VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP929/2018

CATCHWORDS

Retail tenancies lease – restaurant premises and related chattels – *Retail Leases Act 2003* sections 7, 8, 9, 10, 39, 41, 52, 93(1), 94 – *Versus (Aus) Pty Ltd v ANH Nominees Pty Ltd* [2015] VSC 515 - + *Business Commissioner: reference for advisory opinion* [2015] VCAT 478 – *Josephine Ung Pty Ltd v Jagjit Associates Pty Ltd* [2017] VCAT 2111 – *Atlantis Investing Pty Ltd v Parni investments Pty Ltd* [2015] VCAT 1926.

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APPLICANT	Jia Wei Cheng
FIRST RESPONDENT	Li Jing Wang
SECOND RESPONDENT	Jackie Yun Cai
WHERE HELD	Melbourne
BEFORE	Deputy President I. Lulham
HEARING TYPE	Hearing
DATE OF HEARING	19 February 2019
DATE OF ORDER	12 April 2019
DATE OF REASONS	12 April 2019
CITATION	Cheng v Wang (Building and Property) [2019] VCAT 496

ORDER

1. As set out in the Reasons, I have made decisions on the liability of the parties respectively to maintain and repair, or to bear the cost of maintenance and repair of, the leased premises and chattels which are the subject of this proceeding. Because the Applicant did not express his claim in the clear terms that a legal practitioner might, in Points of Claim containing a 'prayer for relief', I direct the principal registrar to list a further hearing before me at **9:30am on 30 April 2019** at which the form of the Order can be settled. The principal registrar is directed to allow one hour for this hearing.

2. Costs reserved.

I. Lulham
Deputy President

APPEARANCES:

For Applicant	In person
For Respondents	Mr. S. Wang, legal practitioner

REASONS

The tenant's claim: that the landlords are liable to maintain and repair, or to bear the costs of maintaining and repairing, the leased premises and chattels.

1. The Respondents ("Landlords") own a motel development in Donald, a Victorian regional town. The development was built in the mid-1980s and is typical of motels of its era, comprising a single storey brick building around three sides of a block of land, with a central paved area used for carparking.

2. On one corner of the development is a restaurant, which is leased by the Landlords to the Applicant ("Tenant"). The restaurant is in a separate building to the motel building, but is built in the same style and shares a canopy with the reception area of the motel. Customers of the restaurant have access to two spaces in the car park.

3. The Tenant has run a Chinese restaurant in those premises for around 30 years, leasing the premises, the equipment and appliances which are necessary for a restaurant business. The restaurant premises are retail premises, as defined in section 4 of the *Retail Leases Act 2003*.

4. The Landlords lease the motel premises to another tenant.

5. The Tenant brings this Application to compel the Landlords to bear the cost of certain items of maintenance and repairs to the premises, equipment and appliances, which he has set out in a document entitled "Points of Claim (Revised)" filed in November 2018.

6. The Tenant has not set out his legal arguments in any detail, but I am satisfied that the Landlords are aware of the legal issues. The Landlords have set out their 'defences' in Points of Defence dated 8 October 2018, a Submission dated 16 November 2018[1], and in written "Trial Submissions" dated 19 February 2019 and at the hearing. There is some overlapping and repetition in the defences. The Landlords deny liability not because they dispute that the items 'require work', but on legal grounds.

7. It is necessary to consider the terms of the parties' current lease, sections 39, 41, 52 and 93 of the *Retail Leases Act* which affect the terms relating to liability for the costs of repairs and maintenance, and the question of when the lease was entered into.

[1] This Submission was filed pursuant to paragraph 2 of the Order made on 23 October 2018.

The hearing

8. Two directions hearings were held in the proceeding, in September and October 2018, at which Orders were made for the exchange of a form of 'pleadings' and relevant documents.

9. In the hearing the Tenant represented himself, and the Landlords were represented by a legal practitioner.

10. The parties had exchanged copies of the documents on which they relied. In the hearing they agreed for the record that all of those documents were genuine, and that they were what they purported to be. As a result, hearing time was not taken up with the parties laboriously tendering documents and verifying their authenticity. Whilst the documents were not organised in this way, it was as if the parties had filed an Agreed Book of Documents.

11. Of course, by conceding that their opponent's documents were genuine, the parties were not agreeing with their opponent's interpretation of the documents, and each party made submissions in relation to the issues.

12. The parties acknowledged that they had engaged in a previous proceeding, BP767/2016, and that information evident from that proceeding was relevant to the current proceeding.

13. I asked the Tenant several times, before and after he had given evidence, whether he wished to place any other documents before the Tribunal. The Tenant said that he did not. He was content to rely on the documents exchanged.

14. The Tenant gave evidence in chief. The Landlords, through their legal practitioner, elected not to cross-examine him, and confined themselves to making submissions. Neither Respondent gave evidence. As such, the Tenant's oral evidence was conceded.

The particular items claimed by the Applicant

15. The items of claim are as follows. I use the numbering system in the Points of Claim (Revised):

    A The Landlords must maintain the premises in a condition consistent with their condition when the Tenant's first retail premises lease was entered into some 30 years ago.

B The Landlords purport to rely on Item 22 of the lease, to require the Applicant to pay for repairs as recoverable outgoings. However, as a matter of construction Item 22 does not have that effect, and if it purported to have that effect, section 52 of the *Retail Leases Act 2003* would prevail.

C & 1 The Tenant incurred an expense urgently repairing the boiling water unit, which stopped working on 30 November 2017. This piece of equipment emits instantaneous boiling water, and is necessary for a restaurant. It is not the same as a mere hot water service. The Tenant notes that eventually the Landlords said they would replace the boiling water unit, and the Applicant says this establishes a precedent or concession, with the result that the Landlords must bear the same responsibility in relation to all of the Landlord's Installations.

2 The Landlords must reimburse to the Tenant the cost of a new hot water service, the amount of which is evidenced by invoice number 4542.

3 The Landlords must reimburse to the Tenant the cost of an urgent service of the freezer carried out on 25 October 2018, evidenced by invoice number 14610006327.

