IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2012 02941

IN THE MATTER OF THE *VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 1998* (Vic)

BETWEEN:

ASIAN PACIFIC BUILDING CORPORATION PTY LTD (ACN 053 997 989) — Appellant

v

SHARON-LEE HOLDINGS PTY LTD (ACN 112 486 030) — Respondent

JUDGE:	GARDE J
WHERE HELD:	Melbourne
DATE OF HEARING:	22 November 2012
DATE OF JUDGMENT:	11 February 2013
CASE MAY BE CITED AS:	Asian Pacific Building Corporation Pty Ltd v Sharon-Lee Holdings Pty Ltd
MEDIUM NEUTRAL CITATION:	[2013] VSC 11

LANDLORD AND TENANT - Effect of abolition of distress for rent on a possessory lien contained in a retail tenancy lease - Landlord's conduct not amounting to distress for rent - Lien not void as against public policy - *Landlord and Tenant (Amendment) Act 1948* (Vic), s 18 - *Landlord and Tenant Act 1958* (Vic), s 12.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr J.S. Mereine	Mr D. Pavitt
For the Respondent	Mr M. Bromley	Soho Lawyers Pty Ltd

HIS HONOUR:

Introduction

1 Asian Pacific Building Corporation Pty Ltd (ACN 053 997 989) ("the landlord") appeals under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) from orders 2 and 4 of the orders of the Victorian Civil and Administrative Tribunal ("the Tribunal") in VCAT Reference R214/2011 ("the proceeding").[1] The appeal is pursuant to leave granted by Associate Justice Mukhtar on 13 June 2012. The proceeding is in the Retail Tenancies List of the Tribunal.

2 Sharon-Lee Holdings Pty Ltd (ACN 112 486 030) ("the tenant") is the applicant in the proceeding before the Tribunal, and entered into a three-year lease ("the lease") of premises known as T1 and T2, 480 Collins Street, Melbourne ("the premises") commencing on 12 April 2009. The tenant conducted a beauty therapy business at the premises.

3 The tenant fitted out the premises at its own expense and purchased stock and equipment.

4 During the latter part of 2009, the tenant fell into arrears under the lease. On 12 February 2010, the landlord re-entered and forfeited the lease.

5 After taking possession of the premises, the landlord retained possession of all chattels, stock and equipment ("the goods") previously stored in the premises and owned by the tenant.[2]

6 On 13 September 2011, the tenant filed an application in the Retail Tenancies List of the Tribunal against the landlord seeking delivery up of the goods, or alternatively damages for detinue or conversion.

7 The landlord defended the application on the ground that it was entitled to retain the goods under a lien granted to it by the tenant in the lease. It contended that it was entitled to retain the goods until all monies owing to it were paid. It counterclaimed against the tenant for arrears of rent and other expenses associated with re-entry.

8 On 21 March 2012, the Tribunal conducted the hearing of a preliminary question to

determine whether the retention by the landlord of the goods constituted distress for rent, and whether the landlord had a claim of lien over the goods.

9 On 30 April 2012, the Tribunal published its decision ("reasons") on the preliminary question. [3]

10 On 14 May 2012, the Tribunal made orders in substance:

> (1) The question reserved for preliminary hearing as to whether the retention by the respondent of goods belonging to the [tenant] constitutes distress for rent is answered in the negative.
>
> (2) The subsidiary question whether the retention of those goods is pursuant to a contractual lien in favour of the [landlord] is answered in the negative.
>
> (3) The Tribunal declares that the conduct engaged in by the [landlord] in seizing and retaining the [tenant's] goods after the lease between the parties had come to an end did not amount to distress for rent.
>
> (4) The Tribunal declares that the [landlord] had no contractual or other right to seize and retain the goods after the lease between the parties had come to end, pending payment of outstanding moneys owed under the lease.
>
> …

11 The landlord has filed a notice of appeal dated 14 June 2012 relying on ten grounds of appeal. The tenant has not sought leave to appeal from orders 1 and 3 declaring that the conduct of the landlord in seizing and retaining the tenant's goods after the lease between the parties had come to an end did not constitute distress for rent.

The Lease

12 Clause 8.1 of the lease provides for re-entry and forfeiture in the event of default by the tenant:

> 8.1 RE-ENTRY AND FORFEITURE
>
> 8.1.1 If the reserved rent or any part of it or any other payment due is unpaid for a period of seven (7) days after the day on which it ought to have been paid whether or not any formal or legal demand has been made (the obligation to pay the reserved rent and the obligation to make other payments of money being fundamental and essential provisions in that were they not agreed by the parties as being so fundamental and essential the Lessor would not have entered into this Lease); or
>
> 8.1.2 If the Lessee commits or permits to occur any breach or default in the due and punctual observance and performance of any of the covenants obligations and provisions contained in this Lease and such breach or default continues for fourteen (14) days after service of a notice on the

> Lessee requiring it to remedy the breach or default (the obligation to observe and perform each and every one of the covenants obligations and provisions being fundamental and essential provisions in that were they not agreed by the parties as being so fundamental and essential the Lessor would not have entered into this Lease); or
>
> …
>
> then any one or more of the events referred to in sub-clauses 8.1.1 to 8.1.5 constitutes a repudiation of this Lease by the Lessee giving rise to the right of the Lessor to forfeit this Lease in any one or more of such events at any time or times and without notice or demand the Lessor has the right to accept such repudiation and terminate and forfeit this Lease consequent upon its acceptance of such repudiation and re-enter the Premises or any part in the name of the whole whereupon the estate and interest of the Lessee in the Premises is terminated and expel and remove the Lessee and those claiming under it without being taken or decreed guilty of trespass and without prejudice to any action or other remedy which the Lessor has or might or otherwise could have for arrears of rent or breach of covenant or for damages as a result of or flowing from any such repudiation and its acceptance and the consequent termination and forfeiture of this Lease including any loss or damage the Lessor may suffer as a result of the termination of this Lease prior to the date of the expiry of the Term and the Lessor will be freed and discharged from any action suit claim or demand by or obligation to the Lessee under or by virtue of this Lease. Further, the Lessor shall have a maintain a lien on all of the goods, chattels and equipment of the lessee in the Premises upon the Lessee being in breach of its obligations under the Lease and the Lessee agrees that the Lessor may remove and retain the said goods chattels and equipment until the Lessee has paid to the Lessor all amounts of money owing to the Lessor by the Lessee.
>
> (Underlining added)

13 Clause 8.4 of the lease provides for removal of the tenant's property upon re-entry by the landlord:

> 8.4 REMOVAL OF LESSEE'S PROPERTY
>
> The Lessor may upon re-entry remove from the Premises any stock-in-trade and other fittings and fixtures of the Lessee and store them in a public warehouse or elsewhere at the cost of and for the account of the Lessee without being deemed guilty of conversion or becoming liable for any loss or damage occasioned by removal or storage.

