# Trials and Tribulations of a Leasing Dispute - 15 March 2022

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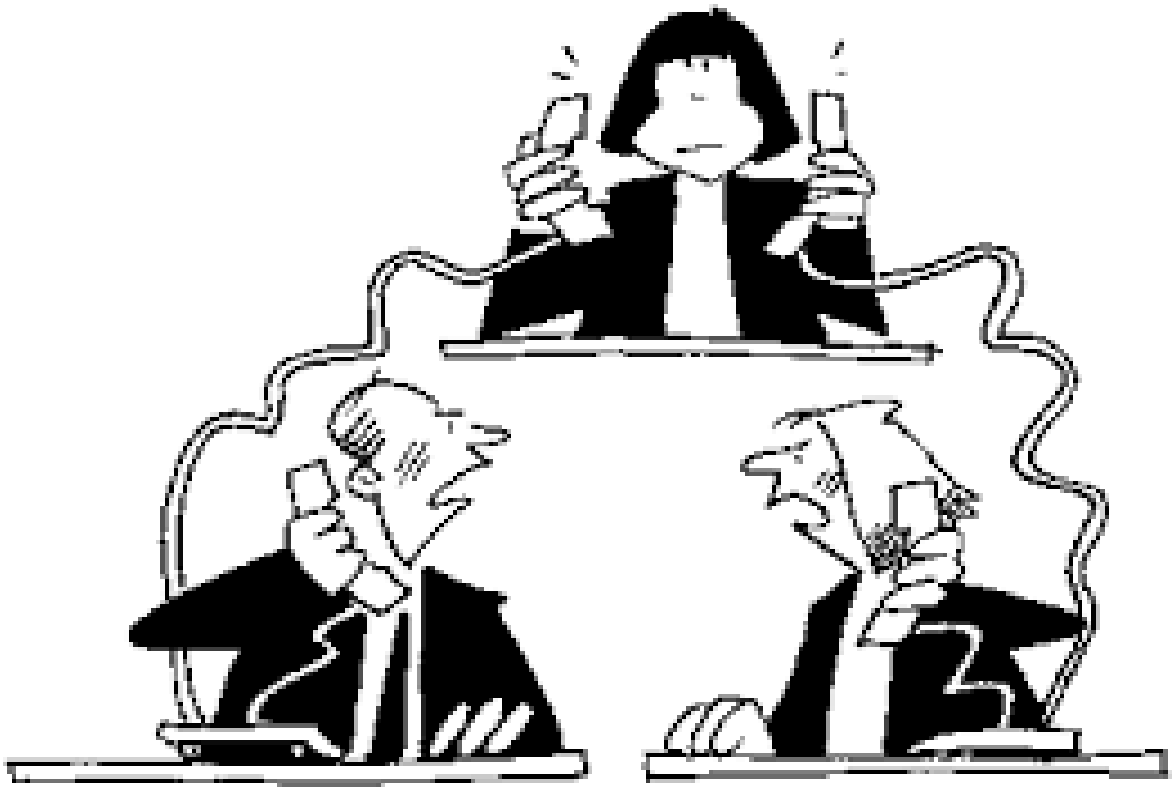

# Contents

## Objectives

1. This paper is an updated paper from the original version of the paper written in March 2016. The updated paper outlines salient issues relevant to the business community when embroiled in a commercial lease dispute.

2. This paper highlights key issues, such as:

    - What are the key issues in a leasing dispute?
    - What issues arise within commercial leasing disputes?
    - Detailed Case Study: What are pleadings? What are material facts? What is a statement of claim?

    - The aim of this paper is to give participants numerous "take away points" to assist in the development of a strong understanding of the relevant legal principles to the various commercial lease disputes that arise in practice.

## Synopsis

3. The application of legal principles to a commercial lease dispute requires an understanding of civil procedure law, the rules of equity and the rules of real property law and how all those laws interact.

4. The author attempts to outline various strategies when attempting to enforce a commercial lease (as a lessor), modify or vary a lease and resist a commercial lease (as a lessee). Various cases are discussed to assist the application of the law.

5. The law stated is the current law in the state New South of Wales.

## About the Speaker

- **William P Calokerinos** is a barrister at the NSW Bar practising from Second Floor Wentworth Chambers. William was called to the NSW Bar in April 2010.

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## Disclaimer

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## Overview

Attendees should become familiar with the following legislation:

- *Retail Leases Act* 1994 (NSW) ('**RLA**')
- *Real Property Act* 1900 (NSW) ('**RPA**')
- *Conveyancing Act* 1919 (NSW) ('**CA**').
- *COVID-19 impact in NSW – be familiar of the relevant regulations and the Code of Conduct.*
    - *Retail and Other Commercial Leases (COVID-19) Regulation 2021 (the Regulation)*
    - *National Cabinet's Commercial Leasing Code of Conduct.*

### Consider COVID-19 impact - Overview

- On 14 July 2021, the NSW Government enacted the **Retail and Other Commercial Leases (COVID-19) Regulation 2021 (the Regulation)** to provide protections for commercial tenants impacted by COVID-19.
- Amendments passed on 13 August 2021 strengthened those protections by reinstating National Cabinet's Commercial Leasing Code of Conduct.
- Under the Regulation, property owners must negotiate rent relief agreements with eligible tenants in financial distress due to COVID-19.
- Landlords of eligible tenants must also attempt before taking action in relation to a failure to pay rent, failure to pay or the business not being open during the hours specified in the lease. In negotiating these agreements, property owners and tenants must have regard to the leasing principles in the Code of Conduct, and the economic impacts of COVID-19.
- Amendments to the Regulation on 13 January 2022 extended rent negotiation rights for tenants who have an annual turnover less than $5 million to **13 March 2022**.
- See the recent case of *McKeon v Songlake Pty Ltd* [2022] NSWCATAP 25

  https://www.caselaw.nsw.gov.au/decision/17eb2aea767542ddd18d9b36

**Facts:**

- The Appellant ran a café and takeaway business in Nimbin in northern NSW. The Appellant entered into a lease with the First Respondent (referred to as the Landlord in this decision and the decision under appeal) for three years from 1 April 2017 with an option to renew for a further three years (the Lease).

- On 2 July 2019 the parties entered into a variation of the Lease granting the Appellant further options to renew until 2029. The first option to renew was to be exercised by 31 December 2019.

- The Second Respondent is a real estate agent in Nimbin (the Agent). Around January 2019, the Appellant engaged him, or his agency, to sell the café business and transfer the Lease. The Agent provided the Appellant with an estimate of $125,000 for the value of the business. At that stage, the lease was to expire on 31 March 2020.

- The Appellant fell behind in paying the rent in October 2019 due to ill health and he ceased trading. His lawyer wrote to the then managing agent for the Landlord, Nimbin Lifestyle Real Estate on 21 October 2019 advising of the Appellant's circumstances and said that the Appellant had listed the business for sale.

- The Appellant expected to be unable to pay the November rent. If any rent was not paid, the debt would be cleared on the sale of the business. The Landlord instructed the then managing agent that it was fine for the Appellant not to pay the November rent on time.

- The Agent (the Second Respondent) or his agency Nimbin Hills Real Estate Pty Ltd bought the business of the then managing agent of the building in which the Appellant's café was located, Nimbin Lifestyle Real Estate. On 30 November 2019, the Appellant was advised by Nimbin Lifestyle Real Estate that the business had been sold to Nimbin Hills Real Estate and rent was to be paid as directed by that new agency.

- Thus, from that date, the Appellant knew that the Agent or agency he had engaged to sell the café was also the Agent or agency who was acting for the Landlord as managing agent.

- The Landlord was not aware that the Agent was acting for the Appellant as well as the Landlord until April or May 2020.

- The Appellant did not pay the rent for the months of November 2019 through to June 2020. The Appellant did not exercise the option to renew the lease in the time specified.

- The Landlord instructed the Agent on 6 March 2020 to require the Appellant to vacate the café on the expiry of the lease on 31 March 2020. The Agent apparently did not do so.

- The Appellant was served with a Notice of Termination dated 19 May 2020 for non-payment of rent. **The Appellant then sought to negotiate with the Landlord to re-open the café on the basis that COVID-19 Regulations would allow the café to function**. The Agent responded on behalf of the Landlord noting that the option to renew had expired; the out of time request was not accepted and requested the return of the keys.

- The Appellant vacated the premises about 3 June 2020.

**Decision:**

- The Tribunal characterised the Appellant's claim as follows: 'at its highest the Applicant's claim in this regard is that the Landlord failed to negotiate and that he blames the Agent for this, hence the application under s 62B of the ***Retail Leases Act 1994 (NSW)***'.

- The Landlord, the Tribunal found, was entitled to act in its interests and take a view as to whether it wished to continue a relationship with the Appellant. Therefore, the Respondents did not act unconscionably in breach of s 62B.

- Further, the Tribunal found that the Appellant could never have been in a position to exercise the option to renew the lease because he was overdue in payment of the rent. The Lease provided that to be able to exercise the option, no rent or outgoings could be overdue for payment.

- Secondly, the Tribunal found that the COVID-19 Regulations operated on impacted leases from April 2020. The breach of lease by the Appellant related to non-payment of rent before the introduction of the COVID-19 Regulations. Thus, termination of the lease was permitted.

- Thirdly, the object of relevant COVID-19 Regulations is to limit the exercise of certain rights by a lessor under retail and certain other commercial leases for a breach of the lease if the lessee is a business that qualifies for certain grants due to the impact of the COVID-19 pandemic and the breach is a prescribed breach that occurs between the prescribed period. The "prescribed period" for the purposes of Regulation No 1 was from 24 April to 23 October 2020.

- The COVID-19 Regulations defined "prescribed action" to include the eviction of the lessee and it provided that there was an obligation on lessors to renegotiate rent and other terms of commercial leases before taking the prescribed action.

The term “impacted lessee” was defined in regulation 4(1)

Regulation 4 (1) A lessee is an impacted lessee if—

(a) the lessee qualifies for the jobkeeper scheme under sections 7 and 8 of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 of the Commonwealth, and

(b) the following turnover in the 2018–2019 financial year was less than $50 million—

(i) if the lessee is a franchisee—the turnover of the business conducted at the premises or land concerned,

(ii) if the lessee is a corporation that is a member of a group—the turnover of the group,

(iii) in any other case—the turnover of the business conducted by the lessee.

## Remedies in Lease Disputes

1. The High Court in *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51 (4 December 2013) at [40] the majority of the Court, French CJ, Hayne and Kiefel JJ opined the following (‘**emphasis added**’):

> *40. The rights and duties which a landlord and tenant have under a lease are bundles of rights and duties which together can be identified as species of property.* ***The origins of those rights and duties lie in the contract which the landlord and tenant or their predecessors in title made.*** *In every case, the rights and duties of the landlord and tenant, whether as an original party to the lease or as a successor in title, stem from the contract of lease and any later contract made in relation to that lease. When a company is the landlord, the rights and duties which that company has in respect of the lease are properly described as "property of the company that consists of ... a contract". The landlord's rights and duties are a form of property; those rights and duties "consist of", in the sense of derive from, the contract of lease.*

## Timeline – Retail Leases under the RLA and CA

Attendees should consider the timeline for a leasing transaction outlined in steps below.

**STEP ONE**

**(1) <u>The Lessor's lawyers</u> must determine whether the lease is a '*Retail' Lease* -**

(a) Did the initial lease commence before 1 September 1994?
(b) Is the term less than six months or is the term a consecutive series of terms of less than six months totalling less than 12 months.
(c) Are the premises more than 1,000 square metres in area? If yes, not retail lease.
(d) If the premises are less than 1,000 square metres, next point, does the proposes use of the premises fall within one of the uses in Schedule 1 of the *Retail Leases Act 1994*? If yes, conclude it is a '*Retail' Lease*

i. Consider the '*predominate use*' of the premises – see case law.

(e) If no to any of the paragraphs (a) to (d) inclusive above, the premises may still may be a retail shop if it is part of a retail shopping centre or arcade (need five or more actual retail shops which are retail for the purpose of (a) to (d) above, then the non-retail characteristics are characterised as "retail").

**STEP TWO**

**(2) <u>The Lessor's lawyers</u> to prepare retail lease so property may be put to market and for listing.**

**STEP THREE**

**(3) <u>The Lessor's lawyers</u> to prepare draft disclosure statement for listing purposes**

**STEP FOUR**

**(4) <u>The Lessor's lawyers</u> to prepare any agreement for lease.**

**a.** Terms may still need to be settled: terms such as new development terms where the final location, final area, final rent, final lease commencement date or other final terms such as contribution to outgoings are unknown.

**STEP FIVE**

**(5) <u>The Lessor's lawyers</u> prepares the Lessor's disclosure statement:**

a. **The statement must be served at <u>least SEVEN days</u> before the lease begins.**

b. As noted in the *Retail Leases Act* 1994 (NSW), landlords (lessors) and tenants (lessees) must sign disclosure statements that are in, or to the effect of, Schedule 2 of the Act. These disclosure statements provide an opportunity to note any promises or representations made to influence their decision to enter a lease and can be referred to as needed.

c. The lessor's disclosure statement includes important details such as:

   i. term of the lease and option to renew

   ii. rent and rent review method

   iii. works, fit-out and refurbishment

   iv. outgoings and other costs

   v. trading hours.

d. The statement should include information about the possibility of any major disruptions such as major alterations or renovations to the building or shopping centre, demolition works or nearby road works.

e. If the shop is in a shopping centre, the statement includes details about the centre, such as annual turnover, anchor tenants, floor plan and tenancy mix.

**STEP SIX**

**(6) <u>The Lessor's lawyers</u> to prepare draft retail lease and draft disclosure statement (when the deal is done) including the following information:**

a. The amount of rent payable;
b. A description of the shop;
c. The date the lease commences and ends;
d. Methods by which the rent can be changed;
e. Any outgoings or services the lessee must pay for (e.g. pay TV);
f. What happens on termination of lease?
g. What happens to the removal of the fittings, fixtures and make good on termination?
h. What bond, or other security or guarantees are needed?
i. Core trading hours.

j. If fitout contribution is required from the lessee (tenant)?

**STEP SEVEN**

**(7) <u>The Lessee's lawyers</u> to review the draft lease and raise any amendments.**

a. If amendments are required, the lessor may be entitled to charge a reasonable sum for legal fees.

**STEP EIGHT**

**(8)** The Lessor's lawyers and the Lessee's lawyers must be vigilant:

a. <u>During the period of negotiations, care must be taken for the words and representations that are used – if there is an implication of a lease to start immediately, the Court have held that a retail lease can commence prior to exchange and execution of counterpart leases.</u>

b. <u>The Lessor's lawyers should have regard to section 16 when the term of the lease, including option to renew, is intended to be less than three years</u>

- section 16(1) of the *Retail Leases Act* asserts that:

> If a retail shop lease is for a term of more than 3 years or if the parties to the lease have agreed that the lease is to be registered, the lessor must lodge the lease for registration in accordance with the *Real Property Act* 1900 (NSW) within 3 months after the lease is returned to the lessor or the lessor's lawyer or agent following its execution by the lessee.

c. <u>The Lessee's lawyers should inspect the development consents and any other permission of licences that are relevant.</u>

**STEP NINE**

**(9)** The Lessor's lawyers should also request the following:

a. Bank guarantee

b. Signature of any guarantor

**c. Any cash security deposit and a bond lodgement form**

d. Confirmation of Insurance Certificates

e. If applicable, copy of the tenant's development consent

f. Costs and fees of any mortgagee's solicitors (arguable whether that is recoverable)

g. The lessee to sign the lease.

**STEP TEN**

**(10)** The Lessor's lawyers or the lessor's agent should send the cash security bond and the signed form to the NSW Government's Retail Bond Scheme.

a. Within SEVEN days of receiving the lessor's disclosure statement, the lessee must give the lessor a copy of the lessee's disclosure statement.

**STEP ELEVEN – Any Assignment of the retail lease?**

**Assignment of the retail lease?**

a. The assignment of a commercial lease is one of the most commonplace transactions between the landlord and the tenant. A tenant's commercial position and specific business needs can change dramatically throughout the course of a lease, and there may come a time, for example, where they desire to sell their business or are simply not able to continue to operate their business.

b. An assignment of lease is a transfer of the whole of the tenant's interest in the lease (i.e. the remaining unexpired term of the lease). The assignment does not create a new lease, but rather, transfers to the assignee the assignor's interest in the lease: *Henningsen v Nolan (2004) 88 SASR 214 at 223.*

c. The lessor has 28 days to respond to a request for consent to an assignment – potential argument of being statute barred.

d. The lessee's lawyers, subject to consent, will need to prepare an assignor's disclosure statement and served that document on all other parties such as the lessor and the assignee at least SEVEN days before the date of the assignment.

**Contrast an assignment with a sublease**

A sublease creates a lease out of a lease (that is a new interest) but transferring less than the tenant's interest in the lease. There must be some reversionary held by the sublessor.

A sublease can also be assigned or against subleased. Where a purported assignment is less than the tenant's interest, then the result is a sublease instead of an assignment. The same applies where a sublease is equal to, or

longer then the sublessor's interest – the sublease takes effect as an assignment.

At common law, A lessee may not assign a lease after it has expired: *Commonwealth Life (Amalgamated) Assurance Ltd v Anderson (1945) 46 SR (NSW) 47.*

**STEP TWELVE – If the lessee exercises an option?**

a. If the lessee chooses to exercise an option under the lease, the lessee's lawyer's must prepare the exercise of the option during the period allowed under the lease.

    i. The lessor has FOURTEEN days after receiving the lessee's exercise of option, to serve a section 133E of the *Conveyancing Act* 1919 (NSW) prescribed notice alleging a breach of any obligation under the lease that precludes the lessee from exercising the option.

    ii. In reply, the lessee has one month after service of the s133E notice, to make an application and seek relief form the Court against the breach of the lease that precludes the exercise of the option under section 133F of the *Conveyancing Act* 1919 (NSW).

**STEP THIRTEEN – Market Rent Review on Option**

a. If there is a market rent review, the lessee can request in writing for the amount of the new market rent to be determined before the lessee has to exercise the option.

**STEP FOURTEEN – Lessor's intention**

a. At the end of the lessee's term where there is no further options for renewal, the lessor is required to give notice of the lessor's intention at the end of the lease term.

## Key Concepts

Attendees should become familiar with the following concepts:

- **COVENANT**:

What is understood by a **covenant**? Covenants are commonly agreements, obligations, formal agreements or formal promises – usually within in a deed.

An absolute covenant can only be created where there are clear words in the lease stating that this was the intention of the parties: *Sweet & Maxwell Ltd v Universal News Services Limited [1964] 2 QB 499 at 732 per Personal LJ.*

Where an absolute covenant against assignment applies, the landlord cannot be compelled to consent to an assignment. Accordingly, if a landlord does choose to consent, the landlord may impose conditions on the assignment: *Viscount Tredegar v Harwood [1929] AC 72.*

Where a covenant against assignment is qualified, under section 133B (1) of the *Conveyancing Act* 1919 (NSW), the landlord cannot unreasonably withhold consent. Where the landlord withholds or declines consent, the tenant has two options:

(a) The tenant may seek a court declaration that consent has been withheld or refused unreasonably: *Section 75 of the Supreme Court Act 1970 (NSW); or*

(b) The tenant can go ahead with the assignment and take the risk that if the landlord commences proceedings, that the court will find the landlord unreasonably withheld consent.