4(1) The Landlords must service the dishwasher.

4(2) All the refrigerators, including a display drinks refrigerator, and a freezer are running badly, because they are beyond their useful life.

4(3) An electrical meter board was damaged by fire in September 2016. The Landlords must have the whole meter board checked at their cost.

4(4) The heating elements in the oven no longer work, and are beyond their useful life.

4(5) The amplifier for the music system needs to be serviced.

4(6) The window frames and the exterior door require repainting, having not been painted for 10 years.

4(7) The wood heater, which services one end of the restaurant, has metal components which have melted and this requires repair.

4(8) Steel shelves in the coolroom are rusted and need replacement. In their current rusted condition they do not comply with health regulations.

4(9) The electrical heater in the restaurant needs to be serviced and thoroughly cleaned as it has accumulated dust since the commencement of the tenancy.

4(10) Cracks in the interior wall, and a hole in the ceiling, require repair.

4(11) The plastic covers of the fluorescent tubes in the internal lights in the restaurant are discoloured and brittle, due to age, and require replacement.

4(12) The steel frames of all chairs in the restaurant are broken and need to be repaired. They have deteriorated over at least three years.

The Applicant's oral evidence

16. Much of the Tenant's oral evidence was actually a submission about the lease and the *Retail Leases Act*, and so I deal with those matters elsewhere. Where the Tenant gave evidence as to facts, he said the following:

> Whilst the Tenant said that he had all of the leases that he had executed since the beginning of his tenancy around 30 years ago, the only leases tendered in evidence were dated 17 November 2006, 28 August 2010 and 24 February 2018. That last document was submitted by the Landlords to the Applicant pursuant to an Order of the Tribunal made on 12 September 2017, which was an inordinate delay.
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> As to C & 1, the Tenant spent $200.00 on an urgent temporary repair to the boiling water unit, which stopped working on 30 November 2017, after the Tenant requested an urgent repair which the Landlords ignored. The plumber, and the manufacturer, have both advised that the boiling water unit must be replaced. A Rheem brand unit, with 2 phase power, would be acceptable to the Tenant.
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> As to 2, the Tenant paid for a new hot water service, and the supplier sent him its invoice number 4542.
>
> As to 4(1), the dishwasher has needed servicing for at least eight months.

As to 4(2), all of the refrigerators, including a display drinks refrigerator, and a freezer are running badly, because they are beyond their useful life. They are 35 years old. The Tenant sent an urgent request for repair and the Respondents would not reply. The plumber has advised the Tenant that the cost of repair would be some three times more than the cost of replacing these items.

As to 4(3), an electrical meter board was damaged by fire on 11 September 2016. The Tenant has asked the Landlords to have the whole meter board checked, but the Landlords have not replied.

The Tenant fears that the building could be extensively damaged by fire, and that because the Landlords have ignored his call to check the meter board, the Landlords could find themselves uninsured.

As to 4(4), the heating elements in the oven no longer work, and are beyond their useful life. The Tenant requested a repair on 23 February 2018.

As to 4(5), the amplifier for the music system has not been serviced for three years.

As to 4(6), the window frames and the exterior door require repainting, having not been painted for 10 years. They are unsightly.

As to 4(7), the wood heater, which services one end of the restaurant, has metal components which have melted and this requires repair. The wood heater heats one end of the restaurant.

As to 4(8), steel shelves in the coolroom are rusted and need replacement. In their current rusted condition they do not comply with health regulations. This has developed over the last 10 years. The Tenant has held off the government health inspectors, by telling them that he is taking the landlords to VCAT. The Landlords have argued that there is a distinction between the "coolroom", for which they may be liable, and the "shelves" inside the coolroom.

As to 4(10), cracks in an interior wall, and a hole in the ceiling, require repair. They need filling and repainting.

As to 4(11), the plastic covers of the fluorescent tubes in the internal lights in the restaurant are discoloured and brittle, due to age, and require replacement. These lights are 30 years old. The Tenant has had to use sticky tape to stop them from falling down.

As to 4(12), the steel frames of all chairs in the restaurant are broken and need to be repaired. The Tenant has done temporary repairs.

The Landlords' defences

17. The Landlords argue that as a matter of law, they are not liable for items which have failed or deteriorated as a result of fair wear and tear, and the Tenant's own descriptions of some items – that they are "beyond their useful life" – reveals that many of them have failed for this reason. On this basis of fair wear and tear, the Landlords assert that they are not liable for the Tenant's claims 2, or 4(2), (4), (6), (7), (8), and (11).

18. Similarly, by reference to depreciation schedules published by the Australian Taxation Office, the following items at ages around 30 years, are well beyond their expected 'lifespans' which range from 5 to 10 years: 3, and 4 (1), (4), (5), & (12).[2]

19. Express terms of the current lease dated 24 February 2018, set out in Item 22, impose obligations on the Tenant, which I quote:

> Item 22(i): to keep the heating and air conditioning in working order, and in the event that either of these appliances or systems require replacement the cost of such replacement shall be borne by the Applicant.
>
> Item 22(ii): to keep the landlord's installations in good order and repair and to replace with similar articles of equal value such parts as may be lost, destroyed, become obsolete or worn out.
>
> Item 22(iii): to replace the carpet when the Applicant considers it necessary[3].

20. The obligation to replace chattels described in Items 22(i) – (iii) is distinct from an obligation to repair (which could be affected by section 52 of the *Retail Leases Act*) and would be capital works, enforceable under section 41(2).

21. In relation to items which the Landlords are liable to repair, section 52(2) provides that the Landlords have that liability, but section 39 permits the Landlords to recover those repair costs from the Tenant as outgoings. Item 14 of the Landlords' disclosure statement dated 9 February 2018 discloses that the outgoings for Repairs and Maintenance will be "depending on need".

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[2] Also drink dispensing machines, although these are not claimed by the Applicant.
[3] Carpet is not claimed by the Applicant.

