

IN THE COUNTY COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL DIVISION  
GENERAL LIST

(Un) Revised  
(Not) Restricted  
(Not) Suitable for Publication

Case No. CI-25-07630

VOLK ROAD 2020 PTY LTD (ACN 638 680 412)

Plaintiff

v

ADAM WHITE PTY LTD (ACN 626 080 233)

Defendant

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JUDGE: HIS HONOUR JUDGE MACNAMARA  
WHERE HELD: Melbourne  
DATE OF HEARING: 13 April 2026  
DATE OF JUDGMENT: 13 April 2026  
CASE MAY BE CITED AS: Volk Road 2020 Pty Ltd v Adam White Pty Ltd  
MEDIUM NEUTRAL CITATION: [2026] VCC

**REASONS FOR JUDGMENT**

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**Subject:** Retail Premises Lease  
**Catchwords:** Lease of premises for storage purposes. Whether premises are retail premises as defined in section 4 (1) of *Retail Leases Act 2003* (Vic). Storages of caravans, water craft and storage units permitted purpose under lease. Special condition prohibiting use of premises for inter alia the retail provision of services, proposed use of premises to provide storage services for reward to third parties known to lessors agent and hence to lessor. Premises are “retail premises”. Court lacks jurisdiction - *Retail Leases Act 2003* (Vic) section 89 (4)(c).  
**Legislation Cited:** *Retail Leases Act 2003* (Vic);  
**Cases Cited:** *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337  
*IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178  
*Sofos v Coburn* (1992) V Conv R 54-439  
*Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333  
**Judgment:** Proceeding dismissed for lack of jurisdiction.

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Ms A Carruthers

Level Playing Field

For the Defendant

Mr Oren Polichtuk

Aitken Partners

HIS HONOUR:

- 1 This proceeding concerns premises being part of 40 Volk Road, Cranbourne West, the registered proprietor of which is the plaintiff, Volk Road 2020 Pty Ltd. The allotment in question consists of slightly less than nine hectares. The plaintiff entered into a lease of that land on or about 1 November 2023 in the form of the Law Institute of Victoria Lease of Real Estate copyright November 2012 revision. The standard boilerplate provisions to be found in such leases were included, and the permitted use was shown as storage of caravans, water craft and storage units. As to the application of the *Retail Leases Act 2003*, Item 15, which also included the permitted use which I have just quoted, included the statement “The Act does NOT apply”, with the word “not” in block capitals.
  
- 2 The lease included certain additional or special covenants to be found at Item 22 of the schedule to the relevant lease. Additional Covenant No 7 is headed “Fitout Works and Reinstatement”. This covenant provides detailed provisions as to the conduct of certain works; attainment of proper standards; and all necessary consents, statutory or otherwise. Additional Provision 3 is as follows:
  - “(a) The landlord makes no representation as to permitted use of the premises. The tenant must obtain all permit or consent of authority if required for the use of the premises.
  - (b) The tenant may only use the premises permitted under the lease and at all times in compliance with the planning scheme of the responsible authority.
  - (c) The tenant must not use the premises:
    - (i) wholly or predominantly for the sale or hire of goods by retail or the retail provision of services; or
    - (ii) in any manner which will result in the *Retail Leases Act 2003* (Vic) applying to this lease.”
  
- 3 The special provision continues so as to exclude the existence of pre-contractual promises or representations.

4 I have been told that the tenant is up to date in the payment of rental; however, the parties have been in conflict as to matters concerning the conduct of earthworks on the premises, alleged failure to obtain necessary statutory consents, and so forth. This has resulted in the service of notices threatening forfeiture of the lease which, according to the plaintiff, have not been complied with, with the result that as far as the plaintiff is concerned this lease has been terminated.

5 The landlord plaintiff seeks possession of the property. It has commenced a proceeding in this Court, late last year, under Order 53 of the Court's Rules.

6 The defendant contends, in the circumstances, that this is an inappropriate procedure to resort to, and that Order 53 is appropriate only for pure trespassers and squatters, not for tenants or former tenants whom a plaintiff wishes to dispose of. It is unnecessary and inappropriate, however, to consider those matters, because the defendant by summons has raised a more fundamental question going to the Court's jurisdiction. Section 89 of the *Retail Leases Act* 2003 provides that a retail tenancy dispute is not justiciable in any court or before an arbitrator but is within the exclusive jurisdiction of the Victorian Civil and Administrative Tribunal. The contention therefore is that this proceeding should be stayed or dismissed.

