PropertyLeasing Newsletter

November 2010

In this issue

Good news story

On Wednesday 13 October 2010, Brendan Maier was elected to the Urban Development Institute of Australia's NSW Council from a particularly strong field of candidates from leading companies in the urban development sector.

By engaging with government, the UDIA aims to make housing more available, affordable and sustainable. It takes a long term view on how we should best improve our communities.

The UDIA is the peak industry body for the property industry and has over 500 members in NSW.

Brendan is the only lawyer on the council and is very enthusiastic about being able to take on this leadership role, representing clients and the industry.

Retail Leases new form of Disclosure Statement

On 1 January 2011 the eastern seaboard States of New South Wales, Victoria and Queensland will jointly adopt a new disclosure statement for retail leasing to replace the Lessor's disclosure statement that currently forms Schedule 2 to the *Retail Leases Act 1994*.

In relation to retail leases that are entered prior to 1 January 2011, the existing form of Lessor's disclosure statement in each State should be provided. However, in relation to a retail lease which is entered into on or after 1 January 2011, then the new form of disclosure statement must be provided.

This adoption of, what is in essence, the Victorian form of the retail leases disclosure statement is part of a national approach to retail leasing legislation. We understand that the other States are sitting back and watching on a "wait and see" basis as to how the new disclosure statement will assist in creating more meaningful disclosure in retail leasing.

There are many changes in the new disclosure statement including several additional attachments that are now mandated. These include a premises plan for the shop as well as, in the event of a shopping

centre, a floor plan, customer traffic flow statistics (where collected) and a copy of any casual mall licensing policy.

When the new form of disclosure statement has been gazetted, we can provide a copy of the same to our retail landlord and retail tenant clients upon request. Please note that you will have to have this form ready in the event that you want to enter into a retail lease on or after 1 January 2011.

Gary Newton
Partner
T: 02 8281 4652
E: gdn@cbp.com.au

When is an Agreement for Lease Binding?

400 George Street (Qld) Pty Limited & Ors v BG International Limited [2010] QCA 245

A decision handed down on 10 September 2010. This case concerns the premises of which the first and second appellants were the registered owners, in Brisbane on which an office building was to be constructed. This case involved an application to bind the respondent to the terms of the agreement for lease. The respondent signed a letter of offer in which clause 37 stated that "all documentation is subject to a mutually agreed legal document by both parties."

The respondent subsequently executed the agreement for lease and the lease that had been sent by the appellants' solicitors, and returned the documents. The agreement for lease and the lease were then executed by the first, third and fourth appellants and sent to Germany for the execution by the second appellant.

Prior to notification that the appellants has executed the agreement for lease and lease, the respondent informed the appellants' solicitors that he was withdrawing his offer to enter into the transaction.

The appellants sought a declaration that the defendant was bound by the terms of the agreement for lease. In deciding this matter, the Supreme Court of Queensland had to determine whether the agreement for lease was in fact an agreement or whether it was a deed. A deed is binding once it is signed and delivered by one party to another, thus the appellants need not have signed the deed for it to be binding. Alternatively, an agreement is not usually intended to be binding until signed by all parties and dated.

Click return to contents

At first instance the Supreme Court of Queensland held that the document was not a deed and thus the respondent was entitled to withdraw from the transaction. The Supreme Court noted that if the document is intended to be a deed it should be reflected in the language of the document and the correspondence between the parties, and that the language of the execution clause, 'Executed as a deed' and 'By executing this deed,' was not sufficient.

On Appeal, the Queensland Court of Appeal overturned the Supreme Court's finding that the document was not a deed and held that the language of the execution clause was sufficient to constitute a clear intention that the parties intended the agreement for lease to be a deed. However the Court of Appeal held that clause 37 of the letter of offer meant that until the bargain was recorded in a document which was both signed and exchanged, there was no 'delivery' and therefore neither party was bound.

This case illustrates that it is imperative to ensure a lease is properly executed by all parties before relying on the assumption that it is binding. The importance the Queensland Court of Appeal placed on the offer letter, which was subsequently superseded by the agreement for lease, indicates the seriousness of signing documents in relation to legal matters.

Faith Laube
Paralegal
T: 02 8281 4454
E: fal@cbp.com.au

When is a Lease deemed to be assigned?

Most retail and commercial leases contain the standard assignment clause which states that any lessee shall not assign, transfer, sublet, charge, encumber, part with or otherwise deal with its interest in or possession of the premises without the prior written consent of the lessor, with such consent not to be unreasonably withheld or where that consent can be withheld at the lessor's absolute discretion.

