IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2019 00109

OMAR PROPERTY PTY LTD (ACN 602 739 668)
(and others in accordance with the Schedule attached) — Plaintiffs

v

AMCOR FLEXIBLES (PORT MELBOURNE) PTY LTD
(ACN 004 284 673) — Defendant

JUDGE:	Garde J
WHERE HELD:	Melbourne
DATE OF HEARING:	17-20, 24-27 February 2020
DATE OF JUDGMENT:	1 May 2020
CASE MAY BE CITED AS:	Omar Property Pty Ltd & Ors v Amcor Flexibles (Port Melbourne) Pty Ltd (No 4)
MEDIUM NEUTRAL CITATION:	[2020] VSC 216

LANDLORD AND TENANT – Tenant's breaches of lease by performing structural works without a building permit – Tenant's failure to seek prior consent from landlord for works - Whether breaches of lease were remedied – Default notice – Purported renewal of lease – Effect of *Building Act 1993* (Vic) and *Building Regulations 2006* (Vic) sch 8 item 4(a)(iii) – Whether landlord required not to unreasonably refuse retrospective application for consent – Whether consent was refused unreasonably – *Building Act 1993* (Vic) ss 4(1), 4(2), 16 – *Building Regulations 2006* (Vic) reg 1801, sch 8 item 4(a)(iii) – *Property Law Act 1958* (Vic) s 146(1).

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr M Borsky QC with Mr R Chaile	Maddocks
For the Defendant	Mr D Collins QC with Mr L Hawas and Mr C Lum	Baker McKenzie

HIS HONOUR:

INTRODUCTION

1 The plaintiffs are the purchasers and former owner of land at 187 and 195-201 Williamstown Road, Port Melbourne ('land'). They seek declarations that two option renewal notices ('renewal notices') given by Amcor Flexibles (Port Melbourne) Pty Ltd (ACN 004 284 673) ('Amcor') to renew a lease of the land ('lease') for a further term are of no effect, and that the lease expired on 31 March 2019. They also seek an order for possession of the land.

2 Amcor denies that the renewal notices are ineffective. It seeks a declaration that it was entitled to renew the lease and an order compelling the plaintiffs to execute a new lease.

Background

3 Amcor was known as Detmold Flexibles Pty Ltd ('Detmold Flexibles') when it was part of the Detmold Group. The Detmold Group operated a packaging manufacturing business on the land.

4 On 31 March 2014, Detmold Flexibles entered into a lease of the land with Gabb Property Victoria Pty Ltd ('Gabb'), a member of the Detmold Group, for a term of five years with options to renew the lease for two further terms of five and two years.

5 By December 2014, the Amcor Group had acquired the shares in Detmold Flexibles as part of its acquisition of the business and operations conducted on the land and another site in Dandenong. It did not purchase the freehold of the land from Gabb.

6 On 29 June 2015, Omar Property Pty Ltd (ACN 602 739 668) ('Omar') became the registered proprietor of the land and the landlord under the lease.

7 On 4 March 2016, Omar sold the land to ID_Land Pty Ltd (ACN 126 819 636) ('ID_Land') for $32,500,000, payable under the contract of sale by a deposit of $1,625,000 and a balance of $30,875,000 by 30 June 2017. The sale was subject to the

lease.

8 On 4 July 2016, the contract of sale was cancelled by deed and a substitute contract of sale ('sale contract') entered into between Omar and the second, third and fourth plaintiffs ('purchasers'). The sale price was $31,650,000, payable by a deposit of $1,582,500 and balance of $30,067,500 on the earlier of 31 March 2019 or seven days before Amcor was due to surrender the lease. Condition 24.2 of the sale contract provided that Omar must deliver the land to the purchasers at settlement in the same condition that it was in on the day of sale except for fair wear and tear.

9 From September 2016, Matt Belford and Jeff Garvey, directors of ID_Land, periodically met with Amcor representatives to discuss Amcor's tenancy of the land. Meetings continued until November 2018. ID_Land sought a surrender of the lease to obtain possession of the land for redevelopment. Amcor sought a lease surrender payment to meet the cost of relocating machinery and vacating the land. Despite the negotiations and correspondence, the parties could not agree. I will later address what took place.

10 Over the period from May to October 2017, Amcor installed a gravure printing press ('press') in a warehouse ('building') on the land described in an attachment to the lease as Building 2, 195 Williamstown Road, Port Melbourne. The press was over 45m in overall length, 10m at its widest point and 6.6m in height.

11 In order to install the press, Amcor and its builder, AJR Crow Pty Ltd (ACN 006 582 430) ('AJR Crow') carried out building work on the land ('works').

12 Amcor did not seek or obtain a building permit for the works, or the consent of Omar as landlord to perform the works.

13 On 11 December 2017, ID_Land obtained a permit from the City of Port Phillip for the development of 122 three-storey townhouses on the land. Such a development would necessitate the demolition of all existing buildings on the land.

14 On 18 June 2018, ID_Land's building consultants, Napier & Blakely Pty Ltd,

inspected the land, and saw that the press had been installed in the building. They observed that the floor slab of the building had been significantly modified to accommodate the increased loading of the press, and that numerous penetrations had been made to the roof for ductwork and infrastructure. They considered that a building permit was required to complete the work, although they had not then reviewed the design documentation or the relevant building regulations.

15 On 4 July 2018, Omar served a notice of default ('default notice') on Amcor under the lease. The default notice stated that without Omar's consent Amcor had:

(a) modified and altered the structure of the building;

(b) broken the concrete slab of the floor;

(c) excavated the ground;

(d) carried out structural improvements and alterations to the concrete slab; and

(e) carried out alterations to the roof.

16 The default notice said in substance that the works breached three conditions of the lease, being:

(a) cl 5.2, in that Omar's consent in writing had not been obtained for structural alterations or additions to the building;

(b) cl 5.4, in that building works had been undertaken without obtaining a building permit contrary to s 16 of the *Building Act 1993* (Vic) ('Act'); and

(c) cl 5.6, in that the building had been cut, injured, damaged or defaced.

17 The default notice required Amcor to remedy each of these breaches within 28 days and to pay Omar's reasonable costs and expenses.

18 On 25 July 2018, Amcor's solicitors responded to the default notice. In substance, Amcor:

(a) admitted that the works included structural alterations or additions under cl 5.2, stating that the failure to obtain prior written consent was an oversight;

(b) requested that Omar provide retrospective written consent for the works;

(c) denied that cl 5.4 of the lease had been breached, stating that the builder had advised that no building permit was necessary; and

(d) denied any breach of cl 5.6 of the lease, asserting that cl 5.6 was not applicable.

19 On 31 July 2018, Omar requested copies of structural drawings and documents relating to the works and reserved its rights.

20 On 16 October 2018, Amcor forwarded a notice of exercise of option to renew the lease for a further term of five years ('first renewal notice') commencing on 31 March 2019.

21 Amcor responded to the request for drawings and documents on 23 October 2018 by providing structural drawings and other documents including a planning permit application for the works made to the City of Port Phillip in May 2017. The application stated that the cost of the works was $5.5 million.

22 On 16 November 2018, the purchasers advised Amcor that they did not consider that Amcor was entitled to renew the lease and had not done so by the first renewal notice.

23 As to cl 5.2 of the lease, they said that Amcor had not remedied the breach. Omar had not given its consent, and it was not unreasonable for Omar to withhold consent as it was required under condition 24.2 of the sale contract to deliver the land to the purchasers in the same state as it was at the time of execution of the sale contract, fair wear and tear excepted. The works would prevent satisfaction of that obligation by Omar which had a proper basis for withholding consent.

24 As for cls 5.4 and 5.6 of the lease, they disagreed with Amcor's response, contending in the case of cl 5.4 that a building permit was required, and in the case of cl 5.6 that

Amcor's construction of that clause was clearly wrong. The purchasers said that cl 12.1(b)(A) was operative, and that Amcor was not entitled to renew the lease.

25 On 23 November 2018, the plaintiffs executed a deed of variation of the sale contract ('variation deed') to take effect retrospectively on 1 July 2018. The variation deed amended the sale contract so that the purchasers had the sole right and absolute discretion to make any decision in relation to the dispute with Amcor. The purchasers were required to keep Omar informed, to act reasonably, and in accordance with Omar's obligations under the lease and the law.

26 In a letter dated 20 December 2018, Amcor contended that:

(a) Omar had been provided with detailed information about the works in the 23 October 2018 letter;

(b) there was no reasonable basis for Omar to refuse consent;

(c) the reason for withholding consent was that the purchasers sought possession of the land to pursue a residential development project;

(d) the breach of cl 5.2 had been remedied by the unreasonable withholding of consent to the works; and

(e) if there was a breach of cl 5.6, it had been remedied on the same basis as the breach of cl 5.2.

27 Amcor gave a second notice of exercise of the option to renew the lease ('second renewal notice') on 21 December 2018.

The trial

28 On 5 February 2020, I ordered that the trial of the proceeding be for the purpose of determining which party is entitled to possession of the land and exclude the question of damages suffered by the plaintiffs or by Amcor. As a result, this judgment solely addresses the competing claims of the purchasers and Amcor for possession of the land.

29 On the same day, I gave leave to Amcor to join AJR Crow and Mr Archibald John Ross Crow as third parties to the proceeding. Amcor elected not to join AJR Crow and Mr Crow or to file a third party notice.

30 On 17 February 2020, I gave leave to the plaintiffs to file and serve an amended statement of claim that would have permitted the plaintiffs to expand their case by including specified ancillary works carried out during the installation of the press. The plaintiffs elected not to proceed with the amendments to the statement of claim.

The land and its use

31 The land is zoned Capital City Zone (CCZ1) under the Port Phillip Planning Scheme, and is subject to the Development Contributions Plan Overlay (DCPO), Development Contributions Plan Overlay – Schedule 2 (DCPO2), Parking Overlay (PO), and Parking Overlay – Precinct 1 Schedule (PO1).

32 The land is used for industry and ancillary offices and contained five printing presses at the commencement of the lease. Four of the presses were flexographic presses and one was a gravure press installed in 2009. The gravure press sat on its own purpose built concrete slab. The presses had exhaust flues passing through the roof of the building, and relied on a regenerative thermal oxidiser for the treatment of fumes.

33 A building condition report prepared by Colliers International dated 24 March 2014 describes the building as in fair condition with some areas needing repair, including:

- areas of the floor where forklifts operated needed resurfacing;
- penetrations and holes in the external metal cladding; and
- extensive leakage throughout the roof.

Relevant provisions of the lease

34 Clause 1 of the lease defines terms used in the lease and contains the following:

(a) In this Lease unless the contrary intention appears:

Lessee includes the Lessee the executors administrators of the Lessee or being a body corporate its successors and assigns.

Lessee's Associates includes an employee agent contractor licensee or invitee of the Lessee.

Lessor includes the Lessor the assigns executors and administrators of the Lessor or being a body corporate its successors and assigns and reversioner immediately expectant upon the term created by this Lease.

…

(g) Where it is provided in this Lease that the Lessee covenants promises undertakes or agrees to perform some act or thing or to refrain from doing or carrying out some act or thing such covenant promise undertaking or agreement shall be read and construed as including a provision that the Lessee shall procure the Lessee's Associates to perform the act or thing or refrain from doing or carrying out the act or thing respectively.

35 Tenant's covenants are found in cls 5 to 7 of the lease.

36 Clause 5.1 provides:

> Not without the consent in writing of the Lessor, which consent shall not be unreasonably withheld, to use or permit the Premises to be used for any purpose other than the purpose or use set out in Item 7 of the First Schedule…

37 Clause 5.2 provides:

> Not to make or permit any structural alterations or additions to be made to the Premises (the ***Tenancy Works***) without first obtaining the consent in writing of the Lessor which consent shall not be unreasonably withheld **provided that** all Tenancy Works the subject of that consent shall be carried out with all due diligence in a proper and workmanlike manner to the reasonable satisfaction of the Lessor and shall be in conformity with the *Victoria Building Regulations* or any other requirements of the relevant municipality or other relevant authority. The Lessee must notify the Lessor in writing if the Lessee intends to carry out a re-arrangement of the internal layout of the Premises by the erection and installation of non-structural Lessee's fixtures and fittings or to the removal or replacement of plant or equipment, all in the ordinary course of business, and work of this nature shall be carried out in a proper and workmanlike manner and in compliance with all statutes and must not diminish the value of the Premises.[1]

38 Clause 5.4 provides:

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[1] Emphasis in original.

> To observe perform and fulfil all the requirements of all statutes so far as they apply to the Premises or to any business or businesses from time to time being conducted on the Premises and not permit anything to be done which may conflict with any statutes **provided that** nothing in this Clause shall require the Lessee to undertake any structural repairs or alterations or incur expenditure in respect of items of a capital or structural nature, unless such structural repairs are required because of the wrongful or negligent act or omission or default of the Lessee or the Lessee's Associates or, because of the Lessee's particular use or occupation of the Premises...[2]

39 Clause 5.6 provides:

> Not to cut injure damage or deface any services facilities plant and equipment or any other part of the Premises or any conveniences or appliances installed on the Premises and not use or permit the Premises to be used for any purpose or in any manner other than those for which they are provided or are properly available and not to abuse or misuse those facilities.

40 Clause 6.1(a) provides:

> The Lessee will at all times… at the Lessee's own expense maintain and keep the Premises and the Lessor's Installations clean and in good and substantial repair… damage by fire, fair wear and tear and act of God only excepted **provided that** the Lessee shall not be liable under this Lease to undertake work of a structural or capital nature including replacement of any of the Lessor's Installations unless any such structural repairs are required because of the Lessee's obligations to make good under clauses 11.3 and 11.4 or because of the wrongful or negligent act or omission or default of the Lessee… or, because of the Lessee's particular use or occupation of the Premises…[3]

41 Clause 6.2 provides:

> The Lessee will, at its own expense, promptly make good any breakage, damage, defects or wants of repair to the Premises…

42 Clause 7.1 provides:

> Subject to Clauses 7.2 and 7.3, the Lessee shall not assign, sublet, license or part with possession or the whole or part of the Premises without the prior written consent of the Lessor and section 144 of the *Property Law Act 1958* (Vic) does not apply.

43 Clause 7.2 provides:

> The Lessor's consent shall not be unreasonably withheld in the case of a sub-lease or an assignment of the lease of the whole or part of the Premises where:

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2 Emphasis in original.

3 Emphasis in original.

(a) in the Lessor's reasonable opinion, the assignee or sub-lessee is a responsible respectable and solvent person or company;

(b) the assignee or sub-lessee signs such agreements and covenants as are reasonably required by the Lessor;

(c) the assignee or sub-lessee meets all proper and reasonable costs of the Lessor; and

(d) in the case of an assignment, provision is made that the Lessee shall not be released from its obligations under this Lease.

44 Other relevant clauses of the lease include the following.

45 Clause 10.1 is concerned with re-entry following breach or default:

> If:
>
> …
>
> (b) the Lessee commits or permits any breach or default to occur in the due and punctual performance and observance of any of the covenants obligations and provisions of this Lease;
>
> …
>
> then in any one or more of either of those events the Lessor subject only to the provisions of section 146(1) of the *Property Law Act 1958* (Vic) shall have the right to re-enter into and upon the Premises and to repossess and enjoy the Premises as of its former estate but without prejudice to any action or other remedy which either party may have against the other party for any antecedent breach of the terms and conditions and covenants of this Lease.

46 Clause 10.2 permits a default notice to be given in the case of a breach of cl 5.2, 5.4 or 5.6:

> In the case of a breach of the covenants obligations and provisions contained in this Lease other than the covenants to pay rent then the notice of default to the Lessee to be given under section 146 of the *Property Law Act 1958* (Vic) shall provide that the period of 28 days or such longer period the Lessor considers is reasonable in the circumstances is the time within which the Lessee is to remedy any breach if it is capable of remedy or to make reasonable compensation in money to the satisfaction of the Lessor.

47 Clause 11.4 provides for the reinstatement of the land at the expiration of the lease:

> The Lessee shall at the expiration or sooner determination of this Lease peaceably surrender the Premises to the Lessor (subject to Clauses 11.2 and 11.3) and subject to the exceptions set out in clause 6.1, reinstate the Premises to the condition of the Premises as at the Commencing Date as shown in the Condition Report including the remediation of any Contamination caused by the Lessee after the Commencement Date as assessed against the Baseline

Environment Report.

48 Clause 11.8 provides:

> If the doing or execution of any act matter or thing by the Lessee under this Lease is dependant [sic] on the consent or approval of the Lessor that consent or approval shall not be unreasonably withheld or delayed.

49 Clause 12.1(b) of the lease deals with the renewal of the lease, and provides:

> The Lessee shall not be entitled to renew this Lease if:
>
> (A) at the time of exercise there is any unremedied breach by the Lessee of this Lease of which the Lessor has given written notice to the Lessee; or
>
> (B) the Lessee has persistently committed material breaches of this Lease of which the Lessor has given notice during the Term.

Relevant statutory provisions

50 Section 4(1) sets out the objectives of the Act in these terms:

> (a) to protect the safety and health of people who use buildings and places of public entertainment;
>
> …
>
> (e) to facilitate the cost effective construction and maintenance of buildings and plumbing systems;
>
> …
>
> (g) to aid the achievement of an efficient and competitive building and plumbing industry.

51 Section 4(2) of the Act directs that these objectives are to be taken into account in the administration of the Act.

52 It is an offence under the Act if building work is carried out without a building permit unless the building work is exempt. Section 16 provides:

> (1) A person must not carry out building work unless a building permit in relation to the work has been issued and is in force under this Act.
>
> Penalty: [not set out]
>
> (2) A person must not carry out building work unless the work is carried out in accordance with this Act, the building regulations and the building permit issued in relation to that work.

Penalty: [not set out]

(3) An owner of land must ensure in relation to building work carried out on that land that a building permit in relation to the work has been issued and is in force under this Act.

Penalty: [not set out]

(4) A building practitioner or an architect who is engaged to carry out building work must ensure that a building permit in relation to the work has been issued and is in force under this Act.

Penalty: [not set out]

(4A) A builder named in a building permit must ensure that the building work to which the building permit applies is carried out in accordance with this Act, the building regulations and the building permit.

Penalty: [not set out]

(5) Subsection (3) does not apply to an owner if the owner has engaged a building practitioner or architect to carry out the building work on that land.

(6) Subsections (1), (2), (3), 4 and (4A) do not apply if the building work is exempted by or under this Act or the regulations.

53 Section 146(1) of the *Property Law Act 1958* (Vic) provides:

> 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.

THE WORKS

View

54 On 18 February 2020, with the assistance of senior counsel and legal representatives,

I had the benefit of a view of the press and the building. I observed the press, the concrete slab floor, and the penetrations to the roof internally within the building and externally from a nearby location. From the ground, I was able to observe the structures erected on the roof of the building. The view permitted me to better understand the evidence. The photographs in the schedule to these reasons show the press and the works.

The works

55 The parties relied on the evidence of structural engineers. The plaintiffs retained Patrick Irwin and Amcor retained Richard Drew. Both were highly qualified and experienced engineers, and inspected the works on a number of occasions. Their qualifications and expertise were unchallenged. Ultimately, their evidence was substantially similar. They were not cross-examined.

