VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP867/2016

CATCHWORDS

Commercial lease, consequence of tenant's breach.

Contract: construction, "property" undefined term, inconsistent use in lease, whether synonymous with defined term "land", obviously defective drafting, numbering and organisation of clauses.

APPLICANT	Rich River Developments Pty Ltd (ACN 117 962 571)
RESPONDENTS	Mr Joseph Cusmano, Mrs Maria Cusmano
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Preliminary Hearing
DATE OF HEARING	11 May 2017
DATE OF ORDER	6 June 2017
CITATION	Rich River Developments Pty Ltd v Cusmano (Building and Property) [2017] VCAT 765

ORDERS

1 The answers to the preliminary questions are:

(a) Under clause 14.4 in the subject (common property) lease, is the landlord precluded from terminating the lease before or without a sale of the property? - No.

(b) What is meant by "the property" in clause 14.4 in the subject lease? – Any property belonging to the Applicant. It does not mean the freehold land.

2 The proceeding is referred to a directions hearing before Senior Member Lothian on 21 June 2017 at 9:00am at 55 King Street Melbourne to make further directions for the conduct of the proceeding and to hear any application for costs. Allow one hour.

3 I direct the Principal Registrar to send copies of these orders and reasons to the parties by email.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr J. Ribbands of Counsel
For Respondents	Mr P.S. Noonan of Counsel

REASONS

1 The lease that underlies this dispute contains, in the words of the applicant-Tenant, some apparently startling drafting. The result is that the Tenant claims its own breach forces the respondent-Landlords to sell the land, keep any amount representing outstanding rent, and pay the rest to the Tenant.

2 On the Tenant's view, the land is worth more than $2 million and at 12 July 2016, according to the Tenant's outline of argument of that day, the Tenant was indebted to the Landlords for approximately $350,000 arrears of rent. If the Tenant's analysis is correct, on 12 July 2016 the Tenant's own breach would have given it a windfall of approximately $1.65 million.

3 The hearing before me on 11 May 2017 was to answer two preliminary questions set down by Order 1 of 1 March 2017. They are:

(a) Under clause 14.4 in the subject (common property) lease, is the landlord precluded from terminating the lease before or without a sale of the property; and

(b) What is meant by "the property" in clause 14.4 in the subject lease.

4 Mr J Ribbands of Counsel appeared for the Tenant and Mr P Noonan of Counsel appeared for the Landlords.

BACKGROUND

5 The lease is unusual. It concerns land beside the Murray River in Echuca at 16-50 Bynan Street. The Tenant operates a caravan park trading as "Rich River Holiday Village". The lease period is 99 years with an option to the Tenant for a further 99 years. The land is within the floodplain of the river and according to the Tenant, cannot be further subdivided.

6 The original landlord was Pherst Pty Ltd ("Pherst"). The Tenant was the original tenant.

7 There are a number of defects in the lease. This is, perhaps, less surprising than it might have been, as Mr Peter Simitzis executed the lease as both the director of Pherst and of the Tenant. It appears that preparation of the lease has not been exposed to the rigorous approach that would be expected if independent solicitors for both parties had been involved.

8 I note that in accordance with an ASIC search of 19 July 2016, Mr Simitzis was a director of the Tenant between 20 January 2006 and 12 July 2013, Ms Georgia Simitzis was the director between 12 July 2013 and 29 October 2015 and Mr Nathan Simms was appointed director on 29 October 2015. I further note that the domestic address for all three directors was the same and that in her affidavit for the Tenant of 12 July 2016, Ms Lauren Clarke described Mr Peter Simitzis as "a representative of the [Tenant]."

9 The lease was executed on 19 October 2011. According to the Landlords' submissions, the Landlords purchased the land from Pherst on 29 March

2012 for $1.75m. It would be unfortunate if any due diligence undertaken on behalf of the Landlords at the time of purchase did not reveal the confusion in clause 14 of the lease.

