IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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HAWAIIAN ASSOCIATION OF SEVENTH-DAY ADVENTISTS,
A Hawaiʻi Non-Profit Corporation,
Respondent/Plaintiff-Appellant-Cross-Appellee,

vs.

STACEY T.J. WONG, As Trustee of the Eric A Knudsen Trust,
Petitioner/Defendant-Appellee-Cross-Appellant.

SCWC-28592

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28592; CIV. NO. 03-1-0026)

JUNE 28, 2013

DISSENTING OPINION BY POLLACK, J.,
IN WHICH ACOBA, J., JOINS

I agree with the majority that "[t]he main issue before this court is whether Paragraph 16 of the Lease prohibits SDA's practice of renting cabins, as vacation residences, to members of the public not affiliated with the Church or School." Majority

Opinion at 20-21. However, I respectfully disagree with the majority's conclusion that Paragraph 16 is ambiguous. I believe that Paragraph 16 unambiguously permits cabin rentals to the general public based on: 1) the plain meaning and common application of the word "including"; 2) standard rules of contract interpretation; 3) well-established principles of landlord-tenant law providing that lessees are permitted to use the demised premises for any valid and lawful purpose absent an express or necessarily implied use restriction; and 4) the incongruous effects of interpreting the Lease in the manner propounded by the majority as a reasonable construction of the Lease.

I.

The first sentence of Paragraph 16 provides: "The demised premises shall be used only for educational, recreation (including vacation residence for members and staff of Lessee's school and church), agricultural, health care and humanitarian uses." The majority concludes that this sentence is ambiguous and could be reasonably construed to either exclude or permit individuals who are not "members and staff of Lessee's school and church" from using the demised premises for vacation residences. Majority Opinion at 20-23. As support for this proposition, the majority relies on two justifications: 1) that the word

"including" could be construed to be a term of enlargement or limitation; and 2) the canon of construction *expressio unius est exclusio alterius*, meaning "the express mention of a particular provision may imply the exclusion of that which is not included." Id. Respectfully, neither justification demonstrates that the language of the Lease is ambiguous.

A.

First, the majority cites the fact that the sixth edition of Black's Law Dictionary defines "including," when used in the context of statutes, as either a term of enlargement or limitation, depending on context. Majority Opinion at 21-22. However, the fact that a dictionary provides multiple definitions of a word used in a contract does not render the contract ambiguous. Ambiguity in a contract "is found to exist . . . only when the contract taken as a whole, is reasonably subject to differing interpretation." Sturla, Inc. v. Fireman's Fund Ins. Co., 67 Haw. 203, 209-10, 684 P.2d 960, 964 (1984) (quotation marks and brackets omitted). "[M]ere complexity," id. at 209, 684 P.2d at 964, or "the parties' disagreement as to the meaning of a contract or its terms" does not create an ambiguity. State Farm Fire & Cas. Co. v. Pacific Rent-All, Inc., 90 Hawaiʻi 315, 324, 978 P.2d 753, 762 (1999). Thus, "an agreement should be construed as a whole and its meaning determined from the entire

context and not from any particular word, phrase or clause." Maui Land & Pineapple Co. v. Dillingham Corp., 67 Haw. 4, 11, 674 P.2d 390, 395 (1984) (quotation marks and brackets omitted). In this case, as discussed herein, Paragraph 16 as a whole demonstrates no ambiguity as to the permissible uses of the demised premises, given that the only interpretation that logically comports with the plain meaning of the Lease terms is one permitting the SDA's cabin rentals to the general public.

Second, the most recent edition of Black's Law Dictionary provides: "The participle *including* typically indicates a partial list. [. . .] But some drafters use phrases such as *including without limitation* and *including but not limited to* — which mean the same thing." Black's Law Dictionary 831 (9th ed. 2009) (underline emphasis added). This is consistent with the definition of "including" provided by other sources. See Nat'l Reporter Sys., Judicial and Statutory Definitions of Words and Phrases 3500 (1904) ("'Including' is not a word of limitation. Rather [it is] a word of enlargement, and in ordinary signification implies that something else has been given beyond the general which precedes it. *Neither is it a word of enumeration*[.]") (emphasis added); Webster's Third New Int'l Dictionary 1143 (1993) (defining "include" to mean "to place,

list, or rate as a part or component of a whole or of a larger group, class, or aggregate").

