

“...the New Zealand courts are taking a more lenient approach to defective notices...”

Leasing issues update



Jane Holland - Senior Associate

Take notice

Defective, invalid, ineffective; all words that can cause panic in the minds of those who have to draft and serve lease notices, such as early termination notices.

The smallest typographical error can be enough to invalidate a notice, often leading to severe consequences for the serving party.

However, the New Zealand courts are taking a more lenient approach to defective notices by following the principle set out in the landmark English decision of Mannai.

In Mannai, the court decided that a clerical error in the notice (a date was inaccurate by one day) would not nullify it. The basis for the decision was that a reasonable person in the circumstances would have understood the intended effect of the notice despite the mistake.

Although Mannai is being applied in New Zealand cases, it is not a wholesale antidote for careless drafting. It is clear that Mannai will only apply where the error in the notice is immaterial and would not mislead a reasonable recipient as to its effect.

The usual rules for notice drafting therefore still apply: look at the lease, comply with its requirements, check and then double check before sending.

For obvious reasons, we recommend that you take legal advice before serving notices under leases where dates are important.

Living by the leasing code

In a final attempt to prevent the UK government policing leasing practice, the English property industry has introduced the Code of Practice for Commercial Leases.

The voluntary code contains 23 “best-practice” recommendations for commercial leasing negotiations. It is hoped that adoption of the code will deter the British government from banning certain practices that it regards as unfair, including full ratchets.

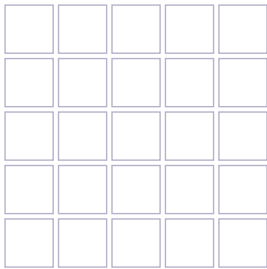
For an industry used to governance by supply and demand, the code has not, predictably, been widely embraced.

A few of its recommendations have been ridiculed as “inane” (“landlords and tenants should negotiate the terms of a

To receive your updates faster, please subscribe to our electronic newsletter service on: info@bellgully.com

To view all our publications or update your details please visit our website:

www.bellgully.com



Leasing issues update

lease openly, constructively and considering each other's views") but many seem to contain balanced advice that should be acceptable to reasonably minded landlords and tenants ("landlords should provide estimates of any outgoing in addition to the rent").

Although there is no equivalent code on the New Zealand horizon (and parts of the code are inapplicable to New Zealand leasing), the code is an interesting overseas development to note and may be a useful starting point for discussions in New Zealand.

Download the code at
www.commercialleasecodeew.co.uk.

Subleases and side letters – the cover's been blown

Offloading over-rented excess space in a falling market can be a test of a tenant's initiative. Subletting the space with rent indemnities or other sublease incentives is one way of reducing the liability.

The problem with such incentives is that they may either breach the terms of the sublease or impact negatively on the value of the landlord's investment.

Astute tenants, needing their landlord's consent for the subletting, sometimes conceal such arrangements in a separate side letter or collateral agreement. The side agreement is expressed to be

"personal" between the tenant and subtenant and is rarely disclosed to the landlord when the tenant makes its application for consent to subletting.

The bad news for tenants is that they will generally have an obligation to disclose this sort of arrangement to the landlord.

An English Court of Appeal judgement has made it clear that any side letters or collateral agreements (whether or not expressed as personal) that affect the sublease are part of the subletting, and must be read as such. Although this issue has not yet been tested in New Zealand, it is likely that this decision would be influential.

A tenant's failure to disclose all material details of the proposed subletting could therefore result in a claim by the landlord for misrepresentation, or worse, forfeiture of its lease.

Savvy landlords should always ask if there are any side arrangements

between tenants and their proposed subtenants, particularly if the premises are over-rented.

For tenants, this decision may present another test of initiative to find ways of sidestepping this dilemma.

Expertise and advice

Bell Gully's Commercial Leasing Team can advise you on all types of leasing issues, including those covered in this newsletter.

Our dedicated commercial leasing team has the experience and expertise to handle all aspects of your commercial leasing, whether as tenant or landlord. In addition, the team can call on other Bell Gully specialists – such as commercial, litigation and tax – if required, providing a quality one-stop service.

Contact the team at the numbers below for more information.

For further information, please contact:

AUCKLAND

Jane Holland – jane.holland@bellgully.com 64 9 916 8983
Tim Storey – tim.storey@bellgully.com 64 9 916 8913

WELLINGTON

David Chisnall – david.chisnall@bellgully.com 64 4 915 6966
Rachel Robertson – rachel.robertson@bellgully.com 64 4 915 6846

Auckland

Royal & SunAlliance Centre, 48 Shortland Street
PO Box 4199, Auckland, New Zealand, DX CP20509, www.bellgully.com
Telephone 64 9 916 8800, Facsimile 64 9 916 8801

Wellington

HP Tower, 171 Featherston Street
PO Box 1291, Wellington, New Zealand, DX SX11164, www.bellgully.com
Telephone 64 4 473 7777, Facsimile 64 4 473 3845

Disclaimer: This publication is necessarily brief and general in nature. You should seek professional advice before taking any further action in relation to the matters dealt with in this publication.
© Bell Gully 2003. All rights reserved.