22. Whilst I refer to this case below, I note that in *Small Business Commissioner: reference for advisory opinion*[4] Garde J said that sections 46(2) – (3) imposed a number of requirements on landlords before outgoings can be recovered, and that under section 94 any provision of a retail premises lease or agreement or arrangement between the parties is void to the extent that it is contrary to or inconsistent with any term imported into the lease by the *Retail Leases Act*. His Honour referred to the test of inconsistency set out by the High Court in the *Caltex Oil (Aust) Pty Ltd v Best* [1990] HCA 53, saying:

> [at paragraph 26]: An express statutory prohibition against contracting out renders void or inoperative contractual provisions which are inconsistent with the statute. Inconsistency between contract and statute is not confined to literal conflicts or collisions between the contractual provisions and the statutory provisions. Inconsistency in this context arises where there is a conflict between a contractual provision or the operation of such a provision and the purpose or policy of the statute. So, if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out. The principle that it is not permissible to do indirectly what is prohibited directly …[5] is a more traditional general statement of the same proposition. It has been acknowledged that, in conformity with this principle, the adoption of a circuitous device with a view to avoiding the need to comply with a constitutional requirement will be of no avail…

23. If the Landlords are liable to repair any of the items, despite the above submissions on fair wear and tear, and given the Tenant's obligation to undertake capital works, section 52(2) makes the Landlords responsible for maintaining the premises in a condition consistent with the premises "when the retail premises lease was entered into", which in the circumstances of this case was 24 February 2018 being the commencement date of the current lease. The items claimed by the Tenant all required repair before 24 February 2018, and the Landlords are not obliged to improve any items beyond their condition at that date.

24. Section 7 of the *Retail Leases Act* defines when the retail premises lease is "entered into", and the Respondents submit that by that section's use of the words "under *the* lease or assignment" *(emphasis added)*, section 7 only applies where there is a renewal of the lease by exercising an option for an additional term under an existing lease. That is, it does not apply where the parties elect to enter into a fresh lease as they did on 24 February 2018.

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[4] [2015] VCAT 478 at [59].
[5] Latin phrases omitted.

25. Some of the items claimed by the Tenant arise from misuse by the Tenant. For example, in his descriptions of the issues, the Tenant refers to burning (item 4(3)) and a hole in the ceiling (item 4(10)), that must have been caused by the Tenant.

26. The Landlords had offered to replace the hot water unit, without admission of liability, but the Tenant's own conduct has resulted in the work not taking place. The Tenant would not cooperate with the Landlords' plumber, and when replacement was discussed, the Tenant initially requested a Rheem commercial unit but later changed his demand to a Whelan brand. The Landlords' offer lapsed.

27. Additionally:

    (a) The equipment and appliances which are the subject of the proceeding called "Landlord's Installations" in the lease.

    (b) The equipment and appliances have been in use for over 20 years and have worn out over time. Many cannot be repaired, but only replaced.

    (c) Replacement of installations is capital work, governed by section 41 of the *Retail Leases Act*, whereas repair of installations is governed by section 52.

    (d) Section 41(2) of the *Retail Leases Act* permits a lease to require a tenant to undertake capital works at the tenant's own cost. Items 22(i) – (iii) of the current lease dated 24 February 2018, oblige the Tenant to keep the heating and air conditioning in the premises in working order, and to bear the cost of replacement if they need replacing, and to keep the Landlord's Installations in good order and repair, and to replace them with similar articles of equal value if they become lost destroyed obsolete or worn out. Whilst section 52 of the *Retail Leases Act* makes the obligations to "repair" and "keep in working order" the Landlord's Installations unenforceable, the obligations to "replace …if they become lost destroyed obsolete or worn out" are for the performance of "capital works" and are saved by section 41(2).

    (e) The Landlords contend that as a matter of fact many of the claims by the Tenant relate to items which are "obsolete or worn out".

    (f) A lease may require capital works to be undertaken at various times, and on different triggering events. In the parties' lease, express terms create trigger points where the heating and air conditioning systems require replacement, or where any of the Landlord's Installations become lost destroyed obsolete or worn out, which are events in themselves that are distinguished from a Landlord's Installation

requiring repair. Another trigger point, although one not relevant on the facts of this case, is where the Tenant considers it necessary to replace the carpet.

(g) Whilst the Landlords concede that section 52 imposes obligations on them, they are not liable for fair wear and tear – which is a significant factor in relation to such old chattels. The Landlords here rely on *Versus (Aus) Pty Ltd v ANH Nominees Pty Ltd* [2015] VSC 515 at paragraph 60.

(h) Whilst section 52 imposes on the Landlords an obligation to repair, the Landlords may recover the cost of repairs from the tenant under section 39 of the Act. That section dictates what the provision of a lease under which the landlord may recover outgoings must specify, and items 1.4 and 13.7 of the Landlords' disclosure statement dated 9 February 2018 meets that requirement.

(i) The Landlords' obligation under section 52 is to maintain the premises in a condition consistent with the condition of the premises "when the retail premises lease was entered into", and in the circumstances that was 24 February 2018. That was when the parties entered into a "fresh lease", which is to be distinguished from parties having renewed an earlier lease. Because the lease was entered into on 24 February 2018, the Landlords are not obliged to improve any items beyond their condition as at that date.

(j) The Landlords' obligation under section 52 is to repair, and not to replace. If an item requires replacement, that is a capital cost to be borne by the Tenant.

(k) Some items of damage claimed by the Tenant arise from negligence or misuse, for which the Landlords are not liable: section 52(3).

(l) There are particular facts relating to the claim in respect of the hot water unit. The Landlords had made a reasonable offer which the Tenant rejected. If the Landlords are liable, it is not for anything beyond that offer.

(m) The Landlords are entitled to pass on to the Tenant repair costs other than capital costs and the costs of urgent repairs if they have been specified as recoverable outgoings in the lease.

(n) To the extent that the Tenant seeks reimbursement of the cost of carrying out urgent repairs, the Tenant did not give notice to the Landlords before carrying out the works as required by section 52(4), and as a result the Landlords are not liable.

(o) The Landlords deny, as a matter of fact, some of the particular defects and repair items claimed by the Tenant.

