

# Update

Retail Leases

July 2010

## Assignment - The Reasonable Landlord

In a recent unreported case, VCAT has interpreted the landlord's obligation to act reasonably when considering an application by a tenant to assign the lease. Deputy President Macnamara determined that in addition to a landlord's obligation to not unreasonably withhold consent to a request for an assignment, the landlord must also act reasonably in its consideration of the financial resources and business experience of the proposed assignee.

### *AAMR HOSPITALITY GROUP PTY LTD v GOODPAR PTY LTD AND BROOKWOOD PTY LTD – VCAT, 13 FEBRUARY 2009*

Section 60(1) of the *Retail Leases Act 2003* provides insofar as it is relevant to the case:

*"The Landlord is only entitled to withhold consent to the assignment of a retail premises lease if one or more of the following applies:*

- (a) ...
- (b) *the landlord considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease;*
- (c) ...
- (d) ..."

By plain reading of section 60(1)(b), it would appear sufficient that the landlord simply hold an opinion that the proposed assignee does not have sufficient financial resources or business experience. That is, on the face of the wording of the section, it establishes a purely subjective test which suggests that in response to any challenge to a landlord's decision, the landlord would merely have to establish that it held the opinion. The question in *AAMR v Goodpar* was should the word "reasonably" be added to section 60(1)(b) so that it reads:

*"the landlord **reasonably** considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease."*

Courts and Tribunals will always be hesitant to read words into legislation because they must start from the premise that Parliament has drafted the words to reflect what it intended the law to be. However, the Courts recognise that there are occasions where Parliament inadvertently fails to deal with certain eventualities and that as a result, in circumstances of necessity, words may need be to read into a statute to give it its intended meaning.

On the basis of the principle, Deputy President Macnamara determined that the words "reasonably" or "acting reasonably" should be read into section 60(1)(b). In doing so, he said:

*"the overriding policy evident in the Retail Leases Act is to provide special protection to a limited class of commercial tenants, namely those who are tenants of small retail tenancies and do not have the clout that say a listed corporation would have ... To construe a provision such as section 60(1)(b)(i) such that one of the protected class of tenants was to be at the mercy of the purely subjective determination of a lessor would not be conducive to the statute's overall policy, per contra, it would tend to subvert the wider policy of the statute ..."*

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Accordingly and not surprisingly, the law in Victoria now stands that the landlord, in determining the financial capabilities or business experience of a proposed assignee, must form its opinions acting reasonably or on a reasonable basis. Therefore, what otherwise appears to be a subjective test created by the words in the legislation has been interpreted to be an objective one where a landlord must take into account "all of the material and considerations objectively available".

### Comment

The outcome of the case is not surprising and perhaps merely succinctly states what the majority of landlords took their responsibility to be. This is so particularly in light of the long standing requirement of landlords to not unreasonably withhold consent to the assignment of a lease.

An additional point of interest arises from the specific facts of the case. The impression from the Deputy President's judgment is that the director of the proposed assignee was a difficult witness and the facts suggested that there may have been a lack of probity on his part. While ultimately that issue did not bear on whether the proposed assignee had sufficient financial resources or business experience, Deputy President Macnamara remarked:

*"Perhaps astonishingly it demonstrated want of probity on the part of the proposed assignee is not amongst the considerations which the statute says a landlord would be entitled to act upon to refuse consent to assignment. The restriction of the landlord's discretion in these circumstances seems more remarkable when one considers the relatively dramatic effect of Section 62" (Section 62 provides a release for assignors and guarantors if proper disclosure is made to the proposed assignee).*

It is submitted that a landlord ought to be entitled to take a view of the probity of its proposed assignee and factor that into its consideration of a request for an assignment. While the legislature is not likely to move swiftly on such an issue, query whether a landlord could by virtue of section 60(1)(c) – reasonable assignment provisions of the lease – insert a standard clause to the effect of allowing it to examine the proposed assignee's behaviour and bona fides?

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