IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
EXPEDITED CASES LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-15-00070

ACCESS SOLUTIONS INTERNATIONAL PTY LTD (ACN 144 796 556) Plaintiff

v

GAMET PTY LTD (ACN 006 963 686) Defendant

JUDGE:	HIS HONOUR JUDGE MACNAMARA
WHERE HELD:	Melbourne
DATE OF HEARING:	14, 15, 16, 17 March, 21, 22, 23, 24 August, 9 October 2017
DATE OF JUDGMENT:	1 November 2017
CASE MAY BE CITED AS:	Access Solutions International Pty Ltd v Gamet Pty Ltd
MEDIUM NEUTRAL CITATION:	[2017] VCC 1563

REASONS FOR JUDGMENT

Subject:	LANDLORD AND TENANT
Catchwords:	Lease of factory; eviction; no notice under s146 *Property Law Act* 1958 served; re-entry unlawful; claim for detinue and conversion of chattels; measure of damages for conversion; whether lease governed by *Retail Leases Act* 2003; ultimate consumer test.
Legislation Cited:	*Property Law Act* 1958; *Retail Leases Act* 2003; *Landlord and Tenant Act* 1958
Cases Cited:	*Briginshaw v Briginshaw* (1938) 60 CLR 336; *ACN 006 577 162 Pty Ltd (formerly Harrop Engineering Australia Pty Ltd) as trustee for the Harrop Family Trust v Beauville Pty Ltd (ACN 134 196 080)* [2016] VSC 17; *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178; *Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333; *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor* [2013] VSC 344; *Cambridge Co-Ordinates Pty Ltd v Viking Press Pty Ltd* [2000] VCAT 264; *Victorian Frozen Food Distributors Pty Ltd v Anassis* (Unreported, 16 July 2009); *Young & Marten Limited v McManus Childs Limited* [1969] 1 AC 454
Judgment:	1. County Court proceeding is stayed. 2. In VCAT proceeding DP1663/2015 the parties must within 14 days of this day bring in short Minutes to give effect to these reasons. 3. Costs reserved

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms M. Marcus	WMB Lawyers
For the Defendant	Mr S. Hopper	RJ Legal Pty Ltd

HIS HONOUR:

Background

1 By an agreement dated 9 August 2010, Access Solutions International Pty Ltd, the plaintiff in this proceeding, purchased a business carried on under the name "Auto Access – Australia" by Thermo Electronics Co Pty Ltd ("Thermo Electronics"), which acted as trustee of the Taglieri Family Trust. (Plaintiff's Court Book ("PCB") 39-74) The assets associated with the business which were part of the sale were defined as follows in clause 29:

> "... The Goodwill, the Debtors, the Plant and Equipment, the Motor Vehicles, the Intellectual Property Rights, the Stock, the Work in Progress and the benefit of the Business Contracts and Arrangements, Statutory Licences, Equipment, Leases, Hire Purchase Agreements, Property Leases and any and all prepayments." (PCB 59)

2 The agreement defined "Excluded Assets" to mean:

> "... assets specified as such in the Particulars used by the Vendor in the conduct of the Business prior to Completion which will not be transferred to the Purchaser on Completion". (PCB 61).

The Schedule of Excluded Assets occupied a full page in the agreement. (PCB 70). It included items as various as a Toyota forklift truck, an assortment of canned paints and a set of golf clubs.

3 Special Condition 2 provided for the purchaser, Access, to accept the terms and conditions of an annexed lease which was to be granted by Gamet Pty Ltd ("Gamet"), the defendant in this proceeding, which is the fee-simple owner of the premises from which the Auto Access - Australia business was conducted in 2010. (PCB 83–109) Both the vendor, Thermo Electrics Co Pty Ltd, and defendant, Gamet Pty Ltd, are controlled by the Taglieri Family.

4 Access Solutions International Pty Ltd ("Access"), which purchased as trustee of the Access Solutions Unit Trust, was trustee of a unit trust in which the Taglieri Family held a substantial number of units, with the balance being held by interests associated with Mr Sergio Galanti, Mr John Emidio Ubaldi, Mr

Nerio Nespeca, Gabriele Peroni and Mr Dario Galanti. As part of the sale and purchase arrangement, these individuals, together with Mr Taglieri, entered into a Guarantee and Indemnity of the obligations of Access to Thermo Electronics under the sale agreement. (PCB 67–69)

5 Despite the change in ownership of the business, management continued to lie with the Taglieri Family. There were four key employees: Mr Angelo Taglieri, who was general manager; his wife, Mrs Angela Taglieri, who did accounts and administration; Mr Dale McFarlane, who did the welding; and electrician, Mr Cameron Mihailovic. (Transcript "T" 687–688)

6 Access manufactures electrically operated security doors and gates for private commercial corporations and government authorities such as Victoria Police and the Country Fire Authority, together with a small number of suppliers to private residents.

7 The lease concerned premises at 92 Bakers Road, North Coburg, which consisted of a factory and office areas. It was for an initial three year period commencing 1 July 2010. (PCB 86) The lease included options for renewal for two further three year terms, the last date for the exercise of the first option being 31 March 2013. (PCB 87) Additional provision 22.5.1 stated:

> "The Tenant [that is, Access Solutions] acknowledges that the Act [that is the *Retail Leases Act* 2003] does not apply to this Lease." (PCB 89)

8 By an email dated 26 March 2013, addressed to Mr and Mrs Taglieri (presumably as representatives of Gamet), Mr Makridis of Access said that he attached "... our request for extension of time to take up Option for Lease to 22 April 2013". (PCB 131–132) After a number of follow-up emails from Mr Makridis, Mrs Taglieri responded by an email on late afternoon of 27 March:

> "Nick,
>
> You seem to be in quite a panic. If I've said that we'll wait to the next meeting, then we'll wait to the next meeting. We will return the request tomorrow, duly signed. Tonight I'm going to make calls regarding the

> lease sum as John mentioned that it is his belief that leases have decreased somewhat. I also need to check the CPI increase as it will need to be added to the current lease value, or deducted from it if John is correct." (PCB 138)

9 Mrs Taglieri returned the Extension of Time Option of Lease document, executed as requested, by email on the morning of 28 March 2013. (PCB 142) She said, "Could you please forward us copy of this document once it has been accepted and executed by Access Solutions International Pty Ltd." Mr Makridis returned the document executed by Access later that morning. (PCB 144) Eventually on 17 May 2013, Mr Makridis emailed a Notice of Exercise of Option for Further Three Years Lease to Mrs Taglieri. (PCB 152-153) Receipt of that document was acknowledged by Mr Taglieri, presumably on behalf of Gamet, by email 17 May 2013. (PCB 154)

10 The result would appear to be a renewed term of the lease expiring 30 June 2016.

11 The conduct of the business by Access was less than successful. A unit holders' meeting for the Access Solutions Unit Trust held 27 October 2014 recorded:

- "Accumulated losses sitting at $261,531.54 as at June 30th, 2014".

As to cash flow, the minutes recorded:

- "$146K overdrawn will get to $160K early November."

The minutes noted that whilst there had been remuneration payments to Mr and Mrs Taglieri and "pay outs" to Mr Mihailovic and Mr McFarlane, "All other directors and unit holders remain unpaid for services rendered since 2010." According to the minutes:

- "Payment priorities remain:
  - Trade Creditors
  - Australian Taxation Office

- Rent
- Remaining outstanding remuneration – Directors $18K
- Remuneration for unit holders working in the business
- Reduction overdraft
- Unit holders past due based on age of outstanding"

12 To describe payments to "trade creditors" and "Australian Taxation Office" as "priorities" implied that these payments were not being made as they fell due. (Exhibit 5)

13 It would appear that relations between the incoming director unit holders of Access and the Taglieris and their long serving employees, Messrs Mihailovic and McFarlane, had cooled distinctly. Mr and Mrs Taglieri departed their employment with Access in May 2014. They were followed by Mr McFarlane in August of 2014 and Mr Mihailovic left around the same time. (T689)

14 These individuals were not directly replaced. It was necessary to modify the business model which had been followed until the first half of 2014 to increase reliance on outsourcing and call upon the assistance and expertise of the unit holders/directors; that is, the persons other than the Taglieris who executed the guarantee and indemnity of Access' obligations under the sale agreement.

15 The minutes of the October 2014 unit holders' meeting (Exhibit 5) stated:

- "Focus remains on reducing under-performing or redundant assets, increasing inventory turns and sub-lease of premises."

Under the heading "Bakers Road Sub Lease" the following was recorded:

- "Confirmed formal advice given to Gamet Pty Ltd, the landlord, on October 14th, 2014 following verbal notification"
- "Advertised property with some interest already shown"
- "Business to continue cleaning up of facility in preparation for potential sub-tenant".

16 The minutes also foreshadowed a requirement for the unit holders to provide guarantees to the National Australia Bank by the end of November "for the base $100,000 [overdraft] facility".

17 Access Solutions had written a letter dated 14 October 2014 to Gamet referring to the lease on 92 Bakers Road, North Coburg and continuing:

> "We advise that Access Solutions International Pty Ltd is in the process of subleasing the above premises.
>
> Accordingly, we will advise you once sublease tenant has been secured." (PCB 165)

18 Mr Makridis (who described himself as a Licensed Public Accountant, not a CPA, (T149, L20-25) engaged estate agency, Nelson Alexander, to lease the property described as "92 Bakers Road, North Coburg", signing an Exclusive Leasing and Managing Authority on behalf of Access Solutions in favour of "Nelson Alexander Smyth". (Exhibit 1) (T178, L5-10, 23-24) Mr Makridis said, despite the terms of the exclusive authority, that:

> "Our intention was to sub-lease part of the premises, to generate some extra cash flow." (T174, L31 – T175, L2)

19 According to the Exclusive Leasing Authority signed on behalf of Access by Mr Makridis, the rent being sought from a prospective tenant was $47,500 per annum. (Exhibit 1) According to Mr Makridis, at that time Access was paying approximately $45,000-$46,000 per annum rental to the defendant, Gamet. (T180, L13-14) The text of a display sign which was erected at the Baker Road premises was produced on subpoena from Nelson Alexander. It offered a tenancy described in block capitals as "MODERN HIGH CLEAR" with 590 square metres of floor area plus mezzanines, including modern partitioned office accommodation, secure car parking for eight cars and a 5 tonne overhead crane. The premises were said to "suit manufacturing, automotive, trade or variety of other uses". (Exhibit 1) The agent dealing with this leasing proposal, Mr Verduci, sent an email dated 2 December 2014 to an individual identified only as "Dan", with an email address. Other material produced

pursuant to the subpoena would suggest that the recipient of the email was Dan Weddell, an individual who, it seems, made a lease inquiry via the website, CommercialRealEstate.com.au. Mr Verduci said:

> "Hi Dan,
>
> The landlord will consider all general offers in the vicinity of $40K p.a. for this property ..."