10 Before, or around the time the Tenant entered into the lease with Pherst, a number of sites were "sold" to third parties as long-term leases associated with the areas leased by the Tenant, and the Tenant has the right to "sell" more sites of this description. The lease then assigns to the Tenant the "right, title and interest in the Leasehold sites", including the right to collect "fees" from the site holders, and the Tenant is solely responsible for paying all rents to the Landlord. The land other than the sites, whether held by separate site holders or remaining the property of the Tenant, is similar in nature to the land that would be held by an owner's corporation, and was described by the parties and in the directions hearing of 1 March 2017 as "common property". It includes the manager's residence, roads, playground facilities, parking areas, swimming pool, office and workshops.

11 According to the Landlords, as early as 1 May 2012 the Tenant failed to pay the rent within 60 days of it being due. They say that by 1 May 2016 approximately $320,000 of rent was outstanding.

12 On 4 May 2016 the Landlords issued a repudiation notice under clause 14.4.5 of the lease, requiring the Tenant to pay the rent in default within 60 days.

13 The Tenant sought, and was granted, an injunction on 1 July 2016 to prevent the Landlords from entering into possession of, or interfering with the quiet enjoyment and use of the whole of "the premises at 16-50 Bynan Street, Echuca". As at that date the parties agreed that there was substantial rent unpaid by the Tenant to the Landlord.

14 The Tenant's explanation for the unpaid rent was that its managers expected a neighbouring abattoir to cease operation but this had not happened and it adversely affected the Tenant's business. There is no suggestion that the previous or current Landlords have any control over the abattoir, or made any representation regarding its continuing business. There is no indication why the Tenant's business, which started next to a working abattoir became unsustainable, as is asserted at paragraph 29 of the Tenant's Outline of Submissions of 3 April 2017, or why the Tenant, which was under control of the same director as the previous landlord, should have been at all surprised.

15 The injunction continues to apply.

16 I accept the Tenant's evidence that the Landlords purchased the land for $1.75 million in late 2011 and that it is now worth considerably more.

THE LEASE

17 The parties agree that the lease leaves much to be desired in the way it has been drafted. In particular, although "premises" and "land" are defined in

the schedule, "property" is not, and the interpretation of this term answers question (b).

18 Clause 14 of the lease is as follows:

> TERMINATION OF LEASE
>
> The following provisions shall apply where: –
>
> 14.1 The Rent is unpaid for 60 days after becoming due for payment
>
> 14.1.1 The Tenant does not meet its obligations under the Lease
>
> 14.1.2 The Tenant is a Corporation and
>
> 14.1.2.1 An Order is made or a resolution is passed to wind it up except for reconstruction or amalgamation.
>
> 14.1.2.2 Goes into liquidation;
>
> 14.1.2.3 Is placed under official management;
>
> 14.2 Has a Receiver, including a Provisional Receiver, or a Receiver and Manager of any of its assets or an Administrator appointed.
>
> 14.2.1 A Warrant issued by a Court to satisfy a Judgement [sic] against the Tenant or a Guarantor is not satisfied within 60 days of being issued.
>
> 14.2.2 A Guarantor is a natural person and:-
>
> 14.2.2.1 Becomes bankrupt;
>
> 14.2.2.2 Takes or tries to take advantage of Part X of the Bankruptcy Act 1966;
>
> 14.2.2.3 Makes an assignment for the benefit of their Creditors or
>
> 14.3 Enters into a composition or an arrangement with the Creditors.
>
> 14.3.1 A Guarantor is a corporation and one of the events specified in this Clause 14 occurs in relation to it.
>
> 14.3.2 The Tenant, without the Landlords written consent: –
>
> 14.3.2.1 Discontinues its business on the property, or
>
> 14.3.2.2 Leaves the property unoccupied for 30 days.

19 I note that all the above are failures or breaches, deliberate or inadvertent, of the Tenant, with no provision regarding any wrongdoing by the Landlords.

20 The parties agree that the "the numbering and indentation within clause 14 is not consistent, and should be given little weight in the construction

exercise"[1]. Clause 14 would be more readily understood if differently arranged.

