

Television Education Network

Landlord's consent to sublease request: A case update (Victoria)

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1. Scope of paper

The recent appeal decision in *Aventus Cranbourne Thompson Road Pty Ltd v Home Consortium Leasehold Pty Ltd*¹ (**Aventus**) places a spotlight on the right to sublease premises under a commercial lease, particularly on what amounts to “permitted use”, and to a lesser extent what amounts to “unreasonably withholding consent” by the landlord.

This paper looks at:

- (a) What happened in the Aventus case?
- (b) What is the impact of the case on a right of a tenant to sublease part of premises?
- (c) The interpretation of restrictions on subletting under a lease – What amounts to permitted use?
- (d) What amounts to unreasonably withholding consent to sublease?
- (e) What should a landlord take into account in determining whether to give a tenant the right to sublease?
- (f) What relevance is a landlord’s corporate structure on the exercise by a tenant of a right to sub-lease?
- (g) How should you advise landlords when faced with requests from tenants wanting to sublease?

2. What happened in the Aventus case?

2.1. Property and Interested Parties

- (a) The case was commenced by the Tenant, Masters Home Improvement Australia Pty Ltd (**Masters**) against its Landlord, Aventus Cranbourne Thompsons Road Pty Ltd (**Aventus**) in respect of a lease of Cranbourne premises (**Lease**).
- (b) The area leased by Masters (**Premises**), is situated over three titles of which Aventus is registered owner. The titles contain the Premises and surplus land, part of which is leased to an Early Learning Centre.
- (c) Two additional adjacent titles of land of which, Aventus Cranbourne Pty Ltd is registered owner, a related company to Aventus, comprise a strip of tenancies and land leased by Bunnings.
- (d) Collectively the titles are known as the ‘Cranbourne Home Centre’ (**Cranbourne Home Centre**) and the Premises as the ‘Cranbourne Home Improvement Store’.
- (e) Aventus was part of the Aventus Group, a collection of trustee land owning companies, which operated under a overarching set of Principles or policies,

¹ [2020] VSCA 199 (**Appeal**) and primary decision *Masters Home Improvement Australia Pty Ltd v Aventus Cranbourne Thompsons Road Pty Ltd* [2019] VSC 428 (**First Instance Judgment**)

which guided the decision making of each of the corporate trustee members of the Aventus Group.

- (f) Masters was a part of the Woolworths Group, a collection of companies which operated various businesses across a number of sectors.

2.2. Relevant Chronology

- (a) The relevant chronology of events is:
 - (i) an Agreement for Lease (**AFL**) was entered into on 6 May 2013 between the then owners of the property, the Dunscombes and Masters as tenant, with Woolworths as the guarantor of Masters obligations;
 - (ii) the Lease was annexed to the AFL, having:
 - (A) BBJ Thompsons Road Pty Ltd as trustee for the BBJ Thompson Road Unit Trust, as landlord, Masters, as tenant and Woolworths, as guarantor for Masters;
 - (B) a commencement day of the Lease as 1 October 2015 with a term of 15 years, with options for renewal for up to 4 further terms (of 10 years for the first renewal and then 5 years each for the next three);
 - (iii) the Lease was never signed however the parties acted in accordance with its terms to perform their respective obligations and it was not in dispute that the Lease reflected the terms agreed between the parties;
 - (iv) on 9 March 2015, Aventus acquired the Premises and became landlord;
 - (v) the Premises were constructed specifically for and to meet the requirements of Masters, which was then opening a network of home improvement and hardware stores throughout Australia. These stores, were in large retail format or “big box” retail stores, broadly similar to the Bunnings network of stores;
 - (vi) Masters began trading from the Premises in October 2015;
 - (vii) in January 2016, Woolworths announced that it would be selling or closing the Masters Home Improvement chain of stores;
 - (viii) Masters ceased trading from the Premises in December 2016 and the Premises had been empty ever since;
 - (ix) in October 2017, Home Investment Consortium Company Pty Ltd (**Home Co**) acquired Masters parent company and became the ultimate parent company of Masters;
 - (x) despite ceasing trading Masters continued to pay rent and outgoings to Aventus as required under the Lease;
 - (xi) in mid-2018, Masters entered into negotiations with Amart Furniture Pty Ltd (**Amart**) for Amart to sublease part of the Premises from Masters;

