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ISSUES ARISING AT THE END OF A RETAIL LEASE (VICTORIA)

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ISSUES ARISING AT THE END OF A RETAIL LEASE (VICTORIA)

PRESENTED ON 2 MARCH 2017 FOR THE TELEVISION EDUCATION NETWORK

BY

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Introduction.

This Webinar broadly concerns issues arising at the end of a Retail Lease. The advertisement put the topics in a particular order. In this paper they are re-ordered into the chronological order in which they are likely to arise and overlapping topics are dealt with jointly. Almost all topics involve either the law of contract as applied to leases or the law of fixtures. Two of the topics, namely avoiding uncertainty as to the treatment of landlord funded fitout items and avoiding inconsistency between the tenant's obligations during the term and the tenant's obligations at the end of the term, can be answered immediately by saying that it is just a matter of clear drafting of the lease, ie what does the lease say – there is no fixed answer. However fitout also attracts certain statutory provisions which are specifically referred to. The other topics require much more detailed treatment. This paper is divided thus -

A. Fixtures: Who owns different items in the premises? How can ownership be determined in the event of a dispute?

   Liubinas v Vicport Fisheries Pty Ltd [2016] VCAT 927.

   Innovative Security Group Australia Pty Ltd v Clearview Holdings Pty Ltd [2016] VCAT 1935.

B. Avoiding uncertainty as to the treatment of landlord funded fitout items.

   Retail Leases Act ss. 3, 20, 23(3)(f)), 32, 77(2)(n), 78(2)(n).

C. Make good provisions:

   What does the lease say? Clarifying the required condition of the premises at the end of the term. Will there be payment in lieu of make good arrangements?

   C1. The landlord's obligations – s. 52.

   C2. Where the tenant's failure to make good means that the lease had not ended - *Fox*

v Toll Properties Pty Ltd [2007] VSC 138.

C3. The term to yield up and deliver premises well and substantially repaired.

C4 The meaning of fair wear and tear.

C5. A detailed example - *AWH Pty Ltd v Impact Fertilisers Australia Pty Ltd* [2015] VCC 346.

C6. Various contractual provisions - *Liubinas v Vicport Fisheries Pty Ltd (No 2)* [2016] VCAT 1893; *Photo Image Works Pty Ltd v M3 Property Group Pty Ltd* [2016] VCAT 406; *Innovative Security Group Australia Pty Ltd v Clearview Holdings Pty Ltd* [2016] VCAT 1935; *VIN Capital Pty Ltd v Kushland Family Daycare Services Pty Ltd* [2016] VCAT 1321.

C7. Damages – the *Bowen Investments Pty Ltd v Tabcorp Holdings Pty Ltd* litigation.

C8. What if the landlord may not make good? *Joyner v Weeks* [1891] 2 QB 31; *Fenridge Pty Ltd v Retirement Care Australia (Preston) Pty Ltd* [2013] VSC 464; *AWH Pty Ltd v Impact Fertilisers Australia Pty Ltd* [2015] VCC 346.

C9. The landlord's rights over the tenant's chattels - *Steinman & Associates Pty Ltd v Brandon* [2016] VCAT 706; The Australian Consumer Law and Fair Trading Act 2012 Part 4.2.

"RLA" means the Retail Leases Act 2003. A reference to a statutory provision is unless otherwise stated a reference to the RLA.

A. Fixtures: Who owns different items in the premises? How can ownership be determined in the event of a dispute?

1. This topic is dealt with first because the obligation to make good partly depends on whether a particular item is a fixture or not. For example under the LIV Lease of Real Estate with Guarantee & Indemnity (Commercial Property) ("the LIV lease") cl. 5.1.2 the tenant must when the term ends remove the tenant's installations and property. To compliment this, under s. 91 VCAT may require a party to do, or not to do, anything including to return specified fixtures or fittings to another party.

2. The law of fixtures, complicated by changes in occupancy over a period of 20 years, has been recently dealt with at length in *Liubinas v Vicport Fisheries Pty Ltd* [2016] VCAT 928. This case primarily concerned whether items were fixtures and who of the landlord and tenant owned items abandoned by a former tenant. The facts were –

(1) In 1994 the respondent landlord purchased premises in Romsey and created a bare shell ready for fit-out by a prospective tenant. It and a prospective tenant Jamieson (a pharmacist) then agreed that he would at his expense undertake a fit out.

(2) The lease dated in December 1994 required the tenant:

> "at the expiration … of the said term to remove any Lessee's partitions, fixtures and fittings and so far as the premises are affected by any such removal to re-instate the same in their former condition and make good any damage or injury to the Premises … and to deliver up possession … of the Premises together with all Lessor's fixtures and fittings in such repair, order and condition required to be maintained by the Lessee …".

The lease defined the Landlord's "Fixtures Furniture and Chattels" as "Staff amenities rooms and toilet block, fixed floor and wall tiling, [hot water service]" ("the Landlord's Installations"). (The Reasons paragraphs 31, 32 and 35 refer to this as the "2004 lease". However from the context, particularly paragraphs 33 and 43, it appears the Tribunal meant the 1994 lease).

(3) After Jamieson obtained possession on 1 January 1995 the fit out ("the Fit-out Works") proceeded, including installation of: a slat-wall comprising melamine coated panels to which shelf stripping and bracketing were attached; a special stepped pelmet or decorative cornice; carpet, ceramic tiles and linoleum; partition walls; and other work required to meet regulatory standards of the Pharmacy Board eg elevating the dispensary by construction of a mezzanine floor. Part of the fit out, particularly certain stands, was freestanding, and the remaining carpentry and partitions were fixed by screws and bolts or other fixings and were easily removable. (Part of the Fit-out Works were ultimately removed in 2014, that removed being described by the Tribunal as "the Assets").

