reflects the fact that most retail premises will include some form of a building.

36. It is still possible for a retail business be conducted on bare land. For example, a car park (without an attendant's kiosk), a paddock for the purposes of horse agistment or a race track which the public can hire for hosting racing events. In my view, interpreting *retail premises* narrowly to exclude a lease of bare land upon which a retail business is being conducted would require reading words into the RLA that are not there.

37. Further, s 4(2) of the RLA describes a number of types of *premises* which are excluded from the definition of *retail premises*. The categories of premises which are excluded are linked to either the type of premises or type of business being conducted under the lease, the type of tenant or the amount that the tenant pays under the lease. Indeed, s 4(2)(f), in conjunction with s 5 of the RLA, gives the Minister discretion to determine that certain premises are not to be included within the definition of *retail premises*. Neither that subsection, nor any of the Determinations made by the Minister under s 5 of the RLA, exclude a lease of bare land from the definition of *retail premises*. In my view, the fact that the RLA is silent on whether bare land falls within the definition of retail premises mitigates against finding that the definition should be narrowly construed to exclude bare land.

38. Further, I do not consider that the authorities relied upon by Ms Porter greatly assist in interpreting the word *premises*, as it relates to the RLA. This is because those authorities concern different legislation to what is currently under consideration. Indeed, the observations of Williams J in *Turner v York Motors Pty Ltd*, referred to by Ms Porter, aptly demonstrates this point:

> … The definition in s. 8 of the *Landlord and Tenant (Amendment) Act* 1948-1949 was adopted after these three decisions. It may be assumed that the New South Wales Parliament used the words in the

> sense these decisions have attached to them. This Court should be slow to place another interpretation on the words in these circumstances although should not hesitate to do so if it considers the decisions are wrong… But, in my opinion, they are right. The word "premises" is used in a popular sense and in this sense has a wide meaning. It is wide enough to include bare land. Its true meaning in any particular statute must be ascertained from the context in which it appears in and from an examination of the scope and purpose of the statute as a whole. If the word "premises" in the present definition is intended to include bare land that part of the definition which refers to any land leased with any premises would be otiose. There are cases decided under other Acts in which the same word has been held not to include bare land.[21]

39. In my view, the definition of *retail premises* in s 4(1) of the RLA appears to be directed towards the purpose of occupation; namely, the provision of retail goods or services, rather than the character of the demised land. By contrast, the *Landlord and Tenant (Amendment) Act 1948* is principally concerned with residential tenancy agreements and as such, focuses on the housing of a tenant. Therefore, the character of the land governed by the *Landlord and Tenant (Amendment) Act 1948* is intrinsically linked to some sort of building that would provide housing. In those circumstances, it is not difficult to understand why the High Court in *Turner & Ors* interpreted the word *premises* in that Act to mean land that had some sort of building erected upon it, and which passed with the freehold.

40. However, the RLA has a different focus. Its main purpose is *to enhance*:

> (a) the certainty and fairness of retail leasing arrangements between landlords and tenants; and
>
> (b) the mechanisms available to resolve disputes concerning leases of retail premises.[22]

41. Clearly, *retail leasing arrangements between landlords and tenants* do not necessarily require that a building be erected upon the demised land. As indicated above, there are many retail leasing arrangements which concern ground leases, absent any building.

42. Ms Porter submitted that it could not have been the intention of Parliament to extend the operation of the RLA to bare agricultural land surrounded by acres or hundreds of acres of grazing and agricultural land, kilometres from any town or shop. She argued that such an expanded definition of retail premises would mean that a lease of bare land used for:

[21] (1951) 85 CLR 55, 83.
[22] Section 1 of the RLA.

(a) grazing cattle or other livestock that is sold to butchers who get them slaughtered or to members of the public who buy livestock for their own use;

(b) growing fruit vegetables that are picked and sold to restaurants for use in their business or to the public who come and pick themselves;

(c) growing wheat or grain that might be sold to flour mills and made into flour; or

(d) the extraction of coal sold to a power station and used to make energy,

are retail leases which would fall under the RLA.

43. I do not accept that the definition of *retail* premises is readily informed or ascertained by reference to those fact scenarios, assuming that they constitute the retail provision of goods and services. All those scenarios could equally apply to a property which had a building erected upon it and from which the supply of goods or services was conducted. If the definition excluded a ground lease, then the retail activity conducted from bare land would not be governed by the RLA; while the same retail activity conducted from land which contained a building would fall within the RLA. I do not accept that this was the intention of Parliament. In my opinion, that outcome would be contrary to the purposes of the RLA, which includes *enhancing the certainty and fairness of retail leasing arrangements between landlords and tenants*.

