

TCRC *Property Update*

Our TCRC *Property Updates* are intended to bring important property issues and current training programs, seminars and events to your attention.

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Dog Depot Case Successfully Appealed By Lessor Failure to Provide a Disclosure Statement

Retail Tenancies Reform Act 1998 - Failure to provide disclosure statement

The Victorian Court of Appeal allowed the landlord's appeal in *The Dog Depot* case. This has allowed the landlord to retain rent paid by the tenant, despite the failure to provide the tenant with a disclosure statement as required by section 8 of the *Retail Tenancies Reform Act 1998 (the Act)*.

As a result of this decision, tenants who have paid rent despite not receiving disclosure statements, will only be able to recover such payments if they can prove some real prejudice as a result of the failure to provide a disclosure statement (for example, the premises were incorrectly described to the tenant). This decision is an enormous relief to landlords (and their professional advisors) who have 'overlooked' providing tenants with a disclosure statement as required by the Act.

The landlord (Ovidio) leased a retail premises in Whitehorse Road, Surrey Hills to The Dog Depot. The lease was for a period of six years from 14 August 2000, with rent of \$22,000 plus GST for the first year, and reviewed annually thereafter. Due to an oversight by the landlord's agent, the tenant was not provided with a disclosure statement at the commencement of the lease. Nonetheless, The Dog Depot took possession of the premises and paid rent in accordance with the lease. Once the oversight was identified, a disclosure statement was immediately given to The Dog Depot.

The Dog Depot brought a claim in VCAT to recover all rent paid to the landlord between August 2000 and May 2003. Relying on the High Court's decision in *David Securities Pty Ltd v. Commonwealth Bank of Australia*, The Dog Depot argued that rent paid by a tenant under the mistaken belief that it was obliged to make that payment could be recovered. VCAT upheld the tenant's claim, and ordered the landlord to repay \$64,953.56 in rent. The landlord unsuccessfully appealed to the Supreme Court, and then to the Court of Appeal.

Court of Appeal's decision

On appeal, the landlord raised two primary arguments. Firstly, that s.8(2)(b) only applied where a tenant exercised its right to withhold rent under s.8(2)(a). The Court of Appeal unanimously rejected this argument, deciding that where rent was paid by a tenant in ignorance of its right to withhold payment under s.8(2)(a), *prima facie*, the tenant has the right to claim repayment.

The second argument raised by the landlord was that the landlord should nonetheless be entitled to retain the rent because the tenant had received good consideration, namely, the exclusive use and occupation of the premises. It was further argued that the landlord would have a 'counter-restitutionary' claim against the tenant for the reasonable value of the tenant's use and occupation of the premises, and that the value of this claim would be same as the amount of the rent that had been paid.

The court held that provided a landlord is able to demonstrate it is not unjust for it to retain the rent paid, the landlord will have a good defence to the tenant's claim. In this case, The Dog Depot received the consideration it had bargained for under the lease, namely the use and occupation of the premises, and that there was no suggestion that the contents of the disclosure statement had any relevant bearing on the benefit that The Dog Depot secured under the lease. Accordingly, the landlord had a good defence to The Dog Depot's claim to recover the rent.

The Court of Appeal cautioned that this decision does not mean that a landlord can sit on its hands and disregard the requirement to provide a disclosure statement. This will particularly be the case where the contents of the disclosure statement will have a material bearing on the subject of the lease and its terms. In such a situation, the landlord will be exposed to a claim by the tenant to recover some or all of the rent it has paid.

Source: *Minter Ellison*



Upcoming Training, Seminars & Events

Retail Leases Seminars

The REIV and Small Business Victoria are holding further seminars on the changes to the Retail Leases Act.

6 March 2006	REIV, Camberwell
16 March 2006	Lakeside Motor Inn, Bendigo
17 March 2006	Wodonga Conference Centre, Wodonga

VIC Sustainability Briefing

The Property Council of Australia is holding a seminar on sustainability at the State Library Theatre on 7 March 2006. Contact Property Council Australia for more information.



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