Tribunal's Main Conclusions

[4]

14 The Tribunal's main conclusions were:

- the conduct which clause 8.1 purports to authorise is prohibited by statute;
- clause 8.1 is void and [un]enforceable, insofar as it purports to give the landlord a right to hold the goods pending payment of money due under the lease;
- the seizure and subsequent retention of the goods, whether it occurred before or

after termination, is unlawful because the clause upon which such a 'right' relies is void as being against public policy;

- clause 8.1 cannot be read down so as to only give the landlord a right to seize and retain the goods following the termination of the lease;
- the contractual foundation to the right to seize and retain the goods is the lease itself;
- such a right cannot survive independently of the lease;
- the right to seize and retain the goods was extinguished once the lease had come to an end;
- clause 8.4 did not assist the landlord, as it only operated to allow the landlord to remove the goods and store them at the tenant's cost pending collection by the tenant; and
- it said nothing about giving the landlord a right to seize and hold the goods, pending payment by the tenant of all monies due under the lease.

15 The Tribunal held that the retention by the landlord of goods belonging to the tenant did not constitute distress for rent. As the goods were seized and retained after the lease had come to an end, the conduct did not amount to distress for rent.[5] However, the Tribunal held that the goods were not retained pursuant to a contractual lien. There was no contractual or other right to seize and retain the goods following termination of the lease pending payment of outstanding monies owed under the lease.[6]

Distress for Rent

16 Distress for rent was abolished in Victoria in 1948. In order to see what it was that was abolished, it is necessary to look at the nature of this remedy as it existed in Victoria at the time of abolition.

17 Shortly after separation of the Colony of Victoria from New South Wales on 1 July 1851, the Victorian Legislative Council was concerned to regulate the common law remedy of distress for rent. In December 1851, a form of warrant to distrain and an

[7]
inventory were required of landlords seeking to distrain the goods and chattels of tenants. The same Act provided for the sale of goods and chattels to be by public auction by a [8]
duly licensed auctioneer, or by various prescribed officials.

18 In 1864, a consolidating statute governing the relationship of landlord and tenant was [9]
enacted. The 1864 Act contained 102 sections and nine schedules. Before distress for rent could be levied, this statute required a warrant to distrain, a bill of charges, a signed inventory and a notice of removal. It also imposed controls over the right to sell [10]
distrained goods.

[11]
19 By 1890, a body of case law had arisen in Victoria concerning the right of landlords to distrain, and the form, authentication and execution of warrants of distress.

20 In 1909, the period of time which must elapse before distrained goods could be sold [12]
was extended by legislation from 5 to 15 days.

21 The law relating to landlord and tenant in Victoria was consolidated in 1915 and 1928. These enactments contained comprehensive provisions governing and regulating the [13]
form, manner and exercise of distress for rent.

[14]
22 In 1948, following wartime restrictions, Parliament abolished distress for rent. Simultaneously, Part IV and the Fourth to Sixth Schedules of the 1928 Act were repealed. Whilst Parliament did not specify precisely what it intended by the abolition of distress for rent, it is to be taken that Parliament intended to abolish distress for rent in its common law and statutory forms as can be seen from the simultaneous repeal of all statutory provisions then operative in Victoria governing the form, manner and exercise of distress for rent.

23 The concept of 'abolition' would normally connote the action of doing away with or [15]
putting an end to a practice or institution, and may be taken as denying legal authority or effect to any action or conduct by a landlord which would constitute distress for rent arising under the common law or under the landlord and tenant [16]
legislation operative in Victoria in 1948. Section 12 of the *Landlord and Tenant Act 1958* (Vic) recorded and declared that distress for rent was abolished in Victoria on 13

August 1948. [17]

24 Whilst s 12 has subsequently been repealed, [18] distress for rent was not revived by the repeal, [19] and distress for rent stands abolished to this day.

Nature of Distress for Rent

25 At common law, distress for rent was an incident of the right to a rent-service, and thereby an incident of the relationship of landlord and tenant. [20] It arose automatically without the need for express agreement. [21] There had to be an actual demise, and not a mere contract for a lease. [22]

26 Distress could only be levied at a time when the tenancy was subsisting. [23] If the landlord was in possession of the property, the landlord could not distrain. [24] Once a tenancy had been terminated by notice to quit, distress could not be levied, even for rent which had accrued due before the expiry of the notice. [25] If the landlord elected to forfeit the lease for breach of covenant, the landlord could not thereafter distrain for rent. [26]

27 Whilst the right of distress arose as an incident of the relationship of landlord and tenant, the parties to a lease could vary the landlord's right either by enlargement or restriction. [27]

28 A landlord need not necessarily sell distressed goods, but had the power to do so. No action lay for not selling the distressed goods. [28]

Cases Concerning Abolition of Distress for Rent

29 There are some cases which have considered the effect of the abolition of distress for rent on liens or on other rights contained in leases. In *Dovey Enterprises Ltd v Guardian Assurance Public Ltd*, [29] Gault J, who delivered the judgment of the New Zealand Court of Appeal, considered a clause of a lease which empowered the lessor following re-entry to remove from the demised premises any chattels belonging to the lessee and to hold the chattels subject to a lien securing the amount of outstanding rent or other moneys owed by the lessee.