21 A more logical arrangement of these provisions is:

The following provisions shall apply where: –

A The Rent is unpaid for 60 days after becoming due for payment (14.1)

B The Tenant does not meet its obligations under the Lease (14.1.1)

C The Tenant is a Corporation and (14.1.2)

C.1 An Order is made or a resolution is passed to wind it up except for reconstruction or amalgamation. (14.1.2.1)

C.2 [It] Goes into liquidation; (14.1.2.2)

C.3 [It] Is placed under official management; (14.1.2.3)

C.4 [It] Has a Receiver, including a Provisional Receiver, or a Receiver and Manager of any of its assets or an Administrator appointed. (14.2)

D A Warrant issued by a Court to satisfy a Judgement against the Tenant or a Guarantor is not satisfied within 60 days of being issued. (14.2.1)

E A Guarantor is a natural person and:- (14.2.2)

E.1 Becomes bankrupt; (14.2.2.1)

E.2 Takes or tries to take advantage of Part X of the Bankruptcy Act 1966; (14.2.2.2)

E.3 Makes an assignment for the benefit of their Creditors or (14.2.2.2)

E.4 Enters into a composition or an arrangement with the Creditors. (14.3)

F A Guarantor is a corporation and one of the events specified in this Clause 14 occurs in relation to it. (14.3.1)

G The Tenant, without the Landlords written consent: – (14.3.2)

G.1 Discontinues its business on the property, or (14.3.2.1)

G.2 Leaves the property unoccupied for 30 days. (14.3.2.2)

22 Clause 14 continues:

14.4 If any of the events referred to in this Clause 14 hereof occurs then the Landlord and Tenant agree that the property shall immediately be placed on the open market for sale in accordance with the following provisions: –

14.4.1 Upon a sale of the property pursuant to this Clause, and after payment of all costs associated with the sale, any amounts,

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[1] Tenant's Outline of Submissions paragraph 11 and Landlords' outline paragraph 16(a).

including legal costs, owing to the Landlord shall be paid and the balance shall then be paid to the Tenant.

14.4.2 In the event that the property have [sic] not been sold within the period of 180 days from the date on which one of the events referred to in this Clause 14 occurs then the Landlord may, at its option, terminate the Lease with immediate effect by Notice in writing to the Tenant, the Landlord retains the right to sue the Tenant for unpaid money or for damages (including damages for loss of the benefit the Landlord would have received if the Lease had continued for the full term) for breaches of its obligations under this Lease.

14.4.3 For the purposes of Section 146(1) of the *Property Law Act 1958 (Vic)*, 60 days is fixed as the period within which the Tenant must remedy a breach capable of remedy and pay reasonable compensation for the breach.

14.4.4 The Landlord must give the Tenant, before terminating this Lease, under this Clause, for non-payment of the Rent, the same notice that would be required to give [sic] under of Section 146(1) of the *Property Law Act 1958 (Vic)* for a breach other than the non-payment of Rent.

14.4.5 Before terminating this Lease for repudiation (including repudiation consisting of the non-payment of Rent) the Landlord must give the Tenant written notice of the breach and a period of 60 days in which to remedy it and to pay reasonable compensation for it. A Notice given in respect of the breach amounting to a repudiation is not an affirmation of the Lease.

14.4.6 Even though the Landlord does not exercise its rights under this Lease on one occasion, it may do so on any later occasion.

14.4.7 Where the property are [sic] to be put on the open market for sale pursuant to this Clause, and in default of agreement within 7 days, the Tenant hereby appoints the Landlord as the Tenant's Attorney for the purpose of signing documents and doing all such things as may be necessary in order to appoint an Agent to market the property for sale and to proceed to do so on such terms and conditions as shall be advised by the Agent appointed for this purpose by the Landlord.

14.4.8 Upon termination of this Lease the Tenant must return the property to the Landlord in the state and condition that this Lease requires the Tenant to keep it in and have removed any goods or anything that the Tenant fixed to the property and have made good any damage caused by the removal. Anything not removed becomes the property of the Landlord who can keep it or remove it and dispose of it and charge the Tenant the cost of removal, making good and disposal.

[underlining added]

23 Clause 14.4 suffers from the same confusion in numbering and organisation as the rest of clause 14, and its sub-clauses appear to have been rendered inconsistent by that confusion. If, as the Tenant contends, the first paragraph of clause 14.4 governs all the sub-clauses that follow, then it would appear that there is an over-riding obligation of the Landlords to sell in all circumstances where the Tenant has breached the lease.

24 I prefer the Landlords' submissions, based on the Tenant's submission that that clauses 14.4.3 to 14.4.6 and 14.4.8 are "conceptually distinct and independent" of the remainder of clause 14.

