IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CI 2014 03955

IN THE MATTER of an application under section 148 of the *Victorian Civil and Administrative Tribunal Act 1998*

BETWEEN:

ORION HOLDINGS AUSTRALIA PTY LTD — Plaintiff

– and –

JING JING WANG — Defendant

ORDER

JUDGE:	The Honourable Associate Justice Mukhtar
DATE MADE:	4 September 2014
ORIGINATING PROCESS:	Originating Motion
HOW OBTAINED:	On return of the plaintiff's summons on originating motion filed 5 August 2014 and adjourned on 3 September 2014
ATTENDANCE:	Mr J McKay of counsel for the plaintiff Mr P Booth of counsel for the defendant
OTHER MATTERS:	See attached minutes of reasons.

THE COURT ORDERS THAT –

1. Unless the plaintiff objects to the following order in writing by 4pm on 8 September 2014, the name of the defendant shall be amended to Jin Jin Wang (instead of Jing Jing Wang).
2. The application for leave to appeal is refused.
3. The proceeding is dismissed.
4. The plaintiff shall pay the defendant's costs of the proceeding.

DATE AUTHENTICATED: 5 September 2014

SUPREME COURT VICTORIA

ASSOCIATE JUDGE

THE HON ASSOCIATE JUSTICE MUKHTAR

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CI 2014 02955

BETWEEN:

ORION HOLDINGS AUSTRALIA PTY LTD — Plaintiff

– and –

JING JING WANG — Defendant

REASONS
FOR ORDERS MADE

MUKHTAR, *AsJ*:

1 After a routine directions hearing on 3 September 2014, the Court heard substantial argument the following day, on this, an application for leave to appeal a decision of the Victorian Civil and Administrative Tribunal. It concerns a retail lease of premises used for student accommodation. There were a number of issues to be determined, but the only relevant finding of the Tribunal for the purposes of this application was that the landlord engaged in unconscionable conduct under section 77(1) of the *Retail Leases Act*.

2 It was established in *Secretary to the Department of Premier and Cabinet v Hulls*,[1] that in an application for leave to appeal under s 148 of the *VCAT Act*, the applicant must first identify a question of law that bears upon the relief that is sought; it must persuade this Court that the decision was attended by sufficient doubt to justify the grant of leave to appeal; and it must show that if the decision were left undisturbed it would be productive of substantial injustice.

3 I decided *ex tempore* to refuse leave, and pronounced reasons. What follows is a recapitulation of those reasons, with some elaboration.

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1 (1999) 3 VR 331.

4 At the outset though I should say first, the plaintiff (**"the landlord"**) obtained and I think became stuck in a real predicament on the application. It lost before the Tribunal on a crucial question of construction of a written "Property Lease Agreement" which came to inform the evaluation of the unconscionabilty issue. There is no application for leave to appeal the Tribunal's construction of the agreement. The landlord confines itself on this application to the finding of unconscionability saying it was not open as a matter of law. But it was a matter of law not argued before the Tribunal. And, in any case, it was a matter dependant on facts either not admitted or not proved beyond controversy. Secondly, I think the new point sought to be argued on appeal is unsustainable. Thirdly, the reasons for the finding of unconscionability (the adequacy of which also came under attack) were not elaborate but the Tribunal applied the correct legal test and, in the light of the construction of the agreement, I think the facts concerning the landlord's exploitative conduct lent themselves readily to a determination of unconscionability without a great deal of elaboration.

5 Therefore I concluded the decision was not attended with sufficient doubt, and there was no injustice in refusing leave.

6 I start with the legislation. Section 77(1) of the *Retail Leases Act* prohibits unconscionable conduct of a landlord. It says:

> A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.

7 Section 77(2) states a number of matters to which the Tribunal may have regard for the purposes of determining whether there was a contravention of that section. For present purposes those matters are:

> (a) the relative strengths of the bargaining positions of the landlord and tenant;
>
> (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the landlord's legitimate interests;
>
> (d) whether any undue influence or pressure was exerted on, or any unfair

tactics were used against, the tenant ... by the landlord ... in relation to the lease;

(k) the extent to which the landlord acted in good faith.

