

**DISCLOSURE STATEMENTS UNDER RETAIL LEASES - important information for  
landlords and tenants.**

It is important that landlords and tenants are aware of their disclosure obligations and rights in relation to retail tenancies. Section 17 of the *Retail Leases Act (Vic) 2003* requires landlords to provide to tenants a Disclosure Statement at least 7 days before entering a retail lease. In the situation where no Disclosure Statement is provided, the tenant may give their landlord notice, no later than 90 days after entering the lease, that they have not been given a Disclosure Statement. Once the notice has been given, the tenant is not liable to pay rent until they are provided with a Disclosure Statement.

Under the *Retail Tenancies Reform Act 1998*, there was no obligation on the tenant to provide notice to the landlord that no Disclosure Statement had been provided.

As many landlords and tenants may be unaware of the requirement to provide a Disclosure Statement, the purpose of this article is to clarify the legal situation regarding rent paid under a Retail Lease where no Disclosure Statement has been provided.

The Victorian Supreme Court of Appeal held in *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd [2004] VSC 400 ("Dog Depot")* that where rent is paid pursuant to a retail lease and no Disclosure Statement has been provided, the retail tenant is unable to claim back the rent paid.

A recent decision of the Victorian Civil and Administrative Appeals Tribunal (*Kiwi Munchies Pty Ltd v Nikolitsis [2006] VCAT 929 (29 May 2006)*) has clarified exactly where retail tenants who are not provided with a Disclosure Statement, but nonetheless have paid rent pursuant to the terms of the lease, stand in relation to their legal obligations under the lease.

**The facts**

Kiwi Munchies Pty Ltd was a tenant under a retail lease dated 1 November 2001. After the expiration of that lease, Kiwi Munchies remained in possession on a holdover. No Disclosure Statement had ever been provided to Kiwi Munchies by the Landlord. In mid-2005, Kiwi Munchies ceased paying rent, and on 5 November 2005 the Landlord served written notification that the tenant was in default and intended to 'forfeit' the lease if the outstanding rent was not paid immediately. On 3 December 2005, the landlord re-entered the property, changed the locks, and refused to allow Kiwi Munchies to access the property and remove its equipment until it received the outstanding rent. Kiwi Munchies applied to VCAT.

**The claim**

Kiwi Munchies were claiming:

- (a) Damages of \$55,000 for conversion of plant and equipment and stock
- (b) Refund of GST paid to the Landlord to the amount of \$4,770.00 plus interest.

- (c) \$61,493.60 rent paid under mistake.
- (d) Refund of stamp duty

## **The Decision**

### **Conversion**

The Tribunal reviewed the requirements for the tort of conversion to be made out. It stated that "conversion may be defined as an intentional exercise of control over a chattel which so seriously interferes with the right of another to control it that the intermeddler may justly be required to pay its full value." In addition, the true owner must demand return of the goods before there is conversion, unless the possession of the goods by the intermeddler is trespassory.

The Tribunal held that the Landlord converted the goods, and was liable to pay their value at the date of conversion to the Tenant. Their value is not the amount which the Plaintiff would be able to sell the goods for, rather the amount which they would need to spend to replace the goods at the date of conversion. Therefore the Tribunal rejected Kiwi Munchies' argument that the stock should be given its value according to what they would sell it for.

### **Rent paid under mistake**

The Retail Leases Act 2003 provides that "a Tenant is not liable to pay rent attributable to the period before the Landlord gives the Tenant a copy of the Disclosure Statement."

As no Disclosure Statement was provided to the Tenant at any stage, Kiwi Munchies argued that all money paid by way of rent was in fact paid under a mistake of fact.

President MacNamara followed the Court of Appeal decision in *The Dog Depot*. In that case, the Tenant was not able to claim back rent money paid before the Disclosure Statement was provided because:

1. the Tenant received good consideration by way of exclusive possession of the property; and
2. the Landlord would have a countervailing claim in restitution.

Kiwi Munchies was therefore unable to claim the rent paid by it.

### **Recovery of GST**

The Tenant argued that all GST paid by it during its tenancy should be returned to it. This was because the Landlord was not registered, nor was he required to be registered, for GST.

The Tribunal held that the amount was recoverable by the Tenant, notwithstanding the fact that the Landlord had been paying all GST monies to the ATO, and the fact that the Tenant

had received input tax credits equal to the amount of GST paid. This is because for a claim of money had and received, evidence that no loss has been incurred is no defence.

### Counterclaim

The Court held that, due to the fact that no Disclosure Statement had been provided, no rent was payable under the Lease. The landlord was unable to rely on the lease to recover the outstanding rent along with his costs. His claim for the recovery of rent needed to rely instead on the law of restitution.

As rent was not payable under the lease, certain other clauses in the lease were also inoperative. These included the penalty interest clause for outstanding rent, and the right to recover the landlord's costs of re-entry in a situation where rent is outstanding and the landlord exercises a right to re-enter in accordance with the lease. The Tribunal therefore held that the landlord was unable to claim locksmith costs, professional costs in preparing the default notice, and the penalty interest as prescribed under the lease.

The amount recoverable in rent arrears was the amount which Kiwi Munchies was paying before it ceased to pay, plus interest calculated on the basis of the Penalty Interest Rates Act 1983.

### **What does this case stand for?**

This case makes it clear that, in a situation where no Disclosure Statement is provided by the landlord to the tenant, no rent is payable under the lease. The tenant is not obliged to pay rent until furnished with a Disclosure Statement, however if it does pay rent, the tenant cannot claim a refund for the rent paid on the basis that it was money paid under mistake of fact. Such a claim would be defeated by the landlord's counter restitutionary claim.

If the tenant does pay rent, and later falls into arrears, the landlord must be careful how they proceed. As no rent is payable under the lease, a landlord who wishes to recover outstanding rent must first bring a claim in restitution before seeking to re-enter the property.

Please do not hesitate to contact Jeannette Eid on 9009 5800 for further information about retail tenancy leases.

Although all care and skill has been used in the preparation of this article, it is intended only to provide a general summary of the case and should not be relied upon as a substitute for professional advice.
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