

Removal of tenant's property after termination of lease



In this issue:

Removal of tenant's property after termination of lease	1
Tenants in Administration	5
Environmental Upgrades to Buildings including Funding Alternative Local Government Amendment (Environmental Upgrade Agreements) Act 2011	8
Court of Appeal finds Purchaser can rescind Contract over flood damage.....	9

Removal of tenant's property after termination of lease

“ ... given the ambiguity at common law regarding removal of tenant's property from a premises by the landlord after termination of the lease it is imperative that the lease adequately address this issue. ”

The position at common law regarding removal of a tenant's property from a leased premises after termination of the lease is not an area of law without uncertainty. However, it is an area that should be given attention by landlords and their solicitors when entering into leases as it is an area where the landlord can be liable for damage or loss if the landlord deals with the tenant's property in a manner which is contrary to the common law or lease. It is also important because items left in the premises by a former tenant can delay or complicate re-leasing by a landlord.

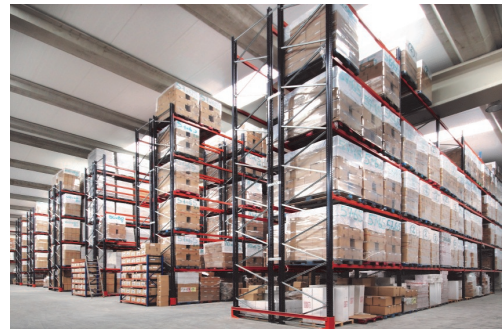
When tenants' property remains in the premises after termination of the lease the common law provides that the tenant must be given reasonable opportunity to remove the items. Although it is not necessarily required at common law it is generally accepted that a prudent landlord would give the tenant reasonable notice detailing a reasonable time period in which to remove them before the landlord attempts to deal with them. This is particularly true where the lease has been terminated suddenly, such as where the landlord terminates by re-entry as a result of a tenant's failure to pay rent.

At common law the landlord does not have any automatic right to ownership of the tenant's property merely because the tenant has left the property in the premises after lease termination. While it is open to the landlord to establish that the tenant has abandoned the property if the factual situation supports this, it is preferable that the lease instead clearly establishes on what grounds ownership of the property will be transferred to the landlord in order that the landlord may dispose of such items as it wishes. The courts have been clear in their requirement that words clearly establishing a transfer of ownership would be required in the lease in

order for title to transfer to the landlord.

The law is unclear as to what obligations the landlord has in relation to the safety of the tenant's property while the landlord is in possession of such items particularly as to what extent the landlord can be held liable for damage to the tenant's property caused while in the landlord's possession. Accordingly, it is necessary that such issues as to what the landlord can do with the tenant's property and the duty of care that the landlord owes to the tenant should be addressed in the lease.

In situations where the landlord has not dealt with the tenant's property in a manner consistent with either the common law position or the lease, the tenant may sue the landlord for conversion of its property. In order to establish conversion the tenant must show that the tenant had an immediate right



to possession of the property at the time that the landlord asserted ownership of the relevant items. In the words of Giles JA in *Sadcas Pty Ltd v Business and Professional Finance Pty Ltd* [2001] NSWCA 267 “conversion is a wrong against a possessory interest, not an ownership interest”. If the

(Continued on page 2)

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(Continued from page 1)

tenant can establish a case for conversion the landlord will be liable to the tenant for the value of the property (at the time of the conversion) that has been converted by the landlord.

In conclusion given the ambiguity at common law regarding removal of tenant's property from a premises by the landlord after termination of the lease, it is imperative that the lease adequately address this issue. The lease should provide the tenant with an opportunity for removal of the items and if the tenant fails to do so then provide for how the landlord can deal with these items including, if desired by the parties, transfer of title of the goods to the landlord in order for the landlord to dispose of the items as it wishes. The lease should be clear as to what items of the tenant's property the clauses apply to. Landlords will generally wish that any such definition of the tenant's property be wide so that the clause captures all items remaining in the premises. If the clause cannot be interpreted to include certain items remaining in the premises then the lease provisions will not apply to such items and the parties will be subject to the common law position.