8 I shall abstain from rehearsing the uncontroversial facts in any detail. The landlord owns two adjacent buildings in Whitehorse Road, Mont Albert. It obtained permission from the local council to operate a business of residential accommodation at the premises. The business traded under the name "Ruian Student Accommodation". There were 42 rooms with only basic furnishings available for rent mostly on a six month basis. The occupants were mainly university students and occasionally visiting academics. The landlord targeted advertising at university students through Chinese newspapers. In mid-2007, the defendant (**"the tenant"**) began looking for suitable properties to commence her own student accommodation business. She entered into negotiations with the landlord for a lease of the premises and the acquisition of the student accommodation business.

9 The parties reached agreement. It was reduced to writing in a two-page document in the Chinese language, signed by both parties, dated 2 November 2007. That document, as translated, was entitled "Property Lease Agreement". It was expressed to be between the landlord and the tenant. The essential terms were as follows. The tenant would "take a lease of the property" for the purpose of operating a student accommodation business. The rent was $185,000 payable monthly at $15,416 with an annual CPI increase. The lease was for three years starting from 10 November 2007 to 9 November 2010. There are no words of sale and purchase of the business being conducted at the premises. In that regard, Article 10 (as it is designated) of the agreement is of crucial importance. It states (with my underlining):

> Party A [the landlord] agrees to <u>assign the business</u>, Ruian Student Accommodation, including the right of use of all current operational facilities, to Party B [the tenant]. Party B may <u>assign such business</u> to a third party subject to Party A's approval.

10 Although one would expect it in any contract for the sale of a business, the written agreement said nothing about the price to be paid for the "assignment" of the business. However, there is no dispute that as part of the agreement reached the

tenant paid $20,000 to the landlord as the negotiated purchase price for the "assignment" of the business. She also paid a security bond equal to one month's rent.

11 Bearing in mind the initial term of the lease ran to 9 November 2010, in 2010 the tenant decided to sell the business. She found a willing purchaser in Ms Sunny Sun. In about July 2010, the tenant and the purchaser reached agreement on a purchase price of $405,000 for the business, identified as "NGC Student Services Australia". One can see the commercial dynamics. The business for which the tenant had paid $20,000 as "assignee" attracted a purchaser for $405,000 within 3 years.

12 According to the tenant's evidence, she then approached the landlord to arrange for the transfer of the lease to the purchaser. Under the terms of the sale of business, the tenant as vendor was bound to obtain for the purchaser by settlement date a lease of the business premises either by a transfer of the existing lease with the landlord's written consent or by the grant of a new lease for a term and on conditions identical to or substantially similar to the existing lease or otherwise on terms as approved by the purchaser. The tenant's witness statement in the Tribunal said where relevant:

> Mr Li [company secretary of the landlord] told me that he would not allow me to transfer the lease unless he was paid a portion of the sale price of the business. I told Mr Li it was not his business and he had no right to claim a share of the sale. Mr Li then reminded me that he had never transferred the Student Accommodation which was still in [the landlord's] name. ... I reminded Mr Li that I had paid all of the annual fees for the relevant permits and conducted my own business. Mr Li discounted this and insisted on being paid 40% of the sale price of the business as a condition for his approval of the transfer of lease or a grant of a new lease to my purchaser. Under the Agreement I had two further terms of three years. Mr Li told me clearly that he would not transfer the lease or give a new lease to the prospective purchaser unless I agreed to pay the amount of money he demanded.

13 I shall not recite the evidence. In essence the tenant protested that the landlord had no right to claim a share of the price as the business was hers. Yet she had to obtain an assignment or a new lease to failing which she would lose the sale. Eventually she saw herself as having no choice but to accede grudgingly and try and claw back the money afterwards. As a sign of defiance, in the agreement signed between tenant and

purchaser the parties inserted a sale price of $300,000 instead of $405,000. The tenant conceded that understatement was designed to reduce the 40% payment to the landlord.

14 The tenant paid $96,000 to the landlord representing 40% of the *net* proceeds of sale which were calculated at $300,000 less $60,000 for expenses. On the same day as that payment was made, 5 August 2010, the landlord executed a new lease granting a lease of the premises to the purchaser for a term of three years at the same previous rent with two optional terms each of three years.

