

Legal Update | Property

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p1 **Property** Further Information

p2 High Court considers implied licences to use development plans

p3 Conduct may preclude enforceability of lease covenant

p4 Reminder: Notify retail tenants of options to renew

Further Information

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High Court considers implied licences to use development plans

The recent High Court decision in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55 (6 December 2006) ('Concrete Case') reinforces the importance of addressing the rights of parties to use plans in development and sale arrangements.

Facts

In the Concrete Case, two companies purchased a property jointly with the intention of conducting a development as joint venture partners. The joint venture engaged an architectural firm, the principal of which was also a director of one of the joint venturer companies, to prepare plans for a residential development. The architect prepared the plans free of charge as it had an indirect interest in the profitability of the joint venture. Planning approval for a development in accordance with the plans was obtained.

Neither the agreement between the joint venture and the architect, nor the agreement between the joint venture partners themselves, was recorded in writing.

The relationship between the joint venture partners ultimately deteriorated and the undeveloped land was sold, with the benefit of the planning approval, to a purchaser. A dispute arose between the purchaser and the architect regarding the use of the plans to conduct the development. The architect claimed the plans were prepared without charge solely for use by the joint venture and, accordingly, the right to use the plans did not pass to the purchaser.

Court's decision

On appeal from the full Federal Court which found for the architect, the High Court held the fact that the architect prepared plans without charge and with the anticipation that they would be used by the joint venture did not prevent the right to use the plans from passing to the purchaser.

The general copyright principle is that, in the absence of any agreement to the contrary, a person who commissions plans obtains an implied licence to use those plans for the purpose for which they were created.

In this case, the plans were contemplated to be used to develop the property from the stage of obtaining planning approval through to achieving profits from the sale of any development built in accordance with the plans.

The collapse of the joint venture, despite not being anticipated by the architect, did not retrospectively alter the purpose for which the plans were created. Furthermore, as planning approval for the development had been obtained and the property was transferred with the benefit of that approval, the joint venture's licence to use the plans passed to the purchaser.

Importantly, the court's decision suggests that a different outcome might have resulted if:

- the property had been sold prior to planning approval being obtained
- the planning approval was expressed to be for the benefit of the joint venture only, and did not pass with the land or
- there was a contrary agreement between the architect and the joint venture.

Practical tips

The decision highlights the importance of addressing rights to use plans in development and sale arrangements.

To avoid uncertainty and potential disputes, developers should ensure that their right to use plans, and their ability to transfer that right to third party purchasers, is clearly set out in their agreements with architects.

Purchasers, who will not usually be aware of the content of any agreement between the vendor and relevant architect, should also take care to ensure that they will be able to use plans prepared in respect of the relevant property.

Appropriate warranties should be included in the relevant contract of sale. This applies both in circumstances where planning approval has been obtained and where plans are purportedly available for the purposes of a subsequent planning application by a purchaser.

Rohan Ingleton | Partner
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Conduct may preclude enforceability of lease covenant

The enforceability of a lease covenant may be negated by the conduct and assumptions made by the parties.

In the case of *Moratic Pty Ltd v Lawrence James Gordon & Anor* [2007] NSWSC 5 ('Moratic Case'), the landlord's failure to collect further rent over the course of the lease term precluded it from being able to rely on the provision under the lease to demand further rent on the grounds of conventional estoppel.

Facts

The lease of the Oaklands Hotel contained a covenant which required payment of fixed rent and a separate covenant requiring payment of 'further rent' equal to 4% of the value of liquor purchased for the hotel each year ('Further Rent Covenant').

The commercial effect of the Further Rent Covenant was that the tenant would effectively indemnify the landlord against the right of deduction of rent exercisable by the tenant against the landlord under the former s 154 of the *Liquor Act 1982* (NSW) ('Act'). Section 154 of the Act was subsequently repealed following the High Court case of *Ha v State of New South Wales* (1997) 189 CLR 465 concerning the constitutional invalidity of similar provisions.

A number of poker machine entitlements ('Pokie Entitlements') were attached to the relevant hotel licence in relation to the property. The tenant entered into a contract for the sale of some of the Pokie Entitlements. The landlord was opposed to the transfer of the Pokie Entitlements and claimed to have a financial interest in the hotel licence by reason of the Further Rent Covenant.