There is also often a separate clause that whenever there is a change in the shareholding of any company other than any company listed on the Australian Stock Exchange and the effect of that change in shareholding changes the control of the lessee, then this is also deemed to be an assignment of the lease and the lessor's consent is required.

Click return to contents

There is a fine line between whether allowing a related entity of the lessee to occupy the premises constitutes subletting or an assignment of the lease.

This was demonstrated in a recent Queensland Supreme Court of Appeal decision of *Ace Property Holdings Pty Limited v Australian Postal Corp*. In this case, the lessor had leased premises to Australia Post (**lessee**). The lease between the lessee and the lessor commenced in 1998. There was a provision in the lease where the lessee was not permitted to sublet, licence or otherwise part with possession of the premises unless it obtained the lessor's prior consent. A company by the name of Decipha which was a joint venture company in which the lessee was a shareholder and which eventually became a wholly owned subsidiary of the lessee occupied the premises from 2003. Decipha occupied the premises and conducted its own business and had its own employees who had no association with the lessee. The lessee had not obtained consent from the lessor for Decipha to occupy the premises. The lessee argued that Decipha was only acting as the agent of the lessee and that such consent from the lessor was not necessary.

The lessor provided the lessee with a notice requiring remediation of breaches of covenant of the lease pursuant to section 124 of the *Property Law Act* 1974 (Qld). The Trial Judge had to determine whether the lessee had parted with possession of the premises without the lessor's consent. The Judge decided that the lessee had not parted with possession of the premises because the lessee was still able to exercise control over Decipha due to their corporate relationship ie Decipha being a subsidiary of the lessee.

On appeal, it was noted by the Court that a lessee may permit another occupant to occupy the premises without the lessee being deemed to have parted with possession of the premises by assignment. However this depends on the facts of each case. Whilst the lessee continued to pay rent to the lessor and the lessee could change the state of affairs of the possession of those premises, the Court considered that the employees of Decipha were not employees of the lessee. This was a factor going to the exercise of control of the premises and the business conducted by Decipha on the premises appeared to be carried out by Decipha in their own right. There was no agency relationship between Decipha and the lessee. Decipha had its own customers which were independent of the lessee. The lessee argued that the lessor had given consent to the lessee's parting with possession of the premises as the lessor was aware of Decipha's occupation. The lessor's argument, which succeeded on appeal, was that the lessor was not aware that Decipha was a separate legal entity carrying on its own business at the premises.

Click return to contents

The Court held that Decipha was a separate legal entity carrying on its own business on the premises and that the lessee had parted

with possession of the premises without the lessor's consent. Consequentially, this amounted to a breach of the lease and entitled the lessor to terminate the lease, as the lease had been assigned without the lessor's consent. The Court commented that it was in the lessee's best interests to obtain the consent of the lessor by allowing the lessee to occupy as sub-licensee and for a sub-licence to be entered into between the lessee and its subsidiary.

Each lessee must take care when allowing related entities to occupy leased premises and carry on business. To avoid any uncertainty, a lessee should obtain the lessor's consent every time someone other than the lessee occupies the premises and inform the lessor of the particulars of the occupying entity to avoid the lessee being in breach of the lease and the lessor therefore having the right to terminate the lease.

Adelina Tama
Solicitor
T: 02 8281 4658
E: awt@cbp.com.au

Option to Purchase in a Lease

We Are Here Pty Ltd v Zandata Pty Ltd [2010] NSWSC 262

This decision was handed down on 9 April 2010. The defendant, an owner of a property at 25 Schwinghammer Street South Grafton in New South Wales on which a motel was situated, granted a lease for 10 years. Clause 28 of the lease included an option to purchase the property in favour of the lessee for $662,500 to be exercised within 35 months after commencement of the lease. The lease also contained an option for renewal for five years, with two further options for renewals also for five years. All options for renewal were identical to the lease except for rent and the exclusion of clause 28.

In 2007 Mr and Mrs Boyd, the lessees, exercised the first option for renewal of five years. The renewal, unbeknown to the lessor, erroneously included clause 28, the option to purchase. Clause eight of the lease gave the landlord a right of first refusal in respect of the purchase of the tenant's motel business. Mr and Mrs Boyd sold their motel business situated on the leased land, to the plaintiff, We Are Here Ltd, the defendant chose not to exercise clause 8. The renewed lease was transferred from Mr and Mrs Boyd to We Are Here Ltd and it was subsequently registered. In March 2009 the plaintiffs gave notice to the defendant of their intention to exercise the option to purchase

Click return to contents

contained in clause 28, along with a deposit cheque. The defendants solicitors returned the cheque and informed the plaintiff that the option should not have been included in the renewed lease.