28. I have considered all of the Landlords' arguments in coming to this decision.

The leases

Express terms relevant to the Tenant's claims

29. Whilst I identify below the express terms of the lease which are relevant to the Tenant's claims, I preface doing so by noting that not only must the lease be construed in accordance with normal principles of construction, but also in the context of the *Retail Leases Act*, which makes some terms void and operates to impose some liabilities regardless of the express terms by simply overriding them.

30. The relevant sections of the *Retail Leases Act* are:

> **Section 93(1)**, which says that "A provision in a retail premises lease is void to the extent that it purports to indemnify, or require the tenant to indemnify, the landlord against any … liability … for or to which the landlord would otherwise be liable or subject". This section can make void express terms which provide, for example, that the Respondents must pay certain expenses but are entitled to reimbursement from the Applicant.
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> **Section 94**, which says that "A provision of 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)".
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> **Section 52**, which is headed "Landlord's liability for repairs" and provides that a retail premises lease is taken to provide the things set out in subsections (2) – (5). Of most relevance to this case is section 52(2) which provides that the landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into various things including the structure of the retail premises, plant and equipment at the retail premises and certain types of appliances provided under the lease by the landlord.
>
> Section 52 can override and in effect make void express terms which provide, for example, that the Tenant must maintain the premises.

There is a Note at the end of section 52 which says "Section 39 regulates the ability of the landlord to recover outgoings including the cost of repairs. Section 41 provides that capital costs are not recoverable from a tenant". Section 36(3) of the *Interpretation of Legislation Act 1984* provides that such a Note is not to be taken to form part of the Act.

Section 52 has been considered in a number of cases. In *Small Business Commissioner: reference for advisory opinion*[6] Garde J, sitting as President of the Tribunal, gave an advisory opinion about whether the landlord could enforce a term of a retail premises lease which stipulated that the tenant was obliged to provide or maintain the leased property's essential safety measures.

His Honour said[7] that the effect of the Note at the end of section 52 "is to highlight other provisions in the Act which, together with the application of section 52, clarify that while the landlord is responsible to arrange and carry out the repairs under sub-section (2), the cost of those repairs, other than capital costs and the cost of urgent repairs, may be passed on to the tenant if they have been specified in the lease as recoverable outgoings under the lease. … A statutory provision placing the responsibility for maintaining the condition of the structure, fixtures, plant and equipment, appliances, fittings and fixtures relating to utilities and other services on the landlord has a clear purpose and policy – namely that Parliament expects and requires the landlord to meet this responsibility. Applying the *Caltex Oil* test of inconsistency, any contractual provision that is inconsistent with the purpose or policy underlying the statutory provision is inconsistent, and therefore void to the extent of the inconsistency".

His Honour said that the landlord is not able to require the tenant to provide or maintain those measures where section 52(2) of the *Retail Leases Act* applied and the landlord was responsible for providing or maintaining the safety measures in order to maintain the retail premises in a condition consistent with the condition of the premises when the retail premises lease was entered into[8], but that the landlord could require the tenant to provide and maintain those measures if section 52(2) of the *Retail Leases Act* did not apply and if the costs were not a capital cost within the meaning of section 41.

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[6] [2015] VCAT 478. The Commissioner may seek an advisory opinion under section 11A of the *Small Business Commissioner Act 2003*.
[7] [2015] VCAT 478 at [71] & [72].
[8] [2015] VCAT 478 at [2].

In *Josephine Ung Pty Ltd v Jagjjit Associates Pty Ltd* [9], the Tribunal said that section 52(2) imposes on a landlord, rather than a tenant, the obligation to maintain the structure and the fittings in the premises, as well as the plant and equipment and appliances fittings and fixtures provided by the landlord under the lease. The issue arose in the context of a rental determination made by a valuer pursuant to the parties' lease, the landlord (Ung) arguing that the determination was vitiated by error because the valuer had misinterpreted the lease by failing to have regard to section 52(2). The Tribunal accepted the landlord's argument.

Section 39(1) provides that "The tenant under a retail premises lease is not liable to pay an amount in respect of outgoings except in accordance with provisions of the lease that specify – (a) the outgoings that are to be regarded as recoverable;…". The section does not commence like s52, with a statement that a lease is "taken to provide" certain things. Instead, it requires the lease to specify the outgoings that might be recoverable from the tenant – meaning that expenses which are not specified in the lease are not recoverable.

Section 39(2) provides that regulations may prescribe the manner in which the amount of outgoings may be determined and apportioned to a tenant, but when one reads regulation 9 of the *Retail Leases Regulations 2013* you see that they do not limit the amount or portion of the outgoings that might be recoverable. The Regulation simply says the proportion should be expressed as a fraction, but as that would include for example "3/3" or "10/10" it is clear that the tenant could be required, in a lease, to bear the whole of the specified outgoing.

I am not convinced that the Note at the end of section 52 summarises the effect of section 39, and having regard to section 36(3) of the *Interpretation of Legislation Act 1984* I cannot see that it deems the cost of repairs to be an outgoing. Further, as section 39 does not commence with a statement that a lease is "taken to provide" certain things, I must conclude that under the parties' lease only the express terms of that lease dictate the Respondents' entitlement to recover outgoings.

Sections 41(1)(a) & (d) provide that – subject to sub-section (2) – a provision in a retail premises lease is void to the extent that it requires the tenant to pay an amount in respect of the capital costs of the building in which the retail premises are located; or plant in that building. **Section 42(2)** says how sub-section 42(1) is to be construed, saying that it "does not operate to render void a provision in a retail

[9] [2017] VCAT 2111 at [79].

premises lease requiring the tenant to undertake capital works at the tenant's own cost". That is, section 42 is not structured like section 52, commencing with a statement that a lease is "taken to provide" that the tenant is not to pay an amount in respect of certain capital costs. I must conclude that under the parties' lease only the express terms of that lease can dictate the Applicant's liability to pay for or to perform capital works.