25 Mr Ribbands handed up a one page addendum to the Outline of Submissions on 11 May 2017 which sought to qualify the Tenant's view that these provisions are "conceptually distinct and independent". It added "we contend that conceptually distinct and independent question remains part and parcel of the sale process." The addendum continued:

> We contend that the sale provisions contained within clause 14.4.1 and 14.4.2 provide a collateral means of enforcement on the part of the landlord which operates as an incentive to the tenant to remedy any breach. If it doesn't remedy the breach, the entirety of the freehold and the leasehold is sold.
>
> Consequently, whilst they are conceptually distinct, they operate concurrently.

26 I am at a loss to understand how the potential windfall benefit arising from sale of the Landlords' land and payment of the balance to the Tenant can act as a "collateral means of enforcement" against a defaulting tenant. I do not accept that the Tenant can, in normal circumstances, be regarded as worse off by virtue of the sale of "its business and property interests".

27 A more logical arrangement of 14.4 is:

> **H** If any of the events referred to in this Clause 14 hereof occurs then the Landlord and Tenant agree that the property shall immediately be placed on the open market for sale in accordance with the following provisions: – (14.4)
>
> **H.1** Upon a sale of the property pursuant to this Clause, and after payment of all costs associated with the sale, any amounts, including legal costs, owing to the Landlord shall be paid and the balance shall then be paid to the Tenant. (14.4.1)
>
> **H.2** In the event that the property have [sic] not been sold within the period of 180 days from the date on which one of the events referred to in this Clause 14 occurs then the Landlord may, at its option, terminate the Lease with immediate effect by Notice in writing to the Tenant, the Landlord retains the right to sue the Tenant for unpaid money or for damages (including damages for loss of the benefit the Landlord would have received if the Lease had continued for the full term) for breaches of its obligations under this Lease. (14.4.2)

H.3 Where the property are [sic] to be put on the open market for sale pursuant to this Clause, and in default of agreement within 7 days, the Tenant hereby appoints the Landlord as the Tenant's Attorney for the purpose of signing documents and doing all such things as may be necessary in order to appoint an Agent to market the property for sale and to proceed to do so on such terms and conditions as shall be advised by the Agent appointed for this purpose by the Landlord. (14.4.7)

I For the purposes of Section 146(1) of the *Property Law Act 1958 (Vic),* 60 days is fixed as the period within which the Tenant must remedy a breach capable of remedy and pay reasonable compensation for the breach. (14.4.3)

J The Landlord must give the Tenant, before terminating this Lease, under this Clause, for non-payment of the Rent, the same notice that [the Landlord] would be required to give under of Section 146(1) of the *Property Law Act 1958 (Vic)* for a breach other than the non-payment of Rent. (14.4.4)

K Before terminating this Lease for repudiation (including repudiation consisting of the non-payment of Rent) the Landlord must give the Tenant written notice of the breach and a period of 60 days in which to remedy it and to pay reasonable compensation for it. A Notice given in respect of the breach amounting to a repudiation is not an affirmation of the Lease. (14.4.5)

L Even though the Landlord does not exercise its rights under this Lease on one occasion, it may do so on any later occasion. (14.4.6)

M Upon termination of this Lease the Tenant must return the property to the Landlord in the state and condition that this Lease requires the Tenant to keep it in and have removed any goods or anything that the Tenant fixed to the property and have made good any damage caused by the removal. Anything not removed becomes the property of the Landlord who can keep it or remove it and dispose of it and charge the Tenant the cost of removal, making good and disposal. (14.4.8)

28 I remark that the clause I have described as M would apply at the end of the lease, regardless of whether the Tenant is in breach. This militates in favour of an interpretation that the first paragraph of 14.4 does not govern the rest of that clause. I also accept Mr Noonan's oral submission that the right to terminate for repudiation on 60 days' notice in clause 14.4.5 is inconsistent with the 180 day sale process.

INTERPRETATION

29 I accept the Tenant's submissions that:

> The Lease is a commercial document and should be given a business-like interpretation. [*McCann v Switzerland Insurance Australia Limited* (2002) 203 CLR 579, 589 [22]]. The rights and liabilities of the parties under a provision of a contract are to be determined objectively by reference to its text, its context and purpose. [*Mt Bruce*

Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37[47]] … The Tribunal should assume that the parties intended to produce a commercial result and so avoid "making a commercial nonsense or working commercial inconvenience" [*Zhu v Treasurer of New South Wales* (2004) 218 CLR 530, 559 [82]].

