

Property Newsletter

November 2009

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Bad hair day for landlord in ADT

The case of *Mirvac Funds Limited v Frost* [2009] NSWADT 94 concerned a retail lease of Shop 3 in Moonee Beach Shopping Centre (north coast of NSW). The shop was a hair and beauty salon called "Mullet Hair".

The lease was entered into on 21 December 2005 for a period of seven years, expiring on 20 December 2012. On 3 May 2008 —less than halfway through the lease—the tenant deserted the premises, with unpaid rent and charges outstanding.

The landlord retook possession shortly after 3 May 2008.

Mirvac Funds Limited (Mirvac) and BNY Trust Company (BNY) applied to the Administrative Decisions Tribunal (ADT) to recover loss of bargain damages and the outstanding rent and charges.

Judicial Member Sigrid Higgins addressed two issues in her determination: standing to bring an action and mitigation of loss or damage.

Issue 1: standing to bring an action

The doctrine of standing (sometimes called "locus standi") states that a person must have a sufficient connection to a dispute in order to bring legal action in respect of the dispute. There are different tests for what will constitute a "sufficient connection", depending on the court or tribunal or type of dispute. For retail leasing disputes in the Administrative Decisions Tribunal the test for standing is found in section 71(1) of the *Retail Leases Act 1994* (NSW) (RL Act), as follows:

71 Lodging of retail tenancy claims with Tribunal

- i) A party or former party to a retail shop lease or former retail shop lease may lodge a retail tenancy claim in respect of the lease with the Tribunal for determination of the claim.
- ii) A claim may not be lodged more than three years after the liability or obligation that is the subject of the claim arose.

Note: Under section 37 of the Administrative Decisions Tribunal Act 1997, the effect of enabling applications to be made to the Tribunal is to confer jurisdiction on it. By virtue of section 142 of that Act, an application includes a mechanism by which an Act provides for a matter to be brought to the attention of the Tribunal for an original decision.

Bad hair day for landlord in ADT (Continued)

“Party” is defined in section 3 as “the lessor or lessee under a retail shop lease”.

Mirvac and BNY’s problem was that according to the Torrens register, the landlord (lessor) on the registered lease was one “Moonee Beach Properties Pty Limited”.

Oddly, Mirvac and BNY’s solicitor neglected to state in the ADT application who exactly they were. Mirvac was probably the leasing agent and as such, would not have standing under section 71(1) to bring the retail lease claim. BNY, however, may have been the new landlord, in which case it would have had standing to bring the claim.

Section 71(1) is a “jurisdictional fact”, meaning that if the ADT decided the claim and it eventuated that BNY was not the landlord, the decision would be of no legal effect. Judicial Member Higgins was of the view that the person bringing the claim bears the onus of showing standing under section 71(1). BNY in this case did not provide any real evidence to show that it was the landlord, so the matter could not be decided.

Issue 2: mitigation of loss or damage

Where a person breaches a contract (such as a lease) the doctrine of mitigation requires the other party — the innocent party — to take reasonable steps to reduce their loss or damage arising from the breach.

So, where the tenant vacates the premises before the expiry of the lease term and stops paying rent, the landlord must actively try to find new tenants. If the landlord does nothing or does not try hard enough, he or she will not be able to claim lost rent for the weeks after the tenant’s desertion.

The landlord bears the onus of proving that he or she mitigated the loss or damage arising from breach. So, in the claim for damages, BNY would have needed to prove that it took reasonable steps to find a new tenant after Mullet Hair closed down. BNY failed to do this. The evidence showed that the next tenant commenced occupation of the shop on 8 February 2009 — nine months after the tenant vacated the property. Judicial Member Higgins thought that this delay may have actually indicated that BNY did not take reasonable steps to find a new tenant.

Assuming BNY was actually the landlord, its failure to mitigate its loss would not prevent it from bringing a claim against the tenant for unpaid rent as at the date on which the lease was terminated by the landlord retaking possession shortly after 3 May 2008. That claim would not be an action in damages for the tenant’s breach of the lease but an “action in debt” or an “action for a liquidated amount”.

