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INTRODUCTION

Welcome to the HWL Ebsworth Newsletter for August.

In the current economic market, it is important for both landlords and tenants to be aware of their respective rights and obligations under their leases, particularly in relation to default and termination. The article on defaulting tenants is designed to provide a checklist of issues for consideration.

New planning reforms for New South Wales have been introduced and although much of the detail will be contained in the Regulations (yet to be released), the fundamental planning reforms are summarised. Watch this space for details on the Regulations in future newsletters.

Defaulting Tenants

Enforcing a commercial lease – Default, notice requirements and re-entry rights

When there is a breach of the lease by a tenant, it is important to consider:

- a. the type of breach;
- b. the remedies available to the landlord; and
- c. the procedures to follow.

1. Notice before right of re-entry for breach other than failure to pay rent

If a landlord wishes to re-enter and re-take possession of the premises (and thereby bring the lease to an end) following a breach by the tenant, *Section 129(1) of the Conveyancing Act 1919* generally requires notice to be given. Such notice must allow a reasonable time for the tenant to rectify the breach before the rights of the landlord to re-entry (and termination) may be exercised.

2. Failure to pay rent (exception to notice requirement)

- 2.1 No notice is required to be given in the following circumstances:
 - a. non-payment of rent;
 - b. where the lease is for one year or less.
- 2.2 In relation to the non payment of rent, *Section 85(1)(d) of the Conveyancing Act 1919* enables the landlord to re-enter the premises without any formal demand for payment of rent if the rent is in arrears for the period of 1 month or more. Most commercial leases exclude and override this 1 month period and contain specific default

provisions, usually of 7 days or 14 days.

3. Re-entry and termination for other breaches

Notice is required before re-entry of the premises by the landlord for a breach by the tenant, other than for non-payment of rent.

4. Form of notice and service of Notice

- 4.1 The form of notice must comply with the requirements of *section 129* of the *Conveyancing Act 1919* and the lease.
- 4.2 The notice must be served in accordance with the provisions of the lease.
- 4.3 Both the form of the notice and the service of the notice are important as failure on either of these points could invalidate the notice.

5. Practical matters on exercising re-entry

- 5.1 If the landlord's right to re-enter and take physical possession has been determined following the guidelines above, any re-entry by the landlord should be done carefully to avoid the tenant seeking damages for wrongful retention of goods or for loss of profit due to the business being closed down. Generally the following procedures should be followed:
 - a. A representative of the landlord should be at the premises at the time the locksmith attends to change the locks.
 - b. A notice should be placed in the windows of the premises advising that the business is temporarily closed and providing your details in the event that someone wishes make enquiries.
 - c. A notice to the tenant should also be prepared and left in a prominent place.

- d. The notice should also specify that the tenant's goods are available for collection upon making arrangements with the landlord. This is to prevent any claim by the tenant that the bounds have been overstepped by the landlord exercising its rights.
- e. Immediately on termination carry out the steps required to find a new tenant, including necessary make good to the premises, and the marketing normally undertaken by the landlord for vacant premises. Evidence of this process will be required if proceedings are brought against the tenant – this is the requirement to mitigate the landlord's loss.

6. Other considerations when exercising re-entry

6.1 Relief against forfeiture

The Courts may prevent a landlord from exercising its legal right to possession of the premises on the grounds that a party having a legal right shall not be permitted to exercise it in circumstances where that would be unreasonable. The courts are said to be providing 'relief against forfeiture'.

6.2 Wrongful recovery of possession

A landlord should be aware that if it attempts to re-enter the premises in exercise of a purported right to terminate a lease for a breach of a condition or for repudiation, and such right is found not to exist, the landlord will be held guilty of trespass and the tenant whose right of possession has been interfered with will be entitled to recover possession.

6.3 Reasonable force

A landlord when exercising a right of re entry can use no more force than is reasonably necessary. A tenant's

legal right to possession under the lease has ceased after the lease has been terminated, and the tenant is strictly speaking a trespasser. Therefore the landlord can use the same reasonable self help remedy as an owner of property against a trespasser on its land.

7. Damages

- 7.1 The landlord may be entitled to damages due to the tenant's breach of a lease, regardless of whether the landlord terminates the lease for such breach.
- 7.2 Accordingly, the landlord may choose not to terminate the lease and instead recover from the tenant damages in respect of the tenant's breach of the lease.

