QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Blue Corp Trading Pty Ltd v Chevron Renaissance Asia Pacific Shopping Centre Pty Ltd* [2020] QCATA 28
PARTIES:	**BLUE CORP TRADING PTY LTD** (applicant\appellant) **v** **CHEVRON RENAISSANCE ASIA PACIFIC SHOPPING CENTRE PTY LTD** (respondent)
APPLICATION NO/S:	APL079-19
ORIGINATING APPLICATION NO/S:	RSL151-18
MATTER TYPE:	Appeals
DELIVERED ON:	27 February 2020
HEARING DATE:	2 December 2019
HEARD AT:	Brisbane
DECISION OF:	Senior Member Brown Member Paratz
ORDERS:	**Application for leave to appeal refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – where the applicant sought leave to appeal – where the tribunal dismissed proceedings for want of jurisdiction –where the applicant claims errors of mixed law and fact in determining the meaning of a retail business - where no error found in the decision below – where leave to appeal refused *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 47(2)(a), s 142(1), s 142(3)(b), s 147(1), s 147(2), s 147(3) *Retail Shop Leases Act* 1994 (Qld), s 5A(1), s 5A(3), s 5A(4), s 5A(5), s 5B, s 5C, s 83(1), s 83(2)(b), s 103(1), sch *Retail Shop Leases Regulation* 2016 (Qld), sch 1 *Abrakidazzle Pty Ltd v Acacia Holdings Pty Ltd* [2006] RSLT 8 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *Bank of New South Wales v Murray* [1963] NSWR 515

Cachia v Grech [2009] NSWCA 232
Collector of Customs v Agfa-Gevaert Ltd [1996] 186 CLR 389
Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd [1993] 43 FCR 280
Ericson v Queensland Building Services Authority [2013] QCA 391
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87
Fox v Percy (2003) 214 CLR 118
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388
Hayes v Federal Commissioner of Taxation (1956) 96 CLR 47
McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577
Ozibar Pty Ltd (as trustee of Ozibar Unit Trust) v Laroar Holdings Pty Ltd [2015] QSC 345
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
Sidebottom v Cureton (1937) 54 WN (NSW) 88
Vetter v Lake Macquarie City Council (2001) 202 CLR 439
WEC Pty Ltd v Cypriot Community Of Queensland Incorporated (No 3) [2002] RSLT 26

APPEARANCES & REPRESENTATION:

Applicant:	Self represented by Ms L Goh
Respondent:	Mr S Eggins of Counsel instructed by Allens

REASONS FOR DECISION

What is this appeal about?

[1] Blue Corp Trading Pty Ltd ('Blue Corp') leased premises ('the leased premises') from Chevron Renaissance Asia Pacific Shopping Centre Pty Ltd ('Chevron') in a multi-level building ('the centre') on the Gold Coast.

[2] Chevron undertook the construction of an internal staircase near the leased premises. Blue Corp objected to the construction of the staircase and lodged a Notice of Dispute.[1] Following (unsuccessful) mediation, the Notice was referred to the tribunal. Chevron filed an application to dismiss the proceedings by Blue Corp on the basis that the tribunal did not have jurisdiction to hear and decide the dispute.[2]

[3] On 22 February 2019, the tribunal struck out the Notice of Dispute. Blue Corp appeals the decision.

Appeals – the statutory framework

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1 Notice of dispute filed 7 June 2018.
2 Application for miscellaneous matters filed 26 October 2018.