44. Mr Hopper further submitted in supplementary written submissions dated 7 May 2019 that regard should be had to the state of the demised premises following renewal of the lease. It is common ground that at that time, significant infrastructure had been installed by the Tenant.

45. In my view, it is unnecessary to look at the state of the premises at the time of renewal. For the reasons set out above, I am of the view that the RLA can apply to a lease of bare land under which a tenant conducts a retail business.

46. Further, I find that the business conducted by the Tenant constitutes the provision of retail goods or services and as such the RLA governs the leasing relationship between the parties. Therefore, the answer to the first question – whether the lease is a lease of retail premises under the RLA – is yes.

DOES GIVING NOTICE UNDER S 46(2) OF THE RLA REVIVE LIABILITY FOR OUTGOINGS TO WHICH THE TENANT WAS OTHERWISE NOT LIABLE TO CONTRIBUTE UNDER S 46(4) OF THE RLA?

47. The Applicant contends that he is not liable to pay for any outgoings which accrued prior to receiving an estimate of outgoings, pursuant to s 46 of the RLA. That provision states:

> (1) A retail premises lease is taken to provide as set out in this section.
>
> (2) The landlord must give the tenant a written estimate of the outgoings to which the tenant is liable to contribute under the lease that itemises those outgoings.
>
> (3) The tenant must be given the estimate of outgoings –
>
> (a) before the lease is entered into; and
>
> (b) in respect of each of the landlords accounting periods during the term of the lease, at least one month before the start of that period.
>
> (4) The tenant is not liable to contribute to any outgoings of which an estimate is required to be given to the tenant as set out in this section until the tenant is given that estimate.

48. The Landlord concedes that if the RLA applies, the Tenant was not required to pay outgoings until such time as the statement of outgoings was delivered to him. However, the Landlord argues that once given, then the obligation to pay outgoings incurred prior to delivery of the statement of outgoings is revived or established.

49. By contrast, the Tenant contends that the delivery of the statement of outgoings does not revive or crystallise any obligation to pay outgoings that would have otherwise been payable but for the failure to give the statement of outgoings to the Tenant. The Tenant says that the late provision of an estimate of outgoings means that he is obliged to pay only those outgoings that accrue after the statement of outgoings is given.

Tenant's submissions

50. Mr Hopper submitted that the evident purpose of the provision is to allow the Tenant to predict the outgoings that it would be required to pay in the following year in order to manage his cash flow. He argued that the late provision of a statement of outgoings could lead to a situation where a tenant was required to retrospectively pay for many years of outgoings at once. This, he submitted, could have a significant adverse effect on a tenant's cash flow and ultimately frustrate the evident purpose of the provision.

51. Mr Hopper contended that retrospectively paying historical outgoings is completely at odds with the purpose of the provision and the RLA in general. He referred to s 1 of the RLA, which states that the main purpose of the RLA *is to enhance the certainty and fairness of leasing arrangements between landlords and tenants*. Mr Hopper submitted that it would be grossly unfair for a landlord to charge a tenant all of the outgoings incurred throughout the term of the lease as one lump sum impost.

52. Mr Hopper submitted that the RLA is generally considered a tenant protection statute and that to allow the late provision of a statement of outgoings to retrospectively revive a tenant's liability to pay outgoings would not promote fairness or certainty for tenants. Further, he argued that any unfairness to a landlord is addressed by decisions which confirm that a tenant cannot retrospectively recover the cost of outgoings that were paid in the absence of a statement of outgoings.[23]

53. Finally, Mr Hopper refer to *Dovastand Pty Ltd v Mardasa Nominees Pty Ltd*,[24] where Marks J considered the text of s 15 of the now repealed *Retail Tenancies Act 1986*, a predecessor to the current RLA. Section 15 of the 1986 Act also required a landlord to give a tenant an estimate of outgoings prior to the beginning of an accounting period and upon entering into a lease agreement. However, the 1986 Act provided no sanctions if a landlord failed to comply. In that case, the tenant argued that the landlord's claim for payment of outgoings was unenforceable because it had failed to comply with the disclosure provisions under s 15. His Honour stated:

> Nevertheless, I am of the view that if the construction of s 15 for which Mr Heerey contends is to produce the result that the landlord cannot recover the share of operating expenses, such a result can only follow from my being satisfied that the non-compliance rendered the claim of the landlord illegal, alternatively, the clauses of the lease on which it was based illegal and void, alternatively irrecoverable as a matter of construction of the Act.
>
> It goes without saying that the Act, as is common ground, does not provide a penalty or that there is to be any other consequence of the non-compliance.
>
> …
>
> The tenant seeks here to establish in this case that the consequence of the non-compliance is no more than to render the share of operating expenses non-recoverable by the landlord for the two years.

