

# SHOPPING CENTRE LANDLORD engaged in unconscionable conduct

By ANTHONY HERRO

A landlord was found to have engaged in unconscionable, misleading and deceptive conduct in the Dukemaster case.



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**I**N AUSTRALIAN COMPETITION AND Consumer Commission *v* Dukemaster Pty Ltd and Patricia Wong [2009] FCA 682 the Federal Court held that Dukemaster, the landlord of the Paramount Shopping Centre, had engaged in both unconscionable conduct (s.51AC TPA) and misleading and deceptive conduct (ss.52 and 53(e) TPA).

Further, the landlord's general manager, Ms Wong, was held to be directly

and indirectly knowingly concerned in a contravention of ss.51AC, 52 and 53(e), *Trade Practices Act* (the TPA).

The proceedings were brought by the ACCC on behalf of four retail tenants in the Paramount Centre in Melbourne. Since the judgment is a very lengthy one, this article focuses on the facts regarding the tenant in shop 3, Mrs Shin, as a proxy for the other tenants.

The case concerns two principal breaches of the TPA. In the first place, s.52 (and s.53(e)), namely, misleading and deceptive conduct; and in the second place, s.51AC, unconscionable conduct.

#### **Facts regarding shop 3, the Korean Lunchbox**

Mrs Shin (the tenant) spoke very little English. Her daughter Ms Zu often translated for her.

On 13 March 2003, she purchased

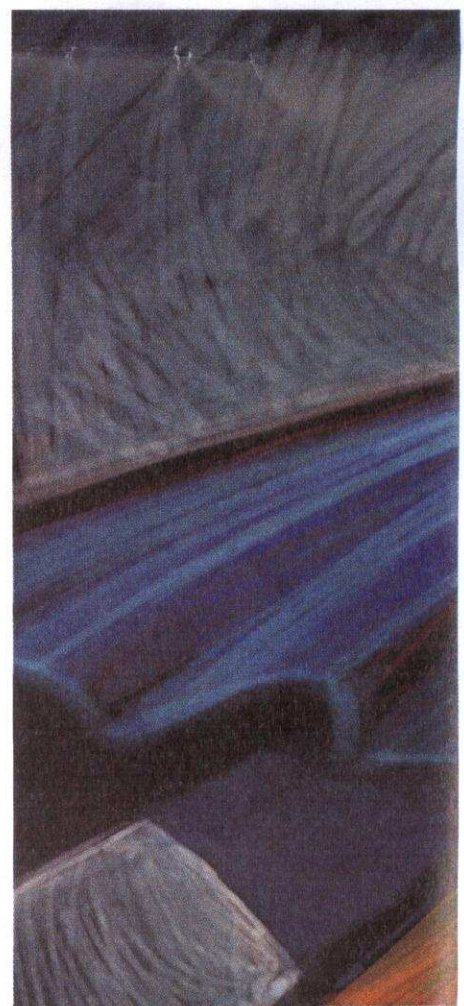


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shop 3 of the Paramount Centre for \$70,000. At this time the lease (first shop 3 lease) was to expire on 31 January 2004. The rent was \$41,600. The first shop 3 lease contained no rent reviews during the term. There was an option to renew which had to be exercised not less than three months prior to the expiration of the term.

The first shop 3 lease provided for Mrs Shin to proceed to rent determination at the end of the first term. The lease contained a provision whereby the landlord provided written notice to the tenant of what it considered to be the current market rent and if the tenant wished to dispute the landlord's proposed rent, the tenant must give notice in writing to the landlord within 21 days.

On 22 April 2003 Dukemaster's solicitors sent a letter to Mrs Shin advising her that the option could not be exercised after 31 October 2003.

On 16 September 2003 Mrs Shin notified the landlord of her intention to exercise the option for a further three years. No legal advice was sought. On 30 September 2003 a letter was hand-delivered to Mrs Shin from Dukemaster's solicitors acknowledging receipt of the notice of exercise of option, stating that the

"renewed lease documentation" would be forwarded to her in due course. This did not occur.

On 27 November 2003 the landlord delivered a letter to Mrs Shin stating that: "the rent for the above shop will be \$48,000 plus GST commencing on 1 February 2004. Please advise by 5 pm on 8 December 2003 whether you accept this offer. We believe the new rent is *very reasonable and below market value*. If you object to our proposed rent we will proceed to valuation." [emphasis added]

**"It is not difficult to see why both the ACCC  
and the Federal Court were concerned  
by the landlord's conduct in this case."**

On 27 November 2003 Ms Zu translated the letter for her mother. Mrs Shin accepted the proposed rent. In early February 2004 the landlord delivered lease documents to Mrs Shin.

