



HIGH COURT OF AUSTRALIA

Public Information Officer

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TABCORP HOLDINGS LTD v BOWEN INVESTMENTS PTY LTD

Tabcorp rented office premises from Bowen Investments. A clause in the lease prohibited the tenant from making substantial alteration or addition to the leased premises without first obtaining the landlord's written consent. Within six months of leasing the building Tabcorp redesigned and replaced the foyer without the landlord's consent, written or otherwise. Today the High Court decided Bowen Investments was entitled to damages that would cover both the cost of reinstating the foyer as it had been prior to the unauthorised alteration and the loss of rent while that work was being done, rather than to damages which would cover only the reduction in the value of the premises arising out of the unauthorised work.

Mrs Bergamin is a director of Bowen Investments. During 1996 she took particular interest in the construction of the foyer in a building owned by the company, located at 5 Bowen Crescent Melbourne. The foyer utilised San Francisco Green granite, Canberra York Grey granite and sequence-matched crown-cut American cherry timber in its construction. On 23 December 1996 Bowen Investments leased the building to Tabcorp.

The lease commenced on 1 February 1997 for a term of 10 years. It contains options to renew for a further five years in 2007 and 2012. Under clause 2.13 Tabcorp promised "not without the written approval of the Landlord first obtained (which consent shall not be unreasonably withheld or delayed) to make or permit to be made any substantial alteration or addition to [the premises]".

On 10 July 1997 Mrs Bergamin had indicated to Tabcorp that Bowen Investments did not consent to any alteration to the foyer. On 11 July 1997 she wrote to Tabcorp advising the landlord could not consent to proposed alterations until they had been examined at a site meeting arranged for 14 July 1997. When Mrs Bergamin attended the premises to inspect the proposal on 14 July she found that a glass and stone partition, timber panelling and stone floor tiles had been removed and that what remained of the floor stone work was being jack-hammered. Despite her protests Tabcorp continued the work of altering the foyer until it was completed in August 1997.

Bowen Investments sued Tabcorp for damages in the Federal Court. The trial judge described Tabcorp's conduct as involving "contumelious disregard" for Bowen Investments' rights. Neither party disputed the description. The trial judge found there had been a breach of clause 2.13 but determined that the appropriate assessment of damages for the breach was the reduction in the value of the premises arising out of the unauthorised alteration to the foyer. The reduction in value arose out of the reduction in the floor area available for use as office space. The resulting loss of rental income was assessed to be \$34,820. On appeal the Full Court of the Federal Court determined that damages should be assessed taking account of the cost of restoring the foyer to its condition before Tabcorp made the alterations. A majority of the Full Court increased the damages to \$1.38 million, made up of \$580,000 for the cost of restoring the foyer

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to its original condition and \$800,000 for rental losses during the restoration period. The third member of the Full Court wanted to hear further argument about how the damages should be assessed. Tabcorp appealed that decision and two Justices of the High Court granted special leave to appeal on 1 August 2008.

In a unanimous decision the High Court held that, in the absence of its giving written consent to any alterations, Bowen Investments was contractually entitled to have the building foyer remain as it had been constructed. By altering the foyer without consent Tabcorp had failed to perform its contractual obligation to preserve the foyer. The appropriate measure of Bowen Investments' loss was the cost of restoring the foyer to the condition it would have been in had Tabcorp not breached that obligation. The High Court dismissed Tabcorp's appeal thus confirming the assessment of damages at \$1.38 million.