VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP871/2016

CATCHWORDS

LANDLORD AND TENANT – whether agreement between the parties is a licence to occupy or a tenancy; relevant factors to consider – whether the payment of outgoings under the agreement between the parties includes water usage or is confined to the payment of water rates.

APPLICANT	NZH Pty Ltd (ACN 138 327 134)
RESPONDENT	Mintvale Pty Ltd (ACN 006 285 936)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	In Chambers
DATE OF WRITTEN SUBMISSIONS	3 February 2017
DATE OF ORDER	10 February 2017
CITATION	NZH Pty Ltd v Mintvale Pty Ltd (Building and Property) [2017] VCAT 197

ORDER

1. I find and declare that the agreement between the parties, the subject of this proceeding, requires the Applicant to pay for water usage.
2. Costs reserved.
3. Liberty to apply.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	On the papers.
For the Respondents	On the papers.

REASONS

1. The Applicant occupies premises located within the Box Hill tram terminus precinct, from which it operates a restaurant and takeaway business ('the Premises'). It occupies the Premises pursuant to an agreement with the Respondent entitled *Sub-Licence Agreement* ('the Agreement'), which provides for a fixed term of occupancy commencing on 19 September 2009 for a period of five years with one further term of five years.

2. On 10 December 2014, the parties entered into a further agreement which varied the terms of the Agreement. The variation agreement increased the amount payable under the Agreement, made provision for a market review of the amount payable under the Agreement and provided two further options to renew the Agreement.

3. The Premises are owned or managed by Metrolink Victoria Pty Ltd, trading as Yarra Trams. According to the Respondent, it is the licensee of the Premises and was authorised under its licence agreement with Yarra Trams to sub-licence the Premises to the Applicant.

4. The parties have fallen into dispute in relation to the obligation to pay for water usage. According to the Applicant, the terms of the Agreement provide that the monthly amount payable thereunder includes all outgoings, which include rates, insurances and water usage. According to the Respondent, the monthly payment due under the Agreement only includes outgoings such as rates, insurance, levies, taxes, et cetera but does not include water usage. The dispute as to who is responsible to pay for water usage arose after the Respondent received an invoice from Yarra Trams in late December 2015, in which it demanded payment for water usage charges. Those water usage charges now total in excess of $21,000.

5. By consent, I ordered that the question as to who was responsible to pay for water usage was to be determined as a discrete question and solely by reference to written material filed in the proceeding. On 13 January 2017, the Tribunal expanded its enquiry to also include determining whether the Agreement constitutes a retail premises lease or alternatively, a mere licence to occupy.

WHO IS RESPONSIBLE TO PAY FOR WATER USAGE?

6. Clause 3.1 of the Agreement states:

> The Sub-Licensee will:
>
> 3.1) Pay the Sub-Licence Fee as set out in the Particulars on the first day of each month with a proportionate part for any payment calculated on a daily basis. The first payment of the Sub-Licence Fee will commence immediately after the Sub-

> Licence Fee Free Period as set out in the Particulars. The Sub-Licence Fee includes all outgoings relating to the Premises, including but not limited to Council rates, levies, assessment, taxes, cost of maintaining and repairing the Premises or the Sub-Licensor's Equipment, insurance premiums and charges. [Underlining added]

The Respondent's submission

7. The Respondent submitted that the Agreement is a commercial document between two commercial entities and is required to be construed in order to give the document business efficacy. Reference was made to the judgment of the High Court of Australia in *Electricity Corporation v Woodside Electricity*,[1] where the joint judgment of French CJ, Hayne, Crennan and Kiefel JJ stated:

> The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or object to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties … intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience.[2]

8. The Respondent contends that the words in Clause 3.1 of the Agreement do not refer to water usage. It contends that to interpret the document as requiring the Respondent to pay for water usage would make no commercial sense, particularly having regard to the volume of water used by the Applicant. The Respondent argued that the reference to water rates in Clause 3.1 is a reference to charges relating to the Premises, which is to be distinguished from water usage, which relates to the use of the Premises.

The Applicant's submission

9. By contrast, the Applicant contends that water usage is an outgoing. It argues that it constitutes a 'standard expense', which is exemplified by the fact that it is mentioned in the prescribed form of disclosure statements for the leasing of all retail premises under the *Retail Leases*

[1] (2014) 251 CLR 640.
[2] Ibid at 656-7.