20 Mr Makridis agreed in cross-examination that 590 square metres represented the entire property leased by Access from Gamet. (T181, L28-T182, L1) Apparently, according to Gamet, solicitors acting for it, namely Tasiopoulos Lambros & Co, forwarded a Disclosure Statement to Access with respect to Access' tenancy at Bakers Road. This document was said to have been dispatched on 16 October 2014. (PCB 169) Mr Makridis, a unit holder and director of Access, denied receipt of this Disclosure Statement. (T159, L7-15) He said that he opened all the company mail that arrived. (*Ibid*, L23) If a Disclosure Statement were dispatched by solicitors on behalf of Gamet, it would be paradoxical. The lease itself, as previously noted, included an agreement by the parties that the *Retail Leases Act* 2003 did not apply. The only class of tenancy in Victoria which requires provision by the landlord of a Disclosure Statement is that class governed by the *Retail Leases Act*. As we will see in a moment, Gamet proceeded in December 2014 to take enforcement action against Access, which necessarily implied that the *Retail Leases Act* had no application to Access' tenancy. For the moment, it is sufficient to note that Mr Taglieri wrote a letter on Gamet's letterhead addressed to the directors of Access and dated 23 December 2014. The letter was headed "Re: Breach of Lease". The first paragraph began:

> "We bring to your attention that you (Access Solutions International Pty Ltd (ASI) – the Tenant), have failed to meet your obligations under the terms of Lease between yourselves and Gamet Pty Ltd (the Landlord) for the commercial property at 92 Bakers Road, Coburg North.
>
> On October 16th, 2014, you were sent a Disclosure Statement from Tasiopoulos Lambros & Co and asked to sign and return it after which a Lease renewal document would be prepared and issued. You have failed to completed *[sic]* the Disclosure Statement within a reasonable

> period of time and as such, occupy the building on a monthly tenancy basis. As a result, and within the terms of the Lease we (Gamet Pty Ltd – the Landlord) advise that as of and inclusive of February 2015, your monthly rent will increase from $3,719.39 per calendar month to $5,207.15 per calendar month." (PCB 169)

21 There was a requirement that within seven days Access "forward documents in accordance with clause 2.1.3 of the Lease". There was a requirement for payment within 24 hours of the sum of $31.08, "being interest at the rate prescribed by the *Penalty Interest Act*, plus 4.0%. This payment is to be made within 24 hours of the date hereon." [The letter did not explain what the principal sum upon which this interest rate was claimed might be.]

22 There was also a requirement for payment on demand of $150 plus GST "without any deductions in accordance with item 2.1.11(d). This payment is to be made within 24 hours of the date hereon." There was then a demand for the provision of "documentation in accordance with item 2.3 of the Lease within seven days of the date hereon". The letter continued:

> "You are required to carry out repairs for all defective Landlords Installation/Chattels which are not in operating condition in accordance with item 3.3.9 of the Lease. You are further required to grant access for the purpose of inspection once these items are affected *[sic]*."

23 There was then a demand for the payment of $979.12, $979.12, $1,271.00 plus $1,271.00, totalling $4,500.24 "without deductions in accordance with item 2.1.2(a) of the Lease". This latter demand appears to relate to land tax. Clause 2.1.2 (not an item in the Schedule as the letter would have suggested, but a clause in the body of the lease) required payment:

> "...the outgoings listed in Item 10 for which the Tenant receives notices directly, and reimburse within 7 days those which the Landlord requests but:
>
> (a) land tax, if it is one of the outgoings, is to be calculated on a single holding basis of the Premises, unless the Premises are only part of the Building in which case land tax is to be calculated as if the Land were the single holding. However, if the [Retail Leases] Act applies, the Tenant is not liable to pay or reimburse land tax."

24 Item 10 of the Schedule referred to "All Building Outgoings". The lease in clause 1 included a long definition of building outgoings. (PCB 92) Land tax

was not specifically mentioned in that definition, though land tax might be comprised as one of the "rates, levies and assessments imposed by any relevant authorities".

25 The land tax assessments, the subject of this demand, were put into evidence as Exhibit 11. They are not, as the lease would require, charged to the tenant on a single holding basis but, rather, on the basis of at least one other landholding of Gamet.

26 The demand in this letter seems wild and unreasonable. It is at odds with the position which Gamet now takes that the *Retail Leases Act* does (despite the terms of the lease itself) apply to the relevant tenancy. It is at odds with the seven days that the lease allows the tenant to reimburse the landlord. It is at odds with the requirement, where land tax is properly claimable by the landlord, that the tax be claimed on a single holding basis. I have already commented upon the inappropriate terminology and the somewhat confusing manner in which the demand was made. A more reasonable manner of making such a demand would be to identify the nature of the sums claimed as land tax and provide copies of the outlays for which reimbursement was sought; but nothing of the sort was done and the reference to "items" rather than to the relevant clause in the lease was calculated to confuse. All in all, the tone of the letter is "over the top" and somewhat incoherent, yet this letter appears to be the basis upon which Gamet proceeded to re-enter the premises on Christmas Eve.

27 Selecting Christmas Eve as the date for his re-entry, Mr Taglieri said:

> "I figured that, by 4.30pm on 24 December, Auto Access would have broken up for Christmas and that meant that for the following 2-3 weeks there would have been little-to-no activity because that's when the building industry generally closes down for the year, so that's when I figured there would be the least disruption." (T754, L4-10)

28 I put it to Mr Taglieri that his choice of time "removed the possibility that [he was] going to be involved in physical confrontation with some person

associated with the tenant, who might dispute [Gamet's] entitlement". He replied, "Well, I guess that too". (*Ibid*, L11-15) Mr Taglieri said that when he re-entered, the workshop was quite clean, all the welding machines were packed away, the gas bottles were disconnected, oxy bottles were disconnected and so on. He said most of the files had been removed from the office, together with the computer server and the computer itself. He said, "It was evident that they were moving out". (*Ibid*, L17-31)

29 According to Mr Sergio Galanti, a certified practising accountant with management qualifications (T246, L9-13), Access had jobs on hand due for delivery in the early New Year at the reopening of the building industry in late January, one at Craigieburn and another at Sale Police Station. (T262, L28-31) He said that by this time, Access had moved extensively to outsourcing and subcontracting the manufacture and installation of its security gates and doors. (T260-2) He said computing had been outsourced to an organisation known as "Crash IT" in Broadmeadows, which "... for a relatively small fee, ... they made sure that your machine never crashes". (T264, L16-22) He said this organisation also hosted Access' computer server. (*Ibid*, L23) Another organisation known as "Pre-Fix Communications" provided a virtual telephone receptionist service "24/7", with the phone service located in Preston or Thornbury. (T268, L16-26)

30 Mr Taglieri sent a letter dated Christmas Eve advising of Gamet's re-entry. The letter stated:

> "As the Landlord is mindful of not disrupting the ongoing business of ASI unnecessarily we (the Landlord) advise you (ASI) that your telephone and computer systems will be left switched on, allowing you connection and communication from remote locations." (PCB 175)

The letter stated that access to the building would need to be by appointment "with at least 24 hours' notice", and communication would only be received "by email". The letter continued:

> "You are not to communicate via telephone due to your extremely aggressive nature noted during past telephone conversations. We will

then give you a time at which you will be able to access the building. A representative of the Landlord will be present at all times. We will issue further correspondence in relation to a schedule of fees to grant access, fees for storage of goods which are the property of ASI in the building from the date hereon and other outstanding monies." (*Ibid)*

The letter then stated:

"You will also further be advised of when to collect particular items which will include but not be limited to your alarm panel and key pad, lock cylinders which you had fitted a short time ago, your telephone system with handsets and your computer system." (*Ibid*)

31 Following an unsurprisingly angry mail exchange, Access was eventually allowed to re-enter the factory building on 27 January 2015, the day after the Australia Day holiday. Mr Sergio Galanti described the scene:

"... we went in on the 27th, the day after the public holiday, and Gabriel Peroni and I walked in. I took a camera with me and when we opened the place it had – it certainly didn't look like the place we had left in December; it had been gone through with a fine tooth comb, totally cleaned, stuff sorted. An area down the back was blocked off by various pieces of equipment, trailers, et cetera, so we had no access to that." (T270, L5-13)

32 The purpose of the visit by Mr Galanti and Mr Peroni was to ascertain the state of affairs and to determine what Access should do next "because we were only given a certain period of time to move out". (*Ibid,* L22-30) Mr Galanti and other plaintiff's witnesses described a process of removal of items from the Bakers Road property over some three days, which required the engagement of a number of trades and sub-contractors to enable the removal, including persons accredited to drive a forklift, a crane hire company and so on. (T273)

33 The last day of access was 2 February. The final load had to be collected from the nature strip, according to Mr Galanti:

"Because we weren't allowed to stay any longer, we were told we had to leave at 5, ... so we moved everything onto the nature strip. Gabe [Peroni] was on his way but we were told that was not to happen. So we put it on the nature strip, waited for Gabriel to turn up and took the last of our goods away." (T274, L1-16)

34 The items removed by Access from the Bakers Road premises were conveyed to a storage at 25B Stanley Drive, Somerton, which Access rented from an organisation known as Spadoni Brothers for three months. (T285, L5-9) Once the items were moved to Somerton, according to Mr Galanti, the unit holders and directors of Access "embarked on the work of sorting, checking, collecting that ... was done over a period of time". (T290, L18-20) The sorting process occupied almost the entire three months for which the Somerton premises were leased by Access. (T291, L23-28)

The proceedings

35 A writ commencing a proceeding on behalf of Access was filed in the County Court on 9 January 2015. The defendant, Gamet Pty Ltd, contended and contends that the lease between the parties was governed by the *Retail Leases Act* 2003 and that a dispute between these parties as to a retail lease lies within the exclusive jurisdiction of the Victorian Civil and Administrative Tribunal. Accordingly, proceeding BP1663/2015 was commenced in the tribunal. I gave a direction for the matters to be heard concurrently. I presided as a judge of the court and a vice president of the tribunal.

36 It will be necessary in due course to determine whether the tenancy was governed by the *Retail Leases Act* 2003. The decision on this point affects both the procedural and substantive rules which apply to the determination of the dispute between the parties.

Plaintiff's claim

37 In its Amended Statement of Claim, Access alleged the existence of the original lease between it and Gamet with respect to the Bakers Road property, and the renewal of that lease by the exercise of the option to renew in May 2013.

38 Next, the plaintiff alleges a "lock out" on 24 December 2014, which, it said, was in breach of the terms of the lease in that there was a failure to provide

quiet possession of the premises, a wrongful re-entry, and a wrongful allegation that Access was merely a month-to-month tenant obliged to pay increased rental. Next, it was said, that even if there were breaches of the lease by Access, Gamet failed to serve a notice in accordance with s146 of the *Property Law Act* 1958 and, for that reason alone, the re-entry was unlawful. If, which Access denied, it were merely a month-to-month tenant, then no one-month Notice to Quit was required by the common law to determine such a periodic tenancy had been served.