30 The Court held that the statutory prohibition must prevail over the terms of the lease.

However, distress was not a remedy preserved by the clause.[30] This was because the lease provided that a lien arose only after termination.[31]

31 On the facts of the case, the landlord had elected to seek to maintain distress for rent in relation to part of the stock. The landlord's right to hold these goods subject to a lien in the terms of the lease was lost by the assertion of a right to distrain these goods. However, the lien was claimed in respect of the excess chattels. The result was that the distrained goods were unlawfully held by the landlord.[32]

32 In *Van der Velde v Marklyn Enterprises Pty Ltd*,[33] a ten-year lease empowered a landlord to retain possession of the tenant's property if the lease was terminated by re-entry until payment in full of rent and other moneys under the lease. A right of lien granted by the lease was exercisable only in the event of termination by re-entry.

33 Wilson J held that the right was clearly intended to survive the termination of the tenancy. Distress could be levied only during the subsistence of the tenancy. Once a tenancy had been terminated, a landlord could not thereafter distrain for rent. The right of lien was not tantamount to distress for rent.[34]

34 In *RAC Finance Ltd v Fewton Pty Ltd (in liq)*,[35] Nicholson J held that as the right of re-entry had been exercised there was no subsisting demise. The statutory abolition of distress for rent had not been transgressed. The powers granted by the clause in the lease arose following re-entry and upon the termination of the demise. The clause was not void or unenforceable.[36]

35 In *Sokolinsky v Hanave Pty Ltd*,[37] the original lease was for a term of two years expiring on 31 July 1991. After the expiration of the lease, the tenant continued in occupation on a tenancy from month to month. In late 1997, the tenant decided to sell his business and all of the equipment used by him to make leather belts. As there were arrears of rent, the landlord changed the locks and repossessed the property publishing a notice that it had taken possession of the property and the goods left on the property.

36 Phegan DCJ held that the landlord was in breach of statute[38] and was not entitled to take possession by way of distress of goods and chattels belonging to the tenant.[39]

37 Mr Mereine of Counsel, who appears for the landlord, criticises the correctness of the decision in *Sokolinsky's* case on the basis that the landlord took possession of the tenant's goods and threatened to dispose of them only after the lease had been terminated by re-entry. It is unnecessary for me to decide whether this criticism is justified on the facts as set out in the unreported decision in the case. The case is in any event distinguishable as there was no lien or other provision in the lease on which the landlord might seek to rely. No transcript or report is available as to what issues were raised on the application for leave to appeal or as to why the Court of Appeal refused leave to appeal.

38 In *Kiwi Munchies Pty Ltd v Nikolitsis*, [40] the landlord sought to impose a condition on the return of goods, and threatened to sell them. Deputy President Macnamara (as he then was) observed that the right the landlord was purporting to exercise had not existed in Victoria for over 50 years. The landlord and his agent had no right to detain the tenant's stock, plant and equipment. [41]

39 Finally, in an interlocutory application in *Gregory v Fertoza*, [42] Smart J held that the question whether there had to be an existing demise before there could be any embargo upon the levying of goods for non-payment of rent was a very arguable one. The suggestion that distress one or two days before re-entry is prohibited but permissible immediately after the re-entry raised a nice question. Such a distinction would seem to cut across the whole purpose of the abolition of distress. His Honour expressed no final view. [43]

Nature of the lien in clause 8.1

40 Clause 8 of the lease is entitled 'DEFAULT BY THE LESSEE'. Clause 8.1 is entitled 'RE-ENTRY AND FORFEITURE'. Clause 8.1.1 deals with outstanding rent, whilst clause 8.1.2 is concerned with a breach or default in the due and punctual observance and performance of any of the covenants, obligations and provisions contained in the lease for a period exceeding fourteen days after service of a notice requiring the tenant to remedy the breach or default.

41 The lien in clause 8.1 ("the lien") is found in the last few lines of the clause and arises if

the tenant is in breach of its obligations under the lease. A breach of obligations under the lease may arise during the term of the lease, and may continue after the termination of the lease.

42 The landlord contended that:

- on a proper construction of clause 8.1 of the lease, a contractual right to assert a lien arose upon the tenant being in breach of its obligations under the lease;
- the right was to secure payment of all money (not only rent) that was due and payable and did not constitute, nor was it tantamount, to distress for rent;
- the landlord enforced the right by taking possession of the goods after the lease was terminated by re-entry on 12 February 2010;
- the taking of possession of the goods on 12 February 2010 could not amount to distress for rent as the tenancy was at an end; and
- clause 8.1 of the lease did not grant the landlord a right to sell the goods to extinguish the debt, and was a different right from distress for rent.

43 In Victoria, the nature of a possessory lien in relation to goods and chattels has been discussed by the Full Court in *Protean Enterprises (Newmarket) Pty Ltd v Randall*.[44] The nature of a possessory lien under a contract for the carriage of goods was considered by the UK Court of Appeal in *George Barker (Transport) Ltd v Eynon*.[45]

44 Lord Justice Stamp with whom Sir Gordon Willmer agreed described the lien in the following way:[46]

> What is in law described under the convenient label of a 'lien' is in relation to a carrier the right to hold the goods which have been carried in respect of the costs of the carriage or, as in this case, the contractual right to hold the goods which have been carried in respect of the debt for the carriage and in the respect of the debts of the same character previously contracted.
>
> …
>
> In my judgment, these rights did not arise or come into existence at the time the carriers took possession of the goods. Nor clearly did they become exercisable at that time. The rights were rights created by the contract which became exercisable at the moment of time when the goods had been carried. The rights

> which were conferred on the carriers by condition 13 of the contract are conveniently and accurately described as a 'lien', but you do not by so describing them alter their character. They are conveniently described as 'a possessory lien', because it is only if the carriers have possession that they can be exercised. But to say that a lien, because it is so described, does not come into existence until possession is assumed is to reason falsely. Contractual rights come into existence at the time of the contract creating them notwithstanding that they may not be exercisable except on the happening of a future event.

45 These passages make it clear that a possessory lien created by a contract comes into existence when the contract is made. The lien becomes exercisable at the moment of time when the contingencies on which the lien is granted are satisfied. The right is conveniently described as a possessory lien, because it is only if possession of the goods is obtained that it can be exercised. Contractual rights such as possessory liens come into existence when the contract is made notwithstanding that they are exercisable only on the happening of a future event.

