VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1233/2018

CATCHWORDS

Retail Leases Act 2003 (Vic), whether a lease can cease to be a "retail premises lease" during the term of the lease by reason of occupancy costs exceeding $1,000,000.

APPLICANT	Verraty Pty Ltd (ACN: 076 360 079)
RESPONDENT	Richmond Football Club Ltd (ACN: 005 563 011)
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	24 June 2019
DATE OF ORDER AND REASONS	18 July 2019
CITATION	Verraty Pty Ltd v Richmond Football Club Ltd (Building and Property) [2019] VCAT 1073

ORDERS

1 I find and declare that from 7 May 2016, the lease between the parties (the 2004 Lease) was not a "retail premises lease" within the meaning of s 11 of the *Retail Leases Act 2003 (Vic)*.

2 I find and declare that the Lease (as renewed by the Renewal) is not a "retail premises lease" within the meaning of s 11 of the *Retail Leases Act 2003 (Vic)*.

3 The respondent must pay the applicant $122,034.45 as reimbursement of land tax paid by the applicant.

4 Cost reserved.

L. Forde
Senior Member

APPEARANCES:

For Applicant	Mr R. Hay, QC and Mr L. Hawas of counsel
For Respondent	Mr D. Collins, QC and Mr C. Northrop of counsel

REASONS

BACKGROUND

1 By a lease (the "**1998 Lease"**) between the applicant ("**Verraty"**) as landlord and the respondent (the "**RFC"**) as tenant, RFC leased the property at 354-364 Stud Road, Wantirna, Victoria (the **"premises"**).

2 By written deed of variation ("**Variation"**) dated 30 January 2004, Verraty and RFC agreed to vary the 1998 Lease.

3 In proceedings R203/2010, this Tribunal found that the 1998 Lease was surrendered by operation of law upon entry into the Variation, the Variation effected a grant of a new lease and the new lease (the "**2004 Lease"**) was subject to the *Retail Leases Act 2003* (Vic) (the "**RLA"**).

4 RFC exercised the option to renew the 2004 Lease for 10 years from 7 May 2018.

5 A dispute has arisen as to whether the 2004 Lease ceased to be a *retail premises lease* within the meaning of the RLA.

6 If the 2004 Lease ceased to be a retail premises lease on 7 May 2016, the landlord claims an entitlement to be reimbursed for land tax payments and to receive rent for the new term at the current rent plus 4%.

7 If, on the other hand, the RLA continues to apply to the 2004 Lease, the tenant will not be liable to pay land tax and the rent for the new term will be determined at market rate.

AGREED FACTS

8 The parties produced a Statement of Agreed Facts. The Statement is attached as appendix 1 to these reasons. The only evidence before the Tribunal was the Statement of Agreed Facts and documents referred to in the statement.

9 Other than the quantum of interest that might be payable in connection with land tax payments, there were no factual matters in dispute.

10 Verraty did not pursue its claim for recovery of monies paid for cost of works on the premises.

ISSUES FOR DETERMINATION

11 Issue 1 - Did the 2004 Lease cease to be a retail premises lease within the meaning of s 11 of the RLA for the 12 months commencing 7 May 2016?

12 Issue 2 - Did the 2004 Lease cease to be a retail premises lease within the meaning of s 11 of the RLA for the 12 months commencing 7 May 2017?

13 Issue 3 - Did the 2004 Lease cease to be a retail premises lease within the meaning of s 11 of the RLA and at any time revert to being a retail premises lease during its term?

14 Issue 4 - Is Verraty entitled to recover land tax pursuant to clause 5.2(b) of the 2004 Lease from RFC for all or any of the period from 7 May 2016 to 6 May 2018?

15 Issue 5 - Is the rent for the first year of the renewed lease that commenced on 7 May 2018 subject to a provision in clause 15(b)(i) of the 2004 Lease so that it must not be less than the rent paid during the final year of the 2004 Lease?

RELEVANT SECTIONS OF THE RLA

16 The provisions of the RLA referred to by the parties are, for convenience, set out below.

17 Section 1 provides:

> Main purpose
>
> The main purpose of this Act is to replace the scheme in the Retail Tenancies Reform Act 1998 with a new scheme to enhance—
>
> (a) the certainty and fairness of retail leasing arrangements between landlords and tenants; and
>
> (b) the mechanisms available to resolve disputes concerning leases of retail premises.

18 "Retail premises" are defined in s 4(1) to mean

> premises used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services or the carrying on of a specified business that the Minister determines is a business to which the paragraph applies.

19 Section 4(2)(a) provides that "retail premises" does not include:

> "premises in respect of which the occupancy costs (as defined in subsection (3)) under the lease concerned is more than the amount prescribed by the regulations for the purposes of this paragraph."

20 "Occupancy costs" are defined in s 4(3) to mean:

> (a) the rent payable under the lease (s.4(3)(a)); and
>
> (b) the outgoings, "as estimated by the landlord, to which the tenant is liable to contribute under the lease" (s 4(3)(b)).

21 Section 4(3)(b) is followed by a footnote:

> "Note: Section 46 requires the landlord to give the tenant a written estimate of outgoings to which the tenant is liable to contribute".

22 For the purposes of s 4(2)(a), regulation 6 of the *Retail Leases Regulations* 2013 prescribes the amount as $1,000,000 per annum exclusive of GST.

23 Section 11 provides:

> "Application generally

(1) This Act applies to a retail premises lease that is—

(a) entered into after the commencement of this section; or

(b) renewed after the commencement of this section, whether the lease was entered into before or after that commencement.

(2) Except as provided by Part 10 (Dispute Resolution), this Act *only* applies to a lease of premises if the premises are retail premises (as defined in section 4) at the time the lease is entered into or renewed.

Note

Sections 36 and 76(1) extend the application of certain provisions of this Act to certain leases entered into or renewed before the commencement of this section."

