VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP333/2017

CATCHWORDS

LANDLORD AND TENANT – Section 4(2) of the *Retail Leases Act 2003* - whether occupancy costs exceed $1 million; Whether GST is to be counted in calculating occupancy costs; Section 11(2) of the *Retail Leases Act* 2003 – whether premises which fall within the definition of *retail premises* at the commencement of the lease can subsequently fall outside the definition of *retail premises* during the term of the lease.

APPLICANT	William Buck (Vic) Pty Ltd (ACN 006 927 822)
RESPONDENT	Motta Holdings Pty Ltd (ACN 060 483 829)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
LAST DATE FOR FILING WRITTEN SUBMISSIONS	15 December 2017
DATE OF ORDER	16 January 2018
CITATION	William Buck (Vic) Pty Ltd v Motta Holdings Pty Ltd (Building and Property) [2018] VCAT 15

ORDERS

1. The Applicant's application is dismissed.
2. Liberty to apply on the question of costs, provided such liberty is exercised by 5 February 2018.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr P Best of Counsel
For the Respondent	Mr S Hopper of Counsel

REASONS

INTRODUCTION

1. On 19 December 2006, the Applicant (**'the Tenant'**) entered into a lease in respect of premises located in Hawthorn East. It continues to occupy those premises, or a part of those premises, notwithstanding that the reversionary interest was transferred to the Respondent (**'the Landlord'**) on 6 July 2010.

2. The written lease agreement is dated 19 December 2006 (**'the Lease'**) and provided for an initial term of eight years with two further terms of six years each. Although the Tenant has remained in continual occupation, the parties renegotiated the Tenant's tenure upon the expiration of the first term. As a consequence, a new lease was entered into, under which the Tenant occupies less floor area than what was originally leased (and with less rent payable). It is common ground that the current lease is governed by the provisions of the *Retail Leases Act 2003* (**'the RLA'**). However, what is in contention is whether the original Lease was also governed by the RLA.

3. Under the terms of the Lease, the Tenant was required to pay land tax. According to the Tenant, it has paid $251,234.68 to the Landlord as reimbursement of land tax up until 31 December 2014. However, if the RLA applies to the original Lease, then the relevant clause requiring the Tenant to reimburse the Landlord for land tax is deemed to be void *ab initio*, pursuant to s 50 of the RLA. That question lies at the heart of the Tenant's claim. It contends that the original Lease was governed by the RLA and as a consequence, it claims that the payment of land tax was paid under mistake of fact or law and it is entitled to be repaid that sum, plus interest.

4. Whether the Lease falls within the provisions of the RLA depends on the amount of *occupancy costs* payable under that Lease. *Occupancy costs* are defined under s 4(3) of the RLA as:

   (a) the rent payable under the lease, and

   (b) the *outgoings*, as estimated by the landlord, and

   (c) any other costs of prescribed kind.

5. If the *occupancy costs* are more than $1 million, then under s 4(2)(a) of the RLA and r 6 of the *Retail Leases Regulations 2003*,[1] the leased

[1] The *Retail Leases Regulations 2003* were current as at the time when *occupancy costs* were first assessed. These regulations were revoked on 22 April 2013 by r 4 of the *Retail Leases Regulations 2013.*

premises fall outside of the definition of *retail premises* and the RLA does not apply.

6. The starting rent under the Lease was $802,795, *plus GST*. Prior to the commencement of the Lease, and pursuant to s 46 of the RLA, the Landlord gave the Tenant an estimate of the outgoings for the first year of the lease term. That document stated that the estimated outgoings in the first year of the first term of the Lease was $150,209 (**'the Estimate of Outgoings'**). Although the parties are at odds as to whether this amount is inclusive or exclusive of GST,[2] it is accepted that this document forms the basis upon which *occupancy costs* are to be calculated, as at the commencement of the Lease.[3]

7. According to the Tenant, if GST is not counted for the purpose of assessing *occupancy costs*, then the occupancy costs amount to $953,004 and the RLA applies. That would mean that the clause in the Lease requiring reimbursement of land tax is void *ab initio*.