- **REVERSION**:

What is understood by a **reversion**? Reversions are commonly created in real property transactions, particularly during lease arrangements. Reversions are simply the interest that is retained by the grantor after the termination of the lease.

Once the lesser estate comes to an end (the lease expires), the property automatically reverts (hence reversion) back to the grantor (lessor).

- **OPTIONS:**

What is understood by an **option**?

- An option is **not** an agreement
- An option gives one of the parties the right to perform it or not as desired
- Critically, the lessee / grantee of an option may exercise it effectually notwithstanding that the lessor / grantor has purported to revoke it.

- There is legal opinion that **<u>an unexercised option</u>** is analogous to a conditional contract:

    i. See case: *Laybutt v Amoco Australia Pty Ltd* [1974] HCA 49

    ii. See case: *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd* [2005] QCA 270

    iii. there is a view that the right of the holder of an option has been described as a **contingent equitable interest** in the **property** to call for its transfer.

- Distinction may rest upon construction of the particular agreement and the classification may ultimately be futile:

    i. See case: *Carter v Hyde* [1923] HCA 36

    ii. See case: *Ballas v Theophilos* (No 2) [1957] HCA 90

- Option to Purchase Property:

    i. may terminate a commercial lease if purchaser is the leasee. An option to purchase imposes **a positive obligation** upon the prospective vendor to keep the offer open during the agreed period so it remains available for acceptance by the optionee at any stage within that time.

    ii. is an offer to sell the reversion.

    iii. See case: *Sharp v Union Trustee Company of Australia Ltd [1944] HCA 35* – the right only has a mere contractual force and confers upon the optionee no equitable interest in the land which is subject of the agreement.

- The right of pre-emption

    i. imposes **a negative obligation** upon the lessor (the prospective vendor) requiring him or her to refrain from dealing with the land inconsistently with the rights of the lessee. The right of pre-emption is <u>not</u> an offer to sell the reversion.

- **<u>EXERCISE OF OPTION:</u>**

Issues to consider:

- Time for exercise
- Address for service

- Form of the exercise
- Effect of an assignment of a lease of an option to purchase
- The option to renew and the nature of the covenant.

## • ELECTRONIC LEASES

On 11 October 2021, the *Real Property Amendment (Certificates of Title) Act* 2021 (NSW) commenced, which abolished the Certificates of Title (**CTs**) and the control of the right to deal (**CoRD**) framework.

All existing CTs in NSW have been cancelled and CTs will no longer be issued.

Existing CTs will not need to be produced, and CoRD holder consent will not be required, for a dealing or plan to be registered.

The changes to electronic leases have the following relevant points:

- **An electronic Lease** dealing form can be lodged where it affects the whole of the land, part of the land and premises by all the registered proprietors.

*Requirements:*

1. **From 6 February 2021**, only the lessor is required to be represented in the workspace for this dealing form.

2. An electronic Lease dealing form is a single party instrument that is prepared and signed by the lessor's Subscriber. It must be accompanied by a copy of the terms of the lease that is signed by or on behalf of the lessor and lessee i.e. the paper Lease 07L form is not required to be attached.

3. The lease can incorporate terms and conditions that are set out in a Memorandum filed with NSW Land Registry Services (**LRS**). It can include a plan if the lease affects part of land. A lease of part of the land or premises affecting multiple land titles in different ownerships must be lodged as a separate lease for each land title in different ownership.

*Legislation:*

1. A lease for a term exceeding 3 years must be registered in order to pass a legal interest to the lessee: see section 53 *Real Property Act 1900* which requires a lease to be registered in the Approved Form. A lease for a term of 3 years or less, including an option to renew, may be registered.

2. Where a retail shop lease is for a term of more than 3 years, including any options to renew, or the parties agree that the lease is to be registered, the **lessor must lodge the executed lease for registration within 3 months after the lease is returned to the lessor or the lessor's representative**: see section 16 *Retail Leases Act 1994*.

*Registered proprietor holding as executor or administrator or trustee:*

i. The lease must not include any reference to the lessor or lessee being a trustee, executor or administrator for another party.

ii. For a lease by a registered proprietor holding the estate as executor or administrator, the term must not exceed three years, including any options to renew: see section 153 *Conveyancing Act 1919*.

iii. For a lease by a registered proprietor holding an estate as a trustee, the term must not exceed 5 years, including any options to renew, except if it is allowed within the trust instrument: see section 36 *Trustee Act 1925*.

*Easement by inclusion in a lease:*

iv. An easement may be created by grant or reservation by the parties to a lease if the parties are the registered proprietors of both the dominant and servient tenements: see section 47 *Real Property Act*. The terms and site of the easement may be contained in an annexure to the lease and may be referenced in an attached plan.

v. Currently, only a lease over part of the land where an easement is being created or reserved during the term of the lease can be lodged electronically. Where a lease is over the whole land and an easement is being created or reserved, the electronic Lease dealing form cannot be used (and accordingly a paper lease form 07L must be lodged as a Dealing with Exception).

## Subscriber requirements

Before lodging a document electronically via an Electronic Lodgment Network – Land Registry Services (NSW), a Subscriber must:

1. verify their Client's identity
2. establish their Client's right to deal with the land
3. have a properly completed and executed Client Authorisation form, and
4. retain evidence that supports the dealing. In addition to evidence supporting the steps taken by the Subscriber to verify the identity of their Client and establish their Client's right to deal, the Subscriber may be required to retain other evidence to support the dealing.

The evidence that the Subscriber is required to retain to support a Lease dealing form may include:

- a true copy of the duly executed version of the document(s) uploaded as an attachment

  and

- if the Conditions and Provisions has been signed by an attorney on behalf of the lessor or lessee, a true copy of the registered power of attorney.

The Subscriber must also certify that they have taken reasonable steps to ensure that the instrument is correct and compliant with relevant law and any Prescribed Requirement.

## Guide to complete

See the NSW Registrar General's Guidelines website for more information. (Complete a Lease - Registrar General's Guidelines (nswlrs.com.au)

- **Loss of Option to Renew**

What were the terms to exercise the option?

- **Statutory rights to relief against loss of lessee's option in NSW:**

Issues to consider:

- Right to relief
- Relevant considerations
- Type of breach covered
- Effect of date of breach in relation to statutory right to relief.

- **Options for Renewal in retail shop leases**:

Issues to consider:

- Is there a right to minimum term
- Where lease contains an option to review, how is the determination of current market rent computed under option to renew?

## Leasing Disputes

All-important lease terms should be reduce to writing and well drafted. So just what can go wrong with a commercial lease and what may give rise to a dispute with parties?

This paper explores what can go wrong.

First question one must always ask in a dispute, is ask the important question of jurisdiction. Most leasing disputes are litigated in the NCAT tribunal as this is a cost-effective jurisdiction for many commercial disputes.

## Tribunal

The **NSW Civil and Administrative Tribunal** (NCAT) is the one-stop-shop for specialist tribunal services in NSW.

NCAT was established on 1 January 2014 by the *Civil and Administrative Tribunal Act 2013*.

NCAT deals with a broad and diverse range of matters, from tenancy issues and building works, to decisions on guardianship and administrative review of government decisions.

## Divisions of NCAT

NCAT has a broad and diverse jurisdiction and various matters makes it way before the tribunal. NCAT has four Divisions and these divisions are listed below:

**(1) Administrative and Equal Opportunity Division**

The Administrative and Equal Opportunity Division reviews administrative decisions made by NSW Government agencies and resolves discrimination matters.

**(2) Consumer and Commercial Division**

The Consumer and Commercial Division resolves a wide range of everyday disputes such as tenancy and other residential property issues, and disputes about the supply of goods and services. **This Division is the relevant division for commercial leasing disputes.**

**(3) Guardianship Division**

The Guardianship Division determines applications about people with a decision making disability and who may require a legally appointed substitute decision maker.

**(4) Occupational Division**

The Occupational Division reviews decisions by government agencies about licensing and complaints concerning professional conduct and discipline.

**NCAT Internal Appeals**

In certain circumstances parties can appeal a decision to NCAT's Internal Appeal Panel. Internal appeals can be made on a question of law and some Division decisions are not subject to an internal appeal and may be appealed directly to the Supreme Court or Court of Appeal.

## NCAT Retail leases

### Consumer and Commercial Division

NCAT deals with retail tenancy claims and unconscionable conduct claims under the *Retail Leases Act* 1994 (NSW) ('**RLA**') – see sections 62A to 62E inclusive.

A retail tenancy claim includes disputes about the payment of money, claims for repairs, amendments to a lease, appointment of a specialist retail valuer and a number of other claims.

An unconscionable conduct claim is where you consider that the other party has caused you financial loss during a retail lease transaction by highly unethical conduct such as relying unfairly on greater bargaining power, using unfair tactics, unreasonably failing to tell you things, or acting in bad faith in some other way.

### Courts

Leasing disputes may also be litigated in a NSW Court. Questions to consider are the following:

- Power of the Judicial Officer (Registrar, Judge).
- Jurisdictional Limit.
- What is the type of the claim – equitable or common law.
- Access the appropriate cause of action and the available evidence.

A **Practice Note 12 (Practice Note SC EQ 12 – Real Property List)** has been released by the Supreme Court of NSW. The Chief Justice Bathurst established Real Property List in the Equity Division of the Supreme Court of NSW.

## Disclosure under the RLA

The significance of the RLA is that its provisions override the contractual intention of the parties to a lease to which the RLA applies. The key provision is section 7 of the RLA which is in the following terms:

**Retail Leases Act 1994 - Section 7**

**This Act overrides leases**

*7 This Act overrides leases*

> *This Act operates despite the provisions of a lease. A provision of a lease is void to the extent that the provision is inconsistent with a provision of this Act. A provision of any agreement or arrangement between the parties to a lease is void to the extent that the provision would be void if it were in the lease.*

**Example of the application of section 7 of the RLA**

As an example of the operation of section 7 of the RLA, sections 31 and 32 of the RLA contained detailed provisions regarding market review of the rent where the lease contains an option to renew or right to extend the lease.

**Sections 31** commence with the following words " *A retail shop lease that provides for rent to be changed to current market rent or that provides an option to renew or extend the lease at current market rent is taken to include provision to the following effect -* "

**Sections 32** commence with the following words " *A retail shop lease which provides an option to renew or extend the lease at current market rent is taken to include provision to the following effect—* "

- and as a result of section 7, the provisions which follow in the section then override the terms of the lease to the extent of any inconsistency.

One of the consequences of section 7 of the RLA is that leases of retail shops (particularly leases of shops in retail shopping centres) follow closely the terms of the RLA to avoid the problem of inconsistency that flows form the operation of section 7.

- The key question for leasing practitioners – is when does the RLA apply?

**When does the RLA apply?**

- The RLA applies to 'retail shop leases' as defined in section 3 of the RLA.

- The definition of a "retail shop lease" or "lease" under the RLA is as follows:

> **"retail shop lease"** or **"lease"** means any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop:
>
> (a) whether or not the right is a right of exclusive occupation, and
>
> (b) whether the agreement is express or implied, and
>
> (c) whether the agreement is oral or in writing, or partly oral and partly in writing.

The definition is broad enough to include agreements to grant a lease in the future as well as present grants.

- The definition of a '*retail lease*' focuses on the purpose for which the premises are to be used and what 'was reasonably contemplated by the parties when they entered into the lease': *Moweno Pty Limited v Stratis Promotions Pty Limited [2003] NSWCA 376.* This means a lease can fall within the RLA even if the premises are used as a **retail shop**.

**The importance of disclosure**

d. There is an obligation on a retail landlord to issue a comprehensive statement of commercial terms which will govern the agreement between the parties and highlight any issues which might affect the tenant's decision to proceed with the retail lease.

e. See sections 9 and 11 of the RLA and Schedule 2 of the RLA - reproduced below:

## Retail Leases Act 1994 – Section 9

### 9 Copy of lease and retail tenancy guide to be provided at negotiation stage

(1) A person must not, as lessor or on behalf of the lessor, offer to enter into a retail shop lease, invite an offer to enter into a retail shop lease or indicate by written or broadcast advertisement that a retail shop is for lease, unless—

(a) the person has in his or her possession a copy of the proposed retail shop lease (in written form, but not necessarily including particulars of the lessee, the rent or the term of the lease) for the purpose of making the lease available for inspection by a prospective lessee, and

(b) the person makes—

(i) a copy of the proposed lease, and

(ii) if the regulations so provide—a copy of a retail tenancy guide prescribed by or identified in the regulations,

available to any prospective lessee as soon as the person enters into negotiations with the prospective lessee concerning the lease.

Maximum penalty—50 penalty units.

(2) The copy of the retail tenancy guide to be made available to a prospective lessee may be or be a copy of—

(a) the officially printed guide, or

(b) a version of the guide printed from a website of a government department or authority or from a website identified in the regulations.

## Retail Leases Act 1994 – Section 11

### 11 Lessor's disclosure statement

(1) At least 7 days before a retail shop lease is entered into, the lessor must give the lessee a disclosure statement for the lease (the ***lessor's disclosure statement***) that complies with the following requirements—

(a) the lessor's disclosure statement is to be in writing and is to be in or to the effect of Parts A and B of the form in Schedule 2 (the ***prescribed form***),

(b) the lessor's disclosure statement is to include Part B of the prescribed form for the purposes of Part B being completed by the lessee and provided to the lessor as the lessee's disclosure statement (under section 11A),

(c) the lessor's disclosure statement must contain the information and be accompanied by the material that is required to complete or accompany Part A of the prescribed form (but only to the extent that is relevant to the lease concerned),

(d) the form of the lessor's disclosure statement is not required to comply strictly with the prescribed form (including its layout) so long as it is substantially to the same effect as the prescribed form.

Maximum penalty—50 penalty units.

**Note—**

Because the lessor's disclosure statement need only include information relevant to the lease, if the retail shop is not in a retail shopping centre the disclosure statement need not include information that is relevant only to shops in retail shopping centres.

(2) If a lessee was not given a disclosure statement as required by subsection (1) or if the disclosure statement that was given to the lessee was incomplete or contained information that at the time it was given was materially false or misleading, the lessee may terminate the lease by notice in writing to the lessor at any time within 6 months after the lease was entered into, unless subsection (3) prevents termination.

(2A) If the lessee terminates the lease in accordance with this section, the lessee is entitled to recover compensation from the lessor for costs reasonably incurred by the lessee in connection with the lessee entering into the lease, including compensation for expenditure by the lessee in connection with the fit-out of the retail shop.

(3) The lessee cannot terminate the lease under this section on the ground that the disclosure statement is incomplete or contains information that is materially false or misleading if—

(a) the lessor has acted honestly and reasonably and ought reasonably to be excused for the failure concerned, and

(b) the lessee is in substantially as good a position as the lessee would have been if the failure had not occurred.

(4) If a lease is entered into by way of the renewal of a lease, a written statement (a ***lessor's disclosure update***) that updates the provisions of an earlier disclosure statement given to the lessee is, in conjunction with that earlier disclosure statement, considered to be a disclosure statement given for the purposes of this section at the time the lessor's disclosure update is given.

(5) The termination of a lease under this section does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the lease in respect of any period before its termination.

(6) A lessor's disclosure statement may be amended with the agreement in writing of the lessor and the lessee before or after the lease is entered into and any such amendment has effect from the date specified in the agreement (which can be a date before the agreement is made).

**Note—**

The Tribunal also has power to order the rectification of a lessor's disclosure statement. See section 72AB.

## Retail Leases Act 1994 – Section 16

### 16 Certain leases must be registered

(1) If a retail shop lease is for a term of more than 3 years or if the parties to the lease have agreed that the lease is to be registered, the lessor must lodge the lease for registration in accordance with the Real Property Act 1900 within 3 months after the lease is returned to the lessor or the lessor's lawyer or agent following its execution by the lessee.

Maximum penalty—50 penalty units.

(2) The 3-month period within which a lease must be lodged for registration is to be extended for any delay attributable to—

(a) the need to obtain any consent from a head lessor or mortgagee (being delay not due to any failure by the lessor to make reasonable efforts to obtain consent), or

(b) requirements arising under the *Real Property Act 1900* that are beyond the control of the lessor.

(3) For the purposes of this section, the term of a retail shop lease includes any term for which the lease may be extended or renewed at the option of the lessee.

**Note—**

For example, a retail shop lease is for a term of more than 3 years if it is for a term of 1 year with an option to renew for a further term of greater than 2 years.

(4) This section does not affect the operation of the *Real Property Act 1900*.