Regulations 2013. Clause 13 of that prescribed form of disclosure statement lists *Outgoings estimates (annual)* for a 12 month period. Under sub-clause 13.8 of that document, provision is made for engrossing the approximate cost of *Utility services*, which are stated to include *electricity, gas, oil* and *water*.

10. In my view, reference to the prescribed form of a disclosure statement is of limited assistance in construing the terms of the Agreement. The prescribed form of the disclosure statement does not define water usage to be an outgoing, as the word *usage* has not been adopted. Indeed, it would be extremely difficult for a landlord to forecast what amount will ultimately be payable in respect of usage, when it has no control over how much water will ultimately be used by the tenant. In my view, sub-clause 13.8 of the prescribed form of disclosure statement relates to the cost of providing the services of electricity, gas, oil and water, rather than the cost of consuming those products.

11. The Applicant further submits that the Respondent has not made a single demand for payment of the water usage since 2009 until the present. Consequently, it argues that there is no established practice between the parties, or facts which could give rise to any inference that the parties had agreed that the Applicant would be liable for water usage. Again, the parties' conduct following the making of the Agreement does not assist in construing the terms of that Agreement.

Final analysis

12. In my view, Clause 3.1 of the Agreement does not include water usage. I do not consider that water used by the Applicant in the course of its business falls within the reference to outgoings mentioned in that clause. I have formed this view based on a number of factors.

13. First, Clause 3.1 makes specific reference to water rates but does not mention water usage. Applying the maxim *expression unius est exclusion alterius*, leads to an inference that water usage, as opposed to water rates, was deliberately omitted from the clause. In forming that view, I am mindful that this canon of construction is not a rule of law and certainly not determinative of the question – as observed by Toohey and Gummow JJ in *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service*:[3]

> … the maxim must always be applied with care, for it is not of universal application and applies only where the intention it expresses is discoverable upon the face of the document.[4]

14. Second, I accept the submission advanced by the Respondent that consideration should be given to construing the agreement so as to avoid a construction which makes commercial nonsense. In that sense, I accept

[3] (1995) 184 CLR 301.
[4] Ibid at 320.

that some weight should be given to the fact that, from a commercial perspective, it is unlikely for one party to accept responsibility for the payment of water in circumstances where that party has no control over the volume of water ultimately used. This proposition was reinforced by Kirby P in *Hyde & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd*:[5]

> [I]n giving meaning to the words of an agreement between commercial parties, courts will endeavour to avoid a construction which makes commercial nonsense or is shown to be commercially inconvenient. This is because courts will infer that commercial parties would not themselves normally agree in such a way.[6]

15. Third, I find that the term 'outgoings' relates to regular financial responsibilities which are incidental to the use of the Premises, rather than financial responsibilities which are incidental to the running of a business within the Premises. In *112 Acland Street v ANZ Bank*,[7] Ormiston and Phillips JJ described that distinction in the following terms:

> "Rates" have ordinarily in this country covered those levied by municipal councils, but they ordinarily comprehend also a considerable range of rates imposed by semi-governmental bodies relating to water, sewerage and the like. "Excess water rates", however, comprehend water usage charges or imposts which are normally borne by the tenant and are in fact the subject of specific inclusion in the covenant under consideration. "Charges" can refer to levies and imposts which may result in the charging of land, but again the word is ordinarily taken to cover those charges which consist in an impost for the supply of some benefit to or for the subject premises.

16. In my view, water usage is not a cost incidental to the use of the building but rather a cost incidental to the business being conducted by the Applicant within the Premises. It is not a recurring charge or a capital expenditure. It is a running cost. Interestingly, the term 'outgoings' is defined in s 3 of the *Retail Leases Act 2003* in the following terms:

> "outgoings" means a landlord's outgoings on account of any of the following –
>
> (a) the expenses directly attributable to the operation, maintenance or repair of –
>
> (i) the building in which the retail premises are located or any other building or area owned by the landlord and used in association with the building in which the retail premises are located; or
>
> …

[5] (1990) 20 NSWLR 310.
[6] Ibid at 313-14.
[7] (2002) 4 BR 372 at 380.