8. According to the Landlord, if GST is added to the starting rent and Estimate of Outgoings, then the *occupancy costs* amount to $1,048,304.40 and the RLA does not apply. That would mean that there is no prohibition against requiring the Tenant to reimburse the Landlord for land tax.

9. For the reasons which follow, I find that the aggregate *occupancy costs* at the time when the Lease was entered into exceed $1 million. Consequently, I find that the RLA does not apply to the Lease.

ISSUES

10. The dispute between the parties raises a number of questions for consideration:

    (a) Should GST be counted in calculating the *occupancy costs*?

    (b) Is the Estimate of Outgoings given by the Landlord at the commencement of the lease inclusive or exclusive of GST?

    (c) Should land tax be included in the Estimate of Outgoings, when calculating *occupancy costs*?

    (d) If the lease is determined to be a retail lease as at the date of entry into the lease, can it cease to be a retail lease simply by an increase in *occupancy costs* at some future date?

[2] As defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
[3] Paragraph 22-23 of the Tenant's *Outline of Submissions* and paragraph 18 of the Landlord's *Outline of Submissions*.

SHOULD GST BE COUNTED?

11. Mr Best of counsel appeared on behalf of the Tenant. He submitted that if GST was not counted on the starting rent, then that factor, of itself, would result in the *occupancy costs* being less than $1 million. Although his primary submission was that the Estimate of Outgoings already included GST, the situation would not change even if the Tribunal accepted the Landlord's contention that the Estimate of Outgoings was GST exclusive. In particular, if that were the case, the *occupancy costs* would only increase to either $962,320 or $968,024.90. The difference between those two figures depends on whether GST is added to council rates, water rates and land tax.[4]

12. Mr Best submitted that GST should not to be added to the base rent for the purpose of calculating *occupancy costs*. He contended that GST, put simply, is a pass-through payment. It is not a payment to be retained by the Landlord as the Landlord must remit the GST it receives to the Australian Taxation Office (**'the ATO'**). Conversely, Mr Best submitted that it is not (ultimately) a payment by the Tenant as the Tenant is able to claim an input tax credit for the payment of GST.

13. Mr Best submitted that rent, for the purpose of calculating *occupancy costs*, is the rent payable under the lease. It is a contractual obligation to pay for the use of the land.[5] Mr Best pointed to the fact that the express provisions of the lease explicitly separated the payment of rent and the payment of GST by using the words "(plus GST)". He further pointed to clause 28(2) of the Lease, which stated:

> The rent to be paid by the lessee to the lessor, being part of the consideration for the supply expressed in this lease, excludes GST.

14. The thrust of Mr Best's argument is that the payment of GST is cost neutral and does not constitute an expense either by the Landlord or the Tenant. Importantly, Mr Best submitted that GST cannot be regarded as an independent outgoing or expense. He contended that the definition of *outgoings* under s 3 of the RLA does not designate GST as an outgoing, notwithstanding that *taxes, levies, premiums or charges payable by the landlord* are expressly listed as *outgoings* under s 3 of the RLA (see below).

15. The difficulty in accepting the proposition advanced by Mr Best stems from the fact that GST is payable by the Landlord in respect of any taxable supply that it makes, which in this case is the supply of the demised premises.[6] It is not a tax imposed upon the Tenant. Whether the Lease is expressed in terms of distinguishing what may be

[4] See Australian Tax Office Ruling GSTD 2000/10, discussed in paragraph 18 below.
[5] *Commissioner of State Revenue v Price Brent Services Pty Ltd* [1995] VR 2 582, 585.
[6] Subdivision 9-B of *A New Tax System (Goods and Services Tax) Act 1999*.