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Bad hair day for landlord in ADT (Continued)

Guidance

Mirvac Funds Limited v Frost provides guidance for landlords and tenants considering bring claims in the ADT or in another tribunal or court. It is a useful reminder that unless standing (for all claims) and mitigation (for contractual damages claims) are proved, the claim cannot succeed.

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Housing Construction Acceleration Plan (HCAP)

Under the NSW government's Housing Construction Acceleration Plan a purchaser of a newly constructed home or apartment can save up to 50% of the stamp duty payable on the contract.

Certain restrictions apply:

- the property must be a new residence or a substantially renovated home
- the purchase price must be less than \$600,000
- if the property is being purchased 'off-the-plan' the contract must state a completion date of no later than 30 June 2011
- the reduction of stamp duty only applies to contracts entered into between 1 July 2009 and 31 December 2009.

HCAP was introduced to cushion the effect on developers of the anticipated reduction in demand from first home buyers following the reduction of the government's first home owners' grant on 30 June 2009.

As a marketing tool for developers there are some major differences between HCAP and the first home owners grant:

- HCAP is targeted at investors — there is no limit on the number of new homes purchased and applications made by a purchaser under HCAP
- HCAP is available to all purchasers (including foreigners and non-residents), and
- HCAP is not limited to individuals

While HCAP will only available to investors who purchase 'off-the-plan', those contracts must specify a completion date of no later than 30 June 2011 and the contract must be completed before 30 June 2011. The Chief Commissioner has a discretion to allow a later date for completion where the delay is caused by 'circumstances beyond the control of the parties but no examples of the circumstances under which the Chief Commissioner may exercise his discretion have been given.

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Part payment of deposits

For many developers, it is still common to include a part payment of deposit clause in sale contracts of a type similar to this:

The deposit is payable in two equal instalments the first payable on the date of this contract, and the second payable on the earlier of completion and termination of this contract for the purchaser's default.

The courts have made it clear that payment of the second instalment is not enforceable for reason that it is a penalty.

For that reason, if a contract that includes a part payment clause is terminated for the purchaser's default, the vendor may keep only that part of the deposit already paid. The vendor has no right to payment of the second instalment.

Despite this the clause is still often used, perhaps because there is a perception that a part payment clause has a "psychological effect" on purchasers? But this is doubtful—we believe that purchasers' lawyers generally know the second instalment is not recoverable.

To provide certainty we recommend that the amount of the deposit actually payable is stated on the front page of the contract.

Whatever method is adopted, if the contract is terminated for the purchaser's default, the vendor is still able to rely on the contract and

commence proceedings to claim damages in excess of the amount of the deposit paid. The standard form contract states that a purchaser must pay damages:

- where the vendor has resold the property within 12 months after termination, for the deficiency on resale and the reasonable costs and expenses arising out of the purchaser's non-compliance, or
- in any other case, for breach of contract.

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Possession of land — no longer 9/10ths of the law?

The recent decision of the NSW Supreme Court of *Refina Pty Ltd v Binnie* (2009) highlights the fragile rights which may be held by a person intending to apply for possessory title of Torrens title land.

This case involves a strip of land (whole parcel). The registered proprietor of the strip of land was Binnie who also owned the adjacent farming property known as "Tiverton". Refina Pty Ltd (Refina) owned the property adjoining the strip of land known as "Henkley". The strip of land was between these two properties.

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Possession of land — no longer 9/10ths of the law? (Continued)

Refina had used the strip of land for over 50 years and had:

- i) enclosed the strip into the land owned by Refina with a fence
- ii) grazed the strip of land by the stock running on Refina's land
- iii) planted a row of trees just inside the boundary between the strip and Binnie's land.

In February 2006 Refina became aware that Binnie was the registered proprietor of the strip of land and discussions were held between the parties to sell the strip of land to Refina. However, no agreement was reached.

In November 2006 Binnie procured registration of a plan of subdivision and the strip of land became part of Tiverton.