Third, this court has consistently held that the term "including" is "ordinarily a term of enlargement, not of limitation[.]" Schwab v. Ariyoshi, 58 Haw. 25, 35, 564 P.2d 135, 141 (1977). We have explained that "the term, 'including' expresses 'an enlargement and has the meaning of *and* or *in addition to*, or merely specifies a particular thing already included within the general words theretofore used.'" Lealaimatafao v. Woodward-Clyde Consultants, 75 Haw. 544, 556, 867 P.2d 220, 226 (1994) (brackets omitted) (emphasis in original) (quoting Black's Law Dictionary 763 (6th ed. 1990)). Thus, the Lealaimatafao court held that by using the term "including" in a statute, the legislature intended to enumerate the types of claims that could be brought, without limiting claims to those listed. 75 Haw. at 556, 867 P.2d at 226. The court held that "[t]he term 'including' in no way implies exclusivity." Id. (emphasis added). Accordingly, rather than being an "all-embracing definition," the term "including" "connotes simply an illustrative application of the general principle." In re Waikoloa Sanitary Sewer Co., 109 Hawaiʻi 263, 274, 125 P.3d 484, 495 (2005) (quotation marks and brackets omitted).

This definition of "including" is consistent with the meaning given to the term by the U.S. Supreme Court and courts in other jurisdictions. See, e.g., Fed. Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); Puerto Rico Mar. Shipping Auth. v. Interstate Commerce Comm'n, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list . . . is illustrative, not exclusive"); Beaver Dam Cmty. Hosps., Inc. v. City of Beaver Dam, 822 N.W.2d 491, 495 (Wis. Ct. App. 2012) (noting that Wisconsin courts have consistently held that "include" is a "term of illustration or inclusion, not one of limitation or exclusion"); Paxson v. Bd. of Educ. of Sch. Dist. No. 87, Cook Cnty., Ill., 658 N.E.2d 1309, 1314 (Ill. App. Ct. 1995) (finding "the word 'including,' in its most commonly understood meaning, to be a term of enlargement, not of limitation"); Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC, 986 So.2d 1244, 1257 (Fla. 2008) ("The phrase 'including motions to quash' logically implies that motions to quash are included in addition to, not to the exclusion of, other permissible motions.").

Fourth, in the above Hawaiʻi cases interpreting the term "including," the court did not apply the maxim of *expressio unius est exclusio alterius*, which the majority relies on. See Majority Opinion at 22. *Expressio unius est exclusio alterius* is a canon of construction meaning "that to express or include one thing implies the exclusion of the other, or of the alternative."[1] Black's Law Dictionary 661 (9th ed. 2009). "For example, the rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote." Id.

However, according to the article cited by the majority opinion, *expressio unius est exclusio alterius* means that "[i]f one or more specific items are listed, without any more general or inclusive terms, other items although similar in kind are excluded." Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 853-54 (1964) (emphasis added). In this case, the item that is listed in the parenthetical clause of the first sentence is preceded by a general and inclusive term, "including," which has been defined by this court to illustrate an example of the general definition

[1] "Canons of construction provide some guidance, but cannot anticipate all of the variables which converge in a concrete case." Edwards v. United States, 583 A.2d 661, 664 (D.C. Cir. 1990). See Int'l Sav. & Loan Ass'n, Ltd., 82 Hawaiʻi 197, 201, 921 P.2d 117, 121 (1996) (*expressio unius est exclusio alterius* "exists only as an aid to statutory interpretation and its application should be limited to ascertaining legislative intent which is not otherwise apparent").

