

update

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Retail update: Landlords – Beware of overholding!

A recent decision of the Victorian Civil and Administrative Tribunal (VCAT) highlights the risk for a landlord of retail premises in allowing a tenant to remain in occupation of the premises after a lease expires.

In *Daco Enterprises Pty Ltd v The Golden Sultana Pty Ltd* [2006] VCAT 2547, VCAT held that an overholding tenant was entitled to a 5 year lease from the date that the initial lease ended, even though the initial lease term had already been for a 3 year period.

This case involved a lease of premises in Mildura, operating as the "Sandors Motel".

The facts were that:

1. the Landlord let the premises for 3 years commencing in September 2000, with an option to renew the lease for a further 6 years.
2. Daco Enterprises (the Tenant) purchased the business and took an assignment of the lease in April 2002.
3. the lease expired in September 2003 and the Tenant did not exercise its option.
4. the Tenant remained in occupation of the premises as a monthly tenant from September 2003 until the date of the VCAT decision in December 2006.

The first question for determination by VCAT was whether the Retail Leases Act 2003 (the Act), which commenced on 1 May 2003, applied to the periodic tenancy. VCAT determined that the overholding, rather than being an extension of the initial lease, created a new lease as from September 2003. Accordingly, the Act applied.

The Act provides that overholding for more than 12 months creates a lease. Thus, the question then to be determined was whether the Tenant was entitled to a minimum 5 year lease and, if so, from what date.

The Act, in effect, provides that an initial retail lease is for a minimum 5 year term. However, rather than referring to an "initial" lease, Section 21 refers to all retail leases, but then [in s.21(3)] provides that a "renewal" of lease does not have to be for 5 years, so long as "there is no break in the tenant's entitlement to possession".

Thus, the issues for determination by VCAT were whether the overholding created a break in the Tenant's entitlement to possession and whether the lease arising from the overholding was a "renewal" under the Act.

VCAT found that although there had not been a break in the Tenant's actual possession of the premises, this was not the same as "entitlement to possession". VCAT concluded that, once the initial term ended, the Landlord could have taken action to exclude the Tenant from the premises. Hence, the tenant had lost its entitlement to possession.

VCAT then went on to consider whether overholding was caught by the definition of "renewal".

Section 9 defines a "renewal" as renewal of a lease either:

- pursuant to an option contained in the initial lease; or
- pursuant to an agreement between the parties to renew the lease

VCAT found that the lease arising from the overholding was not pursuant to agreement between the parties, but arose pursuant to the Act (by virtue of the overholding exceeding 12 months). Accordingly, the "renewal" provision did not apply. Thus, the Tenant was entitled to a further 5 year period from the end of the initial lease.

Clearly, this scenario has highlighted an anomaly where overholding can entitle a retail tenant to more than one 5 year lease, whereas a renewed lease, either by way of option or agreement between the parties, does not. This is obviously an unintended consequence of the Act and it will be interesting to see whether the Victorian Parliament takes action to remove this anomaly.

Until this occurs, Victorian landlords of retail premises need to take care that the flexibility gained by having tenants on monthly tenancies (often in the context of a foreshadowed shopping centre redevelopment) is not lost by allowing the tenant to overhold for more than 12 months, thus triggering the 5 year lease entitlement.

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