Fortius v Premier

It has been reported in the Financial Review that Fortius has sued Premier for $3.6 million in unpaid rent at the MidCity Centre on Sydney's Pitt Street Mall. In response, Premier has cross-claimed alleging unconscionable conduct and breach of good faith terms during the pandemic shutdown.

Premier owns a number of leading retail brands represented in the centre, including Just Jeans, Peter Alexander and Smiggle.

The case brings to a head a number of legal and commercial tensions that have been simmering since Premier announced its response to the pandemic back in March 2020.

It will be recalled that in March 2020, the National Cabinet announced the Leasing Code of Conduct. At its heart, the Code required landlords to extend rent relief to qualifying tenants, to enable them to continue to trade and to thereby maintain employment.

Premier's response to the pandemic was to simply announce on 26 March 2020 the immediate closure of all its retail stores in Australia, and that all of its employees would be stood down and would not be paid.

It went on to announce that it would not pay rent globally for the duration of the shutdown.

On 12 May 2020, Premier announced the re-opening of its stores and that during the recovery phase, it intended to pay rent in arrears for all stores at a gross percentage of sales.

Because of its massive turnover, Premier never qualified for relief under the National Code.

In summary, unless I am missing something:

1. the purpose of the National Code and JobKeeper was to keep retail businesses operating during the pandemic, so far as practicable, to keep people employed.
2. Premier closed its stores and stood down its employees (although they were presumably re-engaged when JobKeeper kicked into gear).
3. Premier did not qualify for relief under the National Code, but simply decided to suspend the payment of rent and to then pay rent in arrears as a percentage of sales.

In general, retail landlords had a tough 2020. At the same time, Premier made hay while the sun didn't shine. It has announced record results across the pandemic period.

I suspect this may have been a source of annoyance to Fortius.

When tenants unilaterally decide to stop paying rent, it is not an unusual response by landlords to lock them out. But with online sales surging and pressure to limit vacancies, this is starting to look like a remedy of last resort. Premier itself makes no secret that 70% of its stores are on holdover or short terms, and that the EBIT margin from its online business is "significantly higher" than the group average. It has closed 51 stores in the last 12 months. You do not need to be Einstein to deduce that Premier is positioned to wind back its bricks and mortar presence when expedient.

And the fundamentals from those factors suggest that any landlords who have not renegotiated their leases with Premier are unlikely to lock it out for breach. Those landlords will be standing on the sidelines, cheering for Fortius.

In terms of the legal issues raised by the Fortius claim, I would make the following observations:

1. Leases generally provide that the agreed rent must be paid on time, without set off, counterclaim or deduction.

2. Leases do not generally entitle the tenant to claim rent abatement in consequence of a pandemic. Generally, that risk lands where it falls.

3. There is no suggestion that Premier has raised a defence of frustration. Generally, the effect of the pandemic was not to frustrate leases. The industry had a good look at this issue at the start of the pandemic, and so far as I am aware, no claim of frustration has been made to the court. One thing is certain: a lease cannot be partly frustrated. A lease cannot be frustrated for the payment of rent, but not frustrated for the purpose of possession and continuation of the term. That would be like being partly pregnant.

4. Premier is reported to be cross-claiming on the ground of unconscionable conduct. My preliminary advice to industry participants is generally that unconscionable conduct claims are the refuge of the weak. While there are occasionally meritorious claims, it is quite rare for them to succeed.

In relation to Premier's cross-claim of unconscionable conduct, section 62B(3) of the NSW Act includes factors to be taken into account:

> "*(f) the extent to which the lessor's conduct towards the lessee was consistent with the lessor's conduct in similar transactions between the lessor and other like lessees,*
>
> *(g) the requirements of any applicable industry code,*
>
> *(h) the requirements of any other industry code, if the lessee acted on the reasonable belief that the lessor would comply with that code,*
>
> *(j) the extent to which the lessor was willing to negotiate the terms and conditions of any lease with the lessee,*
>
> *(k) the extent to which the lessor and the lessee acted in good faith.*"

It would be fascinating to see Premier run a claim based on (h) above, that is, that Fortius acted unconscionably by failing to apply the Code, being an industry Code to which Premier was not entitled.

It would also be fascinating to see if Premier ran a claim based on (j) above. It would be hard to complain about the willingness of the lessor to negotiate, when the lessee itself made a unilateral decision about how it would perform the lease, apparently without negotiation. Generally, if it is sauce for the goose, it is sauce for the gander.

Of course, the above comments are general, and the specific facts could take the case in a number of directions.

Wherever it goes, for nerds like me, the case will be better than t.v.

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Speirs Ryan is a Sydney based boutique property law firm with national coverage. The firm is uniquely placed with specialist teams in both property transactions and strata law.

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