- (xii) on 20 November 2018, Home Co, on behalf of Masters, wrote to Aventus seeking its consent for a proposed sublease of part of the Premises to Amart² and for alterations to the Premises³ in order to create the sublet premises;
 - (xiii) on 23 November 2018, Masters and Amart together with BBQSAM Holdings Pty Ltd (as guarantor) entered into an agreement for sublease. The permitted use under the sublease being for the “*display, sale and warehousing of furniture and furnishings, homewares, flooring products, blinds, etc*”;
 - (xiv) from 20 November 2018 to 8 February 2019 the parties corresponded – no formal position being communicated by Aventus to Masters – instead Aventus sought information;
 - (xv) Masters responded to the requests for information by providing further detail;
 - (xvi) in early 2019 Aventus directly sought to acquire Amart as tenant for the surplus land on the Premises for which it was registered owner;
 - (xvii) No consent was provided to Masters by Aventus;
 - (xviii) Proceedings were commenced.
 - (xix) Masters made clear through the course of the matter that it did not accept any of the issues raised by Aventus provided a reasonable basis to withhold consent. However between 6 May and 27 May 2019, the parties negotiated a form of undertaking to be provided by Masters to Aventus and the Court to resolve outstanding issues relating to the proposed alterations to the Premises relevant to the proposed sublease to Amart;
- (b) The Supreme Court heard the matter between 3 to 12 June 2020.

2.3. First Instance

- (a) The case was heard at first instance before Justice Croft with Masters seeking:
 - (i) a declaration that Aventus was in breach of clause 8.2(b)(iii) of the Lease – that is a covenant not to unreasonably withhold consent or delay its consent to the sublease of part of the Premises to Amart;
 - (ii) an order that Aventus execute such documents or assurances as may reasonably be required to provide its consent to the sublease from Masters to Amart of part of the Premises and to various alterations proposed to accommodate the sublease; and
 - (iii) damages for breaches of the Lease, together with costs and interest⁴.

² Clause 8.2(b)(iii) of the Lease.

³ Clause 7.6(b) of the Lease.

⁴ This damages assessment was agreed to be put on hold pending the determination as to whether Aventus breached clause 8.2(b)(iii) of the Lease by unreasonably withholding its consent to sublease.

- (b) It was not in dispute that Amart would be a suitable tenant and that Aventus was not concerned with Amart competing with other retail tenants at the Cranbourne Home Centre (**Centre**)⁵.
- (c) The key clauses of the lease which were the subject of consideration by the Court were:

Clause 6.3 – Trading Hours

(a) The Tenant ... must open for business during the hours of 9 am to 5 pm 7 days per week ...

Clause 7.6 – Alterations

Permits Masters to alter or refurbish the Premises, including external signage, without the consent of Aventus.

Clause 8.2 – Subleasing, Licencing or Concessions

(a) *Subject to paragraph (b), the Tenant may without the Landlord's consent:*

- (i) *sublet, or grant licences to any person for the occupation or use of, the whole or any part of the Premises; and*
- (ii) *grant concessions to any person for the use of any part or parts of the Premises.*

The Tenant must provide the Landlord with a list of the names of all sub-tenants, licensees and concessionaires occupying or using the Premises promptly upon request, together with a description of the part of the Premises being occupied or used by each sub-tenant, licensee and concessionaire. The Landlord must not request a list under this clause more than once in any 12 month period.

(b) *Despite paragraph (a), the Tenant may not without the Landlord's prior written consent (which consent must not be unreasonably withheld or delayed), sublet, grant licences or concessions which (in aggregate) exceed:*

- (i) *5% of the trading area of the Premises where the sub-leases, licenses or concessions do not form part of a sub-lease, licence or concession programme conducted by the Tenant with respect to 5 or more home improvement stores operating under the same trading name in Australia;*
- (ii) *15% of the trading area of the Premises where the sub-leases, licences or concessions form part of a sub-lease, licence or concession programme conducted by the tenant with respect to 5 or more home improvement stores operating under the same trading name in Australia; and*

⁵ The name given to the five titles of land collectively owned by Aventus and Aventus Cranbourne Pty Ltd.

(iii) 20% of the trading area of the Premises in total.