Refina then commenced proceedings against Binnie submitting that it had become entitled to acquire the strip of land by adverse possession and that Binnie had procured the registration of the plan to defeat an intended possessory application by Refina.

The NSW Supreme Court held that whilst Refina was entitled to make an application for possessory title under section 45D of the *Real Property Act 1900 (Act)*, registration of the plan, which incorporated the strip of land into Binnie's adjacent lot, defeated a claim for possessory title.

Section 45D of the Act provides that if a person is in possession of land then that person may make an application for possessory title

provided the following conditions are present:

- i) the land subject to the claim is a whole parcel of land (other than service lane, garbage lane etc), and
- ii) the applicant has adversely possessed the land for at least 12 years.

Whilst there was sufficient evidence to establish that for well in excess of 12 years and indeed for upwards of 50 years the strip of land was used by Refina, this was not sufficient to make a claim for possessory title following registration of the plan.

It can be seen from this case that whilst a potential applicant may have a strong case of adverse possession, the claim may be lost when a registered proprietor procures registration of a plan that effectively incorporates the disputed land in an adjacent lot.

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The Repco Case — problems with rent review valuations

Retail landlords and tenants may find that their rent review valuation has no legal effect, ie that the new amount of rent cannot be enforced, if the valuation does not comply with section 19 of the *Retail Leases Act 1994 (NSW) (RL Act)*.

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The Repco Case — problems with rent review valuations (Continued)

This is what happened to the landlord and tenant in *Perri v Exego Pty Limited* [2009] NSWADT 170, a decision handed down in July 2009. The tenant operated a Repco store at the leased premises at 456–462 Canterbury Road, Campsie. The store sold automotive parts and accessories.

The landlord (the Perris) and the tenant (Exego Pty Limited) had a 10 year lease, due to expire on 7 December 2010. The lease provided that the rent would be adjusted on every yearly anniversary by 4% and adjusted to market value at the commencement of the sixth year (8 December 2005).

The parties appointed a valuer to make the valuation. The landlord was dissatisfied with the valuation (presumably it was lower than he wanted) and they commenced proceedings in the Administrative Decisions Tribunal seeking a declaration that the valuation was in breach of section 19 of the RL Act and was therefore void.

Section 19 of the RL Act provides that where a retail lease provides for rent to be changed to current market rent, the valuer is to determine the “effective rent”, taking into account:

- i) the provisions of the lease
- ii) the rent that would reasonably be expected to be paid for the shop if it were unoccupied and offered for renting for the same or a substantially similar use to which the shop may be put under the lease

- iii) the gross rent, less the lessor’s outgoings payable by the lessee
- iv) rent concessions and other benefits that are frequently or generally offered to prospective lessees of unoccupied retail shops.

“Effective rent” means the face value of the rent as provided in the lease minus incentives such as cash payments, rent-free periods, fitout contributions, etc.

The valuer conducted the valuation on a completely different basis. He relied on the Australian Property Institute’s guidance for what a valuation should be, ie “the estimated amount for which premises should rent as... between a willing lessor and willing lessee in an arm’s length transaction”.

Judicial Member Molloy held that the valuer did not make the valuation on an effective rent basis and did not have regard to the matters in section 19, as he was required to do.

This did not make the valuation “void” or “in breach” of section 19 — it meant that the valuation had no legal effect. The consequence of this for the tenant was that it could not rely on the favourable valuation or bring legal action enforcing it. In order for the tenant to do this, the valuation would have had to comply with section 19.

The guidance this case provides for landlord and tenants is twofold.

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The Repco Case — problems with rent review valuations (Continued)

First, if a landlord or tenant is dissatisfied with a rent review valuation they have already obtained, they may be able to escape being bound by it if it does not comply with section 19. Legal advice should be sought on this.

Secondly, landlord and tenants appointing a valuer must make sure that the valuer is aware of their obligations under section 19 of the RL Act and conducts their valuation in accordance with that section. If the valuer does not do this, the valuation may be of no legal effect.

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