[4] An appeal to the appeal tribunal on a question of law is as of right.[3] An appeal on a question of fact or mixed law and fact may only be made with the leave of the appeal tribunal.[4]

[5] If an appeal is one against a decision on a question of fact only or a question of mixed law and fact, and leave to appeal is granted, the appeal must be decided by way of rehearing with or without the hearing of additional evidence as decided by the appeal tribunal.[5] In deciding the appeal, the appeal tribunal may confirm or amend the decision or set aside the decision and substitute its own decision.[6]

[6] The relevant principles to be applied in determining whether to grant leave to appeal are: is there a reasonably arguable case of error in the primary decision?;[7] is there a reasonable prospect that the applicant will obtain substantive relief?;[8] is leave necessary to correct a substantial injustice to the applicant caused by some error?;[9] is there a question of general importance upon which further argument, and a decision of the appellate court or tribunal, would be to the public advantage?[10]

[7] If an appeal involves a question of law, unless the determination of the error of law decides the matter in its entirety in the appellant's favour, the proceeding must be returned to the tribunal for reconsideration.[11]

Retail Shop Leases Act 1994 (Qld) ('RSL Act') – the statutory framework

[8] The tribunal has, with certain stated exceptions, jurisdiction to hear and decide retail tenancy disputes.[12] A 'retail tenancy dispute' is any dispute under or about a retail shop lease, or about the use or occupation of a leased shop under a retail shop lease, regardless of when the lease was entered into.[13] 'Retail shop lease' means a lease of a retail shop.[14] 'Lease' is defined.[15] 'Retail shop' means premises situated in a retail shopping centre or that are used wholly or predominantly for the carrying on of one or more retail businesses.[16] 'Retail business' means a business prescribed by regulation as such.[17]

[9] Of specific relevance in this appeal are sections 5A(3), (4) and (5) of the RSL Act:

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3 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') s 142(1).
4 Ibid s 142(3)(b).
5 Ibid ss 147(1), (2).
6 Ibid s 147(3).
7 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
8 *Cachia v Grech* [2009] NSWCA 232, [13].
9 Ibid.
10 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 578, 580.
11 *Ericson v Queensland Building Services Authority* [2013] QCA 391.
12 *Retail Shop Leases Act* 1994 (Qld) ('RSL Act') s 103(1).
13 Ibid sch (definition of 'retail tenancy dispute').
14 Ibid s 5A(1).
15 Ibid sch (definition of 'lease').
16 Ibid s 5B.
17 Ibid s 5C.

(3) Also, a **retail shop lease** does not include a lease of premises located in a retail shopping centre if—

(a) the premises are not used wholly or predominantly for carrying on a retail business; and

(b) at the time the lease is entered into, either—

(i) if the premises are located on a level of a multi-level building—the retail area of the level is 25% or less of the total lettable area of the level; or

(ii) if the premises are located in a single level building—the retail area of the building is 25% or less of the total lettable area of the building.

Examples for paragraph (b)—

1 A lease of premises for an accounting practice on level 4 of a retail shopping centre is not a retail shop lease if, at the time the lease is entered into, 75% of the total lettable area of level 4 is used wholly for professional or commercial offices.

2 A lease of premises for a medical centre in a stand-alone single level building within the parking area of a retail shopping centre is not a retail shop lease if, at the time the lease is entered into, 80% of the total lettable area of the building is used wholly for providing medical services.

(4) The retail area, for a level or building in a retail shopping centre, is the area of the level or building comprising premises used wholly or predominantly for carrying on retail businesses.

(5) The total lettable area, for a level or building in a retail shopping centre, is the total area of all the premises of the level or building that are—

(a) leased or occupied; or

(b) available for lease or occupation.

[10] The tribunal may make the orders it considers to be just to resolve a retail tenancy dispute.[18] The tribunal may, among other things, order the payment of an amount by a party to a dispute to a specified person.[19]

The decision below

[11] In resisting the dismissal application, Blue Corp mounted two principal arguments:

(a) Blue Corp operated a retail business from the leased premises, the lease from Chevron was a retail shop lease and consequently, the dispute was a retail tenancy dispute which the tribunal had jurisdiction to hear and decide (the leased premises argument); and

(b) Even if the premises occupied by Blue Corp were not used wholly or predominantly for carrying on a retail business, by operation of s 5A(3)(b)(i)

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18 *RSL Act* s 83(1).
19 Ibid s 83(2)(b).

of the RSL Act, Blue Corp's lease from Chevron was a retail shop lease (the retail area argument).

