

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1578/2021

CATCHWORDS

Landlord and tenant, whether retail premises lease, premises comprised warehouse for steel and associated uses and office complex, whether *Retail Leases Act 2003* (Vic) applies, meaning of “retail provision of goods”, test to be applied, ultimate consumer test, whether premises open to the public, when test to be applied.

APPLICANT	Eastcombe Pty Ltd (ACN 006 728 981)
RESPONDENT	Fagersta Steels Pty Ltd (ACN 157 676 796)
WHERE HELD	Melbourne
BEFORE	Senior Member L Forde
HEARING TYPE	Hearing
DATE OF HEARING	30 May 2022 and 1 June 2022
DATE OF ORDER AND REASONS	11 July 2022
CITATION	Eastcombe Pty Ltd v Fagersta Steels Pty Ltd (Building and Property) [2022] VCAT 780

ORDER

- 1 The application to amend the points of claim to include a claim based on misrepresentation is refused for the reasons given at the hearing on 30 May 2022. In refusing the amendment, it is not the Tribunal’s intention to prevent the applicant bringing a claim based on misrepresentation in another proceeding.
- 2 I find and declare that the lease is not a ‘retail premises’ lease within the meaning of the *Retail Leases Act 2003* (Vic).
- 3 The respondent must pay the applicant the sum of \$136,286.70.
- 4 The claim for interest on the unpaid outgoings is reserved.
- 5 The applicant has liberty to file submissions on the question of interest, such submissions to be filed by **25 July 2022**.
- 6 The respondent must file submission in reply if any, by **8 August 2022**.

- 7 **I direct the principal registrar to refer the proceeding to me after 8 August 2022 for the purpose of determining the interest claim pursuant to s 100 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).**
- 8 Any application for costs must be filed by **25 July 2022**.

L Forde
Senior Member

APPEARANCES:

For Applicant	Mr S Hopper - counsel
For Respondent	Mr B Harding - counsel

REASONS

- 1 Fagersta Steels (**Tenant**) supplies stainless steel products. By lease commencing 1 July 2017 (**Lease**) it leased premises at unit 1, 66-74 Micro Circuit, Dandenong South (**Premises**) from the applicant (**Landlord**). The Premises are in an industrial precinct.
- 2 For the first three years of the Lease, the parties treated the Lease as a commercial lease and not a lease governed by the *Retail Leases Act 2003 (Vic)* (**RLA**). That changed in July 2020 which the Tenant claimed that the Lease was a “retail premises lease” and covered by the RLA.
- 3 The Landlord seeks a declaration that the Lease is not a lease of retail premises and an order for payment of arrears of outgoings by the Tenant of \$136,286.70 plus interest.
- 4 The Tenant counterclaims for a declaration that the Lease is a retail premises lease and seeks restitution of money paid in the absence of notice under s 46(2) of the RLA and for some essential safety measure payments.
- 5 The issues to be determined by the Tribunal are:
 - (a) Is the Lease a ‘retail premises’ lease within the meaning of the RLA?
 - (b) If so, is the Landlord entitled to:
 - i. retain outgoings paid in the absence of an estimate under s 46(2) of the RLA; and
 - ii. retrospectively charge the Tenant for outgoings once it has given an estimate?
 - (c) If so, is the Tenant entitled to:
 - i. be repaid land tax; and
 - ii. a refund of amounts paid to the Landlord on account of essential safety measures?
 - (d) If not, is the Landlord entitled to recover arrears of outgoings in the sum of \$136,286.70.
- 6 For the reasons set out below, I find that the Lease is not a “retail premises” lease within the meaning of the RLA and that the Landlord entitled to recover arrears of outgoings in the sum of \$136,286.70.

