

**Landlords and Tenants Behaving Badly? The application of unconscionable and unfair conduct to commercial leases in Australia and the UK.**

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***Abstract***

This paper aims to compare the approach of Australia and the UK in the use of unconscionable conduct principles in the area of commercial leasing in the small business sector. The objectives are to trace the process by which unconscionable conduct principles came to be included in the Australian retail tenancies legislation, examine the subsequent case law in order to assess the difficulties in applying the principles to retail lease cases, determine the impact of the provisions on the attitude of the parties to the negotiation, discuss the approach adopted in the UK legal system to unconscionable and unfair bargains and consider the current attitude to its applicability to business leases.

The paper concludes that Australian experience shows that the hurdles set for the application of unconscionable conduct appears to be too high to offer real relief to tenants. Clear guidelines as to what is likely to be regarded as unconscionable conduct in a retail leasing context should be provided. Also, lessees must be able to feel confident that, if they decide to proceed with a retail tenancy claim, there is some prospect of success and they will not be unduly disadvantaged in any further dealings with their landlord.

English law on unconscionable bargains is less well developed than that in Australia, there appears to be no pressing need for it to become so, at least in the context of business leases. However including commercial leases in the law relating to unfair terms in contracts could be one approach to help address the small business tenant policy issue currently exercising the UK Government. But, the issue is often the *conduct* associated with the dealings between the lessor and lessee rather than the terms of the lease itself.

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## **Landlords and Tenants Behaving Badly? The application of unconscionable and unfair conduct to commercial leases in Australia and the UK.**

### **Introduction**

Commercial tenancy legislation in Australia and the UK differs on a variety of levels. Since 1984 Australia has legislated heavily in the arena of retail leases granted to smaller business tenants. Although this legislation varies across the States and Territories, it has a number of similar characteristics. Not only does it prescribe certain lease terms within the contract and outlaw others, it also attempts to control the process by which leases are negotiated by the imposition of information and disclosure requirements. Another important part of the legislation provides for low cost mediation in order to attempt to resolve disputes before they involve expensive court hearings.

This legislation is also augmented by provisions relating to unconscionable conduct originating from Trade Practices legislation. In 1998 section 51AC was inserted into the Trade Practices Act 1974. This extended the unconscionable conduct provisions of the Act to small business transactions. Commentators predicted that this would have a significant impact on retail leasing. This expectation was further fostered by the incorporation into, or “drawing down” of these provisions into State and Territory retail tenancy legislation. This has enabled matters involving allegations of unconscionable conduct to be heard in State and Territory courts and tribunals.

The approach in the UK is very different. Legislation does exist which gives occupational tenants of retail, office and industrial property an extensive right to renew the lease and the process by which the lease is renewed is statutorily controlled. However, there is no attempt to legislate in respect of specific parts of the market such as retail or small business. Furthermore, there is little or no control over lease terms, and there are no mandatory information or disclosure requirements. Relief against unconscionable bargains is only available in very limited areas and these do not include lease contracts. The general law governing unreasonable restraint of trade does not apply to leases. Furthermore, although the Law Commission has recently recommended that the Unfair Terms in Consumer Contracts Regulations 1999 be extended to small businesses, it has suggested that this should not cover land contracts.

This paper aims to compare the approach of Australia and the UK in the use of unconscionable conduct principles in the area of commercial leasing in the small business sector. The objectives are to trace the process by which unconscionable conduct principles came to be included in the Australian retail tenancies legislation, examine the subsequent case law in order to assess the difficulties in applying the principles to retail lease cases, determine the impact of the provisions on the attitude of the parties to the negotiation, discuss the approach adopted in the UK legal system to unconscionable and unfair bargains and consider the current attitude to its applicability to business leases. Some preliminary conclusions are drawn on the effectiveness of the Australian provisions in influencing commercial landlord and tenant negotiations and consideration is given to whether small business tenants in the UK could benefit from the adoption of a similar regime.

### **The introduction of unconscionable conduct principles into retail leasing in Australia**

Unlike the UK, in Australia general equitable relief from the consequences of unconscionable conduct is not limited to specific areas. Furthermore, it is given potentially wider application by statute. The medium for this statutory jurisdiction has been the Trade Practices Act 1974 (Cth). The possibility of inserting a section into the Act addressing unconscionable conduct in commercial and consumer transactions was first mooted as early as 1976<sup>1</sup>; however s52A,

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<sup>1</sup> Swanson Committee para 9.96-9.97

limited to consumer transactions, was not introduced until 1986.<sup>2</sup> In 1992, section 51AA, a provision prohibiting unconscionable conduct within the meaning of the unwritten law of the States and Territories, was inserted into the Act.<sup>3</sup> It was envisaged that the provision would address unconscionable conduct in commercial transactions<sup>4</sup>. However, complaints continued to be made to the ACCC and the state and territory Fair Trading agencies regarding allegations of unconscionable conduct in small business transactions, particularly in the areas of franchises and retail leasing.<sup>5</sup>

In 1997, the Reid Committee concluded that section 51AA was not addressing the concerns of small business.<sup>6</sup> Therefore, the Reid Report recommended that s51AA be repealed and replaced with a new provision that proscribed ‘unfair’ conduct in commercial transactions.<sup>7</sup> To assist in interpretation, the provision was to have contained a non-exhaustive list of factors the court could have regard to for the purposes of determining whether a corporation has engaged in unfair conduct.<sup>8</sup> The Committee made a conscious decision to utilise the term ‘unfair’ rather than ‘unconscionable’ as they were of the view that retaining the term ‘unconscionable’ would not provide a sufficiently clear signal to the courts that a concept broader than the traditional equitable doctrine was intended.<sup>9</sup> Using ‘unconscionable’, a term with a well established legal meaning, could, in the view of the Committee, result in the recognition of and association with the term being retained thus creating a ‘tension between that precedent and the legislative intention.’<sup>10</sup> After considering several examples where a ‘fairness’ standard had been utilized elsewhere, the Committee formed the view that a ‘fairness’ standard regulating conduct in commercial transactions could be a workable option that would not undermine ‘the institution of contract’ by tipping the balance in favor of small business.<sup>11</sup>

The Federal government response to the Reid Report, the New Deal Fair Deal statement<sup>12</sup> concurred with most of the report’s recommendations relating to unfair conduct in matters involving small business. However, the government decided to retain unconscionability rather than adopt an unfairness standard when determining whether business conduct offended the TPA. This decision was made “in order to build on the existing body of case law which has worked with respect to consumer protection provisions of the Act, and which will provide greater

<sup>2</sup> Section 52A, inserted by Act No 17, 1986

<sup>3</sup> Trade Practices (Amendment) Act 1992 (Cth), Act No 222, 1992

<sup>4</sup> Section 52A was renumbered section 51AB. Consumer transactions, covered by section 51AB, were expressly stated to not be in the ambit of section 51AA. See section 51AA(2) Since 1998, this section also refers to section 51AC.

<sup>5</sup> The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997), Chapter 1.

<sup>6</sup> Most decided cases were demonstrating an adherence to the equitable doctrine of unconscionable dealing. Therefore, it was necessary for plaintiffs to establish a special disadvantage and that the lessor had unconscionably taken advantage of the lessee’s special disadvantage. As it is difficult to establish these elements in a commercial context there had been few successful actions under s51AA at the time of the Reid Report. *Willshire-Smith v Votino Bros Pty Ltd* Unreported FCA 3 Nov 1994 per Lee J, , *Swift v Westpac Banking Corporation* (1995) ATPR 41-401, *Leitch v Natwest Australia Pty Ltd* (1995) ATPR (Digest) 46-153, *Australian Consolidated Investments v England* (1995) 183 LSJS 408 ACCC v *Chats House Investments Pty Ltd* (1996) 22 ASCR 539 per Branson J, *Venning v Suburban Taxi Service Pty Ltd* (1996) ATPR 41-468. For a general discussion of the pre-Reid Report position see Zumbo,F, *Unconscionability within a Commercial Setting: An Australian Perspective* (1995) 3 *Trade Practices Law Journal* 183.

<sup>7</sup> See generally, The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997) Paragraphs 6.7-6.22.

<sup>8</sup> The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997) Recommendation 6.1 at 181

<sup>9</sup> The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997) at 178

<sup>10</sup> The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997) at 178-179

<sup>11</sup> The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997) at 167

<sup>12</sup> September 1997

certainty to small businesses in assessing their legal rights and remedies.”<sup>13</sup> In the government’s view, this approach would allow the courts to draw on the bank of precedent already formulated on the meaning and scope of unconscionable conduct. Accordingly, Section 51AC was inserted into the Trade Practices Act 1974 (Cth) on 1 July 1998.<sup>14</sup> The provision extended the unconscionable conduct provisions of the Act to encompass small business transactions.<sup>15</sup>

Observers generally were of the view that section 51AC would have a significant impact on the law, particularly with regard to retail leasing matters. This anticipation was further fostered by the incorporation of the provisions into State and Territory retail tenancy legislation<sup>16</sup> which opened the way for matters involving allegations of unconscionable conduct to be heard in state and territory courts and tribunals.

The draw-down of section 51AC of the TPA Act into state and territory retail tenancy legislation has occurred in most Australian jurisdictions.<sup>17</sup> Although the provisions are generally consistent, there are some differences. Except for the specific focus on retail leasing transactions, the provisions in Queensland, New South Wales and the Northern Territory adhere to the provisions of s51AC. The legislation in the ACT and Tasmania seems to have a slightly wider ambit, referring to, respectively, ‘unconscionable or harsh and oppressive’ conduct and ‘harsh, unjust or unconscionable’ conduct. The Victorian, ACT and Western Australian legislation include some differing factors to which the court may refer when determining whether conduct is unconscionable.<sup>18</sup> To date, South Australia has not adopted the unconscionability provision at all.

### **The current role of unconscionable conduct in retail leasing in Australia**

Although differing to varying extents throughout the states and territories, in 2007 Australian retail leasing legislation is extremely comprehensive and provides a detailed framework for the regulation of retail leasing transactions. The legislation provides significant levels of protection to small retail tenants and has, arguably, eliminated the type of landlord behaviour that gave rise to the concerns identified in the Reid Report. It can therefore legitimately be asked whether, in the light of this, there now remains a role for the provisions controlling unconscionable conduct in this area.

In answering this question, it is necessary to consider whether, despite the existence and the scale of legislative intervention in the regulation of retail leasing in Australia, the plight of retail lessees has actually improved. To some degree, the answer seems to be a resounding ‘yes’. The proactive approach of the state and territory retail leasing tribunals, particularly in relation to cost-effective and efficient dispute resolution, is seen to have the confidence of landlords, tenants and their legal representatives.<sup>19</sup> Also, on the face of it at least, the legislation

<sup>13</sup> The Hon Peter Reith, *New Deal Fair Deal Statement* 30 September 1997

<sup>14</sup> *Trade Practices Amendment (Fair Trading) Bill*, Act No 36, 1998

<sup>15</sup> Defined as commercial transactions involving the supply or possible supply (s51AC(1)(a)) or the acquisition or possible acquisition (s51AC(1)(b)) of goods or services to or from a person (other than a listed public company) the price of which does not exceed \$3 million. Note that this amount will be increased to \$10 million as a result of the 2004 Senate Economics Committee recommendations.