[23] *Richmond Football Club Ltd v Verraty Pty Ltd* [2011] VCAT 2104.
[24] [1991] 2 VR 285.

> The tenant can only succeed if it is what the statute expressly or by necessary implication provides. In my opinion, it does neither.[25]

54. Mr Hopper argued that the decision in *Dovastand* was the catalyst which moved the legislature to include the self-regulating s 46(4) in the amending RLA.

55. It is not clear to me whether *Dovastand* was the catalyst or impetus for the introduction of a self-regulating provision. I was not taken to any extrinsic material which might elucidate that proposition. Nevertheless, what is clear from the dicta of Marks J is that the interpretation placed on the provision by the Tenant *can only succeed if it is what the statute expressly or by implication provides*.

Landlord's submissions

56. Ms Porter submitted that the natural and ordinary meaning of s 46(4) indicates that the provision has some temporal limitation. She argued that it is only until such time that the statement of outgoings is given, that a tenant is not liable to contribute to any outgoings. However, once it is given, then a tenant is liable to contribute, not just progressively but also retrospectively.

57. Like Mr Hopper, reference was made to the main purpose of the RLA and the need to ensure the provisions are interpreted so that they enhance the certainty and fairness of retail leasing arrangements between landlords and tenants. However, unlike Mr Hopper, Ms Porter submitted that the RLA is not to be construed as *tenant protection* legislation. Its purpose is to strike a fair balance between the competing rights and obligations of tenants and landlords.

58. Ms Porter referred to two decisions of this Tribunal in support of her argument. In *Richmond Football Club Ltd v Verraty Pty Ltd*,[26] the tenant sought to recover outgoings paid on the assumption that the RLA did not apply to the lease in question. In that case, there was no dispute that the outgoings were payable under the terms of the lease, but for the operation of the RLA. The Tribunal ultimately determined that the RLA governed the lease. Nevertheless, the Tribunal found that, apart from the payment of land tax, the tenant was not entitled to recover outgoings which had been paid during the currency of the lease, even though it had not been given a statement of outgoings as required under s 46 of the RLA:

> 97. Here the payment of outgoings is part of the consideration paid by RFC. Its use of the Premises is no doubt contributed to the gross amount of those outgoings, at least in relation to

[25] Ibid, 289-290.
[26] (2011) VCAT 2104.

the payment of rates connected with the use of utilities, such as water and sewerage. That is a different situation to what occurred in *David Securities* and in *Roxborough*. In *David Securities*, the borrower got nothing in return for the payment of the grossing-up amount. In *Roxborough*, the retailer received nothing in return for the payment of tobacco licence fees.

98. In my opinion, the payment of outgoings is analogous to the payment of rent, in that it has a direct connection with the use and occupation of the Premises. In my view, *The Dog Depot* applies in respect of the payment of outgoings. Good consideration was received for the money paid in respect of outgoings. That being the case, it would be unconscionable or unfair to allow RFC to be repaid monies in respect of outgoings.

99. Therefore, and having regard to the authorities cited above, the claim for money had and received, in so far as it relates to outgoings, must fail.

59. The second authority relied upon is *Australian Asset Consultant Pty Ltd v Staples Super Pty Ltd*,[27] another decision of this Tribunal. Although that case dealt with a myriad of issues, one aspect turned on the interpretation of s 46(4) of the RLA, in that the tenant sought to recover outgoings previously paid. The Tribunal stated:

> 122 As I read s 46(4) of the RLA, a tenant is not liable to contribute to any outgoings until it has been given an estimate pursuant to s 46(2) in respect of those outgoings. I consider the inference to be drawn is that whilst the estimate has been provided, then the tenant is liable to contribute in respect of those outgoings.
>
> 123 I think that this observation provides the answer to ACC's claim for reimbursement of outgoings it is paid. Once AAC received an estimate of outgoings, it became liable to contribute to the outgoings referred to in the estimate. I accordingly find that AAC's claim for reimbursement of the outgoings it has paid fails.