Permitted Use

Permitted Use Home Improvement Store allowing for retail, wholesale and bulk sale and display of goods, materials, products, merchandise and items of any description (including home improvements including household goods and appliances, building, hardware, timber and nursery products or materials) associated café or restaurant and any other ancillary or associate use permitted by Law.

(d) His Honour identified that the case was predominantly a 'construction of the terms of the lease exercise' and set out 5 questions for determination in light of the matters raised by the parties.

(e) Question 1: Permitted Use of Premises?

- (i) Aventus alleged that Masters aims (as a result of the acquisition by Home Co) were to subdivide the Premises into separate areas with diverse retail uses to create a large format retail shopping centre in circumstances where it had always been contemplated that the Premises would be used as a single Masters store.
- (ii) Home Co had been public in its vision of how it would re-develop the Masters sites it acquired into large format retail shopping centres.
- (iii) Aventus had also been public in its disclosure of its being a part of a corporate structure that was known as the 'Aventus Group'.
- (iv) The Aventus Group having a policy or guiding principle for management of properties held by group members through direct leasing, so as to maintain control over the tenant's and tenant mix in sites and to maximise returns to unitholders.
- (v) Masters argued that the only relevant question for the Court's determination was whether the use of the Premises under the proposed sublease was consistent with the Permitted Use under the Lease.
- (vi) Aventus argued that the Permitted Use under the Lease was for a single home improvement store, with any allowable sub-leases confirmed to area within the overall single store. It also argued that:
 - (A) the sublease provisions only contemplated the 'trading area' of the Premises being sublet (the sublease with Amart envisaged Amart also having access to the common areas including parking, storage etc); and
 - (B) the sublease provisions were to be read in the context of any grant of a sublease would be in aid of carrying on the Permitted Use of a Home Improvement Store, within that single home improvement store.

- (vii) Masters argued that it had always been open to Aventus to negotiate a 'no sub lease' clause in the Lease, or make express reference to the carrying on of a Masters business in the Permitted Use clause, or to limit Masters ability to deal with third party concessionaires only, but Aventus had not done any of these things in the Lease. As such, Masters argued that Aventus had the ability to grant the sublease to Amart and it was unreasonable for Aventus to withhold its consent.
 - (viii) His Honour found that the Permitted Use under the Lease did accommodate the use proposed to be granted under the sublease.
 - (ix) Amart was going to be selling "*household goods*" which, his Honour noted "*the parties themselves, in the Lease, provided at least a partial definition of "home improvement" – specifically defining it to include "household goods and appliances"*⁶"
- (f) Question 2: Trading Area and interdependence of clauses 6.3 and 8.2
- (i) Aventus argued that as Masters had ceased to trade, then there was "no trading area" as required by clause 8.2 of the Lease, for subleasing purposes.
 - (ii) Masters argued that by pushing for this interpretation it was reflective of the desire by Aventus to keep the Premises empty, retain its rent and keep its options open to terminate the Lease in the future. That desire not being a reasonable answer to a request by Masters to sublease the Premises,
 - (iii) His Honour acknowledged that at present there was '*no "trade" being conducted from the Premises*⁷ and as such on his view that there is no area or areas which might be described as 'trading areas'.
 - (iv) He found however that the two clauses were not interconnected but independent of each other. On its face, clause 8.2 (the ability to sublease), had no pre-condition of having to continue to trade prior to its exercise.
 - (v) Clause 6.3 dealt specifically with the obligation to keep certain trading hours.
 - (vi) His Honour noted that clause 1.2(i) of the Lease steers the interpretation of the Lease away from interconnectedness, providing as a rule of interpretation that "*unless stated otherwise, one word or provision does not limit the effect of the other*".
 - (vii) However His Honour found that a reasonable construction of the 'trading area' is that area of the Premises, simply excluding office areas and utilities areas. On that basis there was no difficulty with clause 8.2(b) operating in respect of subletting as there was no interconnectedness with clause 6.3.

⁶ At [91] of the First Instance Judgment.

⁷ At [101] of the First Instance judgment.

(g) Question 3 – does the breach of clause 6.3 (requirement to trade within specified hours) mean Aventus need not consider the request?

