**Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8:**

**Contract breakers beware!**

**Graeme S Clarke SC** *

1. It is a fundamental principle of law that contracts should be performed. In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[1], the High Court has re-iterated that in no uncertain terms. The Court in essence decided that where a breach of contract has caused property damage, the proper measure of assessing an award of damages is the cost of reinstatement rather than the diminution in the value of the property, save in exceptional circumstances. Reinstatement damages put the innocent party in the actual position it would have been in if the contract had been performed, but diminution in value damages do not.

**Outline of the case**

2. Bowen Investments leased a new commercial building to Tabcorp Holdings for a term of 10 years from 1 February 1997. By clause 2.13, the tenant covenanted:

> *"Not without 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 Demised premises."*

3. The building included a high quality foyer of striking appearance built with special materials which the principal of the landlord, Mrs Bergamin, valued highly. Less than six months after the tenant had moved in, it commenced destroying the foyer and re-building it in a manner which Tabcorp considered was suitable for its purposes. Prior approval had not been obtained. The tenant had not provided the landlord with detailed plans as to

what changes it proposed. The landlord discovered that the works had begun a few days later. It was too late to obtain an injunction as the damage had been done. Almost all of the original surfaces of the foyer had been stripped. The landlord was confronted with a fait accompli. The landlord considered the new foyer to be of inferior quality and would not have consented to it being introduced by the tenant.

4. The trial judge in the Federal Court, Tracey J[2], found that the tenant in commencing, and then completing, the destruction and re-building of the foyer had acted in breach of clause 2.13 of the lease. Substantial alterations to the demised premises had been made without the landlord's permission. As to damages, the issue at the trial was whether they should be assessed to be the diminution in value of the reversion as the tenant contended, or the cost of restoring the foyer of the building to its original condition as the landlord argued. The landlord had erected and leased the building for commercial purposes. It was an investment property. Tracey J held that there would be little if any diminution in the value of the property at the end of the tenancy which the tenant's re-building of the foyer would cause, save as to a small reduction in the net lettable area of the building. Tracey J assessed damages at $33,820 being the cost of restoring the lettable area to its original size, and $1,000 nominal damages for the tenant's breach of clause 2.13. The judge rejected the landlord's claim of $1.38 million, comprising $580,000 for the cost of reinstatement of the foyer to its original condition and $800,000 for loss of four months rent while that work was performed.[3]

5. A Full Court (Finkelstein, Gordon and Rares J)[4] upheld the landlord's appeal and awarded it the $1.38 million sought at trial. The High Court (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) dismissed Tabcorp's appeal.

6. The difference between $1.38 million and $33,820, self-evidently, is very considerable. The key argument made by the tenant in the High Court was that the disproportion between the two figures assessed on the different bases was such as to make an award of reinstatement damages unreasonable, and that accordingly the landlord ought be confined to the small diminution in value of the commercial property which had been caused by the breach.[5] The landlord's loss was only the diminution in value. The tenant argued that damages were compensatory in nature, not punitive, and that the landlord was not to be put in a better position than if the breach had not occurred. In the tenant's submission, that would occur if reinstatement damages were awarded as the trial judge had found that when possession would be delivered up to the landlord, the foyer would need refurbishment in any event to take account of architectural developments and the need to "freshen up" the building.[6]

7. These arguments found no favour with the High Court. The Court held that as the foyer would have remained unaltered if the tenant had not breached the lease, the appropriate measure of damages was reinstatement damages because only an award of such damages would put the landlord in the position that it would have been in had the lease been performed.[7] The disproportion between $1.38 million and $33,820 was accorded limited significance, much less a decisive weight. As to that, the Court simply stated, "…the requirement of reasonableness did not mean that any excess over the amount recoverable on a diminution in value was unreasonable".[8]

8. It was the landlord's building and Bowen Investments was entitled to have the foyer it wanted in its building. Diminution in value damages would not achieve that, but would leave the building with the foyer the tenant wanted, not the foyer that the landlord

wanted. As the landlord argued, it had lost its foyer. Damages to compensate for that loss were not to be confined to one measure of pecuniary loss: diminution in value damages, as the tenant contended.