or principle rather than to imply exclusivity. Thus, the maxim of *expressio unius est exclusio alterius* is not applicable in interpreting the first sentence of Paragraph 16. See St. Paul Mercury Ins. Co. v. Lexington Ins. Co., 78 F.3d 202, 206-07 (5th Cir. 1996) ("[W]e are not convinced that the rule of *expressio unius est exclusio alterius* applies in the instant case, as the challenged list of provisions in [the] contract is prefaced by the word 'including,' which is generally given an *expansive* reading, even without the additional if not redundant language of 'without limitation.'") (emphasis in original) (footnote omitted); Dunphy Boat Corp. v. Wis. Emp't Relations Bd., 64 N.W.2d 866, 869-70 (Wis. 1954) (holding that *expressio unius est exclusio alterius* was inapplicable to interpret parenthetical clause in statute using the term "including").

The case cited by the majority opinion in support of the application of the maxim, Tsunoda v. Young Sun Kow, 23 Haw. 660 (Terr. 1917), is entirely distinguishable. Majority Opinion at 22. In that case, a lease demised to the lessee four parcels of land, with an artesian well located on one of the parcels. 23 Haw. at 661-63. The lease was accompanied by a stipulation that the lessee had the right to use as much of the water from the well on the lands demised "as shall be necessary for the purpose of irrigating the lands and for domestic purposes." Id. at 663.

Given this language, the court held that "[u]nder the rule *expressio unius est exclusio alterius* the surplus water from the well, that is, all above the amount necessary for the irrigation of the lands demised to the defendant and for his domestic purposes, was excluded from the operation of the lease." Id. at 665. This is clearly distinct from the Lease in this case, given the use of the term "including."

Therefore, the word "including" is plainly a term of illustration or inclusion rather than a term of limitation or exclusion. The first sentence of Paragraph 16 provides that the demised premises may be used for "recreation." Applying the plain meaning of "including," the parenthetical ("including vacation residence for members and staff of Lessee's school and church") constitutes an example of a permitted recreational use but in no way limits recreational use to the identified group.

B.

The majority nevertheless contends that "[i]f the parties had intended to identify vacation residence as an example of recreational use, they could have done so without referring to a particular category of persons entitled to use those vacation residences." Majority Opinion at 22-23. According to the majority, reading the parenthetical as stating an example of a permitted recreational use of the property "renders the reference

'to members and staff of Lessee's school and church' superfluous." Id. at 23 n.11.

The logical extension of the majority's argument is that clauses following the term "including" will always be considered superfluous if the term is given its ordinary meaning as a word of inclusion. Fundamentally, this would mean that the use of the term "including," or any equivalent word or phrase-"such as," "for example,"-in a contract would result in the contract being deemed ambiguous. Such an interpretation would effectively undermine the purpose of employing these terms, which are used precisely to ensure that there is no ambiguity regarding the scope of the general preceding category.

Additionally, postulating that the parties could have achieved the same effect (permitting the general public to use the premises for vacation residences) by eliminating any reference to a particular group is beside the point. The dispositive issue is what the contract actually expresses. The Lease in this case, by using the term "including," does not exclude individuals other than those referenced from using the premises for vacation residence. In any event, if one were to consider what the parties could have done, it may be observed that if the parties had desired to achieve the result proposed by the majority, then the parenthetical could have been drafted

without difficulty to expressly prohibit the general public, as follows:

> The demised premises shall be used only for educational, recreation (~~including~~ **except** vacation residence **is permitted only** for members and staff of Lessee's school and church), agricultural, health care and humanitarian purposes.

As the Lease was drafted, however, the parties did not expressly prohibit any group from using the demised premises for vacation residences. The only term used to describe the use of the property for vacation was "including." Our prior cases have interpreted the word "including" consistently with its common definition, such that the word indicates a partial list and is essentially equivalent to the phrase "including without limitation" and "including but not limited to." The majority's finding that the term is ambiguous undermines the holdings of these cases, based on an alternative dictionary definition that does not comport with the general use or meaning of "including" and based upon the application of a canon of construction that would result in the word "including" invariably meaning the opposite of its common and accepted definition. Thus, the majority's analysis may have the adverse and unintended consequence of rendering many contracts "ambiguous" on the same basis.

