

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**  
**CIVIL DIVISION**  
**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO BP695/2018

**CATCHWORDS**

LANDLORD AND TENANT – Section 60 of the *Retail Leases Act 2003* – Assignment of lease – whether landlord entitled to withhold consent to assignment.

<b>APPLICANT</b>	AVC Operations Pty Ltd (ACN 607 832 299)
<b>RESPONDENT</b>	Teley Pty Ltd (ACN 122 948 270)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member E. Riegler
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	29 May 2018
<b>DATE OF ORDER</b>	18 June 2018
<b>CITATION</b>	AVC Operations Pty Ltd v Teley Pty Ltd (Building and Property) [2018] VCAT 931

**REASONS**

**INTRODUCTION**

1. On 29 May 2018, I heard an application by the Applicant for an order in the form of a declaration that the Respondent is not entitled to withhold consent to the assignment of the Applicant's leasehold interest in premises known as the *Bush Inn Hotel*. Given the urgency of the application, orders were pronounced and published without reasons on 31 May 2018. Those orders stated, in part:

Subject to the Security Deposit and the Security Guarantees being provided to the Respondent, the Tribunal orders:

1. The Respondent is not entitled to withhold consent to the assignment of lease from the Applicant to the proposed assignee; namely, *Wheatland Hotels Toorak Pty Ltd* (ACN 624 923 860), to the lease over premises located at 505 Malvern Road, Victoria between the Applicant and the Respondent (**'the Lease'**).
2. For the avoidance of any doubt, the Applicant is entitled to assign its interests under the Lease to *Wheatland Hotels*

*Toorak Pty Ltd* (ACN 624 923 860) without the consent of the Respondent.

2. What follows are my reasons of the orders pronounced on 31 May 2018.

## **BACKGROUND**

3. The Applicant is the tenant (**‘the Tenant’**) of hotel premises located in Malvern Road, Toorak and known as the *Bush Inn Hotel* (**‘the Bush Inn’**). The premises are owned by the Respondent (**‘the Landlord’**). The original lease, dated 21 February 2000, was for a term of one year, with four further terms of five years each. However, subsequent variations made to the lease have resulted in the lease term, should all options be exercised, being extended to 2036.
4. On 6 April 2018, the Tenant entered into an asset sale agreement with Wheatland Hotels Toorak Pty Ltd (**‘Wheatland Toorak’**) for the sale of the Bush Inn business. Wheatland Toorak is a company associated with or controlled by the directors of Wheatland Hotels Pty Ltd, which owns and operates other licensed premises, such as the *Orrong Hotel* in Armadale, Victoria. As a condition precedent to the sale of the Bush Inn business, was the assignment of the leasehold interest currently held by the Tenant. The asset sale agreement provided that if the Tenant was unable to procure an assignment of its leasehold interest by 31 May 2018, the parties were entitled to terminate the asset sale agreement.
5. Despite several requests made by the Tenant to the Landlord, consent was not obtained. Consequently, by application dated 17 May 2018, the Tenant sought orders in the form of a declaration from the Tribunal, to the effect that there was consent to the assignment of its leasehold interest to Wheatland Toorak.

## **THE ACT**

6. Section 60 of the *Retail Leases Act 2003* (**‘the RLA’**) provides, in part:
  - (1) A landlord is only entitled to withhold consent to the assignment of a retail premises lease if one or more of the following applies –
    - ...
    - (a) the landlord considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease;
    - ...
7. Section 61 of the RLA further states, in part:
  - (1) A retail premises lease is taken to provide as set out in this section.

- (2) A request for the landlord’s consent to an assignment of the lease must be in writing and the tenant must provide the landlord with such information as the landlord reasonably requires about the financial resources and business experience of the proposed assignee.

...

8. In *AAMR Hospitality Group Pty Ltd v Goodpar Pty Ltd & Anor*,<sup>1</sup> Deputy President Macnamara (as he then was) found that the section should be construed as if it included the word *reasonable*:

45. With the utmost hesitation however I consider that the words ‘*reasonably*’ or ‘*acting reasonably*’ should be read into Section 60(1)(b). In terms of Lord Mersey’s famous formulation there is a necessity to do so. The overriding policy evident in the *Retail Leases Act* is to provide special protection to a limited class of commercial tenants, namely those who are tenants of small retail tenancies and do not have the clout that say a listed corporation would have. The provisions of the statute are aimed at providing protection to this class of tenant and constraining and restricting a largely unrestricted power which landlords of these premises at common law and before the enactment of special retail tenancies legislation had available. To construe a provision such as Section 60(1)(b) such that one of the protected class of tenants was to be at the mercy of the purely subjective determination of a lessor would not be conducive to the statute’s overall policy, *per contra* it would tend to subvert the wider policy of the statute, hence as Batt JA did in *Bausch’s* case, I would read the words ‘*reasonably*’