(i) Aventus argued that:

(A) It had carefully and deliberately reserved its rights with respect to Masters breach of clause 6.3, including by confirming in correspondence on multiple occasions, that it did not consent to Masters ceasing to trade and that cessation constitutes a breach of the Lease;

(B) The breach is a continuing breach such that Aventus has rights as long as the breach continues.

(ii) Masters argued that it is unreasonable for Aventus to accept Masters rent each month in full knowledge of the breach but then refuse to consent to the very thing that would cure the lack of trading – because the sublease will see trading recommence at the Premises – on the ground that consenting to the sublease might deprive Aventus of the right to terminate the Lease in the future for breach of the clause which requires Masters to trade from the Premises.

(iii) His Honour found in construing clause 8.2 (subleasing, licensing and concessions) that it contains no provisions imposing any preconditions with respect to its exercise. This was in contrast to clause 8.1 of the Lease, which dealt with assignment, which had a precondition that Masters not be in breach of any term of the Lease before being able to seek assignment of the Lease.

(iv) For that reason His Honour found that breach of clause 6.3 did not mean that Aventus need not consider the request for consent to sublease made by Masters.

(h) Question 4 – whether clause 8.2(a) (right to sublet) is totally obliterated?

(i) Contrary to Aventus attempts to separate clause 8.2(a) – the right to sublet from clause 8.2(b) – conditions stipulating when consent was required and argue that there was no right to sublet in the circumstances, His Honour construed clause 8.2 such that both 8.2(a) and 8.2(b) must be read together.

“They each have work to do. Moreover the two sub-clauses refer to one another. They each have work to do and, read in a common sense manner, clause 8.2(a) provides the overall right to sublease without Landlord consent. Having set up that right, clause 8.2(b) works to limit the right by setting out circumstances where the Landlord’s consent will be required⁸.”

(i) Question 5: Right to Licence and fit out works

(i) Aventus argued that the provisions of the proposed sublease to Amart purported to grant Amart a licence to use certain areas, which did not fall within the meaning of licences in clause 8.2 of the Lease.

⁸ At [114] First Instance Judgment

- (ii) As a result Aventus argued that Masters was unable to enter the proposed sublease and that to do so would be a breach of the Lease.
 - (iii) His Honour considered the difference between a sublease and licence at law⁹ and found that the right to sublet the Premises includes a right to grant a licence to the sublessee necessary or desirable for the operation of the sublessee's business.
 - (iv) Aventus argued that the Lease terms gave no permission for the Fit out works contemplated for the Amart sublease to be undertaken. His Honour however found that clause 7.6 of the Lease granted Masters an express right to alter or refurbish the Premises.
- (j) Having considered these questions His Honour then set out the applicable legal principles that the Court had to consider.
- (i) *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 unreasonable¹⁰.*
 - (ii) *Reasonableness is judged on an objective basis and confined to issues arising under the lease¹¹.*
 - (iii) *The grounds upon which the landlord's refusal of consent may be based must be concerned with either the character and personality of the proposed assignee or with matters affecting the use or occupation of the premises which may result from the proposed assignment¹².*
 - (iv) *Although the landlord only need consider its own relevant interests, it is unreasonable for it to refuse consent if the detriment to the tenant of the refusal is extreme and disproportionate to the benefit to the landlord¹³.*
 - (v) *Cathedral Place and other Australian authority focuses on the importance of reading the relevant contract and understanding the rights afforded under the contract, to whom those rights are afforded, and with respect to what premises. These authorities ...stand for the principle that considerations extraneous to these matters are unreasonable considerations¹⁴.*
 - (vi) *It is however, clear, that in considering whether to consent to a sublease... a landlord is entitled to have regard to its property interests. Nevertheless,...these interests must have some more immediate connection with the lease in question and do not include broader commercial factors¹⁵.*
 - (vii) *As the cases show, a landlord may properly have regard to a variety of matters as legitimate aspects for consideration in terms of its property*

⁹ At [125] First Instance Judgment

¹⁰ At [132] First Instance Judgment

¹¹ At [133] First Instance Judgement

¹² At [134] First Instance Judgement

¹³ At [135] First Instance Judgement

¹⁴ At [138] First Instance Judgment

¹⁵ At [146] First Instance Judgment

interests...in relation to the effect of increased competition, it has been held that it is reasonable for a landlord who is a trader to refuse consent to an assignment to a business rival; for a landlord of a shopping centre to refuse consent to a person who would compete with existing tenants in the centre, and a landlord may reasonably refuse to consent where it reasonably fears that the assignment will result in a diminution in the rental value of the property or other property belonging to itthey must be immediate factors affecting that particular landlord and its interests, and do not extend to broader commercial factors which are extraneous to that particular landlord and its property¹⁶.