(4) Jamieson commenced business in February 1995.

(5) Although he continued as the only tenant, in 1998 Jamieson entered into an informal partnership with, and sold a half interest in the business to, Linton. The business assets including the Fit-out Works were then transferred by Jamieson to their company ("Romsey Pharmaceuticals").

(6) On 15 February 2001 Jamieson sold his interest in the business to Gibson, thereby ceased to be a partner, and Romsey Pharmaceuticals sold the 'plant and equipment' (listed in Schedule 1 of the agreement) to Linton and Gibson's company ("Romsey Services"). However the list omitted some of the Fit-out Works including the slatwall; pelmet; carpet; ceramic tiles laid in a bespoke fashion; partition walls and mezzanine dispensary floor ("the omitted Assets").

(7) The lease was not transferred but later that year Jamieson agreed retrospectively from 1 January 2001 to convey and surrender the premises to the landlord thereby extinguishing the residue of the 1994 lease term. On 1 February 2001 the landlord leased the premises to Romsey Services from 1 January 2001 for four years with renewal options. In this lease the "Landlord's Installations" were described identically to the 1994 lease and the "Tenant's Installations" were described (Item 7) as "Such fixtures, fittings, plant and equipment including any display counters, shelving and office machinery which may with the consent of the landlord have been brought on to the premises by the Tenant prior to the commencing date of this Lease".

(8) In 2003 Linton sold his share of the business and his shares in Romsey Services to Gibson.

(9) In 2004 Romsey Services renewed the lease for 10 years from 1 January 2005, although no renewed lease was prepared until 2012. The Disclosure Statement stated that the existing structures, fixtures, plant and equipment in the premises provided by the landlord included air-conditioning, hot water service, lighting, painted walls, plastered walls, shopfront, sink, and suspended ceilings.

(10) Under an agreement dated 15 August 2012 the applicants ("the tenants") purchased the business and purportedly had transfer to them the assets of the business listed under Schedule 10 thereof. This list included not only part of the

original fitout but also items installed by Romsey Services and some omitted Assets.

(11) In 2012 the 10 year renewed lease was retrospectively commenced from 1 January 2005. This renewal described the Landlord's Installations identically to the 1994 and 2001 leases and the Tenant's Installations identically to the 2001 lease.

(12) In September 2012 Romsey Services transferred its interest as lessee to the tenants. However, they did not renew the lease and in late 2014 (in the words of VCAT) "decanted and vacated" the premises, purporting to reinstate the premises to a condition commensurate with that before the installation of the Fit-out Works. They left little of the Fit-out Works and removed the partition walls, mezzanine floor, slat wall, shelving, display cases, including the display gondolas and other installations (as stated in (3) above the Fit-out Works removed were referred to by the Tribunal as "the Assets"). They subsequently reopened their pharmacy elsewhere in Romsey using some of the decanted items.

The tenants commenced a VCAT proceeding alleging that fixtures had been removed and claiming the cost of reinstating the premises to the condition existing before the tenants vacated. The tenants alleged that they owned what had been removed.

Section 28(2) of the Landlord and Tenant Act 1958 provided that –

"If any tenant … at his own cost and expense … erects or puts in any … fixtures … (which are not erected or put in in pursuance of some obligation on that behalf) then, unless there is a provision to the contrary in the lease or agreement constituting the tenancy, all such … fixtures shall be the property of the tenant and shall be removable by him during his tenancy or during such further period of possession by him as he holds the premises but not afterwards; …; so as the tenant making any such removal does not in anywise injure the land or buildings … or otherwise puts the same in like plight and condition or in as good plight and condition as the same were in before the erection of anything so removed.

Section 28(2) was replaced by s 154A(1) of the Property Law Act 1958, which came into operation on 1 August 2010. It provided –

"A tenant who at his or her own cost or expense has installed fixtures on, or renovated, altered or added to, a rented premises owns those fixtures, renovations, alterations or

additions and may remove them before the relevant agreement terminates or during any extended period of possession of the premises, but not afterwards".

3. Senior Member Riegler held –

1. Whether a chattel had become a fixture depended essentially upon the objective intention with which it was attached to the land. The two considerations commonly regarded as relevant to determining this intention were the degree and objective purpose of annexation. If the object and purpose of attachment was not the enjoyment of the chattel itself, but the better enjoyment of the freehold, it was a fixture.
2. A tenant could, however, remove fixtures it had brought onto the land if installed for trade, domestic or ornamental purposes and removable without causing significant damage to the demised premises. Examples of trade fixtures were tavern fittings, a nurseryman's trees, an engine and boiler in a sawmill, and petrol pumps at a service station. Examples of domestic fixtures were a water pump, and a kitchen range, stove, copper and grates. Examples of ornamental fixtures were wood panelling, decorative chimney pieces, and house bells.
3. Most of the items in question here retained their character as chattels because –
   (a) Apart from the floor and wall tiling, bathroom and shower facilities, and hot water service, Jamieson was obligated to remove the Fit-out Works at the expiration of his lease.
   (b) Related to (a), most of the Assets were specific to the operation of a pharmacy business. Because the regulations controlling pharmacy businesses restricted their number in the same locality (in this case Romsey) the Assets were of little use to the landlord if the pharmacy moved;
   (c) Under s. 28(2) of the Landlord and Tenant Act rights had crystallised in favour of Jamieson during his occupation. Accordingly even if any of the Assets had otherwise lost their character as a chattel the legislation nevertheless deemed Jamieson to own them.
4. Jamieson's right to remove the Assets carried with it a right to transfer them during his tenancy and any overholding but not afterwards. Accordingly he had in 1998

validly transferred the Assets to Romsey Pharmaceuticals and they could accordingly be on-sold. This disposal was unaffected by his surrender of lease in 2001.