In fact, rather than being a renewal of the first shop 3 lease, the lease documentation was a new and different lease (the second shop 3 lease). The second shop 3 lease differed from the first shop 3 lease in that it contained an annual CPI rent review clause and the option now had to

be exercised no earlier than 12 months and no later than six months prior to the expiration of the lease.

Mrs Shin signed the second shop 3 lease. She did not know how the rent increased or how it was to be calculated. She understood that the lease was for a three-year term but she was unaware that it included a further three-year option. The second shop 3 lease was due to expire on 31 January 2007.

Just before the 27 October 2006, Mrs Shin's daughter drafted a letter requesting that the lease be renewed for a further three years. Note that this purported exercise of option was not in accordance with the time periods required under the second shop 3 lease but rather in accordance with the first shop 3 lease. The

landlord did not communicate with Mrs Shin until 3 January 2007, when a letter was hand-delivered to Mrs Shin which said that the second shop 3 lease expired on 31 January 2007 and "we advise that the commencement rent as at 1 February 2007 will be \$90,0000 plus GST [with annual CPI increases] ... Please advise by 5 pm 10 January 2007 whether you accept this offer. *We believe the new rent is very reasonable and below the market value*. If you object to our proposed rent the matter







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will proceed to valuation." [emphasis added]

Mrs Shin started to cry as her daughter read this letter to her and asked her to read the letter again to make sure that the rent was \$90,000 and that she was expected to respond by 10 January 2007. The daughter read the letter at least two more times. Mrs Shin said that the rent was nearly double what she was currently paying and the increase would mean that she could not afford to pay the rent. Mrs Shin was scared that if she did not accept the offer by 10 January 2007 she would be kicked out.

At the request of her mother, Mrs Shin's daughter telephoned Ms Wong and said that the increase was too high and they couldn't afford it. Ms Wong replied "The rent is reasonable," and "I can't give you a lower rent because you are asking me to be unfair to the other tenants," and "The rent is cheap against what other tenants are paying."

Mrs Shin was unable to contact her solicitor as his office was closed for the

tors wrote to Mrs Shin's lawyers denying that they had put any pressure on Mrs Shin to sign the lease, and that the 19 March 2007 letter was the first time that the rent had been complained of as being excessive, which was inaccurate in light of the telephone conversation between Mrs Shin's daughter and Ms Wong. The landlord rejected the proposal that Mrs Shin continue to pay the old rent and stated that if the balance of the rent for March were not paid within seven days the landlord could re-enter the premises and terminate the lease without further notice.

The next day Mrs Shin paid the balance of the March rent because she was afraid that the landlord would terminate the lease as threatened. Mrs Shin was having trouble paying the rent; eventually she sold the business on 30 November 2007.

#### Application of the law

The ACCC alleged three complaints.

##### The first complaint:

##### 27 November 2003 letter

The ACCC alleged that the 27 Novem-

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Christmas holidays and would not reopen until 12 January 2007, after the deadline expired. She asked other shopkeepers to recommend another solicitor, but they all told her that all solicitors' offices would be closed over the Christmas period. By that time Mrs Shin only had a few days to respond. In the end she signed the letter on 9 January 2007 in Korean and she did so because she feared the landlord. She did not seek further legal advice after her solicitor returned from holidays because she thought there was no point as she had already signed the document.

On 16 January 2007 the landlord's solicitors issued the lease. Contrary to the representations made in the 3 January 2007 letter, the lease was not a renewal but a brand new lease (the third shop 3 lease). The rent was \$90,000 plus GST per year with CPI increases.

By 19 March 2007 Mrs Shin had retained another lawyer to act for her. The new lawyer wrote to the landlord stating: "My client disputes the new rental on grounds that such a huge increase is not reasonable and by any means rather excessive."

The new lawyer recommended that a valuation be sought and suggested that Mrs Shin pay the old rent pending the market determination.

On 21 March 2007 the landlord's solici-

ber 2003 letter was misleading and deceptive because this letter represented to Mrs Shin that Dukemaster believed that the proposed rent for the renewal of shop 3 of \$48,000 for the period 1 February 2004 to 31 January 2005 was very reasonable and below market value (the first Shin representation) and that it had a reasonable basis for believing that the \$48,000 rent was very reasonable and below market value (the second Shin representation) when Dukemaster did not believe and did not have a reasonable basis for believing that the \$48,000 rent was very reasonable and below market value. The court asked: was each representation conveyed and if so, was it misleading or deceptive or likely to mislead or deceive? The representation was conveyed by the letter dated 27 November 2003. The court held that the conduct was misleading or likely to mislead or deceive because "it is much more probable than not that the \$48,000 rent 'was not "very reasonable" and/or "below the market value"'. The landlord obtained no expert evidence in relation to the market rent. An expert witness determined that the market rent was \$43,000, whereas the rent being charged by the landlord was more than 10 per cent above the market rent, namely \$48,000.

