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This is the first edition of the leasing newsletter from CBP's property group. With significant amendments to the *Retail Leases Act* soon to become law, we would like to keep you up to date with the proposed changes and how they will impact landlords, tenants and developers.

Chris Rumore
Head of Property Group

Does return of documents give rise to a binding lease?

The recent Supreme Court decision in *Vasue v Lubo Medich Holdings* looks at the various ways a binding lease can arise.

Facts

Vasue Pty Ltd had been leasing a butchery since 1993. The lease was due to expire on 30 April 2006. The sole director and shareholder of Vasue, Mr Jack Yeak, was murdered late in 2005. His three children took on responsibility for the company and the leases.

Negotiations took place between Vasue and LM Holdings for a new lease of the butchery.

Issues

Vasue argued that there had been an agreement to grant a three year lease with a three year option. If the court was unwilling to accept that, it argued that what LM and its representatives

had said, done and let Vasue do during negotiations meant it could not deny an agreement had come about.

The disclosure statement

Parties to retail leases are required by law to "disclose" certain things to one another before entering into a lease. The statements are usually made on a form, filled out and signed by both the landlord and tenant.

LM Holdings sent a disclosure statement to Vasue.

Vasue argued that when it signed, filled out and sent back the disclosure statement, a binding lease was formed. The Court held that this was not sufficient for the following reasons:

- Vasue had changed the commencement date on the disclosure statement before returning it.
- LM Holdings had not seen Vasue's disclosures until the statement was returned to it. LM Holdings could not have meant to form a binding lease before it had seen this information.

- There were unfinished negotiations about a possible “rental redistribution,” (where rent would be reduced in the first year, with this reduction being “caught up” later in the term.)
- LM Holdings stated in its disclosures that Vasue (because of unfulfilled obligations under the old lease) needed to paint the shop, put in a grease-trap, replace cracked tiling and attend to repairs. These requirements were not listed in the lease, suggesting that LM had no plans to enter into the lease until the work was done.

The work done

While some work fixing up the shop had been done by Vasue, this was a commercial risk which Vasue accepted. It should have known that LM might not proceed with the lease at all (particularly as there was still agreement to be reached on some of the terms of the lease). In any event, the work done could have been compensated with money if necessary - there was no need for the court to force LM to go through with a lease.

Vasue’s case was also damaged by the fact that it never signed the actual lease sent to it by LM, nor did it ever pay the increased rent required by that lease.

The lessons

- When submitting documents to a prospective tenant, make sure that it is clearly stated that the landlord does not intend to be bound until:
 - all terms are concluded (including all provisions of the lease documentation), and
 - the documentation has been executed by both parties.
- If you think terms have been agreed, commit them to writing.

Vasue struggled in this respect and failed to prove a number of terms it said had been agreed in discussions with LM, but which were never written down.

- If there is a series of negotiations and you believe that all terms have been finally agreed, make sure that you set out all of the terms in one document and send it to the other side - even if they have been set out in previous correspondence.

Chris Rumore
Partner

T: 02 8281 4555
E: acr@cbp.com.au

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Purchasers of Retail Shop premises potentially liable for conduct of the previous owners.

As a purchaser of a shopping centre with existing retail tenants, you potentially take on liability for any "bad leasing behaviour" of the previous owners.

Red Roll was leasing a space in Sydney's World Square from Multiplex Latitude Retail Landowner Pty Limited. In late July 2005 Multiplex Lateral assigned the lease and sold the entire centre to Multiplex WS and AWPF Management (**New Owners**).

The New Owners claimed that Red Roll was indebted to them for unpaid rent in excess of \$166,758.10. In December 2007 they gave notice that they would bring the lease to an end if the rent owing was not paid.

Red Roll commenced proceedings in the ADT. They claimed Multiplex Latitude (the original owner) made misrepresentations to them in the lead up to the lease being entered into and had engaged in "unconscionable" conduct - bad leasing behaviour. Controversially, Red Roll also argued that the New Owners were, because of the way

the *Retail Leases Act 1994 (Act)* works, liable for the behaviour of the original owner.

The Act deals with misrepresentations during the period before entry into a lease. A party to a lease is liable to pay "reasonable compensation" to an injured party for any damage the latter suffers because of misrepresentations made to it during that pre-lease period.

The New Owners argued that they could not be liable under the Act in this way. The New Owners pointed out they were not party to any of the pre-lease negotiations. They also argued that the right to compensation provided by the Act is a personal one, and could not be passed "from the scrum...along the back line" from one owner to another. They sought to have the ADT strike out the application and not even proceed to hearing.

Red Roll argued that the definition of "lessor" in the Act includes assignees and therefore the New Owners; (as assignees of the original owner) were included wherever the word "lessor" appeared in the Act, including in the section about pre-lease misrepresentations.

The ADT agreed. It would not restrict the Act so that tenants had no remedy against a new landlord for misrepresentations made by the old landlord. The reality of the market place is that properties and businesses change hands,

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sometimes on more than one occasion during the life of a lease. A misrepresentation may underpin the original entry into the lease and the whole lease contract itself.

A purchaser of retail premises should not only carry out due diligence but also make sure that it is adequately protected against liabilities that may arise under the Act that have not been disclosed (if this is in fact the case).

The ADT refused to dismiss the action and held that the New Owners were the "real respondents" to Red Roll's misrepresentation claim. The New Owners would have to look to the original owner in relation to any sharing of that liability. The New Owners could also potentially be responsible for any unconscionable conduct claim.

The lesson from this decision is simple: if you want to buy a shop with a retail tenant in it, then you must review *all* prelease documentation. Under the Act this includes disclosure materials, advertising materials, agreements for lease, heads of agreement and correspondence. Any apparent or

possible disputes should be raised and investigated. In addition, obtain suitable warranties and indemnities from the vendor and all relevant predecessors that there are no representations, conduct or disputes that may give rise to a claim by the tenant.

Gary Newton
Partner

T: 02 8281 4652
E: gdn@cbp.com.au

If you would like to provide feedback on the CBP leasing newsletter please email either Chris Rumore or Gary Newton:

acr@cbp.com.au
gdn@cbp.com.au

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T 61 2 8281 4555
F 61 2 8281 4567
E law@cbp.com.au
I www.cbp.com.au

Level 42, 2 Park Street
Sydney NSW 2000
Australia

DX 280 Sydney
Advoc Asia member

Colin Biggers
& Paisley

ABN 38 941 300 979

LAWYERS