## Retail Leases Act 1994 – Schedule 2

### Schedule 2 - Lessor and lessee disclosure statements

**Part A**
**Lessor's disclosure statement Lessor Lessee Premises**

**Key disclosure items**

**Note—**

If the terms "landlord" and "tenant" are substituted for "lessor" and "lessee" in this form, they have the same meanings as "lessor" and "lessee" have, respectively, in the *Retail Leases Act 1994*.

| | | | |
|---|---|---|---|
| 1 | Annual base rent under the lease (see item 10.1) | $ | p.a. |
| | | Including/Excluding GST | |

| | | |
|---|---|---|
| 2 | Is rent based on turnover payable by the lessee in year 1? (see item 12) | □ Yes<br>□ No |
| 3 | Total estimated outgoings and promotion and marketing costs for the lessee in year 1 (see Part 5 and Part 6) | $<br>Including/Excluding GST |
| 4 | Term of the lease (see item 5) | years months |
| 5 | Estimated commencement date of the lease (see item 5.1) | / /20 |
| 6 | Estimated handover date of the premises (see item 7.1) | / /20 |
| 7 | Does the lessee have an option to renew for a further period ? (see item 6) | □ Yes<br>□ No |
| 8 | Does the lease provide the lessee with exclusivity in relation to the permitted use of the premises? (see item 2.2) | □ Yes<br>□ No |

## Part 1 Premises

### 1 Premises details

1.1 Street address of premises
[*insert street address of premises and, as applicable, shop number, name of the building/centre in which the premises are located, street address of the building/centre*]

1.2 Plan of premises (if available)
[*insert description of premises by reference to a prepared plan. Attach the plan to this disclosure statement as per item 33.1*]

1.3 Lettable area of premises $m^2$
Actual/Estimate

Will a survey be conducted? □ Yes □ No

1.4 Existing structures, fixtures, plant and equipment in the premises, provided by the lessor (excluding any works, fit-out and refurbishment described in Part 3)
[*Select as appropriate*]

□ air conditioning
□ cool room
□ floor coverings
□ grease trap
□ hot water service
□ lighting
□ mechanical exhaust
□ painted walls
□ electrical distribution load (3 phase)
□ electrical distribution load (single phase)
□ separate utility meter—gas
□ separate utility meter—water
□ separate utility meter—electricity
□ plastered walls
□ shop front

□ sink
□ sprinklers
□ suspended ceilings
□ telephone
□ water supply
□ waste
□ other

1.5 Services and facilities provided by the lessor for the benefit of the premises (for example, security services, cleaning)

### 2 Permitted use

2.1 Description of permitted use
[*note: the lessee should investigate if the proposed use of the premises is permitted under planning laws*]

2.2 Is the permitted use described in item 2.1 exclusive to the lessee?
□ Yes □ No

### 3 Number of car parking spaces

| | | |
|---|---|---|
| 3.1 | Approximate total spaces | spaces |
| 3.2 | Available spaces for customers of the building/centre | spaces |
| 3.3 | Reserved spaces for use of the lessee only | Spaces |

### 4 Head lease

4.1 Is the premises under a head lease or Crown lease?
□ Yes □ No

4.2 Has the lessor provided a copy of the head lease or Crown lease to the lessee?
□ Yes—attached as per item 33.2
□ No
□ Not applicable

4.3 Current term under the head lease or Crown lease and option/s to renew
□ Not applicable
□ Details of head lease as follows—
Current term—
years
/ /20 to / /20
Options to renew—
years
/ /20 to / /20
[*list any options for further terms held by the lessor under the head lease*]

4.4 Is the head lessor's consent to the lease required?
□ Yes □ No

## Part 2 Term of lease and option/s to renew lease

### 5 Term of lease

| | | |
|---|---|---|
| 5.1 | Date lease commences | / /20 |
| | (see also date of handover at item 7) | Actual/Estimate |
| 5.2 | Length of term | years months |
| 5.3 | Date lease expires | / /20 |

(based on the date indicated at item 5.1 as the date the lease commences)

### 6 Option/s to renew lease

6.1 Option/s details
□ No options to renew lease
□ Options as follows—

| **Length of option** | **Period of option** | **Exercise date** |
|---|---|---|
| years | / /20 to | / /20 to |
| | / /20 | / /20 |
| Actual/Estimate | | |
| years | / /20 to | / /20 to |
| | / /20 | / /20 |
| Actual/Estimate | | |

[*List all options to renew lease*]

## Part 3 Works, fit-out and refurbishment

### 7 Date of handover

7.1 Date of handover / /20

(if different to the date the lease commences indicated at item 5.1) Actual/Estimate

### 8 Lessor's works

8.1 Description of works to be carried out by the lessor before the date the lease commences
[*exclude any works that form part of the lessee's fit-out at item 9*]

8.2 Estimate of expected contribution by the lessee towards the cost of the lessor's works $
[*see also outgoings (item 14) in relation to any maintenance and repair outgoings*]

### 9 Lessee's fit-out works

9.1 Fit-out works to be carried out by the lessee
(excluding the lessor's works at item 8)

9.2 Is the lessor providing any contribution towards the cost of the lessee's fit-out?
□ Yes
[*insert details of lessor's contribution*]
□ No

9.3 Does the lessor have requirements as to the quality and standard of shop front and fit-out?
□ Yes
[*insert details or provide fit-out guide*]
□ No

## Part 4 Rent

### 10 Annual base rent

10.1 Starting annual base rent— $

(i.e. when the lease commences) Including/Excluding GST

10.2 Rent free period

[*describe any rent free period*]

10.3 Date of rent commencement— / /20

10.4 How rent payments are to be made?

[*insert description of how rent is paid—eg by equal monthly instalments in advance on the first day of each month, other than the first and last payments which are calculated on a pro-rata basis*]

### 11 Rent adjustment (rent review)

11.1 Rent adjustment date(s) and adjustment method
[*insert a list of all rent adjustment dates and adjustment methods—eg fixed increase by X%, fixed increase by $X, current market rent, indexed to CPI*]

### 12 Rent based on turnover

12.1 Is a rent based on turnover payable by the lessee?
(Note, the lease must specify the method by which a rent based on turnover is to be determined)

□ Yes

[*insert method of calculating the turnover rent*]

□ No

12.2 If a rent based on turnover is not required to be paid, does the lessor require the lessee to provide details of turnover?
□ Yes □ No

## Part 5 Outgoings

### 13 Contribution by lessee towards outgoings

13.1 Is the lessee required to pay or contribute to outgoings?
□ No

□ Yes—fixed amount [per annum/other period] of $

□ Yes—floating amount [per annum/other period] in respect of outgoings for which an estimate is provided in item 14

13.2 Describe any period during which the lessee is not required to pay outgoings—

13.3 Date on which payment in respect of outgoings is to commence—
/ /20

13.4 Formula(e) for apportioning outgoings or determining lessee's contribution to the total outgoings for the building/centre—
[*insert formula(e)*]

13.5 The outgoings that the lessee is required to pay or contribute to as a floating amount are each of the outgoings listed in item 14 for which an estimate of the outgoing is provided.

### 14 Outgoings that the lessee is required to pay or contribute towards—

[*Provide estimates for whichever of the following outgoings the lessee is liable to pay or contribute to. Estimates are for the accounting period of the lessor that is current when this disclosure statement is given or (if this disclosure statement is given less than 1 month before the start of the next accounting period of the lessor) for that next accounting period.*]

Estimates (including GST)—

14.1 **Administration**
Administration (excluding management fees and wages): $

Audit fees: $

Management fees: $

14.2 **Air conditioning/temperature control**

Maintenance: $

Operating costs: $

14.3 **Building/centre management**

Body corporate/strata levies: $

Building intelligence services: $

Customer traffic flow services: $

Energy management services: $

Gardening and landscaping: $

Insurance: $

Pest control: $

Ventilation: $

14.4 **Building/centre security**

Caretaking: $

Emergency systems: $

Fire levy: $

Fire protection: $

Security services: $

14.5 **Cleaning**

Cleaning consumables: $

Cleaning costs (excluding consumables): $

14.6 **Communications**

Post boxes: $

Public telephones: $

14.7 **Customer facilities**

Car parking: $

Child minding: $

Escalators: $

Lifts: $

Uniforms: $

14.8 **Customer information services**

Information directories: $

Public address/music: $

Signage: $

14.9 **Government rates and charges**

Local government rates and charges: $

Water sewerage and drainage rates and charges: $

Land tax: $

14.10 **Repairs**

Repairs and maintenance: $

Sinking fund for repairs and maintenance: $

**Note—**

Under section 23 of the *Retail Leases Act 1994*, the lessor may not recover the capital costs of the building/centre from the lessee.

14.11 **Utility services**

Electricity: $

Gas: $

Oil: $

Water: $

14.12 **Waste management**
Sewage disposal: $

Waste collection and disposal: $

14.13 **Other outgoings***[list]*: $

14.14 Total estimated outgoings for the building/centre: $

14.15 Total estimated lessee contribution to outgoings: $

## Part 6 Other costs

### 15 Advertising and promotional costs

15.1 Is the lessee required to contribute towards advertising and promotional costs (including marketing fund contributions) for the building/centre?
□ Yes □ No

15.2 Lessee's contribution to advertising and promotional costs per annum—
□ Not applicable

□ Yes—contribution per annum is $ Actual/Estimate

□ Yes—contribution per annum is % of the rent (excluding GST) payable from time to time

□ Yes [*insert details of lessee's contribution per annum and how this is determined*]

### 16 Other monetary obligations and charges

16.1 Outline any costs arising under the lease including up-front costs or other costs not part of the outgoings and not referred to elsewhere in this disclosure statement—
[*eg interest and legal costs*]

## Part 7 Alteration works (including renovations, extensions, redevelopment, demolition)

### 17 Alteration works

17.1 Are there any alteration works, planned or known to the lessor at this point in time, to the premises or building/centre, including surrounding roads, during the term or any further term or terms?
□ Yes

[*insert details of the proposed works*]

□ No

### 18 Clauses in lease dealing with relocation and demolition works

18.1 Clause(s) in lease providing for relocation of lessee—
□ Clause(s) of the lease

□ Not applicable

18.2 Clause(s) in lease providing for demolition of the premises
□ Clause(s) of the lease

□ Not applicable

## Part 8 Trading hours

### 19 Core trading hours relevant to lessee

| | | |
|---|---|---|
| Monday— | am to | pm |
| Tuesday— | am to | pm |
| Wednesday— | am to | pm |
| Thursday— | am to | pm |

| | | |
|---|---|---|
| Friday— | am to | pm |
| Saturday— | am to | pm |
| Sunday— | am to | pm |
| Public holidays— | am to | pm |

### 20 Lessee access to premises outside core trading hours

20.1 Is the lessee permitted to access the premises and building/centre outside core trading hours?

□ Yes

[*provide details including cost of access*]

□ No

## Part 9 Retail shopping centre details

**Note—**

This Part must only be completed if the premises are in a retail shopping centre as defined in section 3 of the *Retail Leases Act 1994*.

### 21 Retail shopping centre details

| | | |
|---|---|---|
| 21.1 | Total number of shops— | shops |
| 21.2 | Gross lettable area of the centre | $m^2$ |
| | | Actual/Estimate |

### 22 Annual turnover of the shopping centre

| | | |
|---|---|---|
| 22.1 | Annual estimated turnover (where collected)— | $ |
| | Including GST/ | |
| | Excluding GST | |
| 22.2 | Annual estimated turnover for specialty shops, per $m^2$ (where collected) | |
| | Food | $ per $m^2$ |
| | | Including GST/ |
| | | Excluding GST |
| | Non food | $ per $m^2$ |
| | | Including GST/ |
| | | Excluding GST |
| | Services | $ per $m^2$ |
| | | Including GST/ |
| | | Excluding GST |

### 23 Major/anchor lessees

23.1 Major/anchor lessees and lease expiry dates—

[*list all major and anchor lessees (eg department stores, discount department stores, supermarkets) and the dates on which leases held by those lessees expire*]

### 24 Floor plan and tenancy mix

24.1 Floor plan showing tenancy mix, common areas, common area trading, kiosks and major lessees—

□ Attached as per item 34.1

24.2 Does the lessor assure the lessee that the current tenant mix will not be altered by the introduction of a competitor?

□ Yes □ No

### 25 Customer traffic flow information

25.1 Does the lessor collect customer traffic flow information?

□ Yes—attached as per item 34.2

□ No

### 26 Casual mall licensing for common areas

26.1 Do you adhere to the Shopping Centre Council of Australia's Casual Mall Licensing Code of Practice?

□ Yes—attached as per item 34.3

□ No

## Part 10 Other disclosures

### 27 Other disclosures

27.1 Are there any current legal proceedings in relation to the lawful use of the premises or building/centre?

□ Yes

[*provide details*]

□ No

### 28 Representations by lessor

28.1 Any other representations by the lessor or the lessor's agent—-

[*lessor to insert details of any other oral or written representations made by the lessor or the lessor's agent*]

## Part 11 Lessor acknowledgements and signature

### 29 Acknowledgements by lessor

**By signing this disclosure statement, the lessor confirms and acknowledges that:**

- this disclosure statement contains all representations in relation to the proposed lease by the lessor and the lessor's agents as at the date of this disclosure statement,
- this disclosure statement reflects all agreements that have been made by the parties,
- the lessor has not knowingly withheld information which is likely to have an impact on the lessee's proposed business.

**Warnings to lessor when completing this disclosure statement:**

- The lessee may have remedies including termination of lease if the information in this statement is misleading, false or materially incomplete.

### 30 Lessor's signature

30.1 Name of lessor
[*insert name of lessor*]

30.2 Signed by the lessor or the lessor's agent for and on behalf of the lessor
.....

30.3 Name of the lessor's authorised representative or lessor's agent

[*insert name of person signing with the authority of the lessor*]

30.4 Date

## Part 12 Lessee acknowledgements and signature

### 31 Acknowledgements by the lessee

**By signing this disclosure statement, the lessee confirms and acknowledges that the lessee received this disclosure statement.**

**Before entering into a lease, lessees should consider these key questions:**

- Does the planning authority allow your proposed use for the premises under planning law?
- Is the security of your occupancy affected by—
- mortgages, charges or encumbrances granted by the lessor?
- rights and obligations under a head lease?
- Do the premises comply with building and safety regulations? Are the premises affected by outstanding notices by any authority?
- Could your trading be affected by disturbances or changes to the building/centre?
- Does the lessor require you to refurbish the premises regularly or at the end of the lease?
- Can the lessor end the lease early even if you comply with the lease?
- Are all the existing structures, fixtures and plant and equipment in good working order?
- Are you required to make good the premises at the end of the lease?
- Is the tenancy mix of the shopping centre (if applicable) likely to change during the term of the lease? (see item 24.2)

### 32 Lessee's signature

**It is important that a lessee seek independent legal and financial advice before entering into a lease.**

[*Section 11A of the Retail Leases Act 1994 requires a lessee's disclosure statement to be provided to the lessor within 7 days (or any agreed further period) of the lessee receiving the lessor's disclosure statement. The lessee may be liable to a penalty for an offence under that Act if the lessee's disclosure statement is not provided.*]

32.1 Name of lessee
[*insert name of lessee*]

32.2 Signed by the lessee or for and on behalf of the lessee
.....

32.3 Name of the lessee's authorised representative
[*insert name of person signing with the authority of the lessee*]

32.4 Date / /20

## Part 13 Attachments

### 33 List of attachments

33.1 Plan of premises (see item 1.2)
□ Yes
□ Not applicable

33.2 Head lease or Crown lease (see item 4.2)
□ Yes
□ Not applicable

33.3 Additional attachments
[*list of any additional attachments*]

### 34 List of attachments—retail shopping centre

34.1 Floor plan (see item 24.1)
□ Yes
□ Not applicable

34.2 Customer traffic flow statistics (see item 25.1)
□ Yes
□ Not applicable

34.3 Casual mall licensing policy (see item 26.1)
□ Yes
□ Not applicable

34.4 Additional attachments relating to the retail shopping centre
[*list of any additional attachments*]

## Part B Lessee's disclosure statement

### Advice to the lessor

1 The lessee acknowledges that the attached Part 1, Lessor's Disclosure Statement, was received from the lessor prior to entering into the lease.

2 The lessor has made available to the lessee a copy of the proposed retail shop lease and a copy of a retail tenancy guide as prescribed by or identified in the regulations.

3 The lessee has sought/not sought independent advice in respect of the commercial terms contained in the Lessor's Disclosure Statement and the obligations contained in the proposed retail shop lease.

4 The lessee believes that the lessee will be able to fulfil the obligations contained in the lease, including the payment of the proposed rent, outgoings and other amounts, based on the lessee's own business projections for the business.

5 In entering into the retail shop lease, the lessee has relied on the following statements or representations made by the lessor or the lessor's agents—
**Note—**

Matters such as agreements or representations relating to exclusivity or limitations on competing uses, sales or customer traffic should be detailed.

6 Apart from the statements or representations set out above, no other promises, representations, warranties or undertakings (other than those contained in the lease) have been made by the lessor to the lessee in respect of the premises or the business to be carried out on the premises.

Should more space be required please detail on another page.

Signed by or for and on behalf of the lessee—

Date—

## (1) LEASING DISPUTES – CASE STUDY - OPTIONS TO TERMINATE - *Eddie Azzi Australia Pty Limited v Citadin Pty Ltd*

Two matters to consider are as follows:

A. Termination under a "demolition" or a "Break Clause" – the lessor's right to demolish, substantially repair, renovate or reconstruct the building or the part of it containing the premises in such a way that cannot be carried out without vacant possession of the premises, there are steps that the lessor must do to comply with the Break Clause.

B. Lessor's termination under a "demolition" or a "Break Clause" must be bona fide.

### "Demolition" or a "Break Clause"

Provision in a retail shop lease requiring the lessee to refurbish or refit the shop is void unless it gives such details of the required refurbishment or refitting as may be necessary to indicate generally the nature, extent and timing of the required refurbishment or refitting.

All sections have effect in relation to leases either adding provisions to leases, s.33 of the RLA, or regulating provisions by either specifying the way in which provisions can operate, s.34A of the RLA - relocation and s.35 of the RLA - demolition, or voiding provisions which do not contain sufficient details, s.38 of the RLA. The basis of their operation therefore is as part of the document namely the Lease, evidencing the intention of the Lessor and Lessee.

## Retail Leases Act 1994 – Section 33

### *Lessee to be given notice of alterations and refurbishment*

### *33 Lessee to be given notice of alterations and refurbishment*

A retail shop lease is taken to provide that the lessor must not commence to carry out any alteration or refurbishment of the building or retail shopping centre of which the retail shop forms part which is likely to adversely affect the business of the lessee unless—

(a) the lessor has notified the lessee in writing of the proposed alteration or refurbishment at least 2 months before it is commenced, or

(b) the alteration or refurbishment is necessitated by an emergency and the lessor has given the lessee the maximum period of notice that is reasonably practicable in the circumstances.

## Retail Leases Act 1994 – Section 34

### Lessee to be compensated for disturbance

### *34 Lessee to be compensated for disturbance*

(1) A retail shop lease is taken to provide that if the lessor—

(a) inhibits access of the lessee to the shop in any substantial manner, or

(b) takes any action that would inhibit or alter, to a substantial extent, the flow of customers to the shop, or

(c) unreasonably takes any action that causes significant disruption of, or has a significant adverse effect on, trading of the lessee in the shop, or

(d) fails to take all reasonable steps to prevent or put a stop to anything that causes significant disruption of, or which has a significant adverse effect on, trading of the lessee in the shop and that is attributable to causes within the lessor's control, or

(e) fails to rectify any breakdown of plant or equipment under the lessor's care or maintenance, or

(f) in the case of a shop within a retail shopping centre, fails to adequately clean, maintain or repair the retail shopping centre (including common areas),

and the lessor does not rectify the matter as soon as reasonably practicable after being requested in writing by the lessee to do so, the lessor is liable to pay the lessee reasonable compensation for any loss or damage (other than nominal damage) suffered by the lessee as a consequence.

(2) In determining whether a lessor has acted unreasonably for the purposes of subsection (1) (c), due consideration is to be given to whether the lessor has acted in accordance with recognised shopping centre management practices.

(3) A retail shop lease may include a provision preventing or limiting a claim for compensation under the provisions implied by this section in respect of any particular disturbance if a written statement specifically drawing the attention of the lessee to details of the anticipated disturbance was given to the lessee before the lease was entered into, and the statement included the following—

(a) a specific description of the nature of the disturbance,

(b) a statement assessing the likelihood of the disturbance occurring, including an indication of the basis on which the assessment was reached,

(c) a statement of the timing, duration and effect of the disturbance, so far as they can be predicted.

(3A) A general statement to the effect that disturbances may occur during the term of the lease without setting out the matters referred to in subsection (3) is not a statement to which that subsection applies.

(4) The provisions implied by this section do not apply to any action taken by the lessor—

(a) as a reasonable response to an emergency situation, or

(b) in compliance with any duty imposed by or under an Act or resulting from a requirement imposed by a public or local authority acting under the authority of an Act.

## Retail Leases Act 1994 – Section 34A

### *Relocation*

### *34A Relocation*

If a retail shop lease contains provision that enables the business of the lessee to be relocated, the lease is taken to include provision to the following effect—

(a) The lessee's business cannot be required to be relocated unless and until the lessor has provided the lessee with details of a proposed refurbishment, redevelopment or extension sufficient to indicate a genuine proposal that is to be carried out within a reasonably practicable time after relocation of the lessee's business and that cannot be carried out practicably without vacant possession of the lessee's shop.

(b) The lessee's business cannot be required to be relocated unless the lessor has given the lessee at least 3 months written notice of relocation and that notice gives details of an alternative shop to be made available to the lessee within the retail shopping centre. Such a notice is referred to as a ***relocation notice***.

(c) The lessee is entitled to be offered a new lease of the alternative shop on the same terms and conditions as the existing lease except that the term of the new lease is to be for the remainder of the term of the existing lease. The rent for the alternative shop is to be the same as the rent for the existing retail shop, adjusted to take into account the difference in the commercial values of the existing retail shop and the alternative shop at the time of relocation.
**Note—**

Paragraph (c) only specifies the minimum entitlements that the lessee can insist on. It does not prevent the lessee from accepting other arrangements offered by the lessor when the details of a relocation are being negotiated.