Mr Irwin's reports

56 Mr Irwin prepared two reports.

First report

57 In his first report dated 6 June 2019, Mr Irwin described the building as a steel framed and clad industrial structure of dimensions of about 80m x 30m. It had a flat concrete slab floor and was of simple gable construction. The press was located in the centre of the building.[4]

58 Mr Irwin described the construction of the building as typically undertaken in the following manner:

(a) Concrete pad footings are cast in the ground to carry the columns. The main steel frames are fixed to these columns to carry the building envelope gravity loads.

(b) A flat slab floor is poured onto an engineered sub-base and sub-grade.

4 First Expert Report of Patrick Irwin, 5 ('First Irwin Report').

(c) The main steel frame is a self-supporting portal frame consisting of pairs of columns jointed by roof trusses and forming a rigid frame.

(d) The portal frames are joined together with lighter steel members that carry the roof, wall linings and bracing. The steel purlins span across the roof from frame to frame. The purlins carry the roof lining directly.[5]

59 The engineering drawings for the installation of the press show a floor cut out of about 41m x 2.8m. The design called for a 400mm deep slab with a large central area set down another 750mm and additional set downs at each end of 180mm. The existing slab was to be cut out with concrete saws, broken up and removed, and an extra 500mm of earth excavated.[6]

60 Amcor's geotechnical investigation showed that the fill beneath the existing concrete slab was not an appropriate foundation. As a result, screw piles were installed in the sand to ensure a sound foundation. Polythene moisture barriers were placed over the sub-grade, and the old polythene barrier restored. After the new slab was poured and the concrete cured, installation of the press could occur.[7]

Roof works

61 Mr Irwin said that some of the new roof penetrations required alterations to the roof frame locally, while others were accommodated within the existing roof frame by cutting away roofing material.

62 The largest penetrations were for two ducts at the northern and southern ends of the press. They involved the cutting of a purlin for each duct and the trimming of the opening with a light gauge steel member.[8]

63 There were six penetrations for ventilation shafts accommodated between purlins. The fans and motors in each shaft were of substantial weight, and were supported

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5 Ibid 6–7.
6 Ibid 9.
7 Ibid 10.
8 Ibid 14.

by the purlins and trimmers immediately below the roof. Small rotary ventilators and exhaust risers had been installed, and required penetrations in the roof sheeting. They did not affect the building structure.[9]

Answers to questions

64 Mr Irwin answered questions contained in his instructions as follows:

> **Q: Did any, and if so what, part of the works involve structural alterations or additions to the [building]?**
>
> A: [(a)] The cutting out of the floor slab and replacement with the machine base slab.
>
> [(b)] The cutting of roof purlins and their trimming around to accommodate the large diameter ductwork.
>
> **Q: Did any, and if so what, part of the works involve cutting of any services, facilities, plant or equipment or other part of the [building]?**
>
> A: I can only answer this question with regard to the building structure. My answers are:
>
> [(a)] The cutting out of the floor slab to enable its removal locally for the machine base slab.
>
> [(b)] The cutting of roof purlins to accommodate the large diameter ductwork.
>
> **Q: Did any, and if so what, part of the [works] include the removal of any element of the [building] that was contributing to the support of any other element of the building?**
>
> A: Yes. The cutting and removal of part of the roof purlins that were carrying the roof…
>
> **Q: Did any, and if so what, part of the [works] include the alteration of any element of the [building] that was contributing to the support of any other element of the building?**
>
> A: [(a)] Yes. The cutting and removal of part of the roof purlins that were carrying the roof… Also, the additions of the large diameter ducts, mechanical ventilation shafts.
>
> [(b)] As far as I can tell the slab, in the areas in which it was cut out, was not contributing to the support of other parts of the building…[10]

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9 Ibid 15.

10 Ibid 22–23.

Second report

65 Mr Irwin completed a second report dated 18 November 2019. In a tabular summary of responses to key questions, he noted that both the base work and the roof penetrations involved structural alterations or additions. He said that the roof penetrations, but not the base works, involved the removal and alteration of an element that was contributing to the support of another element of the building.[11]

66 Mr Irwin said that 20 service shaft penetrations were made of the roof and one removed during the work. Chimneys were erected above the large diameter ducts at the northern and southern ends of the press. They consisted of a light metal tube with welded supporting frame imposing wind loads, adding considerable mass to the roof. Two guy wires were put in place to support each chimney. Six evaporative coolers were erected above service shafts supported by perimeter frames on the roof.[12]

67 Mr Irwin answered the question set out below:

> **Q: Describe in detail the roof works the [sic] were undertaken, including without limitation, their nature, scope and effect.**
>
> A: [(a)] For the penetrations to carry the large diameter ducts (2 cases): Roof sheeting was cut back, a purlin was cut away locally and a penetration trimmed around with light metal sections…The surrounds were flashed around from atop. If this was done without engineering guidance and approval, there is potential for the remaining purlins, locally to fail during high wind events…Once the penetrations were established the ducts were fitted. Since these appear to be permanent, fixed installations, strictly the ducts become part of the roof frame.
>
> [(b)] For the six mechanical ventilation shafts… roof sheeting was cut back, and penetrations trimmed around with light metal sections. Additional light framing members were installed to assist the support of the shafts. These works have the potential to overload the roof structure by local gravity loads and cause local failure. This is unlikely to be a problem, as the design of such roofs is typically governed by wind load uplift, however, as I don't know the mass of services installation applied, I cannot rule out a problem. The additional light framing members installed to support the shafts have little potential to cause damage as the loads they carry are negligible. Once the penetration was established the services shaft and mechanical installation were fitted. Since these

11 Second Expert Report of Patrick Irwin, 2 ('Second Irwin Report').
12 Ibid 15–16.

appear to be permanent, fixed installations, they become part of the roof frame.[13]

Mr Drew's reports

68 Mr Drew prepared two reports.

First report

69 In his first report dated 7 December 2019, Mr Drew described the existing building superstructure as comprising a trussed portal frame system fabricated from steel angles. The trusses had an overall depth of 930mm, span of approximately 31.5m, and approximate internal height of about 8.4m.[14]

70 The roof sheeting was supported on what appeared to be bespoke and symmetrical steel purlin "C" sections of about 150mm depth. The base metal thickness of the purlins averaged about 4mm. The roof bracing system was steel angle and strut, and was independent of the secondary structure. The secondary structure consisted of relatively lightweight purlins and girts that supported the roof and wall sheeting, and transmitted the load to the primary structure.[15]

71 The secondary roof structure was modified to permit two flues associated with the press to penetrate the roof. Each flue involved the cutting of an existing purlin, and the installation of new trimming purlins. The flues were stabilised above the roof line with cable stays fixed to the roof structure. It was standard practice to connect guy wires to the primary structure through the roof sheeting.[16]

72 Mr Drew estimated the total weight of the 5m flue on the northern end of the roof as about 170kg, consisting of 813mm diameter x 0.8mm spiro ducting (100kg) and cowl (70kg).

73 The 7m flue on the southern end of the roof was significantly heavier, and weighed

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13 Ibid 35.
14 First Expert Report of Richard Drew, 6, 13 ('First Drew Report').
15 Ibid 6.
16 Ibid 7.

about 380kg. It consisted of 1016mm diameter x 1mm spiro ducting (210kg), cowl (130kg), and brace and damper (40kg).[17]

74 The existing floor was understood to be a 150mm concrete slab, underlain by 150mm of crushed rock and imported, compacted fill to 1.5m depth which was underlain by medium dense natural sands. The slab was understood to be a ground bearing floating slab independent of the superstructure and footings. The superstructure would be supported on a system of piles or pad footings.[18]

75 The press was installed on a new, piled slab approximately 41m long and 2.8m wide. It was generally 400mm thick and flush with the existing floor, or recessed 180-350mm. The piles were helical screw piles recommended to be installed to a depth of 3m.[19]

76 Preliminary structural analysis of the northern and southern flues was carried out under Mr Drew's supervision. This indicated the need for a more sophisticated analytical approach to determine the structural adequacy of the assemblage of the flues stabilised with guy wires on the secondary structure of the roof. The evaluation of combined structural capacity of the asymmetrical roof purlins and the thin-walled flues acting in combination required consideration of torsional and local buckling of thin walled sections. This was beyond the capacity of the proprietary software used by Mr Drew's firm.[20]

77 Mr Drew identified the northern flue as the critical flue for the evaluation of structural adequacy due to its thinner base metal thickness of 0.8mm, and eccentric "dog-leg" to the flue where it joined the press. The bend in the northern flue caused significantly higher stresses under wind action and self-weight than were seen on the straight southern flue.[21]

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17 Ibid 9.
18 Ibid 14, 15.
19 Ibid 15.
20 Ibid 16.
21 Ibid.

78 Mr Drew considered that if the northern flue could be shown to be satisfactory under the wind load mandated under the applicable Australian standard,[22] then the southern flue could reasonably be considered to satisfy the same structural standard for design load.[23]

79 In order to undertake the necessary structural analysis of the northern flue, Amcor engaged Dr Tuan Nguyen and Professor Tuan Ngo of the Department of Infrastructure Engineering at the University of Melbourne. Each is a very highly qualified engineer holding Doctorate of Philosophy and Master of Engineering degrees. They analysed the interaction of the structure on the northern flue with the supporting roof structure to assess the elastic behaviour (with the imposed deformation compatibility of the purlins and flues) of the structural elements involved,[24] and to check that the elastically determined structural actions could be sustained in potential non-linear failure mechanisms.[25]

80 Mr Drew said that the critical applied loading was a (static) wind load under the applicable standard[26] for a return period of 500 years as required by the Building Code of Australia for a building of Importance Level 2.[27] He said that the relevant wind velocity was 45m/sec (or 162kph). The assumed terrain capacity was TC3 corresponding to surrounds of suburban housing with low-rise buildings.[28]

81 Mr Drew said that the assumptions necessary to undertake the structural analysis of

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22 Australian/New Zealand Standard, Structural design actions - Part 2: Wind actions AS/NZS 1170.2:2011 (30 March 2011) ('AS/NZS 1170.2:2011').

23 First Drew Report, 16.

24 Elastic analysis assumes that the structural materials under design actions are in the linear elastic range and are not subject to non-linear effects such as overall or local buckling, or plastic deformation which occurs once the material is stressed past the yield point. Mr Drew noted that this generally sufficed for design purposes but may not be conservative for the evolution of slender structural elements or those incorporating thin sheets of steel where local buckling may lead to rapid and sudden failure – such as the exhaust flues.

25 First Drew Report, 16–17.

26 AS/NZS 1170.2:2011.

27 Under the Building Code of Australia, an Importance Level defines the level of consequences in the event of a building failure. A building of Importance Level 1 has a low degree of hazard to life and other properties in case of failure. A building of Importance Level 3 contains a large number of people. A building of Importance Level 4 is essential to post-disaster recovery or hazardous materials facilities. A building of Importance Level 2 is a building or structure not included in Levels 1, 3 and 4.

28 First Drew Report, 17.

the flues with supporting roof structures were:

(a) the guy wires to the flues are 10mm diameter with negligible pre-tension and are connected to the primary roof structure at an angle of approximately 50 degrees to the horizontal;

(b) the steel flues are modelled as effectively continuous and integral at the joints;

(c) the original purlins have a yield strength of 240MPa;

(d) the flue geometry and weight were as estimated;[29]

(e) the steel ducting has a yield strength of 250MPa;

(f) the new, trimming purlins installed are 150 C 19-Lysaght type, grade 450MPa; and

(g) the layout and plan geometry of the flues and guy wires were estimated, as access to the relevant part of the roof was not possible.[30]

82 Mr Drew's report was accompanied by a report dated 27 November 2019 prepared by Dr Nguyen and Professor Ngo.

83 Dr Nguyen and Professor Ngo undertook a finite element analysis of the structural behaviours and load sharing mechanism of the roof and flue structures based on the 'as built' conditions advised by Mr Drew, having regard to the relevant design standards.[31]

84 They found that the critical structural component is the flue under the combined action of wind pressure for ultimate limit states derived from AS1170.2:2011 (1.0 kPa), which is applied on the flue surface above the roof and axial compression force

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29 See [72]–[73].

30 First Drew Report, 17–18 (footnote omitted).

31 Australian/New Zealand Standard, Structural design actions – Part 1: Permanent, imposed and other actions (4 June 2002) AS/NZS 1170.1:2002; AS/NZS 1170.2:2011; Australian/New Zealand Standard, Cold-formed steel structures (15 May 2018) AS/NZS 4600:2018; Australian/New Zealand Standard, Steel Structures (5 June 1998) AS 4100–1998.

(2.5 kN) applied at the top of the flue. The capacity of the flue reduced by 20% in terms of axial buckling load and buckling pressure when nonlinear, local buckling behaviour was considered. Ultimately, they concluded that the flue had the capacity to carry the load, calculated for ultimate limit states.[32]

85 In an addendum to their report, Dr Nguyen and Professor Ngo provide an additional structural assessment of the capacity of the old purlins after considering their potential for lateral torsional buckling and distortional buckling.

86 They considered that as the building purlins were constructed a few decades ago and of asymmetric section, they were prone to complex buckling behaviours that may undermine their load capacity. Ultimately, they determined that the load capacity of the old purlins was double the maximum bending moment derived in their calculations. As a result, they confirmed the structural adequacy of the flues as constructed on the roof of the building.[33]

Answers to questions

87 Mr Drew answered questions contained in his instructions, as follows:

> **Q: [Did] any of the [works]… involve any structural alterations or additions to the [building]?**
>
> A: The existing slab was cut and a piled slab of higher load capacity was installed over an area of approximately 7% of the floor area of the space in which the printing machinery has been installed. I would consider this a structural alteration (effectively an improvement) of the building.
>
> Two roof purlins that I would consider to be part of the "secondary" structure of the building have been cut (one at each flue location), and additional trimming purlins added to support the flues and purlins that have been cut. In my view this constitutes an alteration to the secondary steel roof structure that supports the roof cladding.
>
> **Q: [Did] any of the [works]…adversely affect the structural soundness of the building…?**
>
> A: The structural soundness of the floor slab in the footprint of the printing machinery has been improved and the load capacity increased. The floor recesses can be filled with concrete to return the floor to its original, planar

32 Report of Dr Tuan Nguyen and Professor Tuan Ngo, 3.
33 Ibid 13–17.

profile.

The *primary* steel building frame is unaltered and in my opinion not adversely affect [sic] by the installation of the flues.

Structural analysis of the roof structure and flue assembly indicates that the purlin structure can support the flues and roof cladding in the 1:500 year wind condition, which…in my opinion would be the relevant and critical load condition for the building in terms of statutory compliance.

The load imposed by the flues on the main roof trusses is relatively light and the trusses comprising the primary roof structure would not be adversely affected. By this is meant [sic] that for the purlins directly supporting the flues the weight of the flues and the wind actions transmitted by the flues are significant. The roof trusses that comprise the primary structure support relatively high loads as a consequence of their span geometry and the addition, the loads transmitted to the trusses by the flues are relatively minor as the flues, as shown by analysis, are to significant degree self-supporting.

Therefore, neither the structural soundness of the roof overall nor the footings of the building have been adversely affected by the works carried out.

Given the very limited intervention to the roof cladding and purlins, and the use of bolted connections which are readily decommissioned, the roof alterations in my opinion represent minor work to the secondary structure of the building.

Q: [Did any of the [works]…involve the removal or alteration of any element of the building…that is contributing to the support of any other element of the building…?

A: Sections of ground bearing slab have been removed to install the piled slab which supports the printing machinery. The ground bearing slab is acting purely as a serviceable floor, and is not supporting any other element of the building. As noted in the foregoing, the slab which has been installed in place of the ground bearing slab is of greater capacity than what it has replaced. In my experience the installation of suitable supporting slab structure within existing buildings is a fundamental and routine requirement for the operation of commercial printing machinery.

Sections of purlin (approximately 1 metre in length) have been removed from two existing purlins to create the necessary opening for the vent-flues associated with the printing machinery. The cut purlins have been trimmed with new 150mm C-section purlin sections that support the cut purlins. The purlins concerned previously supported only the lightweight roof cladding for the building.

In my view only minor, secondary structure has been altered, the bolted connections employed mean that the installation is minor and is easily decommissioned. It has been demonstrated in the representative analyses carried out that in respect of the relevant design standards, there is no adverse effect on the roof structure consequent of the installation of the flues.

Q: Have the [works] been carried out in a manner which does not adversely affect the structural soundness of the building…?

A: As described in the foregoing sections of this report, the installation of a new, piled slab does not affect the capacity of the surrounding areas of slab, and (necessarily so) the new slab is of considerably greater load-bearing capacity than the original slab.

Structural calculations carried out confirm that the secondary roof structure in its altered state conforms to the pertinent requirements of the relevant Australian design standards...The primary structure (*viz.* the steel trusses / portal frame structures) is unaltered and is not adversely affected.[34]

Second report

88 Mr Drew's second report dated 8 February 2020 included the following findings:

(ii) … My view is that the works addressed in Mr Irwin's report and that I have inspected are highly likely to prove adequate in respect of structural compliance, should a detailed verification be carried out, such as was carried out for the two exhaust flues ("Northern" and "Southern") that have been considered in my first report.

…

(iv) My view is that the works described in Mr Irwin's report are: (i) to the secondary structure and cladding, (ii) reversible, and (iii) insofar as I am familiar with printing facilities and able to comment, fundamentally necessary for the operation of such a business as [Amcor] operates. Logically, this would constitute enhancement of the building to the extent that it allows the tenant to carry out the printing operations, which presumably is the purpose of the lease. I do not see that from a structural engineering perspective that the building modifications mitigate against the future usability of the building.

(v) Concerning the scope and description of the works carried out, I am in general and overall agreement with Mr Irwin's observations. I have not verified the timing of such works, but my understanding is that it is not controversial that the works discussed by Mr Irwin occurred while [Amcor] has occupied the premises as a tenant.

(vi) The matters of the slab modifications to receive the printing machinery and the localised work done to the roof to accommodate two exhaust flues associated with the printing machinery are the subject of my previous report in which I found that the slab modifications effectively constitute an upgrade to the load carry capacity of the existing slab, and the roof modifications were to secondary elements of structure and were compliant with the relevant structural standards.

…

(viii) As outlined in following sections of this report, in my opinion the works that involve modification of structure "*contributing to the*

[34] First Drew Report, 19–21 (footnotes omitted).

support of any other element of the building" are the creation of openings to… the roof, and involve secondary elements of structure... These works, whilst constituting modification to the fabric of the building envelope (as opposed to the *primary structure* or "skeleton" of the building), I consider to be structurally standard, minor modifications clearly consequent of the use of the building for commercial printing.

