TIME TICKS AWAY for tenants misled by landlords

By ANTHONY HERRO

The decision in Armstrong Jones significantly altered the retail lease litigation landscape, virtually introducing a six-month limitation period on claims for compensation due to misrepresentation.

Anthony Herro is a LEADR accredited mediator, a mediator on the Retail Tenancy Unit Panel and the principal solicitor of Herro Solicitors, a boutique CBD practice specialising in retail leases.

FOR THOSE WHO PRACTISE IN the area OF retail leasing, the decision of the appeals panel of the Administrative Decisions Tribunal (the panel) in the case of *Armstrong Jones Management Pty Ltd v Saies – Bond and Associates Pty Ltd (RLD)* [2007] NSW ADTAP 47 is a landmark decision.

It has had a significant impact on the rights of retail tenants claiming prelease misrepresentation and unconscionable conduct based upon such misrepresentation.

The facts

The case concerned a dispute between Armstrong Jones Management Pty Ltd (the landlord) and Saies-Bond and Associates Pty Ltd (the tenant) of a retail lease in a new shopping centre.

The tenant was a small furniture retailer, specialising in Balinese-style furniture trading as Coco Interiors. The tenant expressed interest to the centre's leasing agent, Mr Antony Draper, in opening a store in the soon-to-be-completed specialist bulky-goods furniture centre called Style at Home.

Mr Draper falsely represented to the tenant that Harvey Norman was to be a tenant of the centre (the Harvey Norman representation). As noted in the case, representations about an anchor tenant are significant and weigh heavily on the minds of tenants in deciding whether or not to enter into a lease. Both at first instance, and on appeal, the tribunal concluded that Mr Draper made the Harvey Norman representation knowing it was false at the time, and concluded that the tenant relied upon the Harvey Norman representation in deciding to enter into the lease. The tenant proceeded to enter into the lease in reliance on the Harvey Norman representation.

The tenant entered into occupation on 26 August 2004. The centre opened on 15 October 2004. The tenant provided a bond of $40,695, being the equivalent of three months rent, outgoings and promotion levy, securing its obligations under the lease. The rent was $118,800 per year. There was a four-month rent-free period. The tenant was supposed to commence paying rent from 5 February 2005.

The Harvey Norman representation was not contained in either the lessor's disclosure statement or in the lessee's disclosure statement.

The tenant's business did not go well – there were difficulties from day one in the performance of the centre. Many tenants fell into arrears. The tenant never paid any rent or outgoings at all throughout its entire period of occupation of the premises and the tenant failed to adhere to the core operating hours.

After various notices were ignored, on 18 August 2005 the landlord called upon the security bond. On 5 September 2005 the landlord terminated the lease by changing the locks, and commenced proceedings in the tribunal for damages.

The tenant denied liability and filed an application in the tribunal in the nature of a cross-claim, seeking orders relieving it of any liability under the lease, restoring it to the financial position it was in before entering into the lease and awarding damages for the loss suffered, and seeking declarations that various forms of conduct were unlawful. The tenant's claim was predominantly based on misrepresentation and unconscionable conduct.

At first instance, the tenant was successful in its claim for misrepresentation and unconscionable conduct. The landlord was required to return the bond of $40,695. It was a significant victory for the tenant because it in fact had paid no rent or outgoing at all for the period of approximately one year while it was operating in the

premises.

The landlord appealed.

The panel provided a lengthy and detailed judgment. The entire judgment should be read as it raises many relevant considerations for retail lease lawyers, but for the purposes of this article I wish to highlight what I consider to be the fundamental basis of the appeal panel's decision.

Evidentiary issue regarding representation

There is an evidentiary issue which, in my view, weighed heavily on the minds of the panel. It was decided that the Harvey Norman representation was made and relied upon by the tenant. However, the tenant did not take any steps at all in relation to this misrepresentation until proceedings were instituted against it by the landlord for non-payment of rent and outgoings under the lease. Thus the tenant 'sat on its hands' for a period of one year.

The panel found in favour of the landlord and the tenant was ordered to pay damages of $224,588.60.

By way of background for those not familiar with the provisions of the *Retail Leases Act* (the Act), it requires the landlord to serve a lessor's disclosure statement on the tenant seven days prior to entering into the lease. A schedule to the Act sets out the information that must be contained in the lessor's disclosure statement for it to be considered complete and thereby compliant with the requirements under the Act. The tenant is then required to serve a lessee's disclosure statement within seven days of receiving the lessor's disclosure statement, or within some other time frame as is agreed to by the parties.

There is provision in the lessee's disclosure statement, as set out in the Act, for the tenant to record any representations that were made in relation to the lease – namely, in paras 5 and 6 of the lessee's disclosure statement, which are as follows:

"(5) In entering into the retail shop lease, the lessee has relied on the following statements or representations made by the lessor or the lessor's agent:
(matters such as agreements or representations relating to exclusivity or limitations on competing uses, sales or customer traffic should be detailed).

"(6) Apart from the statements or representations set out above, no other promises, representations, warranties or undertakings (other than those contained in the lease) have been made by the lessor to the lessee in respect of the premises or the business to be carried out on the premises."

In the documents provided to lessees, there is usually only a small amount of space left to write under these paragraphs and frequently, tenants (often at the insistence of the leasing agents) sign the lessee's disclosure statement, without giving any real thought to what representations were in fact made.

Some have argued that *Armstrong Jones* turned on the fact that the misrepresentation should have been disclosed in the lessee's disclosure statement.