5. However not all the Assets were sold by Romsey Pharmaceuticals to Romsey Services. Only sold were those listed in Schedule 1 of the 2001 sale agreement. The omitted Assets were simply left in the premises, and Romsey Pharmaceuticals continued to have an equitable right to sever and possess them, not extinguished by the 2001 lease or Jamieson's surrender. Consequently, Romsey Services took its lease, subject to those rights of Romsey Pharmaceuticals, especially where many of the omitted Assets possessed the character of a fixture, eg the partition walls creating the beauty room, decorative ceiling cornice, the raised dispensary floor, and various fixed joinery.
6. Romsey Pharmaceuticals never sought to enforce its right to sever and possess the omitted Assets and had abandoned that right before it was deregistered in 2008. Until that abandonment the landlord held the omitted Assets as gratuitous bailee and on that abandonment it acquired title to them. The tenants were accordingly required to reinstall those items.
7. The tenants were not required to reinstall items installed by Romsey Services as these were transferred to them under the agreement of 15 August 2012.
8. The landlord was not estopped from asserting ownership of any of the Assets by the definitions of Landlord's Installations and Tenant's Installations in the 2001 lease and the 2005 renewal, and in the Disclosure Statement to Romsey Services for the 2005 Renewal. The landlord had made no clear statement that any Assets were either not owned by it or owned by Romsey Services and the tenants had also not established that they relied on the 2001 lease or the Disclosure Statement in forming their view about what Assets they purchased.

The Tribunal deferred deciding whether a particular provision in the 2001 lease (and by extension the 2005 renewal) only required the applicants, on removal of the Assets, to reinstate the premises to an empty shell. See *Liubinas v Vicport Fisheries Pty Ltd (No 2)* [2016] VCAT 1893, referred to below under C6.

4. The brief case of *Innovative Security Group Australia Pty Ltd v Clearview Holdings Pty Ltd* [2016] VCAT 1935 illustrates the importance of the particular contractual words. The landlord succeeding in retaining an access control system, signage, and an air-conditioning system because the lease provided that if any installations or property of the tenant were left on the premises they would be considered abandoned to the landlord. The Tribunal also noted the landlord's undisputed evidence that the parties had jointly paid for the installation of the air-conditioners and agreed that they would be left behind by the tenant as fixtures.

B. Avoiding uncertainty as to the treatment of landlord funded fitout items.

5. As stated above this is simply a matter of the individual contract and the law of fixtures. However the RLA contains a number of relevant provisions, namely –

   (a) "fit out" of retail premises is defined to include the provision or installation of finishes, fixtures, fittings, equipment and services (s. 3);

   (b) A provision of a retail premises lease that requires the tenant to pay or contribute towards the cost of any fit out is void unless that liability was disclosed in the disclosure statement (s. 20). The Form of Disclosure Statement contained in the Retail Leases Regulations 2013 requires:

   a description of works to be carried out by the landlord before the lease commences and an estimate of expected contribution by the tenant towards the cost of the landlord's works;

   a statement of what fit out works are to be carried out by the tenant and whether the landlord is providing any contribution towards their cost;

   a statement of whether the landlord has requirements as to the quality and standard of shop front and fit out and if yes details are to be inserted or a fitout guide provided.

   (c) Although a landlord must not seek or accept payment of key-money or any consideration for the goodwill of any business carried on on the premises a landlord can seek and accept payment for plant, equipment, fixtures or fittings sold by the landlord to the tenant in connection with the lease being granted (s. 23(3)(f));

(d) If the retail premises are located in a retail shopping centre the lease is taken to provide as set out in s. 30 (chiefly as to works and their cost) if the tenant is liable under the lease to pay an amount for the costs of, or associated with, carrying out works to alter certain things (eg electrical reticulation) to enable the proposed fit out;

(e) Section 32 provides that (apart from section 30) nothing in the Act prevents a retail premises lease from providing for the payment of a special rent (in addition to any other rent) to cover the landlord's costs relating to the fit out of the premises.

6. In determining whether a landlord or tenant respectively have acted unconscionably VCAT may have regard to the extent to which: the landlord required the tenant to incur unreasonable fit out costs (s. 77(2)(n)); the tenant was willing to incur reasonable fit out costs (s. 78(2)(n)).

C. Make good provisions:
What does the lease say?
Clarifying the required condition of the premises at the end of the term.
Will there be payment in lieu of make good arrangements?

C1. The landlord's obligations – s. 52.

7. Although make good is an obligation cast on the tenant what the landlord is required to maintain is relevant. Thus under s. 52(2) a retail premises lease is taken to provide that the landlord is responsible for maintaining in a condition consistent with the condition of the premises when the lease was entered into: (a) the structure of, and fixtures in, the retail premises; and (b) plant and equipment at the retail premises; and (c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services. But s. 52(3) provides that the landlord is not responsible for maintaining those things if (a) the need for the repair arises out of misuse by the tenant; or (b) the tenant is entitled or required to remove the thing at the end of the lease.