<sup>16</sup> The draw down was initially delayed by Constitutional difficulties. The *Trade Practices Amendment (Operation of State and Territory Laws) Act 2001(Cth)* resolved this matter of concern. The amendments cleared the way for the state and territory legislatures to pass amendments to their retail tenancy legislation which extends the jurisdiction of the retail tenancy tribunals to consider matters involving unconscionable conduct. *Trade Practices Amendment (Operation of State and Territory Laws) Act 2001(NSW)*, *Retail Shop Leases Amendment Act 2000 (Qld)*, *Retail Leases Act 2003 (Vic)*, *Leases (Commercial and Retail) 2001(ACT)*

<sup>17</sup> Queensland, New South Wales, Victoria, ACT, Tasmania Western Australia and the Northern Territory.

<sup>18</sup> For example in Victoria s 77(2) refers to the list of factors taken from section 51AC and also includes (l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and (m) the extent to which the landlord unreasonably used information about the turnover of the tenant’s or a previous tenant’s business to negotiate the rent; and (n) the extent to which the landlord required the tenant to incur unreasonable fit out costs. WA has adopted an identical provision in s15C. In the ACT ‘good faith’ is omitted and a criteria to act honestly is included s22(2)(i).

<sup>19</sup> ACCC report

makes the rights and responsibilities of the parties throughout a retail leasing relationship unambiguous. Indeed, one lessor representative queried recently whether, given the processes in place regulating the conduct of the parties at all stages of a retail leasing transaction, an unconscionable conduct provision was really necessary.<sup>20</sup> The point was that any untoward conduct is likely to be caught by another provision of the legislation before it would be necessary to allege unconscionability.

However, while the legislative and administrative structures are of enormous benefit, the fact remains that serious disputes continue to arise which do not necessarily 'fit' within existing configuration. The law in relation to the rights (or lack thereof) of a sitting tenant at the end of a lease is one example. Also, in some cases the facts may not evince a contravention of one or more provisions but overall there is a course of conduct which has the effect of undermining a tenant's interests and livelihood. Examples include the predicament of tenants who must move or have their lease terminated due to a relocation or break clause or where a landlord interferes in a tenant's attempt to sell their business.<sup>21</sup> The provisions of the legislation may, on their face, have been complied with but the peripheral activities, or an ulterior motive, of a lessor may, arguably, be unconscionable. Similarly, a series of contraventions may seem insignificant when examined individually but, if viewed in combination they may establish a harsh, oppressive course of dealing.<sup>22</sup> Therefore there must be an avenue for such conduct to be addressed. In the writer's view, it is vital that a workable unconscionable conduct provision remains in the legislation and its limits are tested.

### **What does unconscionable conduct in a retail tenancy context encompass?**

A major issue in relation to the unconscionability provisions in the TPA and state and territory retail leasing legislation is whether they will address the problems they sought to alleviate. It is fair to say that, to date, s51AC and its analogues have generally not been subjected to robust interpretation. Also, the restrained approach which has been generally adopted in relation to s51AA may impact on s51AC and the traditional perception of unconscionability seems to permeate many judgments. This paper will now discuss the interpretation of the unconscionability provisions to date, starting with the potential impact of s51AA on the interpretation on s51AC, and then the decisions so far involving s51AC and its equivalent provisions.

#### *Section 51AA*

Unconscionability for the purposes of section 51AA has generally been interpreted narrowly. The provision has been litigated in relation to retail leasing matters, including two Western Australian cases, *ACCC v CG Berbatis Holdings Pty Ltd* 153<sup>23</sup> which reached the High Court and the Full Federal Court decision in *ACCC v Samton Holdings Pty Ltd*<sup>24</sup>

As the ACCC's submissions in both cases focussed on a 'narrow' view of unconscionable conduct consistent with the equitable doctrine, the Courts in *Berbatis* and *Samton* were arguably relieved of an obligation to consider a wider view of s51AA. However, the judgments exhibit a constrained interpretation of what will amount to unconscionable conduct in a commercial transaction. If, courts and tribunals were to adopt a similar approach to section 51AC, it is doubtful that s51AC and its equivalents would have any impact except in the most extreme circumstances of harsh business conduct.

However, should close adherence to s51AA necessarily follow? The Second Reading Speech of the Bill introducing section 51AC clearly stated that its application was intended to be broader than the equitable doctrine

<sup>20</sup> Eileen Webb - Interview JK- 12 November 2006

<sup>21</sup> Examples of such cases will be discussed below.

<sup>22</sup> For example, the course of conduct in the franchising decision *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 178 ALR 304

<sup>23</sup> (2003) 197 ALR 153

<sup>24</sup> (2002) 189 ALR 76

of unconscionability and section 51AA.<sup>25</sup> In some circumstances where section 51AC has been interpreted, the courts have accepted that section 51AC is broader than at common law<sup>26</sup>. Nevertheless, the question of the *degree* to which the courts will be prepared to extend the traditional restraints of unconscionable conduct in commercial transactions remains unresolved.

### *Section 51AC*

Since its inception, there has been little litigation under section 51AC. This is despite a Ministerial Direction instructing the ACCC to initiate proceedings for the purpose of establishing legal precedent under section 51AC on matters of specific relevance to small business.<sup>27</sup> To date, ACCC v Simply No-Knead (Franchising) Pty Ltd<sup>28</sup> ('Simply No-Knead'), Automasters Australia Pty Ltd v Bruness Pty Ltd<sup>29</sup> ('Automasters'), Coggin v Telstar Finance Company (Q) Pty Ltd<sup>30</sup> (Coggin) and, recently, Australian Competition and Consumer Commission v Dataline.Net.Au<sup>31</sup> are the only court decisions where s51AC actions have been successful.<sup>32</sup> None of the cases involved retail leasing although it appears that had the matter progressed, the conduct in ACCC v Leelee Pty Ltd,<sup>33</sup> a case involving, inter alia, a landlord's conduct in relation to the assignment of a sub-lease, would have been regarded as unconscionable.

Similarly, in the Tribunals, there have been few decisions where the landlord has been found to have engaged in unconscionable conduct in contravention of the relevant provision.<sup>34</sup> Some cases have discussed the provisions at interlocutory level. However, although it was determined that there was a triable issue with regard to unconscionable conduct, no final determination was made<sup>35</sup>. A number of other cases have argued that the conduct under consideration was unconscionable but have not been successful.<sup>36</sup>

Therefore, at this stage it is useful to discuss some of the court and tribunal proceedings where 51AC has been discussed, or where there has been relevant dialogue regarding circumstances which may influence a decision involving unconscionable conduct and retail leasing. These cases will be classified under the following categories: security of tenure (including the sitting tenant and assignment), options, rental, tenancy mix (including exclusivity clauses), redevelopment and termination. Although clearly there are a myriad of other potential scenarios where conduct in retail leasing may arguably be unconscionable, the circumstances listed were matters of concern for the Reid Committee and would appear to remain particularly problematic.

<sup>25</sup> *Trade Practices Amendment (Fair Trading) Bill 1997* (Cth) – Hansard, 30 September 1997, 8800.

<sup>26</sup> *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365 (22 September 2000) *Simply No Knead*, *Hurley v McDonalds Australia Limited* (2000) ATPR 41-741, *Automasters Australia Pty Ltd v Bruness Pty Ltd* (2003) ATPR (Digest) 46 -229 *Australian Competition & Consumer Commission v Leelee Pty Ltd* (1999) FCA 1121 (20 August 1999)

<sup>27</sup> Ministerial Direction, Minister for Customs and Consumer Affairs, Canberra, 28 August 1998. Preference was to be given to initiating proceedings as representative proceedings on behalf of small business.

<sup>28</sup> *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) (2000) 178 ALR 304

<sup>29</sup> *Automasters Australia Pty Ltd v Bruness Pty Ltd* (2003) ATPR (Digest) 46 -229

<sup>30</sup> [2006] FCA 191 (10 March 2006)

<sup>31</sup> [2006] FCA 1427 (3 November 2006)

<sup>32</sup> The *Simply No Knead* and *Automasters* cases involved franchises. *Coggin* involved the conduct of a finance company which took security over the plaintiff's boat to finance the purchase, by a third party, of a franchise. The respondents in *Dataline* contravened s51AC by preventing or dissuading its customers from obtaining independent advice with respect to the terms of a contract for the supply of internet-related services. It was held the terms had the potential for adverse consequences for the customer and the conduct was a misuse of the corporation's bargaining power.

<sup>33</sup> *Australian Competition & Consumer Commission v Leelee Pty Ltd* (1999) FCA 1121 (20 August 1999)

<sup>34</sup> *Worsfold v de Goede* [2002] NSWADT 273, *Sarker v Worlds Best Holdings Ltd* [2004] NSWADT 15, *Irresistible Frocks Pty Ltd v Sparbec and Roche* [2003] NSWADT 241

<sup>35</sup> *Softplay Pty Ltd v Perpetual Trustees (WA) Pty Ltd* [2002] NSWSC 1059, *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 QdR 249 *Castle Mall Fine Foods Pty Ltd v QIC* [2003] NSWADT 207

<sup>36</sup> *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* (2003) 200 ALR 491, *Hoppers Crossing Club v Tattersalls Gaming Pty Ltd* [2005] VSC 114, *Old Papas Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11 (12 February 2003), *Ali v Hassim* [2002] VCAT 274

## Security of Tenure

The predicament of the sitting tenant is an example of circumstances where retail leasing legislation does not, with the exception of preferential rights in South Australia<sup>37</sup> and the ACT<sup>38</sup> assist the lessee. Although certain procedures are in place in several jurisdictions<sup>39</sup>, in the absence of a validly exercised option, the sitting tenant does not have a contractual or statutory right to a new term. A lessor cannot be compelled to enter into a lease, even where that lessor's conduct may not have reflected "general commercial decency".<sup>40</sup> Therefore, in what, if any, circumstances may the refusal to grant a new lease to a sitting tenant be regarded as unconscionable?

In summary, it seems a sitting tenant would have little recourse. Decided cases have noted that a landlord may simply refuse to renew a lease without concern at being for the unconscionable conduct provisions.<sup>41</sup> Several cases have involved circumstances where the lessor has refused to renew the lease unless the lessee agrees to unpalatable conditions. In such cases, the courts and tribunals seem consistent in their approach, at least involving s51AA and equivalent provisions, that as the lessor is not under any obligation to grant the lease, the tenant cannot complain at being asked to comply with even harsh commercial terms as the price of the new lease. It remains uncertain how s51AC and its equivalents will address this situation.