ILLUSTRATION: MICHAEL MUCCI

While the panel discussed in detail the specific disclosure regime provided for in the Act, I consider that this inference is not accurate. There is no doubt that any representation should be disclosed in the lessee's disclosure statement but the case does not turn on the fact that the Harvey Norman representation was not set under either para 5 or 6 of the lessee's disclosure statement. At para 119, the panel said: "In our view, lessees should see the disclosure statement regime as providing the place in which to record all material representations that induced them to enter the contract."

However, the panel goes on to say at para 121: "An evidentiary presumption founded in the omission of the statement from the lessee disclosure statement can be overcome by contrary evidence; and was, we think, overcome in this case."

And at para 122, the panel said: "A lessee should not be barred by an omission at the disclosure statement stage from taking action on a pre-lease representation that was important but not included in the disclosure statement."

Thus, the fact that the misrepresentation was not in the lessee's disclosure statement was not fatal in this case.

The element of delay

The critical element in the appeals panel's decision was the length of time taken by the tenant in raising the issue of the Harvey Norman representation and the fact that the tenant 'sat on its hands' and took no action in relation to the representation until the landlord commenced proceedings against it.

The period of one year was decided to be too long a time frame, such that an estoppel arose which prevented the tenant from being successful in relation to both its claim for misrepresentation and unconscionable conduct with respect to this misrepresentation. The panel looked at the provisions of the Act in relation to the service of disclosure statements as a type of code which is designed to place a limit on the taking of action of a fundamental kind in relation to representations.

> "The most conservative application of this decision is that a party to a retail lease must take some form of action ... within six months from the commencement of the lease."

At para 123 the appeal panel said: "If the lessee does not move to terminate within the time allowed, the right to terminate is lost. In effect, the lease is affirmed. Consequently, we are inclined to the view that an estoppel (so far as remedies such as restitution or rescission are concerned) must arise once the six-month period has passed. If no objection is taken by a lessee to the making of a pre-lease representation or in respect of an omission or other incompleteness in the disclosure statement within the six-month period, a lessor is entitled to regard the lease as secure from attack over matters of that kind."

The Act confers a right on the tenant to terminate a lease within the first six months if a disclosure statement is not given seven days prior to the lease being entered into or if the disclosure statement contains information which is materially false or misleading or incomplete.

For disclosure statements which are incomplete or contain information that is materially false or misleading, this right of termination cannot be relied upon, if the landlord has acted honestly and reasonably and ought to be excused for the failure concerned, and if the tenant is in substantially as good a position as the tenant would have been if the failure had not

occurred. Note that this proviso does not apply in relation to disclosure statements that were not served within seven days before the lease was granted – that right of termination cannot be set aside.

The six-month time frame only relates to the right of termination, and the Act does not specify the six-month time frame with respect to any claim for damages for misrepresentation.

However, the panel has applied this six-month time frame also in relation to misrepresentation and unconscionable conduct claims based on such misrepresentation.

The only time limits set out in the Act are that a retail lease claim must be made within three years (s.71) and the tribunal can make an order to extend this time frame to six years if the tribunal is satisfied that it is just and reasonable to make such order (s.71B)

Reading between the lines in both the decision in *Armstrong Jones* and various other decisions of the tribunal, I note that the tribunal often comments upon evidentiary issues and goes to considerable lengths to obtain a just outcome in the particular facts of the case. It appears critical in *Armstrong Jones* that the tenant took no action in relation to the misrepresentation until proceedings were commenced by the landlord. Further, the tenant paid no rent or outgoings whatsoever with respect to its occupation of the premises at any time.

The difficulty is whether this decision now establishes a precedent such that a party cannot successfully bring a claim for misrepresentation unless action is taken by the wronged party within six months.

The most conservative application of this decision is that a party to a retail lease must take some form of action – for example, having their solicitor write a letter to the other party within six months from the commencement of the lease. Failure to do so may give rise to an estoppel which will prevent the party's claim for misrepresentation.

The practical concern with such an approach is that in many instances, notwithstanding that a misrepresentation has been made, the wronged party moves forward hoping to make the best of the situation in any event – for example, they may have already spent around $250,000 on fit-out, stock and advertising, and they may have a general fear (sometimes in relation to costs) of obtaining legal advice. Such a party may only consider obtaining legal advice after a period of say, one year, after being unable to make a success of the business, in spite of the misrepresentation. As previously stated, a critical issue in this case was the complete silence of the tenant up until the point where the landlord commenced proceedings.

Practice note

Solicitors acting for tenants in particular should undertake the following:

❑ Always ask the tenant what representations were made and strongly advise the tenant to record these in the lessee's disclosure statement. The difficulty in practice is that sometimes leasing representatives place pressure on the tenant to obtain the lessee's disclosure statement prior to the tenant obtaining legal advice.

❑ If a false representation has been made, whether or not it was disclosed in the lessee's disclosure statement, advise the tenant that they should take some steps in relation to this misrepresentation as soon as possible – certainly, within the six-month period – by writing a letter to the landlord recording the misrepresentation, or by instructing you, their solicitor, to write such letter, or to commence proceedings in relation to such misrepresentation.

Legislative review?

In an April 2008 discussion paper prepared by the Retail Tenancy Unit (part of the NSW Department of State and Regional Development), the decision of *Armstrong Jones* has been highlighted, with a proposal in para 3 that legislation be enacted to set aside the implications of *Armstrong Jones*, so that the three-year time limit set by s.71 of the Act would apply to pre-lease misrepresentation. ❑