46 It is an important general principle of construction that courts should be astute, if possible, to uphold the validity of contracts. In *Darling Point Securities Pty Ltd v Industrial Equity Pty Ltd*, [47] the New South Wales Court of Appeal stated:

> There is, in my opinion, a general principle of construction which applies to the present agreement. This principle has been described in a number of ways but is to the effect that courts should be astute, if possible, to adopt a construction which upholds the validity of the contract. As *Barwick* CJ said in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1967-1968) 118 CLR 429, at 437:
>
> > "In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements."
>
> (See also *Hillas & Co Ltd v Arcos Ltd* (1932) AER Rep 494, at 499; *Meehan v Jones* (1981) 149 CLR 571, at 589; *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, at 132, 135, 140-143.)
>
> To similar effect was the observation of *Williams* J in *York Airconditioning and Refrigeration (A/asia) Pty Ltd v The Commonwealth* 80 CLR 11, at 26, as follows:
>
> > "If the court comes to the conclusion that parties intended to make a contract, it will if possible give effect to their intention no matter what difficulties of construction arise."

Is the Lien Void as Against Public Policy?

47 Mr Bromley of Counsel, who appeared for the tenant, contended that the lien was too wide and invalid for contravention of public policy namely the abolition of distress for rent. He contended that because the lien might be seen as authorising conduct by the

landlord which constituted distress for rent, the contractual stipulation giving rise to the lien was invalid and should fall. He contended that the landlord could not rely on the lien for any purpose, and argued that the present case was to be distinguished from cases such as *Van der Welde* and *RAC Finance* where the right in question did not come into existence until after re-entry. He said that the provisions in those cases did not purport to authorise distress for rent because they did not take effect to permit seizure of the goods until after the landlord and tenant relationship had ceased.

48 The main issue in this appeal is whether the abolition of distress for rent effected by sub-ss 18(1) and (2) of the *Landlord and Tenant (Amendment) Act 1948* (Vic) ("the 1948 Act") and s 12 of the *Landlord and Tenant Act 1958* (Vic) ("the 1958 Act") was intended by Parliament to invalidate provisions such as the lien.

49 The question to be decided may be formulated in another way viz whether the lien is void as purporting to authorise conduct otherwise prohibited by law.

50 The applicable principles to decide this question are found in the decision of the High Court of Australia in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*. [48]

51 In *Santai v The Owners – Strata Plan No 77971*, [49] McDougall J of the Supreme Court of New South Wales recently and helpfully summarised the applicable principles derived from *Yango Pastoral* and later cases:

> Many cases have considered the consequences of making a contract that is affected by illegality. It is convenient to start with the decision of the High Court of Australia in *Yango Pastoral Company Pty Limited v First Chicago Australia Limited* [1978] HCA 42; (1978) 139 CLR 410. That case concerned the consequences of a statutory prohibition on a body corporate's carrying on banking business in Australia unless possessed of an authority to do so. The respondent carried on an unauthorised banking business. In the course of that business, it lent money to the first appellant, and received in exchange a mortgage. The other appellants gave guarantees to the respondent of the first appellant's liability. The High Court held that neither the mortgage nor the guarantees were void or unenforceable.
>
> Gibbs ACJ described at 413 the ways in which the enforceability of a contract may be affected by a statutory prohibition rendering particular conduct unlawful. His Honour said that:
>
> > (1) the contract might be one to do something forbidden by the statute.
> > (2) Alternatively, it might be a contract prohibited (expressly or impliedly) by the statute.
> > (3) Again alternatively, a contract, although lawful on its face,

> might be made to effect a purpose rendered unlawful by statute.
> (4) Finally, a contract, although lawful according to its terms, might be performed in a manner prohibited by statute.

It is clear that his Honour did not intend that elaboration to be exhaustive.

Gibbs ACJ then moved to the consequences of illegality. He said (again at 413) that the general rule was that where a contract was expressly or impliedly prohibited by statute, it was void and unenforceable. His Honour recognised that there might be "rare" cases where a contract could be valid and enforceable notwithstanding that it was forbidden by statute. But in all cases, "the test is whether the contract is prohibited by the statute". His Honour recognised that where a statute imposed a penalty on the making or performance of the contract, the question of construction arose of whether the statute intended to render the contract void and unenforceable, or whether it intended only to inflict the penalty.

Mason J (with whom Aickin J agreed) wrote to similar effect at 423. In dealing with the question of construction, Mason J noted at 426 that where a statute imposes a penalty for contravention of an express prohibition against carrying on a business in breach of the prohibition and a person carries on that business in breach of the prohibition and enters into contracts, the question arises whether the statute intends only to penalise the contravener, or to go further and prohibit, so as to render void, contracts so made. At 429, his Honour said that "[t]here is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished".

The decision in *Yango Pastoral* was considered in *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394. Kirby P at 411 summarised the principles emerging from *Yango* as follows:

> 1. The fact that a transaction is made which results from or involves a breach of the requirement of statute may result in a conclusion that the transaction itself is illegal such that, to give effect to the statute, a court will decline to enforce the transaction or will treat it as void;
> 2. Such a result will not, however, always follow. Because statutes rarely provide, in terms, for the effect of the breach of their provisions upon such transactions, it is for the court, in applying the potentially crude instrument of the doctrine of illegality, to determine the imputed legislative intention. It must do so from the language, history and apparent policy of the statute: the court necessarily filling the gaps left by the legislature;
> 3. In reaching its conclusion, the court will consider the extent to which the statute itself already provides adequately for securing the attainment of its apparent objects and for punishing breaches of and non-compliance with its terms. It will also have regard to the possible consequences upon innocent third parties of a rigorous application of the principles as to illegality; and
> 4. Because of the sometimes drastic consequences of the application of the doctrine of illegality upon transactions, the proscription may not be extended beyond those transactions which are clearly in breach of the statute, lest, by casting the net more widely, serious injustice may be done to third parties beyond that necessary to give effect to the presumed legislative intention.

The decision of the High Court in *Fitzgerald v FJ Leonhardt Pty Limited* [1997]

HCA 17; (1997) 189 CLR 215 provides another illustration of the applicable principles. In that case, the work carried out by the respondent (which was licensed to carry out that work) for the appellants was illegal only because the appellants, whose responsibility it was to obtain the requisite permit, had failed to do so.

Dawson and Toohey JJ referred at 218 – 219 to what Gibbs ACJ had said in *Yango Pastoral* at 413. Their Honours concluded that, in the case under consideration, the first three instances were inapplicable, so that the contract could only be illegal if it fell into the fourth category. Their Honours said of that category, at 219, that it "does not stand for the proposition that a contract which is itself legal, will be unenforceable if something illegal is done in the course of its performance".