##### The second claim: 3 January 2007 letter

In the letter dated 3 January 2007 it



was alleged that the landlord represented that it believed that the proposed rent of \$90,000 for the period of 1 February 2007 to 31 January 2008 was "very reasonable" and "below market value" and that it had a reasonable basis for believing that the rent was so. The expert valuer's evidence was that the market rent for that period was \$50,500.

#### **The third allegation: the January 2007 conversation**

During this conversation the landlord represented to the tenant that:

- the \$90,000 rent was very reasonable;
- it had a reasonable basis for expressing its opinion that the \$90,000 was very reasonable; and
- the \$90,000 rent was lower than the rent paid by other tenants in the food court.

the limited time period to respond.

2. The court also held that the landlord's conduct in relation to the third shop 3 lease was unconscionable in that

- the landlord conveyed the representations to the tenant whom the landlord knew had little or no ability to speak English;
- the representations were intended by the landlord to secure a renewal of the lease at a rental for which there was no basis beyond the landlord's decision to seek the stated amount; and
- the landlord required a response within a period of seven days at a time when independent advice was not readily available, and there was no explanation provided by the landlord to justify this limited time frame.

#### **Refunds and costs**

The court ordered the landlord to refund the amount of \$65,761 plus interest at \$55,082 to the tenant. In addition to the monetary sums which the ACCC was successful in obtaining for all four tenants, it was held that Mrs Wong, the general manager, was directly and indirectly knowingly concerned in and party to the contravention by the landlord of ss.51AC, 52 and 53(e) TPA.

Further, the court granted injunctions against the landlord and ordered the landlord to establish a trade practices compliance and education/training program and that this be monitored by the ACCC. The landlord was required to pay costs.

In summary, the Federal Court emphasised the following:

- By stating that the rent was *very reasonable* and *below market rent* when it was not, the landlord engaged in misleading and deceptive conduct.
- With respect to unconscionable conduct, the landlord took advantage of the fact that the tenant had a limited understanding of English. The landlord, without justification provided very short time frames for response.
- The fact that the landlord was prepared to terminate the lease when the tenant suggested that the market rent of \$90,000 was not a fair market rent (when later it was found that the true market rent was \$50,500), and that the landlord's response was that it would terminate the lease within seven days if the money were unpaid, was considered to be unconscionable.
- The fact that instead of renewing an option lease the landlord chose to redraft the lease and change key provisions such as the rent review clauses and the time in which the notice of option had to be exercised was also a relevant factor.

It is not difficult to see why both the ACCC and the Federal Court were concerned by the landlord's conduct in this case. The real test will be in those decisions which follow, where the landlord's conduct is not so blatant, but may nevertheless may be considered unconscionable.

How often does a leasing representative pressure a tenant by emphasising how good the deal is, when there may be no basis for that belief? A further cause of concern is the fact that rental incentives are nearly always contained in confidential side documents, where a landlord makes statements such as 'your rent is less than that of the adjoining tenancy'. On the face of it such comments may be true, but in real terms they may be false.

This decision is significant in its interpretation of what constitutes unconscionable conduct with respect to retail leases.



Yet the \$90,000 was not very reasonable, there was no reasonable basis for this opinion and this rent was not lower than that of other tenants in the food court.

#### **Unconscionable conduct**

The Federal Court found three instances of unconscionable conduct.

1. The Federal Court held that in relation to the first shop 3 lease and the negotiation of the second shop 3 lease the landlord's conduct was unconscionable. Not only were the misrepresentations likely to mislead or deceive; but

- they were conveyed to the tenant whom the landlord knew had little or no ability to speak English;
- they were intended by the landlord to secure a renewal of the lease at a rental for which there was no basis beyond the landlord's decision to seek the stated amount; and
- they required a response within 11 days when there was no explanation to justify

The Federal Court said: "Dukemaster's conduct is irreconcilable with what is right or reasonable."

3. The court held that the landlord's conduct was unconscionable because:

- the landlord refused to address the tenant's complaint regarding the excessive rent for the third shop 3 lease, including rejecting the proposal to proceed to rental determination when there was no basis beyond the landlord's decision to seek the amount stated;
- the landlord denied that the tenant had ever objected to the rental for the third shop lease which was not correct; and
- the landlord threatened to evict the tenant should she not pay the balance of the March rent at the new rate within seven days.

The court said: "Dukemaster persisted in following a course of conduct that deliberately attempted to deny Mrs Shin any opportunity to challenge the proposed rent."