THE LEASE

- 7 The history of the Lease is interesting as the original landlord was a related party to the Tenant. It is accepted that:
 - (a) on about 15 May 2015 Crozier Industrial Pty Ltd (**Crozier**) (now deregistered) became the registered proprietor of the land upon which the Premises are located;
 - (b) Crozier remained the registered proprietor until about 30 October 2017;

- (c) on about 1 July 2017 Crozier as landlord entered into the Lease with the Tenant for a period of 10 years at a rent of \$448,875 per annum plus GST;
 - (d) at the time of entering into the Lease, James Crozier was the sole director of both Crozier, (the original landlord), and the Tenant;
 - (e) on about 21 September 2017, Crozier entered into a contract of sale for the Premises with the Landlord and the Premises were sold subject to the Lease.
- 8 The Lease is entitled “Commercial Lease” and the Premises are described as Factory 1. The use of the Premises is described in item 13 of the schedule to the Lease as:
- 14 Bays of Warehouse for Steel and Associated Uses and Part Office Complex and 2x Overhead JDN Moncrane
- 9 Special condition 6 of annexure A to the Lease states that the parties further agree that the use of the Premises is ‘Warehouse for Steel and Associated Uses and Office Complex’.

THE BUSINESS CONDUCTED AT THE PREMISES

- 10 Much of the evidence about the business conducted at the Premises is not controversial.
- 11 The Tenant relies on the evidence in witness statements of Mr Crozier its director, Mr Andrade an employee accountant, Mr Jansz a sales executive, Mr Pham a store manager/warehouse supervisor and Mr Hewawissa, a sales executive. The witness statements of Messers Crozier, Andrade, Pham and Jansz were with few exceptions mirror images of each other rather than the witnesses’ own words.
- 12 The Tenant’s evidence of its operation can be summarised as follows:
- (a) the Tenant sells stainless steel products to customers including members of the public from the Premises;
 - (b) the preferred method of selling is prearranged sales between customers and a salesperson at the Premises. Sales are also made to members of the public without prearranged sales meetings;
 - (c) the external office door is a security door and locked for reasons of security and safety. When customers have a prearranged meeting a salesperson usually meets them at the external office door in reception. Once greeted customers can access the warehouse through an internal door from reception to view products;
 - (d) members of the public gain entry to the Premises through the warehouse doors which are opened between 6:30 am and 3:30 pm Monday to Friday;
 - (e) customers are at all times escorted in the warehouse by a member of staff;

- (f) business signs are placed outside the warehouse doors and at the warehouse store. The warehouse store is situated inside the warehouse; and
 - (g) products can be purchased at the warehouse store and at the office.
- 13 The Landlord relies on the witness statements of Ms Taranto of Crabtree, the managing agent for the premises and Mr Ventura a solicitor with the law firm representing the Landlord.
- 14 Ms Taranto managed the Premises since late 2018 and had access to Crabtree's records from when they started managing the Premises from about 30 October 2017. Her evidence: -
 - (a) exhibits an inspection report from 30 October 2017 that contains photos taken throughout the Premises;
 - (b) deposes to outstanding outgoings in the amount of \$136,286.70;
 - (c) refers to her observations when attending the Premises for a routine inspection on 25 February 2021 with Ms Gaskell of the Landlord and exhibits photos and video from that inspection.
- 15 Ms Taranto's observation of the Premises included the following:
 - (a) the Premises forms part of a business park. At the entrance to the business park the business occupants with the exception of the Tenant are named on a large sign;
 - (b) there was a sign for the Tenant which was slightly bigger than an A4 size sheet outside the warehouse door;
 - (c) she could not see any signage at the front of the business or office at the Premises;
 - (d) at the time she attended (which through cross examination is likely to be after 3:30 pm) the front door of the downstairs office/reception was locked;
 - (e) within the warehouse, she was required to wear a high visibility vest;
 - (f) there were huge overhead cranes operating in the warehouse and most of the products were massive and heavy and required a forklift to move;
 - (g) there was a small site/foreman's office in the middle of the warehouse. There was no sign stating that sales could take place; and
 - (h) there appeared to be another business operating from the premises also a steel distributor wholesaler called "e-steel".
- 16 The 2017 inspection report photographs show that the Premises comprises a large warehouse area with 5 roller doors, a staff kitchen area and a smaller two level office area with board room and reception area. The photographs show that within the warehouse part of the premises there is what appears to be a portable office type structure the size of a small room (**portable office**). This is the structure referred to by the managing agent as the foreman's office and by the Tenant as the store.