39 There was next a reference to property, being a TT Series Cantilever sliding gate with SEW motor drives and inverters, which were the subject of the Magistrates' Court proceeding. Access said that Gamet had, by the various actions alleged against it, repudiated the lease, which repudiation had been accepted by Access.

40 Further, it was said that Gamet had converted Access' property which had been on the premises, and had wrongfully detained those items of property, despite demands for their delivery on behalf of Access made during a lengthy correspondence between the parties in December 2014 to January 2015. It was said that Access' reasonable requests were denied until access was granted on 27 January 2015 to 2 February 2015, during which time Access "was not permitted by [Gamet] to access part of the Leased Premises". It was said that when access was granted, Gamet "learned that some of [its] Property which was located at the Leased Premises immediately prior to the lock out was no longer present".

41 Next, it was said that during the period of 27 January to 2 February 2015, Access identified property which belonged to it, but was prevented from removing that property and confronted with an assertion by Gamet that the property did not belong to Access. Accordingly, it was said that Access' property had been converted or detained. Finally, it was said that Gamet "caused the security system at the Leased Premises on or about 24

December 2014 to be disabled, thereby causing risk to the Property at the Leased Premises".

42 It was said, as a result of these matters, Access had suffered loss and damage, including expenditure on equipment hire and transport costs to remove property, engaging contractors and others to assist in the removal, engaging specialist technicians to assist, waste disposal and storage costs. It was also said that Access suffered economic loss and consequential loss by reason of being locked out. Access sought delivery up of the detained property or, alternatively, damages together with interest.

43 In its Defence, Gamet said that whilst it admitted that Access had carried on business at the Bakers Road premises, it had "abandoned the leased premises from a date on or before 24 December 2014". As to the lease, according to Gamet, this was "a lease of retail premises as defined in s4 of the *Retail Leases Act* 2003", and, accordingly, the plaintiff's claim was not justiciable in the County Court. It referred to s94 of the *Retail Leases Act.* Gamet noted clause 5.1 of the lease, which treated tenant's installations left on the property after the end of the lease as being "abandoned" and becoming the property of the landlord, *viz* Gamet.

44 It said that Access' abandonment of the premises "on or before 24 December 2014" constituted a surrender of the lease, which Gamet accepted. It referred to clause 10.2.2(a) of the lease, stating its effect as being that if Access vacated the premises during the term, whether it ceased to pay rent or not, the lease would continue until a new tenant took possession of the premises "unless the landlord accepts a surrender of the lease". It was said that Gamet's re-entry on 24 December "accepted [Access'] surrender, triggering the early break of the Lease pursuant to clause 10.2.2(a)". In any event, it denied having repudiated the lease and said that Access' purported acceptance of Gamet's alleged repudiation was "itself repudiatory conduct", which Gamet accepted.

45 As to the allegedly converted or detained goods, it said that they were "deemed abandoned and title vested in [Gamet] pursuant to clause 5.1 of the Lease".

46 According to Gamet, Access had abandoned the premises by 24 December 2014, and, accordingly, "suffered no losses". If, contrary to its primary contention, the lease were found not to be regulated by the *Retail Leases Act*, then Access was in breach of the lease in that "land tax in the amount of $5,411.71 was unpaid". The Defence continued, "accordingly, [Gamet] could terminate the Lease on 14 days' notice". As to its Counterclaim, Gamet said that it was a unit holder in the Access Solutions Unit Trust, and by virtue of a resolution carried 24 July 2012, it became entitled to distribution of $5,125, which had not been paid to it.

47 Next, it was said that "to the extent that the Lease was terminated by acceptance of [Gamet's] repudiation as alleged ... [in] the amended statement of claim", which was denied, Access had failed or refused to pay rent for the period until termination of the Lease and was indebted for the arrears. If the lease were not governed by the *Retail Leases Act*, Gamet claimed the amount owing for land tax under the outgoings covenant in the lease in the sum of $5,411.71.

48 Gamet pleaded that at the end of the term, in accordance with the conditions of the lease, Access was required to return the leased premises to Gamet "in a clean and repaired condition", and remove its "Tenant's Installations", as defined, making good any damage caused by removing those installations. It was obliged to return the premises "in the same condition as at the start of the Lease and properly repaired and maintained", and refinish all finished surfaces in a workmanlike manner with as good quality materials as previously, immediately repairing defective lights and maintaining in working order all electric installations. In breach of those obligations, according to Gamet, Access had failed to:

(a) rectify the external southern concrete wall following the removal of the plaintiff's [for lease] sign;

(b) remove the alarm panel and replace it with the original unit;

(c) repair the high bay metal halid light fittings in the workshop area; and

(d) reinstate electrical wiring, which was left in an unsafe condition.

49 In its Reply to Amended Defence and Amended Defence to Counterclaim, Access denied that it had abandoned the leased premises, saying that its property remained at the premises and Access continued to occupy them in accordance with its normal business activity. It intended to close its business from 17 December 2014 approximately to early January 2015, "in accordance with its normal practice and usual building industry holidays".

50 Access denied that the lease was governed by the *Retail Leases Act*, and said that several actions of Gamet were inconsistent with a contention that it was. It referred to an alleged failure to provide a Disclosure Statement in accordance with s17 of that Act. It noted clause 22.5.1, agreeing that the Act did not apply. It said, "the Director of the Defendant was also a Director of the Landlord and, the same Director also being the director of the vendor who sold the business to the Plaintiffs." This appears to be a reference to Mr Taglieri. Access also noted Gamet's attempt to recover land tax from Access "contrary to s50" of the *Retail Leases Act.* It concluded on the point, "As to the denial that the proceeding is a retail lease dispute, the Plaintiff's claim is based in detinue and conversion".

51 Access said that even if it had abandoned the premises, which it denied, the provisions as to tenant's installations applied "only to installations and fixtures, not to items of stock, materials and raw parts, nor unfixed business equipment and tools". Alternatively, it was said that the clause in question amounted to a

levy of distress for rent which was prohibited by the *Landlord and Tenant Act* 1958. If the *Retail Leases Act* applied, the clause in question, it was said, would constitute unconscionable conduct, contrary to s77 of the *Retail Leases Act*. In its Defence to Counterclaim, it said that if Access was required to pay outgoings, "[Gamet] failed to provide [Access] with any Land Tax Assessment supporting any amounts due and payable". It denied being indebted for any land tax amount. As to the allegations of failure to deliver up the premises in good condition and make good damage, Access said that if it had an obligation to rectify the external wall, Gamet had refused to allow it access to carry out the works. As to the alarm panel, it said Gamet had been "provided with keys and access codes to the new alarm system [in approximately October 2014] and [Gamet was] therefore not entitled to demand the replacement of the alarm with the original unit". Access denied that the light fittings in the workshop were in need of repair at the time of Gamet's re-entry, but if it had an obligation to repair any light fittings, Gamet had refused to allow it access to the premises to effect any repair. It denied the allegation of electrical wiring being left unsafe.

The present proceeding

Plaintiff's claim

52 By its Amended Statement of Claim, Access alleged the existence of the lease of the premises at Bakers Road for three years from 1 July 2010 and its renewal by way of the exercise of an option to renew on 17 May 2013 with the renewed term expiring 30 June 2016.

53 Next, the Statement of Claim referred to the demand letter dated 23 December 2014 and the lock out the following day. Access denied being in breach of the lease and alleged that Gamet's re-entry was wrongful. It referred *inter alia* to Gamet's failure to serve a notice under s146 of the *Property Law Act* or, if Gamet's allegation of a mere monthly tenancy were correct, to serve a one-month Notice to Quit. The Amended Statement of

Claim said that Access, "... hereby accepts [Gamet's] repudiation of the Lease."

54 According to Access, at the time of the lock out property belonging to it, including raw materials, spare parts, work in progress, plant and equipment, office equipment and other items, were located at the Bakers Road premises. It referred to and relied upon a series of demands for the delivery up or the granting of access to the Bakers Road premises to enable those items to be removed in the period December 2014 to January 2015. Access was denied until 27 January 2015 concluding 2 February 2015. During that period, it was said, Access "was not permitted by [Gamet] to access part of the Leased Premises." During the period 27 January 2015 to 2 February 2015, Access "learned that some of the Property which was located at the Leased Premises immediately prior to the lock out was no longer present." The items which were said to be "no longer present" were set out in a schedule. There was a further schedule of property which Access had "identified [as] belonging to it" but which it was prevented from removing. It was said, therefore, that these items were "wrongfully detained" by Gamet which had "thereby converted the [items] to its own use and wrongfully deprived [Access] of the same." There was also a complaint that Gamet "caused the security system at the Leased Premises on or about 24 December 2014 to be disabled, thereby causing risk to the Property at the Leased Premises." Consequently, it was said that Gamet's breaches of the lease and other conduct alleged had caused Access to suffer loss and damage including:

"(a) Equipment hire and transport costs and removing property from the Leased Premises;

(b) Engaging contractors and other persons to assist in the removal of property from the Leased Premises;

(c) Engaging specialist technicians to assist in the removal of property from the Leased Premises;

(d) Waste disposal; and

(e) Storage costs."

55 Further, or alternatively, it was said that Gamet's breach of the lease inflicted economic loss and consequential losses on Access "from being locked out of the Leased Premises" as follows:

"(i) Their inability to use enjoy the Property on and from 24 December 2014 ...

(ii) Economic loss relating to the unlawful withholding of the Property including loss of business on and from 24 December 2014 ...

(iii) The purchase of stock and/or equipment it otherwise would have had access to in the usual course of business at the Leased Premises;

(iv) Replacement value or, in the alternative, market value of the Property; and

(v) Consequential losses."

56 The Amended Statement of Claim sought:

(a) delivery up of "the Property" to Access;

(b) damages;

(c) interest

...

(f) costs...

Defence

57 In its Defence to Access' Amended Statement of Claim, Gamet admitted the lease but said that it was a lease of retail premises "as defined in s4 of the *Retail Leases Act* 2003 ... and that this proceeding is not justiciable before this Honourable Court pursuant to s94 of the [*Retail Leases Act*]".

58 Next, Gamet referred to clause 5.1 of the lease which provided that if the tenant were to leave any of its installations or other property on the premises after the end of the lease, unless the landlord and tenant agreed otherwise, those items would "be considered abandoned and will become the property of the Landlord [Gamet]". It said that Access had abandoned the premises "on or before 24 December 2014" which constituted "a surrender of the Lease which was accepted by [Gamet]". Gamet denied that it had repudiated the lease and said that Access' "purported acceptance" of Gamet's alleged repudiation was "itself repudiatory conduct" which Gamet accepted.