A discussion of retail leasing in relation to sitting tenants should commence with the *Berbatis* and *Samton* decisions. Although both cases involve s51AA, the decisions may be illustrative of how similar circumstances may be interpreted under s51AC and its equivalents. CG *Berbatis* (Holdings) Pty Ltd was the owner of a suburban shopping centre. There was a dispute with a number of tenants in relation to outgoing. One of these tenants, the Roberts, wanted to sell their business. However, as the lease was nearing expiration, a purchaser would only proceed with a purchase of the business if a new lease was granted. The Roberts did not have an option nor was there a contractual or statutory entitlement to a new lease. The lessor agreed to grant a new lease but only upon terms that the Roberts release all their claims against the lessor. The High Court held that, despite their predicament, the Roberts were not under the requisite special disadvantage<sup>42</sup> and that the lessor had not engaged in unconscionable conduct simply because it had exercised, or refused to exercise, a contractual entitlement except on certain terms. In *ACCC v Samton Holdings Pty Ltd*<sup>43</sup>, the lessee failed to exercise an option within the stipulated time. The lessor agreed to grant a new lease on the condition that the lessee paid the landlord \$70000. Therefore, again, the landlord agreed to the lessee's request but only on unpalatable conditions. Although it was acknowledged at first instance that the lessor had "driven a very hard bargain"<sup>44</sup> the lessee was not held to be at a special disadvantage<sup>45</sup> and, on appeal it was noted that in the absence of any obligation to renew the lease, the lessees were within their rights to impose the condition.<sup>46</sup>

In relation to Tribunal decisions, a similar conclusion was reached in *Humphries & Cooke Ltd v Essendon Airport Limited*<sup>47</sup> an action under s7 of the Fair Trading Act 1999(Vic) an equivalent provision to s51AA<sup>48</sup>. The plaintiffs used a site at Essendon Airport to house their company plane. With the encouragement of the lessor, the lessee expended monies and erected a hangar on the site. After several short term leases, the lessor agreed to a 5 + 5

<sup>37</sup> *Retail and Commercial Leases Act 1995 (SA)* S20D

<sup>38</sup> *Leases (Commercial and Retail) Act 2001* S108. This provision applies to leases entered into on or after 1 July 2002.

<sup>39</sup> New South Wales *Retail Leases Act 1994 (NSW)* s44(1), Victoria *Retail Leases Act 2003 (Vic)* s64(2), South Australia (s20J) Note this requirement does not apply in circumstances where the lease contains a right of renewal or the tenant has preferential rights. S 20J(a) and (b)) and the Northern Territory *Business Tenancies (Fair Dealings) Act 2003 (NT)* s60 a retail tenant must be provided with a minimum of 6 months and no longer than 12 months notification prior to the expiration of a lease whether a new lease will be offered and the terms and conditions of the new lease. In Tasmania *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* this time stipulation is not less than three months before expiry of the lease (Cl 29(2)) while the ACT stipulates that such notification must be made no more than 6 months and no less than 3 months prior to the expiry of the lease (s107). Western Australia *Commercial Tenancy (Retail Shops) Agreements Act Amendment Act 1998* places the onus on the tenant to commence the renewal process s13B(1).

<sup>40</sup> *Australian Property Buyers Pty Ltd v Kowalski* [2006] VCAT 24 (6 January 2006)

<sup>41</sup> *Berbatis* per Gleeson CJ and Callinan J

lease. However, the rental sought under the new lease increased by 340%. The lessees claimed *inter alia* that the lessors conduct in demanding such a rental increase was unconscionable.

In an echo of *Berbatis* and *Samton*, the lessee's contentions failed. It was held that since the lessee had no contractual entitlement to a new lease the lessee could not complain if the lessor was agreeable to grant a new lease only upon terms which the lessor found unacceptable.<sup>49</sup>

It seems that even the imposition of an extremely onerous term or terms as a condition of renewal is unlikely to offend provisions equivalent to s51AA. This is the case even if the condition results in some inconvenience or financial detriment to the lessee<sup>50</sup>.

To date, so far as the writer is aware, there has not been a decision involving s51AC and a sitting tenant issue. It seems when a court or tribunal is faced with such a dilemma it will have to choose between a *Berbatis* approach where the freedom of the lessor to deal with its property, and impose such conditions as it sees fit, is paramount, or whether, or to what extent, this approach is tempered by a consideration of the elements of s51AC. Depending on the circumstances, arguably ss 51AC(3)(a), (b), (d), (f)(i) and (k) would impact upon a decision regarding a sitting tenant. For example, there is a difference in the relative bargaining strengths of the parties, the sitting tenant may be treated differently to other tenants whose leases are renewed or are renewed without conditions, the imposition of an unfair term, for example the obligation to cease legal proceedings against the lessor, may be regarded as the use of an unfair tactic, and/or the refusal may indicate a lack of good faith. However, even in the presence of these or other factors, whether these considerations will outweigh views such as those expressed in *Berbatis* remains to be seen. However, as will be discussed below, there is a possibility that unfair contracts legislation may provide some relief.

### Consent to Assignment

Tenants may request to assign their lease to another party, usually because of a sale of the business. Despite provisions in leases and retail tenancy legislation which state that a lessor cannot refuse an assignment unless there are reasonable grounds<sup>51</sup> there are often disputes in relation to what is in fact reasonable. Therefore, in the light of the introduction of s51AC and its equivalents, it should now be considered whether a refusal to consent to assignment can be found to be unconscionable.

Again, there is little authority involving s51AC and its equivalents however, some decisions involving s51AA can be used to analogise. Recently, in *Foong Nominees Pty Ltd and Ano v Han Investments Pty Ltd*<sup>52</sup> the District Court in Western Australia considered circumstances where a lessee, Han Investments Pty Ltd (Han), refused to

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<sup>42</sup> Pursuant to the equitable doctrine.

<sup>43</sup> (2002) 189 ALR 76

<sup>44</sup> Australian Competition & Consumer Commission v Samton Holdings Pty Ltd [2000] FCA 1725 (29 November 2000) per Carr J at first instance.

<sup>45</sup> Ibid at [99]

<sup>46</sup> (2002) 189 ALR 76

<sup>47</sup> [2001] VCAT 2439 (30 November 2001)

<sup>48</sup> There was an issue whether the premises should be regarded as retail premises. Provisions of the Retail tenancy legislation were considered but not in relation to unconscionable conduct. The provisions of s8, which are akin to s51AB, were not applicable as the provision of services were not of a domestic, personal or household use.

<sup>49</sup> At Para [18]

<sup>50</sup> For example, the cost of constructing the hangar, the Roberts' loss of any settlement regarding the outgoings claim and the \$70,000 payment as the 'price' of exercising the option.

<sup>51</sup> *Conveyancing Act 1919 (NSW)* s.133B(1)(a), *Property Law Act 1958(Vic)* s144(1), *Property Law Act 1974(QLD)* s121(1)(a), *Property Law Act 1969(WA)*s80(1)

<sup>52</sup> [2006] WADC 87 (16 June 2006)

consent to an assignment of a licence to operate a Chinese restaurant from Foong Nominees Pty Ltd (Foong) to another party unless Foong agreed to forfeit a \$50,000 security bond. There was a dispute in existence about the payment of back rent and Han insisted that the security bond be preserved to cover the rental allegedly owed. It was alleged, *inter alia*, that in refusing to consent to the assignment, Han had engaged in unconscionable conduct pursuant to s51AA of the TPA.

The case demonstrates several factors similar to those in both *Berbatis* and *Samton* and. the allegation of unconscionable conduct was unsuccessful. It was held that Mrs Foong's state of health, a factor argued to support the allegation of unconscionability, was not the sole or predominant reason for her agreeing to permit the bond to be used to cover the outstanding, disputed, licence fees<sup>53</sup>. It seemed that the court was not satisfied that the alleged disabling circumstance, her medical condition, was such as to have affected her ability to judge what was in her best interests<sup>54</sup> nor that Han had taken unconscionable advantage of any such disadvantage<sup>55</sup>. In the court's view, Mrs Foong made a commercial decision to exercise the option to renew.<sup>56</sup>In summary, Han was entirely within its rights to refuse consent to the assignment given the arrears. The mutual release clause provided a mechanism for the payment of the arrears which, given Mrs Foong's financial position, may not have been repaid.

Nevertheless, it seems at least arguable that a *malevolent* refusal to consent to an assignment may infringe the provisions. The decision of *ACCC v Leelee Pty Ltd*<sup>57</sup> specifically discussed the elements of s51AC however, it must be remembered that the statements of Mansfield J are *obiter dictum* and the matter was determined prior to the decisions in *Berbatis* and *Samton*. In that case the tenants were coming to the end of their lease and wanted the under-lessee to allow them to transfer the lease to a purchaser of the business. The under-lessee refused to do so relying on the provisions of the lease which stated that at the end of the term the tenant had to hand over the premises and remove all fixtures and fittings.

In *Leelee* it was a term of the underlease that, upon the expiration of the occupancy rights which it granted, the Choongs would vacate the stall and remove their plant and equipment. The ACCC claimed that, to insist on the performance of that covenant where the Choongs might otherwise have the opportunity to sell that plant and equipment in situ to a new tenant was unconscionable, in circumstances where (as is here alleged) that insistence was both capricious and directed solely towards causing loss to the Choongs. Therefore by analogy it seems the failure to permit an assignment in similar circumstances may amount to unconscionable conduct. In *Leelee* the applicant asserted, and Mansfield J agreed, that subpars (b) and (k), were of particular relevance.

In *Castle Mall Fine Foods Pty Ltd v QIC*<sup>58</sup> the plaintiffs were lessees who sought to assign their lease. Although the lease agreement stipulated that the lessees would operate a coffee shop, over a period of three years the lessee expanded its business into providing take away food. This remained unchallenged by the lessor and soon the take away food contributed 25% of the business's turnover. The dispute arose because lessor would not consent to the lessee's requested assignment unless the assignee limited their operations to the use stipulated in the lease. The lessees commenced proceedings claiming that the lessor was unreasonably withholding consent<sup>59</sup>and unconscionable conduct. The Tribunal found that consent had been unreasonably withheld and it was therefore

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<sup>53</sup> At [137]

<sup>54</sup> At [152]

<sup>55</sup> Although Han was aware of the medical condition the court was of the view that it was unaware of its exact nature.

<sup>56</sup> If her health was such a concern, Mrs Foong could have chosen not to exercise the option and quit the premises after the first licence expired. Instead, she took the commercially sensible approach and opted to renew.