(d) If a relocation notice is given to the lessee, the lessee may terminate the lease within 1 month after the relocation notice is given by giving written notice of termination to the lessor, in which case the lease is terminated 3 months after the relocation notice was given unless the parties agree that it is to terminate at some other time.

(e) If the lessee does not give a notice of termination as referred to in paragraph (d), the lessee is taken to have accepted the offer of a lease as referred to in paragraph (c), unless the parties have agreed to a lease on some other terms.

(f) The lessee is entitled to payment by the lessor of the lessee's reasonable costs of the relocation, including but not limited to—

(i) costs incurred by the lessee in dismantling fittings, equipment or services, and

(ii) costs incurred by the lessee in replacing, re-installing or modifying finishes, fittings, equipment or services to the standard existing immediately before the relocation but only to the extent that they are reasonably required in the premises to which the lessee's business is relocated, and

(iii) legal costs incurred by the lessee.

(g) If the lessor and the lessee do not agree as to what the actual amount of reasonable costs of the relocation are to be, the amount of the costs is to be determined by a quantity surveyor—

(i) appointed by agreement between the parties to the lease, or

(ii) failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Quantity Surveyors.

**Note—**

This section does not prevent the parties negotiating a new 5 year lease for the purpose of relocating the lessee. Paragraph (f) only specifies the minimum entitlements that the lessee can insist on and the parties can come to some other arrangement for the payment or sharing of the lessee's relocation costs when the details of a relocation are being negotiated.

## Retail Leases Act 1994 – Section 35

### *Demolition*

*35 Demolition*

(1) If a retail shop lease provides for termination of the lease on the grounds of proposed demolition of the building or any part of the building of which the retail shop forms part, the lease is taken to include provision to the following effect—

(a) The lease cannot be terminated on that ground unless and until the lessor has provided the lessee with details of the proposed demolition sufficient to indicate a genuine proposal for demolition within a reasonably practicable time after the lease is to be terminated.

(a1) The lease cannot be terminated by the lessor on that ground unless the proposed demolition cannot be carried out practicably without vacant possession of the shop.

(b) The lease cannot be terminated by the lessor on that ground without at least 6 months written notice of termination.

(c) If notice of termination on that ground is given to the lessee, the lessee may terminate the lease by giving the lessor not less than 7 days written notice of termination at any time within 6 months before the termination date notified by the lessor.

(2) If the lease is for a term of 12 months or less, the period of 6 months in subsection (1) (b) and (c) is shortened in each case to 3 months.

(3) If a retail shop lease is terminated on such a ground and the proposed demolition is not carried out within a reasonably practicable time after the termination date notified by the lessor, the lessor is liable to pay the lessee reasonable compensation for damage suffered by the lessee as a consequence of the early termination of the lease, unless the lessor establishes that at the time notice of termination was given by the lessor there was a genuine proposal to demolish within that time.

(3A) If a retail shop lease is terminated on such a ground, the lessor is liable to pay the lessee compensation for the fitout of the retail shop if the lessee is required under the lease to fit out the retail shop, whether or not the proposed demolition is carried out.

(4) For the purposes of this section, ***demolition*** includes repair, renovation and reconstruction.

## Retail Leases Act 1994 – Section 38

***Refurbishment and refitting***

*38 Refurbishment and refitting*

Provision in a retail shop lease requiring the lessee to refurbish or refit the shop is void unless it gives such details of the required refurbishment or refitting as may be necessary to indicate generally the nature, extent and timing of the required refurbishment or refitting.

## CASE STUDY - *Eddie Azzi Australia Pty Limited v Citadin Pty Ltd; Citadin Pty Ltd v General Pants Co Pty Ltd* [2001] NSWADT 79

**ORDERS**:

1. Declare that Citadin Pty Limited is not entitled to terminate the leases of Eddie Azzi Australia Pty Limited (3796213 L) and General Pants Co. Pty Limited (3696200 D) pursuant to Demolition Notice dated 28 November 2000.

**DECISION DATE**: 18/05/2001

**BEFORE**: Donald B - Judicial Member

**CONTENTIONS**

- The parties are absolutely opposed as to the validity of the Demolition Notice and the legal principles to be applied to the interpretation of the Lease and its enforcement.

- **The Lessor,** Citadin, says very simply that:-

  (a) the Lease, as affected by the Act, establishes a straightforward right to terminate the General Pants and Eddie Azzi leases in circumstances where it intends to carry out or procure or permit a range of works to combine the previous 13 tenancies over four floors with inter-connecting access and adjustment to shop fronts for a complete new fit-out by a replacement tenant.

  (b) the Demolition Notice is properly authorised in accordance with the proper procedures of the company and complies with cl.24 of the commercial lease as affected by section 35 of the RLA.

  (c) there was no promise made by or on behalf of the company when the leases were entered into varying that right or giving rise to any right in equity for the Lessees to prevent its enforcement.

- **The Lessees** contend that:-

(a) they entered into the leases and incurred expense and detriment based on Citadin's promise through Mr. Salter that the demolition clause would not apply in a situation such as this.

(b) the Demolition Notice is void for lack of proper corporate authority and for failure in its terms to comply with the lease and the RLA.

(c) the purpose for which Citadin seeks the usage namely the introduction of a preferable tenant is not for various reasons permissible under or contemplated by cl. 24 and section 35 of the RLA.

(d) the works proposed did not fall within the definition of demolition in the RLA and the Lease.

- At the heart of adjudicating this dispute, it falls to the Tribunal to determine the proper application of cl. 24 of the commercial lease, read together with section 35 of the RLA, as the lease provision intended between the parties to provide the right of the Lessor in stated circumstances to serve a notice terminating the lease on six months notice without an obligation to compensate the Lessee to any extent.

The detailed facts are listed below to enable the participants to understand how factually, commercial lease disputes arise.

**Facts of Case[1] - Eddie Azzi Australia Pty Limited v Citadin Pty Ltd; Citadin Pty Ltd v General Pants Co Pty Ltd [2001] NSWADT 79**

- Skygarden is a landmark building in the Sydney CBD with prime frontages to both the Pitt Street Mall and Castlereagh Street, comprising a high-rise office tower and a retail shopping centre covering 11,000 sq m over seven levels including the basement and roof level.

- Skygarden was opened in about 1990. It was acquired in 1996 by Citadin, a company formed in April of that year.

- The businesses now being carried on by EA ('**Eddie Azzi Australia Pty Limited**') and GP ('**General Pants Co Pty Limited**') were well established in Skygarden as at 1996 in their current locations but under different corporate ownership and with different dimensions and descriptions of their premises. GP has a frontage onto the Pitt Street Mall and the EA beauty salon is on Level One, the level above the Castlereagh St. level, and also at the Pitt Street Mall end.

- There were some 45 retail shops together with an Attic level formerly a food court and now a Roof level including a mezzanine bar, all making up the Retail Complex.

[1] See the judgment – the facts are kindly reproduced from the judgment - *Eddie Azzi Australia Pty Limited v Citadin Pty Ltd; Citadin Pty Ltd v General Pants Co Pty Ltd* [2001] NSWADT 79

- In July 1996, Citadin retained the services of **Mr. L.J. Collins** through his company to represent Citadin in its overall management of Skygarden and in September 1996 Citadin appointed **Mr. David Salter** through his company to be the specific "Managing Agent" of the building under an agreement with express definition of the managing agent's authority and responsibilities.

- In late 1996 **Mr. Azzi** of EA began negotiating with Mr. Salter for expanded premises to add Shop 108 to his current Shop 106A and in due course a new Lease was negotiated for a five year term with a five year option for the combined premises together with a separate agreement between EA and Citadin for the fit-out under which Citadin would contribute about $110,000 towards its cost.

- GP acquired the chain of General Pants shops in about December 1995, including the General Pants outlet on the Pitt St. Mall at Skygarden, and carried on negotiations for the assignment of its then Lease with Skygarden. This developed into a proposal for a new Lease of the existing Shop P1 plus the addition of the small adjacent segment known as Shop P1A which was to be amalgamated into one tenancy. By June 1997 Mr. Staub of GP and Mr. Salter had negotiated the terms of the lease and a draft lease was submitted in early July by the lawyers for Citadin to GP's lawyers , being a lease for a five-year term, without a renewal option.

- The EA and GP Leases contained the same terms and conditions and are in a familiar form for a shopping centre lease with a reviewable annual rent, turnover rent, permitted use requirements, bank guarantees and the building rules as an Appendix.

  In each case the Lease contained clauses found in some but not all commercial leases entitled Demolition and Relocation, in relevant parts as follows:

**COMMERCIAL LEASE - *"CLAUSE 24. DEMOLITION***

*24.1 If the Lessor wants to demolish, substantially repair, renovate or reconstruct the Building or the part of it containing the Premises, the Lessor must give the Lessee:*

*24.1.1. sufficient details of the proposed works to indicate a genuine proposal to carry them out within a reasonable practicable time after this lease is terminated; and*

*24.1.2 at least 6 months' notice of termination, unless the term is 12 months or less in which case the notice of termination must be at least 3 months.*

*24.2. After the Lessor has given a termination notice under cl.24.1, the Lessee may terminate the lease at any time within 6 months before the termination date in the Lessor's notice by giving the Lessor at least 7 days' notice of termination (unless the term is 12 months or less in which case the Lessee may give its notice at any time within 3 months before the termination date in the Lessor's notice).*

*24.3 If the Lessor's works are not carried out within a reasonable practicable time after the termination date in the Lessor's notice, then unless the Lessor shows that at the time it gave its notice there was a genuine proposal to carry out the works within*

*that time, the Lessor may be liable to pay the Lessee reasonable compensation for damage the Lessee suffered because of the early termination of the Lease.*

***CLAUSE 25. RELOCATION***

*25.1 If the Lessor wants to refurbish, redevelop, or extend the building and requires the Premises, the Lessor may give the Lessee a relocation notice:*

*25.1.1. giving the Lessee sufficient details of the proposed works to indicate a genuine proposal to carry them out within a reasonable practicable time after the Lessee's business is relocated and that the works cannot be carried out practicably without vacant possession of the premises; and*

*25.1.2 requiring the Lessee to surrender this lease and vacate the Premises on a specified surrender date which is at least 3 months after the Lessor gives the Lessee the relocation notice; and*

*25.1.3 giving details of new premises within the Building to be made available to the Lessee and offering to enter into a new lease of those premises.*

*25.4 The Lessor must pay the reasonable costs of relocating the Lessor's Business, including fitting out the new premises to the same standard as the Premises were in at the date the relocation notice was given, stamp duty, registration fees and reasonable legal costs and disbursements in connection with the Lessee's execution of the surrender of this Lease and the new lease.*

*The Lessee must do everything reasonably necessary to ensure that any stamp duty refundable on this Lease is paid to the Lessor."*

- In July or August 1997 **Mr. Staub of GP**, having been advised by his lawyers of the demolition clause, had a conversation concerning it with Mr. Salter. Their recollections as to the precise words used in the conversation differ.

  Mr. Staub said words to the effect that he was concerned about the demolition clause and asked if it could be removed before he signed the lease.

  **The two versions of Mr. Salter's reply are:**

  - Mr Staub's recollection: *"You don't need to worry about that. You are a very important player. You know the figures you do are outrageous, the dollars you do out of the square meterage are huge. Why would we want you to leave the centre?...Don't worry. We would never knock the centre down while you were here so you don't need to worry about it. This is in all our leases and is just a standard procedure."*

  - Mr Salter's recollection: *"You shouldn't be concerned about it because Citadin have spent money on your shop, have expanded your space, have agreed to you paying top rent for the location, you are the anchor tenant and I believe that the odds are a million to one that they would demolish your area of the*

*centre during the term of your lease."*

- Mr Staub recalls responding *"I trust you. I feel very secure taking your word on that." Mr Salter had no recollection of the response."*

- Nothing further was said between them concerning the demolition clause and the correspondence between the lawyers concluding the lease made no reference to it. The lease was duly concluded and commenced on 1 September 1997 being subsequently stamped and registered.

- In August 1997 Mr. Azzi having received the EA lease, had a conversation with Mr. Salter in which he asked for the clause to be deleted and on his memory asked *"What does it mean?"* The two recollections of Mr. Salter's reply were:

  **The two versions of Mr. Salter's reply are:**

  - Mr. Azzi's recollection: *"Don't worry about that clause. It's a new building. There is no way they are going to demolish it. They are spending $110,000 on your shop, why would they then throw you out?"*

  - Mr. Salter's recollection: *"It's a new building. The owners have a number of proposals to carry out re construction works in the future on Levels 3 and 4, but I don't believe they'll do any major works and therefore the clause won't apply to you. It's in there because it is a standard term. If anything happened, they would offer you a relocation. Look, they need you. They are spending money on your shop. I don't seem them running around and throwing you out."*

- No further discussion took place between them concerning the clause nor was there any in the correspondence between the lawyers; the lease was duly concluded to commence on 15 August 1997 although it was not signed until 15 December 1997 being subsequently stamped and registered.

- EA received development consent and building approval for its works from Sydney City Council in late August 1997.

- There was considerable evidence as to the extent of that fit-out with EA asserting that it was very much more expensive than the $110,000 paid by Citadin and Citadin's evidence being that EA had paid no more than $30,000 in excess of the Citadin contribution.

  **Finding of Fact** - The Tribunal preferred the Citadin evidence as to the actual costs incurred for the new fit-out. While Mr. Azzi personally may well have spent additional funds on the fit-out, none of those expenses are recorded in any available records or in the books of the company and so the Tribunal was not able to at this time accept his evidence as to the extent of additional expenditures.

- The events then move to the beginning of 2000 when on 9 and 10 February, Mr. **Collins (the lessor)** had conversations with a **Mr. McGrath**, recorded in letters of 9 February (Collins to McGrath) and 10 February (McGrath to Collins) recording that McGrath had introduced to Collins the idea of Borders Books, a major American book chain, taking very substantial space in Skygarden. The letters identified the space at that time as the basement together with the Sportsgirl premises on the Pitt Street Mall and Castlereagh levels.

- On 27 March Citadin retained McGrath's company to develop a tenants mix and leasing strategy for the Skygarden complex and McGrath, in about early April, produced a Strategy Report for the whole retail complex. He recommended three new anchor tenants for the centre as "destination retailers that draw people to a shopping centre", one of those being Borders Books. The report included recommendations to combine a number of Pitt Street Mall level shops, now not including the Sportsgirl shop but instead the GP shop, "to create a linked area with the basement" with proposals to "continue the link from Pitt Street Mall basement levels for the icon retailer at the Pitt Street end" up to the Castlereagh Street level into Shop C11 (then the upstairs Sportsgirl). The plan spoke of including lift access with the possibility of two lifts, a small one between basement, Pitt and Castlereagh levels and a "new glass lift travelling and stopping at all levels to L4".

- Events in April then moved very quickly and by 10 April 2000 the minutes of the management meeting record that **Mr. McGrath**, with the new centre manager **Mr. Ridge,** had proposed a relocation to Mr. Staub of GP who responded that he would not agree to a relocation but would be seeking to expand.

- On 18 April 2000, Borders confirmed to McGrath that their understanding now was that the Skygarden premises on offer to them would extend from the basement through to Castlereagh level and include the GP tenancy (subject to vacant possession) which was acknowledged may not be "available until August 2002".

  Borders stated:-

  > *"It is obviously our preference that the entire space is made available at the one time however, you have indicated General Pants (providing the prime Pitt Street Mall frontage) might not be available until August 2002."*

- McGrath then on 26 April 2000 sent a memo to Collins setting out a strategy to achieve a total rental increase across the three floors of $400,000 by a Border Books tenancy from the basement through P1 to C11, the bulk of which rental increase, some $280,000, would only be available if the General Pants shop was included. He proposed internal vertical access works including lift, internal stairs and possibly escalators, stating,

  > *"The works mentioned above would, I believe, be required to be done by us as part of any re-location or demolition clauses."*

(This note had been in response to the two options in the Borders proposal of 18 April 2000 which envisaged the possibility of commencing their occupancy without the GP shop).

- This is the first mention in the evidence of demolition clauses and by 27 April 2000 - Borders next memo to McGrath observed:

> *"I also understand that you have completed a review of existing leases that confirms the existence of demolition clauses which in turn create a strong possibility for vacant possession of the entire space to be delivered at the same time."*

- Then the minutes of the leasing meeting of 1 May 2000 and a memo from McGrath to Collins both stressed the need to obtain the "legal opinion re demolition and re-location causes" with the response of 2 May 2000 from Collins to McGrath promising the legal opinion by 4 May 2000 and observing:

> *"**The issues are quite involved and his opinion will not necessarily be cut and dried. It appears once his report is to hand it will require extensive consideration with respect to implementing the clauses on some of the lessees**."*

- The internal Border memo of 3 May 2000 reported that:-

*"The definition of demolition for the purposes of the clause needs to be reviewed (...). However, prima facie, vertical access works from the lower level should suffice. When combined with the expansion of more frontage ... I feel we can justify the definition of 'Major Works' for the purposes of the demolition clause. ... We therefore need to develop a plans for vertical access (most likely a three-level lift) to impact on the General Pants ("GP") tenancy. ... This poses a problem because the GP tenancy is at the front of the tenancy while the loading dock is at the back."*

- Then by 11 May 2000 McGrath drafted two versions of an indicative letter of intent, one version for the first time including shops 106 to 108 i.e. including the EA shops of 106, 106A and 108 on Level 1; the other version still up to Castlereagh level only. Both these versions had reached Borders by 16 May 2000 eliciting a response agreeing to "*push for the inclusion of the fourth level of the store*" and seeking inclusion of the GP shop from the start, noting that:-

> *"Preliminary design option indicate the only area over four floors that can accommodate our multi-level lift will be through the GP space. This would appear to give you the fire power to justify works for the purpose of defining the effect of the demolition clause ."*

- Two days later the centre manager Ridge met with Mr. Azzi for a further discussion over Azzi's long-standing concerns about the level of the rent his company was paying. Ridge informed Azzi that Citadin would not reduce the rent but would agree to a surrender of the lease without penalty. Ridge's note of the meeting confirmed

that "*Eddie Azzi knows nothing about the icon tenancy*". Mr. Azzi then in writing requested a written proposal for the "lease to be broken ... as soon as possible" which was sent by Ridge immediately.

- The surrender was not ever agreed, Citadin having declared time of the essence for the offer to surrender and the last letter from Azzi simply observing that he could not reply by the stated date. The Citadin leasing minutes at least at the latest 27 June 2000, suggest an intention for a further follow-up and request for a reply with a continuing hope on the surrender; but no surrender was achieved and there was no further discussion of the surrender between EA and Citadin. Nor did Citadin discuss relocation with EA, Mr Collins evidence being that there was no available space.

- The indicative letter of intent had by 21 June 2000 become the four-level option only, which included the EA shops but still included express conditions for the delayed delivery of the GP Shop P1/1A not until August 2002.