The New South Wales Supreme Court noted that if the claim for specific performance had been made by "Mr and Mrs Boyd, I think it is clear that even after registration of the lease, the landlord would have been entitled to rectification" (at [36]). However, The Supreme Court continued to state that the "lessor seeking to avoid an order for specific performance in favour of a third party namely an assignee of a lease is different. Knowledge of the lessee is not knowledge of the assignee" (at [37]). Therefore, the Supreme Court held that the plaintiff obtained an indefeasible title on registration of the lease and noted that "something more than notice of an interest or mere equity attached to an interest is required to defeat an otherwise indefeasible title. There must be conduct to make it unconscionable to exercise the option to purchase" (at [40]). Thus, the plaintiff was not only entitled to exercise the option to purchase but was able to purchase the land for a price determined more than 10 years earlier.

This case illustrates that erroneously included provisions may be rectified by the lessor against the original lessee but that there is no such entitlement against an assignee of the renewed lease.

Gary Newton
Partner
T: 02 8281 4652
E: gdn@cbp.com.au

Unenforceable guarantee under a lease

Barecall Pty Limited v David Hoban [2010] NSWCA 269

In a judgment handed down on 12 October 2010, the New South Wales Court of Appeal upheld the original decision of the New South Wales Supreme Court to dismiss proceedings seeking to enforce guarantees of the debts of a company pursuant to various instruments of lease, sub-lease and variation of lease. The three documents were in relation a building in Manly, partly owned and partly leased by the appellant, Barecall Pty Limited (**Barecall**).

In 2001 Aqualounge Manly Pty Ltd (**Aqua Lounge)** subleased and occupied the land for carrying on a nightclub, restaurant and bar. In 2003 Aqua Lounge was allowed to occupy an additional floor provided

Click return to contents

that documentation varying the original lease would be entered for higher rent. In a conversation between Mr Oppedisano (on behalf of Barecall) and Mr Spadina, Mr Rossi and Mr Harvey; it was established that Mr Oppedisano would let Aqua Lounge have the additional floor on the same terms as the previous tenant provided that he received personal guarantees from all five of the directors of Aqua Lounge.

Mr Tocchini, the solicitor acting for Aqua Lounge as well as Mr Hoban, Mr Rossi, Mr Spadina, Mr Lussick and Mr Harvey individually as directors of Aqua Lounge, wrote to Barecall giving an assurance that the aforementioned people will guarantee the lease. A few months later Mr Tocchini sent a letter to the solicitor for Barecall and Mr Oppedisano enclosing the documents that had been executed by three of the five guarantors, along with instructions that the other two guarantors would attend the other solicitor's office to execute the documents. Aqua Lounge ceased use of the premises in 2005 due to financial difficulties and Barecall brought an action to enforce the guarantees of the debts of Aqua Lounge.

The Court of Appeal held that although Mr Oppedisano had not been told by his solicitor that only three of the guarantors had executed the guarantee, Mr Oppedisano's knowledge of the situation could be imputed by his solicitors knowledge (at [18]). Therefore the Court of Appeal held that Barecall and Mr Oppedisano could not rely on estoppel because Mr Oppedisano had allowed Aqua Lounge to have possession and use of the premises despite having "knowledge of the absence of the fulfilment of the assurance that had been given" (at [19]). The Court of Appeal further noted that even if the guarantees had been properly executed, the lease had not been registered so it would not have been effective anyway: *per* Chan v Cresdon Pty Ltd [1989] HCA 63; 168 CLR 242 (at [20]).

This case illustrates that a lessor must be satisfied with all lease documents before allowing the lessee to take possession of the premises. The case also highlights the effect of solicitors knowledge being imputed upon their client and the imperativeness that solicitors relay all relevant information to their client.

Faith Laube
Paralegal
T: 02 8281 4454
E: fal@cbp.com.au

Click return to contents

T 61 2 8281 4555
F 61 2 8281 4567
E law@cbp.com.au
I www.cbp.com.au

Level 42, 2 Park Street
Sydney NSW 2000
Australia

DX 280 Sydney
Advoc Asia member

Colin Biggers & Paisley

LAWYERS