I note here that the Landlords' submission is that if an appliance, such as a water heater or wok burner, is replaced rather than repaired, that this is a "capital" expense which the Landlords are entitled to recover from the Tenant. The submission does not sit well with section 41, though, which speaks of the capital costs of the "building" and "plant", and a tenant undertaking "capital works". In *Atlantis Investing Pty Ltd v Parni Investments Pty Ltd*[10] the Applicant tenant claimed reimbursement from the Respondent landlord for the costs of repairing an air-conditioning unit. The Tenant argued that this cost was of "capital works" which it could not be required to bear, because of section 41(1). The Tribunal held section 41(1) was inapplicable, saying that the repairs were not "capital works", because they did not "increase the equity in the equipment but rather, [made] good a fault … to render it operational again. By contrast, a capital cost is a one-time expense incurred in the purchase or upgrading of equipment, rather than components of that equipment which have fallen into disrepair". The Tribunal went on to say[11] that section 52(4) & (5) obliged the landlord to reimburse the tenant these costs. On a separate expense, of upgrading some undersized gas pipes, the Tribunal held[12] that replacing undersized pipes – which was claimed by the landlord as an outgoing reimbursable by the tenant – was not maintenance of existing plant and equipment, but upgrading of plant and equipment, which ultimately benefits the landlord on reversion of the leasehold and was thus a capital expense which the tenant could not be required to bear.

31. I set out the relevant sections of the current lease between the parties, which was prepared by the Landlords' legal practitioners. The Tenant did not engage a legal practitioner in relation to the preparation, perusal or execution of the 2018 lease.

32. Where I quote provisions from the lease, words in (round brackets) appear that way in the document itself, and words in [square brackets] signify my editing.

[10] [2015] VCAT 1926 at [12].
[11] [2015] VCAT 1926 at [14].
[12] [2015] VCAT 1926 at [72].

33. The 2018 lease is set out in a copyright Law Institute document[13] and is designed to contain Conditions, and a Schedule containing particulars of the transaction and – commencing at Item 22 of the Schedule – special conditions. At the foot of the title page a paragraph commencing "Important Notice to the Person Preparing This Lease" urges the legal practitioner using the document to "carefully check the whole document and make appropriate deletions, alterations, and/or additions so it agrees with the instructions you have received. Pay particular attention to clauses 2, 3, 6, 11, 15, and 17 and to the completion of items in the schedule" and to "record any deletions, alterations, and/or additions in schedule item 22".

34. The executed lease contains Conditions numbered 1 – 20 and a Schedule of 7 pages which contain Items that refer back to Conditions identified by their number. Clause 1.2 of the Conditions says that the lease "must be interpreted so that it complies with all laws applicable in Victoria. If any provision of this lease does not comply with any law, then the provision must be read down so as to give it as much effect as possible. If it is not possible to give the provision any effect at all, then it must be severed from the rest of the lease".

35. The central concept that the Landlords are leasing the restaurant to the Applicant does not appear until clause 6.1 of the Conditions, which simply says "the Landlord must give the Tenant quiet possession of the premises … as long as the Tenant does what it must under this lease".

36. As with many standard form contracts, words which have defined meanings are denoted by commencing with a capital letter. Definitions appear in clause 1 of the Conditions, and the leased "Premises" are defined as "The Land and Buildings described in Item 4 and the Landlord's Installations within the Premises". Item 4 of the Schedule says "Premises The Restaurant at the corner of – and – Streets, Donald along with the right of exit and entry thereto"[14]. "Landlord's installations" are listed in item 5 of the Schedule as "Dishwasher, tables, chairs, crockery and cutlery, stoves, fridges and freezer, stereo, coolroom and sundry equipment including pots and pans" which seems to include all of the chattels which could be used in a restaurant other than consumables and containers for take-away food. That point is reinforced by item 7 of the Schedule which leaves room for the listing of Tenant's Installations, being left blank.

37. In clause 1, "Building" is defined as "any building which includes the Premises".

[13] "Lease of Real Estate. Copyright. Law Institute of Victoria. May 2003 Revision".
[14] Obviously the "right of exit and entry" cannot be part of the leased Premises and these words are merely descriptive.

38. Clause 2 sets out Tenant's Obligations. Clause 2.1.2 says "The Tenant must pay when due the outgoings listed in item 10", and item 10 says: "Outgoings which the Tenant must pay or reimburse Council and water authority rates and levies All municipal, water and sewerage rates". The word "outgoings" in clause 2.1.2 does not commence with a capital letter, and there is no definition of that word in clause 1. Clause 2.1.9 says when the outgoings are to be paid. Whilst 'outgoings' is defined in section 3 of the *Retail Leases Act* as "a landlord's outgoings on account of" types of expense beyond rates and taxes, clause 2.1.2 and Item 10 provide that the Applicant is to pay a narrower type of outgoings. Without labouring the point, clause 2.1.2 and Item 10 do not say that the cost of repairs, maintenance, replacement of appliances or the like are 'outgoings': they only identify the above rates and taxes.

39. Clause 2.1.5 says "The Tenant must pay when due the expenses of operating, maintaining and repairing any heating, cooling or air conditioning equipment exclusively serving the Premises but excluding expenses of a capital nature".

40. Clause 3 is headed "Repairs and Maintenance", and a 'note' on the heading draws the parties' attention to the "Important Notice to the Person Preparing This Lease" on the title page of the lease.

41. Clause 3.1 says "In this clause, if this lease is a renewal under an option in an earlier lease (whether or not the renewal is, or an earlier renewal was, on terms substantially different to those of the option), 'start of the lease' means the starting date of the first lease to contain an option for renewal".

42. Clause 3.2 says "Except for fair wear and tear and subject to clause 3.4, the Tenant must keep the Premises in the same condition as at the start of the lease and properly, repaired and maintained". As I said above, "Premises" is defined as including the Landlord's Installations as well as the Buildings. Clause 7.4 says that breach by the Tenant of this clause "is a breach of an essential term and constitutes repudiation", but clause 7.5 says that a party must give the other a written notice of breach on a period of 14 days in which to remedy the breach before terminating the lease for repudiation.

43. Clause 3.3 says that in addition to the tenant's obligations under clause 3.2, "The Tenant must … 3.3.4 immediately repair defective … lights,… and replace missing light-globes and fluorescent tubes …. [and] 3.3.5 maintain in working order all … electric … installations and control apparatus".