Accordingly, any clauses in leases dealing with this issue must be clear and comprehensive in order to avoid any potential for future disagreement between the parties on this issue and to enable the landlord to progress the re-leasing of the premises.

“ ... at common law the landlord does not have any automatic right to ownership of the tenant's property merely due to the fact that the tenant has left the property in the premises after lease termination. ”

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Tenants in Administration

In a previous article we discussed the impact on leases of tenant insolvency. We now deal with voluntary administration in more detail.

One of the consequences of the global financial crisis has been, unfortunately for both the tenants concerned and, as we will see, their landlords, an increase in corporations entering voluntary administration.

Accordingly, it is important for a landlord to have at least a rudimentary understanding of what administration is, how it proceeds and what impact it has on a lease and the rights of the landlord.

When does voluntary administration occur?

A company in financial difficulty can be put into voluntary administration.

Often the company's own directors put the company into voluntary administration. However, a liquidator, provisional liquidator or secured creditor of a company can also appoint a voluntary administrator.

What is a voluntary administrator?

A voluntary administrator is an independent and fully qualified person who takes full control of the company.

What is the purpose of voluntary administration?

Voluntary administration is intended to quickly resolve the future of the company. The voluntary administrator starts by having the intention of working out a way to save the company or at least its business.

If the company or its business cannot be saved then the administrator manages the business affairs of the company to provide a better outcome for creditors than if the company had gone into liquidation.

Process

The administrator will hold a first creditor's meeting within 8 business days after the administration begins.

“ ... it is important for a landlord to have at least a rudimentary understanding of what administration is ... ”

The purpose of the first meeting is to decide two questions:

1. whether the creditors want to form a committee of creditors and, if so, who will be on it; and
2. whether the creditors want the existing administrator to be removed and replaced with an administrator of their choice.

A second creditor's meeting is usually held five weeks after the administration begins. This meeting decides the future of the company. The three options available to the creditors are:

1. end the voluntary administration and return the company to the control of the directors;
2. approve a Deed of Company Arrangement through which the company will pay all or part of its debts and then be free of those debts; or
3. wind up the company and appoint a liquidator.

Ending of administration

The administration, having begun with the appointment of the administrator, ends normally at the outcome of one of the three options referred to above.

(Continued on page 4)

Tenants in Administration

(Continued from page 3)

Landlords – what does it mean for you?

Can a landlord terminate the lease?

Notices under the lease can be served during the period of administration including notices of termination if the landlord is otherwise entitled under the lease to terminate the lease. But as to whether it is worthwhile doing so, see our comments below on recovering possession of the premises.

Can a landlord recover possession?

During the period of administration a landlord can only recover possession of leased premises (assuming action was not commenced pre-administration) with the written consent of the administrator or leave of the Court .

Notice from administrator and responsibility for rent

An administrator may, within 5 business days after the administration commences, give notice to a landlord stating the company does not propose to exercise rights in relation to the property in which event the Landlord can terminate the Lease if otherwise entitled to do so.



An administrator is liable for so much of the rent and other amounts payable by the company under the lease as is attributable to the period that begins after 5 business days

after the administration commences until the company ceases to use or occupy or to be in possession of the property.

Lease security

Assuming the landlord is otherwise entitled under the lease, the landlord may claim a bank guarantee or security deposit during the period of administration.

Enforcement of personal guarantees

During the period of administration, the guarantee of reliability of a company cannot be enforced against the director of the company or a spouse or relative of such a director.

Points to note:

Two points to particularly note for a landlord whose tenant enters into administration are:

1. Read the information sent to you by the administrator and attend meetings. Otherwise you may learn that you are bound by a resolution passed at such a meeting without your input.
2. If in any doubt about your rights get advice as soon as possible after you become aware the tenant has entered into administration.