At 220, their Honours pointed out that although performance of the contract meant that the appellants – the landowner – committed an offence, the manner of performance did not turn it into a contract forbidden by the relevant statute.

McHugh and Gummow JJ considered illegality from 226. Having noted that the contract did not in terms call for the commission of any illegal act, and that the statute did not prohibit any particular act that was essential for the performance of the contract, their Honours said that performance could have been legal if the appellants had obtained the relevant permit. Thus, their Honours said, it was possible for the contract to have been performed without contravening the statute.

Against that background, McHugh and Gummow JJ said, at 227, that the relevant question was whether public policy required that the contract should not be enforced "because of its association with the illegal activity of the owner in, if not causing, then at least suffering or permitting the construction and drilling of bores... without the grant... of permits". That required consideration of "primarily... the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable."

McHugh and Gummow JJ said, at 228, that the case before them was not one of an unlicensed person seeking to recover payment for work done in contravention of the relevant statutory prohibition. The appellants' breach of the relevant legislative prohibition had an insufficient association with the statutory requirement so as to deprive the respondent of its right to payment for the work.

At 230, their Honours approved the formulation of McHugh J in *Nelson v Nelson* (1995) 184 CLR 538 at 613:

> ...Courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or (b) (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.

McHugh [J] had noted in *Nelson* that "[e]lements (ii) and (iii) may often overlap."

It is unnecessary to go to the many other cases that have considered the question of the impact of illegality on a contract. One needs to look at the terms and effect of the statutory prohibition, taking into account whether any penalty is prescribed, and ask whether the contract falls within the statutory prohibition or,

> alternatively, whether it requires the doing of some act that is the subject of the statutory prohibition, or cannot be performed without doing that which the statute prohibits.

[50]

52 In a joint decision of five judges in *Master Education Services Pty Limited v Ketchell*, the High Court considered whether a franchise agreement is vitiated where it is entered into by a corporate franchisor which had contravened the Franchising Code of Conduct. Section 51AD of the *Trade Practices Act 1974* (Cth) provided that the applicable industry codes must not be contravened by corporations in trade or commerce. The Court noted that it did not always follow from a prohibition directed to one party to an agreement that the contract was void [51] in the event of non-compliance.

53 The statutory provision considered in *Australian Broadcasting Corporation v Redmore Pty Ltd* was addressed to the ABC and enjoined it not to enter certain classes of contract without the approval of the Minister. [52] The section did not specify any penalty. The section was concerned with the manner of exercise of powers conferred by other provisions of the statute and was not directed to outsiders having contractual dealings with the ABC. It followed that the failure by the ABC to observe its internal procedures was no answer to an action against it for breach of such a contract.

54 As the Court noted in *Project Blue Sky Inc v Australian Broadcasting Authority*, [53] it is necessary to ask whether it is a purpose of the legislation that an act done in breach of the provision should be invalid. In determining the question of purpose, regard must be had not only to the language of the relevant provision but also to the scope and object of the whole statute.

55 Finally, as was said in *Archbolds (Freightage) Ltd v S Spanglett Ltd*, [54] if a court too readily implies that a contract is forbidden by statute, it takes it out of its power to provide remedies according to the circumstances of the case.

56 A year before the decision of the High Court in *Masterplan Education Services Pty Limited v Ketchell*, five judges of the High Court followed and applied the *Yango Pastoral* principles in *ACCC v Baxter Healthcare Pty Ltd*. [55]

57 The majority of the court noted that differential application of legislation to parties to a

contract is commonplace, although working out the legal consequences may be complex. Even when a statute contained a unilateral prohibition on entry into a contract, it does not follow that the contract was void. [56] Whether or not the statute has this effect depends on the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party and any other relevant considerations. Ultimately, the question is one of statutory construction.

58 In Victoria, the Court of Appeal in *Dover Beach Pty Ltd v Geftine Pty Ltd* recently considered the application of the *Yango Pastoral* principles when considering whether a major domestic building contract was void against the builder for breach of s 31(1) of the *Domestic Building Contracts Act 1995* (Vic) or for breach of s 136(2) or s 176(2A) of the *Building Act 1993* (Vic). [57]

59 In an appeal under s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Court held that the Tribunal erred when it concluded that the contract was 'void against the builder'. Whilst s 31(1) precluded the builder from entering into a contract if the contract did not have a certain content, it could not be said that the contract was void only against the builder. The contract was not rendered void because the builder was relevantly uninsured. The court gave a series of reasons why this should not be the consequence of the builder's non-compliances, and held that restitutionary relief was available.

60 In the present case, there can be no doubt about the general validity of the lease. It is a commercial lease, and represents the commercial agreement between the landlord and the tenant for the occupation of the premises. There is nothing unusual about the terms of the lease as they apply to the parties, and provide for the use and occupation of the premises.

61 It is not suggested on the facts of the case (and the Tribunal so declared) that the landlord had conducted itself in such a way as to seek to levy distress for rent. It is not a case where the statutory proscription was contravened. The problem is not that the landlord acted in contravention of the statutory provision, but rather that the drafter of the lease defined the lien in a wide manner which could embrace conduct which would

constitute distress for rent.

62 The provision contained in clause 8.1:

- is expressed as a lien and would operate as a possessory lien;
- purports to be applicable to breaches of obligations whether occurring during or after the conclusion of the lease;
- can be performed (and was in fact performed) in an entirely lawful manner;
- did not authorise the sale of any of the tenant's goods, chattels and equipment; and
- is not well drawn and presumably is intended to mean "shall have and may maintain a lien on all the goods, chattels and equipment of the Lessee in the Premises …" although neither party suggested that the infelicity in language had any particular significance or affected the outcome of the proceeding.

63 I accept that the object of the abolition of distress for rent is the protection of the public, and particularly to protect a tenant from the consequences of the seizure and sale of the tenant's goods on the premises in the event that the landlord sought to exercise the self-help remedy of distress for rent. As the Honourable A.M. Fraser stated in the Legislative Council, "distraint for rent was an anachronism and a relic of feudal days." [58] By contrast, the Honourable A.G. Warner, Minister of Housing stated that "[w]hen there is a free market, this Act will no doubt be repealed." [59]

Is the Lien Conferred on the Landlord by Clause 8.1 Valid?

