

CASE NOTES

Australian Competition & Consumer
Commission v C.G. Berbatis Holdings
Pty Ltd. & Ors.

Federal Court (W.A. Registry) No.
WG 47 of 1998

Judgment of French J delivered 26
September 2000

TRADE & COMMERCE/EQUITY — LANDLORD & TENANT — UNCONSCIONABLE CONDUCT

The ACCC ("the Applicant") alleged against the corporate owner/landlord of the Farrington Fayre Shopping Centre ("the Centre"), located at Leeming in Perth, contravention of s51AA and s52 of the *Trade Practices Act, 1974 (Cth)* ("the Act"). The applicant contended, on behalf of several of the Centre's tenants, that the landlord was in 1996 guilty of "unconscionable conduct" by making lease renewals conditional upon the withdrawal by each tenant of legal claims against the owner arising out of their existing leases.

The Court was restricted to considering equitable doctrines of unconscionability because the expanded definition contained in s51AC of the Act did not take effect until 1998.

Mr and Mrs Roberts had operated a fish and chip shop at the Centre since 1989. With some of the other twenty five tenants they established in the early 1990's the Farrington Fayre Fighting Fund. This fund supported the tenants' claims against the landlord in the Commercial Tribunal (WA). They alleged, inter alia, overcharging by the landlord of outgoings, management and audit fees, and legal fees. The tenants' solicitor was a Mr Pitman ("P").

The Tribunal in December 1996 upheld in part the complaints of one tenant who ran a test case on behalf of all the Centre's aggrieved tenants. An appeal by the landlord against this decision was not resolved in the District Court until late 1997.

In early 1996 a Mr Forrest ("F") emerged as a prospective purchaser of the Roberts' business. Their lease, however, was due to expire in February 1997. Without a renewal and assignment of their lease to F their business was virtually worthless.

By May 1996, F had engaged a Mr Brown ("B") as his business broker and P as his

solicitor on the purchase. The landlord had already employed a Mr Smith ("S") in March to act as the Centre's property consultant and "asset manager". B met with S, who told him that the negotiation of a lease to F was conditional upon, inter alia, F abandoning his legal representation and the Roberts abandoning their claims (estimated at \$50,000) arising out of the existing lease.

In response to this news, F put his plans to purchase the fish shop on the back burner.

By June 1996 the Commercial Tribunal dispute had attracted considerable media discussion. The landlord floated with S the idea of briefing radio talkback presenter Howard Sattler. S told the Court he subsequently met with Sattler.

By September 1996 the landlord had appointed a Mr Robinson ("R") as its' solicitor in relation to lease renewals and the dispute with the tenants. Instead of a renewal/assignment document with a release clause, R recommended a separate deed of release with independent consideration as a means of affording his client a "real prospect" of enforcement against later claims of "duress" by the tenants.

R informed his client that obtaining the advice of senior counsel on this issue would be an "unnecessary and expensive luxury".

In early December the Roberts relented, executing a lease extension and assignment agreement incorporating the release clause demanded by the landlord. His Honour observed that the landlord had, "understandably", considered the proposal of its' solicitor to be a sham.

The Roberts struck a late deal around this time to sell their business to F for \$65,500. Mrs Roberts told the Court she felt extremely upset and angry that the landlord had put her in a situation where, in her view, she had no choice but to give up her legal rights.

HELD

1. The landlord in May and October 1996 engaged in unconscionable conduct towards the Roberts, contrary to s51AA of the Act.
2. S was in May 1996, as the landlord's



Mark Hunter, barrister in
Darwin

agent, knowingly concerned in or party to unconscionable conduct in trade or commerce, contrary to s51AA of the Act.

3. The Applicant is given liberty to propose further or ancillary relief in relation to the conduct involving the Roberts.
4. The application is otherwise dismissed.
5. Parties to file written submissions on the issue of costs.

His Honour commented that not every landlord who attaches a release condition to the renewal of a lease will be engaging in unconscionable conduct. Each case turns on the particular circumstances of the parties' relationship.

The question to be determined was whether this landlord had used its' legal rights to *unfairly and knowingly exploit the serious disadvantage* of a *vulnerable* tenant so as to compel the Roberts to abandon a *bona fide* legal claim arising out of their existing lease.

Appearances

Applicant — McKerracher and Bellew / AGS

Landlord — Clifford and Robinson / Haydn Robinson.

Commentary

Allegations of misleading or deceptive conduct (s52) against the landlord were dismissed. The Court found the relative disadvantage of the tenants to be different in Equity. The alleged breaches of s51AA were only sustained in respect of the Roberts.

Section 51AC of the Act now allows the Court, in determining the question of "unconscionable conduct", to have regard to various matters including "any undue influence or pressure", "any unfair tactics" and the extent to which the parties have "acted in good faith".