described as the *base rent* and the GST payable by the Landlord on that *base rent* or alternatively, simply as an aggregate figure for rent is irrelevant, in terms of the Landlord's liability to pay GST. Where the rent payable under a lease is expressed as a *base* figure plus GST, it is the aggregate amount that constitutes the consideration for the taxable supply. In other words, expressing the rent as '$802,795 (plus GST)' or simply as $883,074.50 constitutes the same consideration paid by the Tenant (by way of rent) for the taxable supply. This point is further illustrated in the following extract of the joint judgment in *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd*,[7] where the Full Federal Court found that the expenditure by a tenant on outgoings under a lease formed part of the consideration for a single supply of the leased premises:

> [60] Such a conclusion also accords with that reached in a number of stamp duty cases: see *Commissioner of Stamp Duties* v *J V (Crows Nest) Pty Ltd* (1986) 7 NSWLR 529 at 539 per McHugh JA; *Commissioner of Stamp Duties* v *Commonwealth Funds Management Ltd* (1995) 38 NSWLR 173 at 176 - 177 per Kirby P; *Commissioner of State Revenue (Vic)* v *Royal & Sun Alliance Insurance Australia Ltd* (2003) ATC 4998 at [27], [28] and [56]. In the first-mentioned case, McHugh JA said:
>
> > In *Yanchep Sun City Pty Ltd v Commissioner of State Taxation (WA)* (1984) 15 ATR 1165; 84 ATC 4761, Olney J applied the statements made in *United Scientific Holdings Ltd v Burnley Borough Council* as to the meaning of 'rent'. His Honour held that for the purposes of the West Australian stamp duties legislation a covenant by a lessee to pay all rates and taxes charged upon the land was not rent. Olney J said (at 1171; 4767) that it was not enough:
> >
> > > '... to look merely for a contractual liability on the part of the lessee to pay money to or on behalf of the lessor. To be rent the payment must be one which is essentially a payment for the right to use the demised premises.'
> >
> > The illustrations which Olney J gave in the course of his judgment together with his actual decision indicate that he thought that, if a payment by the lessee was directed to indemnifying a liability of the lessor, it was not a payment for the right to use property. The distinction which his Honour appears to make does not seem satisfactory. For it seems to call for a different result depending on whether the lessor calculates a single lump sum payment to compensate him for the cost of letting and maintaining his property or whether he segregates his various overheads from the nett return which the letting of property gives. His Honour's approach is also, I think,

[7] (2006) 232 ALR 38.

> inconsistent with the meaning of 'rent' as it is defined in the modern cases. That definition is concerned with whether the payment - whatever its purpose - is part of the consideration for the right to use the premises. It is immaterial that the payment may reimburse the lessor in respect of one of his obligations if the payment is part of the consideration for the use of the property. In most, if not all, cases a payment by a lessee of rates and taxes owing by the lessor is made as part of the consideration for the use of the premises and for no other purpose.[8]

16. Therefore, I am of the opinion that rent payable under the lease means the sum payable by the Tenant to the Landlord for rent, inclusive of GST and irrespective of the fact that some of that payment will create a GST liability upon the Landlord. In other words, even if the Lease expressly distinguishes between the *base* rent and the amount of GST payable (by using words such as 'plus GST') does not mean that the contractual rent payable by the Tenant is limited to the *base* rent. This is because the Tenant does not pay the GST. GST is paid by the Landlord. Where words such 'plus GST' are used to describe the rent payable under a lease, a tenant must pay the *base* rent plus ten per cent. The aggregate of those amounts then constitutes the contractual rent payable under the lease. Of that sum, the Landlord is liable to pay an amount equal to 10 percent of the *base* rent, by way of GST.

17. Mr Hopper of Counsel, who appeared with Mr Harding of Counsel, further argued that even if GST on the *base* rent did not form part of the contractual rent payable under the Lease, it nevertheless was recognised as an *outgoing* under s 3 of the RLA:

> *outgoings* means the landlord's outgoings on account of any of the following –
>
> (a) the expenses directly attributable to the operation, maintenance and repair of –
>
> (i) the building …
>
> …
>
> (b) rates, taxes, levies, premiums or charges payable by the landlord because the 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
>
> (ii) the supplier of a taxable supply, within the meaning of the A New Tax System (Goods and Services Tax) Act 1999 of the Commonwealth, in respect of any such building or land;

[8] Ibid, [60].