- 17 There is a sign on the roof of the portable office which states the Tenant's name.
- 18 Mr Ventura's evidence concerns a telephone call he made to Mr Hewawissa, a sales executive employed by the Tenant and exhibits a file note of the call. Mr Ventura was cross examined. He states that on 1 March 2021 he called the Tenant on a phone number taken from an internet website. The call was answered by Mr Hewawissa. He inquired about the products offered for sale and whether it was possible for him to attend the Premises to inspect and purchase goods. He says that Mr Hewawissa said words to the effect of:
- (a) the Tenant is just a wholesaler and distributor;
 - (b) you are more than welcome to arrange an appointment to inspect stainless steel products however we are not set up like a shop, we are not a retail shop, just a warehouse;
 - (c) we operate a wholesale model and normally sell to big business; and
 - (d) payment is by COD or setting up an account.
- 19 Mr Hewawissa's witness statement responds to Mr Ventura's witness statement. His evidence is that:
- (a) he has been employed by the Tenant since January 2020. He sells to big business and other salespeople sell to small customers either at the store or at the office. Part of his job is to assess customers who ring up to ascertain whether it is worthwhile doing business with them;
 - (b) he cannot recall saying to Mr Ventura that the Premises were not set up like a shop but said the Tenant is not like Bunnings warehouse where you can just take yourself for a walk around;
 - (c) he said sales are by COD, cash or credit, or '*you can setup an account*'.
- 20 Mr Ventura acknowledged in cross examination that his file note did not record everything said in the conversation. In addition, the date on the file note was 2021 whereas the call occurred in 2022. Nothing turns on the slight differences in the evidence and Mr Ventura accepted that some of the matters not in his file note but deposed to by Mr Hewawissa may have been said by Mr Hewawissa.

DOES THE RLA APPLY?

Legislation and legal principles

- 21 Section 4 of the RLA defines "retail premises" as follows:
- (1) In this Act, *retail premises* means premises, not including any area 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 or hire of goods by retail or the retail provision of services; or
- 22 Accordingly, to find that the Premises is a retail premises, I must be satisfied that the Premises are used, or are to be used, wholly or predominantly for the hire or sale of goods by retail or the retail provision of services.
- 23 The definition of *retail premises* under the RLA has been considered in many decisions of this Tribunal and the courts. It is interpreted at least in part by a reference to the ultimate consumer test i.e. are the goods or services used by the person to whom they are sold or are they passed on by the purchaser in an unaltered state to some third person?
- 24 Based on the authorities¹, matters I should take into account when considering whether the Premises are a retail premises include:-
- (a) the nature of the goods or service offered;
 - (b) whether a fee is paid;
 - (c) whether the goods or service is generally available to anyone willing to pay the fee;
 - (d) whether the ultimate consumer test is satisfied;
 - (e) whether the premises are open to the public in the required sense; and
 - (f) whether the test is satisfied at the time the lease was entered into.

DISCUSSION

What is the nature of the goods sold or service offered?

- 25 There is little evidence before me about the goods or services offered by the Tenant.
- 26 The Tenant's witnesses described its business by saying it
- (a) "sells stainless steel products to customers including members of the public from the premises";
 - (b) prefers to schedule pre-arranged meeting with customers to be held at the Premises; and
 - (c) sells to some members of the public from the Premises without a pre-arranged meeting.
- 27 Tax invoices relied upon by the Tenant record the sale of products not services.
- 28 There is no reference to any other activity that occurs at Premises other than storage of product (warehousing) and selling. There is no evidence that warehousing was offered to customers. There is no evidence that the Tenant is offering any service.

¹ The authorities are referenced later in these reasons.

- 29 Photos taken during the managing agents inspections show that vast quantities of steel product, some of it very large are stored on the Premises.
- 30 It is not in dispute that a fee is paid for goods purchased from the Tenant.

Are the goods or service generally available to anyone willing to pay the fee?

- 31 It is not in dispute that the goods are generally available to anyone willing to pay the fee.

Is the ultimate consumer test is satisfied?