[12] The learned member found:

(a) The business or businesses of Blue Corp had a number of facets but it predominantly operated a real estate agency including operating a letting pool;

(b) Blue Corp offered some services that a travel agency would however these were relatively minor and incidental;

(c) The premises of Blue Corp were not used wholly or predominantly for carrying on retail businesses as defined;

(d) The total lettable area of level 1 of the centre is 4136.5m^2;

(e) Two businesses on level 1 were indisputably retail businesses with a total lettable area of 679m^2;

(f) The premises leased by Infinity Attraction on level 1 of the centre were not used wholly or predominantly for carrying on a retail business because:

(i) Infinity Attraction did not carry on children's activities;

(ii) Infinity Attraction was a tourist attraction and not an amusement parlour;

(g) Less than 25% of level 1 of the centre was a retail area; and

(h) Blue Corp's lease was not a retail shop lease.

The grounds of appeal

[13] Blue Corp's grounds of appeal are numerous however they may be grouped as:

(a) Errors relating to the finding that Blue Corp did not operate a retail business (the leased premises grounds of appeal); and

(b) Errors relating to the finding that Infinity Attraction did not carry on a retail business (the retail area grounds).

[14] The grounds of appeal raise questions of fact and possibly questions of mixed law and fact. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.[20] Where a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words and where it is reasonably open to hold that they do, then the question whether they do or do not is one of fact.[21] If facts fully found are within the spectrum of reasonableness, the question is a mixed question of fact and law.[22]

[15] The grounds of appeal raise the following issues determined by the learned member below:

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20 *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd* [1993] 43 FCR 280.

21 Ibid.

22 Ibid.

(a) The meaning of 'travel agency and booking';

(b) Whether the business conducted by Blue Corp involved, wholly or predominantly, 'travel agency and booking';

(c) The meaning of 'children's amusements';

(d) The meaning of 'amusement parlour'; and

(e) Whether the business conducted by Infinity Attraction involved, wholly or predominantly, 'children's amusements', or 'amusement parlour' or a combination of both.

[16] Accordingly, Blue Corp requires leave to pursue its grounds of appeal.

Consideration

[17] It is appropriate at the outset to make some observations regarding the power of the tribunal to summarily dismiss a proceeding. In circumstances where the tribunal considers that a proceeding or part of a proceeding is frivolous, vexatious or misconceived, or lacking in substance, or is otherwise an abuse of process the tribunal may pursuant to s 47(2)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), order the proceeding or part of the proceeding be dismissed or struck out. The power conferred by s 47 is a summary judgment power. The power to order a summary judgment should not be exercised unless it is clear that there is no real question to be tried.[23]

[18] The tribunal is a creature of statute and derives its jurisdiction from the QCAT Act and various enabling Acts. In the present dispute, the relevant enabling Act is the RSL Act. As we have outlined earlier in these reasons, the tribunal has a specific and limited jurisdiction in respect of the determination of retail shop lease disputes. In the absence of jurisdiction, a proceeding before the tribunal is misconceived and lacks substance and is liable to be dismissed.

[19] A party should only be deprived of the opportunity to pursue a proceeding in the tribunal if the proceeding is obviously hopeless or unsustainable in fact or in law, or is otherwise bound to fail. While, generally speaking, a summary judgment is not appropriate where there is a serious conflict as to a matter of fact or there is any question of credit involved,[24] consideration of a summary judgment application will very often require the determination of issues of fact.

[20] For the reasons that follow, we conclude that the learned member did not err in determining that the tribunal did not have jurisdiction in respect of the claim by Blue Corp and in dismissing the proceedings.

The leased premises grounds of appeal

[21] The learned member made three central findings in relation to the issue of whether the premises occupied by Blue Corp were used wholly or predominantly for carrying on a retail business:

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23 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87.