18. The definition of *outgoings* includes taxes payable by the Landlord because the Landlord is the supplier of a taxable supply, within the meaning of the GST Act and in respect of the demised premises. As indicated above, the granting of a leasehold interest over the premises constitutes a taxable supply of real property, within the meaning of the GST Act. So much is clear from the ruling of the Australian Taxation Office Ruling in its determination GSTD 2000/10:

> 1. A supply of premises under a commercial property lease together with the services required by the tenant to use the premises will, subject to paragraph 5 of this Determination, be a single supply of real property for the purposes of the A New Tax System (Goods and Services Tax) Act 1999 ('GST Act') and the A New Tax System (Goods and Services Tax Transition) Act 1999 ('Transition Act'). Where a single supply is made the reimbursement or payment of the landlord's outgoings is consideration for the supply of the premises.

19. Therefore, the reference to *taxes* in the definition of *outgoings,* when read in the context of paragraph (b)(ii), could include GST. Indeed, neither party were able to attribute any other meaning to the word *taxes* when read with paragraph (b)(ii), other than GST. In particular, it is unlikely to mean income tax even though the liability to pay income tax may arise as a result of rent received, amongst other factors. This is because income tax liability arises irrespective of whether the Landlord is a supplier of a taxable supply. For example, it may arise because a person has earned income by way of interest on deposits, as opposed to earning income on a taxable supply. Similarly, it cannot mean land tax as that tax is not levied because the Landlord is a supplier of a taxable supply.[9] It is levied irrespective of whether rent is received or not and is based on the value of land holdings.

20. On the other hand, the obligation to remit GST on rent receipts arises solely because the Landlord is a supplier of a taxable supply in respect of the demised premises. Therefore, even if the definition of *occupancy costs* under s 4(3) of the RLA excluded GST from the calculation of *the rent payable under the lease*, the reference to the word *taxes*, when read with paragraph (b)(ii) of the definition of *outgoings* must also include GST.

21. I am reinforced in holding that view by the fact that GST is expressly referred to in s 47(6) of the RLA. That provision states, in part:

[9] Although s 50 of the RLA makes void any clause in a retail premises lease which makes a tenant liable to pay land tax, that provision does not apply in the case of a lease entered into at any time on or after 1 May 2003 and before 1 July 2003 in respect of any period before 1 July 2003.

(6) However, the outgoings statement given under subsection (3)(b) need not be accompanied by an auditor's report if it –

(a) does not relate to any outgoings other than –

(i) GST; and

…

22. In my view, the reference to GST as an outgoing in s 47(6) of the RLA indicates Parliament's intention to treat GST as a component of *outgoings.*

23. By contrast, Mr Best submitted that the subsequent amendment of r 6, found in the current *Retail Leases Regulations 2013,* and which commenced on 15 April 2013, leads to an inference that Parliament did not intend to include GST in the assessment of *occupancy costs* when the *Retail Leases Regulations* were first enacted. In particular, r 6 of the *Retail Leases Regulations 2003,* which was in force in 2007, differs from the current version of that regulation. In 2007, r 6 stated:

> For the purposes of section 4(2)(a) of the Act, the prescribed amount is $1,000,000 per annum.

24. Regulation 6 of the *Retail Leases Regulations 2013* now states:

> For the purposes of section 4 (2)(a) of the Act, the prescribed amount is $1,000,000 per annum exclusive of GST.

