Barry.Nilsson. LAWYERS

IS THE SHOPPING CENTRE HALF EMPTY OR HALF FULL? WHETHER SPECIFIC OUTCOMES AND TENANCY RATES CAN BE IMPLIED INTO AN EXCLUSIVE LEASING AGREEMENT

AUGUST 30, 2019 | REAL ESTATE AGENTS' NEGLIGENCE

This case involved a failed joint venture in relation to the post GFC development of a shopping centre. The joint venture claimed the defendant real estate agency, Savills, was liable in contract and tort for the failed venture because it failed to secure sufficient tenants to make the centre viable.

IN ISSUE

- Whether the loss suffered by the joint venture was caused by the negligence or breach of contract of Savills including for failing to implement an appropriate leasing strategy, and failing to identify, find and introduce lessees on appropriate leases.
- Whether Savills owed the joint venture a "special duty" to obtain the best possible outcome in relation to the leasing of the centre, namely a tenancy rate of at least 90%.

THE BACKGROUND

In November 2007 a joint venture was entered into regarding the development of a discount designer shopping outlet in Campbelltown, NSW. The plaintiffs were the directors of one of the companies involved in the joint venture.

In July 2008 the joint venture signed an Exclusive Leasing Agency Agreement (ELAA) with Savills. A term of the ELAA required Savills to find and introduce prospective tenants to the joint venture for approval.

As a result of the underlying economic climate, Savills had difficulty in securing appropriate tenants for the centre. On at least two separate occasions Savills advised the joint venture of these difficulties and sought to defer the opening of the centre. This advice was rejected.

The centre opened in December 2009 with only a 55% tenancy rate. The low rental income generated by the tenancies resulted in the joint venture failing to meet interest payments and ultimately failed.

The Decision at Trial

Based on contemporaneous records and expert evidence the Court found in favour of Savills.

Regarding the "special duty" allegedly owed by Savills, the plaintiffs failed to establish how it arose. The terms of the ELAA were clear in that it did not specify that adequate tenants needed to be introduced in order for the centre to open successfully, nor did it specify a 90% tenancy rate. Further there was no implicit undertaking to achieve a certain result and therefore, without reference to the ELAA, this duty could not be established.

Similarly, based on expert evidence, the Court found that Savills' conduct did not depart from the relevant standard of care and skill of an ordinary leasing agent in providing the services under the ELAA. In this regard, during cross examination, the plaintiffs' own leasing expert conceded that Savills largely did what a prudent commercial leasing agent would do. Therefore no breach of contract was established.

As Savills' obligation in contract was the same in negligence, the claim in negligence also failed. In any event the Court found that, pursuant to s5O of the *Civil Liability Act 2002*, Savills would not be liable because the expert evidence was to the effect that Savills' professional service was widely accepted by the commercial leasing industry as competent professional practice.

IMPLICATIONS FOR YOU

This case is a reminder that caution should be exercised when attempting to imply terms into a contract containing clear and explicit provisions. Further, it reinforces that a Court will be cautious about implying a term into a professional services contract which obliges the service provider to undertake to achieve a certain result (in this case a specific tenancy rate).

Bassal v Savills (NSW) Pty Limited [2019] NSWSC 696

AUTHORS

CHRIS EVANS
ASSOCIATE

+61 8 8128 7751
chris.evans@bnlaw.com.au