

LANDLORD'S RIGHTS WHEN TENANT ALTERS PREMISES WITHOUT CONSENT

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8 (12 February 2009)

The High Court of Australia in a unanimous decision has found against the appellant tenant company, Tabcorp Holdings Ltd in respect of the appropriate measure of damages for its breach of a lease with the respondent landlord company, Bowen Investments Pty Ltd.

FACTS

Bowen Investments owned a newly constructed high quality office building in Melbourne and leased the entire building to Tabcorp Holdings. The lease commenced on 1 February 1997 for a term of ten years with options to renew for a further five years in 2007 and 2012. A clause in the lease prohibited Tabcorp Holdings from making substantial alteration or addition to the leased premises without first obtaining consent from Bowen Investments. Then, in 1997, some six months after entering into the lease, Tabcorp Holdings demolished and replaced the foyer (which Bowen Investments had spent a great deal of money originally designing), which resulted in a marginally enlarged foyer but reduced lettable area on the ground floor. In this case, it was clear that consent to demolish and replace the foyer had not been granted to Tabcorp Holdings and in fact Mrs Bergamin, director of Bowen Investments, had specifically protested against any alteration to the foyer. Despite such protests, works were undertaken by Tabcorp Holdings to alter the foyer and were completed in August 1997.

It was on that background, that Bowen Investments commenced proceedings in the Federal Court of Australia in September 2005, claiming \$1.38 million in damages from Tabcorp Holdings as the cost of reinstating the original foyer. The Trial Judge found that Tabcorp had breached the lease but determined the appropriate assessment of damages for breach was the reduction in the value of the leased premises arising out of the unauthorised alteration to the foyer. The reduction in value arose out of the reduced floor area available for use as office space. The Trial Judge in those circumstances was only prepared to award minimal damages in the sum of \$33,820 for the cost of moving a wall and \$1,000 as nominal damages for breach of lease.

Bowen Investments on appeal, before the Full Court of the Federal Court, fared significantly better. The majority in that Court overturned the decision of the Trial Judge and essentially awarded Bowen Investments what it had claimed it was owed. The Full Court determined that damages should be assessed (not by the reduction in the value of the leased premises arising out of the unauthorised alteration to the foyer) rather by taking into consideration the cost of restoring the foyer to its original condition, before Tabcorp Holdings made the unauthorised alterations. Damages, to the delight of Bowen Investments, were increased to \$1.38 million. The breakdown

of those damages was \$580,000 for the cost of restoring the foyer to its original condition and \$800,000 for rental losses during the expected restoration period.

ISSUES

Unsurprisingly, the saga hadn't finished yet. Tabcorp Holdings, aggrieved by the decision of the Full Court, appealed to the High Court. On 1 August 2008, two Justices of the High Court granted Tabcorp Holdings with special leave.

Tabcorp Holdings argued that damages for breach of lease should not be measured by the cost of reinstating the foyer to its original condition, plus an assumed loss of rent while such reinstatement took place, for the following reasons:-

1. The unauthorised alterations to the foyer did not cause any diminution in the value of Bowen Investments' premises or its revisionary interests; and
2. Tabcorp Holdings themselves were entitled to possession of the premises until 2012 or 2017 (should that option be exercised) at which time Bowen Investments would find it necessary to extensively renovate the foyer anyway.

On the other hand, Bowen Investments remained obstinate that the original foyer be replaced or at least that it be compensated for the cost of doing so.

HIGH COURT DECISION & REASONING

The submissions of Tabcorp Holdings were not accepted. In a unanimous decision the High Court held, that in the absence of Bowen Investments giving written consent to any alterations, Bowen Investments was contractually entitled to have the foyer remain as it was constructed. In reaching that conclusion, the High Court reasoned that by altering the foyer Tabcorp Holdings had indeed failed to perform its contractual obligation to preserve the foyer, and in all the circumstances, the appropriate measure of damages (Bowen Investments' loss) was the cost of restoring the foyer to its original condition before the breach occurred. As a result, the High Court dismissed the appeal and in so doing, confirmed the assessment of damages at \$1.38 million. As expected, costs were awarded against Tabcorp Holdings.

OUR COMMENTARY

Landlords will naturally be a lot more comfortable with the decision of the High Court rather than the original decision of the lower Court.

Practically speaking, this is a case where the High Court has reassured lawyers and aggrieved parties for that matter that the policy of law towards the performance of contracts remains at trying to place the innocent party in a position that party would have been should the contract have been performed. Further, it establishes that the Court is at liberty to subjectively consider the personal preferences of an innocent party (which may not always be in pure economic terms) when choosing the appropriate measure of damages (for example Bowen Investments wanting the foyer returned to its original condition).

Please do not hesitate to contact us if you have any questions or opinions on this case.