

Update

Retail Leases

April 2010

VCAT has recently handed down two decisions of interest concerning the *Retail Leases Act*. *Bite Food Group Pty Ltd v Ubertas Funds Management Pty Ltd* (Retail Tenancies) [2010] VCAT 253 (2 March 2010) deals with the ever illusive concept of compensation for fit-out on early termination of a lease pursuant to a demolition clause.

Figgins Holdings Pty Ltd v Williamson Place Pty Ltd (Retail Tenancies) [2010] VCAT 243 (25 February 2010) sees the Tribunal comment on the concept of unconscionable conduct under the *Retail Leases Act* 2003 and the validity of a deemed agreement.

Section 56 – Compensation for Fit-Out

Bite Food Group Pty Ltd v Ubertas Funds Management Pty Ltd –

The tenant, Bite Food Group Pty Ltd (**Bite Food**), was served with a demolition notice by the landlord, Ubertas Funds Management Pty Ltd (**Ubertas Funds**), which Notice was to take effect at a time when 2.37 years of the lease term remained. The case concerned the methodology by which compensation for fit-out under section 56 should be calculated.

What is reasonable compensation?

Senior Member Walker stated, "... *what should be awarded is the money equivalent for the loss or in other words, the pecuniary value to the owner contained in the asset.*" (para 30)

Counsel for the tenant submitted that the appropriate measure of compensation was the value of the fit-out would add to the retail premises if they were being sold or the replacement value of the fit-out. This argument was rejected on the basis that "*In the circumstances contemplated by the section, the premises are not being sold with the fit-out. ...[Further] in the circumstances envisaged by the section the tenant has been required by the landlord to leave the demised premises and so lose his fit-out. Whatever loss he suffers, is not the cost of reinstalling it in those premises.*" (paras 33 & 34)

The Tribunal similarly found that written down book value was an inappropriate measure on the basis that such values are a subjective measure based on taxation strategies adopted by a particular business but which do not necessarily reflect commercial reality.

Further, the Tribunal determined that the measure has nothing to do with loss of income/profit because the section is confined to compensation for the loss of fit-out itself, not the loss of tenancy or the loss of the profits.

How should fit-out be valued?

Senior Member Walker stated:

I think that the amount of this loss should be quantified by taking the cost of the fit-out and dividing it by the number of days of the lease together with any option periods and then multiplying the result by the number of days by which the lease (together with any remaining option periods) was prematurely determined. (para 51)

By way of example, if a tenant paid \$200,000 for fit-out for a 5 year lease and the lease was terminated pursuant to a demolition clause with 2 years of the lease remaining, a tenant would be entitled to compensation of \$80,000. By way of example, if a tenant paid \$200,000 for fit-out for a 5 year lease and the lease was terminated pursuant to a demolition clause with 2 years of the lease remaining, a tenant would be entitled to compensation of \$80,000.



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Comment

While this case may not prove to be a definitive statement, it is likely to be followed within VCAT for now. Questions arise however, as to whether the formula may create a windfall for the tenant in circumstances where, for example, a tenant may have other premises in which the fit-out may be used thereby retaining its value to the tenant for the intended period of its life. It is conceivable in such circumstance that if evidence of that kind were accepted, the calculation to be made by the Tribunal could be readily adjusted.

Further, questions may arise about the real value of the fit-out, the reasonableness of expenditure in the first instance and how to treat a fit-out contribution, to mention a few. While the objective nature of Senior Member Walker's approach is understandably attractive for its simplicity, the position seems wide open for further argument.

Unconscionable Conduct

Figgins Holdings Pty Ltd v Williamson Place Pty Ltd (Retail Tenancies) [2010] VCAT 243 (25 February 2010)

The facts of this case are relatively unremarkable. They concern the willingness of the parties to negotiate in respect of rent review. The ultimate finding of the Tribunal with respect to the unconscionable conduct claim was as expected, that is, that a party which relies on its contractual rights properly negotiated cannot be said to be acting unconscionably.

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Of interest is the Tribunal's discussion of the concept of unconscionable conduct under the *Retail Leases Act*. The Tribunal followed the October 2009 decision of Senior Member Vassie in *Transaero Pty Ltd v Goulthorpe* (Retail Tenancies) [2009] VCAT 2146 (16 October 2009), which relied on various Federal Court decisions containing usual terms such as "serious misconduct", "something clearly unfair or unreasonable", "showing no regard for conscience", "irreconcilable with what is right or reasonable". Senior Member Vassie, went on to say:

In my opinion the phrase "conduct that is, in all the circumstances, unconscionable" in section 77(1) of the Act should be interpreted in a way that the ... authorities have interpreted similar phrases in similar legislation. "Unconscionable" is a strong word. It connotes conduct of a kind that attracts moral obloquy or an adverse moral judgement.

Comment

As VCAT is presented with more cases in which sections 77 and 78 of the *Retail Leases Act* are argued, it appears to be developing interpretation consistent with the way the Courts have viewed sections 51AB and 51AC of the *Trade Practices Act*. In the respectful view of the author, this is the correct approach. Unconscionable conduct must be conduct of an unconscientious kind and inconsistent with what in all the circumstances may be considered fair and right.

(The case also contains some interesting comments on deeming of rent. We will comment further on those issues in our next Update).

Note: Full text of these decisions may be found at www.austlii.edu.au

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