59 It denied the allegations of wrongful detention of Access' property and said further that "the goods were deemed abandoned and title vested in [Gamet] pursuant to clause 5.1 of the Lease." It said that since Access had abandoned the premises, it had suffered no losses. If the premises were not retail premises for the purposes of the *Retail Leases Act* 2003, Access was in breach of the lease in not having paid the land tax and Gamet, therefore, "could terminate the lease on 14 days' notice."

Counterclaim

Gamet first noted that the defendant was trustee of the Access Solutions Unit Trust pursuant to which and by resolution of an annual meeting of unit holders, Gamet "became entitled to a distribution of $5,125 which has not been paid to it." It said that Access was indebted for non-payment of rent up to the termination of the lease. If the lease were not regulated by the *Retail Leases Act* 2003, Access was obliged to pay $5,411.71 for land tax which remained unpaid. Referring to Access' obligations under the lease to maintain

the leased premises "in the same condition as at the start of the Lease and properly repaired and maintained" (clause 3.2); to refinish all finished surfaces in a workmanlike manner (clause 3.3.1); repair defective lights (clause 3.3.4); and maintain in working order all electrical installations (clause 3.3.5), it was said that Access was in breach of the lease in failing to:

(a) rectify the external southern concrete wall following the removal of [Access'] sign;

(b) remove the alarm panel and replace it with the original unit;

(c) repair the high bay metal halide light fittings in the workshop area; and

(d) reinstate electrical wiring which was left in an unsafe condition.

60 These breaches, it said, had inflicted loss and damage on Gamet.

61 By way of counterclaim, Gamet sought a declaration that the lease was "a retail lease under the [*Retail Leases Act* 2003]" an order permanently staying the proceeding, the amount of the unpaid distribution and land tax, damages, interest and consequential relief.

Reply and Defence to Counterclaim

62 By way of Reply, Access denied that it abandoned the leased premises, saying that it continued to occupy them "in accordance with its normal business activities". Access' business was said to be closed for a summer break from 17 December 2014 to early January 2015 "in accordance with its normal practice and usual building industry holidays." Access denied the lease was governed by the *Retail Leases Act.* It said that its business was "not retail" and its claim was "based in detinue and conversion". Alternatively, it said that even if it had abandoned the premises, clause 5.1 of the lease did not apply to items of stock, materials and raw parts, nor to unfixed business equipment and tools. It was said that clause 5.1 was in any event invalid as it amounted "to distress for rent and is prohibited by operation of s12 of the

Landlord and Tenant Act 1958". If the *Retail Leases Act* applied, then Gamet's "conduct in including the clause in the lease, and in seeking to rely on same in this proceeding" amounted to unconscionable conduct, contrary to s77 of the *Retail Leases Act* and Gamet "should be restrained from relying on the clause." It denied that there was an unpaid distribution under the unit trust and said that if Access were "required to pay outgoings, [Gamet] failed to provide [Access] with any Land Tax Assessment supporting any amounts due and payable." As to the alleged failures to rectify, it denied that it had abandoned the premises and said that Gamet had denied it access to the premises to carry out any such work. It denied that Gamet had suffered any loss and damage.

The trial

63 The matter proceeded to trial before me on nine days over the months of March, August and October 2017.

The re-entry

64 The *Property Law Act* states, *inter alia*:

> "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease or otherwise arising by operation of law for a breach of any covenant or condition in the lease, including a breach amounting to repudiation, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) in any case, requiring the lessee to make compensation in money for the breach—
>
> and the lessee fails, within a reasonable time thereafter, or the time not being less than fourteen days fixed by the lease to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.
>
> ...
>
> (12) This section shall not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of nonpayment of rent whether or not such a breach amounts to repudiation."

65 The matter or matters relied on by Gamet as justifying its re-entry did not include an allegation of non-payment of rent. The service of the notice under s146 was therefore mandatory to justify re-entry. When I asked Mr Hopper to make a short statement following the plaintiff's opening of its case so as to define the issues for the trial, he said that he had no instructions to concede the wrongfulness of Gamet's re-entry but because no notice had been served under s146, "there is nothing I can say to defend the re-entry". (T81, L14-16)

66 For completeness, I should note that whilst there seemed to be some attempt in the course of the defendant's case to make good its pleading that Access had abandoned the premises, rather than being evicted or locked out, this does not seem to have been pressed in closing submissions. In broad terms, the evidence which was on this point uncontested showed that whilst Access might have been regarded as at an advanced stage in the process of "folding its tent", it had not completed that process and had not departed. All of the unit holders and directors who gave evidence stated that there was an intention to resume Access' business at Bakers Road in the early New Year of 2015. Despite accepting, based on the evidence summarised in the background section to this judgment, that Access was actively seeking a sub-tenant for the **whole** the Bakers Road premises (and in this respect I reject Mr Makridis' evidence to the contrary and evidence of any other plaintiff witness who supported him on this point) it had not in fact found that sub-tenant as at 24 December. Access had packed up and sold off or otherwise disposed of a lot of its property from the Bakers Road premises but on 24 December 2014, it could be said, in the words of Lord Tennyson: "Though much is taken, much abides." (*Ulysses*)

67 If the allegation of abandonment by Access is persisted in, I reject it.

68 I should add if it matters, that Gamet appears to have moved not in a sober spirit of enforcing legitimate legal right, but in a spirit of animus in the midst of what had become a toxic relationship between Mr Taglieri, the principal of

Gamet, on the one hand and his fellow unit holders in the Access Solutions Unit Trust on the other. This is indicated by the somewhat incoherent and rambling tone of the letter of 23 December which was apparently to form the basis of the re-entry, parts of which I quoted earlier in this judgment. In the run-up to the eviction, there had been a series of conflicts between Mr Taglieri and the other unit holders, including one in which he was denied access to the Bakers Road premises based upon some actual or alleged concerns as to insurance. Mr Taglieri had raised some insurance concerns relative to the removal of property by Access following the re-entry or lock out. He was demanding insurance particulars of a vehicle attending Bakers Road to remove property for Access. (T850) I asked him if this was in effect, "payback time" and he replied that that was "possible" and he took the stand that he did because Access had made life so difficult for him on the insurance front. (T851, L16-20) Ultimately, this was a matter which need not be pursued because, perhaps surprisingly, Access makes no claim for exemplary damages.

69 The re-entry was, for reasons explained, carried out in circumstances where a mandatory formal process had not been taken. It was, therefore, unlawful. This conclusion does not depend on any view as to the substantive issue whether Access was obliged, as the 23 December letter said it was, to reimburse Gamet for any, and if so what amounts of, land tax. That issue turns upon the question of whether the lease between the parties was governed by the *Retail Leases Act* 2003, a matter to which I will turn in due course.

70 The next step is to quantify the damages to which Access is entitled.

Assessment of damages

Conversion

71 An initial question arising in the assessment of damages in Access' claim for damages for conversion is whether Access had the necessary title to support

a conversion claim with respect to all of the items which are the subject of the claim. The tools and plant and equipment used by Access in its business were, as the background section of this judgment indicated, purchased pursuant to a sale of business agreement from Thermo Electronics Pty Ltd, a company controlled by Mr Taglieri. It acted as trustee of the Taglieri Family Trust. (PCB 39–70) By General Condition 2 of that agreement, headed "Sale and Purchase", it is provided:

> "If all Conditions are satisfied, at Completion:
>
> 2.1 the Vendor (as legal and beneficial owner) sells; and
>
> 2.2 the Purchaser buys, free from all Encumbrances (other than those Encumbrances listed in the Particulars), the Business and the Assets." (PCB 45)

72 In General Condition 29, the "dictionary", the word "assets":

> "[M]eans individually and collectively the Goodwill, the Debtors, the Plant and Equipment, the Motor Vehicles, the Intellectual Property Rights, the Stock, the Work in Progress and the benefit of the Business Contracts and Arrangements, Statutory Licences, Equipment Leases, Hire Purchase Agreements, Property Leases and any and all prepayments." (PCB 59)

73 The "Particulars" which set out certain text in panel form at the beginning of the contract showed in the "Plant and Equipment" panel, "The Plant & Equipment set out in Plant and Equipment Schedule attached herein in Annexure B." [*viz* the Lockwood valuation]

74 The expression "Plant and Equipment" is defined in the same clause so as to mean:

> "all plant, equipment, fittings, internal partitions, light fittings, tables, glassware, signage, stationery, office furniture and equipment, machinery, computer hardware, printers, furniture, fittings and other fixed assets or chattels owned by the Vendors for use in the conduct of the Business specified in the Particulars." (PCB 62)

75 The word "Business" is defined in the dictionary to mean:

> "the whole of the undertaking and goodwill of the business specified in the Particulars carried on by the Vendor under the business name specified in the Particulars from the Premises and using the Assets." (PCB 60)

76 The "business name" referred to in the Particulars is described as Auto Access – Australia, Victorian Registration No.0610512G, Gate Automation and Control. (PCB 39) Plant and Equipment, according to the Particulars, is "the Plant and Equipment set out in the Plant and Equipment Schedule annexed hereto in Annexure B". (PCB 43) The Particulars also include a section on "Excluded Assets" defined as:

> "The Excluded Assets are all property belonging to the Vendor and/or the Covenantors, other than the Plant and Equipment attached hereto. The Excluded Assets include the items set out in the Schedule of Excluded Assets attached hereto."

77 Annexure B is a valuation by Lockwood and Co Pty Ltd. According to the plaintiff, all assets of the Auto Access business were sold to Access under these arrangements except those set out in the Excluded Assets section. According to the defendant, the assets which were sold were those set out in the Lockwood and Co valuation. If an item dating from the Thermo Electronics era was used in the business but was not found listed either in the valuation or in the Excluded Assets list, according to the defendant, Access derived no title which would form the basis for a claim in conversion, whereas, according to the plaintiff Access, such an asset would have been owned by Access, giving it sufficient title to bring conversion claims so long as it was not included in the Excluded Assets section. According to Mr Hopper:

> "it is difficult to see why the parties enumerated that list [the Lockwood list] in that contract if they also intended Thermo Electronics Co Pty Ltd to make a general transfer of the business assets."

78 This is a persuasive argument. On the other hand one may ask why, if the assets in Annexure B, and those alone, were being transferred, would it have been necessary to include a list of excluded assets.

79 Mr Hopper's submission concentrates upon what appeared in the Particulars describing "Plant and Equipment" at PCB 43 to the exclusion of the definition of Plant and Equipment in the dictionary section of the agreement, namely General Condition 29. This seems unlikely to be the proper approach to

construing the contract. In the Particulars section, immediately to the right of the words relied on by Mr Hopper, appear the words "See dictionary, Schedule of Plant and Equipment Clause 10.2.2". Clause 10.2.2 of the General Conditions is an obligation on the vendor to deliver to the purchaser all items of plant and equipment *inter alia*. The Particulars section, in my view, in light of this note on the right-hand side, needs to be read in light not only of the Lockwood valuation Annexure B, but also the definition in the dictionary, which is in quite general terms and extends to "other ... chattels owned by the Vendors [presumably an erroneous reference to the Vendor in the singular] for use in the conduct of the Business ..." The generality of this provision therefore renders appropriate the inclusion of a list of excluded assets.