However, these principles do not license a "judicial rewriting" of the lease. [*Franklins Pty Ltd v Metcash Trading* Ltd (2009) 76 NSWLR 603 [23] The fact that a construction might be seen as unreasonable or benefiting one party at the expense of the other is not in itself a reason for departing from the language employed. [*Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd* [2008] NSWCA 5, [27]-[38]]

The words of the document should be given their ordinary and natural meaning "fairly and broadly, without being too astute or subtle in finding defects" [*Hillas & Co Ltd v Arcos Ltd* (1932) LT 503, cited in *Australian Broadcasting Commission v Australian Performing Rights Association Limited* (1973) 129 CLR 99, 109-110]. The court must then give effect to that language unless to do so would be absurd [*Jireh International Pty Ltd v Western Exports Services Inc* [2011] NSWCA 137 [55]]. Only then "words may be supplied, omitted or corrected to avoid absurdity or inconsistency". [*Fitzgerald v Masters* (1956) 420, 426-7]

30 I also accept the Landlords' submission at paragraph 8:

The High Court recently emphasised the need to have regard to the commercial purpose and objects of a commercial contract and to favour the construction which makes commercial sense in that context [*Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12 at [16]-[17]]:

> It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable business person would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable business person be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.
>
> [The clause in dispute] is to be construed by reference to the commercial purpose sought to be achieved by the terms of the lease. It follows … that the Court is entitled to approach the task of construction of the clause on the basis that the parties intended to produce a commercial result; one which makes commercial sense.

Objective determination

31 As submitted for the Landlords, clause 1 of the lease demises the "premises" to the Tenant for its term "in consideration of the Tenant's compliance with the Rents Covenants and Conditions of the Lease".

32 I accept the Landlords' interpretation that:

> [the] objective commercial purpose of the lease is to give effect to the arrangement described in clause 1 of the lease, in the commercial interests of both parties. It would be contrary to the purpose of the lease to:
>
> (a) give the Tenant more than a leasehold interest in the Premises or a right to a part of the Land other than the demised Premises; or
>
> (b) absolve the Tenant of its obligation to pay the Rent to the Landlord; or
>
> (c) otherwise absolve the Tenant of its obligation to comply with the Covenants and Conditions under the Lease.

33 The context and purpose of clause 14 is to enable the Landlords to overcome or ameliorate a breach by the Tenant. Unless the text is clearly inconsistent, this interpretation is to be preferred.

The understanding of a reasonable businessperson

34 In *Mount Bruce*[2] the High Court said:

> Unless a contrary intention is indicated in the contract, a Court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties … intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

35 The parties to this proceeding are not the original parties to the lease. However, on the assumption that the Tenant and the original landlord did not intend to create a legal pit-fall for a hapless purchaser from that landlord, it is reasonable to conclude that the intended outcome was to force the tenant to comply with the lease or if unsuccessful, to give the landlord a right to extricate itself from the lease with minimum loss on serious default of the Tenant. The interpretation urged by the Tenant represents loss of the whole of the Landlords' capital.

36 I am not satisfied that a reasonable businessperson negotiating at arm's length for clause 14 would have contemplated that the Tenant's breach could lead the landlord to lose the whole of its or their investment.

Commercial nonsense

37 I accept the Landlords' submissions that the provision in clause 14.4.1 which requires the net proceeds of the sale of "the property" to be paid to

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2 *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37

the Tenant does not make commercial sense if "the property" is the Landlords' own property rather than the Tenant's property. In particular, I accept the Landlords' interpretation that:

> Ultimately, it makes no commercial sense to sell the Landlord's property and pay the proceeds to the defaulting Tenant under the lease. Under this approach:
>
> (i) the Tenant is rewarded with the (net) market value of the Landlord's Land; and
>
> (ii) the Landlord is penalised by the loss of all its property rights in the Land including (because the lease attaches to the land) the loss of all its future rights under the lease, without any corresponding compensation, as the proceeds of the sale of the rights instead go to the Tenant.