(ix) The works which are the subject of Mr Irwin's report I consider to be very minor compared to past modifications to the group of buildings that house the printing operation. Such structural modifications are evident in the North section of the "later" building where a large steel portal structural has been installed evidently to replace what was previously a wall…This work in relative terms I consider to constitute a significant, structural building modification; but could be considered an "improvement" in improving the usability of the internal space.[35]

89 As to the roof penetrations and installation of the two flues on the roof of the building, Mr Drew said:

> The criteria that determine whether engineering analysis and design is carried out for routine installation of services on industrial buildings are to significant degree subject to experience and judgement. I agree with Mr Irwin that a chimney or flue of large scale will at some degree of magnitude "invite engineering analysis".
>
> However, if an installer of building services and fixtures routinely carries out a large number of such installations, and becomes conversant with the conditions whereby the scale of components and associated loads becomes critical and structural consideration warrant engineering intervention, then they may choose to exercise judgement rather than revert to engineering analysis in every instance.
>
> The analysis carried out for my earlier report indicates that the installation of the two ("North" and "South") flues is structurally justifiable in the case of the subject building works. That is, analysis shows the altered purlin structure supporting the roof (and partially the flues) to comply with the relevant loading (wind) and material (steel) design standards.
>
> There are other minor service shaft penetrations that have been made to the roof…These appear to be rotary ventilators and minor exhaust risers which in my view are trivial in structural terms.
>
> Mr Irwin also notes the installation of six evaporative cooling units on the roof. I do not have a complete specification for the weight of these, although the supplier's documents indicate an operating weight of 411 kg…
>
> The installation of these units has not involved the cutting of purlins or any structural elements. I have not assessed the structural actions on the roof purlins from these cooling units. However, having assessed the existing purlins to support the North and South flues I consider it likely that the

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35 Second Expert Report of Richard Drew, 3–5 (footnotes omitted) ('Second Drew Report').

installation is adequate with respect to the relevant structural standards.[36]

90 As to the roof penetrations for the exhaust flues and cooling units on the roof, Mr Drew expressed the following opinions:

> The roof penetrations for the two principal ("North" and "South") exhaust flues were examined in my previous report. These have been assessed by independent analysis to be satisfactory.
>
> Whilst I concur with Mr Irwin that the installation of cooling units of the type observed at the site, on a steel framed roof may "invite" engineering assessment and possibly calculations; on the basis of having assessed the capacity of the roof framing to support these flues under ultimate load wind conditions (in my first report), I consider it likely that the cooling units can be adequately supported to conform to the requirements of the relevant structural standards.[37]

91 Commenting on the works, Mr Drew said:

> From an engineering perspective I agree with Mr Irwin, and in my view the fundamental concern of an industrial/process facility is functionality and safety, which I presume to constitute the impetus for the various works carried out.
>
> …
>
> It is clear that considerable modification to the building has occurred over time, and the most recent works (which are the subject of this report) I would have to consider to be relatively very minor.
>
> …
>
> In my view the works which are the subject of this report and Mr Irwin's report conform to such considerations, and I agree with Mr Irwin that it is not relevant to adopt such terms as *defacement* or *damage* – certainly in respect of purposeful works carried out by a contractor in order that the building may be effectively utilised for the purpose required by the occupant.[38]

William Hunter

92 William Hunter, Amcor's operations manager since 2015, gave evidence as to the installation of the press and the performance of the works.

93 He managed the construction work necessary to prepare the building for the press

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36 Ibid 6–7 (footnotes omitted).
37 Ibid 13 (footnotes omitted).
38 Ibid 15–16 (footnotes omitted) (emphasis included).

together with Lalith Fernando, Amcor's Engineering Manager for PE South. Julian Dunwill, Engineering Manager for Amcor's Preston, site focused on the installation of the press once the construction work was complete.

94 The purchase of the press was proposed in about October 2016. In November 2016, Mr Fernando engaged structural engineers to produce drawings for the press which was to be located in the building. A geotechnical report was obtained in December 2016.

95 In January 2017, Mr Hunter was asked to reduce activity on the press installation as Omar had agreed to sell the land and Mr Terry was holding discussions with the buyer about the terms on which Amcor might vacate the land.[39]

96 In early February 2017, Mr Hunter received a proposed press base design from the structural engineers. Given the level of soil contamination beneath the land, that design did not proceed.

97 In March 2017, Mr Terry said that Amcor management had decided to install the press on the land and instructed him to proceed with press installation as swiftly as possible. In early April 2017, he accepted a preliminary quotation from AJR Crow to construct the press base. AJR Crow completed these works by late May 2017. The press base required a month to cure before it could carry the weight of the press.

98 Amcor began to install the press on 19 June 2017. Amcor's employees and contractors installed, calibrated and commissioned the press and were assisted by representatives of the manufacturer.

99 On 8 August 2017, Mr Crow quoted for AJR Crow to perform work to the roof to allow for installation of the exhaust flues for the press. The work was completed in mid-August 2017. AJR Crow cut a small section of the roof rafters and a hole in the sheet metal of the roof in two locations for the exhaust flues. A small frame was attached to the inside of the roof.

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[39] Mr Terry was Vice President and General Manager (Australia) at the time.

100 Representatives from the manufacturer and other contractors subsequently installed the exhaust flues. With the use of a crane, they passed the flues down through the holes in the roof and the frame attached to the inside of the roof before attaching the flues to the press. The exhaust flues were connected to existing ducting on the roof and to a regenerative thermal oxidiser on the ground next to the building. The area on the outside of the roof where the exhaust flues passed was flushed and sealed.

101 In about May 2017, Mr Hunter was instructed by Mr Terry to hire and install a diesel generator to supply power to the press as a power upgrade to the land had not been agreed to by Omar. The press still operates on a diesel generator.

102 After trials of the press, printing commenced on 27 October 2017. The press was fully operational by February 2018.

103 Mr Hunter was not cross-examined.

Mr Crow's evidence

104 Archibald John Ross Crow, a director of AJR Crow, gave evidence as to the works completed by AJR Crow to the floor slab and the purlins.

105 Mr Crow said that he was a registered builder and commenced as a builder in the late 1960s. He has specialised in commercial building since 2002. The Amcor Group had engaged AJR Crow to carry out building work on many occasions, including the construction of concrete foundations for six other printing presses.

106 In March 2017, Amcor asked Mr Crow to provide a quotation for the work to the press base, providing him with the construction design and documents.

107 On 5 April 2017, AJR Crow provided Amcor with a preliminary quotation for the works in the amount of $203,560 plus GST. A screw pile design was adopted, as this would involve the excavation of less contaminated soil.

108 Between 1 May and 10 June 2017, AJR Crow engaged subcontractors to build the machine base according to the construction design, but with the screw piles drilled

deeper in some locations. Edge grinding and base coating work were completed by June 2017.

109 Based on his experience of similar machine bases, Mr Crow was of the opinion that no building permit was required for the press base. He spoke to Damien Wadsworth, a building surveyor, who confirmed this view.

110 In August 2017, after the installation of the press was substantially complete, Amcor requested roof work to create space for flues in two locations. On 8 August 2017, AJR Crow provided a quotation for this work in the amount of $5,520 plus GST. The roof work involved removing a section of purlin at each location to create space for a flue, and connecting each curtailed purlin to the two adjacent purlins by means of trimmers. The work was done at short notice and there were no designs or plans.

111 Mr Crow was of the view, based on experience, that no building permit was required for the roof work. He considered that the work did not affect the structure of the building, and that the support structure of the roof was not affected by the changes made to the purlins. He did not consult a building surveyor before doing this work.

112 Mr Crow said that the roof was structurally sound and the purlins could do the job that they were designed to do. They supported the roof, which sits on the purlins. If there were no purlins, the roof would probably drape over the beams.

BREACH OF CL 5.4

The issues

113 The plaintiffs submit that Amcor contravened cl 5.4 of the lease because the performance of the works was an offence under s 16 of the Act. They say that the works were undertaken without a permit, which was required under the Act.

114 Amcor admits that no building permit was ever sought or obtained, and advanced three contentions:

(a) no building permit was required for the works by reason of an exemption in the *Building Regulations 2006* (Vic) ('Regulations');

(b) the *de minimis* principle applied so as to excuse any breach of the Act or cl 5.4 of the lease; and

(c) the alterations to the purlins and the trimming work was completed by AJR Crow, and not by Amcor as alleged in the statement of claim.

Was the work done building work under the Act?

115 'Building work' is defined widely in the Act to mean 'work for or in connection with the construction, demolition or removal of a building'.[40] In turn, 'building' is broadly defined to include 'structure, temporary building, temporary structure and any part of a building or structure'.[41]

116 If a building permit was required, it was an offence under ss 16(1), (2) and (4) for the work to be done without a building permit. Under s 16, if a building practitioner is engaged, an offence is committed by the person doing the work,[42] and the building practitioner.[43] Both Mr Crow and AJR Crow were building practitioners as defined in the Act.

117 In *McAskell & Anor v Cavendish Properties Ltd & Ors (No 2)*, the issue was whether the laying of a concrete slab could be classified as building work or merely site preparation work.[44] Hansen J held that the test was whether the work was work 'for or in connection with' the construction of a building. If this test was satisfied, the work was 'building work' regardless of whether it could be described as site preparation works.[45] The Court of Appeal dismissed an appeal holding that the

40 Act s 3.
41 Ibid.
42 Ibid ss 16(1), 16(2).
43 Ibid s 16(4).
44 [2008] VSC 563 (Hansen J).
45 Ibid [35].

laying of the concrete slab was an essential part of the construction of the building.[46]

118 I conclude that the works are 'building work' as defined in the Act. Consequently, the works required a building permit unless exempt under the Regulations.

Was the work exempt under the Regulations?

119 Regulation 1801 of the Regulations provided at the relevant time that a building permit was not required under the Act for the building works identified in sch 8. Item 4 of sch 8 exempted:

> Alterations to a building, if the building work –
>
> (a) will not adversely affect the structural soundness of the building, and does not include -
>
> (i) an increase or decrease in the floor area or height of the building; or
>
> (ii) underpinning or replacement of footings; or
>
> (iii) the removal or alteration of any element of the building that is contributing to the support of any other element of the building…

120 It was not submitted that the works affected the structural soundness of the building. The parties also agreed that items 4(a)(i) and (ii) did not apply. However the interpretation of item (a)(iii) was disputed.

121 The plaintiffs submitted that the alteration and partial removal of the purlins to make way for the erection of the northern and southern flues involved the removal or alteration of an element of the building that was contributing to the support of another element of the building. The works did not fall within the exemption and therefore required a building permit.

122 Mr Irwin and Mr Drew were each asked the question whether the works included the removal of any element of the building that was contributing to the support of

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46 *McAskell v Timelink Pacific Pty Ltd* (2010) 30 VR 134 (Mandie and Harper JJA, Emerton AJA).

any other element of the building.[47]

123 Mr Irwin answered in the affirmative, referring to the cutting and removal of part of the roof purlins that were carrying the roof. He also noted the addition of the large diameter ducts for the northern and southern flues and the mechanical ventilation shafts.[48] Mr Drew said that the ground bearing slab did not support any other element of the building. He also said that approximately one metre in length was removed from two existing purlins to create the necessary opening for the vent-flues associated with the printing machinery. He said that the cut purlins previously supported only the lightweight roof cladding for the building.[49]

124 Amcor submitted that the application of item 4(a)(iii) turned on the meaning of the words 'element of the building', and that the issue reduced to whether the two roof purlins cut by AJR Crow and the roof lining under which the purlins sat were separate elements of the building, or whether the relevant element was the roof of which the purlins and roof lining formed part.

125 In support of its submission, Amcor contended that:

(a) it was necessary to examine the characteristics of each individual building to determine whether the relevant alteration would fall within item 4(a)(iii);

(b) item 4(a)(iii) should be given a logical, 'real-world' application, and not a rigid or artificial application that would lead to an absurd result;

(c) the relevant element of the building is the roof, of which the purlins and roof lining form part, and does not descend to the individual building materials of which the roof was constructed; and

(d) the purlin cuts and trimming work performed by AJR Crow were alterations to the roof which did not support any other building element.

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47 See [64], [87].
48 See [64].
49 See [87].

126 The plaintiffs submitted that:

(a) the correct approach required the identification of the nature and effect of the works;

(b) Amcor's distinction between the roof and the roof lining was semantic, as the purlins supported the roof; and

(c) the works properly articulated did not satisfy the exemption in item 4(a)(iii).

127 The plaintiffs drew attention to the fact that both Mr Irwin and Mr Drew approached the exemption in a similar way, treating the purlins as an element of the building that supported the roof. They submitted that:

(a) the cutting and removal of the purlins that were carrying the roof involved the removal or alteration of an element of the building that supported the roof; and

(b) the affected purlins supported the large diameter ducts that were installed on the roof.

128 Mr Drew said that:

(a) he was in 'general and overall agreement with Mr Irwin's observations concerning the scope and description of the works carried out';

(b) the works to the roof involved secondary elements of structure, and constituted modifications to the fabric of the building envelope as opposed to the primary structure or skeleton of the building; and

(c) the modifications were structurally standard minor modifications clearly consequent on the use of the site for commercial printing.[50]

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50 See [88].

Principles of statutory construction

129 The principles of statutory construction are well established and apply to regulations just as much as statutes. In *Project Blue Sky Inc v Australian Broadcasting Authority*, the plurality said:

> [T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[51]

130 The plurality of the High Court emphasised the importance of text, context and purpose in *SZTAL v Minister for Immigration and Border Protection*:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[52]

131 In *CIC Insurance Ltd v Bankstown Football Club Ltd*, the majority of the High Court said:

> [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous.[53]

132 These principles are consistent with s 35 of the *Interpretation of Legislation Act 1984* (Vic), which requires that when interpreting a subordinate instrument, a construction that would promote the purpose or object underlying the instrument is

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51 (1998) 194 CLR 355, [78] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).
52 (2017) 262 CLR 362, [14] (Kiefel CJ, Nettle and Gordon JJ) (citations omitted).
53 (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted).

to be preferred to a construction that would not promote that purpose or object.

133 Another important consideration when considering the interpretation of subordinate legislation was stated by Lord Reid in *Gill v Donald Humberstone and Co Ltd*:

> I find it necessary to make some general observations about the interpretation of regulations of this kind. *They are addressed to practical people skilled in the particular trade or industry, and their primary purpose is to prevent accidents by prescribing appropriate precautions.* Any failure to take prescribed precautions is a criminal offence….They have often evolved by stages as in the present case, and as a result they often exhibit minor inconsistencies, overlapping and gaps. *So they ought to be construed in light of practical considerations*, rather than by a meticulous comparison of the language of their various provisions, such as might be appropriate in construing sections of an Act of Parliament…Of course, difficulties cannot always be foreseen, and it may happen that in a particular case the requirements of a regulation are unreasonable or impracticable; but, if the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, *and adopt that interpretation which leads to a reasonably practicable result.*[54]

Summary of competing submissions

134 The plaintiffs submit that the purlins are an element of the building that contributed to the support of the roof. As a result, a building permit was needed as the works removed or altered an element that supported the roof.

135 Amcor submitted that the purlins formed part of the roof, which was the relevant element of the building. As the portal frames of the building supported themselves, and the roof did not support anything, the exemption applied.[55]

Construction of item 4(a)(iii) of sch 8

136 Item 4(a)(iii) stands to be construed in accordance with the accepted principles of statutory construction.

137 The objectives of the Act assist in the interpretation of the provisions of the Act and Regulations. The first objective in s 4(1) involves the protection of the safety and health of people who use buildings. This points to an interpretation of item 4(a)(iii)

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54 [1963] 3 All ER 180, 183 (emphasis added), quoted in *Driscoll v J Scott Pty Ltd* (1976) 50 ALJR 528, 531 (Murphy J); *Meade v Nillumbik Australia Pty Ltd & Anor (Ruling)* [2019] VSC 786, [43] (Cavanough J).

55 This may not be strictly accurate as the roof supports two chimneys and six evaporative cooling units.

that will not result in, or at least will minimise, risks to the safety of people.

138 Amcor pointed to the objectives stated in ss 4(1)(e) and (g) of the Act, and the need for buildings to be constructed in a cost effective and efficient manner.

Meaning of 'element'

139 In my view, the plaintiffs' submission as to the construction of item 4(a)(iii) is correct, and gives the word 'element' its natural and ordinary meaning of 'a component or constituent part of a whole'. The objectives of the Act and considerations of context and purpose confirm this interpretation. I reject Amcor's interpretation of item 4(a)(iii) for the following reasons:

(a) The first and ordinary meaning of the word 'element' as stated in the online Macquarie Dictionary is 'a component or constituent part of a whole'.[56] While the word 'element' is a protean word used in many fields of human knowledge, it typically assumes a like meaning in the many contexts in which it is used.

(b) The adoption of this meaning of the word 'element' gives effect to the objective contained in s 4(1)(a) of the Act. It provides an appropriate level of protection to people using a building who might otherwise be at risk if unsafe or inappropriate building work were completed.

(c) If the word 'element' were read as relating only to a major building component such as a roof, the exemption would be wide. Roof work would effectively be exempt from the requirement of obtaining a building permit under item 4(a)(iii). This is plainly inconsistent with the protection and safety of people using the building. It would not be a reasonably practicable result.

(d) While the objectives of cost effective construction and efficiency are significant, the preferred interpretation of item 4(a)(iii) would have minimal

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56 Macquarie Dictionary (online at 27 April 2020) 'element'.

impact on cost and efficiency in the building industry.

(e) The preferred interpretation is consistent with textual references in the Act. For example, the definition of 'external wall cladding product' in s 3(1) refers to any product or material that is, or could be used on or in the external wall of a building (including an attachment or ancillary element). Section 160B(4)(g) of the Act makes reference 'to any exceptional technical factors (such as the effect of load bearing elements on the structural integrity of the building)'.[57] Both of these references plainly use the word 'element' in its ordinary English meaning.

(f) Equally, references to the word 'element' in the Regulations also bear its ordinary meaning:

(i) Regulation 710(7)(b) refers to the fire-resistance level of building elements separating each sole occupancy from nominated public areas;

(ii) Regulation 803 refers to primary building elements in the context of termite risk areas; and

(iii) Regulation 1105 speaks of 'fire safety elements'.[58]

(g) The preferred meaning of the word 'element' leads to a practical result capable of application by skilled people in the building trade and in structural engineering. It was the meaning adopted by both Mr Irwin and Mr Drew in their expert reports.

Relevant authority

140 In *Fair Trading Administration Corporation v Owners Corporation Strata Plan 43551*, the word 'element' stood to be interpreted in the context of the definition of 'major

57 Emphasis added.
58 Emphasis added.

structural defect' in cl 31 of the *Building Services Corporation Regulation 1990* (NSW).[59]

141 Under cl 31(b), a 'major structural defect' included 'an inherent or damage-induced defect':

> in a substantial functional element essential to the habitability of a dwelling (for example, a penal wall, masonry veneer wall or slab on ground) which is of such a kind that the element itself does not have adequate structure for its purposes.

142 As to the meaning of the word 'element', Burchett AJ said:

> The use of the word "element" has provoked argument, but *Chambers Science and Technology Dictionary* (1988) shows that, in various technologies, the word simply means a unit of an assembly, a component or a constituent. These meanings are in keeping with the general use of the word in English, as is shown by the *New Shorter Oxford English Dictionary* (1993), where the meanings given include "[c]omponent part" and "[a] component part of a structure or device".[60]

143 Amcor sought to distinguish the decision of Burchett AJ as the definition of 'major structural defect' in cl 31 also used words such as 'substantial', 'functional' and 'essential to the habitability of a dwelling'. The surrounding words narrowed the meaning of 'element' in the context of cl 31. Examples given in the Regulations indicated that the meaning of the word 'element' had to encompass these aspects.

144 The plaintiffs submitted that the approach of Burchett AJ to the concept of 'element' supported their submission. His Honour accepted that a balustrade was a distinct element, and not just a component of a staircase. Likewise, the roof purlins are properly to be characterised as a separate 'element' of the building, notwithstanding that they may also be said to be a 'component' or a 'component part' of the roof structure.

145 While I accept as submitted by Amcor that there were words in cl 31 which assisted Burchett AJ to arrive at the interpretation that he did, considerations of purpose and context both point towards the adoption of a similar meaning for the word 'element'

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59 [2002] NSWSC 624.
60 Ibid [16].

in the present case.