<sup>57</sup> (2000) ATPR 41-742

<sup>58</sup> *Castle Mall Fine Foods Pty Ltd v QIC* [2003] NSWADT 207

<sup>59</sup> And was therefore in breach of s39(1) of the *Retail lease Act 1995* (NSW).

unnecessary to determine the unconscionable conduct issue. However, the Tribunal indicated that there would be at least a triable issue in relation to the unconscionable conduct claim.<sup>60</sup>

Therefore, it would seem that so long as a refusal to consent to assignment was reasonable in the circumstances, a lessor is entitled to rely on its legal rights in this respect. However, *dicta* in *Leelee* suggests that an ulterior motive or a malevolent purpose which was behind the refusal could sustain an allegation of unconscionable conduct.<sup>61</sup> Similarly, the discussion in *Castle Fine Foods*, although there was no final decision made on this point, suggests that a lessor cannot use a lessee's request to assign the lease as an opportunity to reclaim rights they had earlier forgone.

## Options

Most retail leases in Australian shopping centres do not contain options. However, in circumstances where an option is contained in a lease certain pre-conditions to the exercise of the option will be stipulated. The lessee must comply with these conditions. However, if these conditions are not satisfied can the refusal by a landlord to permit the exercise of an option be unconscionable?

Clearly, when the failure to satisfy the pre-conditions is the fault of the lessee, for example as in *Samton* where the lessee neglected to notify the lessee of the intention to exercise the option, it would be difficult to contend that the lessor was behaving unconscionably in refusing to permit the exercise. However, what if the failure was outside the lessee's control or, in fact, involved the lessor?

Both *Yao v Cambooya Properties Pty Ltd*<sup>62</sup> and *Awad v Bucasia Pty Ltd*<sup>63</sup> involved circumstances where, despite the lessee giving oral notification of an intention to exercise an option, the lessee failed to comply with formal requirements in the lease requiring written notice.<sup>64</sup>

In *Yeo* the lessor refused to grant the new term and the lessee commenced proceedings alleging that, given his (the lessee's) statements to the centre management, it was unconscionable for the lessor to refuse to permit exercise of the option. The Tribunal acknowledged that the lessee was in a weaker bargaining position *vis a vis* the lessor and that he had difficulty understanding the lease documentation. Nevertheless, it was held that the conduct was not unconscionable.<sup>65</sup> The Tribunal did acknowledge authorities relating to relief against forfeiture, for example, where the lessor deliberately avoids proper attempts of the lessee to exercise the option. In so doing, it was recognized that there could be other instances which could justify relief including where the lessor takes advantage of a small mistake on the part of the tenant that results in an unconscionable windfall to the landlord.<sup>66</sup> The Tribunal were less indulgent in the *Awad* decision. The Tribunal dismissed the lessee's allegations that it had been unable to serve the notice on the lessor because the lessor had not provided details of an address for service. It was held that the failure to deliver the notice was due to the negligence of the lessee.

<sup>60</sup> *Castle Mall Fine Foods Pty Ltd v QIC* [2003] NSWADT 207 at para 65 it is not desirable for a lessor to use the context of a possible sale of the business and assignment of the lease as the forum within which to agitate the desirability of clawing back trading activities that it may see as going beyond the original permitted use, and see as interfering with the mix that it is trying to achieve in the centre.

<sup>61</sup> S51AC(3)(k) – the lessor would be demonstrating a lack of good faith.

<sup>62</sup> [2004] NSWADT 55.

<sup>63</sup> [2003] NSWADT 247.

<sup>64</sup> In *Yeo*, the Centre Manager was of the view that the lessee may not provide the formal notification. However, instead of specifically advising him to do so, the Centre Manager told the lessee to seek legal advice.

<sup>65</sup> It was held there were no unfair tactics or a lack of good faith.

<sup>66</sup> *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* [2000] NSWSC 459

## Rental

*Barbcraft Pty Ltd v Geobel Pty Ltd*<sup>67</sup> considered the issue of whether the refusal of a tenant to renegotiate rental to provide for review to market was unconscionable. The parties had been in a landlord tenant relationship for many years. The rental was not calculated to the market and there, the lessor alleged, the tenant was paying less rental than they otherwise should be. When the lessee refused to negotiate a change to the rent review formula to provide reference to market rent, the lessor claimed their refusal to negotiate on this issue was unconscionable. The contention failed. The rent review formula was not unconscionable when the lease was entered into, it had been utilized for many years without contention and the lessee's were entitled to continue to rely on it.

Despite the result, this case is of interest for two reasons. Firstly, it seems to suggest that, had the roles been reversed and a lessee was seeking a change in the method of calculation of rental due to a downturn in economic conditions, a refusal by a landlord to negotiate may be similarly permissible. Secondly, a consideration of this fact scenario is an interesting one in light of the unfair contract terms provisions which will be discussed below.

## Sale of a business

Unconscionable conduct has been established in at least one instance where a landlord interfered in the sale of a lessee's business. However, this case involved a malevolent agenda which was directed at undermining a potential sale. It appears a lessor may pursue a potential purchaser when it is clear that negotiations between the existing lessee and the purchaser have broken down.

In *Worsfold v de Goede*<sup>68</sup>, the Tribunal considered several allegations made by a lessee that their landlord had contravened the NSW legislation, including the unconscionability provision. The lessee wanted to sell their business and the landlord learnt that lessee had commenced negotiations with a prospective purchaser. The lessor approached the prospective purchaser and proposed that he deal directly with him rather than the lessee. In these circumstances, the lessor was found to have entered into an agreement with the prospective purchaser allowing the latter to lease the premises once the lessee had vacated. The lessee was then sent a notice of eviction. The grounds listed for the eviction were found by the Tribunal to be without any factual basis. The Tribunal concluded that the lessor had not acted in good faith, used unfair tactics, and had contravened s62B of the RLA by acting unconscionably.<sup>69</sup>

A similar sentiment can be detected in *Walls Gifts and Tobacco Pty Ltd v Warringah Mall Pty Ltd*<sup>70</sup>, although, on these facts, the lessee was unsuccessful in its unconscionable conduct claim. The lessee was negotiating to sell its tobacco shop. Unfortunately for the lessee the negotiations with a large tobacco chain were unsuccessful as the lessee wanted more for the business than the prospective purchasers felt it was worth. The negotiations had broken down and the lessor's agent approached the tobacco chain directly about leasing other premises. Despite the result, the Tribunal were clearly of the view that interference by a lessor in a viable potential sale is likely to be regarded as unconscionable.

## Tenancy Mix

Ideally, a centre will feature a variety of different types of businesses. In some cases however, lessees may negotiate an exclusivity provision to protect their business from competition from other similar businesses. A landlord's failure to comply with an exclusivity provision may be regarded as unconscionable. Similarly, where a lessor competes themselves with an existing business in the centre, in what circumstances may this amount to unconscionable conduct?

<sup>67</sup> [2003] VCAT 1700 (3 November 2003)

<sup>68</sup> *Worsfold v de Goede* [2002] NSWADT 273

<sup>69</sup> *Worsfold v de Goede* [2002] NSWADT 273 at para 24

<sup>70</sup> [2003] NSWADT 161.

### *Exclusivity*

In *Foodco Management Pty Ltd v Go My Travel Pty Ltd*<sup>71</sup> the lessee alleged that the lessor had contravened s51AC of the TPA. The lessor knew that the lessee's business, a specialty muffin shop, sold a narrow range of products and would be vulnerable to competition from a like business. The lease contained a clause that provided that the lessor would not let a shop in the building to another 'specialty muffin shop'. The lessor then leased a shop to a business that competed substantially with the lessee. The lessee contended that, by leasing the premises to a competitor, was in these circumstances unconscionable.<sup>72</sup>

The Court refused to grant the lessor's application for summary judgment, finding that the plaintiff's case could not be described as having 'no real prospect' of success.<sup>73</sup> The Court concluded that both claims were triable issues.

### *Competition*

In *Softplay Pty Ltd v Perpetual Trustees*<sup>74</sup> ('Softplay'), the Court granted an interlocutory injunction restraining the owners of three shopping centres from installing a children's play area in the centre's common areas. The shopping centre owners were intending that these facilities would be used by the patrons of the shopping centre for free. The applicant, Softplay, operated child play centres for commercial gain in the three shopping centres. One of the claims brought by the applicant was that the defendant lessor had engaged in unconscionable conduct.<sup>75</sup> The Court granted the injunction finding that the installation of the free play centres by the lessors would pose an appreciable threat to the lessee's business.<sup>76</sup> It must be remembered however, that this was an interlocutory application where it was merely decided that there was a serious issue to be tried and that the balance of convenience was in favour of granting an injunction. Whether or not the conduct of the lessors would fall within the scope of s51AC was not determined by this case.

### **Redevelopment**

Leases invariably contain provisions that give the lessor the right to relocate the tenant or terminate the lease where the centre is undergoing repairs or renovations.<sup>77</sup> However, the inequality of bargaining power created by such clauses can see tenants compelled to move to less desirable locations within the centre and tolerate conditions which may see a dramatic decline in business. At times lessors may impose short term leases upon tenants during periods of renovation. In the case of a major renovation the lessee may lose their premises completely.<sup>78</sup> Although pursuant to Retail Shop Leasing legislation<sup>79</sup> compensation for such relocation is payable, anecdotal evidence suggests that lessees are reluctant to seek compensation for fear of retribution from lessors whether in the form of subsequent relocations or other matters associated with the lease.<sup>80</sup> Consideration should be given to the position where the tenant is relocated and whether there was any motive behind this move. For example, if the landlord wanted to persuade the tenant to leave they could keep compelling the tenant to move or the tenant

<sup>71</sup> *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 Qd R 249.

<sup>72</sup> The lessor rejected the allegations and claimed that the competitor did not operate a 'specialty muffin shop' business. However, the lessee's allegation of unconscionable conduct did not rely on a breach of the exclusivity clause. The plaintiff proceeded on the basis that it would not be necessary to prove a breach of the exclusivity clause in order to establish a s51AC contravention.

<sup>73</sup> *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 Qd R 249. at para 15

<sup>74</sup> *Softplay Pty Ltd v Perpetual Trustees* (WA) Pty Ltd [2002] NSWSC 1059

<sup>75</sup> contravened s62B of the Retail Leases Act 1994 (NSW) ('RLA'). This is a provision that largely resembles s51AC of the TPA

<sup>76</sup> *Softplay Pty Ltd v Perpetual Trustees* (WA) Pty Ltd [2002] NSWSC 1059 at para 31

<sup>77</sup> Problems discussed in Reid Report para 2.27

<sup>78</sup> *Lolly Pops (Harborside) Pty Ltd v Werncog Pty Ltd* [1998] NSWSC 304 (1 July 1998)

<sup>79</sup> For example section 43(1) *Retail Shop Leases Act 1994 (Qld)*

<sup>80</sup> Eileen Webb Interviews – April 23-24 2006 JK, NK, CT, BP, June 16 2006 CT, PT, CL, November 5-6 2006 TW, PC.

could be placed in an undesirable place in the centre where their business would suffer.<sup>81</sup> The effect of a break clause is of course even more serious. The operation of a break clause results in a termination of the lease where the lessor is undertaking major renovations or demolition. However, can conduct associated with a relocation or a break clause be regarded as unconscionable?