25. Mr Best submitted that the amendment to the regulation was done to clarify the legislature's intention. There is authority supporting that proposition.[10] However, that principle is subject to qualification. In *Allina Pty Ltd v FCT,*[11] the Full Federal Court stated:

> There was some debate before us as to the circumstances in which courts are entitled to examine a later statute to determine whether it throws any light upon the interpretation of an earlier statute. Plainly this course can be taken when the words of the earlier statute are ambiguous, but if the words of the earlier statute are clear, little assistance may be gained from the later statute. Also, care must be exercised to ensure that the words in the later statute have not been inserted to remove possible doubts…[12]

26. In my view, the amending regulation does not clarify what was the case prior to 2013. Rather, it changes the meaning of r 6, as it existed prior to 2013. At that time, the prescribed amount was simply stated as $1

[10] *Grain Elevators Board (Vic) v Dunmunkle Shire* (1946) 73 CLR 70.
[11] (1991) 99 ALR 295.
[12] Ibid, 303. See further Pearce & Geddes, *Statutory Interpretation in Australia,* 7th ed, 2011, paragraph 3.33.

million. As a general principle, the task of statutory construction must begin with a consideration of the ordinary and grammatical meaning of the words used, having regard to their context.

27. Applying that principle, I am not persuaded that the words of r 6, as they existed prior to 2013, indicate an intention to assess *occupancy costs* exclusive of GST. Indeed, such an interpretation seems to be at odds with the definition of *outgoings* set out in s 3 of the RLA, which includes *taxes* payable by the landlord. The approach that I have taken in interpreting r 6 is consistent with what the Victorian Court of Appeal said in *The Treasurer of Victoria v Tabcorp Holdings*:[13]

> 101 As the High Court has pointed out, there are powerful reasons of principle for giving primacy to the statutory text. First, the separation of powers requires nothing less. Axiomatically, it is for the Parliament to legislate and for the courts to interpret. Close adherence to the text, and to the natural and ordinary meaning of the words used, avoids the twin dangers of a court 'constructing its own idea of a desirable policy', or making 'some a priori assumption about its purpose'.

28. In those circumstances, I do not consider that the regulation, as it existed prior to 2013, meant something other than what it stated. On its face, it required *occupancy costs* to be calculated by reference to the rent and outgoings payable under the Lease. If the Lease required the Tenant to pay the Landlord an amount 'plus GST' as rent, then in the absence of any clear expression within the regulation or the statute, to the effect that GST was not to be counted, the assessment included 'plus GST'. The fact that there was an amendment to r 6 enacted in 2013 which may have altered what is to be counted in assessing *occupancy costs* does not, in my view, change the meaning of the earlier regulation.

29. Therefore, I find that GST is, for the purpose of calculating *occupancy costs*, to be calculated as part of the consideration payable for the use of the Premises. This would mean that GST on rent, together with GST on outgoings are to be taken into account when calculating *occupancy costs*.

IS THE ESTIMATE OF OUTGOINGS INCLUSIVE OF GST?

30. As indicated above, it is common ground that the estimated outgoings, for the purpose of calculating *occupancy costs*, is to be taken from the Landlord's Estimate of Outgoings, at least for the first year of the first term of the Lease. However, the parties disagree as to whether that document is GST inclusive.

[13] [2014] VSCA 143, [101] (footnotes omitted).

31. A number of documents were tendered in support of each party's respective position. In particular, although the original Estimate of Outgoings was silent as to whether the amount estimated included or excluded GST, estimates given for subsequent years have expressly stated that the estimates exclude GST. Moreover, accompanying covering letters have also referred to outgoings as excluding GST. According to the Landlord, these documents support its contention that the original Estimate of Outgoings excluded any element of GST. By contrast, the Tenant contends that the Estimate of Outgoings speaks for itself. In particular, no GST is mentioned and on that basis, it is to be assumed that the amount set out therein includes GST.

32. In my view, it is unnecessary to determine whether the original Estimate of Outgoings is inclusive or exclusive of GST. On either scenario, the *occupancy costs* still exceed $1 million. For example, if the Estimate of Outgoings is expressed as being inclusive of GST, the total occupancy costs amount to $1,033,283.50.

SHOULD LAND TAX BE REMOVED FROM THE ESTIMATE OF OUTGOINGS?