- In the 21 June 2000 letter of intent, the split between Lessors and Lessees Works for the establishment of the new tenancy was clearly set out in a Master Schedule with a more detailed schedule annexed (but not in evidence). In summary the Lessor's Work was to provide clean spaces with a range of responsibilities for electricals, hydraulics, air-conditioning and other services and in particular to provide "all voids required for vertical access" and "two lifts ...over the four levels of the premises" and all external shop fronts. The Lessee's Works were for the partitions, ceilings and surfaces and all other fit-out. (Without seeing the detailed schedule annexed it is not clear if the Lessee's works included building the stairs but they appear to.

- Various plans had been prepared for the new tenancy beginning in late May 2000 by the design architect Mr. Williamson who first became aware on 24 May 2000 that Borders was the proposed icon tenant and that they would require "such structural elements as escalators, stairs and lifts for internal communication between ... four levels." The possibility of escalators was rejected by Mr Williamson early on and resulted in changed locations of various elements. Mr. Williamson's evidence was that, at all times from May through September, he prepared and varied his designs without any knowledge or reference to the demolition clause of which he says he became aware only after these proceedings had been commenced in 2001.

- Changes in the designs included different locations for the two proposed lifts and the stairs between the basement and Castlereagh level passing through and in the leasing meeting of 27 June 2000 it is noted that the "Demolition/Relocation clauses will be invoked with vacant possession effective on 1 January 2001." The only shop noted for relocation was C12/13, Look of Australia, and as noted above the EA shops were still hoped to be the subject of a surrender.

- Mr Collins evidence at the hearing would include a table showing that of the thirteen tenancies across the four floor 2,500 sq m area proposed for the Borders shop, ten were on either monthly tenancies or hold-overs, one, Look Australia on Level 1

adjacent to the EA shops was marked for "Relocation" and only two, GP and EA were marked as "Lease Demolition".

- It should be noted that in his preparation of the plans in the editions right through September, Mr. Williamson described them as "Schematic Drawing for Refurbishment and Redevelopment" of the Skygarden Retail Complex. However, at the request of Citadin, he changed the November edition to describe them as "Schematic Drawing for Renovation and Redevelopment ", this being the version attached to the demolition notices.

- By September the plans, as noted, had gone through various changes and on 25 September 2000 Borders' memo to Mr Lovelock (Borders contractor on fit-out design and supervision whose company was also preparing plans and designs), observed:

  > *"I like the plan but fear it might not be feasible. ... My main concern relates to the minimisation of works in the space currently occupied by General Pants. This could threaten the impact of the demolition clause that we need to secure the space."*

  And then a month later an internal memo stated

  > *"With the completion of the Skygarden lease the landlord is now preparing to issue notices to quit on the requisite 13 tenancies required to create our space. ... It is imperative that any changes to the vertical access through the store still ensures sufficient works are undertaken for the purposes of exercising the demolition clause under specific existing leases. In particular we must demonstrate sufficient works through the General Pants Tenancy (on Pitt Street Mall) to justify their lease termination ... It is imperative that we have the plan endorsed by the landlord and his solicitor verifying their confirmation that the changes still invoke the exercise of the demolition clause."*

- On 31 August 1999 the Citadin Board had passed a resolution appointing Mr. Ng as managing director and resolved to grant him power of attorney which was executed under the company seal that day and subsequently registered. The power of attorney included authority to

  > 2.1 Grant and accept the surrender of a lease ...
  >
  > 2.10 Enforce any covenant condition and stipulation in any lease ...
  >
  > 2.11 Exercise any right of re-entry or re-possession.
  >
  > 2.18 Employ any Estate Agent, solicitor, accountant ... to assist the attorney in the performance of the attorney's functions.
  >
  > 2.19 Appoint any agent to do any business ... which can more conveniently be done by an agent.
  >
  > 2.26 Execute all deeds and other documents relating to or incidental to the Property (being Skygarden).

- In early November 2000 Mr Collins met with Mr. Ng, the Managing Director . In that meeting Mr. Collins asked Mr. Ng whether the Demolition Notices could be issued "to General Pants and Eddie Azzi when Borders' lease is signed?" to which Mr. Ng replied, "Yes, issue them then" and Mr. Collins said to the lawyers "You can issue them when the Borders lease is signed".

- At that time the only document relevant to the Borders lease was in fact an Agreement for Lease with the Lease form annexed. This had been drafted during October and by 27 November had been signed by Borders as a result of which Mr. Collins instructed the lawyers to the effect that "Borders have signed the lease; you are instructed to send the notices".

- Mr. Collins was cross-examined during the hearing in the ADT as to the nature of the document that had actually been signed and revealed some confusion as to whether in fact the Lease itself had been signed, answering that he regarded a lease as a more important document than an agreement for lease.

- The Tribunal was satisfied that the only document that Mr Collins could have had in his mind was the Agreement for Lease and that his answers in cross-examination did not so reflect upon his credibility that his evidence as to the fulfillment of pre-conditions for the issue of the Demolition Notices in terms of the company's Managing Director's decision, should not be accepted. It is also the case that a plan forming part of the Agreement for Lease locating the premises geographically within the CBD was not correct and was subsequently changed resulting in a re-execution of the Agreement for Lease sometime in December after the notices had issued.

- **Accordingly on 28 November 2000 the Demolition Notices were signed and served, being received by GP and EA on 29 November 2000.**

- The Agreement for Lease had an attachment in the form of a document entitled "Attachments 1 and 2"; this was a combined schedule dealing with all of the works for the preparation and basic fitting-out of the combined premises and allocating the various tasks between landlord and tenant, generally following the split attached to the letter of 21 June 2000 but in much more detail and, importantly, shifting the obligation to install the lift from landlord to tenant. The obligation in respect of internal stairs was also amended to have all aspects of that function a tenant's function (although as noted above it was not clear whether that had indeed been the position under the letter of 21 June 2000 which only listed stairwell voids for the lessor).

- Attachment "A5" to the Agreement for Lease was a premises plan in the form of Mr. Williamson's September 2000, Issue E, design which provided for a single lift from basement through the GP shop P1 to Level One, covering all four floors and continued to be described as "Schematic Drawing for Refurbishment and Redevelopment ".

- There was also a fit-out manual setting out the standards for the tenants fit-out.

- Given the importance of the demolition notice it is necessary to set it out in full, it being a notice given by Chalmers & Partners referring to themselves as "Solicitors and Agents for Citadin Pty Ltd" and in both cases was as follows, with different headings of course as to the tenant and the defined premises.
  **"DEMOLITION NOTICE**

  We act for Citadin Pty Ltd the proprietor of Skygarden Shopping Complex.

  By Lease ... ("the Lease") our client leased to you the premises.

  By cl. 24 of the Lease if our client wants to demolish, substantially repair, renovate or reconstruct Skygarden Shopping Complex or the part of it containing the premises it may give you a demolition notice which notice must:-

  a) give you sufficient details of the proposed works to indicate a genuine proposal to carry them out within a reasonably practicable time after the Lease is terminated; and

  b) give you at least six months' notice of termination.

- As the solicitors and agents for Citadin Pty Ltd, we hereby give you notice that our client intends to demolish, substantially repair, renovate and reconstruct Skygarden Shopping Complex including the part of it containing the premises.

- Details of the demolition, substantial repair, renovation and reconstruction of Skygarden Shopping Complex are set out in the attached schematic plans prepared by our client's designers, WAM Design Pty Ltd and will be carried out as soon as practicable after termination of the Lease.

- Pursuant to the terms of the Lease you must within seven (7) days prior to the termination of the Lease take, remove and carry away from the premises all fixtures fittings plant equipment or other goods including stock if applicable brought upon the premises by you without damaging the premises and making good any damage caused and remove all rubbish and leave the premises in a clean state and condition.

  **The Lease will terminate on the date six months after the receipt of this notice by you."**

- The Notice contained no other explanation of the project, its timing or implementation and simply attached "schematic plans" which were Mr. Williamson's November 2000 version, Issue G, titled "Schematic Drawing for Renovation and Redevelopment". For reasons not explained, this version reinstated the two-lift option, one lift being in the GP tenancy and with the stairs also well within it. The other impact on the GP premises was slightly expanding the shop and rebuilding the shop front at Pitt Street Mall, removing its rear wall to incorporate it with the adjoining premises and adjusting another internal wall.

- The works affecting the EA premises were the insertion of a lift, an internal stairwell to C11, removal of all internal walls and the extension of the shop front within the Mall internal areas.

- The drawings covered work extending over all seven levels of the Skygarden Retail Complex including the installation of the escalator between the Attic and Roof levels which were also undergoing changes including the installation of a mezzanine floor at Roof level under previous works not detailed in these drawings but associated with the overall alterations of the Complex at this time.

- Then by late January 2001, the plans had changed again for the Development Application to Sydney City Council, the version before me being undated Borders plans prepared by Mr Lovelock's company Designphase as consultant to Borders.

- These importantly provide a single lift and relocate the lift proposal to commence in the previous stairwell in the basement, using a void requiring no passage through the space of the GP shop, and proceeding to serve all four levels. This new location of the lift was obviously a simpler and more practical solution. These plans shift the stairs to intrude only into what is currently air and ceiling space of the GP shop but still requiring a 6sq. m. hole to be cut in the ceiling slab of that shop. They also require demolition of the rear wall of the existing GP shop if the stairs are to be accessed at all.

- The final lift proposal could be built without any impact on the GP space unless of course an opening into that space is required as would obviously be the case if it was part of the whole new tenancy.

- These new plans involve the same amount of impact on the EA premises even though the location of the final lift void in the floor changes.

- These final plans only became available to the Lessees in the course of these proceedings and were not served on the Lessees in any formal sense at about the time of or in relation to the demolition notice.

- It is clear that on any view of the various versions of the plans, even the final plans, implementation of any of them would require vacant possession of both the EA and GP premises. Even if there were no lift entry at Pitt St. level into the GP shop, the whole scheme of the stairs on any of the designs requires demolition of the present GP rear wall and a void in the ceiling.

- That is not to say that alternative plans to link premises in other ways could not accommodate a four level tenancy without impacting on and requiring vacant possession of both the EA and GP shops. However Citadin and Borders do not propose an alternative. They want to achieve a connected tenancy with four floors above each other with a frontage to the important Pitt St. Mall.

- What is not clear from any of the plans themselves is the time frame proposed by Citadin or Borders for implementation. They do not contain any information about timing other than no doubt enabling engineers or builders looking at them to form opinions as to the time likely to be taken to implement them from whenever construction started.

- Much attention was given during the hearing to the variations in the design drawings by the various parties involved in preparation of different version including Mr Williamson's and Mr Lovelock's versions. These were all reviewed in a detailed report by the GP consultant architect Dr. Lesiuk who appeared as an expert, which contained certain material said by the lawyers for GP to be relevant to the issue of the purpose of Citadin in preparing various versions of plans. Dr Lesiuk's report was objected to in so far as it was tendered to prove purpose.

- In his evidence, Mr. Collins for Citadin expressly affirmed that it was a clear purpose of Citadin that the totality of the works to be undertaken in relation to the four floors to achieve an acceptable tenancy for Borders must also be sufficient to entitle it to rely on cl.24 of the Lease, the clause headed "Demolition". On that basis I suggested that it was not necessary to canvass third party evidence relating to Citadin's purpose or intention and hence I have had no regard to any aspect of Dr. Lesiuk's report dealing with purpose.

  (It should be acknowledged that GP and EA were obviously, in the preparation of the case and the commissioning of Dr Lesiuk's report, dealing with the issue of purpose in the absence of the discovered documents and Mr. Collins' subsequent acknowledgment of Citadin's purpose).

- A substantial amount of evidence was also placed before the Tribunal concerning the likely cost of EA both re-establishing a premises fit-out of its current quality in other premises and also renting other premises. **The Tribunal observed during the hearing that as there was no claim for damages by EA, there was no need to review this evidence in great detail. The lawyers for EA confirmed that this evidence was relevant to the issue of reliance to the detriment of EA on the alleged promise of Citadin not to enforce its demolition clause for the purposes of the promissory estoppel argument to be considered below and on that basis the evidence remained before the Tribunal.**

  It would be apparent that whatever the dollar cost to EA in installing the fit-out in the first place over and above the Citadin contribution, re-establishing such a fit-out elsewhere with its granite floors, hand-painted frescoes and other detailed finishes, would not be inexpensive and to that extent would be able to be regarded as a potential detriment to EA in relying on any promise which was not to be kept (if that was the case).

- The final dimension of the evidence that should be reviewed relates to the description given by various witnesses to the nature of the works undertaken over these four floors. For the purpose of informing myself as the Tribunal and within the powers to

do so under the ADT Act, I asked various witnesses who worked as builders, designers, architects and property managers how they would describe the works. The Tribunal did so because of the range of different words used throughout the legal regime constituted by the Leases and the Act concerning changes made to premises (cls 24, 25 of the Leases and Part 4 of the RLA, set out below).

- As different words chosen for use in legal instruments are presumed to have different meanings or shades of meaning, forming a view on those meanings is crucial in determining this case.

  Section 33 of the RLA requires notice to be given of "alterations and refurbishment"; s.34 of the RLA provides for compensation for a ranges of `disturbances' to trading; s.34A of the RLA regulates lease provisions permitting relocation of a tenant, allowing this for "refurbishment, redevelopment or extension" necessitating vacant possession and requires provision of details, timing and impact of these; s.35 of the RLA regulates lease terms permitting termination for "demolition", this word being defined in s.35(4) of the RLA to include any "substantial repair, renovation or reconstruction of the building".

- The Tribunal acknowledges that during the hearing it was apparent these words were not terms of art but were words of ordinary meaning. Even so the Tribunal considered it appropriate and within my authority to seek these views, particularly in light of the overlap in meanings in an admittedly limited survey of dictionary definitions, the Tribunal provided to the parties, with one addition by Citadin's lawyers:-

  **Alter, Alteration**

  To make otherwise or different in some respect without changing the thing itself; to modify. (Shorter OED 3rd Ed rep 1969)

  To make changes to; a change, modification, adjustment made to something (Encarta/Macmillan 1999)

  To make different in some particular, modify (Macquarie- Budget 1985)

  **Refurbish (no OED listing)**

  To restore to a cleaner, brighter or more functional state (Encarta)

  **Renovate (Macquarie)**

  Redevelop (no OED listing)

  To improve an area that has become run down by renovating buildings (Encarta)

  **Repair**

  The act of restoring to a sound or unimpaired condition; restoration of some thing or structure by the renewal of decayed or worn out parts (OED)

To restore something broken or damaged to good condition (Encarta)

To restore to a good or sound condition after decay or damage (Macquarie)

**Renovate**

To renew materially; to repair; to restore by replacing lost or damaged [arts (OED)

To restore to good condition (Encarta)

To make new or as if new again (Macquarie)

**Reconstruct**

To construct anew (OED)

To put back together from component parts (Encarta)

Structural changes, transformation, renewal, alteration of premises that are not insignificant (Butterworths Australian Legal)

- It was therefore important for the Tribunal to determine the understanding of people with long experience in relevant areas as to which of these descriptions they would consider to be apt.

- It was noteworthy that Mr. Lovelock, a builder of over 30 years' experience who was involved in the design advice to Borders, first described the works as alterations but, when the issue was further explained, went on to consider various aspects of the works would attract the meaning of the other words referred to.

- Dr. Lesiuk similarly generically described the works as "alterations" , adding that the works involved "a series of components which involve refurbishment of the existing structure". He did not think "redevelopment" applies and did not favour "renovation" applying in this case.

- Mr. Martin, the property manager, preferred to describe a number of important parts of the works as reconstruction.

- It was obvious from Mr. Williamson's own reports that until requested to change the description, he initially chose "refurbishment and redevelopment" and he acknowledged that the change in description was at the request of Citadin. However he was firm in his professional view that the word "renovation" was correctly used in relation to this project.

**Take Away Point**

- Demolition clauses, as a form of break clause, are appropriate to deal with when major damage occurs to a commercial building, due to fire, storm, explosion etc. The power to terminate the lease depends on the precise scope of the lease provision, coupled with the characterisation of the proposed new works via application of the

legal principles of the *Retail Leases Act 1994 (NSW).*

- Other reading:

  ***Gumland Property Holdings Pty Limited v Duffy Bros Fruit Market (Campbelltown) Pty Limited*** **[2008] HCA 10 (27 March 2008)** - The question in this appeal to the High Court of Australia is whether a commercial lease was validly terminated on the ground of the lessee's failure to pay rent, and, if so, what the monetary consequences were.

  In the Equity Division of the Supreme Court of New South Wales, the trial judge (Macready As J) held that it was. The Court of Appeal, in reasons for judgment delivered by Giles JA, with which Santow JA and Tobias JA concurred, held that it was not.

  The High Court upheld the appeal, restored the orders from the trial judge by setting aside the judgment of the Court of Appeal and determined that the commercial lease was validly terminated on the ground of the lessee's failure to pay rent.

## (2) LEASING DISPUTES – CASE STUDY - DAMAGES that may arise - *Stocks v Retirement Benefits Fund Board* [2007] TASSC 8

## What are damages?


Put simply, commercial leases are contracts that are designed to be performed, not to be broken (that is breached). When a contract is broken the usual remedy at common law is compensatory damages. Damages for a broken contact serve as an award of money by the tribunal or court compensating the plaintiff for the defendant's wrong.

In order for the tribunal or court to award the plaintiff compensatory damages in contract, it must find the following:

1. The plaintiff has a *cause of action in contract* – namely, a breach of contract

2. The defendant's breach of contract has in fact injured or caused a loss to the plaintiff – the element of causation;

3. The loss suffered by the plaintiff *is not too remote;* and

4. The plaintiff has not breached his or her duty to *mitigate* necessary loss.

### Termination

Termination of leases for default is an extensive topic. The two main grounds of termination where there has been default by the Tenant are:

(a) Repudiation

(b) Forfeiture.

## Checklist when default

The following is a checklist to follow when having to deal with acting on a default:

(a) the first step would be to check the event of default definitions in the lease to determine whether the Tenants' conduct is in fact address as an 'event of default' under the lease or a breach of an 'essential term';

(b) consider the requirement of the default provisions including the need to provide a notice to remedy before termination or repudiation;

(c) Section 129 of the Conveyancing Act 1919 (NSW) ("**section 129 notice"**) requires a statutory notice in the prescribed form to be given to a Tenant before termination on any grounds other than non-payment of rent. The Tenant must be given a "reasonable time" to remedy the default, 14 days is generally regarded as reasonable;

(d) No section 129 notice is required if the Tenant has failed to pay rent. That said, if the notice provision in the lease requires notice to be provided for non-payment of rent, then this notice should be required.

(e) Tenants are entitled to seek relief against forfeiture, being a remedy from the Courts to reinstate the Lease.

(f) The Retail Lease Act 1994 (NSW) requires all retail leases disputes to be mediated to before any proceedings are commenced by the Tenant and the Landlord. Nothing in the Act prevents termination for non-payment of rent, as failure to pya rent is not in itself a retail lease dispute – it may be indicative of underlying dispute.

(g) Consider the impact of issuing a termination notice in respect of seeking damages form the Tenant.

**Practical Implications**: the case of ***Sheville v the Builders Licencsing Board (1982) 149 CLR 620 (Shevill)***

The mere failure to pay rent punctually and even for relatively long periods does not necessarily constitute a repudiation of the lease or the beach of an essential term of that lease. The practical implications being that you need to rcover such matters in the lease by specifying:

a. What is to be an essential term, especially if default in rent payments in the lease is to be an essential term; and / or

b. That the lessor has an express entitlement to claim for loss or damage.