“ ... the landlord may claim a bank guarantee or security deposit during the period of administration. ”

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Environmental Upgrades to Buildings including Funding Alternative Local Government Amendment (Environmental Update Agreements) Act 2011

The above Act which took effect 18 February 2011 creates a new mechanism for approving the energy and water efficiency of certain buildings (and hence the NABERS rating) and recovering part of those costs from occupiers if they receive the benefit of lower operating costs.

The Act enables a Council to voluntarily enter into an environmental upgrade agreement with a building owner and financier under which:

1. the building owner agrees to carry out environmental upgrade works;
2. the financier agrees to provide funds to the owner to finance those works;
3. the Council agrees to levy a "charge" on the relevant land for the purpose of discharging the owner's obligation to repay the loan funds and interest and to repay that levy to the lender to the extent it is received.

The Act defines "environmental upgrade works" as works relating to improving the energy, water or environmental efficiency or sustainability of the building and the regulations may include or exclude other improvements.

Such an agreement must specify:

1. the actual works to be carried out on behalf of the owner;
2. the amount of the loan to be provided by the financier and arrangements for its repayment;
3. the amount of the charge to be levied by the Council or the method for

calculating that charge; and

4. the date or dates on which the charge is to be levied by the Council.

The agreement will operate on the basis that the owner will pay the levy to the Council and the Council will use the levy to repay the loan. However, the Council is not liable to the lender if the levy is not received by it but it must use its best endeavours to recover it.

The Council will be permitted to charge certain fees for administering the agreement which may be deducted from the levy.

At this stage, the only buildings eligible are existing non-residential buildings (ready for lawful occupation or use) or residential strata buildings comprising more than 20 lots.

Where an Owners Corporation enters into such an agreement, it may then determine if the upgrade charges are payable from its sinking or its administration fund.

“ ... the maximum amount of an occupant's contribution must not exceed a reasonable estimate of the cost saving to be made by that occupant ... ”

(Continued on page 6)



Environmental Upgrades to Buildings including Funding Alternative Local Government Amendment (Environmental Upgrade Agreements) Act 2011



(Continued from page 5)

In some instances, the owner may be able to recover the Council's levy from occupants in the building. However, that will depend on the wording in the lease, particularly as to whether it can be recoverable as a Council levy or whether there is a specific obligation to contribute to such environmental expenses.

In any event, the said Act states that the maximum amount of an occupant's contribution must not exceed a reasonable estimate of the cost saving to be made by that occupant as a consequence of the works detailed in the environmental upgrade agreement, during the period to which the contribution relates.

In some instances, the environmental upgrade agreement may make provision for the recovery of contributions by a landlord from occupiers as well as the methodology by which those savings can be calculated. Such methodology may also permit not only savings made directly by the occupant but also a proportion of savings made by all occupants of the building to be counted towards the cost savings made by individual occupants.

As participation in these arrangements is voluntary, it will be interesting to see if Councils are willing to negotiate them when approached by building owners.

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Court of Appeal finds Purchaser can rescind Contract over flood damage

A recent decision handed down by the Supreme Court of Queensland serves as a warning to vendors that a contract for sale may be rescinded by a purchaser in the event that a property becomes unfit for occupation before completion – for example due to a natural disaster.

An off-the-plan buyer of a luxury apartment made uninhabitable by Brisbane's January floods has recently won a case against a developer to rescind the contract, setting a potentially significant precedent.

The case of *Dunworth v Mirvac Qld Pty Ltd* [2011] QCA 200 involved a contract for the sale of an off-the-plan multi-million dollar apartment located in the suburb of Tennyson, Queensland on the bank of the Brisbane River.

The plaintiff purchaser entered into the contract in July 2007 to purchase a residential apartment on the ground floor of Mirvac's 'Tennyson Reach' riverside apartment block for \$2.155 million.

Following registration of the community title scheme for the property, Mirvac called for completion of the contract in May 2009. The purchaser sought an order in the Supreme Court of Queensland that the contract be declared void on the basis of misleading and deceptive conduct pursuant to the *Trade Practice Act 1974* (Cth) on the part of the vendor. The plaintiff claimed that the unit was not as high off the ground nor as private as the purchaser had been led to believe. The purchaser's claim was dismissed and an order was made for specific



“ The statutory right to rescind exists ‘at any time up to the date of actual completion or possession (whichever be the earlier date)’ . ”

performance of the contract, with a new completion date set by the Court for 8 February 2011.