24 *Sidebottom v Cureton* (1937) 54 WN (NSW) 88; *Bank of New South Wales v Murray* [1963] NSWR 515.

(a) The business or businesses of Blue Corp had a number of facets but it predominantly operated a real estate agency including operating a letting pool;

(b) Blue Corp offered some services that a travel agency would offer however these were relatively minor and incidental; and

(c) The premises of Blue Corp were not used wholly or predominantly for carrying on retail businesses as defined.

[22] It was uncontroversial that the centre is a retail shopping centre. It was also uncontroversial that by operation of s 5B(a) of the RSL Act, the leased premises are a retail shop and consequently, that by operation of s 5A(1) of the RSL Act, the lease is a retail shop lease.[25]

[23] However as the learned member correctly observed, s 5A(3) of the RSL Act operates to exclude certain leases as retail shop leases.

[24] Section 5A(3) has two limbs. Both limbs must be satisfied for the section to operate to exclude a lease as a retail shop lease. The first limb requires a consideration as to whether *premises* are used wholly or predominantly for carrying on a retail business. If they are not, the first limb is satisfied. The reasons reflect the use by the learned member of the language of the section and specifically whether the *premises* were used wholly or predominantly by Blue Corp for carrying on a retail business. Contrary to Blue Corp's submission, there was no error by the learned member in this regard.

[25] Blue Corp argued below that the business conducted from the leased premises was predominantly that of a travel agency. Chevron argued that the premises were used wholly or predominantly by Blue Corp for the conduct of a real estate agency. A travel agency is a retail business.[26] A real estate agency is not a retail business. It was not contentious below that at least part of Blue Corp's business was a travel agency. What was contentious was the extent of the travel agency aspect of the business.

[26] It was not contentious that Blue Corp operated two businesses from the leased premises: Holiday Holiday and Gold Coast Property Expo.

[27] The evidence before the learned member included:

(a) Blue Corp's promotional material:

(i) referring to the business, Gold Coast Property Expo, as a 'one stop shop offering sales and purchasing services of properties on the Gold Coast, permanent or holiday letting options to investment properties' and which referred to 'the buildings that we sell and/or manage in together with some detailed description on the buildings in order to help makes comparisons easier for buyers and/or tenants';[27]

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25 Transcript of Proceedings, RSL151-18 (22 February 2019) 1-3, lines 1-13.
26 *Retail Shop Leases Regulation* 2016 (Qld) ('RSL Regulation') sch 1.
27 Affidavit of Alana Maree Petty sworn 25 October 2018, [3].

(ii) referring to Gold Coast Property Expo as 'the original leaders in holiday and permanent rentals', and offering 'a unique service to our clients managing and selling their investment properties with diligence and care';[28]

(iii) referring to the business, Holiday Holiday, as 'the letting arm' of Gold Coast Property Expo and referred to 'a selection of holiday letting apartments right in the heart of Surfers Paradise available on a short term rent';[29]

(iv) referring to Holiday Holiday as 'a licensed real estate agent' who 'manage privately owned apartments in Surfers Paradise accommodation and resorts…';[30]

(v) referring to Holiday Holiday as 'directly represents the owners of the apartments that or guests stay in. We manage housekeeping and maintenance very carefully and strive to provide as many savings as possible to owners and guests';[31]

(vi) referring to Holiday Holiday as taking 'care of individual apartments that are within our letting pools … All check-ins, check-outs and service requests are handled by our office and guest lounge in Chevron Renaissance Shopping Centre';[32]

(b) The evidence of Blue Corp's director, Ms Goh, in a previous tribunal hearing that:

(i) 30% of Blue Corp's income was derived from property sales;

(ii) 10% to 15% of Blue Corp's income was derived from tour bookings and the like;

(iii) 55% to 60% of Blue Corp's income was derived from holiday accommodation bookings.

