

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO BP1617/2015

**CATCHWORDS**

RETAIL TENANCY – Section 60(1) of the *Retail Leases Act 2003* – Refusal by landlord to consent to assignment of lease; Tenant alleges refusal unreasonable; Grounds for refusal alleged lack of business experience and/or sufficient financial resources of proposed assignee.

<b>APPLICANTS</b>	MD & S Griggs Pty Ltd (ACN 162 638 280)
<b>RESPONDENT</b>	DWH Pty Ltd (ACN 150 372 802)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member E. Riegler
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	15 December 2016
<b>DATE OF ORDER</b>	19 December 2016
<b>CITATION</b>	<i>MD &amp; Griggs Pty Ltd v DWH Pty Ltd</i> (No 2) (Building and Property) [2016] VCAT 2159

**ORDER**

1. The Applicant's application, seeking a declaration that the Respondent unreasonably withheld its consent to the proposed assignment of the Applicant's leasehold in respect to premises known as the Landsborough Hotel, located at 39 Burke Street, Landsborough, is dismissed.
2. Liberty to apply.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

For the Applicant	Mr L Virgona of counsel
For the Respondent	Mr W Stark of counsel

## REASONS

1. The Applicant is the current tenant of retail premises known as the Landsborough Hotel (**‘the Tenant’**), located in Landsborough, Victoria (**‘the Property’**). The Respondent is the registered proprietor and landlord of that Property (**‘the Landlord’**).
2. In December 2014, the Tenant sought to sell its business and assign its leasehold interest to Woodynel Nominees Pty Ltd (**‘the Proposed Assignee’**). To that end, by letter dated 22 December 2014, the Tenant’s solicitors wrote to the Landlord’s solicitors requesting consent to the proposed assignment. In answer to that request, the Landlord’s solicitors requested the following information or documents concerning the Proposed Assignee:
  - (a) a statement of assets and liabilities;
  - (b) two written references as to business experience;
  - (c) two written references as to financial circumstances; and
  - (d) two written references as to personal character.
3. By further correspondence dated 10 April 2015, the Landlord reiterated its request for the above documentation and further requested:
  - (a) a copy of the proposed instrument of transfer;
  - (b) a business plan from the Proposed Assignee;
  - (c) further details of the Proposed Assignee;
  - (d) a copy of the contract of sale of business; and
  - (e) a copy of the inventory of plant and equipment being sold with the business.
4. On 17 April 2015, a number of documents were forwarded to the Landlord’s solicitors, which included the proposed instrument of transfer, sale of business contract (which included an inventory of the plant and equipment sold with the business), two personal references for Georgina Woodyard, the director of the Proposed Assignee and one business experience reference of Ms Woodyard.<sup>1</sup>
5. Settlement of the sale contract was scheduled to take place on 10 August 2015, subject to the Landlord providing its consent to the assignment. In correspondence dated 4 August 2015, solicitors for the Tenant enquired whether the Landlord required anything further in order to grant consent to the proposed assignment.

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<sup>1</sup> At one point, it was believed that Ms Woodyard in her personal capacity would be the proposed assignee.

6. In response, the Landlord raised a number of issues, which ultimately culminated in disputation between the parties and consent being withheld. The first of these issues related to the interpretation of the lease and whether it provided for any market review upon renewal. The question was ultimately determined by the Tribunal in favour of the Landlord following a hearing and by orders dated 11 October 2016.<sup>2</sup> Other disputes related to allegations of rent being in arrears, the requirement for personal guarantees to be given by the Proposed Assignee's director and disputes over what assets were to be sold as part of the sale of business. Apart from the allegation that rent remains in arrears, all of these issues have now been resolved or determined.
7. Notwithstanding resolution of most of those issues, the Landlord still refuses to give its consent to the assignment of the lease to the Proposed Assignee. The basis upon which it has refused its consent is twofold:
  - (a) The Landlord contends that the Proposed Assignee does not have sufficient financial resources or business experience to meet the obligations under the lease, going forward; and
  - (b) The Landlord contends that the Tenant has not complied with the assignment provisions of the lease. To that end, Clause 4.3.3 of the lease provides that prior to obtaining the Landlord's consent to a transfer of the lease, the Tenant must remedy any breach of the lease. As indicated above, the Landlord contends that rent remains in arrears.
8. Consequently, the Applicant seeks an order in the form of a declaration that the Respondent unreasonably withheld its consent to the proposed assignment of the Applicant's leasehold interest in the Property.

