Section 16
Gone but not forgotten

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I have recently acted for tenant in a retail lease dispute which demonstrates the ability of the legislation to deliver an uppercut when you least expect it.

The case concerned section 16 in NSW, the deemed 5-year term.

This is one of my most loathed provisions, and so there is a delicious irony in fate delivering me an opportunity to weaponise it.

The dispute was resolved commercially, and section 16 was repealed in July, so it is safe to discuss the case. (Section 16 now only operates on leases entered into before 1 July 2017).

Section 16 says that the term of a lease is 5 years, unless the lessee delivers to the lessor before, or within 6 months after, the lease is "entered into", a solicitor's certificate under s 16(3).

Assume the following facts:

- The lessee occupied premises under a lease that expired in September 2014.
- After expiry the lessee continued to hold over. It paid the hold over rent.
- There was no discussion between the lessor and the lessee, about a new lease.
- In April 2015, the parties commenced negotiations, and shook hands on a new lease for a term of 2 years, to commence back in September 2014 when the term of the holding over lease expired.
- In June 2015, the lessee signed the 2-year lease as a deed. The commencement date was backdated to September 2014.
- The lessee delivered the signed 2-year lease to the lessor in June 2015, together with a s 16(3) certificate.
- The lessor signed the lease, as a deed, and returned a signed copy to the lessee.
- The lessee occupied the premises for the 2-year term. That term expired in September 2016, and the lessee held over under that lease.
- In 2017 the lessor served a one month notice to vacate on the lessee. The lessee did not want to leave, and asked us to find a way to continue its tenure in the premises.

Lease commencement dates are often backdated in similar circumstances (although it is less common to see a lease backdated by 9 months).

When we analysed the legal process, the backdating enabled us to run an argument that we think is new to science.

We said that:

- The 2-year lease was in fact "entered into" (per s 8 RLA) on the commencement date in September 2014 (s 8 says "*For the purposes of this Act, a retail shop lease is considered to have been entered into when a person enters into possession of the retail shop as lessee under the lease or begins to pay rent as lessee under the lease (whichever happens first)*"(emphasis added).

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- The s 16(3) certificate was given in June 2015. This was more than 6 months after the lease was "entered into".
- The s 16(3) certificate was therefore ineffective.
- The term of the lease (per s 16(2)) was therefore 5 years from September 2014, and did not expire until September 2019.
- The notice to vacate was therefore invalid, and the tenant was entitled to continue in possession of the premises.

Section 8 of the RLA says (relevantly) that a lease is entered into, when the tenant enters into possession, or pays rent "under the lease".

The lessor argued that it was impossible for the lease to have been entered into in September 2014, because there was at that time no lease "under which" the lessee held possession or paid rent. The lessee was merely holding over under the expired lease. The new 2 year lease had never been discussed, let alone agreed. How can you be in possession under a lease that does not exist?

This is a good argument. In fact, it is hard to dispute, and is the conventional argument.

But let's analyse things a different way.

We know that the essence of a lease is that it grants possession of premises.

And if we look back in time to September 2014, we know that the lessee was either holding over under the expired lease, or was the lessee under the 2-year term certain lease that was expressed to commence in September 2014. The lessee cannot have been in possession under both leases at the same time. It must have held possession under one.

In deciding which of the 2 alternatives applied, (we argued), you need do no more than examine the lease the parties signed. It says that the 2-year term certain lease commenced in September 2014.

If the essence of a lease is possession, and the term of the lease commenced in September 2014, then the lessee must have been in possession under the term certain lease in September 2014.

And if the lessee had possession at that time, the lease must have been entered into. To argue against this is to argue that a person can exist, without being born.

The lessor argued against this that our argument did not matter, because it could prove beyond all doubt that the 2-year lease did not exist until April 2015 (at the earliest). No matter what the lessee said, as a matter of fact, it was only holding over until then.

Again, this is a powerful argument.

However, we said it foundered on the rock of estoppel by deed.

This legal principle states (in simple terms), that a man is estopped from denying the truth of his own solemn deed. If the parties adopt an assumed state of facts as the basis of their deed, they are estopped from denying those facts (even if they are not true).

This meant that the lessor would not be entitled to adduce evidence to contradict what the 2 year term-certain lease, on its face, clearly established, that the lease commenced in September 2014.

It is possible the lessor could have adduced evidence about when the lease was actually "entered into", as opposed to when it commenced, but this would have been difficult, because of the tendency of that argument to derogate from the grant.

The bedrock of estoppel by deed is the legal prohibition on derogation from grant.

If, as the lessor argued, the lease was entered into in around April 2015, the lessee must have been holding over under the expired lease until then. And if the lessor said that the lessee was holding over for that period, it has effectively wiped out from the 2-year term certain lease the period from September 2014 to April 2015. If that is not derogating from the grant, nothing is.

If the lessor said that the term certain commenced in 2014 but was not entered into until April 2015, it confronted the problem that the lease existed before it was created.

That sort of metaphysical conundrum can only be answered by people like Malcolm Roberts.

The arguments did not end here. They were not developed further because the dispute was settled commercially.

It could be argued against the lessee that our case was opportunistic, and designed to achieve an outcome that was never intended.

Sadly, it is clear from the terms of s 16, that this is precisely the outcome the idiotic section was designed to achieve.

Its purpose was to inflict on unsuspecting parties a 5 year term when they had consciously and deliberately agreed to something else. If the bus is at the bus stop, you can't blame people for getting on board.

Thankfully, s 16 has been repealed, and the minimum 5 year term is now a thing of the past.

Shame about the remaining RLA provisions that can still hit you like a wrecking ball.