Before the new completion date arrived, the January floods struck and the by-then-completed building was inundated by 600 millimetres of flood waters and debris. The subject unit was badly damaged as a result. The purchaser purported to rescind the contract on 28 January 2011 under section 64 of the *Property Law Act 1974* (Qld) on the basis that the floods had rendered the unit unfit for occupation. This case was the first decision on section 64 and thus the result was eagerly awaited.

Section 64 provides that in any contract for the sale of a residential dwelling, if before the date of completion or the date of possession, whichever is the earlier, the residence is so destroyed or damaged as to be unfit for occupation as a residential dwelling, the purchaser has the power to rescind the contract.

In New South Wales, a similar statutory right of rescission is found in section 66L of the *Conveyancing Act 1919* (NSW) and is available to purchasers in the event that a property is “substantially damaged” before the earlier of completion of the sale or “possession” of the property by the purchaser, which is defined to mean occupation of the property or receipt of income from the property.

Following the purchaser's purported rescission of the contract in this case pursuant to section 64, Mirvac offered to carry out restoration work at its cost to rectify the damage caused to the unit and thereby restore the unit to

(Continued on page 8)

Court of Appeal finds Purchaser can rescind Contract over flood damage

(Continued from page 7)

its original condition. Such restoration works would take four months and Mirvac proposed an extended completion date of 4 June 2011. The purchaser rejected Mirvac's offer and sought a declaration that the contract had been validly rescinded in January 2011.

The Supreme Court of Queensland ruled against the purchaser and allowed Mirvac until June 2011 to complete the restoration work on the unit.

The purchaser appealed to the Queensland Court of Appeal. The appeal was heard by Chief Justice de Jersey, Justice McMurdo and Justice Dalton.

Mirvac conceded to the Court of Appeal that the unit was uninhabitable as at the date of purported rescission of the contract. The "real question" raised by the appeal, according to Justice McMurdo, was the proper interpretation of section 64 and, in particular, the meaning of the expression "date of completion". The question was raised as to whether a statutory right of rescission can subsist beyond a contractually appointed completion date. Can an extended completion date ordered by a court fall within the ambit of the statutory right? The Court unanimously found that it can. Notwithstanding the passage of the agreed date for completion, if "the actual date of completion or possession...has not arrived...a right of rescission is available to the purchaser".

“ ... this case may very well be a landmark decision for the right of a purchaser to rescind a contract when the subject property is made uninhabitable by flooding or other natural disasters. ”



According to Chief Justice de Jersey, the words of section 64 are clear – if the dwelling is rendered uninhabitable by the date of completion (in this case, the February 2011 completion date set by the Supreme Court and not the May 2009 completion date appointed by

the contract), the purchaser has the power to rescind the contract. The statutory right to rescind exists “at any time up to the date of *actual* completion or possession (whichever be the earlier date)”.

The Court of Appeal upheld the appeal, set aside the Supreme Court orders and found that the purchaser had validly rescinded the contract in January 2011. Mirvac was ordered to pay the purchaser's costs of the appeal.

Thus, in what was seen as a test case as to whether a purchaser could rescind a contract following the floods, this case may very well be a landmark decision for the right of a purchaser to rescind a contract when the subject property is made uninhabitable by flooding or other natural disasters.

While the circumstances of this case are certainly uncommon – with a defaulting purchaser receiving the benefit of an intervening environmental disaster – it reminds vendors of the importance of being aware of when the risk in respect of damage to a residential property passes to the purchaser. The risk passes only before the actual date of completion in very limited circumstances despite special conditions in a contract that might assert the contrary.

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Recent developments in Property, Environment and Planning Law December 2011

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- Options to Renew and Retail Lease Extension
- Vendors Beware
- Residential Tenancies Early Termination

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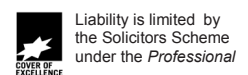
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