(clauses are known as "**anti-Shevill clauses**")

In *Shevill,* the tenant was continually late for payment of rent and, despite initially accepting the late or partial payments of rent, the landlord eventually re-entered and sued for loss of bargain damages, namely any damages suffered as a result of the premature termination of tenancy.

The High Court reasoned that the tenant's breach was not sufficiently serious to constitute repudiation and that the landlord terminated the lease himself when he resumed possession under the terms of the lease. For this reason, the landlord was only entitled to any unpaid rent up until the date of termination. The landlord was not entitled to any loss of bargain damages for prospective rent that would have been recoverable if the lease continued until its expiry date.

Question - are then any anti-Shervill case types clauses in the lease?

## Termination at common law

To terminate a contract at common law, there must have been a breach of an essential term, a sufficiently serious breach of a non-essential term or a repudiation of the contract by the other party.

**Grounds for termination**

A right to terminate an agreement will arise where there is a contractual stipulation conferring the right or there is a breach or repudiation giving rise to the right under the common law.

A common law right to terminate will arise in three circumstances:

- a breach of an essential term;
- a sufficiently serious breach of a non-essential term; or
- the repudiation or renunciation of the contract by the other party.[1]

***Breach of an essential term***

Essential terms are also described as "conditions" (as distinct from "warranties") or "fundamental" terms. The classification of a term as "essential" is a question of construction. The test of "essentiality" depends on whether it was the common intention of the parties, expressed in the language of their contract, that the term be so "essential" that any breach of it would justify termination.[2] A well accepted example of an essential term is where time is expressed to be of the essence.

***Sufficiently serious breach of a non-essential term***

Breaches of non-essential terms, if sufficiently serious, may also give rise to a right to terminate a contract at common law. In this context, non-essential terms are also referred to as

"intermediate" or "innominate" terms and a sufficiently serious breach is described as a breach "going to the root of the contract" or a breach which "substantially deprives the innocent party of the benefit of the contract".[3]

The decision of the High Court in *Koompahtoo* affords a good example. In that case, the Koompahtoo local Aboriginal land council (land council) entered into a joint venture with a property developer, Sanpine Pty Ltd (Sanpine), for the development of a large area of land. The land council contributed the land and Sanpine was to manage the development. Sanpine caused liabilities of $2 million to be incurred, secured by mortgages over the land. The land was nevertheless not developed. The mortgagee went into possession of the land and the land council was placed into administration. The central issue was whether the administrator of the land council was entitled to terminate the joint venture agreement on the basis that Sanpine had breached its obligation to maintain books of account and financial records of the joint venture.

The majority of the High Court were satisfied that "this was an obligation of basic importance" so as to constitute an essential obligation justifying breach.[4] The majority expressly said, however, that they did not rest their decision on this ground. Rather, they upheld the decision of the trial judge that even if it were accepted that all of the contractual obligations which Sanpine breached were not essential obligations justifying termination for every breach, the breaches "were in a number of respects gross, and their consequences were serious".[5] The failure of Sanpine to explain the use of all of the funds borrowed against the land and to otherwise maintain proper books of account and financial records of the joint venture "went to the root of the contract" and deprived the land council of "a substantial part of the benefit for which it contracted", so as to justify termination.[6]

### *Repudiation*

Repudiation extends beyond actual breaches of essential terms and sufficiently serious breaches of nonessential terms justifying termination, to embrace anticipatory breaches of this kind and any other conduct which evinces "an unwillingness or an inability to render substantial performance of the contract" or "an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations".[7]

It is important to note that a party does not necessarily repudiate an agreement by asserting an incorrect view of its construction, although they will most likely fall into repudiation if they persist in their view notwithstanding a clear enunciation of the correct view by the other party. Caution is warranted in this situation. When a party asserts an erroneous interpretation of the contract and the other party does not attempt to correct them but seizes on the error and purports to terminate for repudiation, it may well be that the party purporting to terminate is the repudiating party, giving the mistaken party the opportunity to terminate.[8] This underscores the considerable care that needs to be taken before a party purports to terminate a contract, as a wrongful termination itself constitutes a repudiation entitling the other party to terminate.[9] In fact, the expression "wrongful termination" is a misnomer, because if there are no grounds to terminate, a purported termination is ineffective and simply amounts to repudiation.

## Issues to consider when deciding to terminate a contract

### *Election*

If a right to terminate arises, the innocent party needs to decide whether to elect to:

- affirm the contract and claim damages for the particular breach. It may also be necessary to claim specific performance or injunctive relief to compel the other party to continue to perform (the availability of these remedies is beyond the scope of this article); or
- terminate the contract and claim full loss of bargain damages.

If a contract is affirmed, it cannot subsequently be terminated in respect of the same breach leading to the affirmation, although some breaches may be, by their nature, continuing breaches giving rise to a subsequent right to terminate.

Termination requires unequivocal words or conduct evincing an intention to terminate.[10] While the terminating party is required to justify termination on the basis that they have a legal right to terminate, they are subsequently entitled to rely on any valid ground existing at the time of election whether or not they were aware of it at the time.[11]

An election to affirm will be inferred from conduct which is consistent only with the continued existence of the contract, such as continued performance.[12]

Having regard to the risk in purporting to terminate when there is no right to terminate and the possibility that if there is a right to terminate, it is lost by affirmation, in many cases parties will attempt to hedge their bets and reserve their rights. A party will not necessarily affirm a contract if they give the party in breach an opportunity to perform in suitably qualified and conditional terms or otherwise continue performance subject to an express right to terminate.[13] An election cannot, however, be delayed unreasonably.[14]

A party may not be obliged to accept a repudiation and terminate the contract even if it might be said that to do otherwise would be unreasonable. For example, in White and Carter (Councils) Ltd v McGregor,[15] advertising contractors agreed with a representative of a garage proprietor to display advertisements for the garage for three years. On the same day, the garage proprietor wrote to the contractors saying that there had been a misunderstanding and purported to cancel the contract. The advertising contractors refused. The House of Lords held that they were entitled to refuse, carry out the contract and claim the full contract price.

***Partial termination***

In the absence of an express provision, an innocent party may rescind the whole, but not a part of, a contract, although certain secondary or procedural obligations, such as exclusion clauses and arbitration clauses, may survive.[16] For example, a right of partial termination may be conferred by a contract in circumstances where a party is given a right to terminate a purchase order “in whole or in part”.[17]

***Right to terminate compared with right to rescind***

On termination of a contract, the obligation of the parties to further performance is discharged, while any rights which have accrued prior to termination remain. The innocent party will have a right to damages and one or both parties may have a right to restitution. While accrued rights arising from partial performance prior to termination are not eliminated (for example, amounts due prior to termination must be paid), specific performance even of accrued obligations will not be available following termination.[18]

Rescission, on the other hand, is an equitable remedy that applies where the contract is void or voidable (because, for example, it is vitiated by misrepresentation or mistake or is contrary to public policy) so as to restore the parties to the position they were in prior to the entry into the contract.

It is important to note that, unless a contract expressly confers a right of rescission, such a right does not arise where there is a right to terminate for breach.[19]

***Right to terminate at common law where there is also a right to terminate pursuant to a clause of the contract***

If a right to terminate has arisen at common law, the innocent party may also have a right to terminate pursuant to a clause in the contract.

Whether to terminate a contract at common law or whether to terminate pursuant to a particular provision of a contract is a matter of strategy and will depend on, among other things, the degree of certainty as to the right to terminate and a comparison of the value of a claim for loss of bargain damages, on the one hand, and any remedy which the contract may confer if the contractual right is exercised (such as a right to liquidated damages), on the other hand.

When both options are available, it is important to consider that:

- unless there is an express or implied agreement to the contrary, a contractual right to terminate for breach does not displace any right of termination arising by operation of law in respect of breaches of essential terms, sufficiently serious breaches of non-essential terms or repudiation;[20]
- termination by the exercise of a contractual right does not debar the innocent party from suing for damages for loss of bargain or expectation damages if there is a common law right to terminate;[21]
- absent a clear intention to the contrary, termination in accordance with a contractual right does not give rise to a right to claim loss of bargain or expectation damages unless termination was also justified at law;[22] and
- ordinarily, there will be an implied obligation to exercise a contractual right of termination reasonably and in good faith.[23]

**Conclusion**

If you are considering terminating a contract at common law, it is important to note that:

- there needs to have been a breach of an essential term, a sufficiently serious breach of a nonessential term or a repudiation of the contract by the other party;
- a party does not necessarily repudiate an agreement by asserting an incorrect view of its construction;
- if a contract is affirmed, it cannot subsequently be terminated in respect of the same breach leading to the affirmation; and
- before terminating, it is wise to consider whether it would be better to terminate the contract at common law or pursuant to a term of the contract, if the latter avenue is available.

## Measure of Damages

The High Court of Australia in the case of *Shevill v Builders Licensing Board* (1982) 149 CLR 620 (‘***Shevill’s case**’)*, affirmed the view that normal contractual principles govern the assessment of damages recoverable by the lessor. Gibbs CJ argued at [7] in *Shevill’s case* that the notion of damages for loss of bargain will be recoverable where the lessee is found to be in essential breach of the lease (‘**emphasis added**’):

> It is clear that a covenant to pay rent in advance at specified times would not, without more, be a fundamental or essential term having the effect that any failure, however slight, to make payment at the

specified times would entitle the lessor to terminate the lease. However, **the parties to a contract may stipulate that a term will be treated as having a fundamental character although in itself it may seem of little importance, and effect must be given to any such agreement**: see Wickman Tools v. Schuler A.G. [1973] UKHL 2; (1974) AC 235, at p 251 . In other words, a right to forfeit a lease might arise "in the case of any breach of covenant however trifling, if the parties had agreed that a breach of that covenant should create a forfeiture": Campbell v. Payne and Fitzgerald (1953) 53 SR (NSW) 537, at p 539 . In the present case cl. 9(a) undoubtedly gave to the respondent a right to re-enter if rent should be unpaid for fourteen days. That right was subject to the provisions of s. 129 of the Conveyancing Act, 1919 (N.S.W.), as amended, but that Act is not material in the present case. However, the respondent's argument is that because cl. 9(a) gave a right to re-enter for any breach of cl. 3 that resulted in rent being unpaid for fourteen days, **the covenant in cl. 3 as to payment, together with the provisions of cl. 9(a), became an essential term, or at least gave the respondent the same rights as are available under the general law to a party who elects to terminate a contract for repudiation or fundamental breach**. (at p627).

- The calculation of damages are usually formulated by calculating the difference between the rent reserved by the lease and that recovered on a re-letting of the premises. The calculation is simply is the premises are re-let in a swift manner – but that is often not the case.[2]

## Scenarios

- The paper considers two factual scenarios that may give rise to a claim for damages:

  A. Damages arising due to misrepresentations by leasing agents

  B. Damages arising promise to exercise option for renewal

### Scenario A - Damages – misrepresentations by leasing agents

#### The Negotiation Stage Before The Entering of a Retail Lease

- During the negotiation stage of a lease, a copy of the proposed lease and a copy of the retail tenancy guide should be made available to a prospective lessee: see section 9 of the RLA.

- At least 7 days before a retail shop lease is entered into, the lessee must be given a disclosure statement for the lease: see section 11 of the RLA.

- A lessee will have a right to reasonable compensation for injury and loss suffered as a result of false or misleading statements or representations made in this stage of the transaction: see section 10 of the RLA.

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[2] See the case of *Lamson Store Service Co Ltd v Russell Wilkins & Sons Limited (1906) 4 CLR 672* and the case of *Gumland Property Holdings Pty Limited v Duffy Bros Fruit Market (Campbelltown) Pty Limited* [2008] HCA 10 (27 March 2008)

**Retail Leases Act 1994 - Section 10**

***Right to compensation for pre-lease misrepresentations***

10 Right to compensation for pre-lease misrepresentations

(1) A party to a retail shop lease is liable to pay another party to the lease (***the injured party***) reasonable compensation for damage suffered by the injured party that is attributable to the injured party's entering into the lease as a result of a false or misleading statement or representation made by the party, or any person acting under the party's authority, with knowledge that it was false or misleading.

(2) The giving of a lessor's disclosure statement to a prospective lessee under a retail shop lease is considered to be the making of a representation by the lessor to the lessee as to the information in the disclosure statement.

(2A) The making of a representation by a prospective lessee in a lessee's disclosure statement given to a prospective lessor under a retail shop lease that the prospective lessee has sought independent advice, or as to statements or representations relied on by the prospective lessee in entering the lease, is considered to be the making of a representation by a lessee to the lessor.

(3) This section extends to apply to a statement or representation made before the commencement of this section.

**Comments**

- Disclosure statements are very detailed and there may be difficulty in lessor complying with the disclosure statements. For this reason, a client would expect their solicitor to exercise reasonable professional judgment and thereby would:
    - Draw a client's attention to a clause affecting a lessee client's ability to sub-lease in circumstances where a change in use required the permission in writing of the lessor and head lessor
    - Draw a client's attention to a prospective lessee that they could withdraw from a lease at any time until the formal agreement is signed
    - The situation of giving legal advice to a lessee is governed under the RLA : see section 13(2) of the RLA.
    - In addition to section 10 of the RLA, fairing trading legislation and the *Australian Consumer Law* ('**ACL**'), as most lessors and their lawfully authorised agents would be incorporated agents and the ACL would apply to their actions.

## CASE STUDY - *Stocks v Retirement Benefits Fund Board* [2007] TASSC 8

**ORDERS**: (1) the Lessees claims for damages were upheld, the quantum of damages to be fixed at a later date. The Lessees claim was successful.

**DECISION DATE**: 5 March 2007

**BEFORE**: Supreme Court of Tasmania - Underwood CJ

**CONTENTIONS**

- **The Lessees** contend that:-

(a) they entered into the residential lease and were induced to signing the lease due to the following representations made by the leasing agent:

a. "That Coles Super K and Venture had been confirmed as two of the 3 major retailers for the Northgate Shopping Centre.

b. That approximately 50,000 people would pass through the Northgate Shopping Centre per week.

c. That a Tattslotto agency would be situated in close proximity to the shop.

d. That nearly all the shops at the Northgate Shopping Centre had been let and that only three were then available for lease."[3]

(b) The lessee's contentions were proved correct as:

a. "No Coles Super K store or Venture store had been confirmed as tenants in the Northgate Shopping Centre.

b. The defendant had no reasonable basis for believing and did not in fact believe that approximately 50,000 people would pass through the Northgate Shopping Centre per week and the pedestrian traffic flow through the Northgate Shopping Centre was considerably less than 50,000 people per week.

c. There was never any Tattslotto agency in close proximity to the shop.

[33] Stocks v Retirement Benefits Fund Board [2007] TASSC 8 at [4].

d. Over half the shops in the Northgate Shopping Centre had not been leased." [4]

The brief salient facts of the case are listed below:

**Facts of Case[5] - *Stocks v Retirement Benefits Fund Board* [2007] TASSC 8**

**('Stocks's case')**

- This case concerned the leasing of a shop in a large shopping centre at a time when the shopping centre was not yet ready for occupation.

- The leasing agent (Edwards Windsor) during preliminary discussions with the lessee made important representations regarding the prospective occupants and the leasing of the shopping centre.

- At the time of time of making those representations, those representations were false and ultimately turned out to be incorrect. Importantly, at the time of making the representations the leasing agent had knowledge that those representations were untrue.

- The lessees quickly realised the misrepresentations and their adverse consequences when they commenced trading.

- The lessees ultimately closed business within a few months.

- The leased property was vacated and the lessor and the leasing agent was sued.

- The lessee's claim was successful.

The Honourable Court noted some general interesting general propositions by matter as a history of this dispute at [27] to [28] as follows:

> **27** *A consideration of the issue of whether the defendant's agents made the pleaded representations needs to bear in mind that all those involved in this case understood and accepted that for a shopping centre such as Northgate to be successful for the tenants and thus, of course, for the owner, certain things were of fundamental importance.*
>
> • *There must be two, or perhaps three, major stores including a large supermarket with a "variety component".*
>
> • *There must be a mix of tenancies, described by Mr Edwards (the managing agent) as "somewhat of a science", and about 50 per cent of the*

[44] Stocks v Retirement Benefits Fund Board [2007] TASSC 8 at [4].

[5] See the judgment for detailed facts - *Stocks v Retirement Benefits Fund Board* [2007] TASSC 8.

*specialty shops must be operated by those who operate similar businesses either interstate or intrastate.*

• *The specialty shops must be grouped into a food hall or section, a fashion hall, and a general area.*

**28** *The principle on which the centre would operate was that the major tenants would occupy relatively large areas but pay a relatively low rental while the smaller, or specialty tenants, would occupy smaller areas and pay a relatively high rental. The major tenants attract the shoppers and in return, the specialty tenants subsidise the major tenants' rental. The "bottom" line was the attraction of a high volume of pedestrian traffic through all parts of the shopping centre.*

**Other observations**

- If the matter was litigated pursuant to NSW law, then it is submitted that section 10(1) of the RLA applies.

- The claim for damages in ***Stocks's case*** did not include loss of profits, but rather the claim for damages included losses in relation to the setting up the business, the lessee's labour, rent, legal costs, vexation and distress, and interest.

  It is noted that the claim for loss of profits would have been subject to proof.

- In most lease claims for misrepresentation, a statutory claim is made in the alternative (at the time would have been the *Trade Practices Act* 1974 (Cth)).

## Scenario B - Damages arising promise to exercise option for renewal & relief against forfeiture

**Exercise of option for renewal**

- There are formal requirements for the exercise of an option for renewal in a commercial lease.

- There is a view that the exercising of options should be prepared by the lessee's solicitor to ensure compliance with the law and attend to service of the notice.

- Under section 133E of the *Conveyancing Act* 1919 (NSW), a lessor may endeavour to rely on lessee's breaches of lease covenants (agreements) by serving a prescribed notice.

## (3) LEASING DISPUTES – CASE STUDY - DEFAULT and the right for relief from forfeiture - *Constantine v Saunders* [2007] NSWSC 250


- Every well-drawn commercial lease will have a mechanism in the event of a default. The act of default will include the following:
    - If the lessee is a corporation, the placing of the corporation lessee into liquidation, receivership or official management;
    - Failure to fulfil or observe any other conditions or covenants or restrictions;
    - Failure to pay rent for a specified period (whether the rent is demanded);
    - Failure to pay upon demand any other moneys payable pursuant to the lease;
    - Failure to effect repairs.
- All these general and specific matters will constitute default, which will expressly give the lessor a right to forfeit the lease. The right of forfeiture is usually exercised by the lessor making unequivocal demand for possession, entering into possession of the premises and ejecting the lessee (if necessary), from the premises.
- The drafting of a forfeiture clause should be capable of coming into operation where there is a break of either a positive or negative covenant, hence the phrase "*breach*

*of covenant*" clause. Whether the default and the breach of covenant gives rise to a right to the lessor to sue for substantial damages or nominal damages depends upon whether the particular covenant breached is essential, and thereby the breached covenant needs to be construe in the context of the whole commercial lease agreement.