- (viii) *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 of the lease and an arbitrary and capricious attempt to deprive the tenant of a benefit under the lease.... There is also an implied obligation on each party to a lease to do all that is reasonably necessary to secure performance of the lease¹⁷.*
- (ix) His Honour found analogous to the present proceedings a case where the tenant requested consent to extend trading hours which involved a development application and approval and the landlord refused to agree to the amendment and it was held that such refusal was a derogation from the grant.
- (k) Aventus had, in summary, given to Masters as the reasons for its withholding consent:
 - (i) It would adversely affect Aventus commercial and property interests in the Premises and the development of the surplus land;
 - (ii) It is legitimate for Aventus to consider the interests of the Aventus Group as a whole, and of Aventus Cranbourne (the adjacent land owner), a member of that group;
 - (iii) The sublease is the first step in Masters re-purposing the whole site into several tenancies and the marketing of the site to potential tenants of Aventus;
 - (iv) It is likely to adversely affect Aventus interests as:
 - (A) Aventus will lose control over portion of the Cranbourne Home Centre;
 - (B) Aventus will lose control over the tenancy mix;
 - (C) Masters / Home Co will be defacto landlord and will be competing for future tenants on the surplus land and the Cranbourne Home Centre;
 - (D) The proposal will increase the supply of available tenancies which will or may place downward pressure on rents;

¹⁶ At [147] First Instance Judgment

¹⁷ At [148] First Instance Judgement

- (E) Incentives offered by Masters / Home Co will or may exacerbate the pressure on rents;
 - (F) Valuation [of the Premises] will or may be negatively impacted.
 - (v) The contemplated use falls outside the Permitted use of the land;
 - (vi) Consent may prejudice Aventus ability to exercise its rights under the Lease to terminate;
 - (vii) Aventus has not been told the full nature of Home Co's proposals for the Premises;
 - (viii) Aventus has been marketing the space in the Premises in varying sizes and for diverse uses outside the Permitted Use under the Lease;
 - (ix) There is no disproportion between the detriment to Masters and the benefit to Aventus in the proposed sublease not proceeding; and
 - (x) Aventus has acted with reasonable expedition having regard to the inadequacy of the supporting information which accompanied the request¹⁸.
- (l) His Honour found that:
- (i) Aventus may only take into account its interests in the subject matter of the Lease and perhaps any adjoining property which it owns.
 - (ii) It would result in an ill defined and virtually unlimited range of commercial interests upon which a landlord could call to refuse consent if a landlord was entitled to consider interests of a broader corporate group.
 - (iii) The only basis which a broader corporate group interests could be relevant and taken into account would be if the Lease permitted Aventus to have regard to those interests¹⁹.
 - (iv) In refusing the request for consent Aventus had taken into account the Aventus Group commercial and property interests where none of those parties are a party to the Lease and had adduced no evidence as a separate corporate entity in respect to its decision to refuse the consent.
 - (v) In respect of the claimed grounds for refusal in subparagraph(k) above His Honour found that:
 - (A) There was no reasonable basis for the alleged loss of control over the Premises or tenancy mix and as such these were unreasonable. The obligations still remained in the Lease that consent would need to be sought unless the proposal fell under the limits specified in clause 8.2(b). It was therefore erroneous to consider the request as argued from the Aventus Group's point of view²⁰;