80 I am fortified in this view by the inclusion of a Vendor's warranty in the following terms:

> "21.9 The Assets:
>
> 21.9.1 are all of the assets (other than the Excluded Assets) which have been used and which are appropriate, material and necessary for the successful conduct of the Business; and
>
> 21.9.2 will be the property of the Vendor at Completion and will be free from all Encumbrances (other than those encumbrances listed in the Particulars)." (PCB 53)

81 It follows from all this that a chattel or piece of plant and equipment which was used in the business when it was acquired by Access and which remained on site until 24 December 2014 is to be regarded as the property of the plaintiff, Access, and as the owner of the general property interest in such chattel the plaintiff has sufficient title to sue for conversion.

82 This approach accords with the reasons of Elliott J in *ACN 006 577 162 Pty Ltd (formerly Harrop Engineering Australia Pty Ltd) as trustee for the Harrop Family Trust v Beauville Pty Ltd (ACN 134 196 080)* [2016] VSC 17, [85]–[87].

83 The assets which, according to Access, were in the Baker Road premises at the time of the lock out, and missing when the plaintiff was allowed back into the premises in January the following year, are set out in Schedule B to Access' amended Particulars of Damage as follows:

> "a. Engineering Tools comprising: milling tools, cutting tips, boring bars and tips, quantity of assorted drills, parallel bars, umbrako *(sic)* hold down bolts, cutting tools, button dies, taps, mills, screw stock, unbrako bolts, V bolt sets, drill bits, reamers, chucks, live and dead centres, tapping head and assorted tools being $15,835.00;
>
> b. Shelving Units P9 Contingency for assorted upright tools storage cupboards being $268.00;
>
> c. Hitachi Electric Jack Hammer and assorted spade bits being $447.00;
>
> d. Hitachi Rotary Hammer Drill being $78.00;
>
> e. Ramset DynaDrill being $335.00;
>
> f. King Chrome *(sic)* Metric and AF Spanner Sets being $224.00; and
>
> g. Anchor 1 Tonne Chain Blocks with 3m drop chain being $67.00." (PCB 38L)

84 Access also made a claim for chattels which were on the premises in January 2014, claimed by it but which it was blocked from recovering. These appear in Schedule C to its amended Particulars:

> "a. Lift Tech Porta Power Set – removed by the Defendant and/or its agent after 29 January 2015 when it was no longer present being $299.00.
>
> b. Working set of lifting chains – was secured by the Defendant and/or its agent to a crane, and the crane lifted so that the Plaintiff was unable to access it being $818.00.
>
> c. Air line piping to plant and filter – removed by the Defendant and/or its agent after 29 January 2015 being $268.00.
>
> d. Mounting for Steel Fabricated 10m Welding Swing Arm Gantry Boom – removed by the Defendant and/or its agent after 29 January 2015 being $670.00.
>
> e. Assorted protective gear – welders jacket Boom – removed by the Defendant and/or its agent after 29 January 2015 being $63.00.
>
> f. J Series Test Rig – claim by Mr. Taglieri, Director of the Defendant, that this did not belong to the Plaintiff being $1,958.00.

~~g. Gate Frame and Post – removed by the Defendant and/or its agent after 29 January 2015 being $4,500.00.~~

h. Steel and other raw materials inventory and parts inventory missing from steel racking and shelves in factory and at rear section of factory which was locked by A. Taglieri and not accessible to the Plaintiff – either located in the section of the Leased Premises which was not accessible by the Plaintiff, or removed by the Defendant and/or its agent being $1,500.00.

i. 4 heavy duty trestle forms being $3,520.00." (PCB 38M)

85 I turn, first, to the claim relative to the Schedule B items; that is, the ones which were said simply to be missing. Mr Hopper submitted:

> "It is unclear precisely what is in this group. The court should conclude that insufficient evidence is before the court to allow it to properly quantify this claim."

86 He said that many of the values attributed to the items by plaintiff's witness Mr Ruffino "were little more than a guess" and that he conceded that second-hand items would be half the quoted price. He said Mr Ruffino accepted that functionally equivalent items could be obtained from eBay, albeit of lower quality. Mr Taglieri said that most of these items were, in fact, removed by Access. (T751, L31–T758, L1–4) He said, further, that most of these items were acquired by him at auction second-hand. (T770, L18–27)

87 In contrast to Mr Taglieri's evidence, the directors and unit holders of Access gave evidence that they removed all of the items which they were permitted to remove, and that these items were the subject of careful examination following their transport to the temporary premises leased from Spadoni Brothers in Somerton. It is therefore a question of "oath against oath" as to what the fact is with respect to this issue.

88 The uncontradicted evidence of the plaintiff's witness is to the effect that a significant area of the factory was blocked off from Access when the plaintiff's representatives were allowed back in late January 2014. This blocked-off area was behind a roller-door at the back of the factory, which was closed, with further barriers of 44-gallon, a trailer, and a forklift, finished off with yellow

tape. These are depicted in Photographs PE2 Nos 30 and 31 in Exhibit A. The plaintiff's witnesses said that the items which had been present on 24 December had been thoroughly moved around the factory, or perhaps in some cases removed. They were not in the same places in which they had been prior to the lock out. I did not understand Mr Taglieri to disagree with this.

89 I found the plaintiff's witnesses generally convincing in the evidence which they gave (an exception to this was Mr Makridis in the evidence which he gave starkly denying the plain fact that Access was seeking in late 2014 to obtain a sublease of the **whole** of the Baker Road premises). Mr Taglieri was in control of the premises in January 2014. His action in blocking off a large area at the back of the premises to my mind gives the lie to the evidence which he gave to the court that he made all of the items which had been on site on 24 December available for collection in late January the following year.

90 The fact that Mr Taglieri and Gamet erected the barrier at the back of the factory renders the plaintiff's account of events — namely, that the whole of the items in question were not made available — more plausible than Mr Taglieri's assertion that they were.

91 The arrangement for Access to remove its property from the Baker Road premises was the last step in an eviction process which, for the reasons given above, was illegal. The tone of the correspondence which preceded it was high-handed, intemperate and somewhat irrational. In May 2014, Mr Taglieri had attempted to negotiate a purchase of certain items of plant and equipment which the evidence does not prove overlapped with the items now in question, but which were certainly of the same general class. By an email dated 5 May 2014, Mr Taglieri sought to purchase a list of items from Access for $11,400. He had explained in an earlier email of 17 April 2014 that his proposed purchase of "some of the plant and equipment" would be offset against his salary for March and rent payable to Gamet. Mr Ubaldi, on behalf of Access,

responded in an email of 5 May 2014, confirming that the items would be sold and he nominated a price of $12,980, which he said was a value attributed to the items by Lockwood. (DCB Tab 13) On the list which Mr Taglieri sought to purchase was "assorted tools and drills". (T469, L12) He said that Mr Lockwood's valuation was defective: "What was missed were a substantial amount of accessories which would render those – that equipment ineffective if you didn't buy those tools and accessories to accompany them to make them operative." (T470, L26-30) Mr Ubaldi's concern was that there were "extra assets being rolled into this purchase that hadn't really been provided for in terms of the price". (T470, L4-6) Negotiations broke down and the purchase did not proceed. Mr Ubaldi's evidence on these matters did not appear to have been challenged in cross-examination. Mr Sergio Galanti gave evidence to similar effect. When Mr Taglieri gave evidence, he did not deny that this abortive negotiation on the sale of assets occurred. He agreed that the purchase did not proceed. (T815, L21) He said he could not remember why: "I can't remember if it's because they wanted more money than I was prepared to pay or the – I can't – look, I honestly can't remember what happened and why I didn't buy them, but I didn't buy them." (*Ibid*, L22-26) Mr Taglieri denied that the items which he was seeking to buy, which were to be found in Exhibit 11, overlapped with the items which are the subject of this damages claim. He said, "there are no boring bars, there are no parallel bars, there are no Unbrako hold down bolts, there are no Button dies, no taps, no screw stocks, no Unbrako bolts, no V-bolt sets, no reamers, no live centres, no dead centres, no tapping head." (T817, L8-12) Mr Taglieri agreed that there was overlap between the two lists of equipment, "Some, but certainly not all, no." (T818, L7-8) In the context of the high-handed edicts, there is plausibility to the thought that Mr Taglieri and his company, Gamet, completed the acquisition of these items despite the breakdown of negotiations as to their purchase in May 2014.

92 Mr Hopper submitted that no finding along these lines should be made other than in accordance with the well-known principles enunciated by Sir Owen Dixon in *Briginshaw v Briginshaw* (1938) 60 CLR 336. I accept that submission. Sir Owen said:

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality." ((1938) 60 CLR 336, 361)

Later, he said:

> "But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences." ((1938) 60 CLR 336, 362)

Further on in his judgment, his Honour said:

> "When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues. ... But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected." ((1938) 60 CLR 336, 363)

As already noted, the question as to whether the chattel items alleged by the plaintiff to have "gone missing" between 24 December and the end of January were misappropriated by Gamet and thereby converted could never be proven, on the present state of evidence, to the criminal standard where it is a matter of "oath against oath". The allegation against Gamet and against Mr Taglieri is a most serious one. I believe, however, albeit with some hesitation, that it has been made out to the *Briginshaw* standard based upon the clear evidence of the plaintiff's witnesses on the point. There is an aura of illegality which surrounds Gamet's entire actions with respect to the Baker Road premises in the period December 2014 to January/February 2015, and the previous history of abortive attempts by Gamet to acquire at least some of the

items in dispute in the period February to May 2014, and the highly suspicious action of Gamet in blocking off part of the premises despite ostensibly making them available for the removal of the plaintiff's property. It follows that I prefer the evidence of Access' witnesses to Mr Taglieri's evidence. Insofar as Mr Taglieri has made denials with respect to particular items and statements along the lines that he saw them removed by representatives of Access during the three-day period, I reject that evidence.

93 The plaintiff relied as to issues of quantum upon the evidence given by Mr Ruffino of E & I Supplies or United Tools. He provided a quotation for the value of the items at $15,385, inclusive of goods and services tax. (PCB 243)

94 Mr Ruffino gave his quotation for new replacement items. (T131, L22-3) The second hand price for those items would be about half the new price. (*Ibid*, L28-9). To make a damages award which would give Access "new for old" replacement would involve a betterment beyond what the law would never countenance. Mr Hopper submitted, "The normal measure of damages for conversion is the market value of the goods converted (see *MacGregor on Damages*, 1997 [1379]). Assuming that there is a second-hand market for goods, the plaintiff is entitled only to the second-hand value of the chattels". I accept that submission.