24 Section 35 (3) provides;

A provision in a retail premises lease is void to the extent that it purports to preclude, or prevents or enables a person to prevent, the reduction of the rent or to limit the extent to which the rent may be reduced.

25 Section 46 provides: -

Estimate of outgoings

(1) A retail premises lease is taken to provide as set out in this section.

(2) The landlord must give the tenant a written estimate of the outgoings to which the tenant is liable to contribute under the lease that itemises those outgoings.

(3) The tenant must be given the estimate of outgoings—

(a) before the lease is entered into; and

(b) in respect of each of the landlord's accounting periods during the term of the lease, at least one month before the start of that period.

(4) The tenant is not liable to contribute to any outgoings of which an estimate is required to be given to the tenant as set out in this section until the tenant is given that estimate.

26 Section 50 provides in relation to land tax:

A provision of a retail premises lease is void to the extent that it makes the tenant liable to pay an amount for tax for which the landlord or head landlord is liable under the Land Tax Act 2005.

27 Section 94 provides

The Act prevails over retail premises leases, agreements etc.

(1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

(2) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it purports—

(a) to exclude the application of a provision of this Act; or

(b) to limit the right of a party to the lease to seek resolution of a retail tenancy dispute under Part 10 or otherwise to limit the application of that Part.

RELEVANT PROVISIONS OF THE 1998 LEASE AND THE 2004 LEASE

28 Clause 5.2(b) of the 1998 Lease and the 2004 Lease provides that the lessee shall pay "all State Land Tax".

29 Clause 15(b)(i) of the 1998 Lease and 2004 Lease provides:-

> In the event that the Lessee exercises an option for a Renewed Lease for a Further Term as referred to in Clause 16.1, then the Annual Rental for the first year of the Further Term shall be an amount to be determined by mutual agreement between the Lessor and the Lessee, and in default of agreement prior to the commencement of the Further Term shall be an amount determined as being the appropriate market rental by a valuer appointed by the President for the time being of the Real Estate and Stock Institute of Victoria or his nominee who shall act as an expert and not as an arbitrator and whose fees shall be borne equally by the Lessor and the Lessee and whose determination of the rental shall be final and binding on the Lessor and the Lessee <u>provided that such annual rental shall not be less than the rental paid by the Lessee immediately prior to the rent review date plus 4 per centum</u> (**emphasis added**).

VERRATY'S SUBMISSIONS

30 Verraty relied upon opening and closing written submissions and Mr Hay QC made oral submissions. The submissions can be summarised as follows:-

a The 2004 Lease ceased to be a 'retail premises lease' within the meaning of s.11 of the RLA for the 12 months commencing 7 May 2016 and did not revert to being a 'retail premises lease' during its term;

b The effect of s.11(2) is that the RLA only applies to a lease where the premises were "retail premises" when the lease was entered into. The section does not preclude a lease from ceasing to be a "retail premises lease" during the term of the lease. A retail premises lease that ceases to be a "retail premises lease" during the term may revert to a retail premises lease at a later date during the same term. In other words, during the term the lease could both "jump out" of the RLA and "jump back in" so long as it was a retail premises lease at inception under s 11(2);

c Section 11(2), in contrast to the position under the *Retail Tenancies Act* 1986 (**1986 Act**) and the *Retail Tenancies Reform Act* 1998 (**1998 Act**), makes it clear that for the Act to apply to "retail premises" the premises must be "retail premises" when the lease is entered into.[1] However, there is nothing in s 11(2) to suggest that a "retail premises lease" cannot cease to be a "retail premises lease" during the lease term;

d The Tribunal should not be swayed by the argument that it should not accept Verraty's construction of s 11(2) on the basis that the consequence for RFC is unsatisfactory; that is that the rent will not fall. The authors of *Statutory Interpretation in Australia*[2] say:

e "…arguments by reference to unsatisfactory consequences are on shaky ground unless a more attractive alternative interpretation of the words used in the legislature is available……Another difficulty that is sometimes encountered when it is argued that the literal interpretation would produce unsatisfactory and unintended results is that this may be a matter on which opinions can differ…."

f Caselaw concerning the earlier legislation established that premises could "jump in" (ie become retail premises) and "jump out" (cease to be retail premises)[3];

g In *William Buck (Vic) Pty Ltd v Motta Holdings Pty Ltd* [4] Senior Member Riegler, as he then was, considered whether a "retail premises lease" (within the meaning of s 11 of the RLA) could cease to be a "retail premises lease" during the lease term. While the Senior Member was not required to make a finding on this issue, he observed, after considering cases under the earlier legislation:

> [54] In my view, s 11(2) of the RLA prevents fluctuation to prevent late entry into the Act. Therefore, if the premises are not retail premises at the time the lease is entered into (because the occupancy costs exceed $1 million), then the premises cannot become retail premises later (if the occupancy costs fall below $1 million).
>
> [55] However, I do not consider that the reverse scenario applies. In particular, I am of the opinion that a plain reading of the provision does not prevent late exit from the Act. As submitted by the Landlord, to construe the provision so as to disallow late exit from the Act would require the word 'only' to be positioned differently within the provision, as follows:

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[1] See *Lontav Pty Ltd v Pineross Custodial Services Pty Ltd* [2011] VSC 485 (Dixon J).
[2] Pearce, D.C and Geddes, R.S *Statutory Interpretation in Australia*, 8th ed, LexisNexis, 2014, [2.40].
[3] *Leung v. Hungry Jacks Pty Ltd* (2000) V Conv R 54-614.
Towercom Pty Ltd v. Strathfield Group Ltd (2001) V Conv R 54-634.
[4] [2018] VCAT 15