33. The situation becomes less clear if land tax is removed as a line item from the Estimate of Outgoings, on the basis that it should not form part of the calculation, having regard to prohibition on charging land tax under s 50 of the RLA.

34. Mr Best submitted that there is an inherent inconsistency in construing the definition of outgoings in s 3 of the RLA as including land tax, given that s 50 of the same Act declares a covenant to pay land tax void *ab initio*. He contended that it would be odd to construe the Act whereby the only sum in the estimate which tips the *occupancy costs* over $1 million relates to a tax which is prohibited by the same Act which defines *occupancy costs*.

35. If land tax is excluded as a line item from the Estimate of Outgoings, the *occupancy costs* are reduced by a further $32,000 to $118,209.

36. However, even if that were the case, the *occupancy costs* would still exceed $1 million:

(a)	Rent:	$802,795
(b)	GST on rent:	$80,279.50
(c)	Outgoings (less land tax):	$118,209
(d)	TOTAL:	$1,001,283.50

IS GST PAYABLE ON COUNCIL AND WATER RATES?

37. If, as the Tenant contends, the Estimate of Outgoings is inclusive of GST, then it submits that outgoings should be further reduced because no GST is payable on water and council rates. In other words, if the outgoings are $118,209,[14] inclusive of GST, then, presumably, that figure includes $915.27 as the amount of GST charged on water rates ($10,068) and $1,361.91 as the amount of GST charged on council rates ($14,981). It is common ground that no GST is payable on the source invoices issued by the municipal and water authorities. Therefore, the Tenant contends that $915.27 and $1,361.91 should be deducted from the Estimate of Outgoings, leaving a balance of $115,931.82. If that figure were adopted as the aggregate amount of outgoings, then the total *occupancy costs* would be less than $1 million:

(a)	Rent:	$802,795
(b)	GST on rent:	$80,279.50
(c)	Outgoings (less land tax and GST on council and water rates):	$115,931.82
(d)	TOTAL:	$999,006.32

38. Payment by a landlord of council rates and water rates are not subject to GST because of the operation of Division 81 of the GST Act. However, the situation changes if a tenant is required under the terms of the lease to reimburse the landlord for the payment by it of council and water rates.

39. Clause 8(1) of the Lease required the Tenant to reimburse the Landlord in respect of water rates and council rates. It states:

> The lessee must pay to the lessor the lessee's proportion of any rates, taxes and outgoings after notification by the lessor, and is to pay the amount on the next day on which rent is due.

40. Similarly, clause 9 (1) states:

> The lessee must pay the lessee's proportion of the operating expenses to the lessor.

41. In *Atlantis Investing Pty Ltd v Pamy Investments Pty Ltd*,[15] I considered the issue whether GST was payable on council and water rates, in circumstances where the source invoices (the council rate notice or water rate notice) did not require GST to be paid. I found:

[14] Excluding land tax.
[15] [2015] VCAT 1926.

> 48. In my view, the methodology adopted by the Landlord [is] consistent with the Australian Taxation Office's ruling: *Goods and Services Tax Determination GSTD 2000/10* (consolidated on 24 April 2013). Under that ruling, it is immaterial whether the supply to the Landlord is not subject to GST. If a tenant reimburses a landlord for such an expense, the transaction is categorised as a taxable supply which attracts GST. In other words, it is part of the consideration for the supply of the demised premises.
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> 49. Paragraph 8 of *GSTD 2000/10* states:
>
> > 8. Payment by the landlord of local council rates, land tax or other charges may not be subject to GST because of the operation of Division 81. If the tenant is required under the terms of the lease to reimburse the landlord's expenditure of an Australian tax or an Australian fee or charge under Division 81 of the GST Act, this is not the payment of an Australian tax or an Australian fee or charge by the tenant. Division 81 of the GST Act does not apply to the tenant's reimbursement of the rates, land tax or other charges.
>
> 50. Therefore, I find that the Landlord's treatment of adding GST to Landlord-Tenant invoices for reimbursement of municipal and water rates is in accordance with the relevant *Goods and Services Tax Determination* and valid. It does not matter that the original supply invoice did not attract GST.

