

VICTORIAN SUPREME COURT REVERSES FAULTY AIR CONDITIONING LEASING DECISION

MAY 14, 2019 | COMMERCIAL LEASING

A landlord has successfully appealed a Tribunal decision finding that the landlord repudiated its lease by failing to repair a faulty air conditioning unit in leased premises.

The lease included the following special conditions:

1. the landlord would install air conditioning services to the premises (which the parties agreed was satisfied by the landlord's repair of the current unit);
2. the tenant was responsible for taking out a maintenance contract for the unit to be serviced every six months; and
3. the landlord was responsible for capital repairs to the air conditioning unit (subject to the tenant's maintenance obligations).

THE APPEAL

The Victorian Supreme Court found that the landlord's obligation was only to *install* air conditioning services. There was no continuing obligation to *repair*. As such, the landlord had satisfied its obligation and had not repudiated the lease.

Key takeaways from the appeal include:

1. If *new* equipment is expected to be installed, it must be so provided in the lease. As it was, the special condition only required that the landlord *install* air conditioning.
2. Where a lease does not stipulate a time for performance of a particular item, it is unlikely the term is fundamental or essential.
3. While it was accepted that air conditioning was critical for the financial success of the tenant's business, it did not follow that it was a fundamental term of the lease.
4. A landlord's repair covenant is ordinarily construed as a covenant to repair on notice. Until a landlord is notified, its repair obligations do not arise.
5. Delay may only amount to repudiation where there has been "gross and protracted" or "persistently practised" procrastination. In the circumstances, 10 weeks was not considered to be delay amounting to repudiation.
6. It is incumbent upon the tenant to first take steps to persuade the landlord of its error if the tenant wished to rely upon the landlord's conduct as a repudiation of the contract.
7. Where the repair is simple and inexpensive, failing to repair cannot amount to repudiation, especially where the tenant can arrange the repair and claim the costs as damages from the landlord.
8. A party who is not willing and able to perform the contract according to its terms has no right to terminate the contract for the other party's breach, even if that breach would otherwise justify

termination.

HOW THIS APPLIES TO YOU

Although this was a win for the landlord in this case, its relevance will differ depending on the specific terms of your lease, your obligations, and any special conditions.

If you have any questions, please don't hesitate to contact our Real Estate & Commercial team.

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