



Statutory unconscionable conduct and retail leasing

By Michelle Sharpe

Small businesses have long complained of unconscionable conduct by larger, more powerful companies in retail leasing. These complaints have led to legislative reform with the insertion in 1998 of s51AC in the *Trade Practices Act 1974 (Cth)* (TPA).

More than a decade later, there are very few fully contested cases on retail leasing in relation to s51AC. Indeed, there are only four. In all but the most recent case of *ACCC v Dukemaster Pty Ltd*,¹ unconscionable conduct was found by the court not to have been established. Despite this sparsity of precedent (and the fact that, as has been noted by the courts, unconscionability is incapable of exhaustive definition) these cases do establish some parameters on the kinds of conduct that might well be regarded by the courts to be unconscionable. It follows that an examination of these cases is very helpful in understanding the scope of s51AC, and also its equivalents in state and territory legislation.

LEGISLATIVE HISTORY OF S51AC

A prohibition on unconscionable conduct was first inserted into the TPA 1986.² Section 52A, later renumbered s51AB,³ prohibited corporations from engaging in unconscionable conduct in consumer transactions. Section 51AA was subsequently inserted after a succession of reports considered the extension of the prohibition to commercial transactions.⁴

Section 51AA incorporates the equitable doctrine of unconscionable conduct, providing litigants with access to the wide range of remedies available under the TPA. Section 51AA was intended to provide greater protection to small businesses from unconscionable conduct by larger or more

powerful businesses. Small businesses had complained loudly that they were vulnerable to unconscionable conduct, particularly in relation to franchising and commercial leases.⁵ Section 51AA, however, was later found to be inadequate in providing this protection and further amendments to the TPA were recommended.⁶

Section 51AC was inserted into the TPA in 1998.⁷ It prohibits people and corporations from engaging in unconscionable conduct in transactions with business consumers. Unlike s51AA, s51AC does not refer to the equitable doctrine for content. Instead, it provides a non-exhaustive list of considerations that the court is to take into account in determining the existence of unconscionable conduct. Section 51AC was intended⁸ to be broader in scope than s51AA, and has been recognised by the courts as such.⁹ It was hoped that s51AC would have a significant impact on the law. The federal government directed the Australian Competition and Consumer Commission (ACCC) to run enforcement cases to develop and test the law in relation to s51AC.¹⁰ Section 51AC was also incorporated by most states and the ACT into their own legislation.¹¹ Despite this there have been, to date, very few fully contested cases in relation to s51AC or any of its state or territory equivalents. The few cases that do exist, as noted by one commentator, describe what statutory unconscionable conduct is not, rather than what it is.¹² These cases, however, are still instructive in providing examples of the kinds of conduct that may or may

not amount to unconscionable conduct. In this respect, cases considering s51AC clearly have the greatest precedential value. Section 51AC has been considered in only four fully contested cases in relation to retail leases.

Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd¹³

Essentially, the lessee complained of the lessor's conduct in relation to two issues: improvements made by the lessee to the premises and increases in rent by the lessor. Improvements to the premises included construction of a new toilet and associated structures to facilitate access for those with disabilities. These improvements were necessary for the lessee to obtain a liquor licence that it later successfully obtained. The lessor, however, issued default notices on the lessee requiring it to remove the improvements. The lessor later increased the rent.

The court at first instance held that the lessor had not engaged in unconscionable conduct, and this decision was upheld on appeal. In construing s51AC, the Court of Appeal adopted the reasoning¹⁴ of the Court in *Hurley v McDonald's Australia Ltd*.¹⁵ The Court, in *Hurley*, held that:

'For conduct to be regarded as unconscionable, serious misconduct or something *clearly unfair or unreasonable*, must be demonstrated – ... Whatever "unconscionable" means in s51AB and s51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions showing no regard for conscience, or that are *irreconcilable with what is right or reasonable*... The various synonyms used in relation to the term "unconscionable" import a *pejorative moral judgement*...'¹⁶

The Court of Appeal did not regard the lessor's conduct to be either unfair or unreasonable. It was noted that the trial judge had accepted evidence that the lessor had refused to consent to alterations of the premises because the premises were heritage-listed. Further, it was conceded by the lessee that the increase of rent was set by a rental determination under the rent review provisions of the lease.

Bowen Investments Pty Ltd v Tabcorp Holdings Ltd¹⁷

On entering into the lease, the lessee substantially remodelled the foyer of the premises to make it more suitable for its purposes. The lease did not contain any term requiring the lessee to reinstate the foyer when the lease was signed. The lessor argued that the lessee knew well from negotiations prior to signing the lease that it had mistakenly believed the lessee to be under a duty to reinstate the original foyer. The lessor claimed that lessee had engaged in unconscionable conduct, in breach of s51AC, by knowingly taking advantage of its mistake by remodelling foyer and then, more than seven years later, refusing to reinstate it.