### **THE RETAIL LEASES ACT**

9. Section 60 of the *Retail Leases Act 2003* ('the Act') governs, in part, the party's rights and obligations relating to an assignment or transfer of lease. It provides, in part:

**60. When the landlord can withhold consent to an assignment**

- (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 –  
...
  - (b) the landlord considers that the proposed assignee does not have sufficient financial

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<sup>2</sup> *MD & S Griggs Pty Ltd v DWH Pty Ltd* (Building and Property) [2016] 1718.

resources or business experience to meet the obligations under the lease;

- (c) the proposed assignor has not complied with reasonable assignment provisions of the lease;

...

10. In *AAMR Hospitality Group Pty Ltd v Goodpar Pty Ltd & Anor*,<sup>3</sup> the Tribunal found that the words *reasonably* or *acting reasonably* should be read into s 60(1)(b) of the Act, such that it reads:

the landlord [reasonably] considers that the proposed assignee does not...<sup>4</sup>

11. I wholly adopt and accept the Tribunal's finding and reasoning in *AAMR Hospitality*. Indeed, it was not suggested by either party that s 60(1)(b) of the Act should be read in any other way.

12. Further, it is common ground that the onus on proving that the Landlord had acted unreasonably, in refusing consent, rests on the Tenant, being the party making the allegation.<sup>5</sup>

13. As indicated above, clause 4.3.3 of the lease between the parties is also relevant when considering whether the Landlord has unreasonably withheld consent to the proposed transfer or assignment. It states, in part:

4.3 To obtain the **landlord's** consent to a transfer or sublease the **tenant** must –

...

4.3.3 remedy any breach of the lease which has not been remedied and of which the tenant has been given written notice.

## GROUND S RELIED UPON TO WITHHOLD CONSENT

### Arrears of rent

14. The allegation that the Tenant is in arrears of rent is underpinned by the dispute that existed over the interpretation of the rent review clause in the lease. On one hand, the Tenant contended that there was no ability to review rent, either during each term of the lease or upon renewal. By contrast, the Landlord contended that the rent was to be reviewed upon renewal of each term. Consequently, the Landlord purported to increase the rent by \$312 per month to \$2,000 per month, with effect

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<sup>3</sup> [2009] VCAT 2782.

<sup>4</sup> Ibid at [45].

<sup>5</sup> Ibid at [30]; *Kamil Café Pty Ltd v Asian Pacific Building Corporation Pty Ltd* [2005] VCAT 2264.

from October 2014. The tenant has not paid rent at that increased rate. Consequently, the Landlord contends that rent is in arrears in excess of \$20,000.

15. Mr Virgona of counsel, who appeared on behalf of the Tenant, submitted that this was not a valid ground upon which to refuse consent to the assignment. In particular, he contended that clause 4.3.3 of the lease was only applicable in circumstances where the Tenant was given notice of the breach. He submitted that there was no evidence of any such written notice ever being given.
16. Mr Stark of counsel, who appeared on behalf the Landlord, conceded that no formal written breach notice was given in respect of any rent in arrears. However, he contended that there was correspondence between the parties, which clearly indicated that the Landlord was seeking rent at the increased amount.
17. In my view, the allegation that rent is in arrears is not a valid ground to withhold consent to the assignment. In that respect, I accept Mr Virgona's submission that no formal breach notice has been served, which would enliven clause 4.3.3 of the lease.
18. Further, there is insufficient evidence to conclude that rent is in arrears and if so, to what extent. That issue would require further hearing, after giving the Tenant opportunity to consider and respond to the allegations made by the Landlord.

### **Insufficient financial resources**

19. As indicated above, the Landlord contends that the documentation submitted by the Tenant and the Proposed Assignee fails to demonstrate that the Proposed Assignee has sufficient financial resources to meet future obligations under the lease.
20. The documents relied upon by the Tenant are exhibited to the affidavit of Stella West, the Tenant's solicitor, sworn on 5 August 2016. The documents include:
  - (a) A letter from *Olaris & Associates* dated 6 February 2014, which states:

We have acted as Accountants for Ms Woodyard for the last 25 years. We have prepared her tax returns and in our dealings with her we have found her to be honest, organised, have good business sense, and is of the highest moral character. We would recommend her.
  - (b) A letter from *Harcros Chemicals Pty Ltd* dated 17 December 1990, a previous employer of Ms Woodyard. It is addressed to the Admissions Officer at RMIT. It would appear the letter is a

reference to enable Ms Woodyard to enrol in a study course of some kind.