In *Blackler v Felpure Pty Ltd*.<sup>82</sup> the court examined whether it was permissible for a lessor to use a break clause in a lease when the underlying purpose was to renovate and then occupy the premises themselves. The lessor purported to terminate the lease on the basis that the lessor was planning to renovate the building and required vacant possession of the building to do so. Felpure Pty Ltd were planning to replace the lessee's premises with offices from which they could conduct their business. The lessee claimed *inter alia*, that it was impermissible to use the break clause when the underlying purpose was to put another occupant into possession. On the facts of this case it was determined that the lessors were genuinely planning to renovate the premises. The problem was that they were doing so with the view to using the renovated area as their own offices.

The lessee contended that the decision in *Alcatel Pty Ltd v Scarcella*<sup>83</sup> where the Full Court of the Supreme Court of New South Wales recognised a duty to act in good faith in relation to the performance of a commercial lease, and the *Retail Leases Act* operating together made such a use of the break clause impermissible. In other words the break clause in the lease had to be exercised in good faith and the lessors in fact were acting in "bad faith" because they utilised the break clause suit their own ends.

The court held that the lessors use of the clause was legitimate and did not offend good faith principles. The lessor was undertaking a genuine proposal and Bryson J was of the view that it was unnecessary in the circumstances for the lessor to modify its proposal to continue to accommodate the lessee after the premises were demolished. In conclusion it was determined that the lessors were within their rights to utilise the break clause in this way and it appears His Honour was of the view that such use did not infringe upon any obligation to act in good faith.

In *ACCC v Leelee Pty Ltd*<sup>84</sup> the motives of the lessor appear to have been malevolent and were symptomatic of a lengthy course of ill feeling between the lessor and lessee. The lessors were found to be lacking good faith. Similarly in *ACCC v Simply No Knead*<sup>85</sup> the conduct of the franchisor was aimed at terminating the franchisees for a malevolent purpose. It appears to follow that a decision to use a break clause was not in pursuit of a genuine proposal but to remove an irritating tenant or to pursue another agenda the good faith in s51AC and its equivalents may have been contravened. Similarly, recent decisions suggest that a lessor should be wary of any attempt to utilise a break clause malevolently or to pursue an ulterior motive.<sup>86</sup>

## Termination

Inappropriate termination of an agreement could potentially offend s51AC and its analogues. In two of the cases where s51AC was successfully established, franchisors sought to end the relationship with their respective franchisees in circumstances where the franchisors were aware there was no clear legal justification to do so. In relation to retail leasing, some Courts and Tribunals have considered circumstances where lessors have purported to terminate leases. In summary, the cases indicate that franchisors, and for the purposes of this paper, lessors, who validly exercise a right to terminate a lease will not, without more, be held to have engaged in

<sup>81</sup> *Lolly Pops (Harborside) Pty Ltd v Werncog Pty Ltd* [1998] NSWSC 304 (1 July 1998)

<sup>82</sup> [1999] NSWSC 958 (24 September 1999)

<sup>83</sup> [1998] NSWLR 349

<sup>84</sup> (2000) FCA 1121

<sup>85</sup> (2000) FCA 1365 (22 September 2000)

<sup>86</sup> *Skiwing Pty Ltd v Trust Company of Australia (trading as Stockland Property Management)* [2006] NSWCA 276 (9 October 2006)  
*Cohen v SPB Developments Pty Ltd & Ors* [2006] WADC 186 (24 November 2006)

unconscionable conduct.<sup>87</sup> However, lessors should use caution in terminating a lease and, it seems, that where reliance on the strict legal right to terminate a lease is unreasonable, or is based on an ulterior motive (change) the termination could be vulnerable to an allegation of unconscionable conduct.

*Auomasters*<sup>88</sup> involved the alleged unlawful termination of a franchise agreement. The dispute involved a franchisor, Automasters Australia Pty Ltd, and Bruness Pty Ltd, one of Automaster's franchisees. As part of its franchise system, Automasters provided franchisees with a certain type of computer software which was used to process invoices and permitted the franchisor to thereby calculate royalties. From the start, Bruness found the software to be unsatisfactory and, due to what were claimed to be technical problems with the software, Bruness was unable to accurately record all their invoices. After a series of increasingly hostile exchanges regarding the effectiveness of the software, Automasters purported to terminate the franchise agreement, alleging in the notice of default that Bruness had not complied with the franchise manual for document management.

The Court found that the franchisor's conduct demonstrated an element of oppression which was 'referable to a conscious determination to bring the franchise agreement to an end'<sup>89</sup>, His Honour held that there was no sufficient justification for Automasters to terminate the franchise agreement and, in the circumstances, Automasters had acted capriciously and unreasonably.

*Simply No Knead*<sup>90</sup> also involved conduct by a franchisor associated with a purported termination. In summary the franchisor was intent on making life so difficult for the franchisees that they would terminate or not renew their franchises. The case involved several instances of unconscionable behavior, which were summarized by Sundberg J as an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour in relation to each franchisee that amounts to unconscionable conduct by SNK for the purposes of section 51AC(1).<sup>91</sup>

In relation to retail leasing matters, the Western Australian case of *Old Papas Franchise Systems v Camisa Nominees Pty Ltd and Ors*<sup>92</sup> involved the purported termination of the lease on an iconic coffee shop on the Fremantle 'Café Strip'. Given the discussion above regarding the existence of an ulterior motive or a collateral purpose in relation to termination, the case is a useful one to consider. The lessees were trying to prevent the termination of their lease due to several alleged breaches. The lessee commenced actions seeking *inter alia*, relief against forfeiture. The lessee's also claimed that the lessors had engaged in unconscionable conduct pursuant to ss51AC and 51AA of the TPA. In summary, the lessee claimed that by looking at the lessor's conduct, the lessor revealed an ulterior motive: to harm Old Papa's and bring about the termination of the lease.

The lessees listed several instances of the lessor's conduct which, when looked at in combination, were said to support this contention.<sup>93</sup> The lessees were unsuccessful at first instance and appealed to the Full Court. The Full Court held (McLure J, with whom Murray and Parker JJ agreed) was also of the view that the evidence before the court foreclosed a finding that the respondents were actuated by a desire to harm the lessee and terminate the Lease or otherwise engaged in unconscionable conduct under s51AC or 51AA of the TPA.

<sup>87</sup> For example, cases where s51AC was held not to be contravened through a termination included 4WD Systems and Hoppers Crossing. In relation to tribunal decisions see *Campbell v Astill* [2004] NSWADT 55,

<sup>88</sup> *Automasters Australia Pty Ltd v Bruness Pty Ltd* (2003) ATPR (Digest) 46 -229

<sup>89</sup> *Automasters Australia Pty Ltd v Bruness Pty Ltd* (2003) ATPR (Digest) 46 -229 at para 396

<sup>90</sup> *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 178 ALR 304

<sup>91</sup> *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) (2000) 178 ALR 304; at para 51  
<sup>92</sup> [2003] WASCA 11 (12 February 2003)

<sup>93</sup> In summary, the lessor had refused to give consent for a liquor licence and proposed renovations to the premises. The lessor also refused to consent to the assignment of the lease to a corporation related to the original lessee. There had been a history of legal activity between the parties and certain actions by the lessors, on the face of it at least, seemed provocative. For example, a substantial rental increase (almost 100%) had been imposed after a rent review. Further, the lessor had erected scaffolding around the building which, the lessee claimed, was left there for an unnecessarily long time thus disrupting trading.

In summary, although the list of alleged conduct appeared to suggest some form of oppressive conduct, each could be explained and could not, in the circumstances, be regarded as amounting to unconscionable conduct. In prefixing his comments on whether the conduct would be regarded as unconscionable, McLure J<sup>94</sup> referred to the statements in *Hurley v McDonald's Australia Ltd*<sup>95</sup> where it was noted that for conduct to be regarded as unconscionable, serious misconduct or something *clearly unfair or unreasonable*, must be demonstrated.<sup>96</sup>

In applying this standard to the facts of the case, McLure J<sup>97</sup> noted that, in relation to the refusal to permit the building renovations, the lessor had taken heed of the heritage listing of the premises and the associated issues regarding structural alterations.<sup>98</sup> The liquor licence was intimately involved with the renovation proposal in that the consent to the liquor licence application was linked with the works said to be necessary to obtain that licence. There was a lack of specificity on the lessee's part regarding the works and the lessor's solicitors had repeatedly, without success, requested the lessee appellant to identify the necessary works.

In the circumstances, the rent increase was regarded as a commercial ambit claim, and it was clear that if the proposed sum was not satisfactory there was a process for the formulation of market rent involving both parties. The scaffolding was erected firstly to inspect an area which it was necessary to repair, a process which was legitimately delayed due to bad weather and other works related issues. There were, in the courts view, reasonable explanations for other conduct listed by the lessee. For example, the alleged lack of information being brought about by communication breakdowns because the lessee had failed to inform the lessor of which entity was, in reality running the business. Also, the lessor's conduct had to be seen in the light of the unco-operative and adversarial nature of much of the correspondence between the solicitors for the parties.

In *Sarker v World Best Holdings Ltd*<sup>99</sup>, a Tribunal decision, unconscionable conduct was successfully established. The lessor of a shopping centre had granted a lease to a business called the Dhaka Corporation. The lease agreement granted the Dhaka Corporation the exclusive right to operate an Indian grocery in the shopping centre. Problems arose when the lessor leased a nearby shop in the centre to the applicant. The terms of this lease granted the applicant the exclusive right to operate an Asian grocery in the centre. The lease agreement required the applicant to provide the lessor with bank guarantee for a specified amount. The applicant was also required to comply with the lessor's fit out manual. Compliance with this manual required the lessee to undertake a fit out of the shop to a value of \$40 000 within four weeks of the hand over date. The lessee had not strictly complied with these requirements. Three days after the plaintiff commenced trading the lessor sought to terminate the lease. The lessor claimed the quality and value of the fit out undertaken demonstrated non compliance with the fit out manual. The lessor further claimed that this non compliance and the failure to provide a bank guarantee constituted grounds for the termination. Once the applicant learnt that the guarantee was an issue he offered funds to cover the security.

The lessor did not have a right to terminate applicant's lease for the breaches because the lessor had not complied with the notice requirements under s129 of the Conveyancing Act 1919 (NSW).<sup>100</sup> The Tribunal held that the lessee's breaches did not amount to repudiation.

<sup>94</sup> McLure J noted that as the trial Judge did not expressly deal with or address all of the matters the subject of the grounds of appeal. It should be noted that the grounds of appeal raise in clearer terms than the appellant's pleading the allegation that the respondents' conduct was for the collateral purpose or motive of harming the lessee and terminating the Lease.

