re:lease

law news for commercial landlords, tenants and property managers

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Lease cancellation: getting it right

Making the move of cancelling a lease can backfire if not done properly. In a recent case, a landlord purporting to cancel a lease for a tenant's non-payment of rent was itself placed in breach for not getting it right; and, in that case, the difference between getting it right and getting it wrong was jumping the gun by just one day.

"The Court of Appeal agreed that the landlord's re-entry…was illegal…However, it then looked at the tenant's conduct in response to that repudiation."

In Patcroft Properties Limited v Ingram, the landlord leased premises in central Auckland to a backpackers' business. The tenant was late in paying its rent, but not by much. The rent was due on 1 June. The lease allowed the landlord to re-enter if rent was 14 days in arrears. Accordingly, the landlord would have been entitled to re-enter on 15 June (if the rent had not been paid by then). However, the landlord re-entered 1 day early, on 14 June. The tenant sued the landlord for, amongst other things, the loss of their business.

The High Court decided, in favour of the tenant, that the landlord's re-entry was illegal because it was carried out 1 day before it was entitled to do so. It accordingly awarded significant damages in the tenant's favour. The landlord appealed to the Court of Appeal.

The Court of Appeal agreed that the landlord's re-entry on 14 June was illegal and therefore amounted to repudiation (fundamental breach) of the lease. However, it then looked at the tenant's conduct in response to that repudiation.

If a party to a contract, in this case being the lease, repudiates it then the other party is put to an election of either affirming or cancelling the lease. The tenant gave no clear indication of taking either action (but had its solicitors notify the landlord that its position was reserved). Critically, however, it still did not make payment of the outstanding rent.

The Court looked at the tenant's non-payment of rent. It decided this was not sufficiently clear conduct cancelling the lease by the tenant. So, the landlord had breached the lease by its unlawful re-entry (and, because the re-entry was unlawful, it did not cause the lease to terminate). However, there was nothing to show the tenant had exercised its right to cancel the lease (which had arisen due to the landlord's breach). The lease was therefore still on foot on 15 June, by which date the rent had become 14 days in arrears. The landlord now had a right to cancel for late payment. As the landlord was still in possession of the premises on 15 June, the re-entry had now become lawful. The result was that the tenant's claim for damages for loss of the value of their business failed.

The landlord was fortunate in this case that, although it initially "got it

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wrong" by re-entering early, their unlawful action was made good the next day. If the landlord had "got it right" in the first place, however, it would have saved itself High Court and Court of Appeal litigation.

As for the tenant, if it had accepted the landlord's repudiation and cancelled the lease itself, it may have had a greater chance of claiming damages for loss of business. Alternatively, the tenant could have got itself out of breach by paying the overdue rent. This would have prevented the landlord being entitled to cancel on 15 June and, at least, give the tenant some breathing space.

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New Property Council office lease

The Property Council has recently published a new edition of its standard office lease. Property Council (formerly Building Owners and Managers Association (BOMA)) leases are widely regarded as "landlord friendly" in their terms. This latest version makes significant changes to the prior version (which was reprinted in 1996), many of which were necessary to bring it up-to-date with changes in legislation. It was also intended to bring the lease up-to-date with market conditions. Notably, however, it has retained landlord-discetionary rent reviews and a full ratchet. While this is no longer common in the market, it certainly puts the landlord in a stronger starting position to negotiate the rent review machinery. The lease contains a number of new concepts. These include:

- tenant to offer lease back to the landlord if they want to assign;
- changes in guarantor's shareholding (if tenant is unlisted) which alter its effective control is a deemed assignment requiring the landlord's consent;
- tenant to adopt several environmental initiatives such as energy reduction targets and waste reduction/recycling.

A number of items are now incorporated into the lease which, previously, had to be separately attached (such as rights of renewal, terms where bank guarantee to be provided, unit title obligations, make good requirements and reinstatement guidelines, terms regarding carparks).

While this version of the Property Council office lease endeavours to be more balanced, it is still certainly a more landlord-biased document. All parties should consider its terms critically if looking to enter one of these forms of lease. If you are interested in finding out more about this form of lease, don't hesitate to contact us.

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This paper gives a general overview of the topics covered and is not intended to be relied upon as legal advice.