44. Clause 3.4 says "The Tenant is not obliged … 3.4.2 to carry out structural repairs or make payments of a capital nature" unless the need for them was caused by the Tenant.

45. Clause 6.4 says "The Landlord must keep the structure (including the external faces and roof) of the Building in a sound and watertight condition, but, subject to section 52 of the [Retail Leases] Act (if the [Retail Leases] Act applies), is not responsible for repairs which are the responsibility of the Tenant under clause 3.4.2" – that is, structural repairs necessitated by the tenant.

46. Clause 6.5 says "If the [Retail Leases] Act applies, the Landlord must perform the obligations imposed on it by section 52 of the [Retail Leases] Act". The clause is somewhat otiose because it just seeks to require, contractually, the Respondents to comply with an obligation under legislation.

47. Clause 19 says that any additional provisions are to be set out in Items 22 to 35 of the Schedule.

48. Clause 20 is entitled "If Premises Only Part of Building" and clause 20.4 appears to be relevant. I say "appears" because the heading seems to be intended to mean "If the Premises are only part of the Building", so that they would describe – for example – one Lot in a building affected by an owners corporation. The restaurant building is separate from the motel building in the development, but it shares a canopy with the reception area of the motel, thus joining the buildings together, and the Tenant has the right to some carparking spaces. Further, the whole development is owned by the Landlords and there is no separate title or owners corporation. "Building" is defined in clause 1 as "any building which includes the Premises". I am satisfied then that the Tenant's leased premises fall within clause 20.

49. Clause 20.4 says "The … Landlord's Installations remain under the absolute control of the Landlord which may manage them and regulate their use as it considers appropriate. … If the [Retail Leases] Act applies, these rights may only be exercised in a manner and to the extent consistent with the [Retail Leases] Act".

50. I have noted above that the word "outgoings" in clause 2.1.2 does not commence with a capital letter, and there is no definition of that word in clause 1. Clause 20.7 uses the expression "Building Outgoings" – which is also not defined – but clause 20.7.2 provides that the Tenant must pay or reimburse the Landlord "the proportion specified in item 10", and as I have shown, the effect of that item is that the tenant pays all (ie a 'proportion' of 100%) only of "Council and water authority rates and levies All municipal, water and sewerage rates". I construe clause 20.7 to do no more than clause 2.1.2, and not to impose any additional obligation on the Tenant.

51. Item 22 of the Schedule contains three relevant provisions, which I quoted in paragraph 19.

For the purposes of the Tenant's claim for maintenance and repair, "the retail premises lease was entered into" on 18 July 2010

52. Clause 3.1 says "In this clause, if this lease is a renewal under an option in an earlier lease (whether or not the renewal is, or an earlier renewal was, on terms substantially different to those of the option), 'start of the lease' means the starting date of the first lease to contain an option for renewal".

53. The Landlords submit that because the 2018 lease is a new lease, the parties' obligations to maintain and repair relate to the condition of the Premises on 24 February 2018, being the commencement date of that lease. This submission is incorrect on the face of the document, though, because item 8 shows that the Term of the 2018 lease began on 18 July 2015. If there was any merit in the principle underlying the Landlords' submission, the relevant date to fix the condition of the Premises would be 18 July 2015.

54. However, the Landlords' submission ignores clause 3.1. On the agreed facts presented by the parties, the starting date of the first lease to contain an option for renewal was 18 July 2010, for the following reasons.

55. It is common ground between the parties that:

    (a) the Tenant has leased the premises for around 30 years, from say 1989;

    (b) the Landlords purchased the development in around 2001, and took an assignment of the lease which was then on foot from the vendor of the development, and the Landlords have been the Tenant's landlords ever since. [Neither the lease extant in 2001 nor the transfer were tendered];

    (c) in addition to the lease extant in 2001, the Tenant and the Landlords have been parties to lease documents dated:

        (i) 17 November 2006, which provided for a term of 5 years commencing 18 July 2005 ("the 2006 lease");

        (ii) 28 August 2010, for a term of 5 years commencing 18 July 2010 and with options to renew for four further terms of 5 years ("the 2010 lease"); and

        (iii) 24 February 2018, for a term of 5 years commencing 18 July 2015, with options to renew for three further terms of 5 years ('the 2018 lease").

56. Clearly, the last three leases were executed well after the commencement of their terms. Whilst the Tenant has always remained in possession of the restaurant, the parties have often been in dispute. I was told that the 2006 lease was executed after a mediation in a VCAT proceeding which the Landlords had issued in respect of alleged harassment by the Tenant of the motel operator. Neither the 2006 lease nor any documents from that proceeding were tendered.

57. There are some VCAT Orders in proceeding BP767/2016, relevant to renewal of the 2010 lease, which would be inconsistent if they were read literally. BP767/2016 was commenced by the Applicant in June 2016. He sought to compel the Landlords "to prepare the *renewal* (of) lease pursuant to section 26 of the *Retail Leases Act 2003*" *(emphasis added)*. At a hearing on 1 September 2016 the Tribunal ordered:

    1. I declare that the lease, the subject of the dispute, pursuant to clause 12.1 of the lease, *has been renewed* for a *further* period of five years commencing on the day after the earlier lease period ends, namely, 19 July 2015. *(emphasis added)*

58. In that Order, "the lease the subject of the dispute" was the 2010 lease. The Order declares it to have been renewed.

59. Section 9(1) of the *Retail Leases Act* defines the renewal of a retail premises lease to mean renewal under an option for a further term, or under an agreement to renew the lease on substantially the same terms and conditions for a further term[15].

60. There was no agreement to renew, and so the Tribunal's Order and declaration of 1 September 2016 must refer to renewal under an option in the 2010 lease.

61. On 12 September 2017, the Tribunal made Orders in proceeding BP767/2016 about several issues including the assessment of rent, and the Orders included:

    1. By 2 October 2017, the Landlords must prepare and serve on the Tenant a *fresh lease* of the demised premises, which must set the rental payable thereunder in accordance with order 1 of the Orders dated 31 March 2017. *(emphasis added)*

62. Read literally, the declaration that the 2010 lease "has been renewed" is inconsistent with the subsequent Order requiring service of "a fresh lease".