15 There were a number of issues in the case with which I need not be concerned. What matters are two findings. First, that the $20,000 was paid as consideration for the sale of the business to the tenant. It was her business. Secondly, and consonant with that finding, to give the dealing commercial sense, Article 10 was to be construed as confirming the transfer (that is, outright disposition) of the landlord's business to the tenant, with a reservation of the landlord's right to approve any future transfer of the lease to a new tenant. In other words, "assignment" means "transfer" and the permission to "assign such business to a third party subject to the landlord's approval" means "transfer such lease to a third party..." That finding was a complete rejection of the landlord's case that he never did sell the business to the tenant. He maintained he gave her no more than the right to operate the business, which he said explained why the tenant's right to assign the business was subject to the landlord's approval. All of that was rejected. There is no application to appeal that finding.

16 From there, it was a rather short evaluative step to take for the Tribunal. Why the parties chose to proceed with a new lease to the purchaser rather than an assignment of the existing lease is not a matter which the Tribunal was asked to, or had to investigate. I think it right to say that there is sufficient to say the landlord did not care which. He regarded the tenants business as his and regarded himself as entitled to a share of the proceeds of sale of the business. But as the Tribunal found he was not entitled to that view, and he would not allow a transfer of the lease (by whatever means) without a 40% share of the proceeds. It was either his way or no way. That

attitude prevented the tenant from a substantial gain from the sale of her asset unless she shared the gain with the landlord for something to which he was by hypothesis not entitled. That was found, I think correctly (and certainly open) in accordance with the legal authorities to introduce a distinct element of moral taint or obloquy to elevate unfair or unreasonable conduct to be unconscionable.[2]

17 The submission for the landlord at the Tribunal according to the written submissions and the recital in the Tribunal's reasons was explicit. The submission was this: having regard to clause 10, there was nothing wrong or illegal in the landlord negotiating a price for its approval *of the transfer of the student accommodation business, a business which the landlord claimed ownership of.* And there is the problem for the landlord. It had built an edifice on the contention that it had not disposed of the business to the tenant and it was only reasonable therefore to claim an entitlement to a share of the enhanced business asset. But once the point of construction was decided against the landlord, its case collaterally fell, and came to be decided by reference to the hard core fact that as landlord he was withholding his consent to impede the sale of a business in which he had no interest, unless he was paid a share of the proceeds.

18 On this application, the landlord sought, valiantly I think, to contend that it was not possible to conclude his conduct was unconscionable despite all that because s 79(b)of the *Retail Leases Act* says that a person is not to be taken to engage in unconscionable conduct "...merely because ... the person fails to renew the lease or enter a new lease." The submission is that here the landlord entered a new lease, and Article 10 of the agreement is therefore (now) completely irrelevant because it speaks only of an assignment or transfer of the lease. If s 79 says that it is not unconscionable "merely because" the landlord fails to enter into a new lease, then how, the landlord asks, could the landlord be found to have acted unconscionably under s 77? In saying that, counsel for the landlord concedes that had this been an assignment of a lease, then the landlord would have no case.

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2 See *Body Bronze International Pty Ltd v Fehcorp* (2011) 282 ALR 571 and *Director of Consumer Affairs v Scully* [2013] VSCA 292.

19 I cannot accept this submission, even for leave purposes. First, it was not a point argued below. It would have had to have been put in the alternative yet it was not. The more I look at this case the more it appears that there were two different cases being run before the Tribunal. The landlord was running a case to say that the business belonged to the landlord. The tenant was running a case to say that she bought the business, and was entitled to sell it as her asset. The Tribunal found it was her business. The Tribunal found under Article 10 that she could transfer the lease subject to the landlord's approval. To that, the landlord's case was it was entitled to only give its approval subject to payment of 40% of the purchase price. But, that case collapsed on the finding that the landlord did not have any ownership in the business. If so much turns on the dichotomy between an assignment and a new lease, the question of why a new lease was granted rather than an assignment of the lease simply was not investigated at trial. It did not have to be.

20 Secondly, I accept the submission on behalf of the tenant that the reliance on s 79 is misconceived anyway. Properly understood, that section is not applicable to the facts as the landlord would have them. The phraseology "merely because" in that section refers to a situation where a landlord simply says "no" to renewing a lease or making a new lease. The landlord simply cannot get away from the facts as found in this case that his conduct towards the lease was bound up inextricably with its view that it owned the business.