9. All damages decisions depend on the evidence. However here the correct measure of damages was decided by the High Court as a matter of principle and accordingly its decision is important in its application to subsequent cases. I suggest further that the Court's reasoning merits careful consideration because:

- The disproportion between the two competing measures of assessment of damages was so considerable, which prima facie strongly supported the tenant's contention.
- None of the four judges who decided the case in the Federal Court considered the principles on the basis of which the High Court made its decision; the High Court decided the case afresh.
- Although the High Court's reasoning at first blush appears conventional, on analysis it represents a considerable shift in the Court's position on the assessment of damages in property damage cases against the interests of the contract breaker, and in favour of the interests of the innocent plaintiff.

**The case in more detail**

10. It is necessary to elaborate on the facts and the course of the proceeding.

- Clause 2.10 obliged the tenant to maintain repair and keep the whole of the demised premises in good and substantial repair, working order and condition.

- Clause 2.11 provided that at the expiration of the lease the tenant was obliged to surrender and yield to the landlord the whole of the demised premises in good and tenantable repair.
- The landlord at trial did not allege breach of the clause 2.10 maintenance and repair clause, only breach of the clause 2.13 negative obligation not to make unauthorised alterations.
- The lease did not contain a provision obliging the tenant to make good or reinstate in the event that unauthorised alterations had been made.
- The landlord at trial argued that the lease should be rectified to include a make good clause based on a prior heads of agreement, but Tracey J rejected that claim.[9] No appeal was brought by the landlord in relation to that.
- As a result of the unauthorised alterations in July and August 1997, the landlord could have forfeited the lease[10], re-taken possession and reinstated the foyer, but it did not do so. The landlord's solicitors alleged breach by the tenant of clause 2.13 and required reinstatement. By mid-1998 issue had been joined, but no proceedings were then issued. The tenant remained in possession and continued to pay the rent.
- In 2004 in the course of a market rent review, the dispute about the foyer revived. By April 2006 the lease was renewed early from 1 February 2006 until 31 January 2012, with a further option to renew for five years until 2017. Bowen Investments had commenced the proceeding on 30 September 2005. At that time the term of the lease was not due to expire until 31 January 2007. At the time of the 2006 renewal, it was expressly agreed that nothing in the renewed lease should be construed as affecting, limiting or compromising the proceeding in any way.[11]

- The trial judge found that the relevant representative of the tenant had been well aware of the need to obtain the landlord's consent to its proposed alterations and knew that consent had not been provided. Notwithstanding that, the tenant went ahead and made the alterations. Tracey J considered this to be a contumelious disregard for the landlord's rights.[12] The tenant did not challenge that finding on appeal.
- It was common ground at trial that reinstatement by the landlord could not occur prior to the conclusion of Tabcorp's tenancy in 2012 or 2017 as the tenant would remain in possession.[13]
- The tenant at no time offered to reinstate the foyer to its original condition at the conclusion of the tenancy.[14]
- The landlord's evidence was that the premises would be reinstated at the end of Tabcorp's tenancy, and that evidence was not challenged at trial by the tenant.[15]
- The trial judge found that it was likely that at that time refurbishment of the foyer would be necessary. [16]
- The evidence at trial concerning the cost of reinstatement was in 2004 or 2006 dollars.[17]
- At trial the tenant did not run an alternative argument, or lead evidence, to the effect that if reinstatement damages were to be awarded any, or any particular discount, for betterment ought be made. That possibility was referred to by the landlord at trial and in the Full Court, but the tenant did not pursue it.[18]
- Although the damage alleged to be in breach of the clause 2.13 covenant in the lease occurred in mid-1997 and the proceeding was not commenced until September 2005, the tenant accepted that no limitation issue arose because the lease was made by deed, therefore attracting a fifteen year limitation period.[19]

11. In these circumstances, any commercial lawyer's inclination would be to favour the landlord's position. It had been subjected by the tenant to a deliberate and serious breach of the lease. Prima facie, the tenant should pay the landlord sufficient to make good the breach. However, is it reasonable for the tenant to be required to pay reinstatement damages of $1.38 million, rather than diminution in value damages of $33,820, when the property was a commercial property which would require refurbishment in 2012 or 2017 in any event even if the tenant had not changed the foyer at all? Tabcorp's foyer would not be significantly less attractive to prospective tenants than the landlord's original foyer. The landlord was paid the same rental under the original lease, and would continue to be paid rental through the term/s of the renewed lease.