- 32 In *Wellington v Norwich Union Life Insurance Society Ltd*,² the Supreme Court considered a lease of an office used by a patent attorney and whether the services offered by the tenant fell within the phrase ‘retail provision of services’. Justice Nathan held:

I am satisfied I should characterise the nature of a business carried on in leased premises by taking into account the activities actually performed therein, together with those which are permitted under the terms of the lease....The fact that a tenant may choose to operate at a wholesale level while the premises are leased as retail ones would not determine the question. The critical matters to examine are those activities actually performed and those which are permitted under the terms of the lease. This conclusion arises out of the definition section which qualifies the use of the premises in both the present and future tenses, the words are “premises are used or to be used”. Therefore a court must forecast or at least take into account the potential activities of a tenant in deciding whether they would amount to using the premises for conducting a retail business.³

...

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 common sense 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.⁴

- 33 In *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor*⁵ Croft J held:

[17] ...The cases tend to be concerned with whether or not goods are being sold by retail and although the same characterisation issues as applied to services do exist, they tend not to be focused upon as the position is likely to be more obvious with goods. Thus a sale of “widget type A” from premises by A to B who in turn converts the good “widget type A” to “widget type B” for sale to C would not involve the

² [1991] 1 V.R. 333.

³ Ibid 335.

⁴ Ibid 336.

⁵ [2013] VSC 344 at [17]–[18], [37] (*Fitzroy Dental*).

sale of “widget type A” to C as the ultimate consumer of that type of good. Depending on the nature of the goods involved these transactions may involve sale by wholesale to B and a retail sale to C - or alternatively, two retail sales of different goods “widget type A” to B and “widget type B” to C.

[18] It follows, in my view, from the application of the “ultimate consumer” test and the authorities to which reference has been made, particularly *Wellingtons* case, that the fact that a good or a service is provided to a person who uses the good or service as an “input” in that person’s business for the purpose of producing or providing a different good or service to another person does not detract from the possible characterisation of the first person (and perhaps also the second person, depending on all the circumstances) as the “ultimate consumer” of the original good or service.

[37] ...it is critical to identify the service or services for which leased premises are being used to provide and the extent to which, if at all, that service or services are being “on sold” or merely passed on to a third party.

- 34 The ultimate consumer test was affirmed by the Court of Appeal in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd*⁶. The Court in determining whether the tenant was providing ‘retail services’ at the premises held:

23 What can be seen from the authorities is that the concept of the ‘retail provision of services’ in the Retail Leases Act and its predecessor legislation is that it involves close consideration of the service that is offered, whether a fee is paid, whether it is a service that is generally available to anyone who is willing to pay the fee and whether the persons who use the service are the ‘ultimate consumer’. On one view, to talk of an ultimate consumer of services may appear strained. Most services that are purchased are not susceptible to being passed on to a third person. This may be contrasted with a sale of goods where the difference between wholesale and retail is easily discernible. Nevertheless, the authorities that apply an ultimate consumer test as one indicia of the retail provision of services, are of long standing.

...

46 We rejected the landlord’s submission that the judge approached the task on the basis that an ultimate consumer test alone suffices to determine whether there has been a retail provision of services. The judge looked at other matters, including whether the services are generally available to any person for a fee. Ashley J referred to the provision of services to members of the public in *FP Shine*. In *Fitzroy Dental* Croft J looked at whether the services were open to the public. On analysis, it seems to us that their honours were concerned with whether there were restrictions on access to the service and who could use it. They were not concerned with the characteristics of the user (for example, whether the user was an individual or a business). Both judges

⁶ [2017] VSCA 178 (*CB Cold Storage*).

relied on Wellington. In that case, Nathan J made it clear that the user may, but need not, be a member of the public.

47 Here, even if one assumes that there may be a limited number of people who use the service (because they need to use large trucks to transport the goods to be stored) that would not matter. In any event, the tenant does provide transport facilities if required on payment of an extra fee. In short, the tenant does not impose any relevant restrictions on access. Anyone can use a service and the tenant's office is open during business hours to customers and prospective customers are like.

...

50 In summary, the services were used by the tenant's customers who paid a fee. Any person could purchase the services if the fee was paid. The tenant's business was open during normal business hours. The tenant's customers have not passed on the services to anyone else. They were the ultimate consumers of the tenant services. In isolation, none of these features would suffice to constitute the premises as retail premises. Conversely, the absence of one or more of them, would not necessarily result in a finding that the premises were not retail premises. However, in the circumstances of this case when all of those features are taken together, the conclusion must be that the premises are retail premises.