42. I remain of this view. The fact that the Lease expressly provides for reimbursement of rates means that the payments by the Tenant to the Landlord in respect of those rates constitute part of the consideration for the use and occupation of the premises, which is a taxable supply and subject to GST.

43. In his *Submissions in Reply*, Mr Best submitted that the statutory framework is, however, subject to the terms of the Lease. He drew my attention to the definitions section of the Lease, set out under Clause 1, which provides, in part:

> 'Operating expenses' means the costs to the lessor of:
>
> (a) Management of the building;
>
> (b) repairs to, and maintenance of the building, including any gardening, but excluding structural work and work that is the responsibility of any lessee or occupant of the building;
>
> …
>
> (g) GST on these expenses, to the extent that the lessor does not receive an input tax credit for them under the GST Law.

‘Outgoings’ means:

(a) charges for utilities and services supplied to the building;

(b) insurance premiums and other insurance directly or indirectly related to the building that the lessor reasonably thinks should be taken out;

…

(d) GST on these outgoings, to the extent that the lessor does not receive an input tax credit for them under the GST Law.

‘Rates, rates and taxes’ means rates, taxes, charges, duties and fees imposed under any statute on the leased premises, the building or the lessor as lessor of the leased premises or as registered proprietor of the building. It includes any land tax calculated on a single holding basis, but excludes any income tax payable by the lessor on income derived from the leased premises or the building and any capital gains tax payable in respect of the building.

44. Mr Best submitted that the effect of the definitions is that operating expenses and outgoings payable under the lease (whether estimated or actual) by the Tenant are not subject to an uplift for GST if:

(a) the Landlord has to pay GST on the expense or charge and the Landlord receives an input tax credit for its payment of the expense or charge; or

(b) the Landlord is not levied with GST on the expense or charge and consequently, the Landlord does not claim an input tax credit for the expense or charge.

45. I do not accept that submission. In my view, the definition of ‘operating expenses’ and ‘outgoings’ is intended to avoid double charging of GST. For example, if the Landlord pays an insurance premium of, say $110, of which $10 constitutes GST, the Landlord is entitled to claim an input credit of $10. Under the definitions section of the Lease, the source charge to the Tenant is $100. However, when rendering an invoice for payment by the Tenant, the Landlord is required to add GST, making the total cost charged to the Tenant $110. Therefore, the definitions of ‘operating expenses’ and ‘outgoings’ do not alter the fact that the Landlord is liable to pay GST on invoices that it renders to the Tenant, for which the Landlord does not receive an input tax credit.

46. As indicated above, the Tenant contends that the Estimate of Outgoings is inclusive of GST. Therefore, Mr Best submitted that the value of GST payable by the Landlord should be deducted from the aggregate amount of the Estimate of Outgoings.

47. The Estimate of Outgoings was prepared by the Landlord prior to or at the time the parties entered into the Lease. There is no direct evidence that the individual line items in that document included an uplift of GST levied on Tenant invoices or included any GST comprising the source invoice.

48. In my view, it is reasonable to assume that the Estimate of Outgoings represents the amount that the Landlord estimates will be charged to the Tenant pursuant to and in accordance with the terms of the Lease. Where the Lease stipulates that outgoings will not include GST on the source invoices (if the Landlord is able to receive an input tax credit), it is reasonable to assume that the line items have been calculated in accordance with that prescribed formula. Therefore, it follows that it is reasonable to assume that the individual line items do not include GST payable by the supplier of the source invoice (unless the Landlord is unable to obtain an input tax credit). To assume otherwise would be to assume that the Landlord intends to claim outgoings and expenses contrary to the terms of the Lease.

49. However, that does not alter the fact that GST will be added to invoices generated by the Landlord and payable by the Tenant. The Landlord will then be liable to pay that GST to the ATO. Obviously, if 10 percent comprising the GST payable by the Landlord is not added to Landlord generated invoices, then the Landlord will be out of pocket by 10 percent because it will still have to pay that GST to the ATO on the amount invoiced. Therefore, I find, on the balance of probabilities, that the aggregate amount of the Estimate of Outgoings is the amount that the Tenant is likely to pay the Landlord.