64 I am of the opinion that sub-ss 18(1) and (2) of the 1948 Act and s 12 of the 1958 Act were not intended to, and do not have the effect of invalidating contractual stipulations such as the possessory lien in clause 8.1:

- Subsections 18(1) and (2) of the 1948 Act and s 12 of the 1958 Act are extremely short sections. It is clear that they intended to abolish distress for rent in its common law and statutory forms. However, there is no indication that any other object was intended. There are no machinery, implementation or penalty provisions. There are no provisions that suggest that the object went beyond the

proscription of the self help remedy of distress for rent. This was the protection to tenants that Parliament intended to give.

- Parliament could have said that a provision of a contract is void absolutely, or void to the extent to which it would confer a right to seize or hold or otherwise take control of goods to recover rent as was done in the United Kingdom. [60] It did not do so. What it did was abolish a common law remedy as modified by statute to empower a landlord during the subsistence of the tenancy to sell goods if the arrears were not paid within a specified number of days. In the absence of any provision directed at the parties' ability to make contracts (unlike the legislation operative in the United Kingdom), [61] it is hard to conclude that there was any such intention.

- The language of sub-ss 18(1) and (2) of the 1948 Act and s 12 of the 1958 Act is simple and is directed at the abolition of the common law right as modified by statute to obtain distress for rent. There is nothing express and nothing that emerges by implication that suggests that the changes were intended to invalidate a provision in a lease which granted a lien capable of being exercised in a manner which did not constitute distress for rent in either its common law or statutory form. Parliament did not prohibit any contractual provisions. What it did was to abolish a self help remedy to recover arrears of rent.

- Whilst it may be accepted that Parliament saw distress for rent as an anachronism and as a relic of feudal days, there is nothing to suggest that Parliament was intending to limit freedom of contract in other respects. To the contrary, whilst abolishing distress for rent, the provisions do not otherwise affect the rights of parties to leases generally or their freedom to enter into commercial leases as they see fit.

- Whilst the abolition of distress for rent can fairly be said to be directed at one party only viz the landlord and correspondingly benefit tenants, there is nothing to suggest that landlords were to be penalised in other ways. They were to be disadvantaged only to the extent that they could no longer levy distress for rent, as

had historically been their right.

- Invalidation of the possessory lien would significantly affect the rights of the landlord and the tenant as they agreed them in the lease. The lien has significant application to obligations unrelated in any way to rent. Invalidation of the provision would re-write the rights agreed by the parties in the event of the breach of obligations by the tenant generally. The landlord would be significantly disadvantaged well beyond the loss of the right to obtain distress for rent.

- The intention of Parliament would be realised if conduct amounting to distress for rent were prohibited, but conduct not amounting to distress for rent were not otherwise invalidated or affected. The statute already provides adequately for securing the attainment of its objects.

- The scope of the legislative purpose will be fulfilled without regarding the lien as void and unenforceable. This would affect the substantive rights of the parties as to obligations entirely unrelated to distress for rent.

65 The lien contained in clause 8.1:

- is expressed to be a lien and is not expressed to empower the landlord to levy distress for rent;

- applies to all obligations under the lease and not merely the covenant to pay rent;

- can readily be confined in its operation, as it affects rent, to the period after the termination or expiration of the tenancy;

- does not empower the landlord to sell any goods as would be the landlord's entitlement in the event that distress for rent could still be levied; and

- should be upheld on the basis that courts should be astute, if possible, to uphold the validity of contractual provisions. [62]

66 For the reasons set out above, the first three situations set out by Gibbs ACJ in *Yango Pastoral* case have no application. First, the lease did not require the commission of any

illegality. Secondly, neither s 18 of the 1948 Act nor s 12 of the 1958 Act expressly or impliedly prohibited any particular act that was essential for carrying out the lease. Thirdly, the lease was not made to seize and sell the goods, chattels and equipment in the premises. If the lien were to be affected by the statutory abolition of distress for rent it could only be because of the fourth category enumerated by Gibbs ACJ in *Yango Pastoral*, namely, that although lawful, it might be performed in a manner which was prohibited by the 1948 Act and the 1958 Act.

67 As Dawson and Toohey JJ pointed out in *Fitzgerald v F J Leonhardt Pty Ltd*, [63] the fourth category in *Yango* does not stand for the proposition that a contract, which is itself legal, will be unenforceable if something illegal is done in the course of its performance. The cases provide no authority for such a proposition. Nothing illegal was done in the present case.

68 And as Mr Mereine submitted, to similar effect is the familiar principle of law that if a contract can be performed in one of two ways, legally or illegally, it is not an illegal contract but rather unenforceable at the suit of a party who chooses to perform it illegally. [64]

Grounds 1 and 2 of the Notice of Appeal

69 By its first and second grounds of the notice of appeal, the landlord contends in substance that:

> The Tribunal erred in making the finding (at [38] of its reasons) that it had been conceded that had the landlord seized the goods during the currency of the lease, then the landlord would have been in breach of the *Landlord and Tenant Act* 1958 (Vic) and could not rely on the principles in *Yango Pastoral and Fitzgerald*, there being no basis to justify the finding.
>
> The Tribunal should have found that it was conceded that had the landlord seized the goods and sold them during the currency of the lease, then the landlord would have been in breach of the *Landlord and Tenant Act* 1958 (Vic).

70 During submissions by counsel for the landlord, the Tribunal said: [65]

> Leaving aside section 12 for the moment, could the lien have been exercised during the currency of the lease, did the clause allow that to occur?

71 In response, counsel for the landlord said: [66]

> Yes and in my submission even that wouldn't amount to distress for rent…

Counsel for the landlord went on to develop that submission, primarily on the basis that a possessory lien gave a lien or fewer rights than a landlord who was previously entitled to effect distress for rent.[67] Counsel for the landlord concluded with the following submission:[68]

> So it can't be as my friend submits that the lien which was a possessory right to hold the goods could be tantamount to distress, even if it was effected when the lease was on foot because my clients didn't have a right to sell the goods and that's a fundamental distinction between distress and a possessory lien.