## Relief Against Forfeiture

- Relief against forfeiture is ordinarily given to a lessee in circumstances where the breach of the lease is the failure to pay rent. Relief is ordinarily granted provided the rent is paid: see *Wynsix Hotels (Oxford St) Pty Limited v Toomey [2004] NSWSC 236; Mineaplenty Pty Limited v Trek 31 Pty Limited [2006] NSWSC 1203 and Wilkinson v S & S Gikas Pty Limited [2006] NSWSC 1314.*

  As Campbell J said in Wilkinson (at [23]):

  > "Provided the lessor and other persons concerned can be put in the same position as before the forfeiture or re-entry, the court will usually grant relief against forfeiture upon payment of rent, costs, interest and other expenses."

- In summary, the reasons granting the relief against forfeiture of a lease:

  - in the event of a breach, the forfeiture clause is drafted in manner designed primarily as a security to ensure the breach will not occur;

  - if forfeiture can be achieved by intervention of a court, then there is a good reason (procedural fairness) for not allowing the forfeiture to take effect, but rather, let the Court processes evoke themselves once the relevant application is made by the lessor: see the case of *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 (*'**Macquarie's case**'*) at [355].

    In Macquarie's case, the appeal and cross-appeal arose from proceedings in which the appellant (Macquarie) sued the respondent (Area Health) for recovery of possession of sites near Royal Prince Alfred Hospital (RPAH), and in the alternative for relief against forfeiture and/or damages; and in which Area Health cross-claimed for certain debts and for damages.

- **Take Away Point**: If the breach permitting forfeiture is slight, equity will acknowledge this. Normally a mere breach of covenant on part of the lease will normally never amount to repudiation of the lease.

## CASE STUDY – *Constantine v Saunders* [2007] NSWSC 250

**ORDERS**:

(1) The orders sought in paras 1 and 2 of the plaintiff's notice of motion filed 12 February 2007 are refused.

(2) **On the defendant's notice of motion, order that the defendant be granted relief against forfeiture** subject to the following conditions:

(a) that the defendant pay to the plaintiff's solicitors within seven days the sum of $16,568.90 for unpaid rent and interest calculated up to 19 March 2007;

(b) that the defendant pay the plaintiff's costs of the proceedings before me within twenty-one days of such costs being agreed, or in default of agreement within twenty-one days of their assessment and the issue of a certificate; (c) that the defendant pay the plaintiff's costs the subject of the agreement noted by the court on 11 December 2006 within twenty-one days of the determination of the amount pursuant to the procedure for their determination expressed in para 2 of that agreement.

**DECISION DATE**: 23 March 2007

**BEFORE**: Supreme Court of NSW - Studdert J

**FACTS** [6]

- The plaintiff, Mary Constantine, is the owner of premises including lock-up shops known as 112B and 112C Burton Street, Darlinghurst (the subject premises).

- The subject premises were leased on 21 February 2005 to Keghouse Pty Limited but in the following month, **Keghouse assigned the lease, with the plaintiff's consent, to the defendant, Basil Charles Sanders.**

- The defendant (lessee) paid $128,000 for the purchase from Keghouse and the lease has one year to run, with a three year option.

- Since 24 March 2005, the date upon which the defendant entered into possession of the premises, he has been conducting there a café known as the "Truck Café". The evidence establishes that the defendant has experienced difficulty in paying the rent due under the lease on the due date. Rent due on 24 November 2005 was not paid when required and payments were consistently late thereafter. As at 4 May 2006 arrears of rent totalled $15,725.37 after a payment of $3,551.67 made that day.

[6] See the judgment - *Constantine v Saunders* [2007] NSWSC 250

- There has been litigation since that time:

  (a) There were proceedings in Equity which began when the defendant sought an injunction to restrain the plaintiff from changing the locks.

  (b) There was a mediation agreement on 17 May 2006 and it was agreed at that time that the defendant was in arrears in the sum of $12,225.37. It was agreed that he would make payments totalling $20,328.71 by 3 July 2006. That was to bring the rent up to 7 August 2006.

- Unhappily, default continued to occur and as at 3 July 2006 the arrears amounted to $10,032.95.

- **On 1 August 2006 the plaintiff commenced proceedings in this court by way of statement of claim seeking to recover possession of the premises and an order for payment of arrears of rent.** When the defendant failed to file a defence by the due date the plaintiff sought default judgment, and that was entered on 31 October 2006.

- On 9 November 2006 notice to vacate was issued by the Sheriff and the defendant was called upon to vacate by 23 November 2006.

- On 23 November 2006, an ex parte injunction was granted to the defendant to restrain the plaintiff from taking possession of the premises. On 29 November 2006 further consent orders were agreed to which required the defendant to pay $22,000 by 6 December 2006 and the matter was listed in the Possession List on 7 December 2006.

- The next significant listing was before Rothman J on 11 December 2006. On that date his Honour made the following orders:

  "1. That execution of the writ of possession be stayed until further order.

  2. That the defendant's notice of motion seeking an indefinite stay of execution, an application filed on 23 November 2006, be dismissed.

  3. An order that the defendant be granted relief against forfeiture of the lease.

  4. Liberty to apply on seven days' notice granted to both parties."

- The court also noted an agreement reached at that time between the parties, and the terms of that agreement were expressed as follows:

  "1. The defendant agrees to pay the plaintiff's costs.

2. The parties agree that they will adopt the following procedure to determine the amount of the plaintiff's costs, and that they will sign all documents and perform all acts reasonably necessary to give effect to that procedure:

(a) the plaintiff's solicitors shall provide itemised bills of costs to the defendant's solicitors within 14 days;

(b) within 7 days of receiving the plaintiff's itemised bills of costs the defendant's solicitors shall notify the plaintiff's solicitors which of the bills of costs the defendant agrees to pay in full and which of the bills of costs he disputes;

(c) in respect of all bills of costs which the defendant agrees to pay, he shall make payment to the plaintiff's solicitors within 21 days of notifying the plaintiff's solicitors of such agreement;

(d) in respect of all bills of costs which the defendant does not agree to pay:

(i) such costs shall, in the first instance, be referred to Mr Gordon Salier to mediate:

(A) whether the costs were reasonably incurred within the meaning of clause 5.1 of the lease; and

(B) the quantum of those costs.

The defendant agrees to pay Mr Salier's fees of such mediation;

(ii) should either party be dissatisfied with the determination of Mr Salier, the parties shall, within 7 days of such determination, proceed to costs assessment in relation to the same matters.

The defendant agrees to sign all documents and perform all acts reasonably necessary in order to facilitate the expeditious determination of any such mediation and costs assessment;

(e) in respect of all bills of costs which are determined by the mediator or the costs assessment under sub-paragraph (d), the defendant shall pay those costs to the plaintiff's solicitors within 21 days of receiving a certificate of the mediator (that is not subsequently the subject of costs assessment) or a Costs Assessment Certificate.

3. The defendant shall:

(a) pay $1,500 to the plaintiff by 11.00am on 13 December 2006;

(b) pay the rent for December 2006 on or before 22 December 2006; and

(c) pay all rent and comply with all other obligations under the lease, including payment of rent going forward by the 7th of each month, the first such payment being made on or before 7 January 2007.

4. Provided that the defendant complies with his obligations under paragraphs 1, 2 and 3, the plaintiff consents to the Orders made. The plaintiff is entitled to re-list these proceedings on 7 days' notice in the event of any breach by the defendant of his obligations under paragraphs 1, 2 and 3.

5. In this agreement, the following defined terms shall have the following meaning:

(a) 'plaintiff's costs' means the plaintiff's reasonable legal costs relating to the default pleaded in the Statement of Claim;

(b) 'lease' means the lease described in paragraphs 4 and 5 of the affidavit of the plaintiff sworn 31 July 2006."

- It is common ground that the defendant continued to be in arrears. Rent was not paid when it fell due in January or February 2007. It is also common ground that the defendant breached the agreement noted by Rothman J by failing within seven days of receiving the plaintiff's itemised bill of costs to notify the plaintiff's solicitors which items he agreed to pay in full and which items he disputed: see para 2(b) of the agreement noted by the court on 11 December 2006.

- The continuing failure to pay rent prompted the plaintiff to file the notice of motion presently before the Court, and the registrar referred the matter to me as the Duty Judge on 26 February 2007. The Court heard argument on that date, and further argument on 28 February 2007 before adjourning the matter for further hearing on a date to be fixed. That further hearing occurred on 16 and 19 March 2007.

**ISSUES TO BE DETERMINED** [7]

- Ms Obrart, who appeared for the defendant, submitted that once Rothman J made the order granting relief against forfeiture, that order had the effect that the lease was restored: see *Howard v Fanshawe* (1895) 2 ChD 581. It was submitted that there had been no effective termination of that lease as restored and that the plaintiff's application was misconceived.

- In any event, Ms Obrart submitted, the defendant tendered the arrears in cash on 26 February 2007, and even if the Court had the power to lift the stay the exercise of that power was discretionary, and in the circumstances the Court ought to decline to exercise that power.

[7] See the judgment - *Constantine v Saunders* [2007] NSWSC 250

- Ms Obrart alternatively relied on the notice of motion seeking relief against forfeiture in the event that the Court determined that the lease had been terminated.

- Mr Kasep (for the plaintiff) submitted that what was required to determine the lease was "*some unequivocal act*" indicating the intention of the lessor to avail herself of the option to determine the lease: see *Price v Mayman* [1948] SAStRp 24; (1948) SASR 241 and in particular the judgment of Napier CJ at 246:

> *"...The proviso for re-entry gives the lessors the option to determine the lease, and if they elect that it shall end, it is ended. What is required for that purpose is some unequivocal act, indicating the intention of the lessors to avail themselves of the option given to them. (Roberts v Davey [1833] EngR 542; (1833) 4 B & Ad. 664, at p 671[1833] EngR 542; , (110 ER 606, at p 608); Jones v Carter [1846] EngR 856; (1846) 15 M & W 718 (153 ER 1040).) Up to that point the tenant is lawfully in possession under the lease, but after that he is a trespasser from whom mesne profits are recoverable (Elliott v Boynton ((1924) 1 Ch. 236 at p 246).*

- Speaking generally, the election is evidenced by the commencement of proceedings to recover possession, and, in the eye of the law, this has precisely the same effect as re-entry (*Grimwood Mosse* ((1872) LR 7 CP 360 at p 364); Woolwich Equitable Building Society v Preston ((1938) 1 Ch 129, at p 131)). But it is sufficient if the landlord does what he can to indicate his election to put an end to the lease (*Serjeant v Nash, Field & Co.* ((1903) 2 KB 304 at p 310); *Commissioners of Works v Hull* ((1922) 1 KB 205), and this is so whether possession is recovered or not, subject to relief against forfeiture which restores the lease as though it had never been determined (*Dendy v Evans* ((1910) 1 KB 263))."

- Mr Kasep submitted that the notice of motion on which he was proceeding constituted an unequivocal act conveying the intention of the plaintiff to terminate the lease and to enforce the right to possession.

- The Court considered the following questions:

  (i) Should the stay of the writ of possession be lifted?

  (ii) Should the defendant be granted relief against forfeiture?

- Held (per Studdent J)

  - The principle issue related to the lessee's claim for relief against forfeiture. The facts in this case represents a fairly persistent case of non-payment of rent and the lessee's various procedural litigation steps to prevent termination

resulted in considerable time for the lessee.

- Ultimately, relief against forfeiture was granted to the lessee, although on strict terms. The Court accepted the representations from the defendant that problems accounting for past defaults were dependent upon payments being received in his computer software business, payments which were made at irregular intervals.

- The principles for grant of relief against forfeiture are usefully summarised in the judgment. A lessee with an inability to pay and catch up with arrears of rent will not, in the long-term, secure relief against forfeiture.

- **Practical Tip for lessees** – if you wish to sell your business, endeavour to assign the lease and advise in writing the lessor of that intention.

## Abandonment

- A lessee's act of abandonment must amount to repudiation of the lease for there to be a right to substantiate damages.

- The abandonment must be permanent, rather than temporary to amount to repudiation: See *DHK Retailers Pty Limited v Leda Commercial Properties Pty Limited [1993] FCA 171 (21 April 1993) ('**DHK Retailers's case**').*

- In *DHK Retailers's case,* the facts in this case was that the lessee closed temporarily for the purposes of refurbishment and renovation. The lessee was in breach of the obligation to conduct the business during trading hours, the case was complicated by the fact the lessee argued that he did not evince an intention to abandon the premises permanently.

- The Court determined that the lessor was entitled to re-enter and sue for the recovery damages for the breach as the lessee had chosen to close the business and not trade when the lessee had covenanted to trade and that was a breach of an essential term of the commercial lease.

- On appeal, the Court dismissed the lessee's appeal and opined that:

  *[35] Counsel for the appellant submitted that the notice of re-entry depended on a different ground of default from what was specified in the notice of breach. It is true that the notice of re-entry highlighted the fact that the lessee had allegedly vacated or abandoned the demised premises, a different matter. But the notice did also rely on the fact that the lessee had failed to open the shop for business in accordance with its obligation under the sub-lease. This was the ground taken in the notice of breach. Anyway this is irrelevant. If the lessor was not obliged to give notice of re-entry, any inadequacies in the notice actually given cannot matter*.

*[37] ……We must, of course, consider this appeal on the basis of the version of the facts most favourable to the appellant (the party against whom summary judgment was sought). Even so, we are satisfied that the sub-lease was properly terminated and that the lessor, Leda, became entitled under cl.15.08 to recover damages for breach. Being so satisfied, we are of the view that no purpose would be served by allowing the appellant to defend the claim generally in order to re-agitate the issues raised on the appeal. Although we have reached our conclusion by a route different from that travelled by Higgins J, we are of the opinion that his order was correct.* ***The appeal is dismissed with costs****."*[8]

[8] *Re Dhk Retailers Pty Limited v Leda Commercial Properties Pty Ltd* [1993] FCA 171 per Neaves, Wilcox and Miles JJ.

## (4) LEASING DISPUTES –SURRENDER


- A surrender of a lease is effectively a disposal of an interest in land. It is in effect, an agreement by the parties that the lease is ended.

- A "surrender" of lease is the process of ending a lease other than because of termination for breach, or forfeiture, by which the Tenant, yields-up their estate to the person who has the next immediate estate in reversion – this person is usually, the lessor.

- In some instances, a lease can expressly provide for the circumstances in which a surrender can occur.

  For example:

  - A "break clause" or

  - Where the property has been damaged and either party is entitled to end the lease.

- Pursuant to section 23C(1)(a) of the *Conveyancing Act* 1919 (NSW), a surrender of a lease would require written instructions signed by the lessee or authorised agent.

- Implicit in a lessee's covenant to surrender a lease is the agreement by the surrendering party to give vacant possession – accordingly, the lessee's estate is immediately determined:

  - A lessor is entitled to rent which has accrued and fallen due before the surrender and remains unpaid at the date of the surrender – the personal

covenant for payment is deed to be independent of the estate in the property.

- Generally (without consent), a surrender will not release the lessee from liability for breaches of the covenant.

- The lessee may lose rights expressed in the lease – the lessee needs to obtain urgent legal advice about the following matters:

  - Ability to remove fixtures

  - Ability to re-enter the property to collect personal chattels.

- Usually, a surrender of lease is documented by an agreement for surrender of lease which in NSW is required to be executed as a deed (see section 23B of the *Conveyancing Act* 1919 (NSW)).

- **Practical Issues:**

  - At law, a surrender will release the parties for their respective obligations, arising from and from the surrender.

  - **Usually explicitly agreed, parties will not be released from liability for breaches of covenants which occurred before the surrender**

## (5)HYPOTHETICAL CASE STUDY

**FACTS:**

Our client ('**Findway Pty Limited**') is the plaintiff – Counsel's instructing solicitors act for the plaintiff in the proceedings. Our client has instructed us to file a statement of claim, the claim is for loss of rent, loss of outgoing and also capital loss as a result of the first defendant ('**Tenant Pty Limited**') exercising an option under a lease and subsequently vacating the premises and ceasing to pay the rent and outgoings due pursuant to the commercial lease.

Our client has been unable to relet the premises and the property was subsequently sold with vacant possession. The mortgagee ('Large Bank') placed pressure on our client due to arrears in the mortgage which could not be maintained with the loss of the rental income pursuant to lease. Our client was forced to sell the property under pressure from the mortgagee.

**TASK:**

- Draft a statement of claim, pleading the material facts and seeking damages.
- Draft a defence on behalf of the three defendants.

Form 3A (version 5)

UCPR 6.2

# STATEMENT OF CLAIM[9]

| **COURT DETAILS** | |
|---|---|
| Court | DISTRICT |
| Division | GENERAL |
| List | CIVIL |
| Registry | SYDNEY |
| Case number | 2016/111111 |

| **TITLE OF PROCEEDINGS** | |
|---|---|
| Plaintiff | **Findway Pty Limited** |
| First Defendant | **Tenant Pty Limited trading as Blog** |
| Second Defendant | **Bruce Smith** |
| Third Defendant | **Roger Smith** |

| **FILING DETAILS** | |
|---|---|
| Filed for | **Plaintiff** |
| Legal representative | Solicitor on record – James Partner |
| Legal representative reference | James Partner |
| Contact name and telephone | [name] [telephone] |
| Contact email | jporter@porterlawyers.com |

**TYPE OF CLAIM**

**Claim on Guarantee**

[9] The names are for illustrative purposes only.

[on separate page]

[Note: If the completed RELIEF CLAIMED will fit in the available space appearing after TYPE OF CLAIM on the first page of this form, you may delete the page break, include the RELIEF CLAIMED on the first page and start this page with PLEADINGS AND PARTICULARS.]

## RELIEF CLAIMED

1 An order that the Defendant/s pay the Plaintiff the sum of $228,509.54

2 Interest at the prescribed rate from 26/06/2013 to 10/06/2015 being $1,100.68 and continuing at $41.04 per day pursuant to section 100 of the *Civil Procedure Act* 2005 (NSW).

3 Costs

| | | |
|---|---|---|
| a. | Amount of Claim | $228,509.54 |
| b. | Interest | $1,100.68 |
| c. | Filing Fees | $1,220.00 |
| d. | Service Fees | $79.00 |
| e. | Solicitors Feess | $1,839.30 |
| | **TOTAL CLAIMED** | **$232,748.52**[10] |

## PLEADINGS AND PARTICULARS

1 The Plaintiffs were at all material times the registered proprietors of the property known as Unit 9 296 Old Head Road, Jumptown, NSW 2111, being the all of the land contained in Folio 79/SP6783 ("**the premises**").

2 The Plaintiffs mortgaged the premises to the Bank of South Australia Limited to finance the purchase of the premises ("**the mortgage**").

3 By an agreement made on or about 1 February 2011, the Plaintiff leased to the First Defendant the premises for a term of three years subject to the terms of the retail lease ("**the lease**").
Particulars

a. All the necessary disclosure statements were exchanged in compliance with Part of the *Retail Leases Act* 1994 (NSW).

b. A lease was entered into in accordance with section 16 of the *Retail Leases Act* 1994 (NSW), the term was three years with an option of renewing for an additional two years.

[10] The numbers used in this case study are for illustrative purposes only.

4 The material terms of the lease were:

a. The lease commenced 1 February 2011;

b. The term of the lease was three years with an option for a further two years;

c. The rent was $34,000.00 per year to be increased each year by CPI + 1%.

d. The first defendant was to pay 100% of the outgoings.

5 By Clause 23 of the lease the Second Defendant and Third Defendant guaranteed the performance by the Frist Defendant of all the First Defendant's obligations under the lease ("**the guarantee**").