C2. Where the tenant's failure to make good means that the lease had not ended - *Fox v*

***Toll Properties Pty Ltd* [2007] VSC 138.**

8. The tenant's failure to make good can entail that the lease is continuing and the otherwise departed tenant is accordingly liable for rent. In *Fox v Toll Properties Pty Ltd* a lessor leased an industrial property which included a rear yard to ARN Transport. Toll, which owned adjoining property, occupied the property initially as a licensee of ARN and then on its own monthly tenancy. Its representative eventually handed over the keys to the landlord but, although Toll was required to give vacant possession, three parked cars and a container on a trailer remained on the property and Toll took advantage of a gap in the fence and used the rear yard in its business for another 8 months.

9. Had Toll given vacant possession? Hansen J quoted *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 KB 264 at 270 - 271:

> "Subject to the rule de minimis a vendor who leaves property of his own on the premises on completion cannot … be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, ... the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession. … we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property."

Hansen J accordingly held that the use of the gap in the fence but, as they were removable and unimpeded the landlord's ability to use or let the property, not the parked vehicles and the container on the trailer breached the obligation to give vacant possession. However, Toll was only required to pay for the area which it had in a real and substantial sense used, ie the rear yard not the whole property.

C3. The term to yield up and deliver premises well and substantially repaired.

10. Certain typical terms recur in leases, eg: not to alter the premises without the landlord's approval; to keep the premises in repair; to make good any breakage or damage; that the tenant is not normally obliged to carry out structural repairs; to yield up the premises in good repair (eg the LIV lease cls 2.2.11, 3.1.1, 3.2.9, 3.3.2, albeit more modernly worded). Although most such terms do not as such refer to the situation at the end of the lease they are often found to have been breached at that time. However, the term which

does from its nature only engage at the end of a lease is term requiring yielding and delivery up of the premises well and substantially repaired. The state of repair required by this covenant -

"depends primarily upon the words used. … there was an obligation to yield and deliver up the premises in such a state of repair as that in which they would be found if managed by a reasonably minded owner having regard to their age, character, ordinary use and the requirements of the tenants likely to take them at the time of the demise or subletting: … such a covenant connotes the idea of making good damage so as to leave the subject matter as far as possible as though it had not been damaged … the covenant '... involves renewal of subsidiary parts: it does not involve renewal of the whole': …

(*Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494 at 512 per Rares J quoting *Graham v Markets Hotel Pty Ltd* (1943) 67 CLR 567 at 585). Rares J continued (at 513) -

60 This leads to consideration of the general principle of construction of a repair covenant in a lease in *Proudfoot v Hart* (1890) 25 QBD 42 Lord Esher MR and Lopes LJ held that the words 'good tenantable repair', and their analogues, meant:

'... such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of the reasonably-minded tenant of the class who would be likely to take it.' …"

11. A repair covenant is breached not only if the premises fall into disrepair during the term of a lease but also if the tenant destroys or alters the premises (*Bowen Investments* at 498). On the other hand a covenant to maintain in good and substantial repair (even if not subject to the fair wear and tear exception) does not require the tenant to restore the premises to their original condition at the commencement of the lease (*Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 356).

12. Repair or renewal/improvement? Whether what is required is repair, which generally falls on the tenant, or improvement which generally falls on the landlord, is a question of degree, as illustrated by the following quotations -

"the repair of a structure may involve renewal or rebuilding of part of it, and that all repairs involve renewal to some extent: …. It is a question of degree whether rebuilding part of a house does or does not fall within the category of repairing a house. A covenant

to repair does not involve the covenantee in an obligation to make improvements, but if he cannot perform his covenant to repair without making improvements, then the expense of making the improvements falls upon him. …"

(*Graham v Markets Hotel Pty Ltd* (1943) 67 CLR 567 at 579 per Latham CJ).

"… if the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking, an improvement; but if it is only the replacement of something already there, which has become dilapidated or worn out, then, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs and not improvement".

(*Morcom v Campbell-Johnson* [1956] 1 QB 106 at 115 per Denning LJ).

C4 The meaning of fair wear and tear.

The tenant's fair wear and tear is commonly excused (eg LIV lease cl. 3.1.1). In *JSM Management Pty Ltd v QBE Insurances (Australia) Ltd* [2011] VSC 339 Osborn J adopted a definition of fair wear and tear in *Taylor v Webb* [1937] 2 KB 283 at 302:

"The phrase "wear and tear" … implicitly refers to both cause and effect, and in each aspect it covers two classes of disrepair, (a) that brought about by the normal or ordinary operation of natural causes, such as wind and weather, in contradistinction to abnormal or extraordinary events in nature such as lightning, hurricane, flood or earthquake; and (b) that brought about by the tenant, and other persons present in or on the premises with the consent of the tenant, either unintentionally or as a normal incident of a tenant's occupation, in the course of the "fair" (or "reasonable") use of the premises for any of the purposes for which they were let".

However the wear and tear exception has its limitations as shown by the commonly quoted words of Talbot J in *Haskell v Marlow* [1928] 2 KB 45 at 59:

"The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.
For example, if a tile falls off the roof, the tenant is not liable for immediate consequences; but, if he does nothing and in the result more and more water gets in, the roof and walls decay and ultimately the top floor, or the whole house, becomes uninhabitable, he cannot say that it is due to reasonable wear and tear, … On the other

hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce a considerable defect in condition, but the whole of the defect is caused by reasonable wear and tear, … "

The tenant carries the onus of proving fair wear and tear: *AWH Pty Ltd v Impact Fertilisers Australia Pty Ltd* [2015] VCC 346 at [69].

