Bell Gully

Commercial Leasing

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Leasing issues update

A round-up of recent commercial leasing issues and cases.

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Resource Management Amendment Act 2003

The long promised and long awaited Resource Management Amendment Act 2003 came into force on 1 August 2003.

Proposed amendments were first released in 1998 and have undergone considerable alteration at the hands of different interests in the Government in the ensuing five years.

One significant change is that a lease of part of a title will have to be for at least 35 years (including renewal terms) before it constitutes a subdivision.

This is an important change, allowing leases to be granted with more extensive rights of renewal.

A bit of a difference of opinion

A recent High Court case highlights the disputes which can arise over the difference between "naming rights" and "signage rights".

In the case of *Ernst & Young Nominees v Kiwi Property Holdings Limited* the tenant had a right of first refusal to the "naming rights" for a building.

Subsequently, the landlord agreed to lease space in the same building to IBM, and granted IBM the right to erect signage on two sides of the building.

When the tenant heard of this, it sought an injunction to prevent the signage being erected, claiming that the prominent signs would amount to a renaming of the building.

The Court referred to the "general practice" in Auckland and Wellington for a major tenant with naming rights to be entitled to signage rights on a prominent part of the building, and granted the injunction.

The Court said that the rights granted to IBM did not amount to naming rights (and so trigger the tenant's right of first refusal) but the grant of the signage rights would prevent the landlord subsequently offering naming rights to the tenant. This is because naming rights would include the rights granted to IBM.

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"...it is important to specify the rights for naming and signage that are granted to the tenant and the restrictions that the grant of those rights then imposes on the landlord."

In the Court's view, the landlord had breached the implied lease obligation not to derogate from its grant. The Court said *"a derogation from grant is in effect a breach of contract"*.

Perhaps the lesson to be learnt – whatever the final outcome – is that it is important to specify the rights for naming and signage that are granted to the tenant and the restrictions that the grant of those rights then imposes on the landlord.

Hopefully this should avoid any arguments later on.

The landlord has lodged an appeal so we will keep you posted on further developments.

Timing isn't really everything

There have been two recent interesting cases on the subject of rights of renewal.

Although a lease will specify how much notice a tenant must give to renew a lease, these cases show how much discretion the Court has, under the Property Law Act, to order a landlord to renew a lease, even if the tenant misses the deadline.

In *Sam Bon Koo v Tuatara House Limited* the tenant had a right to renew the lease on 1 July 2002. The lease expired and the tenant continued paying rent without taking any further action.

The landlord then sold the building and did not refer to the tenancy in the sale and purchase agreement. The purchaser notified the tenant that it was terminating the tenant's "monthly tenancy". The tenant made application to the Court for relief.

The Court referred to its "very wide discretion" in such cases and the need to consider all the facts of a particular case.

Although the purchaser claimed that it had been advised that the tenant only had a monthly tenancy, the Court said the purchaser went into the transaction with "eyes wide open" and had full opportunity to make direct enquiries with the tenant, but failed to do so. The tenant was, therefore, granted a renewal of its lease.

In *Mac's Cove Tender Centre Limited v Boyd,* the landlord refused to renew a lease.

One of the reasons given for the refusal was the fact that the tenant was late (by 24 days) in giving notice of its intention to renew and gave the notice after it was advised by the landlord that the property had been sold with vacant possession.

The Court ordered that the lease be renewed. It was satisfied that the tenant would have given notice to renew the lease at the right time had it not believed that it had an agreement with the landlord to buy the building.

The Court said that the exercise of its discretion "was not simply a question of rewarding the innocent third party" which, in this case, was the purchaser. The tenant had the "prior right to occupancy of the building".

These cases emphasise the importance of establishing the extent of a party's right to occupy a building when purchasing a property.

The "reasonable recipient" fights back

Recently, we discussed the issue of defects in lease notices and the approach taken by the courts to these defects. We now have more recent cases on that same subject.

An Australian case illustrates the need to comply strictly with lease requirements when exercising an option.

In the case, a purchaser was exercising an option to acquire naming rights. There were "very explicit provisions" to be complied with in exercising the option – however, those provisions were not properly complied with when the notice was served.

The Court referred to the "numerous cases establishing the proposition that the terms of an option clause must be strictly complied with" and held that the option had not been effectively exercised.

In an English case, the tenant served notice to terminate a lease early. The notice referred to the wrong company as the current tenant, because a series of group company assignments had been overlooked.

The Court held that the notice was ineffective. The landlord could have been confused or misled by the defective notice. It could have thought that the lease had been re-assigned to the original tenant company without the consent of the landlord.

This contrasts with a previous case in which the early termination notice had been given in the name of the wrong group company.

In that case, the right to terminate was personal to the original tenant. The Court said that this meant the landlord could not be confused as to who was terminating the lease and so held that the notice was valid!

The upshot is that you must never assume that the test in *Mannai* (would a reasonable recipient have been misled by the error in the notice) will automatically save you if the notice you serve is defective. It will not save you if:

- the express provisions in the lease have not been complied with; or
- the error is such that it might confuse or mislead the recipient.

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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 unit 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.

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