II.

Interpreting the first sentence of Paragraph 16 to permit cabin rentals to the general public is also consistent with the general rule of landlord-tenant law, that a tenant is entitled to use the premises for any lawful purpose absent an express or necessarily implied restriction:

> [A] lessee is entitled to use demised premises for any lawful or valid purpose without interference on the part of the lessor, so long as such use is not forbidden by an express provision or some necessarily implied construction of the lease, and does not amount to waste or destruction of the property.

86 A.L.R. 4th 263-64 (1991) (emphasis added) (footnote omitted). See 49 Am. Jur. 2d Landlord and Tenant § 404 (2006) ("In order to establish a restriction, express language or language from which a restriction is clearly implied must be shown") (footnotes omitted); Pires v. Phillips, 31 Haw. 720, 722 (Terr. 1930) ("There is nothing in the lease which binds the lessee to use the premises for any particular purpose. He may therefore use them for any purpose he pleases[.]").

Thus, "[i]t is well established that words merely descriptive of the character of leased premises, although indicative of a particular use, do not preclude the tenant from using the premises for any other lawful purpose, or, at least, for any purpose which is consistent with the character of the

property."[2] 86 A.L.R. 4th 264 (1991) (footnote omitted). See 52A C.J.S. Landlord and Tenant § 793 (2012) ("[O]rdinarily, . . . a lease for a specific purpose is generally regarded as 'permissive' instead of 'restrictive' and does not limit the use of the premises by the lessee to such purposes.") (footnotes omitted). See, e.g., Alchemy Commc'ns Corp. v. Preston Dev. Co., 558 S.E.2d 231, 235 (N.C. Ct. App. 2002) ("A mere statement of the purpose of a lease or words that describe the use of the premises are deemed permissive rather than restrictive"); Bennett v. Waffle House, Inc., 771 So.2d 370, 372 (Miss. 2000) (en banc) (lease provision setting forth use of property, "absent a clear and specific indication that the landlord intended to limit the tenant's use of the property, is generally permissive and not restrictive") (quotation marks omitted); Ray-Ron Corp. v. DMY Realty Co., 500 N.E.2d 1163, 1165 (Ind. 1986) ("A lease of property which specifies the purpose of the lease but does not prohibit other purposes is deemed permissive only"); Cox v. Ford Leasing Dev. Co., 316 S.E.2d 182, 183 (Ga. Ct. App. 1984) ("a lease for a specific purpose is generally regarded as permissive instead of restrictive") (quotation marks omitted).

[2] See, e.g., Rapids Assocs. v. Shopko Stores, Inc., 292 N.W.2d 668, 670 (Wis. Ct. App. 1980); Noon v. Mironski, 108 P. 1069, 1070 (Wash. 1910); Baron Bros., Inc. v. Nat'l Bank of S.D. Sioux Falls, 155 N.W.2d 300, 303 (S.D. 1968); Hyatt v. Grand Rapids Brewing Co., 134 N.W. 22, 23 (Mich. 1912); Beck v. Giordano, 356 P.2d 264, 265 (Colo. 1960) (per curiam); Silkey v. Malone, 111 N.E.2d 665, 667 (Ind. Ct. App. 1953) (in banc); Bevy's Dry Cleaners & Shirt Laundry, Inc. v. Streble, 208 N.E.2d 528, 531-32 (Ohio 1965).

In this case, the first sentence of Paragraph 16 specifically permits the use of the demised premises by members and staff of the SDA's school and church for vacation residences. Pursuant to the general rule, this clause is permissive in nature and indicates that the lessor was aware of this intended use of the property. See Forman v. United States, 767 F.2d 875, 880 (Fed. Cir. 1985) (lease provision setting forth the use of the property, "absent a clear and specific indication that the landlord intended to limit the tenant's use of the property," indicates "that the landlord is aware of and sanctions the tenant's intended use, but does not limit tenant to that use alone"). Thus, the first sentence does not expressly prohibit recreational use of the demised premises by individuals other than members and staff of the SDA's school and church.