The experts' view

146 While the construction of the word 'element' in item 4(a)(iii) is a matter of statutory interpretation for the Court, both expert witnesses used the term in their reports in the sense that I have accepted. Both considered that the work done by AJR Crow in removing parts of two purlins and undertaking trimming work was building work that removed or altered an element of the building that was contributing to the support of another element of the building.

A real-world approach

147 I agree with Amcor's submissions that it is important to take a 'real-world' and not an artificial approach to the need for a building permit. Here the partial removal of purlins several decades old was required by a more extensive building project. It was necessary to partially remove the purlins to erect two large flues on the roof of the building. The 7m flue added a load of about 380kg while the 5m flue added a load of about 170kg.

148 When the need arose to confirm that what had been done was structurally sound, it proved to be beyond the capacity of Mr Drew, a very experienced chartered structural engineer, and his engineering firm. The assessment of structural soundness required a separate study by experts from the Department of Infrastructure Engineering of the University of Melbourne. They ultimately concluded that the building work that had been completed was structurally sound.

149 There can hardly be a better demonstration as to why a building permit was needed for the works. Before issuing a building permit, a building surveyor would have reviewed the structural adequacy of the works proposed having regard to the age and strength of the purlins and the existing roof, the configuration and wind load of the new structures, and the dog leg of the northern flue immediately below the roof of the building. The works required assessment by a building surveyor in accordance with the applicable Australian standards, particularly as to the weight of

the new structures on the roof, the effect of wind action, the strength of the old purlins and supporting structures.

Conclusion

150 I conclude that 'building work' as defined in the Act was undertaken without a building permit, and that the work was not exempt under item 4(a)(iii) of sch 8 to the Regulations.

***De minimis* principle**

151 Amcor next submitted that the works were of such a trivial nature that the exemption contained in item 4(a)(iii) of sch 8 to the Regulations still applied. Amcor said that the *de minimis* principle should lead the Court to conclude that there was no contravention of cl 5.4 of the lease.

152 The plaintiffs say that the *de minimis* principle has no application as Amcor's failure to obtain a permit was not trifling and gave rise to a contravention of the Act.

153 Amcor relied on *Farnell Electronic Components Pty Ltd v Collector of Customs*, where the issue was whether a trade catalogue related 'exclusively' to products or services of a country other than Australia.[61] Hill J accepted that the *de minimis* principle applied expressly or by implication in a wide variety of situations where a trivial failure to comply with a specific condition was ignored. However, it did not apply on the facts of the case.

154 Hill J held that the word 'exclusively' meant what it said. It was not a case where resort to logic or legislative policy required the word 'exclusively' to admit of exceptions. 81 items as against 40,000 items was not of such triviality that it could be ignored.[62]

155 Hill J said:

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61 (1996) 72 FCR 125.
62 Ibid 131.

> …there are many references in texts and cases to the de minimis rule as a rule of construction. F.A.R Bennion. Statutory Interpretation: A Code (2nd ed, 1992), p 780 refers to there being a general rule of statutory interpretation that:
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> > unless the contrary intention appears, an enactment by implication imports the principle of the maxim de minimis non curat lex (the law does not concern itself with trifling matters).
>
> Similarly, Halsbury's Law of England (4th ed, 1995), Vol 44(1), par 1441, under the title "Statutory Interpretation" says:
>
> > De Minimis Principle. Unless the contrary intention appears, an enactment by implication imports the principle of legal policy expressed in the maxim de minimis non curat lex (the law does not concern itself with trifling matters); so if an enactment is expressed to apply to matters of a certain description it will not apply where the description is satisfied only to a very small extent.[63]

156 In Victoria, Smith J applied the *de minimis* principle in *Pinho v Andre*, where a bank debt was treated as paid even though the amount of $7.63 was still owing.[64]

157 The plaintiffs submit that Amcor's reliance on the *de minimis* principle is misplaced. They contended that:

(a) parties must perform their obligations exactly to the requirements of the contract unless exact compliance is excluded by the parties in their agreement, or implied;[65]

(b) the breach was not so trifling that it is impossible to suppose that any businessman would regard it as in any way affecting the substance of the contract;[66]

(c) the breach was not a microscopic deviation which businessmen and therefore lawyers would ignore;[67]

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63 Ibid 127.

64 (Supreme Court of Victoria, Smith J, 20 December 1994) 23.

65 Citing *Ritchie v Atkinson* (1808) 103 ER 787 (Ellenborough CJ, Grose, Le Blanc and Bayley JJ); *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 (Latham CJ, Rich, Dixon and McTiernan JJ); *Bowes v Chaleyer* (1923) 32 CLR 159 (Knox CJ, Isaacs, Higgins, Rich and Starke JJ).

66 Citing *Shipton Anderson & Co v Weil Brothers & Co* [1912] 1 KB 574 (Lush J).

67 Citing *Arcos Ltd v EA Ronaasen and Son* [1933] AC 470, 479 (Buckmaster, Blanesburgh, Warrington, Atkin and MacMillan LJJ).

(d) the scheme of the Act and of the exemption to the Regulations does not contemplate the kind of qualitative or evaluative judgment Amcor sought;

(e) cl 12.1(b)(A) of the lease clearly referred to 'any breach', and was in contradistinction to the language in cl 12.1(b)(B) which referred to 'material breaches'; and

(f) application of the *de minimis* principle would be contrary to the common law and to the text of cl 12.1(b) itself.

158 I accept the plaintiffs' submission. Whether the *de minimis* principle should be implied in the context of the Act and the exemptions in the Regulations involves the consideration of statutory purpose. As I have noted, the first objective of the Act includes the protection of the safety of people who use buildings. This objective points to the interpretation and application of the Act and Regulations in a manner that will uphold safety.

159 The works performed by AJR Crow in cutting the purlins and installing trimmers were part of an overall building project overseen by Amcor. This included the erection of chimneys of significant weight on the roof of the building supported by guy wires. The chimney flues passed through the space made available by the cuts to the purlins. The roof of the building and the purlins were a number of decades old. It took no small endeavour by structural engineering experts to demonstrate that the works were sound. In my view, the *de minimis* principle can have little (if any) application where the safety of people and the structural soundness of buildings are concerned.

160 As for the lease, the language of cl 12.1(b) is significant. Amcor was not entitled to renew the lease if, at the time of exercise, there was '<u>any</u> unremedied breach' or if it had 'persistently committed <u>material</u> breaches' of the lease of which written notice had been given.[68] The lease provided that the existence of any unremedied breach of

[68] Emphasis added. See *Forklift Engineering Australia Pty Ltd v Power Lift (Nissan) Pty Ltd & Ors* [2000] VSC 443, [68]–[70] (Warren J), *Androvitsaneas v Members First Broker Network Pty* [2013] VSCA 212,

which notice had been given was sufficient to deny the lessee its right to renew.

161 I reject the *de minimi*s submission made by Amcor.

Pleading point

162 In the statement of claim, the plaintiffs pleaded that Amcor was required to obtain a building permit under the Act before performing the works, and that it failed to do so. No particulars of this allegation were ever requested or provided.

163 In its defence and counterclaim, Amcor pleaded that it did not require a building permit under the Act to perform the works. It said that the work to the roof purlins and the trimming work were carried out by AJR Crow.

164 Amcor submitted that:

(a) the part of cl 5.4 of the lease that was pleaded was –

> to observe, perform and fulfil all the requirements of all statutes so far as they apply to the Premises…

(b) the plaintiffs' case proceeded on the erroneous premise that Amcor had an obligation to obtain a building permit;

(c) Amcor did not carry out the work of modifying the roof purlins without a building permit; and

(d) Amcor retained AJR Crow to carry out that work.

165 The evidence of Mr Hunter is that he and Amcor's engineering manager, Mr Fernando, had overall management and direction of the works. Under their direction, AJR Crow partially removed the two purlins and undertook trimming work. Other contractors and representatives of the manufacturer assisted in the works under Amcor's direction.

166 Clause 5.4 of the lease provides for the lessee to observe, perform or fulfil all the

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[88]–[89] (Redlich and Priest JJA, and Macaulay AJA) ('*Androvitsaneas*').

requirements of all statutes so far as they apply to the premises, and does not '<u>permit anything to be done which may conflict with any statutes</u>'.[69] It is of no consequence to the application of cl 5.4 whether parts of the works were done by Amcor, AJR Crow, representatives of the press manufacturer or other contractors.

167 While the plaintiffs could have provided particulars and referred in the statement of claim to the completion of parts of the works by AJR Crow as Amcor's contractor, Amcor was not caught by surprise and did not suffer any disadvantage. Amcor planned, directed and managed the works through contractors and the representatives of the manufacturer, as well as its own staff. Neither party took objection to any relevant part of the evidence. Mr Crow provided a witness statement for Amcor who called him as a witness.

168 The day is long past when a minor inaccuracy or omission in pleading will defeat the claim relied on by that party in circumstances where the other party was fully knowledgeable of the facts and conducted its case on the correct basis from the outset.

169 In *Vale v Sutherland*,[70] the High Court endorsed what was said by Dawson J in *Banque Commerciale SA (in liq) v Akhil Holdings Ltd*:

> …modern pleadings have never imposed so rigid a framework that if evidence which raises fresh issues is admitted without objection at trial, the case is to be decided upon a basis which does not embrace the real controversy between the parties …cases are determined on the evidence, not the pleadings.[71]

170 In *State Government Insurance Commission v Sharpe*, the Full Court of the Supreme Court of South Australia said:

> Pleadings in an action are to define the issues between the parties. Sometimes …the pleadings may not do so at all or only imperfectly. As a rule…depending on the course of the hearing, that may not matter because the issues become quite plain as the hearing proceeds and no party is put at a disadvantage…The day has well passed when decisions are based on the

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69 Emphasis added.
70 (2009) 237 CLR 638, [41] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
71 (1990) 169 CLR 279, 296–297.

> state of the pleadings, irrespective of the facts or justice.[72]

171 Faced with a situation where the plaintiff's case was not pleaded with the same clarity as counsel achieved in its submissions, the Court of Appeal in *Karatjas v Deakin University* said:

> In any event, there does not seem to have been any objection taken to the pleading or any complaint that counsel for [the appellant] put the case in terms which deviated from the pleading. Possibly, the judge should have required the statement of claim to be amended to accord to counsel's submissions. But the fact that it was not amended is not fatal. Failure to amend does not necessarily preclude a judgment upon the facts as have emerged. It is necessary to look at the actual conduct of the case to see whether the point was taken at trial.[73]

172 There is no substance in Amcor's pleading point or unfairness. It makes no difference under cl 5.4 whether Amcor itself or AJR Crow under Amcor's direction performed a part of the works. The distinction between the performance of work by Amcor itself as against AJR Crow as a contractor for Amcor has no significance under cl 5.4. Amcor adduced evidence that it was AJR Crow, as Amcor's building contractor, which partially removed the purlins. The fact was not controversial, and the trial was conducted on this basis. It would be unjust if the plaintiffs were shut out because of the fact that Amcor performed the works in part using a contractor rather than its own employees.

Building permit

173 I find that a building permit should have been obtained for the roof works involving the partial removal and alteration of the purlins and the erection of the ducts above the altered purlins. No application for a building permit for the works was made prior to the giving of the renewal notices and none has been made since.

Breach of s 16(1) of the Act

174 Section 16(1) of the Act provides that a person must not carry out building work unless a building permit in relation to the work has been issued and is in force under

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72 (1996) 126 FLR 341, 344 (Matheson, Bollen and Millhouse JJ).

73 (2012) 35 VR 355, [18]–[19] (Nettle and Hansen JJA, Kyrou AJA).

the Act. I find that s 16(1) of the Act was breached in that building work was carried out to the building on the land without a building permit. I also find that s 16(2) of the Act was contravened in that building work was carried out other than in accordance with the Act.

175 Section 16(4) provides that a building practitioner who is engaged to carry out building work must ensure that a building permit in relation to the work has been issued and is in force under the Act. AJR Crow had this responsibility for the work that it performed. Section 16(4) applies notwithstanding any contractual stipulation or provision between Amcor and the builder to the contrary. Regardless of who had responsibility to obtain the building permit, building work that required a permit could not be lawfully performed without one.

Breach of cl 5.4

176 Clause 5.4 of the lease required Amcor to perform and fulfil all the requirements of all statutes so far as they apply to the land and not to permit anything to be done which may conflict with any statutes.

177 I find that Amcor caused and permitted building work to be carried out on the land without a building permit contrary to cl 5.4 of the lease.

Was the breach of cl 5.4 remedied?

178 A breach of cl 5.4 of the lease occasioned by the conduct of building work without a building permit is of a type that theoretically cannot be corrected or undone.[74] A contravention of s 16 of the Act occurs when building work requiring a building permit is physically performed. No party submitted that a retrospective building permit could or should have been obtained. There was no amelioration of the effects of the breach, or any attempt to deal with the breach by the time the renewal notices were served, or at any time.

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74 See [208]–[222]; *Australian Style Pty Ltd v .au Domain Administration Ltd* [2009] VSC 422, [117]–[119] (Hargrave J) ('*Australian Style*'); *Androvitsaneas* (n 68) [74]–[80].

179 In the circumstances, I find that no building permit was sought or obtained before the renewal notices were given or subsequently. I find that the breach of cl 5.4 occasioned by the contravention of s 16 of the Act was not capable of remedy. Even if the breach was capable of remedy, it was not and has never been remedied.

Conclusion

180 I find that Amcor acted in breach of cl 5.4, and that the breach was unremedied when the renewal notices were given.

BREACH OF CLS 5.2 AND 5.6

Introduction

181 Clause 5.2 required Amcor not to make or permit any structural alterations or additions without first obtaining the consent in writing of Omar which consent shall not be unreasonably withheld.

182 Clause 5.6 required Amcor not to cut injure damage or deface any services facilities plant and equipment or any other part of the premises.

183 Amcor admitted that it breached cl 5.2 in its defence and counterclaim, but denied a breach of cl 5.6.

184 It is convenient to consider the allegations of breach of cls 5.2 and 5.6 together as they raise similar issues.

Submissions as to cl 5.2

185 The plaintiffs submitted that:

(a) cl 5.2 imposed a clear prohibition on Amcor performing structural alterations or additions without 'first obtaining the consent in writing' of Omar;

(b) the consent required by cl 5.2 was prospective in nature, and had to be obtained before the works were undertaken;

(c) there was no support in cl 5.2 for a construction of the lease that permitted consent to be sought retrospectively; and

(d) there was no clause in the lease that required Omar to consider a request from Amcor to provide retrospective consent for works undertaken in breach of cl 5.2 of the lease.

186 Amcor admitted that:

(a) the effect of the works and the installation of the press was to make structural alterations and additions to the building;

(b) before performing the works, itrequired Omar's consent; and

(c) it caused the works to be performed without seeking or obtaining Omar's consent.

187 Amcor also admitted that Omar was entitled to and did serve a notice of default on 4 July 2018. The default notice called on Amcor to remedy the breach of cl 5.2 within 28 days. Amcor did not submit that the default notice was uncertain or defective, or that the period allowed in the default notice was inadequate.

188 Amcor principally submitted that the breach of cl 5.2 was remedied when the renewal notices were served.

189 Amcor said that the breach of cl 5.2 was remedied because:

(a) it sought retrospective consent from Omar after completion of the works but was refused;

(b) retrospective consent to structural alterations could not be withheld unreasonably;

(c) the refusal of retrospective consent was unreasonable; and

(d) this had the effect of remedying the breach.

Submissions as to cl 5.6

190 The plaintiffs submitted that:

(a) cl 5.6 is broad and applies to cutting, injuring, damaging or defacing any services, facilities, plant and equipment or any other part of the premises;

(b) the works involved cutting, injuring or damaging the building;

(c) the damage caused by the works was not rectified by the completion of the works; and

(d) at the time when the renewal notices were given, Amcor was in breach of cl 5.6 of the lease.

191 Amcor submitted in substance that:

(a) structural alterations and additions might frequently involve the cutting of one or more parts of the premises;

(b) the cutting is repaired when the structural alterations and additions are completed;

(c) the use of the word 'cut' in the context of the words 'injure', 'damage' and 'deface' in cl 5.6 suggests that its purpose is to protect the landlord against actions having a destructive effect on the premises, rather than to protect the landlord against structural alterations or additions;

(d) cl 5.2 is specifically directed at structural alterations and additions and prohibits the landlord from withholding consent unreasonably. Clause 5.2 would have no utility if cl 5.6 was interpreted as prohibiting all structural alterations and additions which involve the cutting of any part of the premises;

(e) even if the works breached cl 5.6, the breaches were remedied by completion of the works before the default notice was issued;

(f) the existing concrete slab was cut in the course of constructing a stronger,

more stable concrete slab capable of supporting the press; and

(g) following the roof modifications, the building remained structurally sound with the roof structure being able to support the floor and roof, including in a 1:500 year wind condition.

Cutting, injuring, damaging or defacing

192 When asked to consider whether the works included the 'injuring' of any services, facilities, plant or equipment, Mr Irwin responded that he could only answer questions about the building structure and envelope. 'Injuring' was not a word commonly used in construction. He made the same response in relation to the word 'defacing', adding that if 'defacing' meant the permanent and detrimental alteration of appearance, he could not offer an opinion as this was an aesthetic assessment outside his formal expertise.[75]

193 Mr Drew said that the fundamental concern of an industrial facility was functionality and safety. This was the impetus for the works. The appearance of the building was an aesthetic consideration. Any assessment was subjective.[76]

194 He added that as the works conformed to structural engineering considerations, and provided safe and serviceable building amenity under the relevant building standards, it was not relevant to adopt terms such as 'defacement' or 'damage'. These words did not apply to purposeful works carried out by a contractor in order that the building could be effectively used for the purpose required by the occupier. He also said that considerable modification of the building had occurred over time, and that the recent works were relatively minor.[77]

195 The observations of the experts have considerable force. Amcor did not inflict on the building any wanton destruction, indiscriminate damage, disfigurement or impairment. The works did not injure, damage or deface the building. They were the

75 Second Irwin Report, 39–40.
76 Second Drew Report, 15.
77 Ibid 16.

result of a professionally-conceived construction design for the installation of the press, carried out by engineers and builders in order to equip the press with the necessary flues, exhausts and vents.

196 I find that the works did entail 'cutting' to parts of the building as I will describe, but did not involve injury, damage or defacement to the building. I shall consider the application of cl 5.6 on the basis that all works that stand to be remedied fall within the meaning of the covenant 'not to cut'.

The key issues

197 The key issues identified by the parties are summarised below:

(a) What were the structural alterations and additions to the building effected during the works?

(b) What parts of the building were cut during the works?

(c) Were the structural alterations and the parts of the building that were cut remedied by the time the renewal notices were given?

(d) Did the lease provide for Amcor to obtain retrospective consent to the works in order to remedy its breaches of cls 5.2 and 5.6?

(e) Was the giving of retrospective consent under the lease conditioned by a requirement not to make the decision unreasonably?

(f) Did Omar act unreasonably in withholding retrospective consent to the works?

What were the structural alterations to the building effected during the works?

198 The identification of the structural alterations and additions to the building effected during the works is a question of fact. In the present case, there were no structural additions that were not also structural alterations. I will simply refer to structural alterations.