> ... this Act applies to a lease of premises only if the premises are retail premises at the time the lease was entered into renewed.
>
> [56] If the provision was expressed in that manner, then it would make no difference that the disqualifying characteristic subsequently arose, such as the occupancy costs increasing to over $1 million during the term of the lease because the characterisation of the lease is made at the time the lease is entered into.
>
> [57] Therefore, if leased premises do not fall within the definition of retail premises at the time that the parties entered into the lease (or its renewal), the premises cannot become retail premises later (for example if the occupancy costs reduced to under $1 million during the term of the lease). However, that does not prevent the reverse scenario. For example, if the occupancy costs were under $1 million at the time the parties entered into the lease, then the premises fall within the definition of retail premises. However, if the occupancy costs subsequently increased to over $1 million during the term of the lease, then the premises would no longer fall within the definition of retail premises.

h The authors of *Retail Leases Victoria*[5] say the following about s 11(2):

> It follows from these provisions that the application of the 2003 Act to any particular lease may fluctuate in some instances, but in a more limited way than under the 1986 Act or the 1998 Act. This is because the only time at which 'fluctuation' can occur is between the date upon which the lease is first entered into and any date or dates upon which it is renewed. This is a more satisfactory situation than 'fluctuation' at any time as a result of the determination of the application of the Act depending upon the time at which a dispute arises and proceedings are taken.

i The authors also considered s 4(2)(a) (ie the "occupancy cost" exception):

> It seems unlikely that para 4(2)(a), the 'occupancy costs' exception, will cause difficulties….as rents will probably not tend to reduce. Nevertheless, there remains the possibility of leases suddenly being caught if the prescribed outgoings and other costs or the prescribed 'amount' is effectively increased from time to time.[6]

j Parliament decided to only make one change to the position that existed under the 1986 Act and the 1998 Act: it chose only to define the moment when a lease had to be a "retail premises lease" for the RLA to apply, being the time at which the "retail premises lease" was entered into;

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[5] Croft, Hay and Virgona, *Retail Leases Victoria* LexisNexis Butterworths, [30.065.10].
[6] Ibid

k The word "payable" in s 4(3)(a) suggests that the rent to be paid is relevant and not the rent that has been paid. For the purposes of s 4(2)(a), regulation 6 of the *Retail Leases Regulations 2013* describes the amount as $1 million per annum exclusive of GST. When regulation 6 is read with ss 4(2)(a) and s 4(3) it is clear that s 4(2)(a), is concerned with annual occupancy costs for each individual year of the lease and for the purpose of s 4(3)(b) an annual estimate of outgoings by the landlord, and not one consolidated estimate before the lease commences;

l Verraty made an estimate under s 4(3) for the years commencing 7 May 2016 and 7 May 2017. In each case "occupancy costs" exceeded $1,000,000 exclusive of GST with the consequence that the RLA did not apply to the lease from 7 May 2016 and 7 May 2017;

m There is no requirement to serve a notice estimating occupancy costs. Section 4(3) of the RLA does not require an estimate of outgoings be given to the tenant. It is enough under s 4(3) if the landlord makes an estimate. There is no requirement to comply with s46 and give the estimate other than at the commencement of the lease;

n Section 46 is only concerned with a "retail premises lease'. The note to s 4(3) is no more than a reminder that if the lease is a 'retail premises lease' the landlord must comply with s46. It directs the landlord to s46 in the event the lease is a 'retail premises lease'. It does not qualify the plain operation of ss 4(2) and 4(3) to expressly exclude as "retail premises leases" premises occupied under leases whose occupancy costs exceed $1,000,000. Such leases are outside the purview of the RLA;

o Even though not required to, Verraty gave RFC a notice under s46 estimating outgoings for the year commencing 7 May 2016 and it is of no consequence if the notice was given late. It was not required to give a notice because the estimate plus rent was more than $1,000,000 (exclusive of GST) and as such the lease was not a retail lease and the RLA did not apply;

p The provisions in the RLA that make provisions in a lease void apply only to retail premises leases. If, once the lease ceased to be a retail premises lease, the provisions of the RLA continued to apply, there would be no point in a lease ceasing to be a retail premises lease: the tenant retains the same benefits and the landlord the same obligations and restrictions that it had when the lease was a retail premise lease. There is nothing fair to Landlords about RFC's contention that terms deemed void remain void notwithstanding that the lease is no longer a retail premise lease. One of the objects of the RLA is fairness;

q If a provision in the lease is deemed void by reason of the RLA then as soon as the RLA does not apply to the lease, the previously void provisions come back into the lease; and

r In summary, the 2004 Lease was not a "retail premise lease" from 7 May 2016 and the lease as renewed by the exercise of the option is not a" retail premises lease." The rent for the new lease is to be calculated in accordance with clause 15.1(b) being the current rent (at 6 May 2018) plus 4% and RFC is to reimburse Verraty for land tax paid after 7 May 2016.

RFC'S SUBMISSIONS

31 RFC relied upon a written Outline of Argument and oral submissions made by Mr Collins QC. The submissions can be summarised as follows:

a The 2004 Lease was and continues to be a retail premises lease under the RLA;

b Clauses 5.2(b) and the proviso at the end of clause 15.1(b)(i) of the 1998 Lease are void and do not form part of the 2004 Lease by reason of s 50 of the RLA (land tax) and s 35(3) (the proviso regarding annual rent);

c The term of the 2004 Lease requiring payment of land tax, was decided by the Tribunal in 2011[7] and found to be void and of no effect. In that case the Tribunal found that the term "is effectively excised from the lease, as if there never was a contractual obligation to reimburse land tax. It is as if the parties had never agreed that RFC was liable to reimburse the landlord for its land tax liability."[8] The Tribunal ordered the return of land tax.

d The finding in respect of land tax applies with equal force to the proviso in clause 15.1(b)(i).