7 Crucial to the effect of the submission is a consideration of whether this matter is properly characterised as a retail tenancies dispute, and this turns upon whether, in the circumstances, the relevant premises are retail premises. Section 4(1) defines retail premises in this way:

“(1) In this Act, retail premises means premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—

(a) the sale or hire of goods by retail or the retail provision of services”.

8 It is not contended by the defendant that the premises are used, or are to be used, either wholly or predominantly for the sale or hire of goods. Rather, it is said that

the premises are to be used, and indeed are being used, for its storage business. The defendant carries on business under the trading name “Savvy Storage”. According to an affidavit sworn by Mr White, principal of the defendant company, received for late filing over the objection of the plaintiff, the trading name “Savvy Storage”, which, it is contended, gives clear notice of the nature of the defendant’s business, whilst not appearing in the lease as executed, did appear on a variety of items of communication between the defendant and the plaintiff’s letting agent. Moreover, according to Mr White, at one stage the plaintiff’s letting agent called upon one of the branches of his company where it carried on its storage business, the contention being that a visit to these premises would give clear notice of the nature of the business which was being carried on.

9 Before going further, it is appropriate, I think, to refer to what is the legal authority on these matters in Victoria: namely, the decision of the Court of Appeal in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178. In that case, a member of the Victorian Civil and Administrative Tribunal determined that the premises in question, which were a cool store providing storage facilities for commercial operators, were not to be regarded as within the definition of retail premises. She reached this conclusion upon the basis that the customers of the facility were not ordinary members of the public who might, for instance, have consumed items of meat which were being stored on site. Rather, they were commercial entities. The argument therefore was that a transaction is one by way of retail if, and only if, it involves the person who might be described as the ultimate consumer. This argument was accepted by the member at first instance, but was reversed on appeal by Croft J. A further appeal was taken from his Honour’s determination to the Court of Appeal. There, the Court – Warren CJ, Ferguson and Kaye JJA – in a joint judgment endorsed the approach taken by Croft J. At paragraph [44] of the determination the Court said:

“The Landlord wishes to restrict the ‘consumer’ to the consumer who purchases goods or services for personal use. But that is not the sense in which the authorities have used the word ‘consumer.’ They have used it in a broader sense to mean a person who uses the service. As the judge

identified, that is not the approach that the Tribunal took. Contrary to the Landlord's contention, the judge applied the authorities that have consistently endorsed as a relevant consideration whether the user of the service is the ultimate consumer."

- 10 That case does not, in the point argued principally in the Court of Appeal, assist us with the determination of the present dispute. It does, however, provide useful guidance.
- 11 First, the Court was prepared to assume without argument that the provision of cold storage facilities to third parties constituted the provision of services. Whether the provision was by way of retail was determined in accordance with the key passage which I have just quoted. This lease includes, as a permitted use, an entitlement to store items on the premises. There is therefore a significant step in support of the defendant's argument on that basis alone. The plaintiff, however, contended that the lease to the defendant was for "clean storage" only. That phrase, "clean storage", does not appear in the lease.
- 12 An affidavit by a Ms Voon, who was the letting agent who negotiated with Mr White, the principal of the tenant company, on behalf of the landlord, was filed, and notice was given for her to attend for cross-examination. At a late date it was stated that Ms Voon could not attend because of other commitments. I expressed some dismay at this, because I was keen to seek clarification on some elements of her affidavit. I floated the idea of a short adjournment of today's hearing which might secure Ms Voon's attendance either in person or via some remote audiovisual facility, and also to cope with the objection which the plaintiff took to a late affidavit, his third, made by Mr White. In the end, counsel for the plaintiff did not embrace the idea of an adjournment, and so this matter has proceeded without Ms Voon's being able to be cross-examined. She refers to a concept of "clean storage" which the plaintiff's counsel, Ms Carruthers, says means storage of a tenant's property only, such as the bus line storing its buses, or the equipment-leasing company storing its equipment. There was, however, no evidence as to the phrase bearing that meaning. Moreover, in a context such as the present, a more obvious

meaning might be storage of materials other than refuse or waste material. Further, since the phrase is not to be found in the lease, I put the question of “clean storage” to one side and return to the lease.