[15] In effect, section 9(2) provides that if there is a break in possession, the resumption in possession is taken to be the entering into of a new lease. In this case, though, the Applicant remained in possession.

63. However, I conclude that the Order of 1 September 2016 prevails over the Order of 12 September 2017, and that the latter merely required the Landlords to take the mechanical step of preparing a new document to evidence the renewed lease. I reach that conclusion because:

    (a) neither party appealed against the Order of 1 September 2016, and

    (b) the Order of 12 September 2017 required the document to set out the rent referred to in the Order of 1 September 2016, which applied to the 2010 lease.

64. I am satisfied that for the purposes of the Tenant's claim for maintenance and repair, "the retail premises lease was entered into" on 18 July 2010, being the commencement of the term of the 2010 lease.

65. This issue was discussed in *Versus (Aus) Pty Ltd v ANH Nominees Pty Ltd* [2015] VSC 515. In that case, ANH was the landlord of a shop[16] and Versus became the tenant in 2006 by taking a transfer by novation from the original tenant.

66. Versus complained that the premises had dampness in a wall and defects in the plumbing. Despite suffering some flooding in the premises, in 2010 Versus advised ANH's agent that it was exercising its option to renew the lease for a further term of five years. Subsequently Versus had to vacate the premises, to accommodate ANH's repair of the premises, and later because dangerous mould developed which made the premises unsafe for occupation. By March 2013 the mould had not been fully remediated and Versus took that as repudiation of the lease by ANH, which Versus accepted bringing the lease to an end.[17] Versus sued for damages, including loss of profits caused by the inability to operate the retail business when it could not occupy the premises. In VCAT proceedings (from which the appeal emanated), the Tribunal rejected Versus' characterisation of events and held that the parties had mutually abandoned the lease.

67. Section 7 of the *Retail Leases Act* provides that a retail premises lease is entered into when the first of three things occur: under the lease, the tenant enters into possession with the consent of the landlord; under the lease, the tenant begins to pay rent for the premises; or the lease or assignment is signed by all parties.

68. In a broad ranging judgment in the appeal, Croft J discussed the date "the retail premises lease was entered into", from paragraphs 49 to 66. His Honour said:

[16] [2015] VSC 515, paragraph 15.
[17] [2015] VSC 515, paragraph 31.

Section 52(1) says "A retail premises lease is taken to provide as set out in this section", with the effect that the subsequent subsections are imposed as lease terms or covenants in retail leases. The subsections become terms of the lease.

By providing that the Act prevails over retail premises leases, section 94 prevents any contracting out of or modification of the provisions or effect of subsections of section 52.

Section 52(2) imposes a "keep in repair" covenant, making the landlord responsible for maintaining the leased premises, structure, fixtures, plant and equipment in a condition consistent with their condition when the retail premises lease was entered into.

The combined effect of sections 7(c) and 52 is to make the landlord liable for damage to the premises that occurs after the execution of the lease and before the commencement of the term.

The condition of the premises by reference to which section 52 operates during a renewed term is not necessarily the condition at the commencement of the renewed term.

Where obligations under section 52, for which a landlord is responsible, arise during the original term, the landlord may become liable for loss suffered during the renewed term. His Honour said at paragraph 59:

> "Liability may arise directly by the operation of section 52 on the renewed lease. This follows because:
>
> (1) The landlord will not be heard to contend that the condition of the premises is the condition when the renewed lease was entered into, if that condition is due to the landlord's failure to fulfil the covenant imported by section 52 into the original lease. Putting it another way, when section 52 refers to the condition of the premises when the lease was entered into *it is to be taken, in the case of a renewed lease, to be referring to the condition in which the landlord has been responsible for maintaining them. (emphasis added)*
>
> (2) … The original lease – which by section 52 obliged the landlord to maintain the premises in a condition consistent with their condition when the original lease was entered into – constituted a prior agreement as to the condition

> which the landlord was to keep the premises. That agreement sets the condition, consistent with which section 52 then obliges the landlord to maintain the premises during the renewed term".

At paragraph 60 His Honour dismissed the suggestion that Parliament could not have intended the landlord to remain responsible for maintaining retail premises in a condition consistent with their condition at the commencement of the original lease, where that lease may provide for multiple terms extending over many years.

69. Applying His Honour's reasoning, the Respondents are liable to the Applicant for damage to the premises that occurred after the retail premises lease was entered into. As on the agreed facts the first lease to contain an option for renewal was the 2010 lease, dated 28 August 2010, for a term of 5 years commencing 18 July 2010, for the purposes of the Applicant's claim for maintenance and repair, "the retail premises lease was entered into" on 18 July 2010.

Conclusions on the Tenant's claims

70. Construed in accordance with the *Retail Leases Act*, the express terms of the lease lead to the following conclusions:

C & 1 Because the boiling water unit stopped working on 30 November 2017, I must conclude that it was working before 30 November 2017. It is one of the Landlord's Installations. It is not an item within clause 2.1.5 because it is not an item of "heating equipment". Construed using the ordinary principles of *ejusdem generis*, "heating, cooling or air conditioning equipment" in clause 2.1.5 refers to things which heat or cool the premises for the comfort of the occupants, not water.

If the boiling water unit failed because of fair wear and tear, clause 3.2 – read literally – would relieve the Applicant from the obligation to maintain it and thus from bearing the costs of repairing it. Section 52 of the *Retail Leases Act* deems the lease to provide that the Landlords are responsible for maintaining the premises including the Landlord's Installations. Additionally, clause 6.5, by reference to section 52 of the *Retail Leases Act*, also obliges the Landlords to maintain in a condition consistent with its condition on 18 July 2010, the boiling water unit.

Section 52(b) requires the Landlords to maintain in a condition consistent with its condition on 18 July 2010 "plant and equipment at the retail premises", which obviously includes the boiling water unit.