e The RLA does not contain a provision that premises must remain retail premises for the RLA to apply or that the RLA ceases to apply if the premises cease to be retail premises during the period of the lease. Section 11(1) does not require continuous monitoring. The time for considering whether the RLA applies is when the lease "is" entered into not "was" entered. This is the only temporal condition;

f As at 7 May 2016 (the commencement of the penultimate year) occupancy costs were less than $1 million. The landlord did not provide an estimate of outgoings until later with the result that there were no outgoings to be added to the amount of rent as at 7 May 2016;

g As at 7 May 2017, (the commencement of the final year) occupancy costs were less than $1 million. The landlord did not provide an estimate of outgoings at all with the result that no outgoings were added to the amount of rent to determine occupancy costs;

h If the 2004 Lease ceased to be a lease to which the RLA applied from 7 May 2016, that does not revive provisions (specifically clause 5.2(b)

[7] Richmond Football Club Limited v Verraty Pty Ltd [2011] VCAT 2104
[8] Ibid at [102]

and the proviso at the end of clause 15.1(b)(i)) in the 1998 Lease that did not become part of the 2004 Lease. Payment of land tax was void by reason of s 50 of the RLA. The proviso at the end of clause 15.1(b)(i) was void pursuant to s 35(3) of the RLA;

i When interpreting the RLA, primary importance must be placed on the text of the statute itself. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[9] the plurality of the High Court summarised the principles:

> This court has stated on many occasions that the task of statutory construction must begin with the consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy;

j Section 35 of the *Interpretation of Legislation Act 1984 (Vic)* provides

> In the interpretation of a provision of an act or subordinate instrument–
>
> a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote the purpose or object;

k Many provisions of the RLA prescribe matters which are taken to be included in the retail lease. They have contractual force. Other provisions in the retail lease are declared void. The terms of the contract become fixed at the time of entry and do not depend on the continuing application of the Act;

l The note in s 46(3)(b) refers deliberately to a single estimate given before the lease is entered as required by s 46(3)(a) and does not refer to outgoings in respect of each of the landlord's accounting periods;

m Neither the text of s 11(1) nor the definition of "retail premises" support an interpretation that an assessment whether the lease is a retail premises lease to which the RLA applies is needed at a time after entry;

n It cannot be supposed that the RLA contemplated an intention that the terms of the lease will fluctuate during its life. On the contrary, an interpretation that allowed the provisions of the lease to change from time to time does not promote certainty or fairness, two of the main purposes of the RLA. An interpretation which fixes the contractual terms of the lease upon its entry provides both certainty and fairness;

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[9] (2009) 239 CLR 27 at [47]

o No provision says the RLA ceases to apply to the lease if the premises cease to be retail premises at some later point;

p The question asked by the Tribunal in *William Buck*[10] is, with respect, not the correct question.[11] Of course, premises which fall within the definition of retail premises at the commencement of a lease can fall outside the definition during the term of the lease because of changed circumstances. An increase in occupancy costs is one example. Another is the transferable shares in the tenant to a listed corporation. The question should be whether the lease to which the RLA applies at the commencement of the lease ceases to be a lease to which the Act applies if the premises cease to be retail premises as defined by the RLA during the period of the lease?

q The use of the word "only" in s 11(2) does not alter the meaning of the provision. It serves simply to emphasise and to put beyond argument that the matters specified in subsection (2) are the sole (i.e. the only) matters to consider;

r The Tribunal in the *William Buck* case based its comments on the decision of O'Bryan J in *Towercom Pty Ltd v Strathfield Group Ltd*[12] in respect of the *Retail Tenancies Reform Act 1998*. What was said about a different Act for a very different purpose provides no guidance whether or not the provisions of the new scheme introduced by the RLA cease to apply just because premises cease to be retail premises as defined in the RLA;

s Even if the RLA contemplates late exit, it does not follow that subsequent to late exit, the lease will include terms that were not part of the lease prior to exit;

t No estimate of outgoings was provided prior to 7 May 2016. Accordingly, the total of rent and outgoings as at that date was less than $1 million. Later provision of an estimate does not change the position as at 7 May;

u If the 2004 Lease ceased to be a lease to which the RLA applied during the penultimate year because the premises cease to be retail premises, it must follow the lease will again become a lease to which the RLA applies if the premises again become retail premises;

v No estimate of outgoings was provided prior to 7 May 2017 or at any time thereafter. Accordingly, the total rent and outgoings as at that date was less than $1 million. If the lease ceased to be a lease to which the RLA applied in the penultimate year then it once again became a lease to which the RLA applied in the last year because no estimate of outgoings was provided to RFC;

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[10] Above 3
[11] The question is set out in paragraph 21(v) of these reasons.
[12] [2000] VSC 370

w Assuming the 2004 Lease ceased to be a lease to which the RLA applied from 7 May 2016 until the end of the lease, the terms of the lease did not change to incorporate provisions that were void when the lease commenced and were never part of the contract between the parties.

FINDINGS

Issue 1 - Did the 2004 Lease cease to be a retail premises lease within the meaning of s 11 of the RLA for the 12 months commencing 7 May 2016?

32 As determined by the Tribunal in 2010, the 2004 Lease was at that time subject to the RLA.

33 On the plain wording of s 11, for a lease to be subject to the RLA, the lease must be:

a a lease of *retail premises* (as defined by s4)*;*

b entered into or renewed after 1 May 2003[13] ; and

c defined as a *retail premises* at the time the lease was entered into or renewed.

To be defined as a *retail premises,* a lease must have the characteristics set out in s 4(1) and not otherwise be excluded from the operation of the RLA[14]. One such exclusion is a lease with occupancy costs (as defined in s 4(3)) of more than $1,000,000.

34 If a lease is no longer a *retail premises* lease under s4 of the RLA, it follows that the lease cannot remain within the scope of s 11. This interpretation is based on the construction of the simple and unambiguous text of the statute itself. A plain reading of the provision does not prevent a late exit from the RLA.