(c) The evidence of Ms Goh in earlier District Court proceedings that she runs 'a business that conducts property sales, property rentals and holiday letting in Surfers Paradise of which I lease premises in a large shopping centre…';[33]

(d) Evidence that Ms Goh and Blue Corp hold real estate agent licences;[34]

(e) The permitted use of the leased premises pursuant to the lease as 'real estate office';[35] and

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28 Ibid [2].
29 Ibid [3].
30 Ibid [4].
31 Ibid
32 Ibid.
33 Affidavit of Lee Goh sworn 20 September 2018.
34 Affidavit of Alana Maree Petty sworn 25 October 2018, exh AMP-7.
35 Affidavit of Simon Coorey sworn 25 October 2018, exh GC-1.

(f) The evidence of Ms Goh in earlier tribunal proceedings that the holiday accommodation booked by Blue Corp related to properties managed by Blue Corp acting as the letting agent for the property owners.[36]

[28] In the proceedings below, Ms Goh gave evidence that 'I do attribute bookings as rentals. So accommodation booking, hotel bookings as far as I'm concerned, that's called rentals. So it's not that that's a real estate job.'[37]

[29] Other than the evidence to which we have referred, Ms Goh led no evidence about the business operations undertaken by Blue Corp and the income derived therefrom.

[30] In this appeal, the thrust of Ms Goh's argument is that the learned member erred in not considering that 60% to 70% of Blue Corp's revenue came from the booking of accommodation and tours and related activities and that these were not activities undertaken by a real estate agent but rather by a travel agent.

[31] The evidence of Ms Goh below was that Blue Corp operated a rental book for holiday accommodation for the benefit of the owners of such accommodation. Chevron submitted that persons using Blue Corp's services could not book accommodation at any location – Blue Corp would only book accommodation at properties it managed.

[32] In submissions below Ms Goh said:

> The reason I concentrate on properties in my books is because it has the highest commission. … (W)e do have the ability to sell other rooms, other properties elsewhere as well and we do charge our guest for such a service. However, my job is to push everyone to my product and make sure that they book the rooms that …that's from a sales point of view; I try to encourage people to … take my bookings, my accommodation. I can most certainly book accommodation in Canberra, elsewhere, for a fee but my job is to encourage people to come to the Gold Coast and book the rooms that I have because … that's the highest commission that I receive.[38]

[33] Considering the meaning of the term 'travel agency and booking' in Schedule 1 of the *Retails Shop Leases Regulation* 2006 (Qld) ('RSL Regulation'), the learned member found that the reference to 'booking' is a reference to a travel booking and not an accommodation booking. The learned member accepted that there may be a degree of overlap between the activities of a real estate agency and a travel agency. Other than the finding regarding 'booking' to which we have referred, the learned member made no specific findings as to the meaning of 'travel agency and booking'.

[34] The High Court, in *Collector of Customs v Agfa-Gevaert Ltd,*[39] set out the five general propositions in relation to the distinction between law and fact in a statutory context identified in *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd*:[40]

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36 Affidavit of Alana Maree Petty sworn 25 October 2018, exh AMP-6, 103.
37 Transcript of Proceedings, RSL151-18 (22 February 2019) 10, lines 20-22.
38 Ibid 17, lines 5-13.
39 [1996] 186 CLR 389, 396 (citations omitted).
40 (1993) 43 FCR 280, 287 (citations omitted).

> (1) The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law…
>
> (2) The ordinary meaning of a word or its non-legal technical meaning is a question of fact …
>
> (3) The meaning of a technical legal term is a question of law …
>
> (4) The effect or construction of a term whose meaning or interpretation is established is a question of law …
>
> (5) The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law … [however] when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question whether they do or not is one of fact.

[35] Whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.[41] Where a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words and where it is reasonably open to hold that they do, then the question whether they do or not is one of fact.[42] If facts fully found are within the spectrum of reasonableness, the question is a mixed question of fact and law.[43] Whether there is evidence of a particular fact is a question of law. A finding of fact in the absence of evidence to support the finding is an error of law.[44]

[36] The term 'travel agency and booking' should be given its meaning according to ordinary usage: a company that arranges travel and/or accommodation for people going on a holiday/vacation or journey.[45] Contrary to the finding by the learned member, in our view, 'booking' includes travel and accommodation bookings. However nothing turns on this.