12. All four Federal Court judges referred to an English Court of Appeal decision, *Joyner v Weeks* [1891] 2 QB 31, which received subsequent High Court approval in *Graham v Markets Hotel Pty Ltd (*1943) 67 CLR 567. Those cases concerned breach of a covenant in a lease to maintain the premises in good repair. Clause 2.10 was such a clause. The rule established by *Joyner v Weeks*, according to Finkelstein and Gordon JJ,[20] was that the landlord is entitled to recover the cost of repairs, including loss of rental during performance of work, if the action for damages for breach of the covenant was brought at or near the termination of the lease.

13. Tracey J in rejecting the landlord's claim for reinstatement damages, reasoned:

> *"In some cases it may be appropriate to award damages on the basis contended for by the applicant. This will be so in a relatively narrow range of cases where a tenant has so damaged or modified premises that they are unlettable at the conclusion on the lease: see* Joyner v Weeks [1891] 2 QB 31. *Normally, however, reinstatement costs will not be awarded unless there exists some special interest in reinstatement arising from a radical change to the usage to which the property can be put following renovations by the tenant: see* Evans v Balog [1976] 1 NSWLR 36.

> *The weight of the expert evidence called in the present case supports the conclusion that, at the end of Tabcorp's lease, whether that occurs in 2012 or 2017, there will be little, if any, diminution in value of the premises occasioned by Tabcorp's renovation of the foyer. While there may be different views as to the aesthetic values of the former foyer and that installed by Tabcorp, Tabcorp's works have not occasioned any significant loss of value to the building. Furthermore, extensive renovation of the foyer would, according to the evidence, be necessary at the end of the lease."*[21]

14. *Joyner v Weeks* had not been cited to Tracey J.[22] Counsel for both parties had referred to *Bellgrove v Eldridge* (1954) 90 CLR 613 at trial.[23]

15. Finkelstein and Gordon JJ held that repair covenant cases illustrated by *Joyner v Weeks* were applicable, because the negative covenant in clause 2.13 not to make unauthorised alterations in effect was the same obligation as a positive repair covenant such as clause 2.10, but disagreed with Tracey J as to their application. Although the tenant would remain in possession until 2012 or 2017, the provision in 2006 agreement that the new lease would not affect the proceeding meant that it was appropriate that reinstatement damages under *Joyner v Weeks* should be awarded.[24]

16. Rares J held that clause 2.10 applied, but was confronted with the difficulty that breach of that clause had never been alleged. Rares J would have awarded reinstatement damages, together with Finkelstein and Gordon JJ, but allowed further submissions as to the procedural consequences.[25]

**In the High Court**

17. In the High Court, the tenant argued that:

- The clause 2.13 negative obligation not to alter without the landlord's consent, which was the only breach relied on, was not the same as a clause 2.10 positive obligation to

repair. *Joyner v Weeks* related to such a repair covenant and so had no application here.[26]

- In any event, *Joyner v Weeks* did not apply because the initial lease was not at an end but had been renewed. Clause 2.10 had no application because the altered foyer was in good repair.[27]
- If *Joyner v Weeks* applied, it was wrongly decided and ought be overruled. The common law rule had been affected by legislative provisions in other States, but not in Victoria, to the effect that reinstatement damages could not be awarded if they exceeded the diminution in value of the reversion at the expiry of the lease.[28] An award of reinstatement damages would be unjust.[29]
- General damages for breach of contract authorities applied, particularly *Bellgrove v Eldridge* in the High Court, with the result that diminution in value damages ought be awarded because the landlord had failed to demonstrate on the evidence, and on the findings of the trial judge, that it was necessary and reasonable for reinstatement damages to be awarded.[30] The landlord's loss was only the small diminution in the value of the reversion.

18. During the course of argument in the High Court, it became apparent there was no need to decide the correctness of *Joyner v Weeks* if it had no application, which left open the possibility that general contractual principles could be applied to decide the case.[31] This is what the High Court did. The Court found it unnecessary to decide anything concerning clause 2.10, or *Joyner v Weeks* issues.

19. The tenant argued that *Bellgrove v Eldridge*, a building contracts case, applied and that its application resulted in diminution in value damages being awarded on the uncontested

factual findings made by the trial judge as to that.[32] The landlord noted that *Bellgrove v Eldridge* concerned a different type of contract, which it obviously did. However, Bowen Investments argued that *Bellgrove v Eldridge* did apply in respect of the breach of the clause 2.13 covenant of the lease, but with the opposite result that reinstatement damages should be awarded.[33]

20. The High Court decided that *Bellgrove v Eldridge* applied, but the surprise in the decision for Tabcorp was that that meant reinstatement damages ought be awarded, contrary to its submission, rather than diminution in value damages.