<sup>95</sup> [1999] FCA 1728

<sup>96</sup> "For conduct to be regarded as unconscionable, serious misconduct or something *clearly unfair or unreasonable*, must be demonstrated - ... Whatever 'unconscionable' means in s 51AB and s 51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions *showing no regard for conscience*, or that are *irreconcilable with what is right or reasonable* ... The various synonyms used in relation to the term 'unconscionable' import a *pejorative moral judgment* ..." [22]

<sup>97</sup> Agreeing with the Trial Judge.

<sup>98</sup> At 117-119.

<sup>99</sup> *Sarker v World Best Holdings Ltd* [2004] NSWADT 15

<sup>100</sup> Conveyancing Act 1919 (NSW)

The Tribunal found that the lessor's management of the applicant's fit out was very lax. The lessor had not given any prior warnings to the applicant before he commenced trading, but rather had indicated that it was satisfied with the plaintiff's fit out. The lessor and its solicitors were found not to have insisted on the bank guarantee and their behaviour was found to have suggested obtaining the guarantee was not a matter of urgency. The Tribunal found that there was an obvious overlap between an Indian grocery and an Asian grocery and that the lessor had made a mistake in allowing this overlap. The Tribunal found that the lessor sought to rely on whatever legal argument it could come up with against the applicant in order to solve its own error.<sup>101</sup> The Tribunal found that the lessor:

- a) acted in a way that was not reasonably necessary to protect its own interests by seeking to terminate the plaintiff's lease without warning;
- b) used unfair tactics by not giving notice of all of its concerns relating to the breaches of the terms of the lease; and
- c) acted in bad faith.<sup>102</sup>

The more powerful party in *Saker*, was acting in bad faith with an ulterior motive to bring its lease relationship with the applicant to an end. It is in this way that facts in *Saker* are similar to those in *Automasters*, *Simply No Knead*, and *Worsfold*. One difference between the facts in *Saker*, and the facts in *Automasters*, *Simply No Knead*, and *Worsfold*, is that in *Saker* it was clear that the lessee had breached the terms of the agreement. However these breaches were not serious enough to amount to repudiation and the lessor had not complied with notice requirements under the Conveyancing Act 1919 (NSW). This meant that the lessor, like the more powerful parties in *Automasters*, *Worsfold*, and *Simply No-Knead*, did not have a right to terminate the relationship.<sup>103</sup>

### **Conclusions on the effectiveness of the unconscionable conduct provisions**

The cases which have discussed section 51AC and its equivalents do indicate the difficulty in satisfying the unconscionability standard. The results of cases thus far suggest section 51AC will offer protection only against malevolent and overt types of conduct. Other less extreme types of conduct which were viewed by the Reid Report as unfair and warranting legislative action would arguably fall outside the scope of this section.<sup>104</sup>

No doubt, some commentators will be of the view that the adoption of a constrained view of section 51AC, in conformity with the interpretation of section 51AA is a desirable development. It could be seen as a sensible and balanced interpretation which prohibits the direst examples of commercial misconduct without creating uncertainty and anarchy in small business dealings. However, section 51AC was intended to provide an avenue for relief to parties who suffer loss through dubious behavior in a small business relationship. If the term unconscionable in section 51AC is constrained, in the same way as the term has been limited in section 51AA, the scope and potential of section 51AC, and the recommendations of the Reid Report, may be rendered largely ineffective.

<sup>101</sup> *Saker v World Best Holdings Ltd* [2004] NSWADT 15 at para 68

<sup>102</sup> *Saker v World Best Holdings Ltd* [2004] NSWADT 15 at para 86

<sup>103</sup> This decision of the NSW Administrative Decisions Tribunal was later set aside by the NSW Supreme Court on the grounds that that the Tribunal was improperly constituted at the time of the decision. The decision is still useful however because it indicates what kind of conduct is likely to be found unconscionable for the purposes of s51AC of the TPA and 62B of the RLA. See too *Irresistible Frocks v Sparbac and Roche* [2003] NSWADT 241.

<sup>104</sup> For example, note the many cases listed in SA Christensen and WD Duncan, *Unconscionability in Commercial leasing – Distinguishing a Hard Bargain from unfair tactics?* (2006) 13 TPLJ 29 where conduct, although harsh and arguably unfair was found not to be unconscionable.

Given that eight years after the introduction of a highly anticipated provision there is still considerable doubt as to the scope of the section, an obvious question may be why is there an absence of precedent?<sup>105</sup> At this stage it is unclear whether this, arguably unexpected, development has been the result of effective dispute resolution and settlement of actions, or that the problems thought to be existing in the industry were not as prominent as originally thought. Another possibility is that a heightened awareness of the provisions of the Act and a raised consciousness amongst lessors and lessees for the need to comply with the Act has resulted in an improvement of practices within the industry so problems of the past are not arising to the same extent. However, several submissions<sup>106</sup> made to the Dawson Committee<sup>107</sup> and more recently the Senate Economics References Committee<sup>108</sup> demonstrate that the types of unfair practices identified by the Reid Committee are arguably still occurring today.

Recent survey work conducted by one of the authors is illuminating in this respect. As part of a wider study into Retail Leases Legislation in Australia using Victoria as the main case study, Crosby (2006)<sup>109</sup> carried out a set of semi-structured interviews with a combination of Government, property professionals and representatives of landlords and tenants. In total 28 individual interviews were carried out in March and early April of 2006 with 36 interviewees (a number of firms and organisations fielded two or more individuals). The interviewees included 9 lawyer representatives of professional law firms and 16 representatives of letting agency practices and property valuers, operating for both landlords and tenants. Two representatives of the Retailers' organisations for Victoria and New South Wales and a representative of the Australian Council for Shopping Centres were interviewed along with a major shopping centre owner, a major financial institution and a major retailer. Government interviewees included the Government official responsible for organising the drafting of the 2003 Victorian legislation, the Small Business Commissioner and 2 representatives of his office who organise the mediation of disputes under the legislation and the Valuer-General for the State of Victoria. In addition, a meeting with the Commercial Leases Committee of the Law Institute of Victoria was arranged to discuss the issues and the researcher also spoke and invited questions at two continuing professional development seminars, one for valuers arranged by the Australian Property Institute and the other for lawyers arranged by Legalwise, a law CPD institute.

The majority of professional interviewees were of the opinion that the drawing down of the unconscionable conduct provisions into the retail leases legislation has increased the feeling that an action for unconscionable conduct against a major landlord was a significant deterrent to any temptation to behave very robustly against a tenant. Being cited by the Victorian Small Business Commissioner (VSBC) for a minor or even quite major offence against the Act did not have the same brand image damage attached to it as a citing for unconscionable conduct. The fact that landlords are wary of the unconscionable conduct issue is illustrated by Croft<sup>110</sup> (2006). He suggests that before the latest Victorian Retail Leases Act was enacted in 2003, there was no sanction for landlords not giving a disclosure statement and landlords started to ignore the requirement as they feared it might be used as evidence in unconscionable conduct proceedings.

<sup>105</sup> Submission by the Trade Practices Committee of the Business Law Section of the Law Council of Australia to the Senate Economic References Committee *Inquiry into whether the Trade Practices Act 1974 Adequately Protects Small Businesses from Anti-Competitive or Unfair Conduct*, 30

<sup>106</sup> Submission by the Fair Trading Coalition to the Senate Economics References Committee Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business. (August 2003)

<sup>107</sup> For example the Fair trading Coalition and Australian retailers Association. Although the submissions were made, the Dawson Committee was of the view that the contentions regarding section 51AA were outside the Committee's terms of reference.

<sup>108</sup> Senate Economics References Committee Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business (Canberra March 2004) at 34

<sup>109</sup> Crosby, N. (2006) An evaluation of the policy implications for the UK approach to small business tenant legislation in Australia. University of Reading Research Report. [www.rdg.ac.uk/rep/ausleaserpt.pdf](http://www.rdg.ac.uk/rep/ausleaserpt.pdf).

<sup>110</sup> Croft, C. (2006). Disclosure Obligations and the Abolition of the 'Dog Depot' Decision. Paper at the Retail Leases Conference, Leo Cussen Institute, March, Melbourne

There are a number of reasons why a tenant might not want to take out an action of unconscionable conduct against a landlord. The annual report of the Victorian SBC (2005) does introduce a point of concern about parties not wishing to formalise disputes as they feel that the other party may be able to retaliate in the future. This point was also discussed in a number of interviews where property professionals had found tenants reluctant to take a dispute too far in case the landlord retaliated by refusing to renew at lease expiry. The lack of a right to renew leaves tenants vulnerable to this sort of behaviour. This is because the unconscionable conduct provisions may not protect the tenant as Section 79 of the Victorian Retail Leases Act specifically states that a refusal to renew the lease is not unconscionable conduct.

If these concerns are real, the SBC could monitor the situation given more resources. Section 25 of the Retail Leases Act requires notification of leases and therefore all kinds of lease data on terms and conditions could be collected including lease expiry dates. Lease expiry outcomes could then be monitored, especially those subject to a dispute of any kind in the existing lease. Tenants' fears that they will be discriminated against at lease expiry if they are subject to a dispute within the lease could be assessed from empirical data on outcomes as opposed to the present anecdotal comments. Anecdotal evidence is often drawn from extreme positions.

It could also be argued that lessees are reluctant to commence actions against landlords for unconscionable conduct because of the high costs associated with litigation. This reticence was noted by the Reid Committee.<sup>111</sup> Although the Commonwealth government went some way towards addressing this problem by providing additional funding to the ACCC to run test cases involving retail leasing matters, resources will only extend to a limited number of matters per year.<sup>112</sup>

### **Unfairness in Australian retail leases**

In its 2004 report, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, the Senate Economics References Committee reconsidered the question of whether a law proscribing unfair conduct should be inserted into the TPA. Although the Committee ultimately decided against recommending the inclusion of such a provision it was noted that although the TPA uses 'the legally familiar term "unconscionable", the mischief which the Act seeks to address seems closer to unfair conduct.'<sup>113</sup>

In Australia, the prospect of a provision prohibiting unfair conduct in commercial transactions is fraught with negativity. Two main arguments emerge against the prospect. Firstly, it is contended that the meaning of the term 'unfair' is too contentious and that a provision prohibiting unfair conduct will result in the courts making 'value laden judgments' which are likely to be applied inconsistently.<sup>114</sup> The other argument against an unfairness provision is its perceived potential to interfere with traditional notions of freedom of contract such that parties will be uncertain whether commercial contracts are enforceable.<sup>115</sup> Such concerns were discussed in the Senate Economics References Committee.<sup>116</sup> The Committee rejected the proposition that an unfair conduct provision should replace s51AC concluding that the term 'unfair' was unworkably ambiguous, and would lead to widespread uncertainty.

<sup>111</sup> The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997) at 158

<sup>112</sup> Hansard, (HR), 30 September 1997 at 8800

<sup>113</sup> Senate Economics References Committee *Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*. (Canberra March 2004) at 35 Indeed, the Committee noted that if the current s51AC 'seeks to proscribe 'unfair conduct, it remains reasonable to consider why it should not simply say so.'