In cases where courts have implied a use restriction from the language of the lease, they have held that "[e]xpress words of restriction are not necessary, where the language used shows that no other use was to be permitted than that specified." Elca of New Hampshire, Inc. v. McIntyre, 523 A.2d 90, 92 (N.H. 1987) (quotation marks omitted); Kaiser v. Zeigler, 187 N.Y.S. 638, 640 (N.Y. App. Term 1921). For example, express words of restriction may not be necessary when the lease uses language such as "'sole' or 'only' or 'and for no other purpose'," to

describe the permitted uses of the land. 49 Am. Jur. 2d Landlord and Tenant § 405 (2006) (footnotes omitted). In this case, the Lease does not use restrictive terms regarding the use of vacation residences on the property; rather, the only term the Lease uses in describing the use of the demised premises for vacation residence is the term "including," which, as explained above, is a term of enlargement rather than limitation.

In contrast, in a case where the lease provided that the premises were leased "for the purpose of operating a restaurant for the sale and consumption . . . of food and non-alcoholic beverages," the court held that the lease impliedly prohibited the sale of alcoholic beverages, despite the lack of a limiting term such as "only." McIntyre, 523 A.2d at 92 (emphasis added). The court explained, "Beverages offered for sale in restaurants may either be non-alcoholic or alcoholic beverages. There are no other available beverage alternatives." Id. In this case, permitting the use of the premises for vacation residences by "members and staff of Lessee's school and church" is not mutually exclusive with permitting all other individuals to engage in the same use, particularly given the use of the word "including" to describe the specified use.

Other courts have held that a restriction may be implied from the language of the lease if such a restriction is

"indispensable to carry into effect the lease's purpose," Marini v. Ireland, 265 A.2d 526, 533 (N.J. 1970), or was "so clearly within the parties' contemplation that they deemed it unnecessary to express it." Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523, 532 (Okla. 1985). Here, it cannot be said that the limitation of vacation residences from use by the general public may be implied from the language of Paragraph 16, as such a restriction is not "indispensable" to using the premises for educational, recreational, agricultural, health care and humanitarian purposes. Additionally, the language of the Lease does not demonstrate that such a restriction was "so clearly within the parties' contemplation" that it was unnecessary to express it in the Lease.

Accordingly, the plain language of the first sentence of Paragraph 16 does not prohibit the use of the demised premises for vacation residences by individuals who are not "members and staff of Lessee's school and church." In accordance with the general rule of landlord-tenant law, absent an express restriction in the Lease or language from which a restriction must be necessarily implied, SDA, as the lessee, is entitled to use the premises for any lawful or valid purpose. Thus, applying well-established principles of property law, the Lease in this

case unambiguously permits the SDA to rent cabins to the general public under the recreational use provision of Paragraph 16.

III.

The majority concludes, however, that the meaning of the first sentence of Paragraph 16 is "particularly ambiguous" when read in context with the second sentence, which provides: "No dwellings shall be constructed or used on the demised premises except for faculty, administrative staff, students and employees." Majority Opinion at 23. The majority reasons that the meaning of the word "dwellings" is ambiguous, and "it is possible that Paragraph 16's restriction on the construction and use of 'dwellings' states the general rule, while the parenthetical reference to 'vacation residence' provides a limited exception thereto." Id. at 23-24. Respectfully, I do not believe that the language of Paragraph 16 is "reasonably susceptible" to such an interpretation, as it would render the parenthetical in the first sentence partially superfluous and unduly restrict expressly permissible uses of the premises.[3]

[3] I do not address whether construing the Lease to prohibit use of the demised premises by individuals who are not members of the SDA's church would violate public accommodation laws pursuant to HRS § 489-3 (2008), which prohibits "[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of . . . religion[.]" A "place of public accommodation" means "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors." HRS § 489-2 (2008).

