

**Inaugural
Hon. Michael Kirby Contract Law Moot
Melbourne, Australia**

**Oral Arguments
28 – 30 September 2011**

THE PROBLEM

**Organised by:
Victoria Law School
Victoria University**

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Arbitration Information

- 1. Arbitration Forum:** **Institute of Arbitrators and Mediators Australia**
Level 13, 200 Queen St
Melbourne VIC 3000 Australia
(03) 8648 6578
(03) 8648 6480
Email: vic.chapter@iama.org.au
- 2. Arbitrators:**

 - i. Arbitrator 1
 - ii. Arbitrator 2
 - iii. Arbitrator 3
- 3. Claimant:** **Big Adventure Groups Ltd (ACN 074 566 087)**
51 Gipps Street, Burnley, Victoria 3055
Telephone: 03 9929 5577
Facsimile: 03 9929 5566
Email: enquiry@bigadventure.com.au
- 4. Claimant's representatives:** **Student 1 and 2**
Henderson & Associates
777 Bourke Street, Melbourne, Victoria
3000 Telephone: 03 9999 7777
Facsimile: 03 9999 7766
Email:
hendersonassociate@henderson.com.au
- 5. Respondent:** **Grant Corporation Ltd (ACN 054 233 055)**
8A-10B Main Road, Docklands, Victoria 3020
Telephone: 03 9911 8888
Facsimile: 03 9919 6666
Email: leasing@grant.com.au
- 6. Respondent's representatives:** **Student 1 and 2**
Wilson & Baker Lawyers
155 Queen Street, Melbourne, Victoria 3000
Telephone: 03 9999 1234
Facsimile: 03 9999 1255
Email:
wilsonbakerlawyers@wilsonbaker.com.au

Summary of Facts

1. At all times, both Big Adventure Groups Ltd (“Big Adventure”) and Grant Corporation Ltd (“Grant”) were registered under the *Corporations Act 2001*.
2. Big Adventure is headquartered in Victoria and it has more than 15 retail outlets in Australia. These outlets supply the Australian market with outdoor and camping equipments and supplies.
3. Grant owns a parcel of land in Docklands Avenue, Victoria. The relevant land was going to be developed as a retail complex.
4. From about January 2010, Big Adventure was negotiating with Grant for an Agreement to Lease (“ATL”) and a Lease for premises in the proposed Docklands Avenue development site which was ultimately going to become another Big Adventure “Super” retail outlet. These so-called “super” outlets are larger than the normal-size Big Adventure outlets.
5. In accordance with Clause 15 of the Agreement to Lease, any dispute, controversy or claim arising out of, relating to or in connection with the Agreement, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with *the Institute of Arbitrators and Mediators Australia Arbitration Rules*. The seat of arbitration shall be *Victoria, Australia*. The language of the arbitration shall be English. The number of arbitrators shall be *three*. Each party will appoint its arbitrator and the President of the Institute of Arbitrators and Mediators Australia will appoint the third arbitrator.
6. The Claimant, Big Adventure, is claiming that the Respondent, Grant, has engaged in the following acts:
 - (a) Breached cll 6, 7 and 12 of the Agreement to Lease; and/or
 - (b) Breached the implied duty to co-operate and the implied duty of good faith; and/or
 - (c) Wrongfully repudiated the Agreement to Lease; and/or
 - (d) Wrongfully repudiated the Lease Agreement; and/or
 - (e) Unconscionably departed from its representation to lease the premises to Big Adventure Groups Ltd.
7. The Respondent, in its response to the Claimant’s Notice of Dispute, has submitted the following defences:
 - (a) It had the legal right to terminate the Agreement to Lease; and/or
 - (b) It had not yet entered into the Lease Agreement and hence there was no repudiation or breach or wrongful termination of such Agreement; and/or
 - (c) It had not made any representation to the effect that the premises were going to be leased to Big Adventure Groups Ltd.

Notice of Dispute

(A copy has been sent to the IAMA)

15 July 2011

Grant Corporation Ltd (ACN 054 233 055)

8A-10B Main Road, Docklands, Victoria 3020
Telephone: 03 9911 8888
Facsimile: 03 9919 6666
Email: leasing@grant.com.au

Att: Mr Terry McCoy

Subject: Request for Arbitration

Dear Mr McCoy

I represent the Claimant, Big Adventure Groups Ltd, and pursuant to Rule 6 of the Institute of Arbitrators and Mediators of Australia Arbitration Rules, Big Adventure Groups Ltd hereby gives its Notice of Dispute against Grant Corporation Ltd.