95 Mr Hopper relied upon evidence given by Mr Taglieri as to his searches on eBay, which showed, he said, that prices range from $7.99 to $167.90 per item. Mr Ruffino agreed, according to Mr Hopper's submission, that "Some functionally equivalent items could be obtained on eBay, albeit of lower quality". (T135, L1-3, T137, L30-31) Mr Ubaldi said, as to the miscellany of assorted items that were part of the purchase offer in the period February to May 2014, which overlaps, to some degree, with these items that "They were top shelf pieces of equipment ... The brands of the stuff that we had and Mr

Taglieri did nothing by halves. When it was his business and his father's business, they didn't buy cheap stuff." (T473, L15-22) I do not accept, therefore, that the lower quality material which might be available on eBay would be a proper guide to the quality of the items involved here. Ultimately, I think the proper approach is to adopt the value quoted by Mr Ruffino and reduce it by 50 per cent to allow for the second-hand status of the items which were converted. I assess the damages for this part of the plaintiff's claim in the sum of $7,697.50.

96 I turn next to the items which were said to be present at the leased premises in January/February 2015, but which Access was precluded from removing. I deal first with certain items which Mr Taglieri agrees are retained by Gamet but which could be returned to Access. I have already described why I conclude that the position taken as to transfer of title of chattels and tools by Gamet is not justified by the terms of the 2010 Sale of Business Agreement. Accordingly, given that Access has sought in its prayer for relief specific restitution of items that would appear to be the appropriate relief to give relative to these, the items are: set of lifting chains; mounting for steel fabricated 10m welding swing arm gantry boom; J Series Test Rig; and heavy duty trestle form. There is, in addition, assorted protective gear which Mr Taglieri said included his personal jacket given to him by his father. (T764, L22-28) However, Mr Hopper said that they could be delivered up to Access if the title issue were resolved against Gamet, which, in the circumstances, it has been.

97 I turn then to the remaining items. The first is Lift Tech Porta Power Set, for which $299 is sought. Mr Sergio Galanti, one of the directors and unit holders of Access, said he derived this and other figures:

> "... we went back to the Lockwood valuation and the list there, and applied the depreciation rates which had been used through the

business over its life, lodged with the Tax Department, et cetera, so we came to a figure that at least could be validated ..." (T306, L19-26)

98 In his closing submission, Mr Hopper suggested a more appropriate figure was $120. I have been unable to find the source of either of these figures. As far as the Lockwood valuation is concerned, there is no separate valuation of the item; rather, it is part of a "contingency" valuation of a miscellany of tools totalling $14,200. (PCB 78) I cannot locate a source of the $120 figure. In light of Mr Galanti's evidence, I am prepared to assume that the $299 figure was derived from Access' asset register, which itself presumably derived ultimately from the Lockwood valuation. Written down values in financial accounts, prepared principally for taxation purposes, do not necessarily accord with the price for which an item could be bought for replacement purposes on the second-hand market, or sold on that market. In the absence of other evidence, however, I adopt the figure of $299 given that this figure appears to be the figure for financial and taxation purposes for which the relevant item would be deemed to be capable of being bought and sold for on the second-hand market. In the absence of an ascertainable source for Mr Hopper's figure of $120, I put it to one side.

99 The next item is "air line piping to plant and filter". There seemed to be little in the plaintiff's evidence about this. Mr Taglieri said that this was just a piece of plastic conduit with no real value. (T762, L30-T764, L11) Mr Hopper's proposed valuation was $5.65 against the plaintiff's valuation of $268. In the absence of a credible denial of Mr Taglieri's account of this item, I adopt the figure of $5.65 of the value.

100 The final item was described as "Steel and other raw materials inventory and parts inventory missing from steel racking and shelves in factory and at rear section of factory which was locked by A. Taglieri and not accessible to the Plaintiff – either located in the section of the Leased Premises which was not accessible by the Plaintiff or removed by the Defendant and/or its agent being $1,500." Mr Taglieri said there were only a few unusable off-cuts and half a

dozen perforated metal sheets remaining. (T766, L1-19) Mr Hopper submitted that I should "conclude there is insufficient evidence to determine the nature of these items or their value". According to Mr Sergio Galanti, the offcuts in question were in the back room which had steel racking. This was the area to which access was denied to the representatives of the plaintiff in January/February 2015. According to Mr Galanti, "... there were drums ... the trailer fully loaded and the forklift, so we never got access to the rear. I do know we asked a number of times, and were never given access to the back room." (T272, L2-7) It seems to me fundamentally unlikely that Gamet would secure and return useless off-cuts. I make that finding in accordance with the *Briginshaw* principles. I therefore accept that were useful off-cuts which the plaintiff was blocked from removing and I adopt the plaintiff's valuation of $1,500 in the absence of any other material.

Removal costs

101 The next head of damages sought by the plaintiff are the costs of Access' relocation. They are summarised in a table to be found in Access' Particulars of Damages (PCB 38N) as follows:

	Suppliers	**Cost Incurred $**
Storage 25B Stanley Drive Somerton	Spandoni Brothers Pty Ltd	7,500.00
Transport, Forklift and Scissor lift hire	Metcalf Crane Services	5,252.00
Trailer Hire	Caltex	72.73
Transport	DeMenna Transport	1,560.00
Stationery, Desk and equipment to restate office	Officeworks	387.28
Disconnection of Equipment and Boom Gates	Control IT & Action Gates	900.00
Sorting, Reconciliation, Record Updates and	Unitholders, Directors & Employees	8,389.72

Cleaning Up		
Waste Disposal	Dirty Harry & Ascot Bins	827.18
Labour Hire	Ferroustek Pty Ltd	5,492.50
Agent Cancellation Fees	Nelson Alexander Smythe	739.09
Selling Fees	eBay & Pay Pal	293.66
GST		3,141.47
	TOTAL	**$34,556.13**

giving a total of $34,556.13. On behalf of Gamet, Mr Hopper submitted that these were costs which Access would have been forced to incur in any event. The evidence as to its sub-letting efforts showed that it was seeking to move out of the Bakers Road premises at the earliest available time. I accept that submission.

102 The plaintiff's witnesses verified the incurring of these outlays. The effect of their evidence was that the relocation had to be organised in an atmosphere of near panic and at a time during the summer shutdown in the building industry where it was difficult to obtain labour. In general terms, the unit holder witnesses said that had Access moved out at a time of its own choosing, it could have done so in a more measured and better managed and therefore far less expensive manner. It could have made greater use of its own unit holders' labour. The evidence showed that the unit holders had a variety of qualifications and were prepared to pitch in, roll up their sleeves and undertake physical labour.

103 I accept the contention that a move at a time of Access' choosing would have been far cheaper and far better managed. Insofar as implicitly it might have been suggested that by using unit holder labour and "in-sourcing" the move, it could have done so effectively for nothing, I do not agree. The table setting out the damages claimed by Access on this point ascribes an amount for unit holder labour. The unit holders verified that this labour was in fact supplied. Given that the unit holders and their families are persons separate from

Access, there is no reason why these amounts in a general sense could not properly be claimed as damages. However, if, for the purposes of analysis, the unit holders and their associates are treated as separate from Access and entitled to charge for their labour, it cannot be that in another part of the same analysis it can be assumed that their labour is available free. It follows that even a properly managed move at a time of Access' own choosing ought to be regarded as incurring whatever costs would be payable to the unit holders and their associates for any services they might provide.

104 The entire amount claimed for storage at 25B Stanley Drive, Somerton and paid to Spadoni Brothers Pty Ltd should be allowed. Mr Wilkinson, who gave forensic accounting evidence on behalf of the defendant, said, quite rightly, that in calculating the cost of business interruption, it was proper to deduct the amount of rental which was saved by reason of the obligation to pay it abating upon eviction. He was clearly correct in this conclusion. Likewise, however, this saving must be offset against the need for storage which was also a consequence of the eviction. The evidence as to what occurred at Somerton was that the items removed from Bakers Road were stored and sorted over a period of some months. No manufacturing took place at Somerton. The use of the premises at Somerton was for storage; it was not a factory base for Access. It is reasonable to infer that, had Access moved out of Bakers Road at a time of its own choosing, it could have completed the sorting exercise at Bakers Road and no storage facility would have been required.

105 As to the balance of the amounts claimed, Mr Hopper submitted, and I accept, that the additional cost imposed by the unfortunate circumstances of the move could be reflected by assuming that a better planned relocation at a time of Access' choosing would have cost only half what this move in fact incurred. I note that this was a "fall-back" submission by Mr Hopper, rather than his preferred position. We also have to consider that the expenditure in question was brought forward to an earlier date than it would have been incurred

otherwise. It is difficult to say exactly when the relocation would have taken place. It might have been as late as 30 June 2016. There was no evidence as to appropriate discount rates and so forth. Doing the best I can, I believe that a further 10 per cent of the cost should be allowed to reflect this process of "bringing forward". The result is that the non-storage costs sought as damages, namely $27,056.13, should be reduced by 40 per cent, leading to damages assessed, $16,233.68 for these items.

Loss of business

106 According to its Particulars of Damages, Access sought either the sum of $174,033.82 for business interruption in accordance with the expert report of Mr Paul Vartelas dated 6 October 2016; or, alternatively, damages for loss of opportunity and loss of business, $4,413.80, relative to a contract for the Sale Police Station, $2,460, for loss of retention amount; and $9,977.95, loss incurred in a contract with Adco Constructions relative to the Craigieburn Police Training Centre; together with loss of retention relative to that contract, $1,713.93.

107 Turning first to the issue of business interruption, in response to Mr Vartelas' report, Gamet relied upon a report from chartered accountant, Mr Wilkinson of Munday Wilkinson, (DCB tab 5). Mr Wilkinson's assessment of the loss was $59,753.

108 Mr Vartelas, a certified practising accountant, official liquidator, registered liquidator and tax agent, analysed Access' gross profit margin for the years ending 30 June 2011 to 30 June 2015 as follows: 2011 – 38.34 per cent; 2012 – 49.55 per cent; 2013 – 47.2 per cent; 2014 – 23.44 per cent; and 2015 – 1.34 per cent.

109 Next, he analysed the gross profit margins for period January to June for each of the same years as follows: 2011 – 40.53 per cent; 2012 – 60.1 per cent; 2013 – 46.1 per cent; 2014 – 49.04 per cent, but omitting 2015. He derived

an average gross profit margin of 49.65 per cent. He reasoned, it seems that, absent the eviction, this average gross profit margin, 49.65 per cent, would have been attained in the months of January to June 2015, which would have led to a gross profit for that period of $108,026.99. In fact, the gross loss for the period was $30,661.17. Accordingly, Access' financial performance for the six month period, according to his analysis, was $138,688.16 worse than would have been but for the eviction. He added overdraft interest at the rate of 7.345 per cent per annum, $19,524.40, leading to a total loss of $158,212.56, to which he added Goods and Services Tax at 10 per cent, $15,821.26, to reach his total assessed damages figure of $174,033.82.