199 Mr Irwin considered the structural alterations effected by the works to be:

(a) the cutting out of a part of the floor slab and its replacement by the machine base slab;

(b) the cutting of two roof purlins and their trimming around to accommodate the large diameter ductwork; and

(c) the addition of the local framing members to assist support of the mechanical ventilation shafts.[78]

200 Mr Irwin considered that the addition of local framing members to support the mechanical ventilation shafts barely qualified as a structural alteration as it was simply the connection of a support system.[79]

201 Mr Drew considered that:

(a) the cutting of the existing slab and the installation of a piled slab of higher load capacity over an area of approximately 7% of the floor of the building was a structural alteration (effectively an improvement); and

(b) the cutting of two roof purlins and the installation of additional trimming purlins to support the flues and the purlins that had been cut were an alteration to the secondary steel roof structure that supports the roof cladding.[80]

202 I accept the evidence of Mr Irwin and Mr Drew as to the structural alterations made during the building works. It makes no difference to the outcome whether the local framing members that support the mechanical ventilation shafts are treated as a structural alteration or not.

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78 Second Irwin Report, 38
79 Ibid.
80 First Drew Report, 19.

What parts of the building were cut during the works?

203 Identification of the parts of the works that involve the cutting of services, facilities, plant or equipment or any part of the building is also a question of fact.

204 Mr Irwin considered that the works that involved cutting were:

(a) the cutting out of the floor slab to enable its removal locally for the machine base slab;

(b) the cutting of roof purlins to accommodate the large diameter duct work;[81] and

(c) the cutting of the roof to accommodate roof penetrations.[82]

205 Mr Drew considered cutting extended to:

(a) the cutting into and breaking of the concrete slab;[83]

(b) the cutting of existing purlins with new trimming purlins added;[84]

(c) roof penetrations for the southern and northern exhaust flues, and six evaporative cooling units; and

(d) minor service shaft penetrations to the roof for rotary ventilators and minor exhaust risers.[85]

206 Neither expert considered that there was any cutting of services, facilities, plant or equipment. Both considered that there was cutting to parts of the building.

207 I accept the evidence of Mr Irwin and Mr Drew and find that the cutting of parts of the building extended to the cutting of the floor slab, the roof purlins, the roof for the northern and southern flues, and the roof penetrations to accommodate evaporative

81 First Irwin Report, 22.
82 Second Irwin Report, 39.
83 First Drew Report, 2.
84 Ibid 7, 21.
85 Second Drew Report, 3–5, 6–7, 13.

cooling units, rotary ventilators and minor exhaust risers.

Relevant authority

208 Amcor relied on *Batson v De Carvalho* ('*Batson*') as to the proper construction of the expression 'any unremedied breach' in cl 12.1(b)(A) of the lease.[86] *Batson* concerned a covenant not to assign, sublet or part with possession of a property without first obtaining the consent in writing of the lessor, such consent not to be unreasonably withheld if the assignee was respectable and responsible. In a suit for relief from forfeiture, Sugerman J said:

> It may be objected, and it has been objected in this case, that here the covenant requires a consent "*first* had and obtained." …To "remedy" a breach is not to perform the impossible task of wiping it out – of producing the same condition of affairs as if the breach had never occurred. It is to set things right for the future, and that may be done even though they have for some period not been right, and even though that may have caused some damage to the lessor… provided…that the breach has not resulted in a detriment to the premises which cannot be removed within a reasonable time. The physical analogy in the use of the word "remedy"…may be referred to, not as an argument but to illustrate what is meant. A breach may be remedied, I think, even though the time for doing the thing under the covenant may have passed, or the order of events stipulated for in the covenant can no longer be observed…
>
> For these reasons I come to the conclusion that the notice was also defective in that the breach was "capable of remedy," if not in any other way, than by seeking the consent of the lessor, and the notice did not require the plaintiff to remedy it.[87]

209 In *L Schuler AG v Wickman Machine Tool Sales Ltd*, a clause in a contract provided that either party could terminate the agreement if the other committed a material breach of its obligations and failed to remedy it within 60 days of being required to do so.[88]

210 In construing the clause, Lord Reid said:

> The question then is what is meant in this context by the word "remedy". It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think the latter is the more natural meaning. The word is commonly used in connection with diseases or

86 (1948) 48 SR (NSW) 417 (Sugerman J).
87 Ibid 427 (emphasis in original).
88 [1974] AC 235.

> ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect of result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied.[89]

211 The principle that a breach may be remedied even though the time for performance of the covenant has passed has been followed in subsequent cases. In *Tricontinental Corporation Ltd v HDFI Ltd*, a default in repayment of monies owed to a lender by the due date was construed so as to be capable of remedy by payment of the money due together with additional interest at the future date.[90] In *Burger King Corporation v Hungry Jack's Pty Ltd*, a breach by failing to comply with a time provision was held to be capable of remedy on the basis of the *Batson* principle.[91]

212 *Australian Style* concerned a clause in an agreement that required that one party immediately give notice of certain security breaches.[92] Another clause provided that it was an event of default if the breach was incapable of remedy or if the party failed to rectify the breach within 30 days of receipt of written notice. Hargrave J held that the *Batson* principle applied only to breaches that were theoretically capable of being remedied. The breach in question was not theoretically capable of remedy.[93]

213 In *Androvitsaneas*, the respondent terminated a credit representation deed following misrepresentations as to the income of credit applicants.[94] On appeal, the appellant submitted that the breaches were capable of remedy by a warning and supervision. The Court of Appeal rejected the submission, and held that the *Batson* principle did not apply.[95]

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89 Ibid 249–50.
90 (1990) 21 NSWLR 689, 702 (Samuels JA), 722–723 (Waddell AJA).
91 [2001] NSWCA 187, [119]–[124] (Sheller, Beazley and Stein JJA).
92 *Australian Style* (n 74).
93 Ibid [117]–[119].
94 *Androvitsaneas* (n 68).
95 Ibid [74]–[80].

214 The Court of Appeal said:

> … we agree that if the ability to remedy a breach of contract is not to be confined to erasing the historical fact of the breach itself ("an impossible task"), then to give the concept some practical content requires a focus on the potential for amelioration of the *effects* of that breach. Much will depend on the nature of the particular obligation breached, and the consequences of that breach in any given case. Variations of language in particular clauses might also require a different interpretation.[96]

215 The Court of Appeal then summarised the relevant principles in this manner:

- The capability to remedy a breach does not imply an ability to wipe out or obliterate the fact of the breach, as if it has never occurred. Rather, it requires the ability to put matters right for the future;
- Putting things right for the future requires dealing with the effect of the breach;
- The question of whether a breach is capable of being remedied is examined at the date of the notice; and
- The breach must at least be theoretically possible to remedy, but beyond that it is a question of whether the breach may be remedied, rather than whether it is a certainty that it will be.[97]

216 *Savva v Houssein* involves consent to alterations and additions to premises.[98] A covenant in the lease provided in substance that signage changes and various building works were to be first approved in writing by the landlord. The tenant changed the signs at the front of the premises, altered the fascia, and erected a flue through the ceiling and roof. Staughton LJ held:

> In my judgment, except in a case of breach of a covenant not to assign without consent, the question is: whether the remedy referred to is the process of restoring the situation to what it would have been if the covenant had never been broken, or whether it is sufficient that the mischief resulting from the breach of the covenant can be removed. When something has been done without consent, it is not possible to restore the matter wholly to the situation which it was in before the breach. The moving finger writes and cannot be recalled. That is not to my mind what is meant by a remedy, it is a remedy if the mischief caused by the breach can be removed. In the case of a covenant not to make alterations without consent or not to display signs without consent, if there is a breach of that, the mischief can be removed by removing the signs or restoring the property to the state it was in before the

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96 Ibid [69] (emphasis in original).
97 Ibid [72].
98 [1996] EWCA Civ 1302 (Staughton and Aldous LJJ, and Sir John May).

alterations.[99]

217 Aldous LJ agreed with Staughton LJ, adding:

> In one sense a breach can never be remedied because there must have been non-compliance with the covenant for there to be a breach. That cannot be the solution. Thus, the fact there has been a breach does not determine whether it can be remedied in the way contemplated by the Law of Property Act 1925 section 146. That was decided in *Expert Clothing Service & Sales Ltd v Hillgate House Ltd*….Slade LJ [said]:
>
> > …breach of a positive covenant to do something…can ordinarily, for practical purposes, be remedied by the thing being actually done…
>
> I can see no reason why similar reasoning should not apply to some negative covenants. An important purpose of section 146 is to give tenants, who have not complied with their obligations, one last chance to do so before the landlord re-enters. Slade LJ in *Expert Clothing* proposed this test…:
>
> > …if the section 146 notice had required the lessee to remedy the breach and the lessors had then allowed a reasonable time to elapse to enable the lessee fully to comply with the relevant covenant, would such compliance, coupled with the payment of any appropriate monetary compensation, have effectively remedied the harm which the lessors had suffered or were likely to suffer from the breach?
>
> It is only if the answer to that question is 'no' can it be said that the breach is not capable of being remedied.[100]

218 In *Akici v LR Butlin Ltd*, the tenant shared the occupation of leased premises with a company of which he was the sole director and shareholder.[101] In allowing the appeal from a refusal to grant relief from forfeiture, Neuberger LJ considered at some length the types of breach of covenant that were incapable of remedy:

> …the proper approach to the question of whether or not a breach is capable of remedy should be practical rather than technical. In a sense it could be said that any breach of covenant is, strictly speaking, incapable of remedy. Thus, where a lessee has covenanted to paint the exterior of demised premises every five years, his failure to paint during the fifth year is incapable of remedy, because painting in the sixth year is not the same as painting in the fifth year...Equally, it might be said that where a covenant to use premises only for residential purposes is breached by use as a doctor's consulting room, there is an irremediable breach because even stopping the use will not, as it were, result in the premises having been unused as a doctor's consulting room during the period of breach. Such arguments, as I see it, are unrealistically technical.

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99 Ibid [18]–[19].

100 Ibid [32]–[35] (citations omitted).

101 [2006] 1 WLR 201 (Mummery and Neuberger LJJ).

> In principle I would have thought that the great majority of breaches of covenant should be capable of remedy, in the same way as repairing or most user covenant breaches. Even where stopping, or putting right, the breach may leave the lessors out of pocket for some reason, it does not seem to me that there is any problem in concluding that the breach is remediable...[102]

219 The Queensland Court of Appeal adopted the *Batson* principle in *Nashvying Pty Ltd v Giacomi*.[103] The tenant of a proposed quarry was unable to obtain town planning consent to establish an extractive industry, and the landlord sought to terminate the lease. The Court held that the evidence did not establish that the breach was incapable of remedy within a reasonable period of time.

220 Croft J applied the *Batson* principle in *Masters Home Improvement Aust Pty Ltd v Aventus Cranbourne Thompson Road Pty Ltd*.[104] Clause 6.3 of a 15-year lease required the tenant to open for business during the hours of 9am to 5pm seven days a week. The tenant ceased to trade, and the landlord contended that the breach of cl 6.3 was a continuing breach of the lease. The tenant submitted that the breach of ceasing to trade was capable of being remedied under the *Batson* principle by the resumption of trade.

221 The tenant requested in writing that the landlord consent to the proposed sublease of part of the premises. Clause 8.2(b) provided that consent to sublet must not be unreasonably withheld or delayed. The subtenant did not go into possession pending the landlord's consent to the sublease.

222 Croft J held that it was unreasonable for the landlord to continue to receive rent but then refuse the very thing that would cure the lack of trading.[105]

Statutory provisions

223 Considerable care must be taken in reviewing authorities from other jurisdictions as there are commonly statutory provisions which require landlords not to

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102 Ibid [64]–[65] (citations omitted).
103 [2007] QCA 454 (McMurdo P, Muir JA and Dutney J).
104 [2019] VSC 428 ('*Masters Home Improvement*').
105 Ibid [112].

unreasonably withhold consent to improvements. By way of example, s 19(2) of the *Landlord and Tenant Act 1927* (UK) provides:

> In all leases …containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld…

224 The provision has been held to apply to alterations and additions that effect an improvement.[106]

225 Similar provisions are operative in New South Wales,[107] Queensland,[108] and the Northern Territory.[109] There is no comparable provision in Victoria.

Were the structural alterations and the cuts to the building remedied by the time that the renewal notices were given?

Press base

226 On the basis of the *Batson* principle, it is clear that the structural alterations and the cutting out of the concrete slab base of the press were remedied by the time that the renewal notices were given. The part of the concrete slab floor that was cut out was replaced by a new, piled slab of concrete about 400mm thick flush with the existing floor.

227 The new part of the concrete slab was structurally sound with greater load capacity. The cut out part of the old concrete slab was filled by new concrete of more than double the thickness. The new concrete was supported by screw piles to a depth of 3m. The floor recesses were insignificant and could readily be filled. The effects of the breach were dealt with and the result was an improvement of the previous concrete slab.

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106 *Ball Brothers Ltd v Sinclair* [1931] 2 Ch 325, 330 (Luxmoore J); *Commissioner for Railways v Avrom Investments Proprietary Ltd* [1959] 1 WLR 389 (Viscount Simonds and Morton, Cohen, Somervell and Denning LJJ); William Woodfall, *Woodfall: Law of Landlord and Tenant Volume 2,* ed V. G. Wellings (Sweet and Maxwell, 28th ed, 1978) 521–2.

107 *Conveyancing Act 1919* (NSW) s 133B(2).

108 *Property Law Act 1974* (Qld) s 121(2).

109 *Law of Property Act 2000* (NT) s 134(2).

228 I find that the structural alterations to and the cutting out of the concrete slab were remedied by the time that the renewal notices were given.

The cutting and trimming of two roof purlins and the cutting out of the roof for two large diameter ducts

229 During the works, two roof purlins were cut, with about a metre removed from each purlin. The roof was cut in two places in order to connect the northern and southern flues, as illustrated in the photographs in the Schedule.

230 I accept that the works undertaken were standard building works and that the trimming of the flues meant that the work as completed was structurally sound.

231 However, the structural alterations made by cuts to the purlins and the cutting out of the roof for the large diameter flues were not remedied. The effects of the breach were not dealt with as two large diameter penetrations remain in the roof. The purlins have not been put back into their former condition.

Mechanical ventilation shafts

232 Mr Irwin described the works done to install the six mechanical ventilation shafts. This involved cutting back the roof sheeting, and trimming around the penetrations for the shaft with light metal sections. Additional light framing members were installed to support the shafts. This work involved cutting the roof sheeting for the shafts although without structural significance.. The cuts remain in the roof today.

Small roof penetrations

233 In addition to the works that I have described, small penetrations were made to the roof lining to accommodate rotary ventilators and exhaust risers. I accept the evidence of Mr Irwin and Mr Drew that these works have no structural significance.

234 There is not a great deal of evidence about the small penetrations for the rotary ventilators and exhaust risers. They appear to be quite minor. The penetrations involved minimal cutting of the roof lining, and appear to have been sealed by the end of the works. The building condition report found that there was extensive

leakage throughout the roof as at the commencement of the lease.[110] There is no evidence that the rotary ventilators or exhaust risers adversely affected the weather proofing of the roof. I accept that these penetrations were remedied.

Conclusion

235 The two cut purlins, and the cut out in the roof for the northern and southern flues as well as for the six ventilation shafts remain to the present day. The plaintiffs' claim that there were unremedied breaches of cls 5.2 and 5.6 when the renewal notices were given succeeds unless Amcor can make good its claim that it was entitled to retrospective consent.

RETROSPECTIVE CONSENT

236 In relation to the breaches of cls 5.2 and 5.4, Amcor principally argued that it was entitled to obtain retrospective consent to the structural works, and that the plaintiffs should not have withheld retrospective consent.

Did the lease provide for Amcor to obtain retrospective consent to the works in order to remedy its breaches of cls 5.2 and 5.6?

237 Clause 5.2 of the lease provides that structural alterations or additions are not to be made without first obtaining the consent of the lessor which shall not be unreasonably withheld.[111] I accept, as the plaintiffs submit, that cl 5.2 makes no provision for retrospective consent.

238 Clause 5.6 of the lease makes no provision for the landlord to consent to the cutting or other conduct prohibited by that clause. I accept as Amcor submitted that cl 5.6 must be read subject to a consent given by the landlord under cl 5.2 of the lease for structural alterations which might incidentally involve cutting. A reasonable businessman would expect that if consent were given by the landlord under cl 5.2, there could be no breach of cl 5.6 occasioned by structural alterations for which the

110 See [33].
111 Emphasis added.

landlord had given consent.[112]

239 Clause 11.8 provides that if the doing or execution of any act, matter or thing by the lessee under the lease is dependent on the consent or approval of the landlord that consent or approval shall not be unreasonably withheld or delayed.

240 Clause 11.8 applies to a number of different consents under the lease.[113] It refers to the circumstances under the lease where the tenant needs to seek approval from the landlord. I accept the plaintiffs' submission that cl 11.8 is prospective in character.

241 Clause 11.8 does not apply to circumstances where retrospective consent is sought of the landlord. It did not apply to the request for retrospective consent made by Amcor.

242 Clause 12.1(b)(A) provides that the lessee is not entitled to renew the lease if at the time of exercise there is any unremedied breach of the lease by the tenant of which the lessor has given notice. I accept Amcor's submission that one way a tenant can remedy a breach of the lease is to obtain retrospective consent from the landlord for what has been done – for example in exchange for agreed compensation. Such a consent may constitute a waiver of the relevant covenant of the lease.[114] In the present case, Amcor sought but did not receive Omar's retrospective consent.

Was the giving of retrospective consent conditioned by a requirement not to make the decision unreasonably?

243 Amcor submitted that Omar was obliged to consider whether it should give retrospective consent to the works, and not to make the decision unreasonably.

244 Amcor did not in its defence and counterclaim allege:

(a) any implied term or covenant of the lease;

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112 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46]–[50] (French CJ, Nettle and Gordon JJ).

113 Clauses 5.1, 5.2, 7.1 and 7.2.

114 See *Hendry v Chartsearch Ltd* [1998] CLC 1382, 1393 ('*Hendry*') (Millett LJ).

(b) acquiescence or waiver by the plaintiffs;

(c) estoppel; or

(d) any duty on the part of the plaintiffs to cooperate or act in good faith.[115]

245 I do not intend any criticism of Amcor by this observation because the evidence in the case simply does not support allegations of such a character.

246 The position may be summarised as follows:

(a) there is no provision in the lease which required Omar to act reasonably in deciding whether to give or withhold retrospective consent to building works undertaken in breach of cl 5.2;

(b) Amcor does not allege any implied term, acquiescence, waiver, or estoppel that might require Omar to act reasonably in deciding whether to give or withhold retrospective consent to building works undertaken in breach of cl 5.2;[116] and

(c) there is no statutory provision operative in Victoria which might have like effect.[117]

247 Amcor submitted that as retrospective consent could be given as a means of remedying a default under cl 12.1(b)(A) of the lease, a request for consent must be conditioned by an obligation on the part of Omar that it would not unreasonably refuse consent. Although it submitted that such an obligation was inherent in the *Batson* principle, Amcor said that it had found no authority where the principle had been applied or rejected in the context of a failure to receive consent for alterations.

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115 No general obligation of good faith is implied into commercial contracts as a matter of law. See *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* [2012] VSC 99, [414] (Dixon J); *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 225, [25] (Buchanan JA).

116 See *Ace Property Holdings Pty Ltd v Australian Postal Corporation* [2011] 1 Qd R 504 where waiver and estoppel of a covenant against assignment and subletting were alleged.