9. In *Le Coz v Innominata Pty Ltd*,<sup>2</sup> an early case dealing with a similar provision in the now repealed *Retail Tenancies Act 1986*, Deputy President Macnamara reviewed several authorities concerning provisions which prohibit a landlord from unreasonably refusing consent to an assignment of lease. Of note is the passage of Mason J in *Secured Income Real Estate (Australia Ltd) St Martin’s Investments Proprietary Limited*,<sup>3</sup> where his Honour states:

[a refusal to consent] on the ground that there were doubts that the appellant would or could pay the rent promptly would, if the ground were made out, not be capricious or arbitrary. I say “promptly” because respondent as owner was entitled to look for a tenant who would not only pay the rent, but would pay promptly and in

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<sup>1</sup> [2009] VCAT 2782.

<sup>2</sup> [1999] VCAT 1598.

<sup>3</sup> (1979) 144 CLR 596, 610.

accordance with the provisions of the lease. If the evidence established that the respondent entertained doubts, reasonably based, that the appellant would pay the rent promptly and without difficulty, then it was reasonable to refuse to grant the lease on that ground. [underlining added]

10. Therefore, I proceed on the basis that s 60 of the RLA is to be construed to mean that the *landlord's consideration that the proposed assignee does not have sufficient financial resources or business periods to meet the obligations under the lease* must be reasonably held. Mere suspicion or conjecture is not sufficient. Having said that, I accept that the onus of proving that consent has been unreasonably withheld is on the Tenant.<sup>4</sup>

### THE LANDLORD'S CASE

11. The Landlord does not take issue with the business experience of Wheatland Toorak, notwithstanding that it is a newly established company that has not previously traded. It was created solely for acquiring and running the Bush Inn. Nevertheless, the Landlord accepts that the directors standing behind Wheatland Toorak are experienced publicans.
12. Similarly, the Landlord does not say that the Tenant has failed to follow the procedure set out under s 61 of the RLA. However, the Landlord contends that insufficient information has been provided for it to be reasonably satisfied that Wheatland Toorak has, or would have, sufficient financial resources to meet its obligations under the lease.
13. The current term of the lease is due to expire on 8 December 2021. The current rent payable under the Lease is \$192,799.92, plus GST with fixed annual 3.8 percent increases for the remainder of the term. In addition, Wheatland Toorak would be required to provide a security deposit equivalent to nine months rent plus GST, which amounts to \$159,059.93. Further to those payments, it appears from the asset sale agreement, that in excess of \$155,000 remains to be paid from Wheatland Toorak to the Tenant, as the balance payable for the purchase of the Bush Inn business.
14. The documents provided to the Landlord by the Tenant, following an initial request by the Landlord for financial documentation comprised:
- (a) references for Larry Wheatland and Leisa Wheatland, the directors of Wheatland Toorak;
  - (b) some financial information of Larry Wheatland, which included payment summaries and a recent tax return;
  - (c) a business plan;

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<sup>4</sup> *Le Coz v Innominata Pty Ltd* [1999] VCAT 1598, [22].

- (d) a resume for Ryan Wheatland (the managing director of Wheatland Toorak);
  - (e) audited financial statements of Wheatland Hotels Pty Ltd; and
  - (f) a copy of the contract the sale of business under which Wheatland Hotels Pty Ltd became the owner of the *Orrong Hotel* business.
15. Following further correspondence passing between the parties, the following additional documents were provided to the Landlord:
  - (a) a Financial Report for the year ended 30 June 2017 for Wheatland Hotels Pty Ltd;
  - (b) a Profit and Loss Statement for the *Orrong Hotel* for nine months of the financial year ending 31 March 2014;
  - (c) a Trading Statement provided by accountants acting on behalf of Wheatland Hotels Pty Ltd for the 2016 and 2017 financial years;
  - (d) an Asset List for Wheatland Hotels Pty Ltd;
  - (e) pay slips for each of the directors of Wheatland Toorak; and
  - (f) a tax return for Larry Wheatland.
16. As indicated above, Wheatland Toorak is a newly established company without any trading history. Consequently, no financial documentation could be provided for that entity. In response to the provision of that documentation, the Landlord wrote to the Tenant by letter dated 9 May 2018 stating:
  - The directors of the Tenant Company have not provided, as previously requested, a Statement of Assets and Liabilities. The Tenant Company, however, has provided the Tax Return of one of its directors, however, that Director shall remain with his current employer and therefore will have no positive role to play in the business.
  - We note that the Purchaser has offered the corporate guarantee of Wheatland Pty Ltd. According to our enquiry the company paid up capital is \$300.00 with a net profit before tax in the approximate sum of \$90,000.00. We are instructed that the value of this entity would not be significant.
  - In view of the fact that the Tenant has failed to furnish a proper Statement of Assets and Liabilities in order for the Lessor to give due consideration the Lessor has no option but not to consent to the Transfer of the Lease.
17. The Landlord contends that in circumstances where Wheatland Toorak has sought to rely on the financial resources of an associated company,

Wheatland Hotels Pty Ltd, it is reasonable for the Landlord to call for evidence of the sufficient financial resources of that associated company.