- (c) A letter from *Roy Morgan Research* dated 23 February 1999. It states that Ms Woodyard was previously employed with that company during the period 1994 to 1997 and held the position of *Computer Operations Supervisor, then Computer Operations Manager*.
  - (d) *The Landsborough Hotel Business Plan 2015*, prepared by the Proposed Assignee.
  - (e) A profit and loss forecast table, showing the anticipated profit and loss for a 12 month period.
  - (f) An extract of a bank statement from the National Australia Bank in relation to an account held by the Proposed Assignee and covering the period May 2015 until June 2015.
  - (g) An extract of a bank statement from the National Australia Bank in relation to an account held by Ms Woodyard and her partner, Geoffrey Nelson, for the period April 2015 until July 2015.
  - (h) An extract of a pay slip for Geoffrey Nelson for the period 29 June 2015 until 12 July 2015. The document states that Mr Nelson is employed as a *General-Purpose Seaman*.
21. Regrettably, no oral evidence was given by the Tenant or the Proposed Assignee to bolster the documentary evidence relied upon by the Tenant. Moreover, the documentary evidence produced in support of the application was more than 18 months old. No recent material has been filed by the Tenant in support of its application.
22. Surprisingly, the *Landsborough Hotel Business Plan 2015* prepared by the Proposed Assignee forecasts a loss of \$6,556 after the first 12 month period of trading. However, the document states further that:
- These figures do not include the accommodation or café revenue, which can turn the loss of \$6,506.00 per year into a profit. The accommodation area and rooms need updating at a cost of \$2,000.00 per room, this will be undertaken in the future if the hotel starts to make a profit. The above figures are based on a weekly turnover of \$3,750.00, which can be improved upon with the right marketing campaign undertaken in the near future.
23. Mr Stark submitted that the profit and loss forecast paints a pessimistic picture for future trading. He contended that the caveat placed on the forecast by the Proposed Assignee, that revenue will improve once accommodation or café revenue is included, does not ease that outlook. In particular, that caveat is conditional upon the business first returning

a profit before the accommodation area and rooms can be updated. However, the forecast does not anticipate any profit being achieved. Therefore, Mr Stark asks the rhetorical question: how can the accommodation area and rooms ever be updated?

24. Mr Virgona argued that after advertising is undertaken, revenue will improve. In my view, this submission is speculative, considering the material produced in this proceeding. Moreover, Mr Virgona informed me that the Landsborough Hotel is the only hotel in Landsborough. Therefore, it is unclear how advertising would greatly improve its market share, given that it already enjoys a market monopoly in Landsborough.
25. Mr Virgona also pointed to the liquidity of both the Proposed Assignee and its principal director, as verified by the two bank statements exhibited to the affidavit. In the case of the Proposed Assignee, the bank statement discloses that it holds or held \$73,736.60 as of 19 June 2015. Similarly, in the case of the joint account, the statement discloses that Mr Nelson and Ms Woodyard jointly hold \$30,023 as of 13 July 2015.
26. However, Mr Stark pointed out that monies in these accounts will be greatly diminished after the Proposed Assignee pays the Tenant the balance of the purchase price under the sale of business agreement. He submitted that \$43,000 was still owing under that agreement. That would mean that only \$30,000 would be left in the Proposed Assignee's account following settlement of the sale of business.
27. In those circumstances, can it be said that the Proposed Assignee has sufficient financial resources to meet the obligations under the lease?
28. In my view, the pessimistic forecast for profit and loss demonstrates that the Proposed Assignee is cognisant of the task ahead of it. It has not furnished optimistic forecasts with a view to colour the reality of the situation. This candid assessment indicates that the Proposed Assignee has allowed for the fact that it will not return a profit in the first year of trading as part of its business plan. In those circumstances, it is reasonable to infer that the Proposed Assignee has made sufficient allowance for this possibility and has not carelessly committed itself into a venture which has no hope of being profitable in the long term.
29. My view is reinforced by the fact that the two bank statements indicate that there were resources at hand in July 2015 to ensure that the obligations under the lease, in terms of meeting rent and outgoings commitments, can be fulfilled even if the business does not return a profit in its first year of trading.
30. That said, I am satisfied that this ground, of itself, would not justify the Landlord refusing to consent to the assignment or transfer of the lease.