"Judicial rewriting"

38 Neither the Tribunal nor a Court may substitute what should have been for what is. This is not the problem I face because both the matters I must interpret are the subject of flawed drafting. The ordinary, natural meaning of "the property" has at least two meanings under the lease and there is no plain interpretation of "what is" concerning the organisation of clause 14.4.

Absurdity

39 I accept the Landlords' submission that:

> … if clause 14.4 requires the sale of the Landlords' land, it would not address the [defaults] in clauses 14.1 to 14.3. … Clause 14.4 would be a commercial and logical non sequitur in response to such circumstances, leaving them unresolved in the context of a continuing lease.

Same word, same meaning?

40 In a well drafted document the same word should convey the same meaning wherever it is used and that only one word should be used to convey a single meaning.

41 This basic rule is of little assistance to either party because "the property" appears to have been used inconsistently and also, if the Tenant is correct, it has the same meaning as "land".

42 Both parties agree that the lease, or parts of it, are poorly drafted. In this very unusual lease I cannot rely on "the property" to mean the same thing wherever it is encountered.

Defined terms

43 "Premises" is a defined term and means "Freehold comprising the land, buildings and improvements on the common property …". There follows a list of the items, buildings and amenities which are included within the definition of premises.

44 "Premises" is used in the lease frequently and usually appears to be consistent with its definition but it is not clear that this is always so.

45 Clause 2.2.9 provides that the Tenant must not, and must not let anyone else:

> … do anything which might prejudicially affect the essential safety measures or the occupational health and safety or disability discrimination status of the premises or the building.

It would be surprising if the Tenant's obligations concerning occupational health and safety were limited to the common areas.

46 "Land" is also defined and means "Certificates of Title Volume 10846 Folios 273, 274 and 275". It means what the Tenant submits that "the property" means. Somewhat surprisingly, "land" does not appear in the lease at all.

Undefined terms

47 "Building" appears a number of times in the lease but is not defined. The list of items under "Premises" includes a number of buildings.

48 The Tenant submits that the text of the lease uses the words "the Lease" or "this Lease" to mean the leasehold interest. This term is also not defined.

49 I discuss "property" below under Question (b).

ANNUITY?

50 Mr Ribbands likened this potentially very long lease to an annuity. While there are some similarities, there are many differences as well.

51 Contrary to Mr Ribbands' submission for the Tenant, the lease does not contemplate that structural or capital repairs might be undertaken by the Landlords for which they are entitled to reimbursement by the Tenant (example clause 2.5.2). And the Landlords are obliged to use insurance proceeds to reinstate (clause 15.1).

52 I am not satisfied that the analogy adds anything to the debate regarding the rights and obligations of the parties, and I accept Mr Noonan's oral submission that introducing the concept of an annuity is irrelevant.

THE QUESTIONS

Question (a)

Under clause 14.4 in the subject (common property) lease, is the landlord precluded from terminating the lease before or without a sale of the property

53 At the commencement of the preliminary hearing it appeared that the parties agreed the answer to question (a) was a qualified "no", but the Tenant seemed to resile from that position during the hearing. Mr Ribbands

said that the answer to question (a) became "yes" except in circumstances where the Tenant's behaviour was contumelious.

54 The question of whether anyone's behaviour was contumelious was not before me and I accept the submission on behalf of the Landlords that repudiation does not depend on a subjective intention in accordance with *Earney v Australian Property Investment Strategic Pty Ltd* [2010] VSC 621 [77].

55 The qualification expressed in the Tenant's outline of submissions dated 3 April 2017 was:

> No, but where cl 14.4 is engaged termination does not relieve the landlord of the obligation to sell the property.

56 The Landlords' answer was "No" and I accept the Landlords' submission that the question of whether they are obliged to sell the land after, or despite, termination is not one before me.

57 I accept the Landlords' submission that the clauses which would trigger a sale are those which demonstrate the Tenant's incapacity to meet its obligations under the lease. I further accept their submission[3] that:

> … if the lease is to remain on foot, a new Tenant must be found; clauses 14.4, 14.4.1 and 14.4.2 provide a limited, 180 day opportunity to achieve this by offering the Tenant's leasehold property for sale to a new tenant.