The Court, citing *Hurley*, held that for conduct to be unconscionable it must be serious misconduct or conduct that is unfair or unreasonable.¹⁸ The Court did not find any evidence that the lessee, even if it knew of the lessor's mistake, had knowingly taken advantage of it. Further, the Court did not consider that the lessor laboured under any special disadvantage in its relationship with the lessee. The

lessor had more than 30 years of experience in commercial leasing and had access to advice from experienced solicitors. Indeed, the lessor had used solicitors to negotiate the terms of the lease. The Court concluded that, even if the lessor's claim had not been statute-barred,¹⁹ it could not succeed.

Harbourside Catering Pty Ltd v TMG Developments Pty Ltd²⁰

The lessee entered into an agreement to sell its restaurant business. The sale was conditional on the lessor's consent to the assignment of the lease. The lessor refused to give its consent. Exercising its right under the s39 of the *Retail Leases Act 1994* (NSW) the lessor claimed that the requisite skills of the proposed assignee were inferior to that of the lessee. The lessee claimed that the real reason for the lessor's refusal was vindictiveness towards the lessee, a desire to obtain a tenant of its own choosing (rather than the lessee's own choosing) and the hope of extracting a settlement from the lessee of separate legal proceedings between the parties.

Although the lessor was exercising a right conferred on it by the *Retail Leases Act*, the court considered that the lessor may still be guilty of unconscionable conduct if that right was exercised with the intention of causing harm to the lessee. This does not mean, the court noted, that a lessor can exercise its rights only if it does so with 'goodwill and disinterest'.²¹ A lessor may still exercise its rights validly if there is some hostility between the parties or where the lessor might otherwise feel a sense of 'personal satisfaction' on its exercise.²² The exercise of a right becomes unconscionable where it is not exercised for the purpose for which it was conferred. The purpose for which a right has been exercised is a question of fact. The court also noted that where the exercise of the right produces result commensurate with the purpose for which the right was conferred, it would be difficult to infer that its exercise was capricious or arbitrary. The court ultimately found that the lessor did not exercise its right out of spite and, consequently, did not engage in unconscionable conduct.

ACCC v Dukemaster Pty Ltd²³

The lessor owned a shopping centre that had a food court on the ground floor of the building. Four separate tenants leased shops in the food court from which they operated businesses selling food. The ACCC, in a representative action, complained that the lessor had taken advantage of its stronger bargaining position to secure a significantly higher rental than the market rental on the renewal of the tenants' leases. All of the tenants were people for whom English was a second language. Only one of the tenants was a corporation, and this was the only tenant that, through its directors, was fluent in English. Shortly before the expiration of the lease (and in breach of the notice requirements under state legislation),²⁴ the lessor offered to renew the lease at a certain rental which it stated, either orally and/or in writing, was 'reasonable and below the market rate'. Two of the tenants subsequently sought a rental determination under the rent review provisions of their leases. The rental determination fixed rent at a rate considerably less than that >>

sought by the lessor. The lessor abided by the determination but refused to extend the lease for the additional terms tentatively agreed upon with the lessee. At about this time the lessor, contrary to its usual practice, sent letters demanding payment of arrears of rent to these tenants.

In construing s51AC,²⁵ the court referred to the recent decision of *ACCC v Allphones Retail Pty Ltd (No. 2)*,²⁶ in which Foster J distilled the relevant propositions from the cases of *Hurley* and *ACCC v 4WD Systems Pty Ltd*.²⁷ The court held that the conduct of the lessor in obtaining high rentals on the renewals of the leases, for all but the corporation tenant, was 'irreconcilable with what is right and reasonable' and unconscionable for broadly four reasons. First, and the most important of all, the lessee's representation that the rental offered was 'reasonable and below the market rate' was found to have been misleading and deceptive. Second, this representation was conveyed to tenants that the lessor knew had little or no ability to speak or read English. Third, the court found that the representation was made by the lessor with the intention of trying to secure a rental that was unjustifiable. Lastly, the lessor's offers to renew at the given rental required a response within, what the court held to be, an unjustifiably short period of time. The court found that the period of time given by the lessor to accept the offer limited the ability of the tenant to obtain independent advice. On one occasion, the offer was made during the Christmas holiday period, when such advice was not readily available.

The court did not find that the same conduct with respect to the corporation tenant, in relation to one of the two renewals of lease, to be unconscionable. The corporation consisted of a number of directors who were well educated and fluent in English. The court did, however, find that the lessor was unconscionable in relation to the second renewal. On renewing the lease for a second time, the lessor (in addition to the same kind of conduct already complained of) had made the offer for a limited time during the holiday period, sent a letter of demand for arrears of rent and refused an additional term on the lease when rent had been fixed by a rental determination. The court found this conduct to be 'deliberate' and 'irreconcilable with what is right and reasonable'.²⁸ Likewise, the court found the lessor's conduct with respect to another tenant – in refusing to offer additional terms after a rental determination and in sending letters of demand for arrears of rent during that time – to be unconscionable.

