



Level 29, 1 Market St
SYDNEY NSW 2000

TEL: (02) 9267 3388
FAX: (02) 9267 3688

Email:
publications@heidtmans.com.au
Web:
www.heidtmans.com.au

LEGAL ALERT

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Retail Landlords - Issues involving the Sitting Tenant

A recent decision of the NSW Administrative Decisions Tribunal (the "**Helou Case**") has forced retail landlords to seriously reconsider their approach to negotiating a new lease with an existing tenant who is holding-over under an expired lease (a "**sitting tenant**").

The Facts

In the Helou Case, the Tenant was a sitting tenant (and was occupying the retail premises on a monthly holding-over basis following the expiry of the lease term).

The Landlord sent a letter to the Tenant offering a new lease, stipulating a higher rent and five year term. Importantly, that letter stated that no legally binding lease would arise until a formal lease (prepared by the Landlord's solicitor) had been signed by both parties and the Tenant fulfilled certain pre-lease requirements (such as provision of a bank-guarantee and procuring insurance policies for the premises).

Ultimately the Tenant accepted the Landlord's offer but, before a new lease was prepared, the Landlord withdrew the offer.

The Tenant instituted proceedings in the Tribunal seeking a declaration that, on the facts, a legally binding lease had been created between the parties.

The Tribunal's Decision

The Helou Case turned on the Tribunal's interpretation of a section 8 of the Retail Leases Act 1997 (the "**Act**"), which provides that a lease will be entered into either when a person enters into possession of a retail shop as a lessee or upon the execution of a lease, *whichever occurs first*.

On the facts in the Helou Case, the Tribunal concluded that:

1. it is possible for a sitting tenant to notionally "enter into possession" of premises, without having to actually vacate and re-enter a retail shop;
2. the commencement of a retail lease by virtue of the tenant entering into possession or payment of



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rent can occur *even though no formal lease is ever prepared or signed*; and

3. a retail lease can be created on the basis of a letter of offer once the fundamental terms of the offer (such as the rent and term of the lease) are accepted by the sitting tenant.

Recommendations

If you are a landlord of retail premises, great care should be exercised when engaging in negotiations for a new lease with sitting tenants. We have developed strategies designed to overcome the problem of landlords becoming automatically and unintentionally bound to a lease offer prior to a formal lease being signed. If you are a tenant of retail premises, be aware of rights and protections which the law gives you.

For further information on the Helou case or to discuss the appropriate lease strategy for your individual circumstances, please contact us.