35 I do not accept RFC's submission that the only time the lease needs to be classified for the purpose of the RLA is at the time the lease was entered into or renewed. Such an interpretation ignores the words in s 11. If RFC's interpretation were correct there is no need for the words "retail premises" to be referenced in the opening line of s 11 which reads, "This Act applies to a retail premises lease…." It would be enough if RFC's submission were correct for the section to reference *retail premises* only in s 11(2). The reference to *retail premises lease* in the opening line of the section is superfluous based on RFC's submission. This interpretation cannot be correct. The section clearly states that the RLA applies to a retail premises lease that complies with the requirements set out in paragraph 33 of these reasons. If a lease at any stage falls outside of the definition of a retail

[13] Being the date of the commencement of s 11 of the RLA.

[14] S (4)(2) provides for premises which are not to be included in the definition of *retail premises* including premises determined by Ministerial Determinations as not *being retail premises.*

premises lease, then on the plain and unambiguous wording of s 11 of the RLA, it is no longer subject to the RLA.

36 If the 2004 Lease ceases to be a *retail premises* lease within the meaning of s4 at any stage during the period of the term, it will fall outside the operation of the RLA. Section 11 does not limit the point in time at which the lease must be a retail premises lease to when the lease commenced or was renewed. That is only one of the requirements.

37 I do not accept the submission of RFC that the absence of a condition that the premises must remain retail premises during the period of the lease supports the interpretation that the only time to consider whether or not the RLA applies is when the lease "is" entered, not "was" entered. That ignores all of the words in the section. Section 11 expressly provides that the RLA applies to a lease which is a *retail premises* lease. It does not limit the requirement of being a *retail premises* lease to any given point of time. The only temporal requirement is in s 11(2). The interpretation submitted by RFC ignores the words "retail premises lease" in the opening sentence of s 11.

38 Put another way, the RLA applies to a lease which was a lease of retail premises at the start of, or any renewal of, the lease and will continue to apply to that lease for so long as the lease remains a lease of *retail premises* within the meaning of s4.

39 I find that the continued operation of the RLA as stipulated in s 11 to the 2004 Lease (which has been found to be a retail premises lease at its commencement) is dependent upon its continued classification as a *retail premises* lease.

40 Subject to issues around timing and notice of estimates of outgoings by Verraty, once occupancy costs under the 2004 Lease are more than $1,000,000, the lease falls outside of the definition of a *retail premises* lease under s4(1) of the RLA.

41 It is common ground that the outgoings and rent for the last two years of the 2004 Lease were more than $1,000,000. The dispute is whether the outgoings can be included in the occupancy cost calculation under s4(3). RFC argues for various reasons that the quantum of outgoings could not be considered in determining occupancy costs for the last two years.

42 RFC submits that there is no basis for construing s4(2)(b) of the RLA as referring to outgoings in respect of each of the landlord's accounting periods as described in s46(3)(b). The submission is premised on the argument that the only time a lease is assessed as being a lease to which the RLA applies is at the commencement of the lease. It is the commencement occupancy costs that are relevant, and no further consideration need be given once the lease is covered by the Act. For reasons already given I reject this interpretation of s 11.

43 RFC submits that the rent and outgoings as at 7 May 2016 (being a month before the penultimate year of the lease) was less than $1,000,000 because no estimate of outgoings was provided prior to that date. The provision of an estimate after 7 May does not according to RFC affect the position as it existed on 7 May 2016. No legal authority was provided for or against this proposition.

44 There is no express temporal requirement in s4(3) of the RLA for when the estimate of outgoings must be made. *Occupancy costs* means the rent "payable" and the outgoings "the tenant is liable to contribute under the lease" as estimated by the landlord. Once *occupancy costs* as defined exceed $1,000,000, premises will be excluded from the RLA.

45 Reference to rent "payable" in s4(3) suggests that it is the rent for the coming year that is to be considered. This suggests that the time for determining the occupancy costs is on each anniversary of the commencement date of a lease. It is the outgoings for the year that are being considered.

46 For outgoings to be included in occupancy costs under s4(3) of the RLA, they must be outgoings to which a tenant is liable to contribute. This is plain on the wording of the section. It is therefore necessary to consider when a tenant is liable to contribute to outgoings under the RLA.

47 The note to s 4(3)(b) of the RLA references s46. The note cannot be read as imposing an obligation on Verraty to provide a written estimate of outgoings to RFC for the purpose of determining whether the lease is a retail premises lease under s4(3). I agree with the submission of Verraty that the note is no more than a reminder that if the lease is a retail premises lease, the landlord must comply with s46.

48 However, s46 is relevant to RFC's liability to contribute to outgoings. Section 46(3) expressly requires a landlord to give an estimate of outgoings to the tenant of a retail premises lease in respect of each accounting period. Section 46 goes on to provide a consequence to a landlord who fails to provide the estimate.[15] A tenant is not liable to contribute to any outgoings until the tenant is given the estimate.

49 Section 46 links a tenant's liability to contribute to outgoings to a landlord providing a written estimate of outgoings to the tenant. Section 4(3) includes in the calculation of occupancy costs only those outgoings which a tenant is liable to contribute under the lease. The key words are "liable to contribute." It follows that if there is no written estimate of outgoings there can be no liability of the tenant to contribute to outgoings. If there is no liability to contribute to the outgoings, the quantum of those outgoings cannot be used in the determining *occupancy costs*. This is because only outgoings that the tenant is liable to contribute to are included in the definition of occupancy costs.

[15] Section 46(4)

50 On 12 May 2016, written notice was given by Verraty to RFC estimating, for Verraty's accounting period commencing 7 May 2016, outgoings of $58,000 plus GST. Rent for the period was $957,012 plus GST. Once the estimate was given, RFC was liable to contribute to the outgoings that accrued from the date the estimate was given. The RLA does not require the estimate to be provided by a certain date in order for it to be included in occupancy costs. If the outgoings were included in the calculation of occupancy costs, the occupancy costs exceeded $1,000,000 by $15,012 in the penultimate year of the 2004 Lease.