Item 22(ii) of the lease does not assist the Landlords. It is inconsistent with section 52(2)(c) and therefore is made void by section 94(1). To the extent the Landlords say that the cost of replacing a boiling water unit should be borne by the Tenant under section 41 – even though they had agreed to replace it themselves –, I reject that submission the this expense is "capital works".

The Landlords are liable for this expense.

2 The hot water service is one of the Landlord's Installations. It has been replaced rather than repaired. For the same reasons as item C & 1, the Landlords are liable for this expense.

3 The freezer is one of the Landlord's Installations. Clause 6.5, by reference to section 52 of the *Retail Leases Act*, obliges the Landlords to maintain the freezer in a condition consistent with its condition on 18 July 2010. Accordingly, the Landlords must reimburse to the Tenant the cost of the urgent service of the freezer on 25 October 2018, evidenced by invoice number 14610006327.

4(1) The dishwasher is one of the Landlord's Installations. Clause 6.5, by reference to section 52 of the *Retail Leases Act*, obliges the Landlords to maintain the dishwasher in a condition consistent with its condition on 18 July 2010. The Landlords must engage an appropriate trades person to service the dishwasher, at their expense.

4(2) The refrigerators, display drinks refrigerator, and freezer are beyond their useful lives, and so require replacement. They are Landlord's Installations. Clause 6.5, by reference to section 52 of the *Retail Leases Act*, obliges the Landlords to maintain them in a condition consistent with their condition on 18 July 2010. Item 22(ii) is inconsistent with section 52(2)(c) and therefore is made void by section 94(1). To the extent the Landlords say that the cost of replacing these appliances should be borne by the Tenant under section 41(2), I reject that submission that this expense would be "capital works" in a relevant building. I am satisfied that if it is a capital cost, it would be a capital cost of "plant" which is not recoverable by the Respondents because of section 41(1)(d). The Respondents must replace these items at their expense.

4(3) Under clause 3.3.5, the Tenant must bear the expense of having the electrical meter board checked and if appropriate repaired or replaced. But because of sections 94(1) and 52(2), that clause is void and therefore the Landlords must bear this expense.

4(4) The heating elements in the oven no longer work, and are beyond their useful life. Item 22(ii) purports to oblige the Tenant to repair or replace these "parts", but the clause is inconsistent with section 52(2)(c) and therefore made void by section 94(1).

4(5) The amplifier for the music system needs to be serviced. The amplifier is one of the Landlord's Installations. Clause 6.5, by reference to section 52 of the *Retail Leases Act*, obliges the Landlords to maintain the amplifier in a condition consistent with its condition on 18 July 2010. The amplifier is not a "part" covered by item 22(ii), and so the Landlords would not be assisted by it even if that Item was not void. The Landlords must engage an appropriate contractor to service the amplifier, at their expense. On a practical level, it is well-known that sound equipment today is much cheaper than in the past and, as technology has changed, that it can be cheaper to replace than to service an item. If the Landlords concluded that it would be cheaper for them to replace the amplifier than to service it, one would expect the Tenant to agree to them doing so.

4(6) Under clause 6.4 the Landlords must keep the external faces of the restaurant sound, and clause 3.4.2 does not oblige the Tenant to do so. The Landlords must repaint the window frames and the exterior door.

4(7) The wood heater, which services one end of the restaurant, has metal components which have melted and this requires repair. The wood heater is a piece of equipment within the meaning used in section 52(2)(b) of the *Retail Leases Act* , and so Item 22(ii) is made void and therefore does not oblige the Tenant to repair or replace these "parts". The Landlords must do so.

4(8) Steel shelves in the coolroom are rusted and need replacement. On the evidence presented, I do not consider shelves to be "parts". I consider them to be integral to the coolroom, and unable to be distinguished from the coolroom. On the basis of this factual conclusion clause 6.5, by reference to section 52 of the *Retail Leases Act*, obliges the Landlords to maintain the coolroom in its entirety in a condition consistent with its condition on 18 July 2010. The Landlords must engage an appropriate trades person to carry out necessary work, at their expense.

4(9) The electrical heater in the restaurant needs to be serviced and thoroughly cleaned. Clause 6.5, by reference to section 52 of the *Retail Leases Act*, obliges the Landlords to maintain the electrical heater in the restaurant in a condition consistent with its condition on

18 July 2010, at their expense. There is no distinction between 'servicing and cleaning' the heater, which might fall within the words of Item 22 (i), and 'maintaining' the heater, which the Landlords must do because of section 52(2).

4(10) Cracks in the interior wall, and a hole in the ceiling, require repair. There is no express term of the lease requiring either party to repaint the interior periodically. Whilst it is an agreed fact that the cracks and the hole exist, there is no evidence as to their extent. If the cracks and the hole are small, they would be attended to in the course of repainting. On the evidence presented I cannot conclude that they are major, structural cracks because the Tenant continues to run the restaurant business and he has not described the cracks and the hole in those sorts of terms. In my view the cracks and the hole do not fall within clause 6.5 and section 52 of the *Retail Leases Act*, but instead fall within clause 3.2 and so are the responsibility of the Applicant.

4(11) The plastic covers of the fluorescent tubes in the internal lights in the restaurant are discoloured and brittle, due to age, and require replacement. The Tenant's description of these items shows that they do not fall within clause 3.3.4 – "repair defective … lights, … and replace missing light-globes and fluorescent tubes" – because the covers are not light globes or tubes and so are the responsibility of the Landlords.

4(12) The steel frames of all chairs in the restaurant are broken and need to be repaired. Clause 6.5, by reference to section 52(2)(b) of the *Retail Leases Act*, obliges the Landlords to maintain the chairs in a condition consistent with their condition on 18 July 2010. It is of considerable concern to the Tribunal that these parties would allow members of the public to use faulty chairs in a restaurant whilst they disagree over which of them should fix them. Surely the parties should appreciate their duty of care to persons who enter the restaurant, and the potential for a member of the public to be injured if a chair was to collapse. The Landlords must maintain the chairs and it is in the public interest that they do so promptly.

I Lulham
Deputy President

12 April 2019