21. In *Bellgrove v Eldridge*, a builder who had built a house for a client which contained defective concrete and mortar, contended that the measure of damages was limited to the diminution in value of the property and did not extend to the cost of rectification. The High Court rejected the builder's contention, holding that the landowner's loss prima facie could only be measured by the cost of reinstatement.[34]

22. The High Court in *Tabcorp Holdings v Bowen Investments*, in reference to that holding, stated:

> *"So here, the Landlord was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages is the loss sustained by the failure of the Tenant to perform that obligation; and that loss is the cost of restoring the premises to the condition in which they would have been if the obligation had not been breached."*[35]

23. The Court continued[36] and referred to a further passage in *Bellgrove v Eldridge*, stressed by the tenant, that:

> *"The qualification … is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt."*

24. The High Court elaborated on this as follows:[37]

> *"Further, the Landlord correctly submitted that the Tenant's submission misconstrued what this Court said in* Bellgrove v Eldridge. *The "qualification" in the passage quoted above that the 'work undertaken be necessary to produce conformity' meant, in that case, apt to conform with the plans and specifications which had not been conformed with. Applied to this case, the expression 'necessary to produce conformity' means 'apt to bring about conformity between the foyer as it would become after the damages had been spent in rebuilding it and the foyer as it was at the start of the lease.' And the Landlord also correctly submitted that the requirement of reasonableness did not mean that any excess over the amount recoverable on a diminution in value was unreasonable. The Tenant's submissions rested on a loose principle of "reasonableness" which would radically undercut the bargain which the innocent party had contracted for and make it very difficult to determine in any particular case on what basis damages would be assessed. That principle should not be accepted.*
>
> *If the benefit of the covenant in cl 2.13 were to be secured to the Landlord, it is necessary that reinstatement damages be paid, and it is not unreasonable for the Landlord to insist on their payment."*

25. The *Bellgrove v Eldridge* "qualification" to the "prima facie" measure of reinstatement damages had become a two-fold exception to a stronger general rule that reinstatement damages rather than diminution in value damages is the correct measure. The exception is whether:

- It is necessary for reinstatement damages to be paid in order for the plaintiff to have the benefit of performance of the contract.
- It is not unreasonable for the plaintiff to insist upon payment of reinstatement damages.

26. The High Court explained that the test of "unreasonableness" will only be satisfied in "fairly exceptional",[38] or "quite exceptional"[39] circumstances. Two examples of unreasonableness were given:

- In a building contract for a cement rendered house using second-hand bricks, where the builder used first quality bricks instead.[40] Demolition of the house and use of second-hand bricks in accordance with the contract would be unreasonable.
- In a building contract for a swimming pool 7 feet 6 inches deep where the depth of the pool as built was only 6 feet, where there was no diminution of value and it was not clear that the plaintiff intended to demolish the pool and reconstruct a new one if reinstatement damages were awarded.[41] It would be unreasonable to award reinstatement damages in such circumstances.

27. The decisive issue is whether the innocent plaintiff was using a technical breach to secure an uncovenanted profit.[42] That was not the case here. The landlord just wanted its original foyer back. There was nothing unnecessary or unreasonable about that, the Court held.

**Analysis**

28. While it is trite law that general contractual principles apply to leases,[43] the High Court had no hesitation in putting *Joyner v Weeks* landlord and tenant issues to one side and applying *Bellgrove v Eldridge* directly.

29. There was no difficulty in the Court applying damages principles decided in the context of breach of building contracts, to breach of a lease. No significance was placed upon the clause 2.13 obligation being a negative one, whereas in a building contract dispute there is a positive obligation to perform which is breached. It did not matter that there was no express clause in the lease calling for reinstatement by the tenant in the event of unauthorised alterations.