51 The s 46 estimate was provided 5 days after the anniversary of the lease. No evidence was provided as to the outgoings that might have applied to that 5-day period although by a simple calculation the outgoings for 5 days were approximately $795. There is an argument that RFC was not liable to pay outgoings for those days as it was not given an estimate. The liability of RFC for occupancy costs, without these 5 days, for the balance of the year still exceeded $1,000,000[16] with the effect that the 2004 Lease was no longer a retail premises lease.

52 I accept Verraty's submission that it is irrelevant that the notice was not given within the time prescribed by s46(3)(b). The only penalty for not giving notice by that time is that the liability to contribute to outgoings does not arise. I reject Verraty's submission that even when the estimate is given late, the tenant remains liable to pay outgoings that relate to the period before the estimate is given. Such an interpretation makes the consequence of a landlord not giving a notice meaningless. [17]

53 Once RFC received the written estimate of outgoings, the amount of those outgoings that related to the period after the notice was given fell within the definition of *occupancy costs*.

54 On 12 May 2016, the occupancy costs as defined under the RLA for the year commencing 6 May 2016 exceeded $1,000,000. Once the occupancy costs exceeded $1,000,000, the 2004 Lease ceased to be a retail premises lease within the meaning of s 11 of the RLA.

55 In my view, the 2004 Lease ceased to be a retail premises lease within the meaning of s 11 of the RLA for the 12 months commencing 7 May 2016.

DID THE 2004 LEASE CEASE TO BE A RETAIL PREMISES LEASE WITHIN THE MEANING OF S 11 OF THE RLA FOR THE 12 MONTHS COMMENCING 7 MAY 2017?

56 The parties agree that Verraty did not provide RFC with a written estimate of outgoings in the last year of the lease although it did make an estimate.

57 RFC contends that if the 2004 Lease ceased to be a lease to which the RLA applied during the penultimate year (which I have found it did), it must

[16] One deducts the outgoings applicable to the 5 day period from the outgoings for the entire year. Rent and outgoings still exceed $1,000,000.
[17] Phillips v Abel [2019 VCAT 1031

follow that the 2004 Lease will again become a lease to which the RLA applies if the premises again become *retail premises*. It says the failure to provide an estimate of outgoings prevents the outgoings from being included in the occupancy cost calculation.

58 Verraty contends that where the outgoing estimate plus rent is more than $1,000,000, a landlord need not comply with s 46 by giving a written estimate of outgoings because the lease will not be a retail premises lease to which the RLA applies. I agree with this proposition. It submitted that it should still make an estimate under s4(3) for each new year and where occupancy costs are $1,000,000 or less it must comply with s46 as the RLA applies. Again, I agree with this proposition.

59 There is no obligation on Verraty to give a written estimate of outgoings in the absence of the operation of s 46 of the RLA.

60 I do not need to make a finding about whether a lease can both "jump out' of the RLA and "jump back in" because the 2004 Lease remained outside the operation of the RLA by reason of its occupancy costs exceeding $1,000,000 in the last two years of its term.

61 Verraty was not required to give a written statement of outgoings under s46 a month before the start of the last year of the lease because s 46 no longer applied to the 2004 Lease.

62 RFC's liability to contribute to outgoings in the last year of the 2004 Lease was not dependent upon Verraty complying with s 46 of the RLA because the RLA did not apply. RFC's liability to pay outgoings arose by reason of the terms of the 2004 Lease. Accordingly, to determine the occupancy costs for the purpose of s 4(3) of the RLA, I have to consider only occupancy costs to which RFC is liable to contribute. The occupancy costs will be the rent and outgoings specified in the 2004 Lease.

63 It is not in dispute that on 3 May 2017 Verraty estimated the outgoings to which RFC was liable to contribute for the last year of the 2004 Lease to be $140,000. The outgoings and rent were in excess of $1,000,000 and as such the 2004 Lease remained outside the scope of the RLA.

64 I find that the 2004 Lease was not a retail premises lease within the meaning of s 11 of the RLA for the 12 months commencing 7 May 2017.

ISSUE 3 - DID THE 2004 LEASE CEASE TO BE A RETAIL PREMISES LEASE WITHIN THE MEANING OF S 11 OF THE RLA AND AT ANY TIME REVERT TO BEING A RETAIL PREMISES LEASE DURING ITS TERM?

65 For the reasons stated, I find that the 2004 Lease ceased to be a retail premises lease in the penultimate year of the lease. It did not at any time revert back to being a retail premises lease during its term.

ISSUE 4 - IS VERRATY ENTITLED TO RECOVER LAND TAX FROM RFC FOR ALL OR ANY OF THE PERIOD FROM 7 MAY 2016 TO 6 MAY 2018?

66 Having found that the 2004 Lease ceased to be a retail premises lease from 7 May 2016, I must now determine the legal effect of provisions in the lease made void by reason of the RLA.

67 Clause 5.2(b) of the 2004 Lease required RFC to pay land tax. The clause was deemed void by reason of s 50 of the RLA to the extent that it made RFC liable to pay land tax.

68 RFC contends that once a provision in the lease is made void, the contract is fixed and there is no requirement for the continued operation of the RLA. RFC contend that once a provision is deemed void, it cannot be resurrected.

69 Verraty submits that if this were correct, where a retail premises lease ceases to be such a lease, the lease would be bereft of terms; there would be few clauses left. Verraty draws support from s 94 of the RLA which says that a provision is void only "to the extent that it is contrary to or inconsistent with anything in this Act…"

70 In my view, once the 2004 Lease ceases to be a *retail premises* lease the RLA has no operation over or effect on the lease. This is made clear by the words used in s 11(2) of the RLA. Clause 5.2(b) of the 2004 Lease (which purported to make RFC liable to pay land tax) was made void to the extent that the 2004 Lease was a retail premises lease and covered by the RLA.