117 See *Landlord and Tenant Act 1927* (UK) s 19(2); *Conveyancing Act 1919* (NSW) s 133B; *Property Law Act 1974* (Qld) s 121; *Law of Property Act* (NT) s 134(2).

248 I have not identified any decision that stands for the proposition that at common law a landlord is obliged not to unreasonably withhold consent to a request for retrospective consent to alterations where the request is not made prior to undertaking the alterations as required by the covenants of the lease.

Single covenant

249 The first step is to consider the nature of the obligation that Amcor seeks to import into the lease.

250 In *Harvey v Walker*, Dixon J said:

> A condition, covenant or agreement in a lease against assigning a term without consent qualified by a proviso that the consent will not be unreasonably withheld has an established meaning and operation. There are not cross-covenants or promises, one on the lessee's part not to assign and the other on the lessor's part not to withhold consent unreasonably. There is but one condition, covenant or stipulation. The proviso qualifies the provision against assigning without consent so that it forbids such an assignment unless upon request for consent the lessor unreasonably refuses or withholds it. In that event the lessee may assign without breach of condition or covenant.[118]

251 Where there are provisions in a lease on the tenant's part not to assign and on the landlord's part not to withhold consent unreasonably, the covenants are read together as a single provision against assignment without the landlord's consent, qualified by the condition that the landlord may not unreasonably refuse or withhold it.[119]

252 Likewise in *Cominos v Rekes*, Waddell J held that in the ordinary case where the covenant is qualified by the words such as 'such consent not be unreasonably withheld', the effect is not to impose a countervailing obligation on the landlord but to limit or curtail the tenant's obligation under the covenant.[120]

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118 *Harvey v Walker* (1945) 46 SR (NSW) 180, 182 ('*Harvey v Walker*').

119 See *Harvey v Walker* (n 118) 182; *Air Force Association (Victoria Division) v White Manufacturing Co (Aust) Pty Ltd* [1951] VLR 85, 91 (Smith J) ('*Air Force Association*'); *Fuller's Theatre and Vaudeville Coy Ltd v Rofe* [1923] AC 435, 439–440 (Privy Council).

120 (1979) 2 BPR 9619, 9623, citing *Moat v Martin* [1950] 1 KB 175, 180 (Evershed MR); *Treloar v Bigge* (1874) LR 9 Ex 151.

Relevant authority

253 Long standing authority is against Amcor's submission that the *Batson* principle extends so far as to require a landlord not to unreasonably refuse a request for retrospective consent where there is no provision in the lease for retrospective consent to be sought or given.

254 In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*, Mason J stated:

> It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself.[121]

255 In *Barrow v Isaacs & Son*, relief against forfeiture was sought where premises were sublet in breach of a covenant that required the tenant to first obtain the landlord's licence and consent in writing.[122] Retrospective consent was sought and refused. The English Court of Appeal held that the omission to ask for the landlord's consent was not a mistake of a character in respect of which the Court could grant relief from forfeiture for breach of covenant.[123]

256 *Barrow v Isaacs* was followed in *Eastern Telegraph Company Ltd v Dent*.[124] The tenants covenanted not to underlet without first obtaining written consent from the landlords, such consent not to be unreasonably withheld. No possible objection could have been taken to the prospective tenants had the consent of the landlords been sought. There is no mention in the judgment of an application for retrospective

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121 (1979) 144 CLR 596, 607–8 ('*Secured Income*').
122 [1891] 1 QB 417 ('*Barrow v Isaacs*') (Esher, Lopes and Kay LJJ).
123 Ibid 430 (Kay and Lopes LJJ agreeing at 422).
124 [1899] 1 QB 835 (Smith, Collins and Romer LJJ).

consent, although proceedings for relief from forfeiture were brought. The English Court of Appeal held that although the tenants had committed a breach of a covenant through forgetfulness, equity would not grant relief.[125]

257 Romer LJ added that:

> The proviso to the covenant has no application to this case, for it cannot be said that the lessors unreasonably withheld their consent to a sub-letting, because no consent was asked for. Under these circumstances the lessors have a legal right under the contract which they can enforce by coming to the Court.[126]

258 While these authorities concern applications for relief from forfeiture, and not the exercise of an option to renew a lease, they stand for the principle that where the lease provides that consent is to be first had and obtained the tenant must actually seek consent from the landlord prior to performing the act for which consent is required. In *Barrow v Isaacs*, an unsuccessful application for retrospective consent was made as soon as the oversight was discovered. The fact that an application for retrospective consent was made was insignificant, and made no difference to the result.[127]

259 These authorities were followed in New South Wales in *McMahon v Docker*.[128] Here, a tenant sublet a weekly tenancy without seeking the landlord's consent, despite a clause against assigning or subletting without the landlord's written consent. Herron J held:

> It is a startling proposition that a tenant, who has covenanted that he will not assign or sub-let without the landlord's consent, can confer on a complete stranger rights of entry and possession against the true owner....There is, however, no case which suggests that the consent of the landlord need not be asked for. Indeed, it is clear that the consent of the landlord must be asked for…and even if the stipulation is that the consent shall not be arbitrarily, unreasonably or vexatiously withheld the lessee must apply for the consent, or the lease is liable for forfeiture…but if the consent is withheld unreasonably, or the application for consent is ignored for an unreasonable time…the lessee is released from the covenant, and may assign without

125 Ibid.
126 Ibid 839 (emphasis added).
127 *Barrow v Isaacs* (n 122).
128 (1945) 62 WN (NSW) 155, 157 (citations omitted).

consent…[129]

260 In Victoria, Smith J held in *Air Force Association*:

> Under such a covenant, the lessee is guilty of a breach if he assigns without asking for consent or if he assigns after asking for consent and having it unreasonably refused or withheld. But he is not guilty of any breach if he assigns after asking for consent and having it unreasonably refused.[130]

261 There does not appear to have been an application for retrospective consent in *Air Force Association*.

262 In *Tamsco Ltd v Franklins Ltd*, Young CJ said:

> It is clear law that where a lease includes a covenant…the lessee must actually seek the consent. Even if the assignee is a person to whom there could be no reasonable objection, the landlord may re-enter for breach if no application for consent is in fact made.[131]

263 In *Tamsco*, the tenant had made a number of approaches concerning consent which Young CJ described as 'desultory'.[132] It also asked the landlord to reconsider, and sought retrospective consent.

264 In *Australian Mutual Provident Society v 400 St Kilda Road Pty Ltd*, the tenant AMP was alleged to have sublet and parted with possession of parts of the leased property and to have carried out improvements and used the property other than as an office without the landlord's prior consent.[133] AMP relied on the duty of good faith on the part of the landlord. The trial judge granted relief from forfeiture.

265 On appeal, O'Bryan and McDonald JJ noted that since 1904 all leases in Victoria which contained a covenant against subletting were deemed to be subject to a proviso to the effect that such consent shall not be unreasonably withheld under s 144 of the *Property Law Act 1958* (Vic).[134] However:

> In the absence of s 144, the common law did not impose an obligation upon a

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129 Ibid (citations omitted) (emphasis added).
130 *Air Force Association* (n 119) 91 (emphasis added).
131 [2001] NSWSC 1205, [37] (citations omitted) (emphasis added) ('*Tamsco*').
132 Ibid [38].
133 [1991] 2 VR 417 ('*AMP*') (Murphy, O'Bryan and McDonald JJ).
134 *Property Law Act 1958* (Vic) s 144(1); *Conveyancing Act 1904* (Vic) s 22.

> landlord to act reasonably, if asked to consent to an assignment or sub-letting by a tenant. A tenant's covenant not to assign without consent would be absolute if no more was said.[135]

266 Noting that s 144 could be excluded by the parties by an express provision in their lease, O'Bryan and McDonald JJ said:

> …the language of s 144 enables parties to contract, if they wish, so as to require a tenant to obtain consent to an assignment, underletting or parting with possession of the premises. A tenant's covenant prohibiting assignment etc., if not qualified by the words "such consent not being arbitrarily or unreasonably withheld" or, if the operation of s 144 is not expressly excluded, would be absolute. A lessor, in these circumstances would be given an unfettered discretion to refuse or withhold consent.[136]

267 Murphy J agreed and held:

> Courts do not have power to introduce into contracts any terms simply because they think them to be reasonable. Where there is an apparently complete bargain the implication of a term will be generally restricted to cases where there is shown to be an established usage…or where it is necessary to imply the term to make the contract work – to give it business efficacy…Even then it is not open to imply a term which would in effect contradict any express terms of the contract.[137]

268 The English Court of Appeal looked at the issue again in *Hendry*.[138] A clause in two written agreements provided that the defendants were not entitled to assign or transfer the benefit of an agreement whether in whole or part without the prior written consent of the other party which shall not be unreasonably withheld. The agreements were assigned without any request for consent. After the assignment had taken place, a request for consent to a new assignment was refused.

269 Henry LJ said:

> The suggestion that the assignor can validly assign in breach of his contract without ever seeking prior written consent by asserting that, as such consent could not reasonably be refused, so it is unnecessary, seems to me to be a recipe to promote uncertainty and speculative litigation. I prefer the simple certainty that prior consent never applied for is never withheld or refused (whether reasonably or otherwise). The burden of suing should be on the party who asserts that he is not obliged to ask for prior consent as his contract

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135 *AMP* (n 133) 421.
136 Ibid 425.
137 Ibid 418.
138 *Hendry* (n 114) (Evans, Henry and Millett LJJ).

required him to because it could not reasonably be refused.[139]

270 Millett LJ agreed and added:

> A covenant against assignment may be in absolute terms or conditional on obtaining the lessor's prior consent; and such a condition may be qualified by a proviso that the lessor's consent shall not be unreasonably withheld. Where the condition is qualified in this way the lessor does not undertake not unreasonably to refuse his consent, but an unreasonable refusal of consent leaves the lessee at liberty to assign without it.
>
> But it is essential that the lessor's consent is sought before the assignment is made. Consent cannot be said to be withheld or refused if it is not asked for. It is no answer that no reasonable objection could have been made if consent had been sought; the proviso has no application unless it is.[140]

271 Later Millett LJ said:

> In the case of a lease, the fact that an assignment in breach of covenant is effective to vest the term in the assignee means that it is too late to seek consent; the breach of covenant is complete and the lease is liable to forfeiture. That is not so in the case of the benefit of a contract. The assignment does not constitute a breach of contract and is without legal effect so far as the other party to the contract is concerned. It is not too late for the assignor to ask for consent. But the contract requires the assignor to obtain the prior consent of the other party; retrospective consent, if given, may operate as a waiver, but cannot amount to the consent required by the contract. The proper course is for the assignor to ask for consent to a new assignment and to wait until it is given or unreasonably refused before proceeding to make it.[141]

272 The observation by Millett LJ that retrospective consent may operate as a waiver but cannot amount to the consent required by the contract provides an underlying legal rationale as to why retrospective consent is effective to remedy a breach of lease.

273 *Hendry*[142] was followed by the Queensland Court of Appeal in *Ace Property Holdings Pty Ltd v Australian Postal Corporation*.[143] Fryberg J said:

> In any event, the evidence does not support the finding of unreasonable withholding of consent. As Australia Post rightly conceded, consent cannot be said to have been withheld unless and until it has been asked for. It is no answer that no reasonable objection could have been made if no consent had

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139 Ibid 1393 (emphasis added).
140 Ibid (emphasis added) (citations omitted).
141 Ibid (emphasis added).
142 *Hendry* (n 114).
143 [2011] 1 Qd R 504 (Keane and Fryberg JJA, and Douglas JJ).

been sought.[144]

274 The tenant (Australia Post) sought to strengthen its position by alleging waiver and estoppel by election by the landlord. Both allegations failed on the facts. Relief from forfeiture was refused by the Court.

275 In *Commercial Tenancy Law*, the learned authors the Hon Clyde Croft, Robert Hay QC and Luke Virgona accept the authority of the cases referred to above and say:

> The lessee must ask for consent before he or she assigns even though it could not properly be refused.[145]

276 In *Nguyen v Valore*, Ball J of the Supreme Court of New South Wales considered the situation of a tenant who erected a wall without obtaining building approval from the local council or a private certification to the effect that the work had been performed in accordance with the Building Code.[146] After a breach notice was served under the lease, the tenant sought to exercise an option to renew the lease.

277 Ball J held:

> It appears to be accepted that where consent to an assignment is sought and withheld unreasonably, it is not a breach of a term in the lease preventing assignment without consent for the lessee to assign the lease. There is no reason why the same principle should not apply to a term preventing a change in use without consent.
>
> In my opinion, Mr Nguyen breached cl 7.6 of the lease by erecting the wall without consent. It was not suggested that he ever asked for consent. Consequently, the question whether consent was withheld unreasonably does not arise.[147]

278 Ultimately, Ball J made orders under s 133F of the *Conveyancing Act 1919* (NSW) which permits the court to give relief from breaches where an option to renew was exercisable under a lease.

279 There is no equivalent statutory provision in Victoria.

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144 Ibid [188] (citations omitted) (Douglas J agreeing).

145 Clyde Croft, Robert Hay and Luke Virgona, *Commercial Tenancy Law* (Lexis Nexis, 4th ed, 2017) 474 [15.8] ('*Commercial Tenancy Law*').

146 [2018] NSWSC 1364.

147 Ibid [52]–[53].

280 I conclude that in the absence of a statutory remedy, the accepted law is to the effect that the tenant must ask for consent prior to the date when the consent is required. If the tenant seeks prior consent, it cannot be unreasonably refused. If the tenant does not seek prior consent, the tenant's right to seek consent that cannot unreasonably be refused does not arise.

Does the *Batson* principle impose an obligation on the landlord not to unreasonably refuse retrospective consent?

281 Amcor sought to distinguish the authorities to which I have referred on the basis that retrospective consent was not necessarily sought in each case and on the basis that the *Batson* principle had been supported by appellate courts, and should be taken as imposing an obligation on a landlord not to unreasonably withhold consent if retrospective consent is sought by a tenant.

282 The factual setting for the operation of the *Batson* principle is a breach of the lease by the tenant of which the landlord has given written notice. While it may be accepted that the subsequent consent of the landlord to the breach is sufficient to remedy the breach whether with or without compensation, there is nothing in the lease or in the concept of remediation which would enliven the landlord's obligation not to unreasonably refuse consent.

283 In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*, the High Court, in the joint judgment of Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ said:

> Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. At least, it will do so unless relief is afforded by the operation of statute or some other legal or equitable principle applicable to the case.[148]

284 Similarly Gibbs J said in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd:*

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the

148 (2004) 218 CLR 471, 483 [35].

> instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.[149]

285 Primacy must always be given to the text of a written contract or lease. As was said in *Cherry v Steele-Park*, the starting point and the ending point of the construction of a written commercial contract is the language chosen by the parties to record their bargain.[150]

286 The provisions of the lease independently point to the conclusion that Amcor's argument cannot be sustained. Clause 12.1(b) deprives the tenant of the right to renew the lease in certain circumstances. It does not purport to impose any obligation on the landlord. It is highly unlikely that the parties intended that cl 12.1(b) should be construed so as to impose an obligation on the landlord not to unreasonably refuse an out-of-time request for consent made by the tenant after the works had been completed.

287 There are clear indications in the lease to the contrary:

(a) cl 5.2 expressly provides for the consent of the landlord to be <u>first</u> obtained;

(b) cls 5.1, 7.1 and 7.2 all provide for the consent of the landlord to be obtained before the tenant can proceed. None speak in terms of retrospective consent;

(c) cl 11.8 is concerned with the grant of consent under a provision of the lease. Where consent is sought in accordance with a provision of the lease it cannot be unreasonably withheld or delayed. Clause 11.8 does not address or contemplate retrospective consent or provide that an application for retrospective consent cannot be unreasonably withheld; and

149 (1973) 129 CLR 99, 109.
150 (2017) 96 NSWLR 548, 565 (Leeming JA, Gleeson JA agreeing at 551).

(d) there is nothing in the lease that would support the suggested obligation that the landlord may not unreasonably refuse consent not sought under a provision of the lease.

Conclusion

288 Amcor's argument depends on the implication of an obligation not found in the lease. The implication of an obligation that retrospective consent to structural alterations cannot be unreasonably withheld by the landlord is akin to rewriting cl 12.1(b)(A) to impose a new obligation. Such a provision would be inconsistent with the existing covenants of the lease that provide for and contemplate the giving of prior consent by the landlord.

289 As previously noted, Amcor does not claim that there is any implied term, acquiescence, waiver, estoppel, or statutory provision that might assist its position.

290 The *Batson* principle is fundamentally concerned with the construction of the word 'unremedied' commonly found in option renewal provisions. There is nothing in the principle that requires or permits what would effectively be the importation of a new covenant into the lease.

291 The result is that the long understood and accepted law governing the relationship of landlords and tenants must be applied. The tenant must seek the landlord's consent before performing the act for which prior consent is required if the right to seek consent is to be conditioned by a qualification that it not be unreasonably withheld.

Did Omact unreasonably in withholding its consent to the works?

292 For the reasons that I have given, it is unnecessary for me to make findings of fact as to whether the retrospective consent sought by Amcor was unreasonably refused by Omar. Nevertheless, I will do so because most of the evidence in the trial was concerned with this question, and it is possible that this proceeding will go further. It would be unfortunate if a factual dispute that occupied a considerable amount of

courttime was left unresolved.

The evidence

293 The plaintiffs relied on the witness statements and evidence of:

(a) Grant Fielder, the Company Secretary of Omar, and the Chief Financial Officer and Company Secretary of the Detmold Group;

(b) Rodney Detmold, the Executive Chairman of the Detmold Group and a director and co-owner of Omar; and

(c) Matthew Belford, a director of MB Williamstown Road Pty Ltd and ID_Land, the second and fourth plaintiffs.

294 Amcor relied on the witness statements and evidence of:

(a) Andrew Terry, Vice President, Financial and Information Technology of Amcor Singapore Pty Ltd and Vice President and General Manager (Australia) from March 2014 to December 2017;

(b) Andrew Allibon, General Manager Strategy, Transformation and Information Systems in the Amcor Flexibles Division – Australia until March 2017 when he left Amcor;

(c) Paul Crabtree, Finance Manager – Reporting and Controlling for Amcor Flexibles Asia Pacific, one of the five business groups of Amcor; and

(d) Scott Jackson, Chief Financial Officer of the Australian and New Zealand business of Amcor.

295 Mr Crabtree and Mr Jackson were not cross-examined.

Grant Fielder

Power upgrade

296 Mr Fielder gave evidence that in April 2017 and again in June 2018, Amcor requested

Omar to consent to a power upgrade by the electricity supplier, CitiPower, of the main power supply to the land. CitiPower requested a 30 year lease with a further term of 30 years of an area located within the land to house an electricity substation.

297 The sale contract was due to settle on 31 March 2019. As Omar had agreed to deliver the land at settlement in the same condition that it was in on the day of sale except for fair wear and tear, Omar did not agree to Amcor's request after consultation with ID_Land. Mr Fielder advised Amcor of Omar's decision.

The dispute with Amcor

298 Mr Fielder said that Amcor did not ask Omar for consent to install the press or to undertake the works. He became aware that the press had been installed on 20 June 2018. Following the provision of information by Amcor on 23 October 2018, Omar decided that it was appropriate to discuss the position with ID_Land given that the settlement date under the sale contract was fast approaching and ID_Land would be responsible for dealing with Amcor in the long term.