- 35 The Tenant's opening submissions state that it sells stainless steel products to wholesalers and to individuals. There is no evidence other than what is set out in these reasons about the nature of the Tenant's customer base.
- 36 The witness statements filed by the Tenant refer to customers and members of the public but there is no clarification or explanation about whether there is a difference in the two terms. Mr Andrade's witness statement refers to members of the public as being included in the term "customer". Who else is included in that term, if anyone, is unclear.
- 37 Mr Hewawissa says he told Mr Ventura in a telephone call that the Tenant is more of a wholesaler and not like a Bunnings warehouse where a customer can just walk around. He also said he "sells to big business. Other people here sell to small customers either at the store or at the office".
- 38 By consent, a document titled *Fagersta Steels Pty Ltd Cash Sales History*. (**CS History**) was tendered. As noted by Mr Hopper, counsel for the Landlord:
- (a) it purports to cover the two year period 1 May 2020 to 30 April 2022 whereas, the Lease has a commencement date of 1 July 2017. There is no record of sales at the start of the Lease; and
 - (b) it shows cash sales of \$329,592.03 over that two year period, whereas the annual rent for the Premises was \$448,875 (plus GST) at the commencement of the Lease with 3% annual increases, so clearly this does not represent all of the Tenant's sales.

- 39 The term “Cash sales” is generally understood to mean sales in which the payment obligation of the buyer is settled at once and includes payment by cash, direct debit and credit card. The Tenant did not explain the nature of the sales were included in the CS History.
- 40 Given Mr Hewawissa’s evidence of sales by COD, credit card and on account it appears that not all sales by the Tenant are include in the CS History. On account sales are not usually treated as cash sales. This is consistent with the CS History showing cash sales equal to about a third of the rent suggesting that the business must be acquiring income from other sources if it is to be profitable.
- 41 No explanation was provided about what the products referenced in the invoices listed in the CS Histroy were used for. As submitted by the Landlord, it is completely unclear whether the products were consumed, on-supplied or used as an input into another business.
- 42 There is no evidence about the proportion of sales made to the ultimate user. The Tenant acknowledges that it is wholesaling from the Premises. This suggests that the goods are on sold without alteration but the evidence is lacking. There is no evidence of how purchasers use the products. Do they use the products as an input into their businesses using it as the end consumer, use the product in some way and re-supply it or on-supply without change?
- 43 The sale of a product to a member of the public is not synonymous with a sale to the ultimate consumer.
- 44 Even if it was established that some sales were made to the ultimate consumer, the evidence does not demonstrate what portion of sales were to, or were to be to, the ultimate consumer. There is simply no evidence of sales to the ultimate consumer to satisfy the ultimate consumer test discussed above. Accordingly, I am not persuaded that the Premises are used wholly or predominantly for retail sales.

Are the premises open to the public in the required sense?

- 45 In *536 Swanston Street Pty Ltd v Harbrut Pty Ltd*⁷ Kaye J considered premises with a permitted use of “cabaret, restaurant and/or discotheque” and held that:

The question which then arises is: are those provisions properly described as retail, namely, the sale of goods by retail or the retail provision of services?

I have been referred to several definitions by authorities of what is described as retail shop and retail trade. Perhaps the most the succinct statement from which assistance is to be derived is from that made by Viscount Dunedin in his speech in *Turpin v Middlesbrough Assessment Committee and Kaye & Eyre Brothers, Limited* [1931]AC 451 at p474.

⁷ (1988) ConvR 54 – 323.

His Lordship then said, referring to buildings, that they were buildings to which the public can resort for the purpose of having particular wants supplied and services rendered to them. It is, in my view, clear that the demised premises fall within that description of being available to members of the public for the purposes of having their food and drink requirements supplied and services of discotheque entertainment provided to them. Accordingly, in my view, the demised premises are retail premises within the meaning of the Act.