The relevant arbitration clause is provided in Clause 15 of the Agreement to Lease:

15. Any dispute, controversy or claim arising out of, relating to or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the Institute of Arbitrators and Mediators Australia Arbitration Rules. The seat of arbitration shall be Victoria, Australia. The language of the arbitration shall be English. The number of arbitrators shall be three. Each party will appoint its arbitrator and the President of the Institute of Arbitrators and Mediators Australia will appoint the third arbitrator.

The Claimant is seeking **damages or other alternative remedies** from Grant Corporation Ltd based on the following **causes of action**:

- (a) Breach of cll 6,7 and 12 of the Agreement to Lease; and/or
- (b) Breach of the implied duty to co-operate and the implied duty of good faith; and/or
- (c) Wrongful repudiation of the Agreement to Lease; and/or
- (d) Wrongful repudiation of the Lease Agreement; and /or

(e) Unconscionable departure from its representation to lease the premises to the Claimant.

The Claimant nominates Mr/Ms. Arbitrator 1 as an arbitrator in this dispute. His/her curriculum vitae is attached.

In accordance with Rule 6.4 of the Institute of Arbitrators and Mediators of Australia Arbitration Rules, the dispute will be deemed to be referred to arbitration ten (10) days after the service of this Notice of Dispute.

Sincerely Yours

Claimant's Representative 1

Wilson & Baker Lawyers
155 Queen Street, Melbourne, Victoria 3000
Telephone: 03 9999 1234
Facsimile: 03 9999 1255
Email: wilsonbakerlawyers@wilsonbaker.com.au

Acceptance of Notice of Dispute

(A copy has been sent to the IAMA)

18 July 2011

Henderson & Associates
777 Bourke Street, Melbourne, Victoria 3000 Telephone: 03 9999 7777
Facsimile: 03 9999 7766
Email: hendersonassociate@henderson.com.au

Att: Claimant's Representative 1

Subject: Request for Arbitration

Dear Sir/Madam,

I am representing the Respondent, Grant Corporation Ltd, and I hereby confirm the acceptance of the Notice of Dispute from the Claimant.

The Respondent noted the Arbitration Clause and will proceed with the arbitration proceeding accordingly. The Respondent hereby nominates Mr/Ms. Arbitrator 2 as an arbitrator in this dispute. His/her curriculum vitae is attached. The IAMA will nominate the third arbitrator.

The respondent has no objection of a procedural nature. However, in response to the Claimant's allegations, the Respondent will submit the following substantive defences:

- (a) It had the legal right to terminate the Agreement to Lease; and/or
- (b) It had not yet entered into the Lease Agreement and hence there was no repudiation or breach or wrongful termination of such Agreement; and/or
- (c) It had not made any representation to the effect that the premises were going to be leased to the Claimant.

Sincerely Yours

Respondent's Representative 1



Claimant's Exhibit No. 1

Big Adventure Groups Ltd (ACN 074 566 087)

51 Gipps Street, Burnley, Victoria 3055

Telephone: 03 9929 5577

Facsimile: 03 9929 5566

Email: enquiry@bigadventure.com.au

22 February 2010

Grant Corporation Ltd
8A-10B Main Road, Docklands, Victoria 3020
Telephone: 03 9911 8888
Facsimile: 03 9919 6666
Email: leasing@grant.com.au

Att: Mr Terry McCoy

Subject: Agreement to Lease (50-75 Docklands, Victoria 3020)

We are writing to you to offer to lease the premises labelled as “**Retail-Large-No.12**” in the proposed development area of **50-75 Docklands, Victoria 3020**. At this stage, it is anticipated that the lease will contain the following Agreement to Lease provisions:

Background

- A **Grant Corporation Ltd, 8A-10B Main Road, Docklands, Victoria 3020** (“the lessor”) is the registered proprietor of the land at 50-75 Docklands, Victoria 3020, being the whole of the land contained in **Volume 07248 Folio 594**. The lessor intends to construct on the land retail premises with an adjoining car-park.
- B The lessor has prepared preliminary plans and specifications of the building. (“Docklands Grand Premises Development Plan Number SK001 dated 10/10/2009” (“Plan SK001”)).
- C Mr Eric Simonds, on behalf of **Big Adventure Ltd, 51 Gipps Street, Burnley, Victoria 3055** (“the lessee”) has inspected the Plan SK001 and has marked a copy of it for identification.
- D When the construction of the building is complete, the lessee wishes to lease the “**Retail-Large-No.12**” on the Plan SK001 from the lessor.

