

Update

Retail Leases

May 2010

VCAT refuses to deem agreement as to rent

Our recent update commented on the findings of VCAT *Figgins Holdings Pty Ltd v Williamson Place Pty Ltd* (Retail Tenancies) [2010] VCAT 243 (25 February 2010). The Update concerned the findings in that case about unconscionable conduct under the *Retail Leases Act 2003* (“the Act”).

Figgins v Williamson Place also presented key findings about the deeming of rent under a rent review clause.

Rent Reviews

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

The lease contained a common provision concerning market rent review at the end of the fifth year of the term. It provided a mechanism by which the landlord could write to the tenant giving notice of what the landlord nominated the market rent to be going forward. If, within one month of the landlord’s notice, the tenant did not give notice of its objection to the nominated rent, the nominated rent was deemed to be the rent. Specifically, clause 8.2.1 of the lease provided:

“Failing such notice from the Tenant the proposed Rent will be the Rent payable from the Rent Review Date until the next Rent Review Date.”

In this case, the rent nominated by the Landlord for the sixth year of the term (\$692,936) represented an increase of 53% on the fifth year (\$458,954). The tenant did not respond within one month of the landlord’s notice. (The tenant claimed that it had not received the notice, but this became a non-issue once the landlord produced a registered post receipt.) The landlord therefore started charging the nominated rent from the beginning of the sixth year. The tenant later obtained a valuation which put the market rental of the property at \$530,000.

Mediation at the SBC failed and VCAT was asked by the tenant for declarations that the rent be determined by specialist valuer in accordance with the regime contained in the Act and that the clause in the lease purporting

to deem rent was void (pursuant to s94 of the Act) for inconsistency with the rent review provisions of the Act.

Section 37 of the Act sets out the basis on which a market rent review is to be made if such a review is provided for in a retail lease. Relevantly, sub-section 37(3) provides:

“If the landlord and tenant do not agree on what the amount of that rent is to be, it is to be determined by a valuation carried out by a specialist retail valuer ...”

The question for the Tribunal was whether the deeming provisions of the lease had the effect that the new rental had been *agreed* as contemplated by section 37(3). The Tribunal made the following observations:

- It was not referred to, nor could it locate, any authorities as to what might constitute “deemed agreement”;
- The objective of the Act as set out in section 1 is to “*enhance the certainty and fairness of leasing arrangements between landlords and tenants*”;
- The Act is remedial or ameliorating legislation and it must be interpreted in that way.

The Tribunal’s findings are contained in a simple statement at paragraph 18 of the reasons:

“Importantly [*clause 8.2.1*] does not say that failing notice of objection the parties will have been deemed to

Update - Retail Leases

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have agreed the new rent (assuming for the moment that there can be deemed agreement, and I am not persuaded there can). It simply imposes the new rent on the tenant, and in doing so is in my view inconsistent with clauses 35 and 37 of the RLA which clearly provide for a mechanism for the determination of market rent. Accordingly, clause 8.2.1 is void under s94(1) insofar as it seeks to impose deemed rent where the tenant has failed to notify the landlord of its objection within the specified time.”

Comment

The concept of deemed agreement is difficult to reconcile. In this sense, “deem” must have the meaning of “to be *judged* to be so” or “to be *regarded* as so”. The concept of agreement between two parties concerns the mutuality of legal rights and obligations. It is difficult to conceive where one party has not been engaged in a process, that its intention to enter into an agreement can be evidenced by its silence or that its intentions can be judged or regarded as being something specific merely because it has said nothing.

Could there be a circumstance where agreement is made by the offeree remaining silent? If so, it is submitted the least that would be required is that the mechanism

by which the agreement comes into being are specific. Taking a rent review clause as an example, minimum requirements must include characterisation of the landlord’s notice nominating the new rent as being an offer. The clause must then go on to impose an obligation on the tenant to communicate its rejection of the offer – such an obligation or duty being a feature of cases where the courts, particularly in America, have found offers to have been accepted despite the silence of the offeree – and to define as acceptance of the offer, the failure to communicate rejection.

Even if such a clause were drafted and agreed to by the parties to the lease, the position would by no means be clear. Cases concerning acceptance of offers by silence find binding contracts generally only where some custom of trade or course of dealing exists and where the offeree takes the benefit of the offer. In the case of the obligation to pay rent, it is difficult to marry the payment of a higher rent with the taking of a benefit by a tenant. However, absent a specific authority on the issue, Landlords would be wise to review their standard leases for clauses similar to that in contention in *Figgins v Williamson Holdings* and consider alternative drafting.

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

Contact details



Chris Brodrick, Partner

T: +61 (0)3 9321 9804

E: chris.brodrick@holdingredlich.com.au



Margot Sharpe, Partner

T: +61 (0)3 9321 9820

E: margot.sharpe@holdingredlich.com.au

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Melbourne

350 William Street, Melbourne VIC 3000
T: +61 (0)3 9321 9999 F: +61 (0)3 9321 9900

Sydney

Level 65, MLC Centre, 19 Martin Place, Sydney NSW 2000
T: +61 (0)2 8083 0388 F: +61 (0)2 8083 0399

Brisbane

Level 1, 300 Queen Street, Brisbane QLD 4000
T: +61 (0)7 3135 0500 F: +61 (0)7 3135 0599