71 RFC relies upon the Tribunal's statement in *Richmond Football Club Limited v Verraty Pty Ltd*[18] where is was held that clause 5.2(b) "is effectively excised from the lease, as if there never was a contractual obligation to reimburse land tax. It is as if the parties had never agreed that RFC was liable to reimburse the landlord for its land tax liability."

72 I agree with the statement in the 2010 decision but note that the Tribunal was not commenting upon the effect on terms in a lease once the RLA ceased to apply.

73 Once the 2004 Lease is no longer a retail premises lease, s 50 of the RLA can have no ongoing effect. Once s 50 of the RLA has no effect on the 2004 Lease, clause 5.2(b) of the 2004 Lease is no longer void. The voiding provisions of s 50 do not have the effect of deleting or voiding for all time clause 5.2(b) of the 2004 Lease. The effect of s 50 of the RLA is to prevent the operation of clauses like clause 5.2(b) of the 2004 Lease for so long as the RLA applies to the lease.

74 To interpret the effect of the voiding provisions as having permanent effect even if the RLA ceased to apply, means there would be no point of the leases ceasing to be a retail premises lease. As submitted by Verraty such an interpretation would mean the tenant retains the same benefits and the landlord the same obligations as when the lease was a retail premises lease.

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[18] Above 6 at [102]

Such an interpretation goes against the very purpose of the RLA to create certainty and fairness.

75 Accordingly, for the reasons given, I find that Verraty is entitled to recover land tax from RFC from 6 May 2016.

ISSUE 5 - IS THE RENT FOR THE FIRST YEAR OF THE RENEWED LEASE THAT COMMENCED ON 7 MAY 2018 SUBJECT TO A PROVISION THAT IT MUST NOT BE LESS THAN THE RENT PAID DURING THE FINAL YEAR OF THE 2004 LEASE?

76 For the same reasoning as applied to the previous issue, I find that the proviso to clause 15(b)(i) of the 2004 Lease ceases to be void once the lease falls outside of the operation of the RLA.

77 Accordingly, I find that the annual rent for the first year of the further Term unless agreed, shall not be less than the rental paid by RFC immediately prior to the rent review date plus 4 per centum.

L. Forde
Senior Member

APPENDIX 1

STATEMENT OF AGREED FACTS

1. The applicant (**Verraty**) and the respondent (**RFC**) are both corporations and are capable of suing and being sued.

2. Verraty is the registered proprietor of the property at 354-364 Stud Road, Wantirna (**Premises**).

3. By a lease (**1998 Lease**) between Verraty as landlord and RFC as tenant entered into on about 26 August 1998, Verraty leased the Premises to RFC for ten years commencing on 7 May 1998 **[TB 30-134]**. The Lease contained one option to renew for a term of 10 years.

4. The 1998 Lease contained:

   (a) Clause 15.1(b)(i), which provided that the rent for the first year of the renewed term of the Lease would be determined by a market review (in the absence of agreement). Clause 15.1(b)(i) concluded with the following proviso: *'provided that such Annual Rental shall not be less than the Rental paid by the Lessee immediately prior to the rent review date plus four per centum'*; and

   (b) clause 5.2(b), which provided that RFC covenanted and agreed to pay or reimburse Verraty for all state land tax (assessed on a single holding basis) assessed against the Premises.

5. By written deed of variation dated 30 January 2004 (**Variation**), Verraty and RFC agreed to vary the 1998 Lease by extending its term to 20 years commencing on 7 May 1998 and to other variations as set out in the deed **[TB 136-142]**.

6. In proceeding R203/2010, the Victorian Civil and Administrative Tribunal found that:

   (a) the 1998 Lease was surrendered by operation of law upon the entry into of the Variation;

   (b) the Variation effected a grant of a new lease on the terms of the Lease as varied by the Variation; and

   (c) the Lease effected by the Variation was a retail premises lease subject to the *Retail Leases Act 2003* (**Act**) (hereinafter referred to as the **2004 Lease**).

   [TB 143-145]

7. The penultimate year of the initial term of the 2004 Lease commenced on 7 May 2016.

8. The rent RFC was liable to pay under the 2004 Lease for the penultimate year was $957,012 (excluding GST).

9. By email on 5 May 2016, Mario Abbotto, on behalf of Verraty, sent Lou Guzzardi of Leebridge Chartered Accountants copies of various water accounts and council rates for his records for the Premises **[TB 147-157]**.

10. Some time between 5 May 2016 and 12 May 2016, Verraty estimated the outgoings to which RFC was liable to contribute under the Lease for the 12 months commencing 7 May 2016 to be $58,000 made up of $32,000 for council rates and $26,000 for water (all excluding GST).

11. By email on 12 May 2016, Lou Guzzardi, on behalf of Verraty, sent RFC a document headed 'Section 46 Estimate of Outgoings' estimating that for Verraty's accounting period commencing 7 May 2016 RFC would be liable to contribute $32,000 for council rates and $26,000 for water (all excluding GST) **[TB 158-159]**.

12. The following water accounts and council rates notice for the Premises were issued to Verraty:

   (a) South East Water account issued 14 July 2016 addressed to Verraty at the Premises **[TB 160-161]**;

   (b) Council rates notice issued 11 August 2016 addressed to Verraty at the Premises **[TB 162-165]**;

(c) South East Water account issued 14 October 2016 addressed to Verraty at the Premises **[TB 166-167]**;

(d) South East Water account issued 16 January 2017 addressed to Verraty at the Premises **[TB 168-169]**; and

(e) South East Water account issued 16 April 2017 addressed to Verraty at the Premises **[TB 171-172]**.