58 I also accept the Landlords' submission that under clause 14.4.2:

> … the opportunity to sell "the property" only extends to "a period of 180 days from the date on which one of the events referred to in this clause 14 occurs".

Further, I accept that the Landlords have the ultimate right to choose to bring the sale process to an end and terminate the lease. I find that unless this is so, clauses 14.4.4 14.4.6 and 14.4.8 become meaningless.

59 It was submitted in the Tenant's Outline of Submissions that "a termination of the lease during the 180 day period does not thereby extinguish the tenant's right to receive the balance of the proceeds of sale". There is no evidence before me that if effective, acceptance of the Tenant's repudiation occurred during 180 days from the Tenant's first failure to pay rent (alleged by the Landlords to be in May 2012).

60 Rather, I accept Mr Noonan's oral submission that clause 14.4 provided a limited window to sell the business and the lease while the lease was still alive, as was apparently offered by the Landlords after the defaults commenced but before the injunction was obtained. Mr Noonan also noted that the Tenant has equipment which is peculiar to the site, and which could also be part of "the property".

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3 Paragraph 21 of Respondents' Outline

Conclusion regarding question (a)

61 The answer to question (a) is therefore no.

Question (b)

What is meant by "the property" in clause 14.4 in the subject lease.

62 The Tenant's answer is:

> … the whole of 16-50 Bynan Street, Echuca being land more particularly described [in] Certificates of Title Volume 10846 Folios 273, 274 and 275.

63 The Landlords' answer is the Tenant's property only, being leasehold interests, not the land belonging to the Landlords.

64 In its written submissions the Tenant said that its interpretation "might seem initially startling" but concluded "it is unsurprising therefore in these circumstances that clause 14.4 requires the landlords to sell the [land] and retain sufficient funds to discharge rental arrears."

65 In considering the "circumstances" the Tenant has in mind, at paragraph 28 of the Tenant's submissions there appears:

> In that context, the return on investment is enormous and reflects the risk[s] which are involved, which may involve the failure of the business.

66 The "risks" referred to are that, in the Tenant's submission, the Landlords stood to receive an enormous amount over 99 or 198 years and their only obligation was to provide quiet enjoyment. They had none of the usual obligations of a landlord, such as paying for capital improvements.

67 I am not satisfied that this analysis is of any assistance in interpreting the lease. The Tenant's interpretation remains startling.

68 "Property" is used extensively and often has the meaning the Tenant attributes to it. For example, Clause 13.3 provides:

> The Tenant undertakes that from the fees collected by it from site owners that it shall in addition to payment of the rental, pay all expenses associated with the maintenance for the property including but not limited to Rates, Land Tax, Special Levies, Insurance, Registration or License fees, general property maintenance and upgrades and any works including common property building works, roads, landscaping, electrical, rubbish removal and general works required for the proper conduct and operation of the business. [Underlining added]

69 In this clause there is a clear distinction between "the property", which I interpret to be synonymous with "the land" and "common property" which forms part of "the property".

70 However, this is not always so and I reject the submission for the Tenant[4] that other than clause 14.4 "the property" means the land in every other context. As submitted for the Landlords, in clause 10.2.5 the lease refers to transfer of the Landlords' freehold as "the transfer of the freehold of the premises". I also accept the Landlords' interpretation of clauses 6, 8.1.4 and 14.4.8 where "property" appears to be synonymous with "premises", clause 5.1 where it appears to mean chattels and clauses 2.2.14 and 2.4.2 where there are different meanings for property within the same clause.

71 In clause 14.4.7 it is clear that "the property" does not mean the land. If it did, as submitted for the Landlords, it would be unnecessary for the Tenant to appoint the Landlord as its attorney; the land does not belong to the Tenant. I accept the Landlords' submission that:

> … clause 14.4.7 of the lease contemplates that, under clause 14.4, the Landlord may compel the sale of the Tenant's property, but does not contemplate that the Tenant may similarly compel the sale of the Landlord's property or land.

Conclusion regarding question (b)

72 "Property" in clause 14.4.7 must be consistent with "property" in clause 14.4 as the latter is in aid of the former. I find that "property" in this context is not the same as "land". I find that "property" in the context of clause 14.4 means any property belonging to the Tenant.

SENIOR MEMBER M. LOTHIAN

[4] Outline of Submissions paragraph 24