Operative part- Agreement to Lease

1. The lessor will grant and the lessee will take a lease of the leased premises at the rent, for the term and subject to the provisions of the draft Lease Agreement.
2. The lease will start on the date by which the lessor is to complete the construction of the building and the leased premises, as described in cl 7 or on any other date upon which the lessor and lessee agree.
3. The lease will be for the duration of twenty (20) years with an option to renew for a further ten (10) years. Schedule A sets out the anticipated rents, taxes and outgoings.
4. Subject to cl 5, the lessor will construct the building and the leased premises substantially in compliance with the final plans and specifications and will do so in a professional manner.
5. The lessor may make any changes to the preliminary plans and specifications that it reasonably thinks should be made. Despite such changes, the parties will remain bound by this Agreement and the lessee will not have any claim against the lessor for damages or compensation for the changes.
6. The parties agree to act in good faith and use their best endeavours to agree on the Lease Agreement as soon as the plans and specifications have been finalised.
7. The lessor, in accordance with the terms of this Agreement, must:
 - (a) Obtain all necessary development approvals by 1 June 2010;
 - (b) Commence the construction of the premises by 1 September 2010;
 - (c) Substantially complete the construction of the premises by 1 July 2011; and
 - (d) Complete the construction of the premises by 1 December 2011.
8. The lessor must notify the lessee in writing within twenty (20) days of becoming aware of the following:
 - (a) the approvals referred to in cl 7(a) are not obtained;
 - (b) the commencement referred to in cl 7(b) does not take place;
 - (c) the premises is not substantially completed in accordance with cl 7(c); or
 - (d) the premises is not completed in accordance with cl 7(d).
9. Upon receiving the notice referred to in cl 8, the lessee may terminate this Agreement to Lease.
10. The exercise of the right in cl 9 will not prevent the lessee from taking any other action under this Agreement or other agreements entered into with the lessor.

11. If the construction of the building or the leased premises is delayed because of:
 - (a) any industrial dispute or action affecting the construction;
 - (b) inability to obtain labour or materials;
 - (c) the weather;
 - (d) any restrictions or controls imposed by any statute or statutory instrument;
 - (e) any disaster or serious event that is beyond the reasonable control of the lessor,

the time allowed by cl 7 will be reasonably extended to compensate for each delay.

12. The lessor will prepare the Lease Agreement for the purpose of execution by both parties.
13. The Lease Agreement will incorporate the terms of this Agreement and otherwise be on the same terms as the lessor's standard lease.
14. The lessor reserves the right to negotiate aspects of the Lease Agreement.
15. Any dispute, controversy or claim arising out of, relating to or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with *the Institute of Arbitrators and Mediators Australia Arbitration Rules*. The seat of arbitration shall be *Victoria, Australia*. The language of the arbitration shall be English. The number of arbitrators shall be *three*. Each party will appoint its arbitrator and the President of the Institute of Arbitrators and Mediators Australia will appoint the third arbitrator.

Signed by:

Big Adventure Groups Ltd

Director 1

Director 2

Dated: 22 February 2010

Grant Corporation Ltd

Dated:

-End of Agreement to Lease-

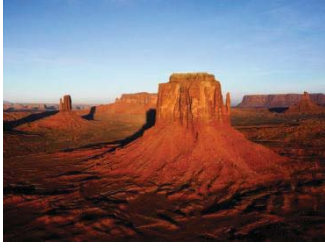
If Grant Corporation Ltd decides to accept this offer and enter into the Agreement to Lease with Big Adventure Groups Ltd, both parties will be bound by the Agreement. Please indicate your company's acceptance by having your authorised officers sign the enclosed copy of this letter in the space indicated and returning it to us.

Once we receive your acceptance, we will use our best endeavours to obtain the approval by our management. This Agreement to Lease is conditional upon such approval.

Do not hesitate to contact me should you have any queries.