- 46 In *FP Shine (Vic) Pty Ltd v Gothic Lodge Pty Ltd* [1994] 1 VR 194, Ashley J considered whether a caravan park was a retail premises under the *Retail Tenancies Act 1986* (Vic)⁸:

In 536 Swanston Street, Kaye J had to consider a lease of premises used as a restaurant, cabaret and discotheque. Members of the public could enter the premises upon payment of an admission fee. Having paid that fee, any such person could enjoy music and entertainment provided and could use of facilities for dancing and so on. In addition, food and drink could be purchased.

His honour held that (1) the premises were used wholly or predominantly for carrying on a business – that is, the business of provision of entertainment; (2) the business included both sale of goods (that is, sale of goods and drink) and provision of services (that is, the services of the discotheque); and (3) that the provision of goods and services were properly characterised as “retail”.

In my respectful opinion his honour’s conclusions were correct and may be applied to the facts now under consideration. In the present situation the business involving the retail provision of services is the provision of serviced caravan sites with necessary ancillaries of kiosk, amenities block and recreation room. It has a retail characteristic, being provision of services to members of the public wishing to avail themselves of the services in return for payment of money. It is no less retail provision of services because they are provided by way of site hirer. No doubt by analogy, the admission to the discotheque in 536 Swanston Street was only for some limited period.

- 47 In *Fitzroy Dental*, Croft J considered whether the premises in that case was “open to the public”. The premises comprised a café/restaurant located at the front of the premises and a conference centre and facilities at the rear of the premises. It was not disputed by the parties that the premises was only open to the public in a physical sense when the centre was booked and that anyone could book the centre. Croft J warned that a “walk in off the street test” must be treated with caution as a decisive test as to whether premises are open to the public. He went on to say:

[33] For the reasons I have indicated I am not satisfied that there is any basis in the provisions of the Act or the authorities for constraining the concept of “open to the public” with respect to Premises to the extent that the Plaintiffs would have it constrained. True it is that it would be

⁸ at 198.

very difficult to imagine a situation where commercial premises which were accessible on a “walk in off the street” basis could, in the absence of specified and unusual circumstances, be said not to be “open to the public”. It does not, in my view, follow that the converse position indicates that premises are not “open to the public”.

[34] In the present circumstances I am satisfied that the Premises is open to the public. There is no evidence to suggest that any person or class of persons is prohibited or otherwise prevented from being able to utilise the conference and function services provided by the Defendants at the Premises.

...

The fact that the Premises may not be “open” for the provision of services during usual ordinary business, such as apply to ordinary retail shops or restaurants and bars, does not detract in any way from the Premises being “open to the public” in the relevant sense⁹.

- 48 Business signage is one factor to take into account in classifying the retail aspect of a lease.
- 49 There is limited signage for the Tenant on the Premise. I accept Ms Taranto’s evidence that when she inspected the Premises in February 2021 the Tenant’s name did not appear on the list of tenants in the industrial park on the directory sign at the front of the park.
- 50 A photograph of the sign outside the warehouse roller door shows the sign is about the height of an A4 sheet and length of about three A4 sheets. It is located around head height on the wall to the left of the roller door. From only a short distance it appears illegible in one of the photographs, the pale blue colour of the name blending into the silver background of the sign. The sign sits above other small signs advising that safety vests, foot protection and head protection must be worn in the area.
- 51 The Tenant’s opening submissions state that the evidence will show that business signs are placed outside the warehouse doors and at the warehouse stores inviting the public to enter. The evidence does not go this far. The signage does not invite the public to enter. The signage only references the Tenant’s name.
- 52 One photograph of unknown origin and date, relied upon by the Tenant, shows a sign printed on a sheet of A4 paper sticky taped to a corner of one of the front windows of the portable office with the words “Cash Sales”.
- 53 A photograph taken of the same window on 30 October 2017 during the Crabtree inspection shows no such sign.
- 54 Ms Taranto’s evidence which I accept is that there was no sign for cash sales on the portable office during her inspection in February 2021.

⁹ Above n 4 at [33]-[34].