30. I suggest that it did matter that the tenant's breach was deliberate. The High Court reiterated the trial judge's finding that the tenant's breach involved a "contumelious disregard" for the tenant's rights.[44] The Court also stated:

> "*The clandestine conduct of the Tenant made it impossible for the Landlord to apply for an interlocutory negative injunction, but that does not detract from that aspect of cl 2.13 in assessing damages for its breach*".[45]

31. The manner in which the nature of the tenant's breach was taken into account, as reflected in the Court's reasons, is perhaps indicated by exchanges between bench and bar during the course of argument. Gummow J stated that exemplary damages were not in point as the damages sought were for a breach of contract, but that the special nature of the foyer, in the landlord's view, was known to the tenant could be considered. French CJ stated that it might not be so much a case of punishing contumelious conduct, as not rewarding it.[46]

32. The Court plainly did take account of Mrs Bergamin's evidence that the landlord intended to reinstate, although the Court did not emphasise that. Rather, that evidence was the basis of the great significance which the Court placed on requiring the contract to be performed. Performance was what the landlord wanted: to have damages assessed on a basis as though the contract had been performed, and to achieve such performance in fact by reinstating the foyer. The Court held that the landlord was entitled to that.

33. It should be noted that, as in all common law damages awards concerning future matters, it is beside the point that the landlord's circumstances might change (eg. if it decided to sell the building subject to the renewed lease, without reinstatement of the foyer).[47] Neither the parties nor the Court referred to this.

34. The tenant in the High Court accepted that the personal preferences of the landlord as to reinstatement were to be taken into account, but contended that such preferences had wrongly been treated by the Full Court as decisive. The disproportion between the two measures of assessment of damages demonstrated the unreasonableness of awarding reinstatement damages. Reliance was placed upon the swimming pool case, *Ruxley Electronics and Construction Ltd v Forsyth* in that regard.[48] However, the High Court in effect held that the disproportion was no answer to the importance of enforcing contractual performance, which nonetheless required that an award of reinstatement damages in lieu of performance be made. The issue was not, as the tenant submitted,[49] whether reinstatement damages are a reasonable measure of loss compared with the diminution in value of the property caused by the breach. Such an approach would give insufficient weight to securing to the innocent party the tenant's promised performance.

35. The Court reiterated,[50] but also explained, the familiar ruling principle regarding damages at common law for breach of contract. Parke B in *Robinson v Harman* (1848) 1 Exch 850 at 855, 154 ER 363 at 365, stated:

> "*The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.*"

36. Importantly, the Court held that regarding a covenant such as clause 2.13, "…it is *not the case* that, in Oliver J's words (in *Radford v De Froberville)*[51] that:

> *'the disappointment of the plaintiff's hopes and expectations from the contract becomes a relevant consideration only so far as it is measurable either by some deterioration of the plaintiff's financial situation or by some failure to obtain an amelioration of his financial situation.'*

To reason otherwise is to undermine a fundamental postulate inherent in cl 2.13."[52] (emphases supplied).

37. In other words, it was not just about money. The landlord was entitled to have its foyer back regardless of whether the market, or the tenant, valued it as highly as the landlord did. I suggest that the Court's emphasis on the due performance of contractual obligations, not unreasonably insisted upon by the innocent plaintiff, is the reason why the tenant's disproportion argument was rejected, and was rightly rejected.

38. Each party to a contract is reasonably entitled to expect that the other party's agreed performance is what it will receive in exchange for its own performance. That can be just about money, as in a cash sale of goods.

39. However, conduct to which the parties have not allocated a particular price is often part of the exchange, especially where performance is to occur over time. In the event of non-performance, the market price of non-performance (here diminution in the value of the property) is an inadequate measure of the value to the innocent party of the promised performance where an award of damages can rectify the breach.

40. The High Court stated that:

> *"Underlying the Tenant's submission that the appropriate measure of damages was the diminution in the value of the reversion was an assumption that anyone who enters into a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid."*[53]

41. The Court rejected that assumption, emphasising the existence of equitable remedies such as specific performance and injunctions to ensure or encourage the performance of contracts, rather than the payment of damages for breach.[54]

42. A potentially troubling aspect of the Court's decision is the fact that the landlord would not re-take possession until 2012 or 2017, by which time refurbishment of the foyer would be required even if the tenant had not altered the foyer at all. Would not the landlord be overcompensated by being in a position to have a new foyer in 2012 or 2017, rather than having an old one in need of refurbishment?

43. It is important to highlight the High Court's answer to the question.[55] Had the tenant contended at trial that reinstatement damages should be reduced to some extent due to the betterment for the landlord of new over old (cost of reinstatement less cost of refurbishment), and led evidence to quantify that, then a betterment reduction may (well)[56] have been merited. However, the tenant did not do so. Hence no findings were made by Tracey J which could have formed the basis of a betterment allowance in favour of the tenant. Accordingly, the disproportion between $1.38 million and $33,820 is perhaps not as significant as first appears.