299 After the first renewal notice was served, the position became more complicated as Omar had obligations to both Amcor and ID_Land. Mr Fielder described Omar's situation as a balancing act, given its obligations as a landlord and as a vendor. Omar and ID_Land agreed that ID_Land would take responsibility for dealing with Amcor in relation to matters arising under the lease.

300 On 23 November 2018, Omar and the purchasers executed the variation deed. Omar did not decide whether it would give consent retrospectively for the work that had been performed or how it would respond to the exercise of the option until after the deed of variation was executed.

Rodney Detmold

301 Mr Detmold said that he was aware from general industry knowledge that Amcor was intending to purchase a new gravure printing press for installation at one of its factories in Victoria. To the best of his recollection, he became aware of the

installation of the press only after it had been installed. Amcor's request for retrospective consent to the works and the discussions between Omar and ID_Land were handled by Mr Fielder with his authority.

302 Mr Detmold knew that Amcor had four sites in Victoria and was planning to consolidate. He considered that there was no room in the building to install more printing machinery. Mr Detmold attended a meeting with Mr Terry and Mr Allibon of Amcor on 7 September 2015. Amcor did not mention moving equipment, or provide him with further information. He did not recall ever being told that Amcor was going to relocate equipment or install new equipment on the land.

Matthew Belford

Residential development of the land

303 On 23 March 2016, Mr Belford, Mr Garvey and ID_Land's acquisition manager met with Mr Allibon. They advised Mr Allibon that ID_Land was a property developer and intended to develop the site for residential use. Mr Allibon said that Amcor had experienced inefficiencies in operating from a number of sites. Amcor was looking to reduce the inefficiencies by exiting a site in Dandenong.

304 When the sale contract was executed, Mr Belford was hopeful that an early surrender of the lease could be achieved, or at least, that an agreement could be reached with Amcor not to exercise its options to renew the lease.

305 By cl 10.5(a) of the special conditions in the sale contract, Omar and the purchasers agreed that the purchasers must use reasonable endeavours to negotiate with Amcor to procure an early surrender of the lease on satisfactory terms. Under cl 10.5(b), Omar agreed to provide the purchasers with reasonable assistance in negotiating the surrender of the lease with Amcor.

Meetings between ID_Land and Amcor

306 Mr Belford and his co-director Mr Garvey embarked on a series of meetings between September 2016 and February 2018 with Amcor representatives, making repeated

efforts to obtain an early surrender of the lease.

307 Mr Belford said that there were meetings between ID_Land and Amcor's representatives on:

(a) 7 September 2016 (Belford, Garvey, Dordevic and Allibon);

(b) 7 October 2016 (Belford, Garvey and Allibon);

(c) 14 December 2016 (Belford, Garvey and Allibon);

(d) 10 February 2017 (Belford, Garvey, Allibon and Terry);

(e) 11 April 2017 (Belford, Garvey, Jackson and Terry);

(f) 17 May 2017 (Belford, Garvey, Hope and Terry); and

(g) 14 February 2018 (Belford, Garvey, Hope and Terry).

308 In late 2016, Mr Belford said that Mr Allibon mentioned that Amcor had new press equipment to be installed at Melbourne and that Amcor was considering which site the equipment would go to. Mr Allibon had said that if the equipment went to Port Melbourne this would create further challenges for Amcor to vacate the land and increase Amcor's relocation costs.

309 Mr Belford said the meetings were repetitive and canvassed the same issues. Amcor's representatives would express Amcor's intention to consolidate operations in Melbourne or overseas. They would then discuss the challenges and costs involved in having to relocate from the land including the costs of relocating machinery, ceasing work during any move, and the potential for staff to be made redundant.

310 Amcor's representatives said that there was a large cost to Amcor in vacating the land. ID_Land would need to pay Amcor a substantial sum of money in order to incentivise Amcor to vacate the land. Amcor's representatives requested that the monetary amount to be paid to Amcor be advised in follow-up correspondence as

any offer would need to be considered by Amcor's management in Singapore.

311 Mr Belford said that Amcor did not at any time during these meetings make clear that it intended to install a new press at the Port Melbourne site. Mr Belford said that he and Mr Garvey were unaware that machinery had been installed on the land prior to 18 June 2018.

Offers made by ID_Land to Amcor

312 ID_Land made a series of ascending offers to Amcor over the period from October 2016 to February 2018:

(a) Letter of 11 October 2016. ID_Land offered a cash incentive payment of $1.1 million payable three months prior to vacant possession with a waiver of the make good provisions of the lease, and any requirement to remediate;

(b) Letter of 22 December 2016. ID_Land offered a cash incentive payment of $3.05 million payable on vacant possession in March 2019 with a waiver of the make good provisions of the lease and any requirement to remediate;

(c) Letter of 24 April 2017. ID_Land offered a cash incentive payment of $4.02 million payable on vacant possession in March 2019, alternatively $3 million in December 2019, or $925,000 in March 2020 with a waiver of the make good provisions of the lease and any requirement to remediate;

(d) Letter of 30 May 2017. ID_Land offered a cash incentive payment of $4.95 million payable on vacant possession in March 2019, alternatively $3.85 million in December 2019 with a waiver of the make good provisions of the lease along with any requirement to remediate; and

(e) Letter of 14 February 2018. ID_Land offered a cash incentive payable on vacant possession of $3 million in December 2019 and $3 million in December 2021 with a waiver of the make good provisions of the lease and any requirement to remediate.

313 Amcor did not accept any of these offers. Mr Belford said that at one stage of the negotiations, Mr Allibon stated that Amcor would require an incentive in the order of $9 million to reach agreement.

Contamination

314 Under the sale contract, the purchasers bore the cost of decontaminating the land. Mr Belford said that decontamination costs can be significant particularly when a site is being purchased for residential development where higher decontamination standards apply. The offers made by ID_Land to waive any requirement for Amcor to remediate the land were of material additional value.

Electricity substation

315 Mr Belford said that when he received the CitiPower proposal, he was concerned about the proposal based on his experience in a previous project. During this project, he had assumed that a substation could easily be moved, but later discovered that the substation serviced street lights and other properties. This was the case for the substation servicing the land. On this basis, ID_Land informed Omar that it would not agree to the proposed lease with CitiPower.

Negotiations

316 By May 2018, Mr Belford and Mr Garvey were concerned that an agreement had not yet been reached with Amcor. On 9 May 2018, Mr Belford received an email attaching a letter from Simon Roy, Vice President and General Manager of Amcor. The letter stated that the parties had moved beyond discussion regarding an early lease surrender.

317 Mr Belford was surprised by the statements made in the letter as he considered that discussions were continuing. Mr Garvey responded to the letter with further emails.

Subsequent events

318 On 31 July 2018, ID_Land and Omar sought information about the works from

Amcor. Amcor provided plans and information almost three months later.

319 In November 2018, Omar and ID_Land agreed by the variation deed that ID_Land would have principal responsibility for dealings with Amcor. Mr Belford said his concerns with Amcor's conduct intensified given the way Amcor responded to the default notice and its lack of timeliness in providing Omar with the requested information. He said that he was concerned about ID_Land's capacity to have a working relationship with Amcor. He said without the physical inspection of the land, it was unlikely that Amcor would have informed the plaintiffs of the installation of the press and works.

320 In cross-examination, Mr Belford was taken to an email from Mr Allibon responding to the offer made on 11 October 2016. Mr Allibon said that he was open to 'continuing [their] engagement to keep [ID_Land] appraised of [Amcor's] activity'. Mr Allibon said that Amcor had ordered the press and was well engaged with local authorities on legislative requirements for installation 'which [he has] been instructed to continue with'.

321 Mr Belford said that in meetings in late 2016 and early 2017, Amcor raised the installation of press equipment on the land as a possibility. When Amcor requested consent to the substation, he was unaware whether the substation was for existing work or new equipment. As Amcor had discussed new equipment, he thought that they were related. When he referred in correspondence to the 'confirmation of interim works with regards to installation of any new press', he was referring to the talk of a new press. He was not told that a new press would be installed on the land.

322 Mr Belford said that the solvents and materials that would be brought onto the land for the new machinery were not discussed. He was concerned about contamination.

323 After finding that the press had been installed while ID_Land sought possession of the land, he and Mr Garvey felt that they had been misled. Amcor was less wanted as a tenant because he was of the view that Amcor had gained an advantage by having the press installed without delay or stoppage.

324 Mr Belford maintained that his reason for deciding not to grant retrospective consent was the deterioration in ID_Land's relationship with Amcor.

325 Mr Belford said that commercially ID_Land would prefer to develop the land rather than hold the site as an asset. He agreed that ID_Land's commercial imperatives to gain vacant possession were clear. However, he said that the key reason for wanting Amcor out as a tenant was that he felt that Amcor had deliberately misled ID_Land, which had paid over $30 million for the land.

Andrew John Terry

Purchase of a new press

326 Mr Terry said that in April 2014 when the Amcor Group purchased Detmold Flexibles, there were four flexographic printing presses and one gravure printing press operating on the land. Amcor had no reason to believe that Omar would object to the installation of a new press on the land.

327 In June 2016, Amcor's board resolved to purchase a new gravure press to replace three old presses at Nunawading, permitting the Nunawading site to be closed. At the same time, Amcor decided to install the new gravure press on the land.

328 Mr Terry said that in August 2016, Amcor contacted CitiPower to secure a power upgrade for the new press. In April 2017, Mr Fielder advised that Omar would defer to the position of ID_Land, and that ID_Land did not agree to Amcor's request.

Meetings with ID_Land

329 Mr Terry said that he and Mr Allibon met with Mr Belford and Mr Garvey in December 2016. Subsequently, he attended meetings with ID_Land representatives on 11 April 2017 and 14 February 2018. He said that Amcor's position was the same throughout the meetings. Given Amcor's intention to install new equipment on the land, and the investment it was making, the costs for Amcor of an early departure from the land had to be factored into ID_Land's offer.

Installation of the new press

330 Progress with the new press was as follows:

(a) Amcor ordered the new press in October 2016. Structural engineers retained by Amcor in November 2016 advised on the foundation work required to install the press. By early December 2016, Amcor had decided where on the land the press would be installed. Amcor reviewed whether to install the press on the land following ID_Land's offers for an early surrender of the lease.

(b) The decision to install the press on the land was made in about mid-March 2017. In early April 2017, AJR Crow quoted for the construction of the press base. Base works were completed by late May 2017. The press arrived by ship in June 2017 with assembly commencing on 19 June 2017. Modifications to the roof were completed by August 2017 with the press in operation from 27 October 2017.

(c) The press was fully operational in February 2018.

331 Mr Terry said that he was not aware of the provisions of the lease. He was not aware of any requirement to inform Omar of the installation of the press or of any specific requirement for Omar's consent to be obtained for building modifications. When the press was installed in 2017, he did not believe that the work was of such a nature as to require consent.

332 Mr Terry denied that Amcor did not seek consent for the works during his dealings with ID_Land because obtaining consent was not going to be straightforward. He believed that Amcor was open with ID_Land during meetings.

333 Mr Terry agreed that ID_Land was not informed by Amcor during 2017 that installation of the press had begun or been completed. He could not recall what he or others said at the February 2018 meeting, which was over three months after the press became operational. Apart from explaining that the date of the meeting was immediately before his departure to Singapore with his family, he was not able to

give any reason why ID_Land was not informed that the press had been installed at that meeting.

334 Mr Terry could not explain why ID_Land had not been kept informed of progress with the press installation, or why Mr Garvey in ID_Land's letter of offer dated 14 February 2018 still spoke of 'confirmation of interim works with regards to installation of any new press'.

Andrew Allibon

335 Mr Allibon said that from about July 2016 he was involved in the project to install a new gravure press on the land to replace three gravure presses at Nunawading.

336 He said that he did not review the lease in any detail. It did not occur to him that the works required Omar's consent under the lease.

337 Mr Allibon attended meetings with representatives of ID_Land in 2016 and until early 2017. At the first meeting in early 2016, Mr Garvey and Mr Belford advised that ID_Land had purchased the land. They asked whether Amcor was willing to vacate the land before the lease expired, stating that ID_Land was prepared to offer Amcor incentives to vacate early and to waive the make good obligation under the lease. Mr Allibon said he responded that Amcor was yet to make any decision about the future of the land. Amcor would incur significant costs from relocating equipment, employee redundancy, and customer interruption. He said that if ID_Land had a particular proposal, they should put it to him to discuss with Amcor's senior management.

338 Mr Allibon said that the meeting with Mr Garvey and Mr Belford in September 2016 covered the same ground. He stated that Amcor proposed to install a large new gravure press on the land at substantial cost. If the new press was installed, Amcor would be unlikely to vacate the land before the end of the lease term.

339 Following receipt of ID_Land's letter of 11 October 2016, he told Mr Garvey in a telephone conversation on 17 November 2016 that the offer was too low and would

need to be substantially improved if Amcor was to give it serious consideration. He suggested that Amcor would need a cash payment in the vicinity of $8–10 million but was prepared to consider a lower cash payment with other incentives such as lower rent and outgoings. He said that he told Mr Garvey that once the press was installed, Amcor would not vacate the land given the time to dismantle, reposition and commission the press, conduct customer trials, transition as well as the loss of production.

340 Mr Allibon's last meeting with ID_Land was on 10 February 2017. At this meeting, Mr Terry repeated that ID_Land would need to improve its offer substantially for Amcor to consider it seriously. If it did not, Mr Terry was clear that Amcor would proceed to install the press on the land. When he left Amcor in March 2017, planning for the press installation was proceeding.

Paul Crabtree

341 Mr Crabtree took over the day-to-day management of Amcor's leases after Mr Allibon left Amcor. In about late May 2017, he received a list of properties leased by Amcor and electronic versions of Amcor's leases. He did not recall reading the provisions of the lease that required Omar's consent to structural alterations until after the default notice was received.

Scott Jackson

342 In mid-2017, Mr Jackson attended a meeting with Mr Garvey and Mr Belford. He recalled that they stated that ID_Land wished to redevelop the land and pressed their offer for Amcor to vacate the land. Mr Terry described the cost to Amcor of vacating the land early and said that the offers ID_Land had made were too low. Mr Jackson said he attended two further meetings with Mr Garvey and Mr Belford in 2018 with Simon Roy who had replaced Mr Terry as Amcor's Australian Vice President.

Findings as to correspondence and meetings concerning the installation of the press and performance of the works

343 I make the following findings of fact:

(a) Since the purchase of the land in 2016, the purchasers have consistently sought the early surrender of the lease and vacation of the land by Amcor.

(b) In June 2016, Amcor's board decided to purchase a new gravure press for installation on the land. From this time on, Amcor's intention was to install the press on the land.

(c) In November 2016, structural engineers were engaged by Amcor to provide drawings for the press and a geotechnical report was obtained.

(d) After ID_Land's offer of 22 December 2016 was received, Mr Terry instructed Amcor staff to reduce activity on the installation of the press.

(e) In March 2017, Amcor management decided to proceed with press installation. Mr Terry directed Mr Hunter to proceed with press installation as swiftly as possible.

(f) Prior to 24 April 2017, Mr Belford and Mr Garvey became aware of interim works with regard to the installation of a new press, referring to these works in ID_Land's offer of that date.

(g) The installation of the new press base by AJR Crow commenced in early April 2017, and was completed by late May 2017.

(h) ID_Land was not informed by Amcor management that press installation had commenced in June 2017 or that the new press was in operation from 27 October 2017.

(i) Amcor did not tell ID_Land that the new press was fully operational in February 2018.

(j) While the attendees at the meeting between ID_Land and Amcor on 14 February 2018 do not have a clear recollection of what was said at this meeting, Amcor representatives did not make known to the ID_Land representatives that the press had been installed and was about to become fully operational.

(k) When they made the offer of 14 February 2018, ID_Land's directors still believed that the installation of the press had not progressed beyond the performance of interim works.

(l) Mr Roy's letter of 9 May 2018 on behalf of Amcor said that the parties had moved beyond discussion. It did not say that the press had been installed, and had been operating for a number of months.

(m) Mr Garvey and Mr Belford discovered shortly after 18 June 2018 that the press had been installed on the land.

(n) Amcor's intention to install the press on the land inevitably conflicted with ID_Land's desire to develop the land as soon as possible.

(o) During meetings and negotiations, both parties were well aware of their conflicting positions.

(p) Amcor management was aware that if ID_Land was informed of the installation of the press and the works, it would oppose Amcor's proposal just as it had refused to consent to the power upgrade.

(q) Amcor management did not review the contents of the lease, and did not understand that Amcor needed consent from Omar to perform the works. Amcor elected to proceed with the works regardless of the likely objection from ID_Land.

Was the refusal unreasonable?

344 Amcor requested that Omar provide retrospective consent to the works on 25 July 2018. In response, Omar requested documents and information concerning the press and works on 31 July 2018. Amcor responded with documents and information on 23 October 2018. On 16 November 2018, the purchasers refused retrospective consent.

Solicitors' correspondence

345 The letter of 16 November 2018 by the purchasers' solicitors stated that:

(a) the purchasers had a clear interest in the issue whether Amcor was entitled to renew the lease;

(b) the purchasers considered that Amcor was not entitled to renew the lease and had not done so;

(c) it would not have been unreasonable for Omar to have withheld consent if consent had been sought prior to the works, and it was not unreasonable for Omar to withhold consent;

(d) the land was subject to the sale contract at the time of the works;

(e) the sale contract required that at settlement Omar deliver the land to the purchasers in the same state that it was in at the time of the execution of the sale contract, fair wear and tear excepted;

(f) the works prevented satisfaction of that obligation by Omar, which had a proper basis for withholding consent; and

(g) if Omar had sought the purchasers' consent to the works, the purchasers would have decided not to give consent.

346 On 6 December 2018, Omar's solicitors wrote to Amcor's solicitors advising that Omar had authorised the purchasers to deal with the dispute and to have the conduct of any litigation arising from the renewal notice.

347 Amcor's solicitors replied on 20 December 2018, asserting among other things that the reason for withholding consent was that the purchasers sought possession of the land to pursue a residential development project. The purchasers' solicitors responded, seeking vacant possession of the land by 31 March 2019.

348 Both Mr Fielder and Mr Belford said that ID_Land had taken responsibility for dealings with Amcor in relation to the default notice and the renewal notice.

Mr Belford's reasons for refusing consent

349 In final submissions, counsel for the plaintiffs summarised Mr Belford's evidence as to why ID_Land considered that retrospective consent should not be given to Amcor as follows:

(a) Amcor had no reservation about deliberately breaching the lease because it had not informed Omar or ID_Land of the installation of the press;

(b) Amcor's conduct was particularly alarming because it was aware that ID_Land was concerned about the impact that new press would have on the contamination levels on the land and the possibility of vacant possession;

(c) Mr Belford considered that he had been misled by Amcor throughout his interactions and negotiations with Amcor. His concerns intensified after learning of the way in which Amcor engaged with the issue once it was raised; and

(d) he was concerned about ID_Land's capacity to have a working relationship with Amcor given that Amcor was willing to breach the lease without notice to ID_Land at a time when it was aware that ID_Land was trying to reach agreement with Amcor.

The reasons for refusal

350 In *Secured Income*, Mason J said:

> I am inclined to the view that the landlord is entitled to rely on a ground not taken at or about the time of refusal. It would be most unjust if the landlord could not take advantage of an important ground justifying refusal merely because it was not known to him at the time…the general rule in contract is that a party can justify his termination or rescission of a contract by reference to grounds not taken at the relevant time.[151]

351 It is appropriate to consider each reason advanced by the plaintiffs for refusing consent for the works, whether the reason was advanced by Mr Belford or Mr Fielder in evidence or is found in solicitors' correspondence.