<sup>114</sup> The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997) at 168

<sup>115</sup> The House of Representatives Standing Committee on Industry, Science and Technology. *Finding a Balance –Towards Fair Trading In Australia* (Canberra May 1997) at 167

<sup>116</sup> Senate Economics References Committee *Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*. (Canberra March 2004) at 35

However, arguably Australian courts have considerable experience with interpreting, and giving meaning to, 'general concepts'<sup>117</sup> such as reasonableness, unconscionability, good faith and, indeed, unfairness. Unfairness has been the subject of judicial consideration pursuant to section 106 of the Industrial Relations Act 1996 (NSW) and the term 'unjust' which is arguably synonymous to unfair has been discussed in the context of the Contracts Review Act 1980 (NSW). There is no indication that this legislation has resulted in an outpouring of litigation and inconsistent, subjective decision making nor widespread uncertainty of contract. The possible application of unfair contracts legislation to retail leases will be discussed below.

Therefore, we will now consider, if there was to be an extension to consider unfairness in Australian retail leasing transactions, what the form and scope of the provision would be? Given the recent introduction of unfair contract provisions into the *Fair Trading Act (1999) (Vic)*, and the likely inclusion of such provisions in other state legislation,<sup>118</sup> an appropriate course may be an extension of these provisions to encompass retail leasing and other small business transactions. However, this begs the question: would unfair contracts legislation also be inappropriate because it is the *conduct* of the offending party rather than the terms of the lease itself that are unfair?

Unlike the UK, unfair contracts legislation is a relatively recent development in Australian law. Indeed, the proposal did not gain traction until developments in Victoria which led to the introduction of s32W of the *Fair Trading Act 1999 (Vic)*. Section 32W defines an unfair term in a consumer contract for the purposes of Part 2B (Unfair Contract Terms in Consumer Contracts). A term is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

Clearly, the provision applies only to consumer transactions. Like the dialogue in the UK prior to the introduction of the UCT legislation, there was debate as to whether the provisions should extend to small business transactions.<sup>119</sup> However, seemingly inevitably, the legislation was limited to consumer transactions. Section 32X provides examples of the kinds of contract terms which could contravene the provisions. In determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect listed in s32X(a)-(m).<sup>120</sup> An unfair term in a consumer contract<sup>121</sup> and a

<sup>117</sup> J.Dietrich, *Giving Content to General Concepts*, (2005) MULR 6 Dietrich defines 'general concepts' as 'those legal notions or ideas that are necessarily described in broad and abstract terms'. Note too the comments in footnote 1 of the article.

<sup>118</sup> NSW Qld and WA

<sup>119</sup> Workshop on Unfair Commercial Practices – 22nd & 23rd January 2003 Session 3 – unfair competition and consumer protection. Elizabeth Start, Policy Development Officer The Federation of Small Businesses

<sup>120</sup> (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;

(b) permitting the supplier but not the consumer to terminate the contract;

(c) penalising the consumer but not the supplier for a breach or termination of the contract;

(d) permitting the supplier but not the consumer to vary the terms of the contract;

(e) permitting the supplier but not the consumer to renew or not renew the contract;

(f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;

(g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;

(h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;

(i) limiting the supplier's vicarious liability for its agents;

prescribed unfair term in a standard form contract are void<sup>122</sup>. The contract will continue to bind the parties if it is capable of existing without the unfair term or the prescribed unfair term.<sup>123</sup>

Therefore, if these provisions were to apply to retail leases it would need to be considered whether the particular lease was individually negotiated or was a standard form lease. The latter is almost invariably the case. It is recognized that certain terms in retail leases tend to disadvantage a lessee. Indeed, when the Australian Retailers Association proposed a retail leasing code of conduct, several provisions, including relocation clauses, were identified as being appropriate for a model clause to be developed. Although the larger retail lessors still tend to utilize their own leases, in several states and territories, model clauses have been drafted and are available for use. Therefore, it seems it would be a relatively easy task to identify terms in standard form leases which were regarded as unfair. Also several of the provisions of s32X(a)-(m) appear to be relevant to retail leasing transactions.

Therefore, it would now be useful to examine the common scenarios in retail leasing above and see if unfair contracts legislation would assist where unconscionability has failed. At the outset, it should be noted that, although in some situations unfair contracts legislation may assist, in most cases where tenant's complain of landlord behavior it is in the context of the landlords *conduct* not the terms of the contract. Indeed, on the face of it, leases, which must conform to the relevant retail leasing legislation, may appear seemingly benign. However it is often the conduct surrounding or associated with the leasing transaction that is oppressive. Therefore, again, in such circumstances a lessee would be left without a remedy.

### **Sitting tenant**

Earlier in this paper the predicament of the sitting tenant was examined. In summary, the imposition of harsh terms as the 'price' of a new lease seems unlikely to be regarded as unconscionable as the lessor is under no obligation to grant a lease at all. If the unfair contracts provisions applied to retail leases, it is arguable a lessee may have some recourse. However, as in the case of unconscionability, the meaning of unfairness in a business context will be a major consideration. Could the exercise of a lessor's right to choose whether they want to lease their premises to a particular tenant or not, ever be regarded as unfair? Put another way, a lessor refuses to grant another lease unless the sitting tenant agrees to a huge rental increase or a condition that the lessee must abandon legal proceedings against the lessor. This is a contract term, but is it unfair so as to contravene the unfair contracts provisions?

Arguably, the answer is yes. Even if the contract has not been entered into, it appears in the Australian context that a potential contract is sufficient to come within the auspices of the legislation.<sup>124</sup> Arguably, such a provision in a contract could contravene ss32X(a)(b) and (e). If the provision was declared to be an unfair contract term it would be void. Presumably, a lease could remain on foot in the case of a clause involving the pursuit of legal action but may not in the case of rental.<sup>125</sup>

### **Assignment and options**

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- (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
  - (k) limiting the consumer's right to sue the supplier;
  - (l) limiting the evidence the consumer can lead in proceedings on the contract;
  - (m) imposing the evidential burden on the consumer in proceedings on the contract.

<sup>121</sup> S32Y(1)

<sup>122</sup> S32Y(2)

<sup>123</sup> S32Y(3)

<sup>124</sup> AAPT

<sup>125</sup> S32Y(a)(b)(c)

On the face of it, a standard clause involving consent to assignment would not seem to be unfair. However, there does not seem to be an opportunity for the unfair contracts legislation to permit an examination of the conduct behind the term. Therefore, the problems associated with the refusal of consent to assignment, for example an ulterior motive or malevolent purpose could not be addressed. This would also seem to be the case with standard option clauses.

## Rental

Finding a clause involving rental to be unfair may be extremely contentious. A rental provision, particularly involving the amount of rental to be paid is pivotal and if such a term was found to be unfair and thus void, the lease may be unable to remain on foot. However, to consider the decision in *Barbcraft*, the essence of the unconscionability alleged against the tenants was that they refused to renegotiate the rent fixing arrangements under the lease when changes in circumstances made it fair to do so, or put another way unfair not to do so.<sup>126</sup> The lessor's counsel utilised a decision<sup>127</sup> under s106 of the Industrial Relations Act 1996 (NSW) which deals specifically with unfair contracts. In that case, an applicant successfully argued that the rental provision in a hotel lease where there was no provision for a reduction in rental where the applicants could show that the turnover of the business could not sustain the rental regime was 'in its terms unfair, harsh and unconscionable.'<sup>128</sup>

Potential problems involving a sale of a business would seem to involve conduct rather than the terms of a contract. It also seems that the applicability of the unfair contracts legislation would not impact upon issues involving tenancy mix. Similarly, relocation clauses may seem fair on their face although, arguably, a lack of power on the lessees part to influence relocation decisions and the operation of a break clause may offend ss32X(a),(b)(e)(f)(g) and/or (k). However, again it is likely to be conduct, rather than contract terms, that requires remedy. Similar comments would apply to a termination clause which may potentially offend ss32X(a)(b)(c)(d) and/or (h).

Therefore, although the extension of unfair contracts legislation to retail leases may have some impact, especially in the case of conditions placed on a sitting tenant and on rental provisions, the reality is that it is unfair *conduct* which, for the most part, should really should be addressed. Unfair contract terms would be considered within an unfair conduct provision. Also, the use of an unfairness provision, rather than the unconscionability standard and the accompanying problems discussed above, appears to be an appropriate response. However, debate will continue to rage on this point, and, at present, it is unlikely such a development will occur.

## The position in the UK

### Background and context

The situation in the UK appears to be quite unlike that in Australia. There has never been the widespread criticism of landlord behaviour as occurred in the evidence put before the Reid Committee. This is not to suggest that UK landlords behave perfectly but rather that they operate in a very different context and in one that tends to militate against unfair practices.

The adverse comments in Australia have largely been aimed at landlords of retail property and the most obvious point to make is that the retail market in the UK is far more diverse. There is not the same concentration of premises in shopping centres (although this is increasing) and the ownership of shopping centres is spread

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<sup>126</sup> At [38]

<sup>127</sup> *Starkey v Mitchforce Pty Ltd* [2000] NSWIR Comm 216 per Hungerford J.

<sup>128</sup> At [38]

amongst a far greater number and range of landowners. This means that, rather than being in a dominant position and being able to dictate terms to prospective tenants who have few alternative locations, the owners of UK shopping centres need to compete for tenants. This in itself tends to encourage them to develop a positive image.

There have, nevertheless been criticisms of UK landlords and these have induced a response from government. It was as a result of a long period of sustained pressure both before and after the second world war from tenants who complained of undue pressure at the expiry of their leases that a statutory right of renewal was given to all tenants who occupied premises for the purposes of their business. Part II of the Landlord and Tenant Act 1954 in its original form was noteworthy for extending to all types and sizes of business tenant and for being mandatory - there was originally no contracting out of its protection. Its range of operation has, if anything, grown (it was expanded to encompass on-licensed premises in 1989) but contracting out is now permitted and this practice has become more widespread, especially for shorter leases of non-retail property. Despite this, a statutory right of renewal is enjoyed by most retail tenants, large and small, and this offers significant protection from unacceptable landlord behaviour at the end of the contractual term. Since this statutory right of renewal is not dependent on any minimum period of occupation it is also a benefit that can be passed on to an assignee, however late on in the lease this takes place. In this way, tenants retain a very real economic interest in their premises.

In the early 1990s an influential report<sup>129</sup>, coupled with a rise in the number of tenants' complaints to their MPs arising from the effects of the property recession, prompted government to investigate commercial leasing practices. The criticisms being levelled were rarely about unfair practices as such but rather at the way in which lease provisions had become heavily standardised and landlord-orientated. Thus the pressure was on to abolish original tenant liability and upward only rent reviews and to introduce more flexibility on lease length. Over the years since then significant progress has been made on these issues. Original tenant liability has gone<sup>130</sup> and lease lengths have shortened and become more diverse<sup>131</sup>. Only the upward only rent review has proved impervious to change and, even here, its impact had lessened due to shorter lease lengths<sup>132</sup>.