13. By letter to Verraty dated 20 April 2017, RFC exercised the option to renew the 2004 Lease for 10 years from 7 May 2018 **[TB 173]**.

14. By email on 1 May 2017, Mario Abbotto, on behalf of Verraty, to RFC, acknowledged receipt of RFC's letter of 20 April 2017 exercising the option to renew and stated that Verraty would propose a commencing rent for the renewed term shortly **[TB 174]**.

15. The final year of the initial term of the 2004 Lease commenced on 7 May 2017.

16. The rent RFC was liable to pay under the 2004 Lease for that final year was $980,893 (excluding GST).

17. On 3 May 2017, Verraty estimated the outgoings to which RFC was liable to contribute under the 2004 Lease for the 12 months commencing 7 May 2017 to be $70,000 made up of $45,000 for council rates and $25,000 for water (all excluding GST) **[TB 175]**. Verraty did not give that estimate to RFC in writing or verbally.

18. By letter dated 29 June 2017 to Brendon Gale of RFC, Verraty proposed that the rent for the first year of the renewed Lease be the rent RFC was paying (in the final year of the initial Lease term), plus CPI, plus GST **[TB 176]**. RFC did not respond to that letter.

19. By email on 5 April 2018, Mario Abbotto of Verraty stated to Michael Stahl of RFC that as RFC had not communicated with Verraty further, Verraty would instruct lawyers to prepare the necessary documents to record the renewed Lease, and the rent to be applied would be pursuant to Verraty's letter to Brendan Gale of 29 June 2017 **[TB 177]**.

20. Under cover of a letter dated 9 April 2018, RFC sent Verraty a market rent assessment for the Premises from Charter Keck Cramer of even date **[TB 178-**

193]. The assessment was that rent would be between $635,000 to $655,000 (excluding GST).

21. On 19 April 2018, Verraty wrote to RFC and stated that the Act did not apply to the 2004 Lease, that Verraty was willing to accept rent increased at 4% for the first year of the renewed Lease, and that Verraty's solicitors would prepare the renewed Lease and send it to RFC for signing **[TB 194-196]**.

22. BSP Lawyers responded on behalf RFC by letter to Verraty dated 2 May 2018. In the letter, BSP Lawyers stated that the Act applied to the 2004 Lease **[TB 197-198]**.

23. Under cover of a letter dated 10 May 2018, Millens Lawyers, on behalf of Verraty, sent BSP Lawyers, on behalf of RFC, a Deed of Renewal of Lease recording that RFC had renewed the Lease for the further term of 10 years commencing on 7 May 2018 **[TB 199-206]**.

24. The Deed of Renewal included an amended schedule to the Lease. Item 7 of the amended schedule provided that RFC would pay Verraty rent of $1,020,128.72 (excluding GST) for the first year of the renewed term (7 May 2018 to 6 May 2019). That amount was 4% more than the rent RFC was paying in the final year of the initial term of the 2004 Lease being $980,893 (excluding GST).

25. BSP Lawyers responded by letter to Millens Lawyers dated 15 May 2018. In the letter, BSP Lawyers stated that Act did apply to the 2004 Lease and that the rent for the renewed term was to be determined by a rent review conducted in accordance with the Act **[TB 207]**.

26. Millens Lawyers responded by letter dated 21 May 2018. In the letter, Millens Lawyers repeated that the Act had ceased to apply to the 2004 Lease **[TB 208]**.

27. RFC has not signed the Deed of Renewal.

28. The State Revenue Office assessed land tax against the Premises for the year ending 31 December 2016 at $41,850. Verraty received that land tax assessment notice and has paid the assessed amount **[TB 212**]. Of that amount, $27,328.28 was referable to the period between 7 May 2016 to 31 December 2016.

29. The State Revenue Office assessed land tax against the Premises for the year ending 31 December 2017 at $62,100 **[TB 213]**. Verraty received that land tax assessment notice and has paid the assessed amount. Of that amount:

(a) $21,437.26 was referable to the period between 1 January 2017 to 6 May 2017; and

(b) $40,662.74 for the period between 7 May 2017 to 31 December 2017.

30. The State Revenue Office assessed land tax against the Premises for the year ending 31 December 2018 at $62,100 **[TB 214].** Verraty received that land tax assessment notice and has paid the assessed amount. Of that amount:

(a) $21,437.26 was referable to the period between 1 January 2018 to 6 May 2018; and

(b) $40,662.74 for the period between 7 May 2018 to 31 December 2018.

31. Under cover of an email from Ross Millen of Millens Lawyers to Andrew Heale of BSP Lawyers on 28 May 2018, Millens Lawyers, on behalf of Verraty, served on BSP, on behalf of RFC, notices to tenant dated 28 May 2018 under which Verraty demanded, *inter alia*, that RFC reimburse Verraty for the following amounts of land tax that Verraty had paid:

(a) $27,403.15 for the period between 7 May 2016 to 31 December 2016;

(b) $21,437.26 for the period between 1 January 2017 to 6 May 2017;

(c) $40,662.74 for the period between 7 May 2017 to 31 December 2017; and

(d) $21,437.26 for the period between 1 January 2018 to 6 May 2018;

plus GST of $11,094.04.

[TB 209-235]

32. The amount of land tax for the period between 7 May 2016 and 31 December 2016 should have been $27,328.28. Verraty has not provided a tax invoice to RFC in respect of any of the amounts claimed for land tax as required by clause 23(5) of the 2004 Lease [**TB 140]**.

33. RFC has not reimbursed Verraty for the land tax set out in the paragraph 31 and has not paid the GST set out in that paragraph.

34. Under cover of a letter dated 28 March 2019, Verraty received from Knight Frank a market rent assessment for the Premises of even date **[TB 242-245]**. The assessment was that rent was $950,000 (excluding GST).