[37] The term 'real estate agency' should also be given its meaning according to ordinary usage: a business that arranges the selling, renting, or management of homes, land, and buildings for their owners.[46]

[38] The learned member's findings regarding the business activities undertaken by Blue Corp were findings of fact. Findings of fact should not be interfered with on appeal unless they are demonstrated to be wrong by incontrovertible facts or uncontested testimony, or they are glaringly improbable or contrary to compelling inferences.[47]

[39] It was, in our view, open to the learned member on the evidence before him to conclude that the businesses operated by Blue Corp were predominantly in the nature of a real estate agency and not a travel agency. The evidence of Ms Goh was

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41 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47, 51; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 394 – 395.

42 *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd* [1993] 43 FCR 280.

43 Ibid.

44 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

45 Oxford Online Dictionary.

46 Ibid.

47 *Fox v Percy* (2003) 214 CLR 118.

that the primary focus of that part of the business involving holiday accommodation bookings was on the accommodation managed by Blue Corp for the owners of the properties. Ms Goh's evidence was that Blue Corp managed a rental book of various properties on behalf of the owners of the properties and that Blue Corp 'pushed' customers to those properties.[48] These are activities consistent with the operations of a real estate agency. There can be no doubt that the property sales activities undertaken by Blue Corp were consistent with the operation of a real estate agency. None of this evidence was contested by Blue Corp.

[40] It was therefore open on the evidence for the learned member to find that 85% to 90% of Blue Corp's income was derived from activities associated with business activities in the nature of a real estate agency.

[41] It follows that it was open on the evidence for the learned member to find that the predominant business operated by Blue Corp from the leased premises was a real estate agency and not a travel agency.

[42] There was no error by the learned member.

The retail area grounds of appeal

[43] The learned member found that the area of level 1 of the centre comprising premises used wholly or predominantly for carrying on retail businesses did not comprise more than 25% of the total lettable area of level 1. Insofar as it is relevant to this appeal the learned member arrived at this conclusion based, in part, on his findings regarding the business activities undertaken by Infinity Attraction.

[44] Level 1 of the centre comprised a number of tenancies.[49] The total lettable area on level 1 was 4136.5m^2. It was not disputed that tenancies occupying 679m^2 of the total lettable area on level 1 formed part of the retail area.

[45] Blue Corp focused upon three tenancies in support of its argument that the retail area of level 1 comprised more than 25% of the lettable area on that level:

(a) Austy Wedding Company which had an area of 209m^2;

(b) Ultiqua Lifestyle which had an area of 374m^2; and

(c) Infinity Attraction which had an area of 561m^2.

[46] The learned member found that the premises occupied by Austy Wedding Company and Ultiqua Lifestyle were not used wholly or predominantly for carrying on a retail business. These findings are not challenged by Blue Corp. The focus of Blue Corp's appeal is on the learned member's finding that the premises leased by Infinity Attraction were not used wholly or predominantly for carrying on a retail business.

[47] Blue Corp contended below that the business undertaken by Infinity Attraction fell within the meaning of 'children's amusements' or 'amusement parlour' or a combination thereof and was therefore a retail business for the purposes of s 5C of the RSL Act.

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48 Transcript of Proceedings, RSL151-18 (22 February 2019) T17, line 8.

49 Affidavit of Simon Coorey sworn 25 October 2018, [13].

[48] While the reasons refer at various points to 'children's activities' as opposed to 'children's amusements' it is readily apparent that the learned member intended to refer to 'children's amusements'.

