

## COMMERCIAL & RETAIL LEASING UPDATE

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### Lessons from a court case:-

**Landlord and tenant get no lease advice and save legal fees at the start but create an expensive “lawyer’s picnic” for three years later.**

**Offices at:**

**Brisbane**  
Level 28 Central Plaza One  
345 Queen Street  
Brisbane

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99 George Street  
Beenleigh

**Caboolture**  
9 Elliott Street  
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Caboolture

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55 Limestone Street  
Ipswich

**Telephone**  
Freecall 1800 652 969

mail@quinnscattini.com.au  
www.quinnscattini.com.au

The recent Supreme Court decision of *Lyschrome Pty Ltd V Swire Cold Storage Pty Ltd* [2009] QSC 187 provides several examples of problems that arise when a commercial lease is negotiated by people without the benefit of legal advice.

### 1. The Facts

- Swire was the landlord of a cold storage facility.
- Lyschrome ran a large refrigerated trucking company and was the tenant of the cold storage facility.
- Lease negotiations were never finalised into a formal lease document.
- The tenant was under the impression that they had negotiated a 3-year lease with a 3-year option (6 years total).
- The landlord was confident that there was not a 3-year option but underestimated the problems caused by the landlord’s representative when negotiating the lease.
- A 6-year total term was essential to the tenant to ensure that its replacement cold-storage building could be built in time.
- Neither party took any legal advice and relied on an exchange of letters and the memory of their staff as to what was agreed
- The matter came to a head as the parties approached the 3-year term expiry date on 19 October 2008 and the landlord demanded that the tenant vacate the premises.

### 2. The Result

The matter went to trial in the Supreme Court over 3 days in June 2009.

The Judge remarked on the messy state of the leasing arrangement and commented on the lack of business sophistication of the tenant and the landlord’s representative.

The Judge found that the landlord’s representative had engaged in “*misleading and deceptive conduct*” under the Trade Practices Act by promising a 3 year option in initial lease negotiations.

The Judge ordered that the tenant be allowed to continue in the premises until the completion of its replacement building, but not longer than the end of March 2010.

### 3. Minor Lesson – representations

The landlord had allowed one of its employees with no legal training or experience a major role in lease negotiations.

That employee did not have a full understanding of the meaning of an “option” in the leasing context and made promises that the landlord could not possibly keep.





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The lesson for landlords, tenants, and anyone in business negotiation is to ensure that your negotiations are handled by a knowledgeable and trustworthy party.

Secondly, negotiating parties should ensure that they do not make “*promises they can't keep*” and other misrepresentations about facts and intended conduct. A full set of recommendations on this topic is beyond the scope of this article.

#### 4. Major Lesson – properly negotiating and finalising your lease

The major lesson from this case relates to the poor state of the parties' lease.

The tenant has a very large and successful refrigerated transport business for which specialised premises were essential and in short supply across greater Brisbane.

The tenant had never sought legal advice during lease negotiations, did not read the lease document that was supplied by the landlord and did not ensure that a lease became fully signed between landlord and tenant.

The tenant instead conducted his affairs and made important business decisions based on his understanding of the negotiations.

While the Judge took sympathy on the tenant on these facts, one must consider the following:-

- With a different set of facts, a different Judge, or a change in any other variable the tenant may have lost the case and its business would have been severely damaged, possibly irreparably.
- While the tenant achieved a satisfactory result, this was after a 3 day trial in the Supreme Court (and substantial legal work beforehand). We estimate that the tenant's legal costs would have been at least \$60,000.00.
- In contrast; obtaining timely and professional advice in relation to the lease (including negotiating the terms and finalising the lease) would have been a bargain. While every set of circumstances are different the average cost of such work usually falls between \$1,500.00 and \$5,000.00 depending on the work involved.

A party (landlord or tenant) with a finalised lease on unambiguous terms which he/she understands can make proper and timely business decisions rather than going to court at great expense to “roll the dice” in the hope of obtaining a satisfactory outcome to a dispute.

Money spent on legal advice and negotiations at the beginning can save you many thousands of dollars in the future by avoiding potential disputes and bad results.

**Julian Creagh**  
**Solicitor**  
**Quinn & Scattini**

This update is for your information and interest only. It is not intended to be comprehensive, and it **does not constitute and must not be relied on as legal advice**. You must seek specific advice tailored to your circumstances.

If you would like to ask any questions about this or any other leasing issue Julian may be contacted on (07) 3221 1838 between 8:00am and 5:30pm Monday to Friday or on email [jcreagh@quinnscattini.com.au](mailto:jcreagh@quinnscattini.com.au)

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**Brisbane**  
Level 28 Central Plaza One  
345 Queen Street  
Brisbane

**Beenleigh**  
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