13 In reliance on a decision of Nathan J in *Sofos v Coburn* (1992) V Conv R 54-439, Ms Carruthers, on behalf of the plaintiff, contended that the plain terms of the lease in question here excluded any retail use, and therefore excluded the operation of the Act. His Honour’s decision was given under the *Retail Tenancies Act* 1986, where jurisdiction to deal with retail tenancy disputes was vested in statutory arbitrators. The matter was brought before his Honour on an application to determine that an arbitrator who had assumed jurisdiction in a tenancy dispute had done so without jurisdiction. His Honour concluded that the arbitrator had acted without jurisdiction and that the appropriate orders should be made. The lease before his Honour restricted the use of the premises to wholesale and export fish supply. In fact, according to the tenants, they had used the premises for other purposes: namely, retailing of fish. His Honour concluded, in terms of the corresponding definitions in the 1986 Act, that on those facts it could not be said that the retail use was under the terms of the lease, because it was in violation thereof. He said that the words were perfectly plain and should be given their plain effect, subject only to the well-known exception deriving from the seminal analysis of Sir Anthony Mason in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352. According to Ms Carruthers, the situation was the same here, in light of the provision seeking to exclude these premises from the operation of the *Retail Leases Act* 2003.

14 Returning for a moment to the *IMCC* case, which as I have noted constitutes the most authoritative treatment of these matters, I note that the lease before the Court of Appeal and the Tribunal and Croft J included a provision that the tenant:

“Not use or permit to be used the Demised Premises or any part thereof for any purpose other than as set out in item 11 of the reference schedule or for any residential purpose whether temporarily or permanent or as retail Premises (as defined in the *Retail Tenancies Reform Act 1998*) nor permit or suffer any storage space forming part of the Demised Premises

to be used for any purpose other than storage.” (See [2017] VSCA 178, [7])

15 The Court stated at paragraph [9]:

“The parties accepted that the reference to the *Retail Tenancies Reform Act 1998* in cl 4(a)(i) could be taken, for present purposes, to be a reference to the *Retail Leases Act 2003*, and that the relevant effect of this part of the use covenant is simply to constrain the permitted use to that specified in item 11 of the reference schedule. It is not determinative of whether the premises are retail premises under the *Retail Leases Act*.”

16 The basis on which it was contended that the plain words of the lease pointed away from the premises being properly characterised as retail premises depended upon a provision not identical to, but to similar effect as, the provision which I have just quoted. The Court nevertheless found this provision ineffective to take the premises outside the ambit of the *Retail Leases Act*. Moreover, in so far as the Court simply dismissed the appeal from the determination made by Croft J, his Honour had deliberately not remitted the matter to the tribunal for further consideration, because he concluded that his determination to the effect that the premises in question were retail premises concluded the dispute. It follows, therefore, that the Court of Appeal must have concluded, and arguably in the passage by way of commentary on the relevant clause did conclude, that such a provision is ineffective to take premises which are otherwise retail premises outside the ambit of the statute.

17 This approach is in no wise inconsistent with what Nathan J held in *Sofos v Coburn*. His Honour found that the inconsistency lay not with a generalised provision excluding the retail tenancies legislation (in that instance the 1986 Act), but rather with the permitted use itself. As we have noted already, a storage use is to be regarded as capable of constituting the retail provision of services. Aside from the evident conclusion to that effect by the Court of Appeal in the *IMCC* case, Judge Robertson in *Horgan v Equi Ventures Pty Ltd and Anor (Ruling)* [2024] VCC 1965, surveying this area of the law and having reviewed the leading cases, said at paragraph [69] of her judgment:

“In addition to the “ultimate consumer test,” other factors relevant to determining whether goods or services provided from leased premises are “retail” include:

...

(h) storage of goods at leased premises is a retail use”

18 Her Honour footnoted a decision of VCAT in *Global Tiger Logistic Pty Ltd v Chapel Street Trust* (Unreported, Victorian Civil and Administrative Tribunal, Member Rowland, 24 October 2012).

19 The ineffectiveness of the excluded provisions in *IMCC* and, I am inclined to think, the present instance, must be explained by reference to s94 of the *Retail Leases Act*. That provision has a heading, or chapeau, stating:

“94. The Act prevails over retail premises leases, agreements etc.

(1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

(2) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it purports—

(a) to exclude the application of a provision of this Act; ...”