A.

The majority reasons that the term "dwellings" is ambiguous, "insofar as it could refer broadly to a structure in which people live (as Wong contends) or, more specifically, to a place of primary or permanent residence (as SDA contends)." Majority Opinion at 23. The majority finds that it is therefore "possible" that the second sentence states the general rule while the parenthetical reference to "vacation residence" provides a very limited exception. Id. at 23-24.

As with the interpretation of the term "including," the fact that the word "dwellings" has different meanings (as a primary or short-term residence) does not by itself create an ambiguity in the Lease.[4] The word must be interpreted in context, as an ambiguity may only be found to exist when considering the contract as a whole. Sturla, Inc. v. Fireman's Fund Ins. Co., 67 Haw. 203, 209-10, 684 P.2d 960, 964 (1984).

In this case, as the ICA recognized, the only logical definition of the word "dwelling" in the context of the Lease is a primary or permanent residence, rather than generally any structure a person inhabits. First, the fact that the second

[4] "Dwelling-house," which is often shortened to "dwelling," means "[t]he house or other structure in which a person lives; a residence or abode." Black's Law Dictionary 582 (9th ed. 2009). An "abode" is a "home" or "a fixed place of residence." Id. at 6. "Residence" is defined as "[t]he act or fact of living in a given place for some time," and typically "means bodily presence as an inhabitant in a given place[.]" Id. at 1423.

sentence lists only those individuals who would be expected to permanently or primarily reside on the premises (faculty, administrative staff, students and employees), suggests that the term "dwelling" is used to connote a structure for permanent residence and not vacation residences. Conversely, the second sentence does not include those individuals who would not be expected to permanently reside on the premises but who would be expected to be able to enjoy recreational use of the premises; for example, parents of the students attending the school, children who are members of the church but who do not attend the school, and other church members who are not faculty, staff, students or employees.

Second, the meaning of "dwellings" is clear when looking at the two sentences comprising Paragraph 16 and interpreting their plain meaning so that they support, rather than defeat, each other. See 52A C.J.S. Landlord and Tenant § 794 (2012) ("[I]n arriving at the meaning of restrictions, the whole lease, and not single clauses, should be considered so that, when the restrictions are considered in connection with other parts of the instrument, they will tend to support, rather than defeat, it.") (footnotes omitted). The parenthetical expressly permits all church members to use the premises for "vacation residences," while the second sentence restricts the

construction and use of "dwellings" to faculty, administrative staff, students, and employees. As the ICA recognized, it would be "illogical that a given use of the Property (vacation residence by church members) should be expressly permitted in one sentence but forbidden in the next." Memorandum Opinion at 13-14.

B.

The majority, however, proposes that Paragraph 16 could reasonably be construed so that the "restriction on the construction and use of 'dwellings' states the general rule, while the parenthetical reference to 'vacation residence' provides a limited exception thereto." Majority Opinion at 24-25. Pursuant to this interpretation, the term "dwellings" would establish a broad category of structures in which people reside (for short or long-term residence) that is inclusive of "vacation residences." Although this interpretation may avoid the inconsistencies between the parenthetical and the second sentence that were identified by the ICA, it would also have the effect of rendering the parenthetical superfluous.

Under the majority's proposed interpretation, the term "dwellings" is inclusive of "vacation residences," so that even without the parenthetical, vacation residences are prohibited

from being used by anyone other than faculty, administrative staff, students and employees.