60. Ms Porter also drew my attention to other provisions of the RLA that entitle a tenant to withhold rent. In particular, s 17 of the RLA states, in part:

> (1) At least 7 days before entering into a retail premises lease, the landlord must give the tenant -
>
> (a) a disclosure statement in the form described by the regulations (but the layout of the statement need not

[27] [2016] VCAT 1726.

be the same as the prescribed disclosure statement); and

(b) a copy of the proposed lease in writing.

…

(2) If a tenant has not been given the disclosure statement before entering into a retail premises lease, the tenant may give the landlord, no earlier than 7 days and no later than 90 days after entering into the lease, a written notice that the tenant has not been given the disclosure statement.

(3) If the tenant gives the landlord a notice in accordance with sub-section (2) –

(a) the tenant may withhold payment of the rent until the day on which the landlord gives the tenant the disclosure statement; and

(b) the tenant is not liable to pay the rent attributable to the period from and including the day on which the notice was given until and including the day on which the landlord gives the tenant the disclosure statement; and

(c) the tenant may give the landlord a written notice of termination at any time before the end of 7 days after the landlord gives the tenant the disclosure statement.

61. Ms Porter submitted that the wording of s 17 of the RLA differs from that of s 46, in that it requires a tenant to give notice to a landlord before any entitlement to withhold rent accrues and importantly, specifically and additionally states that a tenant is not liable to pay the rent attributable to the period between when the notice was given and the disclosure statement provided. Ms Porter argued that if s 46 were to operate in the same fashion as s 17, then Parliament would have expressed that provision in the same way. In other words, the fact that s 17 additionally states that no rent is payable during the relevant period, indicates Parliament's intention that s 17 was to operate differently to s 46, which has no corresponding sub-section.

Findings

62. Both *Richmond Football Club* and *Australian Asset Consulting* deal with a different factual matrix. In both those cases, the tenant was seeking reimbursement of outgoings already paid. Although not specifically argued in *Australian Asset Consulting*, the basis for refusing the claim in *Richmond Football Club* was that the landlord's counter-restitutionary claim prevailed. In other words, it was held that the tenant had received good consideration for the payment of outgoings and on

that basis, equity would not come to the tenant's aid to recover monies had and received.

63. The present case is different. Here, outgoings were not paid during the period that the Landlord had failed to comply with his obligations under s 46 of the RLA. Here, it is the landlord that seeks to recover those outgoings, rather than resisting a claim by a tenant for reimbursement of outgoings already paid.

64. Moreover, I am not persuaded that the distinguishing features between s 17 and s 46 necessarily lead to the conclusion that Parliament did not intend s 46 to prohibit retrospective recovery of outgoings once a statement of outgoings is given to a tenant. The two provisions deal with different aspects of the leasing arrangement. The requirement in s 17 for a tenant to serve a notice is an additional step imposed by the legislation, given that the consequences of not complying with that section are significantly more serious than simply foregoing the payment of outgoings. Non-compliance with s 17(1) can lead to early termination of the lease agreement. In my view, requiring the additional step of having to give notice no earlier than seven days and no later than 90 days after entering into the lease reflects the main purpose of the RLA, which is to enhance the certainty and fairness of retail leasing arrangements between landlords and tenants. Without that temporal restriction and the requirement to give notice, a landlord would be left in an uncertain and precarious position if no disclosure statement has been given to the tenant.

65. Notwithstanding the comments made by the Tribunal in *Australian Asset Consulting*, I am of the opinion that the purpose of s 46(4) would be rendered somewhat otiose if the Landlord's interpretation of the provision was accepted. The corollary is that an interpretation which does not revive an entitlement to claim outgoings incurred prior to the giving of the statement of outgoings best accords with the main purpose of the RLA; namely, *to enhance the certainty and fairness of leasing arrangements*. In my view, this is best achieved by construing the provision against the Landlord, given that he ultimately has control over this situation. If outgoings are not paid because the Landlord has failed to give the Tenant a statement of outgoings, then that situation is easily remedied by the provision of a statement of outgoings. The landlord is only penalised to the extent that it continues to fail to comply with its obligations under the RLA.

