



## Lack of Consent Proves Costly - April 2009

When a tenant of a commercial building fits out premises without an owner's consent, what damage is an owner entitled to recover? Is the owner entitled to recover the cost of restoration, or only an amount that reflects the diminution in value of the premises? If a tenant's fit out does not devalue a property, is an owner entitled to any substantial damages at all? What if the lease is a long term lease, and the original fit out would have needed refurbishment anyway?

These and other questions were recently considered by the High Court in *Tabcorp Holdings Pty Ltd v Bowen Investments Pty Ltd*.

### Facts

Bowen Investments Pty Ltd (Bowen) owned a multi-storey office building in Melbourne. It took great pride in the building's construction, and used high quality materials. The foyer was constructed using Canberra York Grey granite, marble and American cherry. It was described as having a "striking" and "timeless" appearance.

In 1996, Bowen negotiated a lease for the whole building with Tabcorp Holdings Pty Ltd (Tabcorp) for a term of 10 years, with two 5 year options. The lease contained a standard covenant requiring Tabcorp not to make or permit to be made any substantial alteration or addition to the premises without the approval of the landlord, such approval not to be unreasonably withheld.

Prior to occupation, Tabcorp undertook a fit-out of the building for use as offices with Bowen's consent. Tabcorp also sought Bowen's consent to alter the foyer in line with its security needs and corporate image. Tabcorp wanted a style that would suit its image as a "progressive, technologically advanced business". This involved stripping back the floor, walls, pillars and ceilings, substituting its own finishes and extending the floor area.

Bowen agreed in principal to the alterations, but reminded Tabcorp that it would be required to reinstate and make good the premises at the end of the lease. This would be problematic as Canberra York Grey granite was no longer available.

Tabcorp proceeded to carry out the alterations without Bowen's consent, and Bowen demanded that the foyer be reinstated. Bowen expressed a concern, shared by its architect, that the alterations detracted from the overall presentation, and would result in a lower realisable sale price if the building was sold during the lease term. Tabcorp refused to accede to this request, and Bowen commenced proceedings in the Federal Court to recover damages.

### Decision of the Federal Court

At first instance, the trial judge held that whilst Tabcorp had acted in "contumelious disregard" for Bowen's rights, Tabcorp's alterations had had no adverse affect on the lettable value of the building, other than a small reduction in lettable floor space. Furthermore, the evidence suggested that the original foyer would have had to have been refurbished at the end of the lease in any event.

In these circumstances, Bowen was awarded damages of \$34,820 for loss of rental income, and nominal damages of \$1,000 for Tabcorp's breach of the lease.

## **Appeals to the Full Federal Court and High Court**

Bowen appealed this decision, disputing the basis on which damages had been assessed.

On appeal, the Full Federal Court agreed that the measure of damages should have been the cost of reinstating the foyer to its original condition as required by the lease. This was said to be the prima facie measure of damages for a claim made near or at expiration of a lease term. The prima facie rule applied unless: (1) a tenant could show that a landlord did not genuinely intend to reinstate, or (2) insistence on reinstatement was unreasonable. In regards to unreasonableness, the Court approved of English authority holding that, "[M]any considerations, aesthetic, historic or even personal, may be relied upon as yielding reasonable grounds for refusing consent for a tenant to make improvements":

In this case, Bowen's evidence was that it did intend to restore the premises, and this stance was held to be reasonable. It was immaterial, for example, if Bowen's insistence on reinstatement had been based merely on a difference in aesthetic values.

In these circumstances, the Full Federal Court increased Bowen's damages to \$1.38 million, which included \$580,000 for the cost of restoration, and \$800,000 for lost rental during the restoration period.

Tabcorp appealed this decision to the High Court.

In a unanimous decision the High Court disallowed the appeal, and confirmed the Full Federal Court's assessment of damages. The High Court held that Bowen was contractually entitled to preservation of the premises, and it was not prepared to alter the bargain that the parties themselves had reached.

The Court held that it was only in exceptional circumstances when a contractual right to restoration would not be enforced.

### **Practical considerations**

When entering into a lease the parties should carefully consider any make good covenants to ensure as best they can that their interests are properly protected.

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