Relevant principles

352 In *Iqbal v Thakrar*, the English Court of Appeal considered whether a landlord's refusal to consent to proposed structural alterations was unreasonable. Although no

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151 *Secured Income* (n 121) 611.

case was cited to the court that dealt with that type of consent, it held that the principles laid down in cases relating to the giving of consent by the landlord to an assignment of lease could be applied with any necessary changes.[152]

353 The Court summarised the principles accepted in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*[153] with some modifications to allow for requests for consent in relation to structural alterations or additions:

> (1) The purpose of the consent is to protect the landlord from the tenant effecting alterations and additions which damage the property interests of the landlord;
>
> (2) A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests;
>
> (3) It is for the tenant to show that the landlord has unreasonably withheld his consent to the proposals which the tenant has put forward…;
>
> (4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable landlord in the particular circumstances;
>
> (5) It may be reasonable for the landlord to refuse consent to an alteration or addition to be made for the purpose of converting the premises for a proposed use even if not forbidden by the lease. But whether such refusal is reasonable or unreasonable depends on all the circumstances…;
>
> (6) While a landlord need usually only consider his own interests, there may be cases where it would be disproportionate for a landlord to refuse consent having regard to the effects on himself and on the tenant respectively;
>
> (7) Consent cannot be refused on grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment;
>
> (8) In each case it is a question of fact depending on all the circumstances whether the landlord, having regard to the actual reasons which impelled him to refuse consent, acted unreasonably.[154]

354 The principles in *International Drilling*[155] and *Iqbal v Thakrar*[156] were applied by Nettle

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152 [2004] EWCA Civ 592, [26] (Gibson LJ) ('*Iqbal v Thakrar*').
153 [1986] Ch 513, 519–20 (Balcombe LJ) ('*International Drilling*').
154 *Iqbal v Thakrar* (n 152) [26].
155 *International Drilling* (n 153).

J in *Cathedral Place Pty Ltd v Hyatt of Australia Ltd & Ors* in holding that the tenant had the burden of establishing that the landlord's refusal of consent was unreasonable.[157]

355 Similarly, Ginnane J held in *Camperdown Dairy International v The Camperdown Cheese Company*:

> …the Tenant bears the onus of showing that the Landlord's withholding of consent was unreasonable. The question of whether the Landlord's conduct was reasonable or unreasonable is a question of fact for the Court to decide. The question is whether the landlord's conduct was reasonable, not right or justifiable.[158]

356 In cases where an assignee of a lease or approval of sublease is in issue, the character and personality of the assignee or sublease may be of great importance. However, in a case such as the present where consent is sought for structural alterations, the significance of a consideration such as the character and personality of the sitting tenant is much less. Rather the landlord's reason for refusal would ordinarily involve a matter affecting the property or the use or occupation of the premises arising out of the structural alterations.

357 In *Masters Home Improvement*, Croft J said:

> It is the task of the Court to discern the real and true reason for a landlord's refusal of consent. If the landlord's main aim is to obtain some collateral advantage, for example the surrender of the lease, then refusal of consent is unreasonable.[159]

358 Later Croft J said:

> … refusal would be unreasonable if, in the circumstances, refusal amounts to a derogation from the grant comprised by the lease and an arbitrary and capricious attempt to deprive the tenant of a benefit under the lease.
>
> It is, however, clear, that in considering whether to consent to a sublease – accepting that similar considerations apply with respect to consent to an assignment of a lease – a landlord is entitled to have regard to its property

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156 *Iqbal v Thakrar* (n 152).

157 [2003] VSC 385, [13]. See also *Pimms Ltd v Tallow Chandlers Company* [1964] 2 QB 547, 564 (Willmer, Danckwerts and Diplock LJJ); *International Drilling* (n 153) 520; *Tamsco* (n 131) [49].

158 [2016] VSC 693, [56].

159 *Masters Home Improvement* (n 104) [132].

interests. Nevertheless, as the authorities indicate, these interests must have some more immediate connection with the lease in question and do not include extraneous broader commercial factors. Thus, in *Commercial Tenancy Law*, it is said that:

> The court will not interfere if a reasonable person in the lessor's position might have regarded the proposed transaction as damaging to his or her own property interests, even though some persons might take a different view…Consequently, the lessor is entitled to consider the effect which the assignment may have on other premises owned by him or her…

…

Another aspect of refusal of consent is that it would be unreasonable if, in the circumstances, the refusal amounts to a derogation from the grant comprised by the lease and an arbitrary and capricious attempt to deprive the tenant of a benefit under the lease. Intrinsic to a lease is an implied term of cooperation and the implied obligation on the landlord not to derogate from the grant of the demise. The relevant question with respect to the obligation not to derogate from grant is whether the effect of the act disturbs or interferes with the tenant's occupation. There is also an implied obligation on each party to a lease to do all that is reasonably necessary to secure performance of the lease.[160]

359 To the same effect is the decision of the Court of Appeal in *Bromley Park Garden Estates Ltd v Moss*.[161] Cummings-Bruce LJ said:

> … The reason described… in evidence, and accepted by the judge as his ground for decision, was wholly extraneous to the intention of the parties to the contract when the covenant was granted and accepted. That reason cannot be relied upon merely because it would suit the landlords' investment plans, or their purpose in obtaining...the surrender of [the] lease. It may well enhance the financial interests of the landlord to obtain a single tenant holding the whole building on a full repairing covenant with long-term capital advantage when they put the building upon the market, but that intention and policy is entirely outside the intention to be imputed to the parties at the time of the granting of the lease… or the assignment…[162]

360 In the same decision, Dunn LJ said:

> …but there is nothing in the cases to indicate that the landlord was entitled to refuse his consent in order to acquire a commercial benefit for himself by putting into effect proposals outside the contemplation of the lease under consideration, and to replace the contractual relations created by the lease by some alternative arrangements more advantageous to the landlord, even

160 Ibid 74–75 [145]–[146], [148], citing *Commercial Tenancy Law* (n 145) [15.14].
161 (1982) 1 WLR 1019 (Cumming-Bruce, Dunn and Slade LJJ) ('*Bromley Park*').
162 Ibid 1031.

though this would have been in accordance with good estate management.[163]

361 *Brodan Pty Ltd v Clearview Industrial Estate Pty Ltd* involved a request by a tenant of an industrial property for approval to install pits below new furnaces used to anneal copper and copper compounds.[164] The landlord and tenant had been in dispute for some time about a range of matters. The landlord responded by asking for further details, and then advising that until the defaults earlier advised were attended to, the landlord was unable to consider the request for consent. Ultimately, the landlord pointed to damage that was adversely affecting the appearance of the floor and enhancing the difficulty of selling or leasing the premises at the end of the lease.

362 Young J held:

> It seems to me quite clear that when the court is considering the question as to whether a landlord's refusal to consent is reasonable or not, the court looks not only at his expressed reason, but also looks at certain circumstances which existed at the time of refusal, but which were not then known to the landlord, and also to reasons which existed, but which the landlord did not then express. One does not, however, look either to any new reasons which have occurred, because of circumstances after the refusal, nor does one look to see whether some of the reasons which then existed are no longer valid reasons.[165]

363 In a later passage, Young J said:

> The cases show that what is meant by "subject matter" is something which is closely connected to the premises or the relationship of lessor and lessee or perhaps the concern with respect to neighbouring premises. It does not, however, cover such situations where a landlord seeks to obtain a collateral benefit, such as to put pressure on the tenant to obtain immunity from possible increase in rates or to put pressure on the tenant to gain a surrender of the lease, or the like.[166]

Amcor's submissions

364 Amcor submitted that the purchasers lacked reasonable grounds for refusing consent. The main submissions made by Amcor were that:

(a) Omar let the purchasers make the decision;

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163 Ibid 1033.
164 (1986) 4 BPR 9173 ('*Brodan v Clearview*').
165 Ibid 9176 (citations omitted).
166 Ibid 9179.

(b) the asserted concern as to the purchasers' capacity to work effectively with Amcor was not a reasonable ground for refusing consent;

(c) contamination caused by the new equipment was not a real reason why the purchasers refused consent; and

(d) the purchasers acted in their commercial interest to end Amcor's tenancy.

Omar's submissions

365 The plaintiffs submitted that both Omar and the purchasers had reasonable grounds for refusing consent because they were concerned that:

(a) the land needed to be left in the same state (fair wear and tear excepted) when the sale contract was signed;

(b) Amcor misled them concerning the installation of the press;

(c) the purchasers could not establish a working relationship with Amcor; and

(d) possible contamination would increase costs to the purchasers in developing the land.

Was there enough information to decide whether to consent?

366 By 16 November 2018, Omar had considerable information concerning the land and the press:

(a) The principals of Omar had extensive experience of printing operations on the land, and had considerable industry knowledge.

(b) Mr Belfold and Mr Garvey had met with Amcor representatives on at least seven occasions, and were cognisant of the possibility that Amcor might seek to install a new press.

(c) ID_Land's building consultants had conducted an inspection of the press and building on 18 June 2018, and reported on what they saw. Almost five months

had elapsed since that inspection of the land.

(d) Amcor had provided plans, documentation and some photographs under cover of its solicitors' letter of 23 October 2018.

(e) ID_Land had successfully applied for a planning permit, and supplied plans and documentation to the City of Port Phillip to obtain a permit for the development of 122 three-storey townhouses.

367 I am satisfied that Omar and ID_Land had sufficient information to be able to decide whether to retrospectively consent to the works.

The purchasers not Omar made the decision to refuse consent

368 Late in 2018, Omar formed the view that it was appropriate for the purchasers to assume responsibility for dealing with Amcor's breaches of the lease given that on settlement of the sale contract the purchasers would have to deal with Omar on a continuing basis. It was the purchasers who made the decision to withhold consent to the structural alterations.

369 In the letter of 16 November 2018, the purchasers' solicitors stated that Omar was obliged under the sale contract to deliver the land to the purchasers in the same state as it was in at the time of execution of the sale contract, fair wear and tear excepted. While this was the case, it was the purchasers and not Omar who were the real decision-makers. The letter stated that the purchasers did not consider that Amcor was entitled to renew the lease, but did not specify the reason why they had declined to give consent to the structural alterations.

370 To identify the reasons why the purchasers refused retrospective consent to the works, it is necessary to look to the evidence.

Concerns about Amcor's conduct and poor working relationship

371 The purchasers bought the land subject to the existing lease. When they signed the sale contract, Amcor was the sitting tenant. They did not get to choose Amcor as the

tenant. The consent that Amcor sought was a consent to structural alterations to the building required by the installation of the press. This did not depend on whether the purchasers approved of Amcor as a tenant, or could enjoy a working relationship with Amcor.

372 Concerns about Amcor's conduct and the potential for a poor working relationship are not persuasive reasons to refuse consent for works intended to install a modern press. They raise doubt as to whether the purchasers understood the nature of the consent that was sought, particularly as there were at the commencement of the lease five existing printing presses on the land with exhaust flues through the roof including one gravure printing press installed on its own concrete slab.

373 I find that the purchasers' objection to the past conduct of Amcor was not the real or substantial reason why consent was refused to the works. Rather, the principal reason for the refusal was to prevent Amcor from entrenching itself as a tenant and from exercising its options to renew the lease. This was an unreasonable basis for declining to give consent to the works.

Contamination concerns

374 Mr Belford said that prior to late 2016, he told Mr Allibon that ID_Land was concerned about the impact that the installation would have on the contamination level of the land. Mr Allibon did not recall the statement.

375 The plaintiffs did not express any concern about contamination caused by the new press in correspondence or in emails passing between the parties. Throughout its attempts to induce Amcor to surrender the lease, ID_Land repeatedly offered to waive the make good provisions of the lease despite the fact that there were older presses on the land that had been operating for a number of years.

376 Although the press uses solvents and vents to air after exhaust gasses are treated, there is no evidence of any contamination or pollution to the land caused by the press. The purchasers did not procure an expert environmental review of press waste or emissions or request an environment management plan. They did not seek

expert advice as to whether there really was a problem, or investigate whether environment protection licences or works approvals were needed. They were protected at all times by the covenants of the lease.

377 I do not consider that the risk or threat of contamination caused by the future use of the press was a significant concern. It was an unreasonable basis for the purchasers to refuse consent to the structural alterations.

The purchasers' commercial interest in ending Amcor's tenancy

378 The purchasers had a very strong commercial interest in obtaining possession of the land to redevelop it as a residential estate. They made a large investment exceeding $30 million in purchasing the land and sought to commence residential development of the land as soon as possible.

379 In December 2017, ID_Land obtained a two year permit to develop the land for 122 townhouses. Although the permit was capable of extension, it expired in December 2019.

380 On many occasions, Mr Garvey and Mr Belford expressed their desire to have Amcor vacate the land and not exercise its options to renew the lease. At every opportunity, they pressed the importance to ID_Land of early possession of the land.

381 In a series of escalating offers, over the period from October 2016 until February 2018, ID_Land offered Amcor large sums of money to obtain the surrender of the lease.

382 In his evidence, Mr Belford discounted the significance to ID_Land of obtaining vacant possession of the land in the decision to refuse consent to the structural alterations. However, ID_Land was a developer, not a long term investor in industrial property. It had no interest in waiting five or seven years for the lease to conclude and possession of the land to revert to the purchasers.

383 ID_Land's aspiration to obtain possession of the land as soon as possible is illustrated by its unwillingness to enter into a lease with CitiPower for an upgraded

power supply. If placed in an inconvenient location, a new substation might impinge on the residential development of the land. It might also serve to entrench Amcor as the sitting tenant.

384 Having regard to the whole of the evidence, I am satisfied that the principal reason for the plaintiffs' refusal to consent to the works was the desire to obtain early possession of the land for residential development. The existence of continuing and unremedied breaches of the lease by Amcor suited ID_Land's interests and could debar Amcor from validly exercising its option to renew the lease. This would mean that Amcor would have to vacate the land at the end of the lease on 30 March 2019.

Did the purchasers unreasonably withhold consent to the works?

385 In *Ashworth Frazer Ltd v Gloucester City Council*, Lord Bingham set out three overriding principles to be considered when deciding whether a landlord's withholding of consent was reasonable:

(a) There must be a connection between the landlord's reasons and the relevant subject matter of the lease.

(b) The question of whether the landlord's conduct was reasonable is one of fact.

(c) The question is whether the landlord's conduct was reasonable, and not whether it was right or justifiable.[167]

386 A landlord is entitled to have regard to its property interests in deciding whether consent should be given under a covenant of a lease. Indeed, as Young CJ observed in *Tamsco*, there is no independent rule that a collateral purpose necessarily makes the refusal of consent unreasonable as the collateral purpose may be connected with the terms of the lease.[168] However, a decision to refuse consent for extraneous broader commercial factors without any immediate connection to the lease is outside

167 [2001] 1 WLR 2180, 2182–2183.
168 *Tamsco* (n 131) [53].

the range of permissible proprietary interests.[169]

387 In *Secured Income*, Mason J adopted a passage from *Colvin v Bowen*[170] where Walsh J held that the desire of the landlord to resume possession of the property in order to occupy it was not a proper ground for refusing consent.[171] To the same effect are *Bates v Donaldson*[172] and *In Re Winifrey & Chatterton's Agreement.*[173]

388 In *Boss v Hamilton Island Enterprises Ltd*, the Queensland Court of Appeal held that a landlord was not entitled to refuse consent to the assignment of a sublease for the purpose of acquiring a commercial benefit through more advantageous management arrangements.[174]

389 Likewise, in *Brodan v Clearview*, where a landlord refused to consent to alterations and sought to put pressure on a tenant to gain a surrender of the lease as a collateral benefit, Young J held that the landlord's conduct was unreasonable.[175] The landlord's reasons were not within the scope of permissible considerations which might cause a landlord to refuse consent.

390 For the reasons that I have given, I am satisfied on the balance of probabilities that the predominant reason for the purchasers' refusal to consent to the structural alterations was to advance their commercial interests by denying Amcor the opportunity to renew the lease, and thereby to regain possession of the land. This was important to them as they sought to redevelop the land for townhouses at the earliest opportunity. They were principally motivated by an extraneous commercial purpose unrelated to the covenants of the lease.

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169 *Masters Home Improvement* (n 104) [146], [148] (Croft J); *Eddadock Pty Ltd v Denning Properties Pty Ltd* [2002] NSWSC 208 [72] (Bergin J); *McKenzie v McAllum* [1956] VLR 208, 215 (Duffy J).

170 (1958) 75 WN (NSW) 262, 264.

171 *Secured Income* (n 121) [34].

172 [1896] 2 QB 241 (Kay and Smith LJJ).

173 [1921] 2 Ch 7 (Sargant J).

174 [2010] 2 Qd R 115, 130 [14], 155 [145] (Fraser JA, Chesterman JA and Margaret Wilson J agreeing at 156). See also *Bromley Park* (n 161) 1033A.

175 *Brodan v Clearview* (n 164) 9179.

CONCLUSION

General conclusion

391 I have found that Amcor acted in breach of cl 5.4 of the lease when it performed the works. Its breach of cl 5.4 was unremedied when the renewal notices were given. Amcor also acted in breach of cls 5.2 and 5.6 of the lease by carrying out structural alterations. The cutting of the purlins and the cutting out of the roof in a number of locations were unremedied when the renewal notices were served.

392 Amcor did not request consent from Omar before it commenced the works. Amcor did seek retrospective consent after performing the works but this was too late to attract the requirement that the consent not be unreasonably refused. Had the request for consent been made within time, and been refused, on the evidence before me, I would have held that it was unreasonably refused.

393 The result is that Amcor was not entitled to exercise its option to renew the lease as under cl 12(1)(b)(A), there were continuing unremedied breaches of cls 5.2, 5.4 and 5.6 of the lease at the time when the renewal notices were given.

Remedies

394 The plaintiffs are entitled to a declaration that the renewal notices were of no effect and that the lease expired on 31 March 2019. They are entitled to possession of the land. The counterclaim must be dismissed.

SCHEDULE OF PHOTOGRAPHS

Photograph 1 – General view of interior of the building showing steel trusses, purlins and installed printing plant with southern flue at far end.

Photograph 2 - Slab cut out and excavation works in progress in 2017.

Photograph 3 – Freshly poured slab with finishing works in progress.

Photograph 4 – Northern flue roof penetration from the interior showing cut purlin and trimming purlins.

Photograph 5 – Northern flue.

Photograph 6 - Southern flue with bracing frame/damper.

SCHEDULE OF PARTIES

OMAR PROPERTY PTY LTD (ACN 602 739 668)	First Plaintiff (First Defendant by counterclaim)
MB WILLIAMSTOWN ROAD PTY LTD (ACN 612 177 723) AS TRUSTEE FOR THE MB WILLIAMSTOWN ROAD TRUST	Second Plaintiff (Second Defendant by counterclaim)
JG WILLIAMSTOWN ROAD PTY LTD (ACN 612 179 352) AS TRUSTEE FOR THE JG WILLIAMSTOWN ROAD TRUST	Third Plaintiff (Third Defendant by counterclaim)
ID WILLIAMSTOWN ROAD PTY LTD (ACN 612 184 675)	Fourth Plaintiff (Fourth Defendant by counterclaim)
AMCOR FLEXIBLES (PORT MELBOURNE) PTY LTD (ACN 004 284 673)	Defendant (Plaintiff by counterclaim)