One area where concern has, if anything, increased is that relating to the lack of property awareness shown by small business tenants. Research has shown that, as a group, very small business tenants are less likely than their larger counterparts to take property advice and often take their leases on the first terms offered; even where they do negotiate terms this rarely extends beyond the level of rent<sup>133</sup>. They show little awareness of what their lease terms are. Despite considerable efforts at information dissemination – notably by means of voluntary codes of practice – there has been little real progress on this front. Whilst there is no evidence that landlords are deliberately taking advantage of such tenants there remains serious concerns that these tenants are not necessarily taking property on terms most suitable to their needs.

The one sector in the UK where there is evidence of unfair practices by landlords relates to leases of pubs granted by “pubcos”<sup>134</sup>. These leases are often granted to individuals with no previous experience of the licensed trade and there is clear evidence of poor negotiating practices and the inclusion of unfair terms in leases<sup>135</sup>. The most common cause of complaint – the beer tie – has eventually been found not to fall foul of European competition

<sup>129</sup> *Retail Rents – Fair and Free Market* John Burton. Adam Smith Institute. 1992

<sup>130</sup> As a result of the Landlord and Tenant (Covenants) Act 1995.

<sup>131</sup> See *Monitoring the 2002 Code of Practice for Commercial Leases* ODPM 2005

<sup>132</sup> See *Monitoring the 2002 Code of Practice for Commercial Leases* ODPM 2005

<sup>133</sup> See *Monitoring the 2002 Code of Practice for Commercial Leases* ODPM 2005

<sup>134</sup> Companies created following the requirement that the large brewing companies dispose of a significant proportion of their tied public houses. The top six pubcos own 40% of the pubs in the UK. They either lease their pubs to tenants or operate managed pubs.

<sup>135</sup> *Pub Companies* House of Commons Trade and Industry Committee (HC 128 – 1, 21 December 2004)

rules<sup>136</sup> but has certainly been found to be of no positive benefit to tenants<sup>137</sup>. The flood of litigation on the beer tie issue has shown that there have been many unattractive practices in this sector although it does seem clear that the better operators have now cleaned up their act.

It would, therefore, appear that in the UK there has not been the same pressing need to address unfair practices as has been the case in Australia. That said, there is evidence that small business tenants generally are vulnerable to the imposition of unsuitable lease terms and there is often a very fine line to be drawn between unsuitability and unfairness. It is therefore pertinent to consider the extent to which English law is equipped to offer protection in this regard<sup>138</sup>.

### Unconscionability and unfairness in English law

Unlike in Australia, in the UK the equitable principles of unconscionability have never been generally<sup>139</sup> extended to commercial contracts but have largely remained confined to their traditional areas, notably penalties, forfeitures and mortgages. In modern times the view has been that it is for Parliament, through legislation, to correct any inequality of bargaining power<sup>140</sup>. This statutory intervention has occurred in two particular areas: credit agreements (the Consumer Credit Act 1974) and consumer contracts (Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCR')). Generally speaking, this legislation has no application to business leases although the latter is playing an important role in residential tenancies (which are covered by the UTCCR). However, the Law Commission has recently considered whether the UTCCR should be extended so as to benefit businesses, a move that could be highly relevant to business tenants<sup>141</sup>.

Following extensive consultation the Law Commission has recommended that a re-formulated UTCCR type scheme should be extended so as to benefit small businesses (defined as employing no more than 9 employees)<sup>142</sup>. The protection given would be to allow the small business to challenge non-core<sup>143</sup> standard form<sup>144</sup> terms as being unfair or unreasonable. Any term (including a core term) could be regarded as unfair or unreasonable simply because it is not expressed in plain or intelligible language<sup>145</sup>. Once clearly expressed, the fairness and reasonableness of a non-core term would be judged according to either (or both) its substance and effect or the circumstances prevailing at the time the contract was entered into<sup>146</sup>. There would be statutory guidelines on factors to be taken into account (including the knowledge and understanding of the party adversely affected by the term and the relative bargaining strengths of the parties)<sup>147</sup>. There would also be included in the legislation an Indicative List of terms that are likely to be regarded as unfair<sup>148</sup>.

<sup>136</sup> *Inntrepreneur Pub Company v Crehan* [2006] UKHL 38.

<sup>137</sup> *Pub Companies* House of Commons Trade and Industry Committee (HC 128 – 1, 21 December 2004), para 129.

<sup>138</sup> See *Protecting the Small Business Tenant* Susan Bright [2006] 70 Conv 137.

<sup>139</sup> Its role is so narrowly confined that it can rarely be relied upon. One party must be at a serious disadvantage, this must then be exploited by the other side in a morally reprehensible manner and the resulting transaction must not merely be harsh or improvident but overreaching and oppressive, see *Alec Lobb (Garages) Ltd v Total Oil (Greta Britain) Ltd* [1983] 1 WLR 87.

<sup>140</sup> See *National Westminster Bank plc v Morgan* [1985] AC 686, at 708.

<sup>141</sup> *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission.

<sup>142</sup> *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission, paras 2.35 – 2.36.

<sup>143</sup> Ie terms other than those defining the subject matter of the contract or the price, see *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission, para 3.56.

<sup>144</sup> A term that has been proposed by the other side as one of its standard terms and which has not been altered in favour of the small business by subsequent negotiations, *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission, para 5.78.

<sup>145</sup> *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission para 3.102

<sup>146</sup> *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission, para 3.101.

<sup>147</sup> *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission, para 3.105.

<sup>148</sup> *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission para 5.84.

Legislation in this form would offer significant protection against the inclusion in leases to small businesses of unfair or unreasonable terms. It would prompt a drafting revolution since the present approach to wording of business leases would often fail a plain or intelligible language test<sup>149</sup>. If the Office of Fair Trading were to adopt a similar stance on the terms of business leases as has been adopted towards residential leases<sup>150</sup>, some known areas of concern<sup>151</sup> would be tackled. In particular, absolute prohibitions on assignment and subletting would be frowned upon<sup>152</sup>, as would any over-long periods of notice for the operation of tenant breaks<sup>153</sup>. It is also likely that upward only rent reviews<sup>154</sup> and the imposition of automatic authorised guarantee agreements<sup>155</sup> would be subject to very close scrutiny.

However, the Law Commission has proposed that contracts for the disposal of an interest in land should be excluded (along with certain other types of contract) as being a specialised contract in respect of which it is usual to take legal advice<sup>156</sup>. While it is fair to say that many tenants in the UK do take legal advice before signing a lease, those that do not are more likely to be very small businesses. Furthermore, even where legal advice is taken, this is often at the stage where the terms have already been agreed (without any property advice) and where the lawyer is usually being pressed, by both sides, to settle the documentation as quickly as possible<sup>157</sup>. Research carried out with regard to pub tenants shows a very similar pattern, with 40% of tenants failing to take legal advice before signing their agreements<sup>158</sup>. There is, therefore, a very strong case for suggesting that the exclusion of land contracts should be re-considered.

## Conclusions

The UK has not generally seen the same problems over positively poor landlord behaviour as occur in Australia. The pub sector certainly has had its difficulties but, as that sector has diversified, the position does seem to be improving. While the English law on unconscionable bargains is less well developed than that in Australia, there appears to be no pressing need for it to become so, at least in the context of business leases. Furthermore, as the Australian experience shows, the hurdles set for the application of these principles appears to be set too high to offer real relief.

There is, however, a real issue in the UK over the awareness of small business tenants and while there is no strong evidence that landlords take seriously unfair advantage of such tenants there are clear indications that these tenants do not always obtain leases on the best available terms. Addressing this problem by the use of voluntary codes has had little impact at the small end of the UK market. The UK government remains committed to improving the situation and there seems little doubt that useful lessons can be learned from the way in which Australia has imposed disclosure requirements. Furthermore, extending the unfair contract terms regime to leases granted to small businesses would help to eradicate some of the problems that have been identified. Apart from helping to eliminate some undesirable terms, it would also drive forward the use of plain and intelligible lease

<sup>149</sup> *Guidance on Unfair Terms in Consumer Contracts* (2005) OFT 356 Office of Fair Trading, paras 5.1 – 5.13.

<sup>150</sup> *Guidance on Unfair Terms in Consumer Contracts* (2005) OFT 356 Office of Fair Trading

<sup>151</sup> As identified in *Monitoring the 2002 Code of Practice for Commercial Leases* ODPM 2005.

<sup>152</sup> *Guidance on Unfair Terms in Consumer Contracts* (2005) OFT 356 Office of Fair Trading, paras 4.22 – 4.28.

<sup>153</sup> *Guidance on Unfair Terms in Consumer Contracts* (2005) OFT 356 Office of Fair Trading, paras 3.74 – 3.76.

<sup>154</sup> *Guidance on Unfair Terms in Consumer Contracts* (2005) OFT 356 Office of Fair Trading, paras 3.101 – 3.103.

<sup>155</sup> *Guidance on Unfair Terms in Consumer Contracts* (2005) OFT 356 Office of Fair Trading, paras 4.12 – 4.13.

<sup>156</sup> *Unfair Terms in Consumer Contracts* (2005) Law Com 292 Law Commission, para 5.76.

<sup>157</sup> See *Monitoring the 2002 Code of Practice for Commercial Leases* ODPM 2005

<sup>158</sup> *Pub Companies* House of Commons Trade and Industry Committee (HC 128 – 1, 21 December 2004), para 107.

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drafting. This, again, would help those tenants who, experience shows, will always continue to shun professional advice.

In relation to Australia, for s51AC to impact upon the more oppressive examples of the landlord/tenant relationships it must be regarded as a real deterrent to engaging in unconscionable practices. It seems this will only occur if the provisions were interpreted by the courts and tribunals in a manner that reflects the intention behind the legislation rather than being restrained by traditional interpretations. If this does not occur the legislature should be prepared to amend the legislation. The courts, tribunals and indeed the ACCC should be prepared to address the unconscionability issue and provide clear guidelines as to what is likely to be regarded as unconscionable conduct in a retail leasing context. Also, lessees must be able to feel confident that, if they decide to proceed with a retail tenancy claim, there is some prospect of success and they will not be unduly disadvantaged in any further dealings with their landlord. At present, the high bar ostensibly set by the unconscionability standard seems to be acting as a deterrent to tenants commencing actions.<sup>159</sup> As Crosby (2006) noted, unless relations with a landlord have irrevocably broken down, tenants are reluctant to commence actions, particularly in relation to unconscionable conduct, for fear of retaliation. Finally, although it is often asserted that an extension of unfair contract terms legislation may be appropriate, it seems unlikely that such a development would make much difference. The issue often is the *conduct* associated with the dealings between the lessor and lessee rather than the terms of the lease itself.

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<sup>159</sup> EW Interview JK 26/4/06, CT 27/04/06, CT, DJ 29/04/07