C5. A detailed example - *AWH Pty Ltd v Impact Fertilisers Australia Pty Ltd* [2015] VCC 346.

13. A long recent Victorian example involving the foregoing principles is *AWH Pty Ltd v Impact Fertilisers Australia Pty Ltd* [2015] VCC 346. This was not a retail lease but involves principles common to all leases. AWH sub-leased part of one warehouse to Impact ("the tenant") pursuant to sub-leases which included -

(a) the definition of permitted use as "the storage and handling of non-hazardous fertiliser, … and ancillary use."

(b) the tenant was required to use the premises only for the permitted use and in a manner consistent with that in which a business of that nature is usually conducted (cl.2.4(a));

(c) upon termination the tenant was required to give vacant possession in the condition and state of repair of the premises that existed at the commencement of the agreement (cl. 4(t));

(d) Clause 2.5 –

> (a) Repair
> (i) At the Sub-Lessee's cost, to maintain, replace repair and keep the … Premises clean substantially free of pollutants and contaminants and in good and substantial repair and working order, having regard to the condition of the Sub-Lease Premises at the commencement of this Sub-Lease but excluding any obligation in respect of fair wear and tear …
> (ii) … :
> (A) the Sub-Lessee must deliver up the Sub-Lease Premises … subject to clause 2.5(a)(i), in the condition the Sub-Lease Premises were in at the commencement of this Sub-Lease;
> **…**
> (iv) The Sub-Lessee acknowledges that nothing in this clause 2.5(a) imposes any obligation on the Sub-Lessor to repair or maintain fair wear and tear in respect of the Sub-Lease Premises (but excluding any

> roadways) unless …
> (v) The Sub-Lessor acknowledges that nothing in this clause 2.5(a) imposes any obligation on the Sub-Lessee to perform or make any improvements, structural or capital works.
> (vi) For the purposes of clause 2.5(a)(i) the parties agree that the condition of the Sub-Lease Premises at the commencement of this Sub-Lease shall be detailed in the condition report attached … ".

(e) the sub-lessor covenanted that the premises were in a fit condition for use at the commencement of the sub-lease (cl. 3.3).

(f) insofar as not inconsistent with the leases the terms of the Head Lease were incorporated into the leases mutatis mutandis (cl. 6).

Impact stored and handled non-hazardous fertilisers on the premises. On its vacation there was found to be corrosion damage to the roof and walls of leased premises caused by it. The landlord sued for breach of the lease and in the tort of waste. Judge Lewitan held –

1. There appeared to be contradictory make good obligations in cls. 2.4(t) and 2.5(a)(i) in that only cl. 2.5(a)(i) referred to fair wear and tear. To avoid inconsistency cl. 2.4(t) should be interpreted as subject to clause 2.5(a)(i).
2. Having regard to the permitted use, which it was agreed was reasonable, if the presence of fertiliser accelerated corrosion in the premises, then that corrosion comprised fair wear and tear because it involved reasonable use and the effect of outside elements. This was notwithstanding AWH's argument that reasonable use could not include the destruction of many purlins, substantial roof sheeting and a large part of a wall and the need to treat other purlins, expenditure on all this being allegedly disproportionate to the rent received.
3. The covenant that the premises were in a fit condition for use did not alter the outcome.
4. If however the corrosion had not amounted to fair wear and tear did the exemption that the tenant was not obliged to "perform or make any improvements, structural or capital works" (cl. 2.5(a)(v)) apply? This issue arose because some of the old roof sheets and purlins had been replaced with

new parts and purlins but otherwise the structure remained the same as at the time of the lease. However, cl. 2.5(a)(v) did not apply because the totality of the work could properly be described as repairs since it involved no more than renewal or replacement of defective parts.

5. Any implied covenant that Impact would use and deliver up the premises in a tenant like manner was, to the extent of inconsistency with the express terms of the lease, excluded and otherwise not breached.
6. The tenant had not committed waste. Waste was a tortious act or omission which, without consent, permanently altered the nature of the premises to the prejudice of the holder of the reversionary interest. Waste was either voluntary or permissive. By allowing fertilizer dust to accumulate on surfaces thereby causing corrosion the sub-tenant did not commit voluntary waste - the offending act must be wilful or negligent and occur not merely as a consequence of a reasonable permitted use. Nor was there permissive waste because there was no failure by the tenant to take action to prevent damage resulting to the premises.
7. The landlord was not estopped from bringing this proceeding based on the allegation that it knew that the tenant was storing and handling non-hazardous fertiliser at the premises, without complaint even after corrosion was discovered, leading the tenant to assume it was entitled to do so in the manner in which it was. The landlord was not seeking to depart from any assumption to the detriment of the tenant. What was disputed by AWH was whether the damage constituted fair wear and tear and the landlord did not induce Impact into an assumption that it would not enforce its rights to repair under the lease.

C6. Various contractual provisions - *Liubinas v Vicport Fisheries Pty Ltd (No 2)* [2016] VCAT 1893; *Photo Image Works Pty Ltd v M3 Property Group Pty Ltd* [2016] VCAT 406; *Innovative Security Group Australia Pty Ltd v Clearview Holdings Pty Ltd* [2016] VCAT 1935; *VIN Capital Pty Ltd v Kushland Family Daycare Services Pty Ltd* [2016] VCAT 1321.