50. That being the case, even on the Tenant's best case scenario, the amount of outgoings to be used in calculating the *occupancy costs* will be $150,209 or $118,209 if land tax is not counted. As indicated above, even if the lesser amount of $118,209 was counted, the amount of *occupancy costs* would still exceed $1 million.

Section 11

51. Pursuant to my orders dated 29 November 2017, further submissions were filed in answer to a question raised during the course of the hearing; namely, whether premises which fall within the definition of *retail premises* at the commencement of the lease (because *occupancy costs* are less than $1 million) can subsequently fall outside of the definition of *retail premises* during the term of the lease (because *occupancy costs* increase to over $1 million).

52. Although my findings set out above do not require me to make any determination on this issue, I consider it appropriate to set out my

observations concerning this issue, having regard to the submissions filed by the parties.

53. Section 11(2) of the RLA states:

> **11 Application generally**
>
> (1) …
>
> (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.

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:

> … this Act applies to a lease of premises <u>only</u> 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*.

58. The Landlord referred me to a number of authorities and extrinsic material in support of that proposition. In particular, in *Towercom Pty*

Ltd v Strathfield Group Ltd,[16] O'Brien J considered a similar scenario which arose under the former *Retail Tenancies Reform Act 1998* and *Retail Tenancies Act 1986*. In that case, the tenant was a proprietary company at the time of entering into the lease but subsequently changed its status to a public company during the term of the lease. Under the relevant Act, retail premises did not include premises leased to a public company. His Honour found that the provision posited a scenario whereby retail premises could cease to be retail premises during the term of the lease:

> 33 I am of the opinion that premises leased as "retail premises" can cease to be "retail premises" during the term of the lease if any of the disqualifying characteristics are specified in s 3 (1) (a), (b), (c), (d) or (e) occur. The converse may create a "retail premises lease" for the purposes of the Act. Premises under the terms of a lease may become "retail premises" because the disqualifying characteristic specified no longer disqualify the premises and the tenant from the protection afforded by the Act.

59. Although his Honour found that the relevant provision allowed both exit from and entry into the Act during the term of the lease, the relevant provision was expressed differently to s 11 of the RLA. In particular, the provision in the 1986 Act was not qualified by the word 'only'. As I have already indicated, I am of the opinion that the qualifying word 'only' and where it is positioned within the text of s 11, operates to prevent late entry into the RLA. This was not the case under s 3(1) of the former *Retail Tenancies Act 1986*.

60. My observations are consistent with those expressed by Dixon J in *Lontav Pty Ltd v Pinecross Custodial Services Pty Ltd (No 2)*,[17] referred to by Mr Best, where his Honour stated:

> Section 11(2) makes clear that the Act only applies to a lease of premises if the premises are retail premises (as defined in s 4) at the time of entering into the lease.[18]

61. As confirmed by his Honour in the above extract, s 11(2) of the RLA prohibits late entry into the Act. However, the decision says nothing about late exit from the Act.

62. Therefore, even if GST was not counted on water rates and council rates when calculating the starting *occupancy costs*, (which would then mean that *occupancy costs* amount to $999,006.59), the terms of the lease required an increase in rental of 3.5 percent in the second year of the first term, making rent $830,892.83, excluding GST. If GST is

[16] [2000] VSC 370.
[17] [2011] VSC 485.
[18] Ibid, [105].

added to that amount, the rent payable during the second year of the first term is $913,982.11. Therefore, even if GST was not added to council rates ($1,361.91) and water rates ($915.27) and if land tax ($32,000) were all deducted from the estimated outgoings, leaving a balance of $115,931.82, the *occupancy costs* would still exceed $1 million ($1,029,913.93) from the second year and following.

SENIOR MEMBER E. RIEGLER