¹⁸ At [152] First Instance Judgment

¹⁹ At [166] First Instance judgment

²⁰ At [192] First Instance judgment

- (B) There was no reasonable basis for the alleged competition from Masters / Home Co as a defacto landlord for future tenants of the surplus land or Cranbourne Home Centre. Masters cannot demand Aventus act outside the terms of the Lease and Aventus is free to pursue any tenant it wishes²¹.
 - (C) The competitive effect of the proposed sublease ought not to be given so much weight as to prevail over the clear right to sublease granted to Masters under clause 8.2 of the Lease²². Such considerations His Honour found to be irrelevant²³ in the circumstances.
 - (D) There was no reasonable basis for the alleged concerns about the potential increase in supply and potential downward effect on rents. His Honour noted that there is in effect no increase in supply as Masters was seeking to sublease existing space and that Aventus had been in discussions with parties interested in leasing a substantial area at the Premises, the surplus land and the Cranbourne Home Centre²⁴.
 - (E) Any concerns about incentives which might be offered by Masters / Home Co and their effect on the value was equally applied to incentives that Aventus would be offering and their effect on value. As such these arguments cancelled each other out and the overall effect was neutral²⁵.
 - (F) Aventus was not in a position to develop the surplus land at the time. it was still considering its options, had no start date, no details of tenants it intends to attract or any other plans. As such there was not an obvious significant detriment likely to be incurred by Aventus. His Honour found that it was not reasonable for Aventus to adopt the approach hat it had in the present circumstances by refusing to provide consent and was wholly disproportionate when taking into account the detriment to Masters of the refusal and the benefit to Aventus²⁶; and
 - (G) The proposed use by Amart was within the Permitted Use of the Lease²⁷.
- (m) His Honour also found that:
- (i) Masters and Woolworths took the risk in entering into the Lease that they may not be able to obtain consent to sublease.
 - (ii) Masters will suffer a real detriment in loss of rent from the proposed sublease.

²¹ At [196] First Instance judgment

²² At [196] First Instance judgment

²³ At [198] First Instance judgment

²⁴ At [201] First Instance judgement

²⁵ At [206] First instance judgment

²⁶ At [209] First Instance Judgment

²⁷ At [214] First Instance judgment

- (iii) the interests of the Aventus Group (i.e. the ‘Guiding Principle’ adopted by Aventus not to consent to subleases, although there may be a contractual right to do so in their leases), are extraneous to the Lease and should not derogate from the right to sub-lease granted under the terms of the Lease.
 - (iv) None of the matters Aventus had provided to justify its refusal to consent to the sublease was a reasonable basis for Aventus to refuse its consent to sublease. The refusal was found to be unreasonable in all the circumstances and Masters was entitled to the declaratory relief and other orders sought²⁸.
- (n) The orders sought in 2.3(a) were then made.

2.4. On Appeal

- (a) Aventus appealed largely on two issues:
 - (i) whether the sublease to Amart falls within the specific clause allowing for a sublease; and
 - (ii) the reasonableness of Aventus’ decision to withhold consent.
- (b) This second issue only needing to be decided if, on the first issue, Aventus failed to successfully argue its case.
- (c) The Court of Appeal, citing the joint judgment of French CJ, Nettle and Gordon J in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*²⁹, held that:
 - (i) the term ‘trading area’ (in clause 8.2) and the covenant to trade (clause 6.3) do not preclude the proposed sublease to Amart, subject to it being a ‘Permitted Use’³⁰.
 - (ii) the ‘Permitted Use’ of the store relates to a store offering for sale a range of goods falling within a very broad category and covering the main trades undertaken by master tradespersons. It thus addresses both a range and various type of goods³¹.
 - (iii) the use in clause 8.2(b) of a singular ‘Home Improvement Store’ is of some relevance.

*What it suggests is that the tenant will aggregate products and services within the one store rather than house a series of separate free standing stores*³².
 - (iv) they were:

“persuaded that the ‘Permitted use’ requires that there be a single home improvement store. The Lease contains enough flexibility for the tenant

²⁸ At [220] First Instance judgment

²⁹ [2015] HCA 37

³⁰ At [60] Appeal Judgment

³¹ At [76] Appeal Judgment

³² At [78] Appeal Judgment

*to sublease or licence part of the Premises to a free standing business. However, that business must be functionally connected in a way that means that there is a single home improvement store operating from the site. Viewed objectively, that is the only form of trading that the parties to the Lease had in mind*³³.

- (v) the subtenancy clause allowed for some flexibility but it could not be used to “*fundamentally alter*” the nature of the tenancy³⁴.
- (vi) the relevant enquiry is whether under the proposed sublease to Amart, the Premises, would be used as a ‘home improvement store’³⁵.
- (vii) *The [trial] judge concluded that the permitted use under the proposed sublease to Amart fell within the Permitted Use under the Lease on the basis that furniture furnishings, homewares, flooring products and blinds were all household goods and the sale of household goods was expressly provided for under the Lease*³⁶.