6 On 29 October 2012 the First Defendant exercised the option to renew the lease ("**the agreement to lease**").

7 In breach of the lease, the First Defendant failed to pay the Strata Levies, being outgoings due pursuant to the lease, from 1 January 2013 to 31 December 2013.

8 The First Defendant vacated the premised on 20 February 2014.

9 In breach of the agreement to lease the First Defendant ceased to pay rent from 4 March 2014.

10 In breach of the agreement to lease the First Defendant failed to pay outgoings from 1 March 2014.

11 By reason of the failure by the First Defendant to pay the rent and outgoings due pursuant to the lease and the agreement to lease the Plaintiffs were unable to pay the mortgage payments due to the Bank of South Australia Limited.

12 On 16 December 2014 and by reason of their failure to pay the mortgage payments the Plaintiff was forced to sell the premises.

13 On 16 August 2014 the Bank of South Australia Limited served on the Plaintiff a Notice of Demand requiring payment of the total amount due under the mortgage within seven days of the date of the Demand ("**the Demand**").

14 On 16 December 2014 a contract for sale of the premises was exchanged for a sale price of $990,909.00 plus GST.

**Particulars**

a. The premises was widely advertised.

b. The premises was listed with a reputed agent.

c. The premises was auctioned with an undisclosed reserve.

d. The reserve was in line with market expectations and market appraisals.

e. The property was sold under the reserve price on the day of the auction but after the auction by negotiation with the highest bidder.

15 The sale of the premises settled on 20 January 2015.

16 By reasons of the First Defendant's breach of the lease and the agreement to lease the Plaintiff has suffered loss and damage totalling $228,509.54.

**Particulars**

a. Rent from 4 March 2014 to 19 January 2015 totalling $22,465.20

b. Outgoings from 1 March 2014 to 19 January 2015 totalling $15,931.14.

c. Damages arising from the forced sale of the premises at an under market price $190,113.20.

17 On 12 February 2015 the Plaintiff demanded in writing that the Second Defendant and the Third Defendant pay the arrears in rent and outgoings, and the damages within 14 days of the date of the demand.

18 In breach of the guarantee the Second Defendant and the Third Defendant have failed to pay the Plaintiff the arrears of rent and outgoings and the damages.

19 The Plaintiff claims from the First, Second and Third Defendants the sum of $228,509.54.

## SIGNATURE OF LEGAL REPRESENTATIVE

#This statement of claim does not require a certificate under section 347 of the Legal Profession Act 2004.

#I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff[s] that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity [eg solicitor on record, contact solicitor]

Date of signature

## NOTICE TO DEFENDANT

**If you do not file a defence within 28 days of being served with this statement of claim:**

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

## HOW TO RESPOND

**Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

1 **If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.

**2** **If money is claimed, and you believe you owe the money claimed,** by:

- Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
- Filing an acknowledgement of the claim.
- Applying to the court for further time to pay the claim.

**3** **If money is claimed, and you believe you owe part of the money claimed**, by:

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.lawlink.nsw.gov.au/ucpr or at any NSW court registry.

**REGISTRY ADDRESS**

Street address

Postal address

Telephone

[on separate page]

[Do not include the affidavit verifying in Local Court proceedings. See Guide to preparing documents for other circumstances where affidavit not required.]

**#AFFIDAVIT VERIFYING**

| | |
|---|---|
| Name | Sarah Believer, Director of Findway Pty Limited |
| Address | Level 2, 380 Smith Street, Sydney NSW 2000 |
| Occupation | Property Investor |
| Date | 2 February 2016 |

I say on oath:

1 I am the plaintiff.

2 I believe that the allegations of fact in the statement of claim are true.

#SWORN #AFFIRMED at

Signature of deponent _____

Name of witness

Address of witness

Capacity of witness [#Justice of the peace #Solicitor #Barrister #Commissioner for affidavits #Notary public]

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent)**:

1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]

#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*

2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]

#I have confirmed the deponent's identity using the following identification document:

_____

Identification document relied on (may be original or certified copy) †

Signature of witness _____

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

---

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[†"Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

**Form 7A (version 4)**

UCPR 14.3

# DEFENCE

## COURT DETAILS

| | |
|---|---|
| Court | DISTRICT |
| #Division | GENERAL |
| #List | CIVIL |
| Registry | SYDNEY |
| Case number | 2016/111111 |

## TITLE OF PROCEEDINGS

| | |
|---|---|
| Plaintiff | **Findway Pty Limited** |
| First Defendant | **Tenant Pty Limited trading as Blog** |
| Second Defendant | **Bruce Smith** |
| Third Defendant | **Roger Smith** |

## FILING DETAILS

| | |
|---|---|
| Filed for | **Bruce Smith, Second Defendant** |
| Legal representative | [solicitor on record] [firm] |
| Legal representative reference | [reference number] |
| Contact name and telephone | [name] [telephone] |
| Contact email | [email] |

## HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at [time, date and place to be inserted by the registry]

## PLEADINGS AND PARTICULARS

1 The Second Defendant admits the facts alleged in paragraph 1 of the Statement of Claim.

2 The Second Defendant does not know and does not admit the facts alleged in paragraph 2 of the Statement of Claim.

3 The Second Defendant admits the facts alleged in paragraph 3 of the Statement of Claim.

4 The Second Defendant admits the facts alleged in paragraph 4 of the Statement of Claim.

5 The Second Defendant admits the facts alleged in paragraph 5 of the Statement of Claim.

6 The Second Defendant does not admit paragraph 6 of the statement of claim and says that, if, which is not admitted, the matters pleaded in paragraph 7 of the statement of claim are correct, then as at the date of the service of the notice to renew, the First Defendant had no right to exercise the option to renew the lease and then said notice was void and of no effect.

7 The Second Defendant does not admit the facts alleged in paragraph 7 of the statement of claim.

8 The Second Defendant admits the facts alleged in paragraph 8 of the statement of claim.

9 The Second Defendant admits that no rent was paid after 4 March 2014 but does not otherwise admit the facts alleged in paragraph 9 of the statement of claim.

10 The Second Defendant repeats paragraph 6 above but otherwise does not admit the facts alleged in paragraph 10 of the statement of claim.

11 The Second Defendant does not know and cannot admit the facts alleged in paragraph 11 of the statement of claim and repeats paragraph 6 and 9 above.

12 The Second Defendant admits the plaintiff sold their premises on 16 December 2014 but does not otherwise admit the facts alleged in paragraph 12 of the statement of claim.

13 The Second Defendant admits the facts alleged in paragraph 13 of the statement of claim.

14 The Second Defendant admits the facts alleged in paragraph 14 of the statement of claim.

15 The Second Defendant admits the facts alleged in paragraph 15 of the statement of claim.

16 The Second Defendant denies the facts alleged in paragraph 16 of the statement of claim.

17 The Second Defendant does not admit the facts alleged in paragraph 17 of the statement of claim.

18 As to paragraph 18 of the statement of claim, the Second Defendant says:

a. That the obligation of the Second Defendant under clause 23.3 of the lease is confined to legal obligations under the lease with which the First Defendant has failed to comply.

b. Does not admit that the First Defendant has failed to comply with any legal obligations under the lease.

c. Denies that if, which is not admitted, the plaintiff have incurred losses in connection with the sale of the premises, that any such losses fall within the guarantee in clause 23.3.

19 The Second Defendant denies the facts alleged in paragraph 19 of the statement of claim.

20 In further to the facts alleged in particulars (a) and (b) of paragraph 16 of the plaintiff's statement of claim, the Second Defendant says that the plaintiff is not entitled to the whole of the damage claimed therein as the plaintiff has failed to mitigate the loss.

21 In further to the facts alleged, in particular (c) under paragraph 16 of the statement of claim, the Second Defendant says that the damage alleged to have arisen from the forced sale of the premises (which is not admitted), is too remote, as it is not something the Second Defendant should have contemplated as occurring in the usual course of events as a consequence of the alleged breaches pleased in paragraph 7, 9, 10 of the plaintiff's statement of claim when it entered the lease.

22 In the alternative, in further answer to the facts alleged, in particular (c) under paragraph 16 of the plaintiff's statement of claim, the Second Defendant says that the plaintiff's damage claim therein is too remote, in that, on the information available to the Second Defendant when the lease was entered into, the Second Defendant, did not know that such damage was likely to result from the Second Defendant's alleged breaches of the lease pleaded in paragraphs 7, 9 and 10 of the plaintiff's statement of claim, such that the loss of the kind described therein should have been within the reasonable contemplation of the Second Defendant.

## SIGNATURE OF LEGAL REPRESENTATIVE

#This defence does not require a certificate under section 347 of the Legal Profession Act 2004.

#I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

Capacity [eg solicitor on record, contact solicitor]

Date of signature

[on separate page]

[Do not include the affidavit verifying in Local Court proceedings. See Guide to preparing documents for other circumstances where affidavit not required.]

## #**AFFIDAVIT VERIFYING**

Name

Address

Occupation

Date

I [#say on oath #affirm]:

3 #I am the [first] defendant.

#I am [give details of the capacity of the person making the affidavit and the facts that qualify the person to make the affidavit].

4 I believe that the allegations of fact contained in the defence are true.

5 I believe that the allegations of fact that are denied in the defence are untrue.

6 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

#SWORN #AFFIRMED at

Signature of deponent _____

Name of witness

Address of witness

Capacity of witness [#Justice of the peace #Solicitor #Barrister #Commissioner for affidavits #Notary public]

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent)**:

1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]

#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*

2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]

#I have confirmed the deponent's identity using the following identification document:

_____

Identification document relied on (may be original or certified copy) †

Signature of witness _____

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[†"Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

[on separate page]

[Do not include this section if you have previously given this information to the court in these proceedings.]

## #FURTHER DETAILS ABOUT FILING PARTY

### Filing party

| | |
|---|---|
| Name | |
| Address<br>[The filing party must give the party's address.] | #[unit/level number] #[building name]<br>[street number] [street name] [street type]<br>[suburb/city] [state/territory] [postcode]<br>#[country (if not Australia)] |
| #Frequent user identifier | [include if the filing party is a registered frequent user] |

### Legal representative for filing party

| | |
|---|---|
| Name | [name of solicitor on record] |
| Practising certificate number | |
| Firm | [name of firm] |
| #Contact solicitor | [include name of contact solicitor if different to solicitor on record] |
| Address | #[unit/level number] #[building name]<br>[street number] [street name] [street type]<br>[suburb/city] [state/territory] [postcode] |
| DX address | |
| Telephone | |
| Fax | |
| Email | |
| Electronic service address | [#email address for electronic service eg service@emailaddress.com.au #Not applicable] |

[on separate page]

## #PARTY DETAILS

[Include only if more than two plaintiffs and/or more than two defendants.]

### PARTIES TO THE PROCEEDINGS

| **Plaintiff[s]** | **Defendant[s]** |
|---|---|
| [name] [role of party eg first plaintiff] | [name] [role of party eg first defendant] |
| [repeat as required for each additional plaintiff] | [repeat as required for each additional defendant] |

## FURTHER DETAILS ABOUT PLAINTIFF[S]

### [First] plaintiff

| | |
|---|---|
| Name | |
| Address<br>[The filing party must give the party's address.] | #[unit/level number] #[building name]<br>[street number] [street name] [street type]<br>[suburb/city] [state/territory] [postcode]<br>#[country (if not Australia)] |
| #Frequent user identifier | [include if the plaintiff is a registered frequent user] |

[repeat the above information as required for the second and each additional plaintiff]

### Legal representative for plaintiff[s]

| | |
|---|---|
| Name | [name of solicitor on record] |
| Practising certificate number | |
| Firm | [name of firm] |
| #Contact solicitor | [include name of contact solicitor if different to solicitor on record] |
| Address | #[unit/level number] #[building name]<br>[street number] [street name] [street type]<br>[suburb/city] [state/territory] [postcode] |
| DX address | |
| Telephone | |

Fax

Email

Electronic service address [#email address for electronic service eg service@emailaddress.com.au #Not applicable]

## DETAILS ABOUT DEFENDANT[S]

**[First] defendant**

Name

Address #[unit/level number] #[building name]

[street number] [street name] [street type]

[suburb/city] [state/territory] [postcode]

#[country (if not Australia)]

[repeat the above information as required for the second and each additional defendant]

**Form 7A (version 4)**

UCPR 14.3

# DEFENCE

## COURT DETAILS

| | |
|---|---|
| Court | DISTRICT |
| #Division | GENERAL |
| #List | CIVIL |
| Registry | SYDNEY |
| Case number | 2016/111111 |

## TITLE OF PROCEEDINGS

| | |
|---|---|
| Plaintiff | **Findway Pty Limited** |
| First Defendant | **Tenant Pty Limited trading as Blog** |
| Second Defendant | **Bruce Smith** |
| Third Defendant | **Roger Smith** |

## FILING DETAILS

| | |
|---|---|
| Filed for | **Tenant Pty Limited, First Defendant** |
| Legal representative | [solicitor on record] [firm] |
| Legal representative reference | [reference number] |
| Contact name and telephone | [name] [telephone] |
| Contact email | [email] |

## HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at [time, date and place to be inserted by the registry]

## PLEADINGS AND PARTICULARS

1 The First Defendant admits the facts alleged in paragraph 1 of the statement of claim.

2 The First Defendant does not know and does not admit the facts alleged in paragraph 2 of the statement of claim.

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6 The First Defendant does not admit paragraph 6 of the plaintiff's statement of claim and says that, if, which is not admitted, the matters pleaded in paragraph 6 of the statement of claim are correct, then as at the date of service of the notice to renew, the First Defendant had no right to exercise the option to renew the lease and the said notice was void and of no effect.

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9 The First Defendant admits that no rent was paid after 4 March 2014 but does not otherwise admit paragraph 9 of the statement of claim.

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13 The First Defendant admits the facts alleged in paragraph 13 of the statement of claim.

14 The First Defendant admits the facts alleged in paragraph 14 of the statement of claim.

15 The First Defendant admits the facts alleged in paragraph 15 of the statement of claim.

16 The First Defendant denies the facts alleged in paragraph 16 of the statement of claim.

17 The First Defendant does not admit the facts alleged in paragraph 17 of the statement of claim.

18 The First Defendant does not plead to the facts alleged in paragraph 18 of the statement of claim.

19 The First Defendant repeats paragraphs 1 to 18 above and otherwise does not plead to paragraph 19 of the statement of claim.

20 In further answer to the facts alleged in particulars (a) and (b) of paragraph 16 of the statement of claim, the First Defendant says that the Plaintiff are not entitled to the whole of the damage claimed therein as the plaintiffs' have failed to mitigate their loss.

21 In further answer to the facts alleged in particular (c) under paragraph 16 of the statement of claim, the First Defendant says that the damage alleged to have arisen from the forced sale of the premises (which is not admitted), is too remote, as it is not something that the First Defendant should have contemplated as occurring in the usual course of the events as a consequence of the alleged breached pleaded in paragraphs 7, 9 and 10 of the plaintiff's statement of claim when it entered the lease.

22 In the alternative, in further answer to the facts alleged in particular (c) under paragraph 16 of the plaintiff's statement of claim, the First Defendant says that the plaintiffs' damage claimed therein is too remote, in that, on the information available to the First Defendant when the lease was entered into, the First Defendant, did not know that such damage was sufficiently likely to result from the First Defendant's alleged breaches of the lease pleaded in paragraphs 7, 9 and 10 of the plaintiff's statement of claim, such that the loss of the kind described therein should have been within the reasonable contemplation of the First Defendant.

**SIGNATURE OF LEGAL REPRESENTATIVE**

#This defence does not require a certificate under section 347 of the Legal Profession Act 2004.

#I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

Capacity [eg solicitor on record, contact solicitor]

Date of signature

[on separate page]

[Do not include the affidavit verifying in Local Court proceedings. See Guide to preparing documents for other circumstances where affidavit not required.]

## #**AFFIDAVIT VERIFYING**

Name

Address

Occupation

Date

I [#say on oath #affirm]:

7 #I am the [first] defendant.

#I am [give details of the capacity of the person making the affidavit and the facts that qualify the person to make the affidavit].

8 I believe that the allegations of fact contained in the defence are true.

9 I believe that the allegations of fact that are denied in the defence are untrue.

10 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

#SWORN #AFFIRMED at

Signature of deponent _____

Name of witness

Address of witness

Capacity of witness [#Justice of the peace #Solicitor #Barrister #Commissioner for affidavits #Notary public]

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent)**:

1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]

#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*

2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]

#I have confirmed the deponent's identity using the following identification document:

_____

Identification document relied on (may be original or certified copy) †

Signature of witness _____

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[†"Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

[on separate page]

[Do not include this section if you have previously given this information to the court in these proceedings.]

## #FURTHER DETAILS ABOUT FILING PARTY

### Filing party

| | |
|---|---|
| Name | |
| Address<br>[The filing party must give the party's address.] | #[unit/level number] #[building name]<br>[street number] [street name] [street type]<br>[suburb/city] [state/territory] [postcode]<br>#[country (if not Australia)] |
| #Frequent user identifier | [include if the filing party is a registered frequent user] |

### Legal representative for filing party

| | |
|---|---|
| Name | [name of solicitor on record] |
| Practising certificate number | |
| Firm | [name of firm] |
| #Contact solicitor | [include name of contact solicitor if different to solicitor on record] |
| Address | #[unit/level number] #[building name]<br>[street number] [street name] [street type]<br>[suburb/city] [state/territory] [postcode] |
| DX address | |
| Telephone | |
| Fax | |
| Email | |
| Electronic service address | [#email address for electronic service eg service@emailaddress.com.au #Not applicable] |

[on separate page]

## #PARTY DETAILS

[Include only if more than two plaintiffs and/or more than two defendants.]

### PARTIES TO THE PROCEEDINGS

| **Plaintiff[s]** | **Defendant[s]** |
|---|---|
| [name] [role of party eg first plaintiff] | [name] [role of party eg first defendant] |
| [repeat as required for each additional plaintiff] | [repeat as required for each additional defendant] |

## FURTHER DETAILS ABOUT PLAINTIFF[S]

### [First] plaintiff

| | |
|---|---|
| Name | |
| Address<br>[The filing party must give the party's address.] | #[unit/level number] #[building name]<br>[street number] [street name] [street type]<br>[suburb/city] [state/territory] [postcode]<br>#[country (if not Australia)] |
| #Frequent user identifier | [include if the plaintiff is a registered frequent user] |

[repeat the above information as required for the second and each additional plaintiff]

### Legal representative for plaintiff[s]

| | |
|---|---|
| Name | [name of solicitor on record] |
| Practising certificate number | |
| Firm | [name of firm] |
| #Contact solicitor | [include name of contact solicitor if different to solicitor on record] |
| Address | #[unit/level number] #[building name]<br>[street number] [street name] [street type]<br>[suburb/city] [state/territory] [postcode] |
| DX address | |
| Telephone | |

Fax

Email

Electronic service address [#email address for electronic service eg service@emailaddress.com.au #Not applicable]

## DETAILS ABOUT DEFENDANT[S]

**[First] defendant**

Name

Address #[unit/level number] #[building name]

[street number] [street name] [street type]

[suburb/city] [state/territory] [postcode]

#[country (if not Australia)]

[repeat the above information as required for the second and each additional defendant]