20 Accordingly, we have reached the situation where a permitted use for storage purposes is at least *prima facie* to be regarded as consistent with a retail use.

21 In another decision in the early days of the retail tenancies legislation, namely *Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333, Nathan J considered the position of patent attorneys. He determined that a lease to a firm of patent attorneys could be regarded as a retail lease with the leased premises being retail premises, despite the fact that the attorneys typically dealt with other professionals rather than ordinary members of the community and despite the fact that they communicated electronically and by telephone rather than with customers coming in and coming out of the premises. More particularly, at page

333, he said it was relevant, in determining whether premises were retail premises or not, to consider not merely what the lease provided but also what actually happened.

- 22 As to this, the plaintiff raised a fairly complex series of issues. The first was to contend that the matter of use needed to be determined at the outset of the relevant lease, and it would not be possible, and indeed had not been proven, that a retail use – that is, using the premises for the purpose of offering storage facilities to third parties – had been established as at the commencement of the lease on 1 November 2024. The contention seemed to be that unless it could be proven that the relevant enterprise was up and running from the very outset, the premises simply did not enter the field of retail premises. Ms Carruthers on behalf of the plaintiff referred to various statements to the effect that the status of premises as retail premises needed to be fixed from the outset. She conceded that premises may cease to be retail premises during the course of the lease, apparently referring to a decision in the 1990s of the Supreme Court where that eventuality occurred because a tenant converted from a private company to a public company.
- 23 Turning aside from these fairly arcane matters, and reverting to the terms of the definition of retail premises in s4(1), the Act provides that under the terms of the lease relating to the premises, the premises “are used, or are to be used, wholly or predominantly” etc. By the clear words of the statute, there is no requirement that the retail use commence *instanter*. Indeed, this is at odds with all commercial experience, where retailers typically require some weeks to fit out their shop premises.
- 24 In my view, where a lease with a permitted use for storage purposes is entered into, the definition is met where it appears that preliminary steps are being taken immediately to set up the premises for the business permitted by the lease, and some minor delay does not affect the characterisation of the premises at all.

25 Under cross-examination, Mr White said that the premises were commenced for trading purposes in January 2024. Ms Carruthers cross-examined him upon this, seeking in a broad sense to raise doubt – which she did not definitively put to him – that it was untrue. Rather, her contention was that the affidavit material on behalf of the defendant did not exhibit a range of material indicative of trading, and trading from the relevant premises. We found in the course of discussion on that subject a pro forma storage contract which mentioned on one page another set of premises from which apparently the defendant traded and the subject premises. This was a pro forma only. Ms Carruthers said that to make good the argument that was being put, an entire range of customer contracts should have been produced. Mr White said it would be possible to produce them, but he was not pressed on the subject. The contention of Ms Carruthers, as I understood it, was that as applicant for relief by way of stay or dismissal it was incumbent on the defendant to produce that material, and failure to do so meant that the defendant fell short, and the application for a stay or dismissal should fail as a result.

26 In my view there was an element of unreality in all this. It did not seem to be put in any positive way that the enterprise conducted by the defendant company that carries on business under the name of “Savvy Storage” was other than what might be supposed from the name: namely, the provision to third parties of storage services.

27 Further, based on the uncontradicted evidence of Mr White that the managing agent visited premises where the defendant company was carrying on this business, I conclude that it must have been evident to the agent what the relevant business was. Mr White said – and he was not challenged, and there was no evidence to contradict this – that the agent was the only point of contact between him and the plaintiff lessor. Therefore, I conclude that the knowledge of the agent should be attributed to the principal, namely the plaintiff. If that be true, the situation is one in which the plaintiff well knew the nature of the enterprise which the defendant was conducting, and contented itself in the expectation of escaping

an onerous statutory regime with provisions restricting retail uses which, to the mutual knowledge of the relevant parties, was not intended to have contractual effect. Mr White has deposed to his premises being open for extensive hours to members of the public wishing to avail of the storage facilities, and further that these facilities are provided for reward.

28 When one adds all of those matters together, in my view it is clear that these premises are or were to be used for the retail provision of services, and in those circumstances disputes as to the lease which the plaintiff now says has been determined are, at least as far as Victorian jurisdiction is concerned, within the sole jurisdiction of the Victorian Civil and Administrative Tribunal and not within the jurisdiction of this Court.

29 Accordingly, the relief which is sought by the defendant should be granted.

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