72 In the circumstances it was not conceded by counsel for the landlord that had it seized the goods during the lease it would have been in breach of the 1958 Act.

Grounds 3 and 4 of the Notice of Appeal

73 Grounds 3 and 4 may be stated in substance:

> The Tribunal erred in deciding (at [42] of the reasons) that clause 8.1 is void as being against public policy.
>
> The Tribunal should have decided that clause 8.1 was lawful according to its own terms, could be performed without contravening the *Landlord and Tenant Act* 1958 (Vic) and as such it was not void.

74 The Tribunal's decision that clause 8.1 of the lease is "void as being against public policy" was founded on its conclusion that "the conduct which Clause 8.1 purports to authorise is prohibited by statute".[69]

75 For the reasons which I have given, the lien contained in clause 8.1 is not void as against public policy. The lien could have been performed in many ways without contravening the statutory abolition of distress for rent and is not void. If the landlord sought to obtain distress for rent under clause 8.1, such conduct would be unlawful, but this does not invalidate the lien or deny the lien operation and effect, for example, in circumstances where the breach of lease was unrelated to rent, or as here where the breach related to rent, but the landlord acted only after the lease was terminated.

Grounds 5 and 6 of the Notice of Appeal

76 Grounds 5 and 6 are in substance:

> The Tribunal erred in deciding (at [43] of the reasons) that the right to seize and retain the goods was contingent on the future performance of the lease.
>
> The Tribunal erred in deciding (at [46] of the reasons) that the seizure and retention of goods pursuant to clause 8.1 of the lease is an act in performance of the lease.

77 The right to seize and retain the goods was not contingent, or expressed to be contingent on the future performance of the lease.

78 At the time of entering into the lease, the tenant agreed that if the landlord became entitled to exercise its contractual right to the lien, then the landlord "may remove and retain the goods, chattels and equipment" until all moneys were paid to the landlord. The landlord was entitled to hold the goods, chattels and equipment, but not to sell them or apply the proceeds to arrears. There was no obligation upon the landlord to seize and retain the goods while the tenancy subsisted.

79 The landlord's right to seize and retain the goods was not contingent on the future performance of the lease. The right accrued upon the tenant breaching its obligation under the lease to pay moneys to the landlord with the result that the landlord could secure the payment of outstanding monies.

80 The words constituting the lien do not give rise to any ambiguity. The purpose and object of the lease was for the landlord to demise an interest in the premises to the tenant. [70] The relevant performance was the occupation of the premises by the tenant in return for the obligation to pay rent. [71] The purpose of the transaction was not for the tenant to grant or the landlord to assume an interest in the goods, chattels and equipment in the premises. The lease did not require the performance of any obligations in this regard.

81 The landlord's contractual right to assert the lien was solely contingent on the tenant's failure to perform the lease rather than the performance of any future obligation under the lease. The commercial purpose of the contractual right was to secure the payment of debts due and owing to the landlord by the tenant under the lease.

82 The lease did not require the landlord to seize and retain the goods. Rather, the landlord required possession of the goods under the lien. [72]

Grounds 7 to 10 of the Notice of Appeal

83 Grounds 7 to 10 are in substance:

> The Tribunal erred in deciding (at [47] of the reasons) that clause 8.1 did not create an accrued right, the effect of which was to permit [the landlord] to seize

and retain the goods after the lease had come to an end.

The Tribunal erred in deciding (at [47] of the reasons) that the right to seize and retain the goods was extinguished when the lease came to an end.

The Tribunal erred in deciding (at [49] of the reasons) that there is no contractual or other right to seize and retain the goods following termination of the lease, pending payment of outstanding moneys owed under the lease.

The Tribunal should have decided that:

(a) upon [the tenant] being in breach of its obligations under the lease [the landlord] had an unconditional right to:

(i) remove and retain all of the goods, chattels and equipment in the premises; and

(ii) assert a lien over all of those goods, chattels and equipment removed from the premises until [the tenant] had paid to [the landlord] all amounts of money owing to [the landlord] by [the tenant];

(b) all of the facts which gave [the landlord] that unconditional right had occurred prior to the lease being terminated by re-entry;

(c) that unconditional right was not contingent on the future performance of the lease;

(d) that unconditional right was not extinguished when the lease came to an end; and

(e) therefore, on re-entry and termination of the lease, [the landlord] had an unconditional right to remove and retain all of the goods, chattels and equipment in the premises and assert a lien over all of those goods, chattels and equipment removed from the premises until [the tenant] had paid to [the landlord] all amounts of money owing to [the landlord] by [the tenant].

[73]

84 In *McDonald v Dennys Lascelles Ltd*, the High Court said as to rescission of a contract that:

> Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired.
> ….
> But when a contract, which is not void or voidable at law, or liable to be set aside in equity is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.

85 When the lease was terminated, there were no unfulfilled promises in relation to the landlord's contractual right to assert a lien. Rather, the tenant was in breach of its obligation to pay rent. The effect of the lien was that the landlord could take possession

of, and retain the goods, chattels and equipment in the premises. The contingencies that gave the landlord the right to assert a lien over the goods, chattels and equipment had been satisfied.

86 The fact that the landlord had to take possession of the goods to take the benefit of the right did not prevent that right maturing into an immediately enforceable obligation which was not discharged on termination of the lease. The position is analogous to that which obtains when a party is entitled to a right, which is contingent upon an event which does not involve further performance of the contract. [74]

87 The effect of the provision in clause 8.1 of the lease was that the parties agreed that if the tenant breached its obligations the landlord would have the right to assert a possessory lien which was intended to secure performance of the obligation of the tenant to pay all outstanding moneys owed to the landlord.

Conclusion

88 For the reasons set out above, I have come to the conclusion that the Tribunal has erred on questions of law, that the appeal should be allowed and that orders 2 and 4 of its order of 14 May 2012 should be set aside.

89 The reasons that I have given are sufficient to dispose of the preliminary point raised in the Tribunal. However, the proceedings before the Tribunal involve a number of conflicting claims and cross-claims. I am unaware of these claims, or their factual or legal merit. They were not argued before me and are yet to be determined by the Tribunal. As was discussed in *Osland v Secretary to the Department of Justice (No 2)*, [75] it is appropriate for the matter to be remitted to the Tribunal for determination in accordance with these reasons for decision, and in accordance with law. This will permit the other claims to be considered by the Tribunal and all of the proceedings resolved.