(b) rates, taxes, levies, premiums or charges payable by the landlord because a landlord is –

(i) the owner or occupier of a building referred to in paragraph (a) or of the land on which such a building is erected; or …

17. In all scenarios contemplated under s 3 of the *Retail Leases Act 2003*, the reference point links to the *building* or *the land* upon which the building is erected. This is different to costs which are linked or attributable solely to the running of a business, such as electricity usage charges, telephone usage charges, internet usage charges and water usage charges, even though those utilities service the demised premises. In other words, those charges are directly linked to what is being conducted on or at the demised premises, rather than to the building or the land itself. Put simply, if no water is used, then no charge is levied.

18. Therefore, when considering all of the above factors, I find that the term 'outgoings' in Clause 3.1 of the Agreement does not include water usage. Consequently, I find that the Applicant is responsible to pay for the water that it has used while occupying the Premises.

IS THE AGREEMENT A RETAIL PREMISES LEASE?

19. The Agreement is labelled as a sub-licence. Clause 1.1 of the Agreement states:

> The parties acknowledge that the Sub-Licensor is a Licensee of the Premises from Metrolink Victoria Pty Ltd trading is Yarra Trams. The Sub-Licensor warrants that it has the right to grant a sub-licence to occupy to the Sub-Licensee, and that the Premises may be used for the Permitted Use.

20. Similarly, Clause 9 of the Agreement states:

> The rights given by this agreement rest in contract only and may be assigned with the consent of the Sub-Licensor which must not be unreasonably withheld. Nothing contained in this agreement shall create any tenancy or other interest in the Premises.

21. It is trite to say that exclusive possession is the touchstone of a lease agreement. In *Radaich v Smith*,[8] Windeyer J expressed that proposition in the following manner:

> What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of

[8] (1959) 101 CLR 209.

> the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right to exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second.[9]

22. Moreover, statements to the effect that nothing in the document amounts to a demise are of limited assistance, as the relationship between the parties is to be determined by law and not by what the parties have chosen to label it: *Birt & Co Pty Ltd v Leichhardt Municipal Council*.[10]

23. Having regard to those fundamental principles, there are a number of factors present in the Agreement which are indicative of a tenancy having been created. These include:

    (a) Regular monthly payments.

    (b) A fixed term of occupation.

    (c) Further options for renewal.

    (d) Clause 2.2, which states that the Respondent will not unreasonably interfere with or disturb the Applicant's use of the Premises.

    (e) Clause 3.4, which allows the Applicant to change all the locks (without any obligation to give the Respondent a duplicate key).

    (f) Clause 3.6 of the Agreement, which allows the Applicant to install minor fittings or equipment needed for the operation of its business.

    (g) Clause 7.1, which only allows the Respondent to terminate the Agreement by cause and only after the Applicant has failed to remedy a breach following 14 days prior notice.

    (h) The amendment to the Agreement which:

        (i) makes numerous references to *rent* being paid; and

        (ii) refers to a valuer determining *market rent* for each year of any renewed term.

24. In my view, the above factors lean towards a tenancy having been created. However, the Respondent contends that, notwithstanding the above factors, a tenancy cannot be created because the Respondent has no proprietary interest in the Premises. Its interest lies in contract only as it constructively occupies the Premises as a licensee to Yarra Trams.

25. A copy of the agreement between the Respondent and Yarra Trams has not been produced as part of the materials filed in support of each party's

[9] Ibid at 222.
[10] (1951) 18 LGR 78.

respective position. Nevertheless, on the assumption that there is no proprietary interest held by the Respondent, I accept the proposition that no demise of the Premises can be created under the Agreement. That scenario is analogous to a situation where a head lease is forfeited or expires by effluxion of time. In such a case, any sublease is automatically brought to an end: *Metropolitan Trade Finance Co Pty Ltd v Coumidis*;[11] *Clarke v Watson*.[12]

26. However, that analysis may not provide a complete answer to the question for determination. In particular, even though the Respondent describes its relationship with Yarra Trams as being a relationship of Licensor and Licensee, the law may find that, in reality, the relationship is that of landlord and tenant. If that were the case, then it would be open for the Respondent to grant a leasehold interest to the Applicant.

27. Consequently, given that there are limited details about the terms of the agreement between the Respondent and Yarra Trams, apart from what is contended by the Respondent, I am unable to definitively determine whether the relationship between the Applicant and the Respondent is one of landlord and tenant. Therefore, that question remains unanswered.

SENIOR MEMBER E. RIEGLER

[11] (1973) 2 ALR 258.
[12] [1943] VLR 81 at 87.