Yours sincerely

Eric Simonds
Managing Director
Big Adventure Groups Ltd



Claimant's Exhibit No. 2

Big Adventure Groups Ltd (ACN 074 566 087)

51 Gipps Street, Burnley, Victoria 3055

Telephone: 03 9929 5577

Facsimile: 03 9929 5566

Email: enquiry@bigadventure.com.au

5 April 2010

Grant Corporation Ltd
8A-10B Main Road, Docklands, Victoria 3020
Telephone: 03 9911 8888
Facsimile: 03 9919 6666
Email: leasing@grant.com.au

Att: Mr Terry McCoy

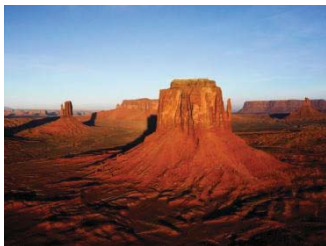
Subject: Agreement to Lease (50-75 Docklands, Victoria 3020)

Dear Terry

We acknowledge your acceptance of the Offer Letter/ Agreement to Lease which we sent to Grant on 22 March 2010. Our Board has ratified this agreement and we are pleased to continue to negotiate the ultimate lease agreement. We believe that most, if not all of the clauses from the Offer Letter will transpire in the ultimate lease agreement. Our in-house counsels are happy to hear from your solicitors re the ultimate lease document.

Regards

Eric Simonds
Managing Director
Big Adventure Groups Ltd



Claimant's Exhibit No. 3

Big Adventure Groups Ltd (ACN 074 566 087)

51 Gipps Street, Burnley, Victoria 3055

Telephone: 03 9929 5577

Facsimile: 03 9929 5566

Email: enquiry@bigadventure.com.au

15 April 2010

Grant Corporation Ltd
8A-10B Main Road, Docklands, Victoria 3020
Telephone: 03 9911 8888
Facsimile: 03 9919 6666
Email: leasing@grant.com.au

Att: Mr Terry McCoy

Subject: Docklands Grand Premises Development Plan Number SK001 dated 10/10/2009" ("Plan SK001")

Dear Terry

I have received the CAD file and both our Retail Viability Manager and I have reviewed it closely. We have no objection to the revised SK001 plan subject to two matters. Firstly, to enhance visibility, the entry to the premises needs to be shifted 6 metres to the right. Secondly, please ensure that the area of the premises remains within the 600-700m².

Are there any news on the development approvals?

Regards

Eric Simonds
Managing Director
Big Adventure Groups Ltd

Claimant's Exhibit No. 4

Email

Date: 26 April 2010
Time: 15:30pm
From: Ericsimonds@bigadventure.com.au
To: Leasing@grant.com.au

Subject: RE: Att Eric Simonds Re Docklands Grand Premises Development Plan Number SK001 dated 26/04/2009" ("Plan SK001")

Dear Terry

I have to say that all looked good. Good job on everyone involved. We will keep the CAD file for our internal record.

Please advise us should there be any further changes in the Plan SK001.

Regards

Eric Simonds
Managing Director
Big Adventure Groups Ltd



Claimant's Exhibit No. 5

Email

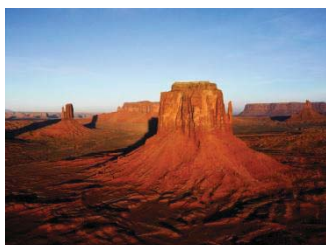
Date: 10 May 2010
Time: 09:30am
From: Ericsimonds@bigadventure.com.au
To: Leasing@grant.com.au
Subject: Progress on development approvals

Dear Terry

Is there any news on whether the development approvals have been obtained? It is our belief that nothing else at this stage is still outstanding. Therefore, we are ready to execute the Lease agreement as soon as your solicitors send it to us.

Regards

Eric Simonds
Managing Director
Big Adventure Groups Ltd



Claimant's Exhibit No. 6

Email

Date: 24 May 2010
Time: 09:30am
From: Ericsimonds@bigadventure.com.au
To: Leasing@grant.com.au
Subject: RE RE:Progress on development approvals

Dear Terry

We are very concerned at this stage as we have not received any news from you re the development approvals nor the Lease Agreement.

We would appreciate prompt response.