14. Certain shorter cases illustrate sundry contractual provisions. In *Liubinas v Vicport Fisheries Pty Ltd (No 2)* [2016] VCAT 1893, the facts of which are stated in fuller detail in A above, VCAT dealt primarily with what exact state the premises were to be left in under the lease dated 1 February 2001 to Romsey Services, renewed in 2005. The lease:

defined "Tenant" as "[T]he person named in item 2 [Romsey Services], or any person to whom the lease has been transferred" (cl. 1.1);

stipulated that when the term ended the tenant must remove the "Tenant's Installations" etc (cl. 5.1.2);

defined "Tenant's Installations" in substance as various items "which may with the consent of the landlord have been brought on to the premises by the Tenant prior to the commencing date of this Lease");

provided -

"At the expiration … of the said term the Tenant is to remove the Tenant's partitions, fixtures and fittings insofar as the premises are affected by any such removal to reinstate the same in their condition when first occupied by Craig Jamieson … (cl. AP6);

Senior Member Riegler held –

1. By reference to the definition of *Tenant* in clause 1.1, cl. AP6 applied to the (current) tenants and required them to remove only what they owned.
2. In cl. AP6 "occupied" was to be given its usual meaning – that is, the date when Jamieson, either personally or by his servants or agents, was permitted to occupy and exercise control over the premises. Accordingly reinstating the premises "in their condition when first occupied by Craig Jamieson" meant as at the commencement date of the 1994 lease, being 1 January 1995, before he undertook the fit-out.
3. This outcome was not affected by cl. 5.1.2 even though, in conjunction with Item 7, it may ultimately have no work to do (because no fixtures, fittings, plant and equipment *et cetera* were brought onto the premises by Romsey Services).
4. Clause 5.1.2 (in conjunction with Item 7) dealt with fixtures and fittings brought onto the Premises prior to the commencement of the lease and cl. AP6 dealt with fixtures and fittings brought onto the Premises after the commencement of the lease.

15. *Photo Image Works Pty Ltd v M3 Property Group Pty Ltd* [2016] VCAT 406. The Lessee covenanted (cl. 1(m)):

> "At the expiration … of the Term, to remove any Lessee's partitions, fixtures and fittings and to reinstate the Premises to their original condition as at the commencement of the Lessee's occupancy of the Premises and to make good any damage to the Premises to the reasonable satisfaction of the Lessor. …"

After the lease commenced the tenant replaced rotted carpet with carpet tiles and arranged its business fit out including installing lights and door handles. The landlord subsequently issued a notice to vacate based on a special condition allowing this if vacation was required due to substantial works or demolition of the premises. While the tenant was still in occupation a dispute arose, settled by Terms of Settlement including that the tenant was not required to make good or reinstate the premises. On vacation the tenant removed some lights, door handles and the carpet tiles. The landlord claimed that it had suffered damage but gave evidence that there was in fact no intention to demolish or carrying out substantial works but only to sell. VCAT held –

1. The Terms of Settlement incorporated the Lease by reference, and accordingly the tenant could in reliance on cl. 1(m) remove its fixtures and fittings.
2. The landlord's claim for the cost of allegedly fixing the damage failed because: the Terms of Settlement did not require the tenant to make good or reinstate the premises; the Notice to Vacate required vacation to enable the landlord to demolish the premises or carry out substantial works.

16. In *Innovative Security Group Australia Pty Ltd v Clearview Holdings Pty Ltd* [2016] VCAT 1935 the landlord was awarded an amount for repainting, carpentry, carpets and blinds. VCAT held: that once the tenancy was terminated the tenant had no right of access to make good; and that the term obliging the tenant to remove the tenant's installations and make good any damage caused in installing or removing them applied even to allegedly beneficial changes.

17. In *VIN Capital Pty Ltd v Kushland Family Daycare Services Pty Ltd* [2016] VCAT 1321 a term in a sub-lease that the registered owner may carry out essential maintenance works and repairs to the premises and invoice the Licensor (ie tenant) for the same, who would in turn invoice the sub-tenant, made the latter liable for the reasonable cost of repairs to make good, except for fair wear and tear.

C7. Damages – the *Bowen Investments Pty Ltd v Tabcorp Holdings Pty Ltd* litigation.

18. The dispute between Bowen Investments Pty Ltd and Tabcorp Holdings Pty Ltd which engaged the Federal Court at first instance and appeal and the High Court illustrates a number of relevant principles. Bowen had constructed a multi-storey office building with striking foyer of Canberra York Grey granite floor, marble pillars and walls covered with American cherrywood panels. In 1996 it leased the premises to Tabcorp for 10 years commencing on 1 February 1997 with options to renew. The lease contained covenants requiring the tenant: "to maintain repair and keep the whole of the demised premises in good and substantial repair working order and condition" (cl 2.10); to yield up the demised premises "in good and tenantable repair order and condition" (cl 2.11); and not without the approval of the landlord to "make or permit to be made any substantial alteration or addition to the demised premises" (cl 2.13). Early in lease the tenant without approval demolished the foyer and substituted a new foyer. In 2005 before the lease ended the lessor sued for breach of cl 2.13. (The parties subsequently agreed to extend the lease but on condition that the litigation was unaffected).

19. At first instance (*Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2007] FCA 708) the court upheld a claim for two breaches of cl 2.13, being the destruction of the old and construction of the new foyer. However the landlord only obtained damages of approximately $35,000 representing the difference between the respective values of the property with the old and new foyer. The Full Court of the Federal Court overturned this award, giving the landlord the full cost of restoring the foyer to its original condition ($580,000) and $800,000 for loss of rent during that restoration (*Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494). The High Court confirmed this (*Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272).

20. The High Court reasoned –

(a) At trial, the only claim for damages for breach of contract was based on an alleged breach of cl 2.13. Accordingly, damages were to be assessed on that basis.