*the trial judge’s approach was erroneous as it gives no content to the requirement that the Premises be uses as a home improvement store...the judge erred by focussing on only one of the two critical aspects of the definition, namely, the type of goods but not the range of goods*³⁷.

- (viii) Since 2016 the Premises had not been used for any purpose. The fact that Aventus had not taken any action in respect of Master’s breach did not mean that Aventus was not entitled to insist that any use of the Premises be confined to the ‘Permitted Use’, nor did it alter the meaning to be attributed to the Lease³⁸.
- (ix) Because Masters was not currently trading, and no home improvement store was being conducted at the Premises, the proposed Amart store must qualify as such a store. That is because it is not possible to aggregate the use that is contemplated under the proposed sublease to Amart with any other use that is presently occurring in order to satisfy the Permitted Use covenant in the Lease³⁹.
- (x) Masters contemplated that Amart will be joined by other subtenancies in the future, as part of the repurposing of the Premises, however, the question of ‘Permitted Use’ is what the proposed sublease to Amart allows at that point in time, rather than what might come in the future⁴⁰.
- (xi) *Masters made the legitimate point that it has to start somewhere given that the Masters concept store has failed and it wishes to sublet the Premises. However the fact that Masters has found itself in a difficult position does not alter the requirements of the Lease. Masters must face the reality of its own making that whether or not Amart’s use under the proposed lease is permitted by the Lease must be assessed against a*

³³ At [84] Appeal judgment.

³⁴ At [85] Appeal Judgment

³⁵ At [87] Appeal judgment

³⁶ At [91] Appeal judgment

³⁷ At [92-93] Appeal Judgment

³⁸ At [94] Appeal judgment

³⁹ At 95] Appeal judgment.

⁴⁰ At [96] Appeal judgment

blank slate because no other use is presently being carried on in the Premises. We do not consider that the Lease allows for a non-compliant use to become a compliant one by factoring in other potential uses of the Premises by hypothetical future subtenants⁴¹.

- (xii) If Amart were to commence trade in accordance with the proposed sublease then the Premises would not be used as a 'home improvement store' as Amart does not offer the range of goods required to meet this description⁴².
- (d) The Court of Appeal found as a result that the proposed sublease to Amart would not be a 'Permitted Use' of the Premises and set aside the trial judge's orders and an order made that the proceeding be dismissed.
- (e) As the Court of Appeal had found the sublease was not able to meet the 'Permitted Use' criteria they did not comment on whether Aventus refusal to consent was unreasonable in the circumstances⁴³.

3. What is the impact of the case on a right of a tenant to sublease part of premises?

- (a) Where a lease contains a right to sublease tenants will have the ability to exercise a right to sublease but can only do so within the parameters of the right granted to them.
- (b) This case emphasises the need to be clear when drafting lease terms about:
 - (i) what comprises the Permitted Use of the premises proposing to be let;
 - (ii) what conditions might be attached to a right to sublease, licence or appoint concessionaires (i.e. tenant not to be in default?, consent required or not required, consent only required in certain circumstances);
 - (iii) the extent of definitions included to provide clarity to parties; and
 - (iv) to be aware of the interaction of terms within a lease on the operative effect of rights granted (for example, singular or plural interpretations, a general obligation to give effect to the terms of the lease, entire agreement clauses).
- (c) So to the extent there are conditions to be met, then tenants need to ensure when seeking consent that these conditions are demonstrably met.

4. The interpretation of restrictions on subletting under a lease – What amounts to 'permitted use'?

- (a) In this case the right to sublease was linked to the conduct of a Permitted Use which itself was defined in the Lease.
- (b) The Court of Appeal reviewed the entirety of the clause, the relevant other clauses and definitions in the Lease and considered what the parties had intended when they entered into the Lease.