No amount was ever demanded by the landlord or paid by the tenant under the Further Rent Covenant. The tenant brought proceedings against the landlord seeking a declaration that the tenant was not liable to pay any amount under the Further Rent Covenant (among other things).

Tenant's arguments

The tenant argued that the Further Rent Covenant was not enforceable by the landlord on the following alternative grounds:

- it was an implied term of the lease that the Further Rent Covenant would not apply if s 154 of the Act was repealed
- there was a variation of lease to the effect that the Further Rent Covenant was to be omitted
- the landlord was estopped from relying on the Further Rent Covenant through the course of dealings between the landlord and tenant.

Court's decision

The Moratic Case was decided in favour of the tenant such that no further rent was payable by the tenant on the grounds of conventional estoppel (as opposed to promissory estoppel which was pleaded by the tenant). Each of the elements of conventional estoppel was established by the tenants as follows:

- the tenant assumed certain terms of its legal relationship with the landlord ie the tenant assumed that the only rent payable by the tenant to the landlord was the fixed rent ('Rent Assumption')
- the landlord adopted the same Rent Assumption
- both the tenant and landlord conducted their relationship on the basis of the Rent Assumption
- each party knew or intended that the other party act on the basis of the Rent Assumption
- the tenant would suffer detriment if there was departure from the Rent Assumption.

Although the tenant succeeded on the grounds of conventional estoppel, it did not succeed on its arguments based on implied terms, variation of lease and promissory estoppel.

Practical tips

In light of the Moratic Case, landlords need to remember that their conduct can at times affect the enforceability of the express lease terms. In particular, if a landlord does not insist upon the performance of a contractual obligation over an extended period of time, it should take positive steps to ensure that the tenant does not assume that it is necessarily exempt from that obligation.

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Reminder: Notify retail tenants of options to renew

Victorian landlords of retail leases must remember to notify their tenants of the date after which an option to renew for a further term is no longer exercisable.

When a retail premises lease contains an option to renew the lease for a further term, the landlord must notify the tenant of the date after which the option is no longer exercisable. This mandatory requirement is unique to Victoria and is stipulated by section 28 of the *Retail Leases Act 2003* (Vic) ('Act'). Similar requirements were contained in section 18 of the *Retail Leases Act 1998* (Vic) and section 14 of the *Retail Leases Act 1986* (Vic).

Timing of notice

Notice must be provided at least 6 months and no more than 12 months before the date after which the option to renew is no longer exercisable. Landlords should note that the relevant date for the purpose of calculating a period within which notice must be given is not the expiry of the term of the lease. It is the last day upon which notice of exercise of the option to renew can be given as provided under the terms of the lease. The relevant date is commonly 3 months prior to the expiration of the term which is being renewed.

Form of notice

It is a requirement of section 28 of the Act that the notice be in writing. However, no particular form of notice is prescribed.

Case law in this area indicates that the notice acts as a reminder and that a clear reminder must be given. A reminder connotes a document physically separate from the lease itself. Senior Member Young in the Victorian Civil and Administrative Tribunal matter of *M&G Jaz Pty Ltd v Retzam Pty Ltd* [2004] VCAT 866 stated that "it needs to be sent so that it is separate geographically and separate temporally from the exchange or passing of other documents associated with the lease or the lease itself."

Exception

Notice is not required if the tenant exercises or purports to exercise the option to renew before being notified of the date.

Failure to comply

If a landlord fails to notify the tenant within the time period specified by section 28(1) of the Act, then an implied term is inserted in the lease via section 28(2) of the Act. The implied term is that the date after which the option to renew is no longer exercisable is instead 6 months after the landlord notifies the tenant as required under section 28(1) of the Act.

If that date is after the date that the term of the lease ends, then the lease continues until that date. The lease for the further term commences on the expiry of the previous lease.

Practical tips

Landlords should ensure that written notice separate from the lease itself is given to the tenant in every case. This will prevent the tenant from being able to rely on the 6 month extension of the date after which the option to renew is no longer exercisable.

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