First, if this were the case, then the second sentence expressly permits vacation residences to be constructed and used by administrative staff, faculty and employees. Accordingly, there would be no need for the parenthetical to carve out an exception for "staff of Lessee's school and church" to use vacation residences. The majority's proposed interpretation of the Lease would render the reference to "members and staff of Lessee's school and church" superfluous. Such a result is contrary to the well-established principle that contracts should be interpreted to give meaning and effect to all contract terms. See Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawaiʻi 286, 297, 141 P.3d 459, 470 (2006) (this court has "long expressed our disapproval of interpreting a contract such that any provision be rendered meaningless"); Restatement (Second) of Contracts § 203 (1981) ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

Second, reading the two sentences of Paragraph 16 in concert so that they support rather than defeat one another suggests that the parties understood the category of "dwellings"

to be distinct from the category of "vacation residences," and used the parenthetical to underscore this distinction. The majority argues that interpreting the parenthetical to state an example of a permitted recreational use, "without explaining the import of this language," would render the parenthetical reference to "members and staff of Lessee's school and church" superfluous. Majority Opinion at 23 n.11. However, the rationale for specifically identifying members and staff of the SDA's school and church as examples of individuals who could use the demised premises for vacation residences may have been to clearly differentiate the use of "vacation residences" from the use of "dwellings." Because the second sentence restricts the use of "dwellings" to faculty, administrative staff, students and employees, the parties may have wanted to ensure that this restriction would not be interpreted to exclude members and staff of the school and church from using cabin rentals. Thus, the parties would have used the word "including" to accomplish the result of ensuring that members and staff of the school and church could use the premises for vacation residences, thereby underscoring the inclusive nature of the recreational category of permitted uses. The majority's inordinately expansive reading of the second sentence may have been precisely what the parties

intended to avoid by including the parenthetical reference to members and staff of the SDA's school and church.

Third, the majority's proposed interpretation would have the effect of unduly restricting the clearly expressed purposes of the Lease. Under the majority's proposed interpretation, members of the general public would not be permitted to use the cabin rentals, vacation residences, or any structure in which people temporarily or permanently reside. Such a restrictive interpretation is at odds with the first sentence of Paragraph 16, which broadly permits the demised premises to be used for educational, recreational, agricultural, health care and humanitarian purposes. Restricting short-term housing to members and staff of the SDA's school and church would adversely affect the SDA's ability to use the premises for these stated purposes. For example, if the SDA offered health care services on the premises, consistent with the first sentence of Paragraph 16, the SDA would be prohibited from permitting a sick person to temporarily stay in a cabin or structure, simply because the person was not affiliated with the SDA's church or school. If the SDA offered humanitarian services that necessitated overnight care,[5] such as providing shelter for the homeless or for victims of domestic violence, then the SDA would

[5] The adjective "humanitarian" means "zealously concerned for or active in the promotion of human welfare and [especially] of social reform." Webster's Third New Int'l Dictionary 1100 (1993).

be similarly burdened by the majority's proposed interpretation of the Lease.

Our main objective in interpreting contracts is to ascertain and give effect to the intention of the parties, "as manifested by the contract in its entirety." Brown v. KFC Nat'l Mgmt. Co., 82 Hawaiʻi 226, 240, 921 P.2d 146, 160 (1996) (quotation marks omitted). We have also said that "[i]n construing a lease we must avoid an unreasonable interpretation if that can be done consistently with the tenor of the agreement and choose the most obviously just interpretation as the presumed intent." Broida v. Hayashi, 51 Haw. 493, 496, 464 P.2d 285, 288 (1970) (emphasis added). In this case, I believe that the Lease does not limit the use of "vacation residences" on the premises and restricts only the use of "dwellings," meaning long-term or primary residences, to faculty, administrative staff, students and employees. This interpretation is consistent with the tenor of the Lease as a whole, which clearly evidences the parties' intent to allow the SDA to use the premises for broad purposes benefitting a wide range of individuals, regardless of their affiliation with the SDA's church or school. Consequently, I believe that the Lease unambiguously permits the SDA's rental of cabins to members of the general public.

IV.

Based on the foregoing, I respectfully dissent from the majority's holding that Paragraph 16 is ambiguous. I would therefore conclude that the ICA correctly vacated summary judgment in favor of Wong on Count I of the Complaint and affirm the ICA's judgment on appeal.

DATED: Honolulu, Hawaiʻi, June 28, 2013.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack