VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R119/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Retail Lease – premises required to be air-conditioned – Landlord unable to provide air-conditioning for an uncertain period pending litigation - agreement for reduction in rental until cause of lack of air-conditioning resolved – allowance given by Landlord – Tenants claiming damages for lack of air-conditioning notwithstanding having received the agreed reduction – loss of profits that would have been made by sub-letting – no right to sub-let – premises licenced by company related to the Tenants – alleged loss not suffered by Tenants – whether damages would have been too remote - quantum of damages sought not proven - no claim for damages available - reduction was in consideration of there being no air-conditioning - *Retail Lease Act* 2003 – s.77 - unconscionable conduct – what amounts to - failure to warn of full nature of dispute concerning air-conditioning – not proven – licence fees received exceeding rental paid to landlord – whether loss suffered – *Australian Consumer Law* – whether conduct of Landlords misleading and deceptive – no loss proven

FIRST APPLICANT	Meadsview Pty Ltd
SECOND APPLICANT	Natsue Pty Ltd
FIRST RESPONDENTS	Robert Fenton and Glenda Fenton
SECOND AND THIRD RESPONDENTS	Ashley Fenton, Alison Fenton
FOURTH RESPONDENT	Owners Corporation No.1 336467A
FIFTH RESPONDENT	Owners Corporation No.2 336467A
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	19-21 June 2018
DATE OF ORDER	10 August 2018
CITATION	Meadsview Pty Ltd v Fenton (Building and Property) [2018] VCAT 1249

ORDERS

1. The application is dismissed.

2. No orders as to costs.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr L.P. Wirth of counsel
For the Respondents	Mr A.M. Donald of counsel

REASONS FOR DECISION

Background

1. The First Respondents together with the Second and Third Respondents ("the Landlords") are the owners of a strata title shop front office situated in a building at the corner of Glenhuntly Road and Carre Street, Elsternwick ("the Unit").

2. The Unit is approximately 80 m² in area and has a small frontage to Glenhuntly Road, incorporating a plate glass window and a door giving access onto the footpath. It has a suspended ceiling and plaster partitioning and the accommodation comprises a small entry foyer, partitioned offices, a kitchenette and an amenity area

3. The Respondents ("the Tenants") are companies associated with a Dr Pinskier and his brother who, through some corporate structure, operate a number of medical clinics throughout suburban Melbourne under the name "Medi-7". These clinics are operated in leased premises and employ general medical practitioners as well as other quasi health professionals upon terms whereby those persons carry on their respective professional activities in an allocated part of the clinic and, in exchange, part of the fees generated by their activities are shared with some entity within the group of companies associated with the Tenants.

4. By an undated commercial lease ("the Lease") the Landlords leased the Unit to the Tenants for a period of three years commencing on 4 March 2013. There were options for two further terms, one of two years and the other of three years. The commencing rental was $21,000.00 per annum, payable monthly in advance, but there was an initial rent-free period of three months. Outgoings were payable by the Tenants and the permitted use of the Unit was "offices and/or medical centre".

5. This proceeding once encompassed a greater dispute involving the Fourth and Fifth Respondents ("the Owners' Corporations") concerning the air-conditioning of the Unit but those issues have now been resolved. What remains is a claim by the Tenants against the Landlords for damages that are said to arise from the failure of the Landlords to provide air-conditioning for the Unit.

Hearing

6. The matter came before me for hearing on 19 June 2018 with seven days allocated. Mr L.P. Wirth of counsel appeared on behalf of the Tenants and Mr A.M. Donald of counsel appeared on behalf of the Landlords.

7. For the Tenants, I heard evidence from the director of the first applicant, Dr Pinskier, from an accountant who occupied part of the Unit as a subtenant, Mr Gostin, and from two valuers, Mr Derzekos and Mr Sirianni.

8. For the Landlords I heard the evidence of one of the first respondents, Mr Robert Fenton.

The evidence

9. There was a great deal of material in the Tribunal Books concerning the dispute between the Landlords and the Owners' Corporations. However, since those parts of the proceeding have been resolved I only need to concern myself with the Tenants' claim, not with the rights and wrongs of the dispute between the Landlords and the Owners' Corporations.

Absence of air conditioning

10. Before the Lease was executed, the Unit had previously been air-conditioned by a split-system air conditioning arrangement, incorporating an external compressor that had been located in the car park at the rear of the building in which the Unit is situated. The external compressor broke down and required replacement. A dispute then arose between the Landlords and the Owners' Corporations over the location of a replacement compressor. This dispute had not been resolved at the time the Lease was entered into, although there had been some indication that a particular location for the compressor would be agreed upon.

11. Very shortly after the Tenants executed the Lease, negotiations between the Landlords and the Owners' Corporations broke down and the Landlords' agent sent to the Tenants the following email:

> "Please be formally advised that there is a dispute between the Landlord of Suite 5/378 Glenhuntly Road and the Owner's Corporation of the building with regards to the unencumbered location of the outdoor air-conditioning unit for the premises on the veranda above Lot 30.
>
> The car park and access ramp had been identified as suffering from inherent operational impediments through the failure of the Owner's Corporation.
>
> The issue is now with the Landlord's solicitor and legal action against the Owner's Corporation is imminent.
>
> The Landlord has advised that due to the Owner's Corporation's inconsistent decision-making and conduct in this matter and the consequent unfair impact on the Lease between Medi-Admin and the Landlord that we are to provide the following:
>
> Three possible options exist under the current exceptional circumstances
>
> 1. Opt out of the Lease and have all funds returned to you, exempting the administration costs at $440
> 2. Continue the Lease without air-conditioning, at an agreed rental amount
> 3. Reduce the rental on the Lease until the matter is rectified
>
> Please advise at your earliest convenience how you would like to proceed in this matter." (sic.)

12. In response, Dr Pinskier sent the following email to the agent:

> "Further to our discussion I am willing to discuss only the third option.
>
> Can the landlord come back to me with an offer?"

13. The agent responded as follows:

> "We have received response from the landlord with regard to your desire for the landlord to make an offer.
>
> The landlord is willing to offer a rental deduction of $20 + GST per week for the lack of air conditioning, until the matter is rectified."

14. Dr Pinskier replied on 5 April 2013 with the following email:

> "We have considered the matter and would accept a $40 reduction.
>
> We have not been able to utilise the site due to the heat."

15. On 11 April the agent replied as follows:

> "The landlord has accepted your proposal of the $40 reduction until the matter is resolved.
>
> This will be reflected on your first tax invoice after the rent free period."

Subsequent events

16. At about the time the Tenants entered into the Lease, they also leased adjoining premises in the same building, being Shops 3 and 4, which also had an entrance onto Glenhuntly Road. These were larger premises and were air-conditioned. The Tenants cut a doorway in the common wall and created a short passageway in the Unit in order to connect the Unit with these adjoining premises.

17. The problem with the air conditioning was not resolved until 14 September 2016. In the meantime, the Tenants or a related entity licensed or sublet parts of the Unit to Mr Gostin and also to a Mr Oren. The money received from the licensing or subletting exceeded the rental that the Tenants had to pay to the Landlords.

18. By an email sent on 1 December 2015, the Tenants exercised their option for a further term, even though the air conditioning was still not working at that time. They are still in possession of the Unit.

Liability for air-conditioning

19. By the terms of the Lease, the Unit was demised to the Tenants together with the fixtures, furniture and chattels described in Item 4 of the Schedule. Included as part of the fixtures, furniture and chattels in that item in the Schedule is "air-conditioning system".

20. It is not disputed that the Landlords were required by the terms of the Lease to provide an operable air-conditioning system to the Tenants and that, until 14 September 2016, they did not do so.

The permitted use

21. Although the permitted use stated in the schedule is "offices and/or medical centre", Dr Pinskier told the agent at the time he negotiated the Lease that the Unit was to be used as an office and the adjoining premises were to be used as a medical centre. In cross-examination, he said that he did that so that he would obtain a better rent.

Loss of sub-letting income

22. The claim brought by the Tenants is for the loss of the profits that they claim they would have made by licensing or subletting rooms within the Unit to other persons. They claimed that they were unable to do that because of the lack of air conditioning.

23. Dr Pinskier said that a medical clinic that the Tenants might have opened in the Unit could have grown from 0 to 30 patient visits per day in the first year of trade and then to 44 patient visits per day the second year and 55 in the third year, with an increase in the number of full-time working doctors within the practice to meet the increasing demand. He described these as being conservative estimates based upon his experience with other practices. He said that the estimates did not allow for the very large amount of foot traffic in the area, which he described as being a large and very active retail precinct in Glenhuntly Road.

24. He said that the Tenants ordinarily pay medical practitioners 60% of the fees they generated by way of "commission" and that the annual operating cost of the practice would have been approximately $10,000 for utilities and $65,000 for an administrator and receptionist. He said that other overheads ordinarily associated with running a medical clinic would have been covered by the Tenants' head office located in the adjoining premises next door.

25. It was not suggested that any business plan had been prepared for the establishment of a medical centre in the Unit, nor do any steps appear to have been taken by the Tenants to establish such a centre.

The agreement to reduce the rental by $40 per week

26. Mr Donald submitted that, by the email chain referred to above between the agent and Dr Pinskier, the parties agreed to vary the Lease by deleting the words "air conditioning system" and reducing the rental by $40 per week plus GST, until the matter was resolved. He said that there were no other stipulations concerning how long the period without air-conditioning was to be, or as to preserving any potential claims by the Tenants in the future. He said that the rights and obligations of the parties merged in the agreement and regulated those rights until air conditioning was provided.

27. Mr Wirth referred me in some detail to the correspondence between the Landlords and the Owners' Corporations and criticized the conduct of the Landlords in that regard. While giving evidence, Mr Fenton defended his conduct of the negotiations. The Owners' Corporations are no longer

participating in this proceeding and I have heard no evidence from any witnesses that they might have called. I am unable to determine the reasonableness or otherwise of Mr Fenton's conduct of the negotiations to obtain air-conditioning for the Unit and in any case, I am not concerned with that dispute.

28. When the agreement concerning the rental reduction was reached, the Landlords had informed the Tenants of the dispute and provided some details, as stated above, including informing the Tenants that there was to be litigation. Mr Wirth complained of there being limited information from the Landlords, but when they made their counter-offer, which the Landlords accepted, the Tenants were aware that the dispute was significant, in that it would involve litigation and it would leave the Unit without air-conditioning until it was resolved. Dr Pinskier said, in his email containing the counter-offer, that the Tenants were unable to use the Unit due to the heat and so they were aware of the consequences of there being no air conditioning for an uncertain period. It is also clear from Dr Pinskier's witness statement that he is an astute and successful business man.

29. Mr Wirth said that the reduction in rental, which he said was "nominal", should be understood to be, not the price paid for the absence of air conditioning but as "a commercial accommodation for a temporary nuisance". He said that the reduction in rental only stands as a credit to the Landlords that they can now set off against their liability to the Tenants for failing to provide air conditioning.

30. I do not accept that submission. The agent's email stated clearly that the reduction offered was "for the lack of air conditioning". The reduction in rental was in an amount the Tenants themselves requested and there was nothing in the exchange of emails to categorize it as anything other than compensation for the Tenants while the Unit was without air conditioning. That compensation could only be for the absence of air conditioning until the matter was resolved. That is the clear meaning of the words used and it is what I think the parties intended

31. Mr Wirth said that a term should be implied into the agreement that any such variation would only be for a short period.

32. Both counsel referred me to the classic statement concerning the implication of terms into a contract to be found in *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1994) 180 CLR 266 where Lord Simon of Glaisdale, in giving the advice of the majority of the Board of the Privy Council, said (at paras. 40-42):

> "40 …for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes

without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

41. Their Lordships venture to cite only three passages - albeit they are familiar to every student of this branch of the law. In *The Moorcock* (1889) 14 PD 64, at p. 68, Bowen LJ said:

"I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men…"

It is because the implication of a term rests on the presumed intention of the parties that the primary condition must be satisfied that the term sought to be implied must be reasonable and equitable. It is not to be imputed to a party that he is assenting to an unexpressed term which will operate unreasonably and inequitably against himself.

In *Reigate v. Union Manufacturing Co*. (1918) 1 KB 592, at p. 605, Scrutton LJ said:

'A term can only be implied if it is necessary in the business sense to give efficacy to the contract i.e., if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case?', they would both have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'

42. In Shirlaw v. Southern Foundries (1926) Ltd. (1939) 2 KB 206, at p. 227, MacKinnon LJ said:

'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course.'"

33. Mr Wirth said that, given:

(a) the absence of any external ventilation in the Unit;

(b) the "unbearable" conditions that prevailed in the absence of air conditioning;

(c) the fact that the Unit was retail space from which commercial activity was to be undertaken;

(d) the "serious losses" the Tenants faced from not being able to use the Unit, in the form of on-going rental and the inability to produce any meaningful revenue from the premises;

the emails, when read as a whole, would reasonably be understood to mean that the parties had not bargained away the practical use and profitability of the Unit for "a mere 10% reduction in the rental".

34. There are a number of difficulties with that submission. First, the facts stated are not established. The front room of the Unit became unbearably hot at some time during the heat of summer but the evidence as to the rest of the Unit at that time of year is unclear. The evidence does not establish that, for the rest of the year, the Unit as a whole was unbearably hot. Substantial income was also generated from the Unit by at least one of the entities in the Tenants' corporate group.

35. Secondly, there is the difficulty of identifying what the implied term would be. Mr Wirth suggested that it should be that the reduction would be "for a reasonable time", but "reasonable" would be "reasonable in the circumstances" and that would depend upon when the dispute with the Owners' Corporations was resolved. Until then, the Landlords would not be able to locate the new compressor anywhere at all. I do not believe that it would be reasonable to say, after some unspecified period, that, notwithstanding the agreement as to compensation that the parties had reached, the Landlords should thereafter be in breach of the Lease and pay damages, even if it had nowhere to put the compressor.

36. Thirdly, at the time the agreement was reached, the Tenants knew that there was litigation contemplated and that the time during which the Unit would be without air conditioning was uncertain. If they wanted a temporal limit on the operation of the agreement they could have specified it. As it is, I am unable to say that a term of the nature suggested by Mr Wirth "goes without saying" or is necessary in order to give business efficacy to the agreement.

37. Finally, there was a temporal limit agreed to specifically, namely, the reduction would apply until the matter was resolved. The suggested term would not be consistent with that.

38. For these reasons I am not satisfied that the term can be implied of the nature suggested by Mr Wirth.

Satisfaction

39. The primary defence of the Landlords is that the parties entered into an agreement in the emails referred to that, in consideration of there being no air-conditioning available, there would be a reduction in the rent of $40 a week plus GST until such time as the problem of the air-conditioning was resolved. Mr Donald submitted that, the rebate having been allowed and accepted, is not now open to the Tenants to claim damages for breach of the Lease in failing to provide air-conditioning.

40. I accept that submission. Since the tenants have received compensation for the absence of air conditioning for that period in an agreed amount that they themselves suggested, their claim with respect to that has been satisfied. They cannot come back now and seek further compensation beyond the agreed sum. That is sufficient to dispose of the claim in contract for breach of the Lease.

Mr Sirianni's evidence

41. Evidence was called from an economist, Mr Sirianni, to provide a valuation of the medical practice that might have been conducted in the Unit. According to his report, he based his conclusions on financial statements that had been provided by the corporate group of which the Tenants form a part, as well as financial information of other medical practices that he has obtained. He said that, for the purpose of his analysis and report, he did not take into account the specific location of the practice or any historical or current trading results of the practice. That is understandable because such a practice was never established.

42. He said that his report was based on the assumption that there was a secure lease for the Unit. He has also necessarily assumed that the Tenants would have been able to use the Unit in the manner contemplated by his report, although he does not say that.

43. He estimated the income that would have been derived from the hypothetical practice for the first three years as follows:

	Total Income	**Net Income**
First Year	$393,983	$157,593
Second Year	$570,826	$228,330
Third Year	$761,961	$304,784

44. Although his report is apparently intended to demonstrate a loss that has been suffered by the Tenants, it is apparent from the financial statements attached to his report that the business of conducting medical practices upon which he has based his figures is not conducted by them but by a related company called MEDI-7 Pty Ltd. That does not mean, of course, that the Tenants might not have determined to conduct a medical practice themselves but that is not the assumption that was made in Mr Sirianni's report.

45. Since the comparison that has been made is with medical practices, the above figures appear to be on the basis that the licensees of the rooms in the Unit would be medical practitioners. However, the intention appears to have been to license the rooms to "Allied Service providers".

Mr Derzekos' report

46. Mr Derzekos is a valuer of real estate. He said in his report that he had been instructed by Dr Pinskier to provide a rental assessment of the Unit as at 4 March 2013 in accordance with the following specific terms of reference:

    - Rental assessment was to be based upon the lease tenure to Melbourne Pathology as well as four additional Allied Service providers;
    - Rental assessment was to be based upon a 'per practitioner' basis only; and
    - that the use did not require a town planning permit from the city of Glen Eira town planning department.

47. On these assumptions, his "rental assessment" of the Unit as at 4 March 2013, excluding goods and services tax, was $110,000.00 per annum.

48. He said that the primary basis of this assessment was a direct comparison with other properties within metropolitan Melbourne that were leased as medical practices. He provided the addresses of 10 such premises in Melbourne which are all operating medical centres, some purpose-built and some renovated, and all of them having planning permits. He divided the rental of each of these locations by the number of practitioners practising there and fixed on a figure of $15,000 per practitioner per annum. On the basis of there being four Allied Service providers, which were his instructions, and on the basis of the Tenants receiving $50,000 per annum from Melbourne Pathology, which again, were his instructions, the rental value to the Tenants to be derived from sub-letting the Unit, was $110,000.00 per annum.

49. Before considering this evidence it is necessary to consider some other matters.

Right to sublet or license

50. The principal loss claimed is revenue from sub-letting or licensing the use of rooms in the Unit but there is nothing in the Lease conferring upon the Tenants a right to do that.

51. Mr Donald referred me to s.63 of the *Retail Leases Act* 2003 which provides as follows:

> "A retail premises lease may contain a provision which allows the landlord an absolute discretion to refuse consent to—
>
> (a) the grant of a sub-lease, licence or concession in respect of all or part of the retail premises; or
>
> (b) the tenant parting with occupancy rights to all or part of the retail premises; or
>
> (c) the tenant mortgaging or otherwise charging or encumbering the tenant's estate or interest in the lease."

52. By Clause 1(t) of the Lease, the Tenants were not to assign, transfer, sublet, mortgage, charge, license or otherwise part with possession of the Unit without the prior written consent of the Landlords and the provisions of s.144(1) of the *Property Law Act* 1958 were expressly excluded.

Subletting or licensing of the Unit

53. In about September or October 2013, Mr Gostin, moved into the Unit by arrangement with the Tenants and conducted his accountancy practice there. No consent or permission was sought or obtained from the Landlords to this arrangement. It is unclear whether he was a sub-tenant of the Tenants or a licensee of their related company, Medi-Admin Australia Pty Ltd ("Medi-Admin"), or of some other entity.

54. Mr Gostin said in evidence that, due to the absence of air conditioning he obtained a portable air conditioner and set it up so that the exhaust air went out through the office door to the street.

55. He remained a sub-tenant or licensee of a room in the Unit until November 2016 by which time the air conditioning for the Unit had become operational and he no longer needed his mobile air-conditioner.

56. On 11 November 2016 the Landlords served a notice under s.146 of the *Property Law Act* 1958, alleging that the Tenants had sublet their interest in the Unit to multiple third parties, including Medi-Admin, and requiring the breach to be remedied within 14 days.

57. Presumably as a result of this notice, Mr Gostin then moved out of the Unit and into the Tenants' offices next door. According to Dr Pinskier, Mr Gostin paid rent of $68,304.00 while he was in the Unit, exclusive of GST.

58. Mr Oren occupied part of the Unit pursuant to a written arrangement with Medi-Admin on 12 January 2016. It is unclear how long he was there but, according to Dr Pinskier, he paid $10,917 on account of his occupancy. Again, no consent of the Landlords was sought or obtained for his being there.

Conclusion as to sub-letting/licensing

59. The basis of the claim for lost opportunity is that it was the intention of the Tenants to sublet rooms in the Unit to Melbourne Pathology, and also to potential medical or quasi medical practitioners, at a very substantial profit.

60. The only evidence that I have concerning subletting or licensing of the Unit is that it was done by Medi-Admin, not the Tenants. That evidence is the lease to Melbourne Pathology and also the license agreement with Mr Oren, both of which are in the name of Medi-Admin as lessor or licensor, and not in the name of the Tenants. I am not satisfied on the balance of probabilities that it was the intention of the Tenants to sublet or license the Unit otherwise than to Medi-Admin. There is no evidence as to the terms of any agreement that they entered into with Medi-Admin and so it is not possible to evaluate any lost opportunity arising from that relationship.

61. There is the further difficulty that it has not been demonstrated that, had consent to sublet or license rooms in the Unit been sought from the Landlords, it would have been given. Dr Pinskier said that he and his brother had always managed to sublet other premises that their group of companies had leased from other landlords. However in this instance, the Unit was let at a modest rent to the Tenants, not to Medi-Admin, with the expectation by the Landlords that it would be used as offices. Had consent been sought to the granting of a series of sub-lettings or licences of individual rooms, which would have generated substantial income of the magnitude suggested, there is the possibility that the Landlords might have refused to consent or sought to renegotiate the rent to some higher figure. If the Tenants did not agree it would have been open to the Landlords under the terms of the Lease to refuse consent. Since no consent was ever sought, there is no indication of what the Landlords' response would have been and it cannot be assumed that consent would have been granted.

Who has suffered the alleged loss? - The "sub-lease" to Melbourne Pathology

62. An executed form of lease of the rear part of the Unit to Melbourne Pathology was produced by the Tenants but the "lessor" named in that document is Medi-Admin, not the Tenants. Dr Pinskier said that that was a mistake. He said that the Tenants are shareholders of Medi-Admin and that he and his brother are its directors.

63. The text of this lease document indicates that it was prepared by Melbourne Pathology and not by the Tenants. There was no explanation as to how a mistake as to the identity of the "lessor" came to be made or why Dr Pinskier and his brother executed the document, which is clearly in the name of Medi-Admin, if it was not intended that it would be that company that would provide the use of the rear part of the Unit to Melbourne Pathology.

64. Moreover:

    (a) Dr Pinskier referred in paragraph 32 of his witness statement to the established business model that he and his brother use and he said that what they proposed to do with the Unit was "…consistent with the business model that we have established at several sites…";

    (b) Dr Pinskier exhibits other sub-leases to Melbourne Pathology for other premises occupied by their group of companies in Clayton and Chadstone and in each case, the sub-lessor providing the space to Melbourne Pathology is Medi-Admin, not the Tenants; and

    (c) when Mr Oren occupied a room in the Unit, the licensor was Medi-admin, not the Tenants.

65. I am not satisfied that the naming of Medi-Admin as lessor in the Melbourne Pathology lease document relied upon in the present case was a

mistake. As a consequence, the only party that could have suffered any loss by reason of Melbourne Pathology refusing to occupy the Unit was Medi-Admin and that company had no contractual right to occupy the Unit, much less lease or license part of it to Melbourne Pathology. Further, Medi-Admin had no contractual relationship with the Landlords.

The other occupants

66. Dr Pinskier said that, when Melbourne Pathology refused to continue with the sub-lease, due to the Unit being without air conditioning, the Tenants advertised for replacement sub-tenants without success. No copies of any advertisement were produced nor was there evidence of any kind to say what the advertising was. The "Allied Service providers" were not identified in the evidence nor was it suggested that any agreements had been entered into with persons willing to take up occupancy of rooms within the Unit for $15,000.00 per annum. The Unit is also not purpose-built, renovated or even fitted out for use as medical rooms.

67. Mr Derzekos acknowledged in cross-examination that before the proposed use proceeded it would be necessary to obtain a planning permit for the number of practitioners that were to carry on practice in the Unit and there is no evidence that that was ever done.

68. If it really had been the intention of the Tenants to carry on a medical practice in the Unit instead of using it as offices, which is what Dr Pinskier told the agent the Tenants intended, it does not appear that any preparations were made by them in this regard.

69. It seems to me that the assessment made by Mr Derzekos only stands if the assumptions upon which it was made are justified and they are not.

70. The rental paid by the Tenants to the Landlords was $21,000.00 per annum plus GST. That was for the Unit in the condition in which it was let to the Tenants and, since the Unit remained in that condition throughout the tenancy, it seems to me that that is the best indication of its rental value.

Remoteness

71. There is also the question of whether the contractual claim for damages for loss of the opportunity that is claimed are too remote. In *Hadley v. Baxendale* (1854) 156 ER 145 (at p. 151) it was said that damages are not too remote if they:

> "… may fairly and reasonably be considered either [as] arising naturally, that is, according to the usual course of things, from such breach of contract itself or ... may reasonably be supposed to have been in the contemplation of both parties, at the time they made a contract, as the probable result of the breach of it."

72. In the present case, Dr Pinskier told the agent that the Unit was to be used for offices and so the loss that might reasonably be supposed to have been in the contemplation of both parties at the time the contract was made would have been the loss of use of the Unit as offices, not the much greater

figures suggested by the Tenants. There was also no right to sub-let and so damages arising from an inability to do so would not arise naturally, according to the usual course of things, from the lack of air-conditioning.

Unconscionable conduct

73. Mr Wirth submitted that the Landlords had engaged in unconscionable conduct contrary to s.77 of the *Retail Leases Act* 2003. Subsection (1) of that section provides, where relevant:

> **"**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."

74. The section provides examples of matters that might amount to unconscionable conduct. In the present case, the conduct is said to be the failure of the Landlords to provide adequate information to the Tenants concerning the dispute about the air conditioning.

75. In *Director of Consumer Affairs v. Scully* [2013] VSCA 292 the Court of Appeal considered a claim for damages for unconscionable conduct pursuant to s.8(1) of the *Fair Trading Act* 1999. In a judgment with which the other members of the Court agreed, Santamaria JA said that it was undesirable to attempt a comprehensive definition of the word 'unconscionable' as it appeared in s 8(1) of the Act and in cognate provisions. However he made a number of observations in paragraphs 38 to 49 of the judgement, which may be summarised as follows:

    1. The word "unconscionable" is intended to have its ordinary meaning and is not to be confined to notions of unconscionability that have developed in courts of equity;
    2. Conduct is to be distinguished from the consequences that the conduct may have on the lives of other people. It is the conduct that must be unconscionable;
    3. Equity's exploration over the years of the manifold and novel ways in which the strong can exploit the weak, in trade and commerce or otherwise, will usually be of assistance in assessing whether it should be said that conduct has been unconscionable;
    4. The matters referred to in s 8(2) help illuminate its meaning, but presence of one or more of those matters, without more, does not mean that conduct has been unconscionable;
    5. Section 8(2) makes it clear that qualities of unreasonableness and unfairness in the circumstances it specifies are not to be regarded as automatically rendering conduct unconscionable, but rather are matters to which regard is to be had in determining whether conduct is unconscionable. They are indicia of unconscionability;
    6. The task of statutory construction must begin with a consideration of the statutory text. To treat the word "unconscionable" as having some

larger meaning, derived from ordinary language, and then to seek to confine it by such concepts as high moral obloquy is to risk substituting for the statutory term language of no greater precision in an attempt to impose limits without which the Court may wander from well-trodden paths without clear criteria or guidance. That approach should not be adopted unless the statute clearly so requires;

7. The Act applies to conduct 'in trade or commerce, in connection with the supply or possible supply of goods or services';
8. Section 8(1) uses the phrase 'in all the circumstances'. The characterisation demanded by the provision is one that is to be made 'in all the circumstances'. Consideration of 'all the circumstances' can cast a different complexion on things.
9. It is necessary to show at least 'some degree of moral tainting in the transaction of a kind that permits the opprobrium of unconscionability to characterise the conduct of the party';
10. It is a noticeable feature of all the cases, thus far, in which conduct has been held to be 'unconscionable' that the conduct has been found to be unethical in some manner or other."

76. Mr Wirth submitted that the Landlords did not deal honestly and fairly with the Tenants when it offered the Unit for lease because they remained silent about the years of dispute and the causes thereof whilst leaving the impression that, whatever the problem might have been with the air conditioning, it was being fixed.

77. Having regard to the observations summarised above, I am not satisfied that the failure of the Landlords to go beyond the information that was provided in the email from the agent to the Tenants shows any degree of moral tainting or unconscionability.

78. Dr Pinskier was told by the first email from the estate agent that there was an unresolved dispute and that litigation was contemplated. From this it must have been apparent to him that the dispute was serious and its resolution may have to await the outcome of litigation. If he had wanted any further information he could have asked for it and he did not do so. The Tenants were also aware of the consequences of the lack of air conditioning.

79. Mr Wirth said that it was as a result of the alleged unconscionable conduct that the Tenants agreed to accept a rental reduction of $40 plus GST per week.

80. By s.80 of the Act, a party who suffers loss or damage because of unconscionable conduct may recover the amount of the loss or damage by lodging a claim with the Tribunal against the other party.

81. To assess damages for such a claim, it is necessary to compare the position in which the Tenants, now find themselves, with the position in which they

would have been had the alleged unconscionable conduct not occurred. (see *Murphy v. Overton Investments* [2004] HCA 3). The claim is not for loss of bargain.

82. It is by no means apparent that, had Dr Pinskier known the full details of the dispute between the Landlords and the Owners' Corporations involving the air-conditioning, the Tenants would have acted any differently. In this regard, when the Lease came up for renewal, the Tenants exercised their option for a further term, notwithstanding that the air-conditioning had still not been installed.

Misleading and deceptive conduct

83. By s.18 of the *Australian Consumer Law* a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. If a person does engage in such conduct in contravention of s.18 then, by s.236 of the *Australian Consumer Law*, a person who suffers loss or damage because of that conduct may recover the amount of the loss or damage from any person involved in the contravention.

84. The misleading and deceptive conduct relied upon by the Tenants is said to be a representation that the Unit had air conditioning when in fact it did not.

85. Since it was a term of the Lease that the Unit would be air-conditioned, there is no need for the Tenants to rely upon s.18 but in any case, the making of the representation is established.

86. As with the claim for unconscionable conduct, in order to assess the loss or damage, it is necessary to compare the position in which the Tenants, now find themselves, with the position in which they would have been had the alleged unconscionable conduct not occurred. They cannot recover damages on a contractual basis.

87. There is no direct evidence as to what the Tenants would have done if Mr Fenton had told Dr Pinskier before the Lease was entered into that the Unit was not air-conditioned. If it really had been the intention of the Tenants to conduct a medical practice in the Unit and if that really was impractical in the absence of air-conditioning then it is reasonable to suppose that the Tenants would not have entered into the Lease.

88. They would then not have been able to license, or allow Medi-Admin to license, rooms in the Unit to Mr Gostin or Mr Orens from which Medi-Admin derived $79,221.00, excluding GST. I have no evidence as to how this amount was accounted for between Medi-Admin and the Tenants but, since the rental they would have paid to the Landlords for that same period was less than what was received, it does not seem to me that they have suffered a loss by entering into the Lease.

89. There was no evidence that the Tenants lost the opportunity to lease alternate premises. Indeed, since they were informed of the true situation

within days of signing the Lease, it would be remarkable if such a claim could be established.

90. In any case, for the reasons given above, the claim has been compromised.

Conclusion

91. For all of these reasons the claim made is not established and the application will be dismissed. Costs will be reserved but the parties will be aware of the limited power to award costs in Retail Tenancy disputes.

SENIOR MEMBER R. WALKER