[49] The learned member found that 'children's amusements' meant a business conducting activities aimed particularly at children, such as a play centre or children's rides. The learned member found that while the business undertaken by Infinity Attraction may hold particular appeal for children and young people it was not aimed exclusively or primarily at children and therefore did not come within the meaning of 'children's amusements'.[50]

[50] Blue Corp says that the learned member gave 'children's amusements' an unnecessarily restrictive meaning and relies upon the decision of the former Retail Shop Leases Tribunal ('RSLT') in *WEC Pty Ltd v Cypriot Community Of Queensland Incorporated (No 3)*where it was held:

> We are not dealing here with a revenue or penal statute but with a remedial Act designed to provide remedies in "small to medium" landlord-and-tenant cases without the expense, publicity and delay that may attend such litigation in the regular courts. It should be liberally construed.[51]

[51] Blue Corp also relies upon *Abrakidazzle Pty Ltd v Acacia Holdings Pty Ltd* [52] where it was held:

> The claimant submits that the nature of its business is such that it carries on a combination of businesses listed in the schedule to the regulations. These include "café", "clothing", "snack bars", "amusement parlours" and "children's amusements". Therefore, the claimant's use is "wholly or predominantly for the carrying on of one or more retail businesses".
>
> The Tribunal is of the view that each and every activity conducted by the claimant should not be considered in isolation. Given the nature of the business itself, their combined effect has to be considered. While the phrase "family activity centre" is not itself defined in the lease, in looking at its overall operation, the Tribunal accepts the claimant's submission that it predominantly carries on either a retail business or a number of retail businesses. In the Tribunal's view, "family activity centre" most likely does fall within the purview of what might be considered to be "amusement parlours" and "children's amusements". It has a café and, as the Tribunal has concluded elsewhere, "clothing" is a permitted use.[53]

[52] The terms 'children's amusements' and 'amusement parlour' in Schedule 1 of the RSL regulation should be given their ordinary meaning.

[53] The ordinary meaning of 'children's amusements' is activities, games and the like designed to provide entertainment and pleasure for children. It may be that a business undertaken by a lessee includes activities directed at children and adults alike. This might include, for example, amusement rides. However it would give the term 'children's amusements' an impermissibly broad meaning if it encompassed

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50 Transcript of Proceedings, RSL151-18 (22 February 2019) T1-8, lines 40-44.
51 [2002] RSLT 26, 7 (citations omitted).
52 *Abrakidazzle Pty Ltd v Acacia Holdings Pty Ltd* [2006] RSLT 8 ('*Abrakidazzle*').
53 Ibid 9.

activities designed to be enjoyed by children and adults alike. The word 'children's' would, if such a broad interpretation was adopted, be rendered redundant.

[54] Blue Corp, relying upon *Abrikadazzle*, says that 'children's amusements' encompasses family activities, that the business activities undertaken by Infinity Attraction may be classed as family activities and that its business therefore falls within the meaning of 'children's amusements'.

[55] In *Abrakidazzle* the lessee's business involved a number of quite separate and distinct activities some of which were identified in the Schedule to the RSL Act. The permitted use under the lease was:

> Family Activity Centre including coffee shop/café, multipurpose function room, children's drama, speech and music programs, games and paraphernalia intended for use as part of a family activity centre operation and all other activities related to or associated with the operation of a family activity centre.[54]

[56] The lessee said that it carried on a combination of businesses listed in the Schedule. The tribunal found after considering the overall operation of the lessee's business, that the lessee carried on predominantly a retail business or a number of retail businesses. The tribunal made no specific finding as to the meaning of 'children's amusements' or 'amusement parlour'.

[57] The decision in *Abrakidazzle* turns on its facts. The tribunal considered the specific activities undertaken by the lessee, which included a café and the sale of clothing together and in combination. *Abrakidazzle* is not, in our view, authority for the proposition that 'children's amusements' should be given the expansive meaning contended for by Blue Corp.

[58] We find no error by the learned member in his determination of the meaning of 'children's amusements'.

[59] The learned member found that 'amusement parlour' meant a place such as Timezone, where people go and play individual games as few or as many as they wish. Blue Corp says that the learned member erred in giving the term an overly restrictive meaning.