110 In contrast, Mr Wilkinson made his calculation based on the gross profit margin which he analysed as being 23.68 per cent for the six months to 31 December 2014. As previously noted, he reduced the amount of the loss by rent saved by reason of the eviction in the sum of $21,774.

111 Mr Vartelas disagreed with any deduction being made for the rent which was saved by reason of the termination of the tenancy. According to Mr Vartelas, this involved the view "that because of the lock out the company was actually financially better off." (T679, L20-21) He said he disagreed with that view (*Ibid*, L22-25).

112 In allowing for the financial consequences of the lock out, it was plainly appropriate for Mr Wilkinson to treat the rent which might otherwise have been payable by Access as a credit against the damages liability of Gamet. I have already explained why, according to the same train of reasoning, it was appropriate to allow as a debit against Gamet and its damages liability for Access' outlay on storage costs at Somerton. On this point, I prefer the opinion of Mr Wilkinson to that of Mr Vartelas.

113 More generally, what sets the two of them apart is that Mr Vartelas proceeded on the basis that but for the lock out, the gross profit margin for the affected

period; *viz*, the first six months of 2015, would have been at the same level as the long term average going back to 2011. In contrast, Mr Wilkinson said that he was influenced in taking the profit margin for only the previous six months prior to the lock out by a concern to reflect the trend in profitability which was evident in the financial statements of Access.

114 Ms Marcus, cross-examining for the plaintiff, put it to Mr Wilkinson that:

> "... a longer period – looking at the period from when the directors and unitholders took over the business in 2011, would be a more accurate analysis than just a six month period?" (T904, L22-26 [the transcript falsely attributes this question and cross-examination to Mr Hopper])

115 Explaining his disagreement, Mr Wilkinson said:

> "... You've got to recognise in a business that there are trends, that a business may be profitable and its profit may change, may deteriorate." ... [This business] was more profitable in 2012, less profitable in 2013 and even less profitable in 2014, so if you took an average you're ending up with a number that's incorrect." (T904, L26-29, T905, L4-7).

116 Mr Wilkinson agreed with me that he was trying to "identify a trajectory of profitability and project that trajectory forward?" (T907, L3-4).

117 Mr Wilkinson conceded that there had been a rebound in profitability in the period July to December 2013. (T910, L3-6) He noted, however, that the gross profit margin was "50 per cent of what they were doing back in 2013". (T910, L8) He said he assumed "that the business would be able to continue at that 23.68 per cent [profit level]." (*Ibid*, L13-14) He said that despite an increase in profit margin from 5.15 per cent to 23.68 per cent between the two six month periods in calendar 2014. He remarked, "I'm not going to sit and say, well, it went from 5.15 per cent to 23.68, well, that's going to be, as Mr Vartelas has said, 49.6 per cent, go back to the high level – that's just ridiculous." (*Ibid*, L16-20)

118 He continued a little later in answer to a question from me:

> "Now, if you look at the 2015 accounts which are set out on p.12 ofmy report, you will see the gross profit marginwas 9.8 per cent for the year, that's the 12 monthsended 30 June 2015. If one has 23.68 for the firstsix

> months to December, and then for the whole year 9.8,in my brain I say, well, that next six months, the gross profit margin must have been negative. That means it wasn't on a trajectory upwards. Now, if you're going to talk margins, in a business like this you'd expect a small fluctuation in gross profit margins if the closing stock and work-in-progress are correctly recorded. If the expenses and direct costs are correctly recorded, you'd expect that gross profit margin to remain pretty constant." (T912, L2-16)

119 In my view, the responses to Ms Marcus' questions of Mr Wilkinson in cross-examination were convincing. More pertinently since, in the second half of calendar year 2014, Access was moving to a different model involving outsourcing rather than having permanent full-time employees, such as Mr and Mrs Taglieri, Mr Mihailovic and Mr McFarlane, a comparison with the period before 30 June 2014 would entail projecting the trend relative to apples based upon a previous trend relative to oranges. I adopt the opinion of Mr Wilkinson in preference to that of Mr Vartelas.

120 As to the alternative claim for losses referable to contract for gate fabrication and installation at Sale and Craigieburn, since this claim is made in the alternative, and I have sustained the primary claim for business losses albeit in an amount less than claimed by the plaintiff, the alternative claim must necessarily be put aside. Even if that were not the case, in my view, the matters raised by Mr Hopper in his closing submissions rendered this alternative claim problematic and unlikely to be successful.

121 The claims relate to loss of retention amounts and losses on the contracts. As to the Sale contract, Mr Hopper relied on evidence from Mr Taglieri at T773, L28-31 and T774, L1-28 and Exhibit 9, to the effect that the retention amounts have been paid to Access and have not been lost insofar as the Sale contract was concerned.

122 Mr Hopper said:

> "A retention amount is security for defect[ive] works. It is unclear how the defendant is said to have caused that loss, rather than it being caused by defect[ive] work performed by the plaintiff's sub-contractors."

123 I accept that submission.

124 Mr Hopper further observed that Mr Taglieri gave evidence that he had quoted the Sale job at $59,600 plus GST in September 2013 (Exhibit 6, T775, L1-20)

125 Access' Particulars of Damages show the price agreed upon as $53,856 (PCB 38N). Mr Hopper said, correctly as it seems to me, that any loss suffered may have been the result of committing to the work at an adequate price.

126 As to the Craigieburn contract, the claim seems to be for loss of $9,977.95 only.

127 Mr Hopper submitted that since these losses seem to have derived from some type of design fault which required the addition after completion of an additional post, the loss could not be attributed to the lock out. Absent evidence to the contrary, I accept that submission as well.

Application of *Retail Leases Act* 2003

128 The *Retail Leases Act* introduces some particular rules different from the general law of landlord and tenant with respect to what it defines as retail premises leases. Section 11(1) of the Act provides that it applies to retail premises leases entered into after the commencement of the Act or renewed after the commencement of the Act. Section 4(1) of the Act provides, *inter alia*:

> "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
>
> ..."

129 Sub-paragraph (2) includes a series of exclusions from the primary definition, none of which appears to be relevant in the present instance. Gamet asserts

that the lease in question here is a retail premises lease and regulated by the Act. Access denies this.

130 On behalf of Gamet, Mr Hopper submitted that insofar as the terms of the lease were rendered relevant by the inclusion in s4(1) of the words "under the terms of the lease", the "permitted use" under the lease, "manufacture and sale of steel gates", was supportive of the Act's application because "that use self-evidently permits retailing". (PCB 87) He noted that clause 22.5.1 of the lease (PCB 89) included an acknowledgement by the parties that the *Retail Leases Act* did not apply, but this provision, he submitted, was avoided. Assuming the Act otherwise applied it was rendered void by s94(2) of the Act, which provides:

> "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."

131 According to Mr Hopper, the question was as at the commencement of the lease, whether that be 17 May 2013 or 1 July 2013, whether Access' use of the premises was wholly or predominantly retail, as that expression is understood for the purposes of the statute.

132 According to Mr Hopper, Exhibit F showed that in the financial years ending 30 June 2013 and 30 June 2014, "at least 68 per cent of new gate builds by a dollar value were builder intermediary supplies". By that was meant "the supply of gates to the owner of land through the hands of an intermediary, usually a builder". He said that if I were satisfied "that the balance of supplies [were] made up of direct owner supplies and servicing gates, then the lease must be retail". Likewise, if I were satisfied that the majority of supplies were builder intermediary supplies, then the lease would be regarded as retail.

133 Mr Hopper referred to the decision of the Court of Appeal in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178; *Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333; and the decision of Croft J in *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor* [2013] VSC 344 at [16].

134 In support of submissions leading to the opposite conclusion, Ms Marcus referred to the same authority. She said it was important to bear in mind that the *CB Cold Storage* case decided by the Court of Appeal was concerned with what the court found to be the retail supply of services rather than of goods. She referred to the statement by the court of Warren CJ, Ferguson JA (as she then was) and Kaye JA:

> "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." [2017] VSCA 178 at [23]

135 She noted the statement later in the judgment by the court:

> "The Landlord's focus on what happens to the goods that are stored after they leave the premises is not relevant in this case. That may have been relevant if the question was whether there was a sale of goods by retail. But it is not. It is not a question of consumption of the goods." (*Ibid*, [45]

136 She referred to my statement as a Deputy President of VCAT in *Cambridge Co-Ordinates Pty Ltd v Viking Press Pty Ltd* [2000] VCAT 264 [32]:

> "In my view the predominant nature of business is to be determined by reference to the activities involved in the business and where a business entails as one invariably does the sale of goods or services that activity is best judged by reference to the volume of sales in dollar terms."

137 According to Ms Marcus, Access' business involved "the sale of goods, not services". She said that Access' sale of goods "involves wholesale sale of goods, predominantly to builders who then on-sell the gates as part of larger works". She said the reference in the "permitted use" section of the lease to "the manufacture and sale of steel gates" referred to "the manufacture and

consumption as it were, of steel gates predominantly at a wholesale level". Accordingly, she submitted, the *Retail Leases Act* did not apply.

138 Ms Marcus adopted the same analysis of Access' business as had Mr Hopper, that is, she accepted that the question of "predominance" was to be judged by reference to sales volume in dollar terms. She concluded that Exhibit F, which provided details of Access' sales disclosed 75 per cent of them as gate construction and fabrication for builders. She submitted, however, for the reasons already explained, that this rendered Access' business predominantly non-retail.

139 She noted that the quotations given to customers by Access, for instance at PCB 300, included substantial items described as "Work by Others". She said:

> "What the ultimate consumer of the gate has contracted to buy from the builder is not simply a gate that happens to be produced by [Access] but the whole package as completed by the "Work by Others". In a number of cases, the "Works by Others", is only one part of the broader package of what is being provided by the builder. The builder is not simply passing on 'widget type A' (the gate) to B. The gate is used as an input as part of a broader project. The provision of the gate is usually the end result of a tender process."

140 She referred to an affidavit by one of the directors/unit holders, Mr Gabriel Peroni. (DCB 6, paragraph 8)

141 It will be seen that the parties are agreed on some of the fundamental steps in analysis. They are agreed that the predominance of a particular aspect of Access' business for analytical purposes is to be judged by the volume of sales in dollar terms. Further, they are agreed that this is to be judged by reference to the data in Exhibit F which, when analysed, shows that the predominant element of Access' business is supplying gates to builders and architects, which gates are to be incorporated in structures built or designed by the builder or architect, as the case may be for a customer or client.