66. On the other hand, I accept that it would be unfair and create uncertainty if a landlord was able to retrospectively claim for historical outgoings many years ahead of when they were actually incurred. It is not difficult to imagine that such a scenario would place a tenant in a financially difficult position, having assumed that what had been charged

historically represented its liability to pay outgoings. It is also not difficult to imagine that such an impost could be financially burdensome and place a tenant in a precarious situation if it were unable to make payment within what might be a relatively short default period following service of a default notice. Indeed, the failure to pay may lead to an early termination of the lease or deprive a tenant from being able to exercise an option to renew. In my view, neither of those outcomes would enhance the certainty and fairness of retail leasing arrangements.

67. In forming that view, I accept that there may be situations where a tenant takes advantage of a landlord's failure to comply with s 46(4) of the RLA. However, as I have already indicated, a landlord ultimately has control over that situation. It can immediately remedy the non-payment or short payment of outgoings by giving its tenant the statement of outgoings. On the other hand, apart from protesting or litigating, a tenant cannot force a landlord to give the statement of outgoings. Therefore, when balancing the rights and obligations of each of the parties to a lease agreement, I believe the object and purpose of the RLA is best met if the self-regulating provision did not operate in the manner suggested by the Landlord.

68. I am reinforced in holding this view by the commentary in *Retail Leases Victoria*, where the learned authors state:

> Subsection 46(4) contains a "self-enforcing" provision, particularly having regard to the fact that it is "implied" as a lease term under subs 46(1), which provides that the tenant is not liable to contribute to any outgoings of which an estimate is required to be given to the tenant until the tenant is given that estimate (as to which see *Wang v Yan (No 2)* [2006] VCAT 236 (24 February 2006), Deputy President Macnamara; referred to with approval applied by Senior Member Davis in *Yan v Wang* [2008] VCAT 2405 (27 November 2008)) in relation to the now equivalent provisions of the *Retail Tenancies Reform Act 1998*, see [150,015]). These provisions, which differ from the approach of the provisions of s 21 of the 1998 Act, appear to go some way to actually abrogating the tenant's obligation to contribute to any outgoings at all for the period prior to the provision of an estimate in accordance with s 46. The wording of these provisions "is not liable to contribute to any outgoings" is very reminiscent of the wording of paragraph 17(3)(b) of the landlord's disclosure statement provisions of the 2003 Act, which provides that, in certain circumstances, the tenant is "not liable to pay the rent" attributable to the period prior to the landlord giving the tenant a disclosure statement, provisions which, with respect to the critical wording, reflect the corresponding disclosure statement provisions of para 8(2)(b) of the 1998 Act, which have been held to entirely abrogate the rent obligation prior to compliance with the disclosure requirements: see [40,110]. On this approach the tenant's liability to contribute to

> any outgoings is entirely abrogated prior to the date that the landlord complies with the s 46 requirements, and compliance would not revive any of those prior obligations. By analogy with the authorities on the disclosure provisions to which reference has been made, it would be as though the tenant's comments to pay outgoings in the lease are entirely removed until s 46 is complied with, and then they are only "restored" in futoro. However, in *Australian Asset Consulting Pty Ltd v Staples Super Pty Ltd* [2016] VCAT 1726, Member Edquist took a contrary view. The tenant claimed that it was entitled to recover outgoings that it had paid because it had not been given an estimate of outgoings as required by 46. The landlord gave an estimate after the outgoings had been paid. The Tribunal held that the "inference" to be drawn from s 46(4) was that "once the estimate had been provided, then the tenant is liable to contribute in respect of those outgoings [referred to in the estimate]" and accordingly, the tenant's claim failed.[28]
>
> [Emphasis added]

69. Accordingly, I accept the Tenant's submission as to the proper interpretation of s 46(4), which I consider best reflects the main purpose of the RLA. As indicated above, the provision is intended to self-regulate compliance with s 46. To the extent that it imposes a burden on a landlord in not being able to recover outgoings, that burden is mitigated or extinguished once a landlord complies with its obligations under the RLA. In my view, that best reflects striking a balance between the interests of tenants and landlords and importantly, enhances the certainty and fairness of retail leasing arrangements between landlords and tenants.

70. Accordingly, my answer to the second question is that giving notice under s 46(2) of the RLA does not revive or establish liability for outgoings previously incurred.

DEPUTY PRESIDENT E. RIEGLER

[28] Croft, Hay & Virgona, Lexis Nexis, *Retail Leases Victoria*, (Service 35) [60,020].