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[1]

[2]
[3] The goods were returned by the landlord to the tenant after monies were paid in January 2012.
[4] [2012] VCAT 546.
[5] Ibid [40]-[44] and [46]-[49].
[6] Ibid [49].
[7] Ibid.
[8] *An Act to regulate Distress and proceedings therein 1851* (Vic), 15 Vict no 4, ss II and III.
[9] Ibid, s VII.
[10] *The Landlord and Tenant Statute 1864* (Vic), 27 Vict no 192.
[11] Ibid ss 53, 72, 75, 78 and 81, 4th and 5th Schedules.
[12] *Landlord and Tenant Act 1890* (Vic), 54 Vict no 1108, Annotations.
[13] *Landlord and Tenant Act 1909* (Vic), 9 Edw. VII, Act no 2211, s 10.
[14] *Landlord and Tenant Act 1915* (Vic), 6 George V, Act no 2677, ss 49-88; *Landlord and Tenant Act 1928* (Vic), 19 George V, Act no 3710, ss 28-65.
[15] *Landlord and Tenant (Amendment) Act 1948*, Act no 5291 of 1948, ss 18(1) and (2).
[16] See, the Macquarie Dictionary Online, which defines "abolish" as a verb meaning "to do away with; put an end to; annul; destroy ... [French *abolis-*, stem of *abolir*, from Latin *abolēre* destroy]."
[17] Under Commonwealth wartime regulations, it was impossible to issue distress for rent. The effect of abolition in 1948 was that when the Commonwealth controls ceased, distress for rent would no longer be available under the *Landlord and Tenant Act 1928* (Vic) – see the Legislative Council debate on the Landlord and Tenant (Amendment) Bill, 11 August 1948, page 2313 per the Hon. A.M. Fraser.
[18] *Landlord and Tenant Act 1958* (Vic), Act no 6285 of 1958, s 12.
[19] *Consumer Affairs Legislation Amendment Act 2010* (Vic), Act no 1 of 2010, s 91.
[20] *Interpretation of Legislation Act 1984* (Vic), s 14(2)(a) to (d).
[21] Woodfall's Law of Landlord and Tenant Vol 1 (2012 edn) 9/3 [9.004] and the authorities cited therein.
[22] Ibid.
[23] Ibid.
[24] Ibid 9/4 [9.006] and the authorities cited therein.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid 9/5 [9.008] and the authorities cited therein.
[29] Ibid 9/58 [9.147] and the authorities cited therein.
[30] [1993] 1 NZLR 540 (CA) (Hardie Boys, Gault and Anderson JJ).
[31] Ibid 546.
[32] Ibid.
[33] Ibid 547.
[34] [2005] QSC 239 (Wilson J).
[35] Ibid [13].
[36] (Unreported, Supreme Court of Western Australia, Nicholson J, 9 December 1993).
[37] Ibid 3.
[38] (Unreported, New South Wales District Court, Phegan DCJ, 18 February 2000); leave to appeal refused *Hanave Pty Ltd v Nikolinsky* (Unreported, New South Wales Court of Appeal, 13 November 2000).
[39] *Landlord and Tenant Amendment (Distress Abolition) Act 1930* (NSW).
[40] (Unreported, New South Wales District Court, Phegan DCJ, 18 February 2000) 16-7.
[41] [2006] VCAT 929 (DP Macnamara).
[42] Ibid [17], [34] and [35].
[43] (Unreported, Supreme Court of New South Wales, Smart J, 21 January 1997).
[44] Ibid 1.
[45] [1975] VR 327, 333-4.
[46] [1974] 1 WLR 462; [1974] 1 All ER 900.
[47] Ibid 472; 910.
[48] (1991) NSW Conv R 55,589, 59,525 (Clarke JA, with whom Priestley and Handley JJA agreed), followed by the Full Federal Court in *Minister of State for Employment Workplace Relations and Small Business v CPSU* (2001) 109 FCR 303, 358-9 [200].
[49] (1978) 139 CLR 410.
[50] [2010] NSWSC 628 [76]-[89]. I note that an appeal from this decision was allowed on another ground described by the Court of Appeal as "really only a side issue below" by Young JA at [16] with whom Macfarlan JA and Handley AJA agreed in *Casuarina Rec Club Pty Ltd v The Owners - Strata Plan No 77971* (2011) 80 NSWLR 711.
[51] (2008) 236 CLR 101.
[52] Ibid [16].
[53] (1989) 166 CLR 454.

[54]
[55] [1961] 1 QB 374, 387 (Pearce LJ).
[56] (2007) 232 CLR 1.
[57] Ibid 29 [46]; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1998] QB 216, 270 (Kerr LJ).
[58] (2008) 21 VR 442 (Ashley JA with whom Redlich JJA and Coghlan AJA agreed); see also *Kermani v Westpac Banking Corporation* [2012] VSCA 42.
[59] Victoria, *Parliamentary Debates,* Legislative Council, 11 August 1948, 2313.
[60] Ibid.
[61] See the *Tribunals, Courts and Enforcement Act 2007* (UK), ss 71 and 85. Section 85 provides that "a provision of a contract is void to the extent that it would do any of these –
(a) confer a right to seize or otherwise take control of goods to recover amounts within subsection (2) …" (underlining added)
[62] Ibid.
[63] See [46] above.
[64] (1997) 189 CLR 215, 219.
[65] *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, 391 cited with approval in *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 226.
[66] Transcript of Proceedings, *Sharon-Lee Holdings Pty Ltd v Asian Pacific Building Corporation Pty Ltd*, (VCAT, R214/2011, 23 March 2012) p 26 lines 27-30.
[67] Ibid p 27 lines 1-2.
[68] Ibid pp 27-31.
[69] Ibid p 31 lines 18-24.
[70] [2012] VCAT 546 [40].
[71] Undated lease, clause 2.
[72] Undated lease, clause 3.
[73] *Protean Enterprises (Newmarket) Pty Ltd v Randall* [1975] VR 327, 333-4.
[74] (1933) 48 CLR 457, 476-7 (emphasis added).
[75] *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (in liq)* (1936) 54 CLR 361, 380.