

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

RETAIL TENANCIES LIST

VCAT REFERENCE NO. R172/2012

APPLICANT	Global Tiger Logistic Pty Ltd (ACN 129 459 650)
RESPONDENT	Chapel Street Trust
WHERE HELD	Melbourne
BEFORE	Member L. Rowland
HEARING TYPE	Hearing
DATE OF HEARING	24 October 2012
DATE OF ORDER	8 November 2012

ORDER

The Tribunal declares:

The Lease dated 10 January 2011 between the applicant and the respondent is a retail lease within the meaning of Section 4 of the *Retail Leases Act 2003*.


MEMBER L. ROWLAND



APPEARANCES:

For the Applicant	Ms T. Quinn of counsel
For the Respondent	Mr Harrison, solicitor

REASONS

Background

- 1 Global Tiger Logistics Pty Ltd is the tenant and applicant in this proceeding. It contends that the lease entered into between the landlord and tenant is a retail lease. Chapel Street Trust, the landlord and respondent in this proceeding contends that the lease is not a retail lease and the Retail Leases Act has no application.
- 2 The landlord is the owner of rented premises at 136 Derrimut Drive, Derrimut. The rented premises comprises 220 square metres of office space and 660 square metres of warehouse space. It is located in an Industrial 2 Zone in the shire of Brimbank. The landlord has planning approval for the premises to be used as office and warehouse. The planning scheme permits the use of the rented premises as a retail premise (other than a shop) subject to obtaining a planning permit. No planning permit to use the rented premises as a retail premises has been obtained by either the landlord or tenant.
- 3 On 11 January 2011 the tenant signed a commercial lease in the standard REIV form lease and took possession of the rented premises. The term was for 3 years. Rent at \$50,000 per annum was to commence on 10 April 2011.
- 4 On 7 February 2011 the tenant complained of a water leak. The leak into the rented premises was not resolved until 8 August 2012. The tenant ultimately seeks compensation from the landlord for the water leak.

Nature of application

- 5 The tenant seeks in these proceedings a 'preliminary' declaration that the rented premises are retail premises within the meaning of the Retail Tenancies Act. The tenant contends that if the Retail Tenancies Act applies then the tenant will have the benefit of Sections 52, 54 and 57 which create an obligation upon the landlord to repair the roof and to compensate a tenant.
- 6 The landlord contends that if the Retail Tenancies Act does not apply, then it is not liable to pay the tenant compensation. The basis for this contention is presumably, that the landlord's obligations under the terms of the Commercial Lease do not require the landlord to repair the roof.
- 7 The Consumer Guarantees, including fitness for purpose, under the Australian Consumer Law would appear not to apply to the lease because the tenant does not come within the definition of consumer for the purposes of the section. Conduct in breach of the general protections such as misleading and deceptive conduct would appear to apply to the lease.
- 8 An affidavit sworn by Glenn Duker, lawyer for the tenant, in support of the application for declaration deposed

The Applicant seeks the Preliminary Determination pertaining to the jurisdiction of the Victorian Civil and Administrative Tribunal ('the Tribunal'). If the determination is found in the Respondent's favour then the entire proceeding in the Tribunal will be disposed of, saving the parties time and money and the Tribunal's resources. If the determination is found in favour of the Applicant then, the Tribunal's jurisdiction will have been established at the outset and the issues in dispute in the proceeding will be confined. I also anticipate that any further negotiations, including any further mediation between the parties are likely to be more focused and meaningful.

- 9 The Tribunal has jurisdiction to hear and determine a dispute between the landlord and tenant pursuant to Section 184 of the *Australian Consumer Law and Fair Trading Act 2012*. The jurisdiction extends to any dispute or claim arising between the parties including any claim made under The Australian Consumer Law. The Tribunal has exclusive jurisdiction to hear and determine a retail lease dispute.

Affidavit material

- 10 The parties filed affidavit material in support and in reply to the application. No points of claim have been prepared or filed.
- 11 The affidavit material reveals that the landlord negotiated and executed the lease on the basis that the premises were to be let as office and warehouse. The landlord knew that the tenant was engaged in logistic services. It is agreed that logistic services essentially consists of shipping/transport and storage/warehousing.

Issues for determination

- 12 Two issues require determination:
1. Are logistic services retail services?
 2. Do logistic services come within the permitted use of the lease?

- 13 Section 4 of the Act provides:

Meaning of retail premises

In this Act, retail premises means premises, not including any are intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for –

- (a) the sale of hire of goods by retail or the retail provision of services; or....

Are logistic services retail services?

- 14 The landlord contends that logistic services are not retail services because it does not result in a final consumption and storage and warehousing is not a service.

15 I accept the submissions of the tenant that the ultimate consumer test is the touchstone of retailing.

16 The ultimate consumer test has been generally adopted by the Courts to determine whether or not a sale is a retail sale. Nathan J in *Wellington V Norwich Life Insurance Society Limited* 1991 1 VR 333 said;

The essential feature of retailing, is to my mind, the provision of an item or service to the ultimate consumer for fee or reward. The end user may be a member of the public, but not necessarily so. In support of this conclusion, I call in aid not only commonsense but the Macquarie Australian Dictionary which defines retail as being a sale to an ultimate consumer, usually in small quantities. When the verb is used in the transitive form, it is to sell directly to the consumer.

17 Given the ultimate consumer test I find it difficult to conceive of any sale of a service which would be other than retail. I find that the provision of logistic services is a retail activity, as it is a sale of services to an ultimate consumer within the meaning of the ultimate consumer test. The test does not distinguish between a commercial or private consumer.

Are logistic services permitted under the lease?

18 The next issue to determine is whether logistic services come within the permitted use under the lease. The critical words of section 4 as contended by the landlord for this proceeding are “under the terms of the lease”.

19 Under the terms of the lease, the permitted use is office and warehousing. The landlord contends that retail services is not permitted by the lease. The decision of Nathan J in Wellington’s case is authority for considering not only what the lease expressly permits but also the use to which the premises are actually put. So whilst office and warehouse do not immediately suggest a retail use, the actual use must be considered. For example, it is commonplace that the permitted use of an office may also be a retail use, such as lawyers and accountants offices.

20 In this case the tenant is using the office space as an office and the warehouse to store goods. The activities conducted by the tenant are entirely consistent with the permitted use in the lease, but those activities are also the retail sale of services.

21 I find that the tenant’s logistic service business is conducted within the permitted use of the rented premises. I find that the rented premises are used predominantly for the retail provision of services.

22 I thank the parties for their thoughtful and comprehensive submissions. There will a declaration that the lease is a retail lease within the meaning of section 4 of the Retail Leases Act.

MEMBER L. ROWLAND