(b) The ruling principle with respect to damages at common law for loss caused by a breach of contract was that the party was, so far as money can do it, to be placed in the same situation as if the contract had been performed. That did not mean "as good a financial position": in cases where the contract was not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract was not possible. In such cases, damages simply representing the diminution in value of the property were insufficient (286);

(c) The landlord was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages was the loss sustained by the failure of the tenant to perform that obligation; and that loss was the cost of restoring the premises to the condition in which they would have been if the obligation had not been breached (287);

(d) The work to be undertaken must be necessary to produce conformity with the contractual obligation and must also be a reasonable course to adopt. The test of unreasonableness was, however, only to be satisfied by fairly exceptional circumstances (288);

(e) If the benefit of the covenant in cl 2.13 were to be secured to the landlord, it was necessary that reinstatement damages be paid, and this was not unreasonable (290);

(f) If the landlord employed the damages and interest after the lease expired in 2012 or 2017 on rebuilding the foyer, it would be better off than it would have been if cl 2.13 had not been breached in which case it would have retaken possession of a foyer subjected to 15 or 20 years' wear and tear. If the tenant had requested a discount in the damages to take account of this "betterment" problem, its application, if backed by appropriate evidence, may have had merit. There was no such evidence. (291).

(g) The High Court did not disapprove a statement by Finkelstein and Gordon JJ in the Full Court that there was no meaningful distinction between a full repair covenant and cl. 2.13, at least as regards the extent to which the clause prohibits alterations or additions without approval. Accordingly damages for breach of cl. 2.13 were to be assessed on the same basis as for breach of a repair covenant (284).

C8. What if the landlord may not make good? *Joyner v Weeks* [1891] 2 QB 31; *Fenridge Pty Ltd v Retirement Care Australia (Preston) Pty Ltd* [2013] VSC 464; *AWH Pty Ltd v Impact Fertilisers Australia Pty Ltd* [2015] VCC 346.

21. *Joyner v Weeks* [1891] 2 QB 31 deals with the possibility of the landlord not doing the repairs. Before the end of a lease the landlord re-let the premises to a third person under a second lease, to commence at the end of the first lease. Under the second lease the new tenant agreed to pull down and alter part of the premises to make them and adjoining premises into one shop. The old tenant left the premises not well and sufficiently repaired, the cost of making good "the delapidations" being 70 pounds, but in the course of the alterations the dilapidations were themselves demolished. The plaintiff however recovered damages of 70 pounds. The Court opined that the right to claim the ordinary measure of damages arose at the moment of determination of the lease. In the Full Court Finkelstein and Gordon JJ however said -

"The rule in *Joyner v Weeks* is not an absolute rule. It is, however, the prima facie rule which will be applied unless the lessee can show by sufficiently cogent evidence that in both the short and the long term the lessor will definitely suffer no loss or will suffer a loss which can definitely be assessed at less than the prima facie measure".

(at 499 quoting *Maori Trustee v Rogross Farm Ltd* [1994] 3 NZLR 410 at 420)

22. In some States, but not in Victoria, the rule in *Joyner v Weeks* has been varied by statute. A recent Victorian case is *Fenridge Pty Ltd v Retirement Care Australia (Preston) Pty Ltd* [2013] VSC 464. Under a lease of a nursing home the tenant covenanted to deliver up the premises in as good repair, order and condition as they were at the commencement of the lease, "fair wear and tear" excepted. The tenant breached this term, allowing the condition of the premises to deteriorate substantially. It was however because of other

actions by the tenant no longer economically feasible to conduct a nursing home business on the land. The landlord accordingly did not carry out the make good works but instead profitably developed the land as an apartment complex. It nonetheless claimed damages for failure to make good, relying on *Joyner v Weeks.* Hargrave J held that the prima facie rule for assessment of damages for breach of a make good obligation was what would put the premises into the state of repair in which the tenant was bound to leave them. This rule applied unless the lessee could show by sufficiently cogent evidence that the lessor will definitely suffer no loss or will suffer a loss which can definitely be assessed at less than the prima facie measure. The tenant had not shown this.

23. In *AWH Pty Ltd v Impact Fertilisers Australia Pty Ltd* [2015] VCC 346 the landlord claimed "make good costs", relying on the obligation (referred to in paragraph 13 above) to the effect that Impact was to deliver the premises in the condition the premises were at the time of the commencement of the sub-lease. The tenant disputed its liability to reinstate smoke detectors, a smoke curtain and fire hose reels on the ground that there had been a permanent change in use of the premises (to fertiliser storage) and therefore the landlord did not intend to restore, nor did the subsequent tenant desire restoration of, these items. Judge Lewitan found that the fact that reinstatement would not be immediate did not meet the burden of the exceptional circumstances test set out in *Bowen Investments* to make damages for reinstatement unreasonable. Her Honour was not satisfied that the warehouse would be used as fertiliser storage permanently, or whether otherwise reinstatement would be required to comply with fire regulations, and the landlord was subject to a head-lease containing similar "make good" provisions to the sub-leases.