⁴¹ At [97] Appeal judgment

⁴² Ibid

⁴³ At [105] Appeal Judgment

- (c) As a result it found that operating a single home improvement store was the central purpose (or Permitted Use) which could be supplemented with other businesses related to the Permitted Use as long as the central purpose was operating.
- (d) The Court of Appeal gave effect to what it considered was the intention of the parties at the time of entrance into the Lease as reflected in the terms of the Lease itself, which was noted was entered into after negotiation involving legal practitioners on either side.
- (e) As such it equal consideration to the Permitted Use of the Premises with they type of goods proposed to be sold by Amart and concluded that without anything else Amart's use was not the Permitted Use required by the Lease.
- (f) When drafting or interpreting lease clauses that have multiple components (such as conditions) this case illustrates that the Court will give consideration to each of the components when determining the satisfaction (or otherwise) of the request against the Lease requirements in the context of the overall purpose (intention of the parties) of a lease.

5. What amounts to unreasonably withholding consent to sublease?

- (a) Apart from the over-ruling of Justice Croft's first instance decision in respect of whether the sublease to Amart fell within the Permitted Use under the Lease, the Court of Appeal did not engage with whether the conduct of Aventus was reasonable or unreasonable in withholding its consent.
- (b) As such Justice Croft's judgment provides the only guidance in these circumstances on the multiple grounds that were raised by Masters as evidence of unreasonableness of Aventus.
- (c) Justice Croft found on each of the items raised by Aventus (see the discussion above at 2.3(k) to (m) of this paper) that there was no reasonable basis for withholding consent and therefore that Aventus had been unreasonable in doing so.
- (d) The grounds referred to were extensive and raised valid commercial concerns. However the arguments were flawed, on the basis of Justice Croft's reasoning, by giving consideration to corporate group interests (Aventus Group) and not the interests of the legal entity that was landlord.
- (e) One aspect that Justice Croft noted particularly was the absence of evidence of impact / consideration on Aventus's sole position (c.f. the Aventus Group position). Had this been presented there may have been a different outcome if evidence of that nature had been presented.
- (f) The judgment as it stands maintains the strict corporations law separation of legal entitles approach to determine whose interests are being affected and whether that is reasonable in the circumstances or not.

6. What should a landlord take into account in determining whether to give a tenant the right to sublease?

- (a) A landlord will always be required to consider the specific circumstances of the proposed lease including:
 - (i) the proposed tenant;
 - (ii) the property/ premises to be leased;
 - (iii) what factors are important for the landlord to protect and how much control does the landlord wish to maintain over the premises;
 - (iv) future plans for the premises or surrounding areas of the premises;
 - (v) the inter-relationship of the lease with any sub-leases (e.g. clauses that align options being exercised, if on sale whether there is a right to end the sub-tenancy etc).
- (b) Having consideration to those factors will inform then the drafting that needs to occur in order to document the rights available and any constraints on those rights that the landlord wants to impose.
- (c) Inevitably there will also be negotiations that will seek to alter clauses so it is critical for a landlord to be firm on what is non-negotiable and what can be negotiated.

7. What relevance is a landlord's corporate structure on the exercise by a tenant of a right to sub-lease?

- (a) Looking solely at Justice Croft's judgment the answer is none whatsoever. Considerations of non-lease parties are extraneous and irrelevant to the consideration of the landlord assessing a request for consent to sublease based on His Honour's judgment.
- (b) However at [5] of the Appeal Judgment the Court of Appeal noted that if it was required to consider the reasonableness of the landlord's withholding of consent to sublease, then "*the matters that a landlord might legitimately take into account in granting or withholding consent to a sublease*" would need to be considered and "*Factually, it also requires an examination of the relevant corporate structure and landholding within the Aventus Group*".
- (c) It would appear that this is an issue to be determined another day and in the interim the landlord's interest and considerations remain pre-dominant.

8. How should you advise landlords when faced with requests from tenants wanting to sublease?

- (a) Treat any request for consent to sublease reasonably.
- (b) As landlord you are entitled to seek further information if the request does not provide all the information you might reasonably require in order to make a decision.

- (c) You are however obliged to act reasonably within the scope of the terms of the Lease and to attempt to give effect to the agreement between the parties (either by force of contractual term or by implication), save where a contractual out is available.
- (d) The main features for consideration continue to be:
 - (i) Is the proposed sublessee the type of tenant desired, if not why not; and
 - (ii) Is the proposed sublease in some way inappropriate, unfeasible or inconsistent with the terms of the Lease granted.
- (e) This case and its appeal demonstrates that the courts will give effect to the terms agreed to by the parties, as they interpret them, if differing views exist.

9 March 2021