44. In any event, the message from the Court is clear enough: Contract breakers beware!

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1 [2009] HCA 8 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

2 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2007] FCA 708.

3 [2007] FCA 708 at paras [82], [90]-[103].

4 *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494; [2008] FCAFC 38.

5 Young QC, leading counsel for the landlord: [2008] HCA Trans 395 at pages 30, 31 and 36.

6 Young QC: [2008] HCA Trans 395 at pages 25, 26, 30 and 34; [2007] FCA 708 at para [102].

7 [2009] HCA 8 at para [15].

8 [2009] HCA 8 at para [19].

9 [2007] FCA 708 at paras [57]-[63].

10 Young QC: [2008] HCA Trans 395 at page 30;
Bennett QC, leading counsel for the tenant: [2008] HCA Trans 395 at pages 48, 57.

11 [2007] FCA 708 at para [54].

12 [2007] FCA 708 at para [84].

13 [2007] FCA 708 at para [91].

14 Bennett QC: [2008] HCA Trans 395 at page 58.

15 (2008) 166 FCR 494 at paras [25], [27].

16 [2007] FCA 708 at para [102].

17 [2009] HCA 8 at para [26].

18 [2009] HCA 8 at paras [24], [25]; Bennett QC: HCA Trans 395 at page 52.

19 Young QC: HCA Trans 395 at pages 12, 25; *Limitation of Actions Act* 1958 (Vic) s. 5(3).

20 (2008) 166 FCR 494 at para [10].

21 [2007] FCA 708 at paras [92], [93].

22 Young QC: HCA Trans 395 at page 9.

23 Young QC: HCA Trans 395 at page 29.

24 (2008) 166 FCR 494 at paras [13], [24], [31].

25 (2008) 166 FCR 494 at paras [67], [68], [122]-[124].

26 Young QC: HCA Trans 395 at pages 13, 14.

27 Young QC: HCA Trans 395 at pages 13, 21.

28 Eg. *Conveyancing Act* 1919 (NSW) s 133A.

29 Young QC: HCA Trans 395 at pages 23, 24 and 25.

30 Young QC: HCA Trans 395 at pages 9, 16, 18 and 36.

31 Young QC: HCA Trans 395 at page 19, 23;
Bennett QC: HCA Trans 395 at pages 41, 49, 50, 51 and 56.

32 Young QC: HCA Trans 395 at pages 16, 18 and 36.

[33] Bennett QC: HCA Trans 395 at 55.

[34] (1954) 90 CLR 613 at 617; Dixon CJ, Webb and Taylor JJ.

[35] [2009] HCA 8 at para [15].

[36] [2009] HCA 8 at para [17].

[37] [2009] HCA 8 at paras [19], [20].

[38] [2009] HCA 8 at para [17].

[39] [2009] HCA 8 at para [18].

[40] [2009] HCA 8 at para [17]; example provided by the High Court in *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618.

[41] [2009] HCA 8 at para [18]; example provided by the House of Lords' decision in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 at 354-355.

[42] [2009] HCA 8 at para [17], citing with approval Oliver J in *Radford v De Froberville* [1977] 1 WLR 1262 at 1270; [1978] 1 All ER 33 at 42.

[43] *Progressive Mailing House Pty v Tabali Pty Ltd* (1985) 157 CLR 17 at 29, 38, 51 and 56.

[44] [2009] HCA 8 at para [4].

[45] [2009] HCA 8 at para [12].

[46] With Bennett QC: HCA Trans 395 at page 58.

[47] *Bellgrove v Eldridge* (1954) 90 CLR 613 at 620; see generally *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 at paras [50]-[62].

[48] Young QC: HCA Trans 395 at pages 35, 36 and 37; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 at 354B, 358-359, 360-361, 365-366, 367 and 370-371.

[49] Young QC: HCA Trans 395 at page 36.

[50] [2009] HCA 8 at para [13]

[51] [1977] 1 WLR 1262 at 1273; [1978] 1 All ER 33 at 44.

[52] [2009] HCA 8 at para [14].

[53] [2009] HCA 8 at para [13].

[54] Ibid.

[55] [2009] HCA 8 at paras [24], [25].

[56] Bennett QC: HCA Trans 395 at pages 43, 52, conceded that a small betterment discount may have been appropriate, but that that was a matter for the tenant to argue.