18. The Landlord points to the financial statements of Wheatland Hotels Pty Ltd. Although those documents indicate a net equity in the amount of \$93,000, the assets of that company include unsecured loans of around \$180,000.
19. Moreover, the Business Plan provided by Wheatland Toorak states that it will require funding of \$500,000 to effect improvements in the running of the Bush Inn business. Further, it is common ground that the directors of Wheatland Toorak (and proposed guarantors of the lease) have no personal assets.
20. The Landlord contends when all those factors are taken into consideration, little comfort can be gained from the financial documents provided by the Tenant. On that basis, it argues that it has not acted unreasonably in withholding its consent to the assignment of the lease.

#### **TENANT'S SUBMISSIONS**

21. The Tenant submits that there is abundant information provided to the Landlord which indicates that Wheatland Toorak has the financial resources or backing to meet its obligations under the lease. Reference was made to a spreadsheet, which set out the projected profit and loss of Wheatland Toorak, if it were to take over the Bush Inn business. That spreadsheet detailed anticipated revenue, cost of sales and expenses, leaving a net profit which would clearly allow Wheatland Toorak to meet the financial obligations under the lease.
22. The projected revenue detailed in that spreadsheet contemplated that there will be an increase in takings of up to 40% from what is currently the case. That increase in takings is said to arise because of several factors, which are set out in the Business Plan. These include increasing the trading hours and re-modelling the interior of the Bush Inn to increase patronage.
23. The Tenant submits that further comfort for the Landlord is derived from the fact that a significant security deposit, representing nine months rent, is to be provided together with both personal guarantees by each director and a corporate guarantee provided by Wheatland Hotels Pty Ltd.

#### **FINDINGS**

24. I accept that in many cases, landlords may be reasonably justified in withholding consent to the assignment of a lease to a corporate entity which has no trading history and where those persons standing behind that corporate entity have no personal assets or experience.
25. However, this case is different. Here, it is conceded that the persons standing behind Wheatland Toorak are capable and long-standing

publicans. The only issue is whether Wheatland Toorak has sufficient financial resources to meet the obligations under the lease.

26. I accept that the significant security deposit provides some comfort to the Landlord, especially in circumstances where the current term of the lease has only 42 months to run. Further, I find that some weight can be given to the projected revenue set out in the Business Plan of Wheatland Toorak. I do not consider it to be unrealistically optimistic. I have formed this view because the financials of Wheatland Hotels Pty Ltd show an improvement in gross profit from 2016 to 2017, indicative of that entity, and in particular, the individuals managing that enterprise, operating licensed premises with business acumen.
27. Moreover, I do not consider that one can overlook the personal guarantees offered by the directors of Wheatland Toorak, merely because those persons have no personal assets. Those guarantors potentially stand to have judgment entered against them should Wheatland Toorak fail to meet its obligations under the lease. It is reasonable to assume that business people, especially publicans in control of licensed premises, would take considerable steps to avoid such an outcome.
28. Similarly, and for the same reason, I do not regard the corporate guarantee offered by Wheatland Hotels Pty Ltd to be valueless.
29. The clear intent of s 60 of the RLA is to restrict the circumstances by which a landlord can refuse to consent to the assignment of a lease. It confines consideration to whether the proposed assignee would not have sufficient financial resources or business experience to meet its obligations under the lease. This is an onerous threshold to overcome. This proposition was made clear by Deputy President Macnamara in *AAMR Hospitality Group*:

... the clear terms of Section 60(1) of the Retail Leases Act which limits the considerations which entitle a landlord to withhold consent to an assignment. Perhaps astonishingly a demonstrated want of probity on the part of the proposed assignee is not amongst the considerations which the statute says a landlord would be entitled to act upon to refuse consent to assignment. The restriction of the landlord's discretion in these circumstances seems the more remarkable when one considers the relatively dramatic affect of Section 62.<sup>5</sup>
30. Consequently, I am unable to find that it was open for the Landlord to reasonably consider that Wheatland Toorak did not have sufficient financial resources to meet the obligations under the lease. In forming

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<sup>5</sup> *AAMR Hospitality Group Pty Ltd v Goodpar Pty Ltd & Anor* [2009] VCAT 2782, [52].

that view, I accept that ‘financial resources’ may also comprise financial backing from associated entities or individuals.

**SENIOR MEMBER E. RIEGLER**