21 Authorities recognise that it is possible on appeal for a new point to be advanced which was not taken below.[3] They are usually cases where the new point requires no evidence for its resolution and that in the interests of justice compel that the Appeal Court should deal with the question. Here, I would hold that it is not in the interest of justice to advance this point. Not only was it not argued below but there is sufficient to conclude that the landlord conducted its case on a set course which was fundamentally against viewing the failure to take the point below as somehow excusable. Secondly, in any event, it would require some evidence as to why it is a

3 See *Geelong Building Society v Encel* [1996] 1 VR 594 at 604-5 and *Ravinder Rohini Pty Ltd v Krizaic* (1991) 30 FCR 300 at 316.

new lease was chosen rather than an assignment of a lease. It would be an important factual question because the landlord's case seems to turn on the dichotomy between a renewal of a lease and a new lease. Thirdly, I think the point is bound to fail.

22 It was submitted that the Tribunal should have considered the point for itself. I cannot accept this. I have been taken carefully through the "pleadings" and the witness statements and the written submissions. Apart from a passing reference to s 79(b) in the points of defence, the point never came to be raised again either on the evidence or written submissions. There is no evidence that it was raised in closing oral submissions. I think the Tribunal's reasons, if I may say so, carefully and methodically recite the submissions made and have been shown to deal with the very issues that the written submissions and the evidence presented for determination. The Tribunal cannot be expected to decide a point not put before it.

23 Finally, as a second ground for leave to appeal, it was submitted that the reasons for the conclusion that the landlord had engaged in unconscionable conduct were inadequate in that they did not show a proper course of reasoning. Authorities in this field recognise that a finding of unconscionable conduct, involving as it does notions of unethical conduct or moral obloquy involve value judgment or normative judgments. To say that conduct is unconscionable is to characterise the result rather than to identify the reasoning that leads to the application of that description. Here it was submitted that the Tribunal's reasons do not show the basis upon which such a conclusion was reached. I reject that submission. Appeal courts have to be careful to ensure they do not scrutinise a tribunal's reasons with a fine tooth comb looking for error. I think the Tribunal properly identified the four criteria under s 77(2) to characterise what occurred here. In the end, once it was found that the landlord had no claim to the business, it requires not a great deal of explication to say that the use of his power as landlord to stop someone selling an asset unless they share the proceeds of sale was not only unfair and unreasonable but carried with it moral reprehensibility. That really is all the Tribunal was saying.

24 Finally, the landlord placed great reliance on *Australian Competition and Consumer*

Commission v Berbatis Holdings Pty Ltd.[4] Great care must be taken with that case. It was decided according to the form of unconscionable conduct being the knowing exploitation by one party of the special disadvantage of the other. The special disadvantage was a disabling circumstance affecting the ability of an innocent party to make a judgement in that party's own best interests. I shall not dwell on *Berbatis*. On the facts of that case, it can be used to contend that to take advantage of a superior bargaining position does not therefore mean there is unconscientious exploitation of another person's disability to conserve her own interests. But what was the bargaining position here? As recited in the Tribunal's decisions, the landlord was saying that *as it was a business belonging to the landlord* it was entitled to exact a price before granting an assignment or a new lease. There, as in so much of the landlord's case, is the problem. It was not found to be a business belonging to the landlord. He sought to assert an interest, and by means of his power as landlord, to gain an interest which so it has been found he was not entitled to. As was put by the tenant's counsel in unavoidable blunt terms, the landlord just wanted the money and used his power as landlord to extract it. Accordingly, *Berbatis* really has no application at all.

25 It was for those reasons this Court regarded it as not unjust to refuse leave to appeal, and to dismiss the proceeding.

26 Finally, it will be seen that the Court has made a conditional order amending the spelling of the defendant's name. The defendant's written submissions draw the Court's attention to that error. I note the amended spelling conforms with the spelling on the 2007 agreement (as translated). Moreover, the Court has today been given a VCAT order (made in Chambers), which has made the same conditional order in the VCAT proceeding.

DATED: 5 September 2014

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4 (2002) 214 CLR 51.