Regards

Eric Simonds
Managing Director
Big Adventure Groups Ltd



Respondent's Exhibit No. 1



Grant Corporation Ltd
(ACN 054 233 055)

8A-10B Main Road, Docklands, Victoria 3020
Telephone: 03 9911 8888 Facsimile: 03 9919 6666
Email: leasing@grant.com.au

1 March 2010

Big Adventure Groups Ltd (ACN 074 566 087)

51 Gipps Street, Burnley, Victoria 3055
Telephone: 03 9929 5577 Facsimile: 03 9929 5566
Email: enquiry@bigadventure.com.au

Att: Mr Eric Simonds

Subject: Agreement to Lease (50-75 Docklands, Victoria 3020)

Dear Eric

We have received your Offer Letter relating to the Agreement to Lease the premises which are to be constructed on 50-75 Docklands, Victoria 3020.

We have attached to this letter our acceptance of the Offer Letter and we count on you to getting the approval from Big Adventure's Board as soon as practicable in order to seal this agreement between the two companies.

In addition, we bring your attention to cll 8, 9 and 10 of the Offer Letter. It is our position that we will use reasonable endeavours to satisfy the conditions in Clause 8, especially in obtaining the development approvals by the specified due date. In addition, the termination right under Clause 10 should be a bilateral one.

Lastly, please find attached the Schedule of rent, taxes and outgoings as agreed by both parties in our latest meeting.

We are looking forward to hearing the good news on the Board's approval. Should you have any questions or wish to discuss anything further, please do not hesitate to contact me.

Warm regards

Terry McCoy
Commercial Manager
Grant Corporation Ltd

Respondent's Exhibit No. 2



Grant Corporation Ltd
(ACN 054 233 055)

8A-10B Main Road, Docklands, Victoria 3020
Telephone: 03 9911 8888 Facsimile: 03 9919 6666
Email: leasing@grant.com.au

9 April 2010

Big Adventure Groups Ltd (ACN 074 566 087)

51 Gipps Street, Burnley, Victoria 3055

Telephone: 03 9929 5577 Facsimile: 03 9929 5566

Email: enquiry@bigadventure.com.au

Att: Mr Eric Simonds

Subject: Docklands Grand Premises Development Plan Number SK001 dated 10/10/2009” (“Plan SK001”)

Dear Eric

Our architects have revised the SK001 plan and the revised plan is now attached to this letter. The premises referred to as “**Retail-Large-No.12**” will now be located within a mall, albeit being on the same position as it was as per the preliminary SK001 plan.

I have also emailed you the plan in a CAD form to allow you to consider the new measurements. Please do not hesitate to contact me should you have any questions.

Regards

Terry McCoy
Commercial Manager
Grant Corporation Ltd

Respondent's Exhibit No. 3

Email

Date: 26 April 2010
Time: 09:30 am
From: Leasing@grant.com.au
To: Ericsimonds@bigadventure.com.au

Subject: Att Eric Simonds Re Docklands Grand Premises Development Plan Number SK001 dated 10/10/2009" ("Plan SK001")

Attachment: Docklands Grand Premises Development Plan Number SK001 dated 26/04/2010.cad

Dear Eric

We noted your requirements and our architects have altered the plan accordingly. We do assure you that there was only a very small difference in the area size and as you are aware, the location stayed the same as well.

Please have another look at this revised plan which is attached in its CAD form.

Regards

Terry McCoy
Commercial Manager
Grant Corporation Ltd



Respondent's Exhibit No. 4

Email

Date: 18 May 2010
Time: 09:30 am
From: Leasing@grant.com.au
To: Ericsimonds@bigadventure.com.au
Subject: RE: Progress on development approvals

Dear Eric

We are doing all that we can to obtain this approval. Will keep you informed.

Regards

Terry McCoy
Commercial Manager
Grant Corporation Ltd



Respondent's Exhibit No. 5

Email

Date: 25 May 2010
Time: 09:30 am
From: Leasing@grant.com.au
To: Ericsimonds@bigadventure.com.au

Subject: RE RE RE: Progress on development approvals

Dear Eric

Unfortunately, it is foreseeable that we will not be able to obtain the necessary approvals for this development within the timeline specified in the Agreement to Lease. We are therefore giving you a notice as per cl 9. In addition, as per our agreement reflected in my letter to you on the 1st March 2010, we are exercising our right to terminate the Agreement to Lease and to cease any further negotiations.

It is unfortunate that this is the ultimate result of our lengthy negotiations but we have to take into account our commercial interests and we have decided to enter into an Agreement to Lease with another party.

Regards

Terry McCoy
Commercial Manager
Grant Corporation Ltd