- 55 The temporary nature of the cash sales sign and the lack of evidence about when it was tapped to the window are not persuasive.
- 56 At its highest the Tenant's evidence establishes that:
- (a) it sells stainless steel products to customers including members of the public from the Premises;
 - (b) the products are sold to the public by prior appointment, or by attending the Premises during business hours;
 - (c) members of the public gain entry to the Premises through the warehouse doors of the Premises;
 - (d) the warehouse doors are open between 6.30am and 3.30pm, Monday to Friday except on public holidays;
 - (e) products can be purchased at the warehouse store and at the office; and
 - (f) on at least one occasion a paper sign reading "cash sales" was tapped to the portable office.
- 57 The Tenant's evidence goes no further than establishing that members of the public can attend and buy steel from the Premises. The frequency of such visits is unknown. The percentage of sales directly to members of the public is unknown.
- 58 The evidence in support of the Premises not being open to the public in the retail sense includes:
- (a) members of the public gain access through the warehouse roller door;
 - (b) attendance by customers is restricted. Customers must be accompanied by a staff member when in the warehouse. Signs state people entering must wear special clothing and be accompanied by a member of staff to enter the Premises;
 - (c) the absence of signage at the entrance to the business park to identify that the Tenant is an occupant of the business park;
 - (d) a small discreet sign beside one of the warehouse roller doors with the Tenant's name;
 - (e) the external office/reception area door of the Premises is kept locked;
 - (f) there is no contact number displayed at the front office/reception area door;
 - (g) the nature of the business being a wholesaler although the customer base is unclear;

- (h) the lay out of the warehouse depicted in photographs showing huge racks of product sometimes stacked to the ceiling and stacks of large steel sheets and overhead cranes; and
 - (i) no obvious sales area or showroom other than the portable office.
- 59 Unlike in *Fitzroy Dental* and *FP Sunshine* where customers are required to pay a hire fee or an entrance fee to gain entry, a member of the public cannot enter the Premises and walk around unaccompanied. Their access remains restricted.
- 60 While I accept the Tenant’s evidence that it is possible for a member of the public to attend the Premises during business hours and make a purchase, I am not persuaded that the Premises operate or have ever operated since the commencement of the Lease as a retail premises in the sense required by the RLA.

Is the test satisfied at the time the lease is entered into?

- 61 The RLA applies to premises that are retail premises at the time the lease is entered into or renewed.¹⁰
- 62 It is not in dispute that the Lease has a commencement date of 1 July 2017. To be a lease of retail premises, it must be shown that the Premises was used, or was to be used, wholly or predominantly for a retail purposes on 1 July 2017.
- 63 The first inspection photographs taken by Crabtree were taken on 30 October 2017.
- 64 None of the Tenant’s witnesses specifically refer to what occurred at the Premises at the start of the Lease.
- 65 Mr Crozier’s witness statement refers to “warehouse stores and their branded signage” being in place since 2015. There is no description of where these warehouse stores (note the plural) were located with the exception of a reference to a warehouse store situated just inside the warehouse door. I assume this is a reference to what I have called the portable office.
- 66 Mr Crozier does not depose to members of the public purchasing steel products at the start of the Lease. His witness statement makes no reference to time other than the reference to signage being on the “warehouse stores” since 2015. He says the Premise has always been open to the public but this is not the same as sales to members of the public at the start of the Lease.
- 67 No other witness for the Tenant deposes to what occurred at the Premises at the start of the Lease.
- 68 I cannot be satisfied on the evidence before me that the test is satisfied at the time the Lease was entered into.

¹⁰ S 11 RLA and *Verraty Pty Ltd v Richmond Football Club Ltd* [2020] VSCA 267

FINDINGS

69 I find that:

- (a) the ultimate consumer test has not been satisfied;
- (b) the Premises is not open to the public in the requisite sense;
- (c) the evidence does not refer to the use of the Premises at the start of the Lease; and
- (d) the evidence does not show that the Premises were being used wholly or predominantly for the sale of good by retail.

70 Taking these matters into account, I find that the Lease is not a “retail premises” lease within the meaning of the RLA.

LANDLORD’S CLAIM FOR OUTGOINGS

71 Ms Taranto deposed to current unpaid outgoings in the amount of \$136,286.70. Her evidence was unchallenged.

72 I find that the Tenant is liable to the Landlord in the sum of \$136,286.70 for unpaid outgoings.

73 The Landlord claims interest on the unpaid outgoings but did not address the interest in its submission.

L Forde
Senior Member