C9. The landlord's rights over the tenant's chattels - *Steinman & Associates Pty Ltd v Brandon* [2016] VCAT 706; The Australian Consumer Law and Fair Trading Act 2012 Part 4.2

24. In *Steinman & Associates Pty Ltd v Brandon* [2016] VCAT 706 an overholding tenant brought onto the premises a number of motor vehicles including a Landcruiser and BMW, mechanic's tools and other chattels belonging to him and

others. In November 2015 the landlord wrote complaining of rental arrears, foreshadowing a notice to quit, and requesting removal of belongings by a particular date. There was no adequate response and accordingly on 2 December 2015 the landlord re-entered and changed the locks with the contents inside. After a part payment the landlord wrote giving the tenant the choice of either paying the remaining rent or providing security in the form of either the Landcruiser or BMW, such security to be returned on payment of outstanding monies, and on provision of such security the tenant could have access to recover all other goods. The landlord also stated that if the tenant did not make this choice the landlord would sell everything in the factory after a particular date. The tenant subsequently sought access to remove his belongings but the landlord responded by removing the Landcruiser and storing it elsewhere. After this the landlord offered access for the tenant to remove the rest of his belongings failing which the landlord said he would sell them take them to a tip. The tenant continued not to act.

Cl. 3(d) of the lease provided that upon re-entry the landlord was entitled to remove the tenant's property from the factory and store it at the risk and expense of the tenant.

Part 4.2 of the Australian Consumer Law and Fair Trading Act 2012 dealt with disposal of uncollected goods. It provided –

"54(2) Goods under bailment are uncollected goods if—

(a) the goods are ready for delivery to the provider in accordance with the terms of the bailment, but the provider has not taken delivery of the goods and has not given directions as to their delivery; or

(b) the receiver is required to give notice to the provider when the goods are ready for delivery but cannot locate or communicate with the provider; or

(c) the receiver can reasonably expect to be relieved of any duty to safeguard the goods on giving notice to the provider but cannot locate or communicate with the provider; or

(d) the provider has not paid the relevant charge payable to the receiver in relation to the goods within a reasonable time after being informed by the receiver that the goods are ready for delivery.

…

55(1) The relevant charge is the amount payable by the provider to the receiver for goods under bailment and payment of which entitles the provider to take delivery of the goods.

(2) Unless determined otherwise by a court order, the amount payable to the receiver is the sum of the following—

(a) for any carriage or storage of the goods or for any repairs, cleaning, treatment or other work done in connection with the goods—

(i) the amount agreed …; or

(ii) in the absence of an agreement, an amount that is reasonable;

(b) the amount of costs for any storage, maintenance or insurance of the goods incurred by the receiver from—

…

56(1) This Part applies to the possession of goods under a bailment …

…

(3) Subject to the exclusions in subsection (2), this Part applies in addition to any other remedy or right that may be available to dispose of uncollected goods under any other Act.

…

57 The common law relating to the bailment of goods remains in force to the extent to which it is not affected by this Part … "

The Landlord commenced a VCAT proceeding seeking an order for the disposal and sale of the goods. The proceeding was adjourned to allow the tenant to remove his belongings but on the adjourned date some items remained.

25. VCAT held –

1. Clause 3(d) of the lease only permitted the landlord upon re-entry to remove and store the tenant's property at the risk and expense of the tenant, its purpose being to enable the landlord to obtain vacant possession. The landlord had, however, gone further.
2. The remedy of levy and distress for rent having been abolished, the landlord could not seize and sell the tenant's belongings.
3. A landlord who took possession of premises containing the tenant's goods was a gratuitous bailee of those goods. The only part of s. 54(1) which could be relevant was s. 54(1)(d). However there was no "relevant charge". The only contractual agreement was the lease: there was no contract between the parties with respect to any of these goods and no money falling due under the terms

of any bailment of them.

26. *Steinman* does not engage all relevant provisions of the Australian Consumer Law and Fair Trading Act 2012. Other relevant provisions are –

(a) A receiver must not dispose of uncollected goods if a dispute exists between the provider and receiver regarding the relevant charge and a court application has been made to determine the charge (s. 58(2)(a));

(b) Different sale and procedural requirements apply to low-value goods (under $200); medium-value goods ($200 - $4,999) and high-value goods ($5,000 and above) (ss. 60 – 62);

(c) As to high value goods, the receiver must give notice of intention to dispose to provider, the owner and (s. 62(1)(a)(iii)) "any person who has a publicly registered interest in the goods" and (s. 62(1)(a)(iv)) and "any other person having or claiming an interest in the goods of which the receiver is aware". Section 3(1) defines "publicly registered interest" to mean an interest in goods recorded in the PPSA register if the goods are described by a serial number in that register or in any register prescribed by the regulations;

(d) A receiver may apply to a court for an order to dispose of uncollected goods (s. 68(1)) and give a copy of the application to the provider, owner, person with a publicly registered interest in the goods and any other person known to have to be claiming an interest in the goods. A court can then order the disposal of the goods, determine the relevant charge payable to the receiver, or make other necessary orders (s. 70). If a court order has been made for disposal the provider, owner or any other person with an interest is entitled on payment to the receiver of the relevant charge to delivery of the goods (s. 71).

27. Importantly, the Act can be excluded by a contrary agreement between provider and receiver about uncollected goods (ss. 56(4) and (6)). Accordingly the LIV lease provides -

"5.1 If the tenant leaves any tenant's installations or other tenant's property on the premises after the end of the lease, unless the landlord and tenant agree

otherwise–

"5.1.3 all items of the tenant's installations and tenant's property will be considered abandoned and will become the property of the landlord, but the landlord may remove any of the tenant's installations or other property and recover the costs of removal and making good as a liquidated debt payable on demand; and

"5.1.4 the parties intend that clause 5.1. 3 operate in place of any legislation that might otherwise apply to goods remaining on premises".

(see generally "Please Dispose of Thoughtfully, New Laws for Uncollected Goods" by B. Hazlett and H. Linossier LIJ October 2013 p. 59).

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