142 In *Victorian Frozen Food Distributors Pty Ltd v Anassis* (Unreported, 16 July 2009) as a Deputy President of VCAT, I considered whether a lease of premises to the applicant company was governed by the *Retail Leases Act.* While there were some over-the-counter fish sales, presumably to ordinary consuming members of the public, more typically and predominantly the company's sales were to other enterprises such as hotels, restaurants, vineyards, clubs and so forth. Counsel for the applicant tenant submitted that there was here no wholesale sale, that is, a sale to a person who intended to on-sell to an "ultimate consumer". The fish were "consumed" by the hotel, kitchen or vineyard or club and a different commodity was supplied by wholesale to the customer of the hotel, club, etc. I said:

> "The question is whether ... where for instance bulk fish items are delivered to the kitchen of an hotel, motel or club the kitchen can be regarded as the ultimate consumer. In my view this cannot be. It would lead to bizarre results if this were correct. On this view a factory which manufactures plastic and/or rubber items such as body trims or windscreen wiper blades for supply to a car manufacture such as Holden or Ford would be regarded as in the retail trade because Holden or Ford in the hypothetical example '*consume*' the plastic and rubber items by incorporating them as trim or wiper blades in the final motor vehicle construction. An ordinary person would be astonished and bemused at the suggestion that such an enterprise was a retailer.
>
> Again, on the same reasoning, BHP Steel would be regarded as a '*retailer*' if it delivered raw sheets of metal to be pressed into car bodies by one of the major car manufacturers. Again, an astonishing proposition." [75]-[76]

143 I reached this conclusion and adopted that reasoning without the benefit of the later authoritative statements from Croft J in *Fitzroy Dental* and the Court of Appeal in *CB Cold Storage*. I now turn to those authorities.

144 In *Fitzroy Dental*, Croft J was concerned with an application for a declaration that a lease of premises in Brunswick Street, Fitzroy was a retail lease and the dispute relative to it was a retail tenancy dispute within the meaning of the *Retail Leases Act.* His Honour reviewed various authorities and remarked:

> "... the authorities do indicate strong support for the "ultimate consumer" test as the touchstone of retailing. The cases tend to be concerned with whether or not goods are being sold by retail and although the same characterisation issues as apply 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 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." [17]

145 His Honour continued:

"It follows, in my view, from the application of the 'ultimate consumer' test and the authorities to which reference has been made, ... 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." [18]

146 His Honour found that the premises in question had been used "predominantly as a conference centre and café/restaurant". [23] He said:

"The Defendants acknowledge that other than when used in conjunction with bookings, the Premises is not otherwise 'open' to the public, at least in a physical sense; but there is nothing in the evidence to suggest that it could not be booked at any time, during business hours, for use at any time. The Defendants also say that the café restaurant is only used for the purpose of providing refreshment to conference participants as an adjunct to a booked conference in conjunction with that conference. " [29]

147 Finding that the premises were retail premises in accordance with the relevant definition, his Honour said at paragraphs 38 and 39:

"In the present circumstances I am of the opinion that the evidence establishes that the Premises are used, under the terms of the Lease and in actual fact, for the provision of a conference centre with an ancillary café/restaurant which are provided, on a commercial basis, to a person, persons, or some corporate or other entity which uses the space and any attendant services provided at the Premises, such as café/restaurant facilities, for the purposes of a conference or function. It appears from the evidence that third parties attend conferences or functions for the purpose of education, training, general edification or enjoyment – or a combination of these things. Thus the attendees, the third parties, receive a service which is both different in nature and extent from that which is provided to the conference or function promoter or organiser. They do not receive the space, the whole of the Premises, to utilise for the provision of a conference or function, whether for profit or other reasons, indirectly commercial – such as business promotion or employee or contractor training – or for social purposes. The service the attendees, the third parties receive, involves enjoyment of the 'space, the Premises, and its services, but it includes more than this alone – and

, in any event, their enjoyment of the 'space', the Premises, is constrained by the extent to which it is enjoyed by other attendees, third parties. The conference or function provider, on the other hand, enjoys the whole space for his, her or its particular purposes.

Consequently it follows, in my view, that by analogy with the authorities considered the conference or function provider is properly characterised as an 'ultimate consumer' of the services provided to him, her or it at the Premises by the tenant of the Premises. These services are, in turn, an 'input' into the different services provided to attendees at the conference or function but, for the preceding reasons, these are to be characterised as services of a different nature. Thus there are two transactions involving the retail provision of services – first the provision of services to the conference or function provider or organiser and then the provision of different services to the attendee; though the retail characterisation of the second transaction may be affected if it is gratuitous, an issue to which I now turn."

148 In *CB Cold Storage*, the Court of Appeal, Warren CJ, Ferguson JA (as she then was) and Kaye JA heard an appeal from a determination of Croft J that a lease by IMCC to CB Cold Storage of premises in Laverton was regulated by the *Retail Leases Act*. According to their Honours:

"IMCC Group (Australia) Pty Ltd ('the Landlord') leases a property at Laverton to CB Cold Storage Pty Ltd ('the Tenant'). The Tenant operates a cool storage business using freezer warehouses and related facilities that are built on the property. The Tenant's customers (usually companies involved in the food industry) pay it fees to store their dairy products, small goods, seafood and the like. The Tenant's customers range from large primary production enterprises to very small owner operated businesses and include producers, manufacturers, distributors, importers and exporters. The Tenant also provides ancillary services to its customers such as loading and unloading pallets into the warehouses and arranging the transportation of products to and from the warehouses. [1]

149 Croft J had held that the lease was regulated and the court dismissed the appeal from his determination. The court said at paragraph 5:

"Here, there is nothing in the nature of the services provided that would exclude them from being considered retail services. The services were used by the Tenant's customers who paid a fee. Any person may purchase the services if the fee is paid. The Tenant's customers do not pass on the services to anyone else. They are the ultimate consumers of the Tenant's services."

150 The court said at [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."

151 The court also remarked at [45]:

> "The Landlord's focus on what happens to the goods that are stored after they leave the premises is not relevant in this case. That may have been relevant if the question was whether there was a sale of goods by retail. But it is not. It is not a question of consumption of the goods. Rather, the focus must be on the service that is provided by the Tenant."

152 The court was unwilling to upset what it regarded as a judicially settled meaning of the phrase "retail provision of services" [24].

153 These cases do, as Ms Marcus correctly submitted, deal with the phrase "retail provision of services", not with the meaning of the phrase "the sale or hire of goods by retail". Nevertheless, the analysis by Croft J in *Fitzroy Dental* extends to sales of goods as well as services. It remains possible, based on those authorities, to argue a narrower approach to the concept of retailing relative to goods. It might be, therefore, that my own decision in *Anassis'* case, which seems to fit ill with these cases, could still be justified based upon its dealing with sales of goods rather than the retail provision of services.

154 Ms Marcus' submission, it will be recalled, is that Access was engaged in the sale of goods rather than the retail provision of services. The question is, however, whether Access was in the business of selling goods. Ms Marcus, in her closing submission, conceded that a builder was regarded as supplying services rather than selling goods. (T984, L19-22) It is difficult to see that a sub-contractor to builders like Access is in any different position. (*Ibid, L*23-25)

155 She responded that in contrast to the *CB Cold Storage* case, "the builder [I assume this is a reference to Access] is obtaining goods, obtaining various

things from various people and its service is to pull everything together, and complete a job and provide it to a third party". (T985, L1-4)

156 She said the head contractor builder should not be regarded as the ultimate consumer.

157 In my view, Ms Marcus' concession that a builder is not to be regarded as in the business of selling goods is properly made. In *Young & Marten Limited v McManus Childs Limited* [1969] 1 AC 454, the House of Lords considered a claim by a builder against a sub-contractor which undertook to provide roofs for houses erected by the builder where the tiles used in the roofing process proved to be defective. Lord Reid said: "This is a contract for the supply of work and materials and this case raises a general question as to the nature and extent of the warranties which the law implies in such a contract." [1969] 1 AC 454, 465

158 Lord Pearce said:

> "Had this been a sale of tiles, the third party would have been liable for breach of condition as to merchantability under s14(2) of the *Sale of Goods Act* 1893, and could in turn (in the normal course) have recovered from those who had sold to them ... It is argued, however, that there is a clear distinction between a sale of goods and a contract for work done and material supplied and that, either no responsibility for the materials arises under the latter form of contract or, all responsibility is excluded when materials of a particular sort, for which there is only one manufacturer, are chosen by the employer." [1969] 1 AC 454, 469

159 Their Lordships concluded that, despite the contentions described by Lord Pearce, the sub-contractor was liable to the head contractor for the defective tiles.

160 What is important for present purposes is that their Lordships proceeded on the basis that a building sub-contractor does not sell goods and the sale of goods legislation, in this State the *Goods Act* 1958, Part I, has no application.

161 In attempting to characterise Access' business for analysis under the *Retail Leases Act*, once it is accepted that it does not involve the sale of goods, the

only alternative characterisation available is that it entails the supply of services. The authorities referred to, which are binding upon me, lead to the view that the builder, in the typical transaction entered into by Access, is the ultimate consumer of the door which is an input into the builder's productive process to deliver a product in the form of a fire station or police station or other such premises to its customer. The sale by Access is therefore a retail sale. This is Access' predominant business.

162 No exclusionary provision in the *Retail Leases Act* being said to apply. I accept Mr Hopper's contention that the lease here is regulated by the 2003 Act. Section 81 of the 2003 Act provides that a dispute is a "retail tenancy dispute" where it arises "under or in relation to a retail premises lease" to which the 2003 Act applies. Section 83 provides that a reference to a lease "includes a former lease". Section 89 gives VCAT jurisdiction to hear and determine an application by a landlord or tenant seeking resolution of a retail tenancy dispute. Section 89(4), subject to certain immaterial exceptions, states that a retail tenancy dispute "is not justiciable before any other tribunal or a court or person acting judicially …".

163 It follows, therefore, that insofar as this proceeding has been brought in the County Court, Gamet is entitled to the stay of proceedings which it seeks.

Counterclaim

164 The finding that this lease was regulated by the *Retail Leases Act* necessarily dictates the dismissal of the counterclaim for the recovery of land tax. (See s50 *Retail Leases Act*)

165 The finding that the Act applies also means that Gamet's re-entry was not only procedurally unjustified by virtue of s146 of the *Property Law Act* and s94A of the *Retail Leases Act*, but also substantively unjustified being purportedly based upon Access' failure to pay land tax.

Disposition

166 What I have said indicates that this dispute was not properly justiciable in the court. The order made in court should be simply to stay the proceeding. The orders substantively disposing of the controversy between the parties should be made in Tribunal proceeding DP1663/2015.

167 Within 14 days of this day, the parties must bring in short Minutes to give effect to my reasons in court and in the Tribunal proceeding.