[60] Relying upon the decision in *Ozibar Pty Ltd (as trustee of Ozibar Unit Trust) v Laroar Holdings Pty Ltd*[55] Blue Corp says that 'amusement parlour' should be given a broad meaning. In *Ozibar,* McMeekin J was required to consider whether a nightclub fell within the meaning of 'amusement parlour'. In finding that such a conclusion was an 'impermissible stretch,' His Honour found that the concept of 'amusement parlour' was one well understood in society and 'conjures up images of innocent entertainment for the younger people involving arcade games.'[56]

[61] In particular, Blue Corp relies upon the following passage from *Ozibar*:

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54 *Abrakidazzle Pty Ltd v Acacia Holdings Pty Ltd* [2006] RSLT 8, 4.

55 *Ozibar Pty Ltd (as trustee of Ozibar Unit Trust) v Laroar Holdings Pty Ltd* [2015] QSC 345 ('*Ozibar*').

56 Ibid [28].

> I have been unable to find a dictionary definition of "amusement parlour" although I think that the concept is well understood in our society. It is encapsulated, for example, in the policy document of the Melbourne City Planning Scheme of 2006: "Amusement parlours provide an important entertainment and recreational role … particularly for young people." The National Gallery in Canberra advertises having an "amusement parlour" and indicates that available there, in what are described as "family spaces", will be "free activities inspired by Sideshow Alley for families to enjoy together." Each example reflects my understanding of the concept. Nightclubs are not the places for "young people" or "families".[57]

[62] Blue Corp says that McMeekin J's comments in *Ozibar* support the applicant's submission that 'amusement parlour' should be given a broad meaning. However, the Melbourne City Planning Scheme referred to in *Ozibar* defines 'amusement parlour' as:

> A building that contains:
>
> a) three or more coin, card, or token operated amusement machines;
>
> b) one or more coin, card, or token operated amusement machines with more than one screen or console that can be played by three or more people simultaneously; or
>
> c) two or more coin, card, or token operated billiard, snooker, or pool tables.
>
> It does not include coin, card, or token operated children's rides, amusement machines if there is the ability to receive a monetary reward, or premises used for a Bar or Hotel.[58]

[63] While McMeekin J did not refer to the above definition, it reflects in our view the ordinary meaning of 'amusement parlour' as being premises open to the public, where the predominant use is for amusement by means of coin, card or token operated amusement machines.

[64] There was no error by the learned member in his determination of the meaning of 'amusement parlour'.

[65] The evidence before the learned member described Infinity Attraction in the following terms:

> … INFINITY is enjoyed by all ages and nationalities. It is great family entertainment for adults, teens and children, a very popular party venue and a unique group or team building activity.
>
> The incredible INFINITY journey takes around 30 minutes and is suitable for children over 8.[59]

[66] The evidence before the learned member was that the activities undertaken by Infinity Attraction were designed for the enjoyment of adults and children over the age of 8 years and not to be enjoyed exclusively or predominantly by children. It

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57 *Ozibar Pty Ltd (as trustee of Ozibar Unit Trust) v Laroar Holdings Pty Ltd* [2015] QSC 345 [26].
58 Local Planning Policies Melbourne Planning Scheme.
59 Affidavit of Gerard Coory sworn 25 October 2018, exh GC-5

was open to the learned member, on the evidence, to find that the activities undertaken by Infinity Attraction were not 'children's amusements'.

[67] There was no evidence before the learned member that there were, situated on the premises of Infinity Attraction, amusement machines of the type to which we have referred. It was open to the learned member to find that the activities undertaken by Infinity Attraction did not fall within the meaning of 'amusement parlour'.

Conclusion

[68] We have found no error by the learned member. The learned member's findings of fact have not been demonstrated to be wrong, nor are they glaringly improbable or contrary to compelling inferences.

[69] There was no error by the learned member in dismissing the proceedings by Blue Corp.

Orders

[70] Application for leave to appeal refused.