CONCLUSION

While it has been noted by one court that statutory unconscionability resembles an elephant in that 'it is impossible of simple and exhaustive definition' but 'nevertheless easily recognisable when it presents itself',²⁹ the cases outlined above do mark out some parameters on the kinds of conduct that might well be regarded by the court to be unconscionable. For conduct to be unconscionable it must clearly be deliberate, or at least reckless, exploits some vulnerability of a weaker party to the benefit of the stronger party, and is of a kind that might be regarded as wrong or

unreasonable. In practical terms, this means that lessors should know who their tenants are and have regard to any vulnerabilities they might have. This may mean, for example, that a lessor should allow a tenant who is not fluent in English a longer period of time than would usually be allowed to obtain assistance and advice in relation to offers or lease documents. Lessors must also be able to justify their actions as being commercially reasonable. ■

Notes: **1** [2009] FCA 682 (*Dukemaster*). **2** *Trade Practices Revision Act 1986* (Cth). **3** *Trade Practices Legislation Amendment Act 1992* (Cth), s8. **4** House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee), Parliament of Australia, *Mergers, Takeovers and Monopolies: Profiting from Competition?* (1989); House of Representatives Standing Committee on Industry, Science and Technology (the Beddall Committee), Parliament of Australia, *Small Business in Australia: Challenges, Problems and Opportunities* (1990); Australian Labor Party Special Caucus Committee of Inquiry (the Wright Committee), Parliament of Australia, *Report of the Special Caucus Committee of Inquiry into Aspects of the Australian Petroleum Industry* (1991); Australian Trade Practices Commission, *Unconscionable Conduct and the Trade Practices Act: Possible Extension to Cover Commercial Transactions* (July 1991) (the TPC Report); and Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls* (December 1991) (the Cooney Report).

5 The TPC Report. The Trade Practices Commission noted in its report that it had received a 'stream' of complaints over the years from small businesses alleging unconscionable conduct from larger businesses in relation to commercial leases. **6** House of Representatives Standing Committee on Industry, Science and Technology, Parliament of Australia, *Finding a Balance – Towards Fair Trading in Australia* (1997) (the Reid Report). **7** *Trade Practices Amendment (Fair Trading) Act 1998* (Cth). **8** *Trade Practices Amendment (Fair Trading) Bill 1997* (Cth), Hansard, 30 September 1997, at 8800. **9** See, for example, *Hurley v McDonald's Australia Ltd* [1999] FCA 1728, *ACCC v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365 and *ACCC v Allphones Retail Pty Ltd (No. 2)* FCA 17. **10** See direction by the then Minister for Customs and Consumer Affairs, Warren Truss, to the ACCC in the Commonwealth of Australia, *Government Notices Gazette*, No. GN 35 (2 September 1998) 3010. **11** *Leases (Commercial and Retail) Act 2001* (ACT), s22, *Retail Leases Act 1994* (NSW), s62B, *Retail Shop Leases Act 1994* (Qld), s46A and *Retail Leases Act 2003* (Vic), ss77 and 78. **12** Eileen Webb, 'Almost a decade on – A (Reid) report card on retail leasing' (2006) 13 *Australian Property Law Journal Report*, 240 at 282. **13** [2003] WASCA 11. **14** *Ibid*, at para 139. **15** [1999] FCA 1728 (*Hurley*). **16** *Ibid*, para 22. **17** [2007] FCA 708. **18** *Ibid*, at para 73. **19** Section 82(2) of the TPA requires that any proceeding be commenced within six years of the cause of action accruing. **20** [2007] NSWSC 1375. **21** *Ibid*, para 54. **22** *Ibid*. **23** *Dukemaster*, above n1. **24** See s18(3) of the *Retail Tenancies Reform Act 1998* (Vic) which requires a lessor to notify the lessee of its right to renew the lease three months before the expiration of the lease. **25** *Dukemaster*, above n1, at paras 16 to 17. **26** [2009] FCA 17 at paras 109 to 115. **27** (2003) 59 IPR 435 at para 185 where Selway J in turn cites the case of *Hurley* before holding that unconscionable conduct under s51AC would require 'some moral fault or responsibility' and that, consequently, the conduct complained of must be 'a deliberate (in the sense of intentional) act or at least a reckless act'. **28** *Dukemaster*, above n1, para 299. **29** *Barbcraft Pty Ltd v Goebel Pty Ltd* [2003] VCAT 1700 at para 87.

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