- 7.3 If the lease is terminated due to the tenant's breach, the damages recoverable are dependent on the right relied on by the landlord in terminating the lease.

8. Proceedings against the tenant

- 8.1 Once the tenant has been locked out of the premises, the landlord may decide to commence legal proceedings against the tenant to recover damages from the tenant. Examples of proceedings are:
 - (a) Creditor's Statutory Demand; and
 - (b) Statement of Claim.

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Reforms to the NSW planning system – the Environmental Planning and Assessment Amendment Act 2008

The *Environmental Planning and Assessment Amendment Act 2008* (NSW) (**New Act**), which commenced on 23 July 2008, instils a number of significant changes to the *Environmental Planning and Assessment Act 1979* (NSW) (**Act**).

These changes are summarised as follows:

1. Environmental Planning

- 1.1 There will be no more regional environmental plans (**REPs**)
- 1.2 The Minister for Planning now wields substantial control in the process of making local environmental plans (**LEPs**). The Minister is given the discretion to decide the progress of an LEP by making a "gateway determination" in relation to the LEP, including whether the proposal should proceed, what community consultation is required (if any) and whether consultation with public authorities is required.

- 1.3 The NSW Governor is given a very broad power to make state environmental planning policies (**SEPPs**). Formerly, a SEPP could only be made in accordance with a recommendation from the Minister and the SEPP must have related to matters that are, in the opinion of the Minister, of significance to environmental planning for NSW.

2. Development Assessment

- 2.1 Formerly, development applications were determined by local councils or the Minister but the New Act creates new planning approval bodies, each

of these having defined duties and functions as follows:

- a. **The Planning Assessment Commission's** main role is to determine major project applications under Part 3A (Major Infrastructure and other Projects) of the Act. It will also have an advisory role to the Minister.
 - b. As the name suggests, **regional planning panels** will act as the decision-makers for regionally significant development applications.
 - c. **Independent hearing and assessment panels:** IHAPs are not a new concept to planning law as many councils have used the expertise of various IHAPs to assess development at various times. IHAPs will be established by councils to advise and hear submissions on certain local development applications.
 - d. **Planning arbitrators** will determine appeals from local councils for smaller-scale development proposals.
- 2.2 "Complying development" will be increasingly used as a form of assessment and approval to enable more certification style approvals for small developments such as individual residential and small commercial/industrial.

3. Development Contributions

- 3.1 Development contributions will be increasingly regulated by the creation of criteria to determine the setting, levying and spending of contributions (such criteria include reasonableness and affordability).
- 3.2 There will also be further restrictions limiting the levying of local contributions.

4. Certification of Development

- 4.1 The New Act aims to strengthen the enforcement measures associated with the private certification of development and planning laws. Accordingly:
 - a. a private certifier is required to issue directions to a developer if the certifier becomes aware of non-compliance with a development approval;
 - b. additional design and other pre-requisites apply to the issue of a Part 4A (certification of development) certificate;
 - c. local councils have increased investigatory and on-the-spot enforcement powers; and
 - d. a consent authority can require construction "compliance bonds" for all conditions of development consent.

Objective of Reforms

The Minister's media release on 15 May 2008 stated that the reforms created by the New Act as well as the Building Professional Amendment Act 2008 "will create an efficient and transparent planning system for the 21st century – introducing independent decision-making and streamlining processes for working families".

These planning reforms will affect almost every aspect of development control. The New Act proposes significant changes to the process and time-frames for making planning instruments; the allocation of responsibility for controlling development proposals and time-frames for decision-making; the way in which development contributions are planned and imposed; and the certification of development in the existing Act.

Whilst the expressed object of the reforms is to streamline processes (and it is hoped that the objectives are realised

in practice) much of the detail concerning implementation of the new regime is to be contained in Regulations. The reforms introduce a number of new levels of assessment approval bodies as well as new categories of development. The industry cannot be certain of how the regime will operate in practice until the suite of reforms is complete. At the time of press, the Department of Planning has yet to indicate when the Regulations will be made. Indeed a timetable for draft Regulations is yet to be released by the Department. It is these Regulations that will dictate whether the reforms actually achieve the objectives.

Perhaps the most certain aspect of the reforms to date is that "the devil will be in the detail". Undoubtedly, the property industry will scrutinise the operation of the reforms closely over time when the suite of reforms is complete and operational.

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