## Sufficient business experience

31. Mr Virgona conceded that neither the Proposed Assignee, nor its director, have had any prior experience in running a hotel, restaurant or licensed premises. Nevertheless, he said that the Tribunal can draw some comfort from the fact that Mr Nelson, Ms Woodyard's partner, has previously worked in a bar. As indicated in the Business Plan, it is anticipated that Mr Nelson will manage the hotel side of the business.
32. However, no detail of Mr Nelson's prior bar-work has been provided. It is not known for what period Mr Nelson worked in a bar, the type of premises in which he worked, what duties he was responsible for or how long ago he undertook that work.
33. Ms Woodyard's employment reference, exhibited to the affidavit of Ms West, is not recent. Indeed, it discloses that Ms Woodyard was last employed in 1997. Mr Virgona submitted that this factor should not be viewed negatively. In particular, he said that Ms Woodyard's absence from paid work was due to her having to provide care for family members. He argued that the reality of rejecting the Tenant's application based on this ground would set an undesirable precedent that people who have been out of the workforce for a number of years would inevitably be excluded as potential assignees of a small business.
34. I do not accept this submission. The mere fact that someone has been out of the workforce for a number of years does not, in my view, mean that that person is, by that fact alone, lacking in sufficient business experience. Experience in running a small business may be gained in several ways. Persons who have been out of the workforce for a number of years can also gain experience in a particular industry by undertaking vocational courses or by working alongside others within a particular industry or business, sufficient to gain the requisite experience. Indeed, it is not unusual for a vendor of a retail business to continue to work in the business for a short period of time after settlement of the sale, so as to allow a smooth transition to the purchaser.
35. However, in the present case, there is no evidence of any such arrangement being agreed. There is no term in the *Sale of Business* agreement, exhibited to the affidavit of Ms West, to that effect.
36. Moreover, Mr Stark submitted that the Landlord was concerned that there was no specific hotel management experience identified by either the Proposed Assignee, Ms Woodyard or Mr Nelson. He said the Landlord feared that the Proposed Assignee will run into difficulties, without having some experience in managing a licensed establishment.



37. In my view, these concerns are not without justification. As indicated above, it is anticipated that Mr Nelson will run the hotel side of the business. However, no particulars have been provided as to his experience as a barman. Moreover, there is no evidence of either Ms Woodyard or Mr Nelson having undertaken any vocational training specific to running a licensed establishment.
38. Mr Virgona argued that the hotel caters to a very small farming community. It is not a large establishment and many of the intricacies of running a busy licensed establishment would not be applicable to the business at hand. He said that the references exhibited to the affidavit of Ms West show that Ms Woodyard is an organised person with computer skills. He submitted that these skills are sufficient to demonstrate that she has sufficient business experience in order to meet the obligations under the lease.
39. In my view, the evidence does not go that far. I am not persuaded that the Proposed Assignee, its director or others associated with the Proposed Assignee necessarily have sufficient business experience to meet the obligations under the lease.

## **CONCLUSION**

40. Given my finding that insufficient evidence has been adduced to demonstrate that the Proposed Assignee, its director or others associated with the Proposed Assignee, have sufficient business experience in running or managing a licensed hotel establishment to meet the obligations under the lease; I find that the Landlord has acted reasonably in refusing consent on this ground.
41. Although I acknowledge that the Landsborough Hotel may be a small establishment, catering to a confined demographic, the fact remains that there are obligations specific to licensed premises which distinguish those businesses from other types of retail businesses. Those obligations, if not met, may result in criminal sanctions being imposed upon the licensee or others who sell liquor from the hotel. None of the persons identified in the *Business Plan* or in the other documents exhibited to the affidavit of Ms West, are said to have had experience in running or managing a licensed hotel establishment. In those circumstances, I am not satisfied that the Landlord's concerns are ill-founded. I find that the landlord did act reasonably in considering that the Proposed Assignee did not have sufficient business experience to meet the obligations under the lease.
42. However, I note that circumstances may change. In particular, it is open for the Proposed Assignee, its director or others to gain the requisite experience or alternatively employ somebody to manage the business with the requisite experience. Where such evidence is

subsequently produced, then the basis upon which the Landlord has withheld consent may no longer be justified. For example, working alongside the Tenant for a period of time may, of itself, constitute the requisite experience, especially when one has regard to the size of the licensed establishment.

43. Therefore, my finding that the Landlord has acted reasonably in withholding consent, is confined to an examination of the evidence and materials produced in this hearing. However, I reiterate that things may change, which may require the Landlord to review and reconsider its position.

**SENIOR MEMBER E. RIEGLER**