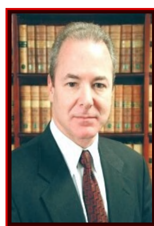
Property & Probate Law

Case studies by David P Lloyd



Recent Cases

***Tabcorp Holdings Ltd v. Bowen Investments Pty Ltd* [2008] HCA 8**

This unanimous High Court decision confirms that the correct measure of damages in a situation where the tenant under a lease has breached a covenant not to make alterations to the premises without prior consent of the landlord will invariably be the cost of reinstatement works, not diminution in value of the freehold. The rationale was said to be that "…..the Landlord was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages is the loss sustained by the failure of the Tenant to perform that obligation; and that loss is the cost of restoring he premises to the condition in which they (sic) would have been if the obligation had not been breached".

***Naval and Military Club Ltd v. Southraw Pty Ltd* [2008] VSC 593**

In this case, the plaintiff was the vendor of land under a contract of sale, and argued that despite it having served a second rescission notice, the contract had been ended by an earlier one. One might say the fallacy of such a proposition is that the second notice of its very nature pre-supposes that the contract is still on foot. In strict legal terms, the vendor might be estopped from denying the continued existence of the contract were the purchaser to act to its detriment on receipt of the later notice; but in any event, the service of the second notice takes effect as an offer to revive the contract which is capable of being accepted by performance in accordance with the terms of the notice.

It is no answer to the problem to attempt to serve the second notice without prejudice. As was famously pointed out in *Haynes v. Hirst* (1927) SR (NSW) 480, "A man, having eaten his cake, does not still have it, even though he professed to eat it without prejudice".

AAMR Hospitality Pty Ltd v. Goodpar Pty Ltd [2009] VCAT *(not yet on Austlii)*

In this recent decision, VCAT for the first time considered provisions of the Retail Leases Act 2003 relating to the transfer or assignment of a retail premises lease.

The focus of attention was on two sections, the first being s.60(1)(b). The section is headed "When the landlord can withhold consent to an assignment". It provides that a landlord "is only entitled to withhold consent to the assignment of a retail premises lease if one or more of the following apply". One of the four factors listed is this:

> (b) The landlord considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease.

The landlord's position was that it had formed the view that the transferee did not have sufficient financial resources, and that, for the purposes of the section, this was all that was required. The Tribunal took a different view, however. It was not prepared to accept that the section would allow a landlord to arbitrarily or capriciously withhold consent simply because it considered that the transferee did not have sufficient financial resources, particularly bearing in mind that the legislation is fundamentally for consumer protection. The Tribunal took the view that the landlord's position should be open to objective scrutiny, and, to that end, paragraph (b) should be read as if it provided to the effect that "the landlord *acting reasonably* considers …".

Section 62 is, fairly plainly, poorly drafted. Nonetheless its intention is tolerably clear. The section is headed "Protection of Assignors and Guarantors". The objective of the section is to release the outgoing tenant and any guarantors from their obligations following the lease being transferred. However, there are some difficulties. For one thing, the section does not provide, in as many words, that the release of the tenant and its guarantors is to operate from the date on which the transfer takes effect. This can be the only sensible interpretation of the section, and the Tribunal was prepared to effectively read it in such a way.

Secondly, the section is said to apply if the tenant has given the landlord and proposed transferee a proper disclosure statement in accordance with section 61(4). Section 61 deals with the mechanics of applying for the landlord's consent to the transfer of the lease. In the 2005 amendments to the legislation, s.61(4) was repealed and a new sub-section (5A) inserted. That new sub-section provides to similar effect to the since-repealed sub-section. The Tribunal was prepared to treat the erroneous cross-reference to s.61(4) as being a reference to s.61(5A).