



# AVOIDING REPAIR DISPUTES

**MICHAEL REDFERN**, Consultant  
**EMMA DUNLEVIE**, Senior Associate



**Many repair disputes can be avoided by ensuring that condition reports in respect of the lease premises are prepared and signed off by the parties at all appropriate times.**

In particular, condition reports should be prepared at the commencement of a lease, at the renewal of a lease, on the assignment of a lease and, most importantly, at the expiry of a lease.

Most leases will provide for a make good requirement on the part of the tenant and, in many respects, the precise extent of the tenant's obligations to make good will depend upon proof of the condition of the premises as at the commencement of the tenant's occupancy and the comparative condition as at the expiry of the lease. The condition report will represent an acknowledged description of the condition of the premises at these times and, being signed by the parties, should represent an acknowledged statement of the position as at the time of making.

The condition report should deal with all aspects of the premises and we can provide precedents for use if required.

Where a lease is subject to the *Retail Leases Act 2003* section 52 of that Act provides that a landlord is responsible for maintaining, in a condition consistent with the condition of the premises when the retail premises lease was entered into -

- (a) The structure of, or fixtures in, the retail premises;
- (b) Plant or equipment at the retail premises; and
- (c) The appliances, fittings or fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

Accordingly, in determining the extent of the landlord's responsibility under the Act, it is critical that a very clear statement of the condition of the premises, as at the date the lease was entered into, is available to the parties.

The value of a condition report is well put by John Permewan, forensic architect and building consultant in a paper delivered to the Leo Cussen Institute in 1999 as follows -

*Setting aside other matters, the actual physical condition of a building can appear obvious to all present at an initial inspection, but it becomes critical to both parties at the end of the lease if there is a requirement to return the premises to the condition as at the commencement of the lease. The length of the lease can cloud memories of the initial condition and the changes that may have taken place. It is quick, simple and cost effective to have an independent existing condition inspection completed which contains both a written report and supporting photographs. It is not unknown at the end of a lease for a landlord to argue that the tenant caused significant damage to the building while a tenant says that the damage was either pre-existing, or fair wear and tear since occupation. It is considerably cheaper and less stressful for a client to refer to a pre-lease condition report within the lease and to use the same consultant at the end of the lease to prepare an option as to the probable condition at the commencement of the lease.*

For more information regarding the content of this article please contact Michael Redfern, Consultant or Emma Dunlevie, Senior Associate

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# REPAIR OBLIGATIONS FOR LANDLORDS AND TENANTS IN COMMERCIAL AND RETAIL LEASING



Repair obligations come from three sources: the lease provisions, the common law and legislation.

Commercial practice generally categorises a lease as either commercial or retail. It is through this window that we will examine repair obligations for landlords and tenants. **EMMA CREAN**, Senior Associate

## 1 Commercial Leases

Generally, the lease will require the tenant to carry out certain repairs in respect of the premises. However, unless the need for repair is caused by the tenant, repair obligations will not usually extend to structural repairs, or repairs required by fair wear and tear.

While a commercial lease will not contain an implied covenant that the tenant should maintain and repair a premises<sup>[1]</sup>, it will contain an implied covenant that the tenant use and deliver up the premises in a "tenant-like manner".<sup>[2]</sup> This phrase has been interpreted to mean that a tenant ought to "take proper care of the place", repair and, where required, maintain but only where the damage has been caused by the tenant.<sup>[3]</sup>

At common law, a landlord is not generally obliged to put the premises into a proper state of repair at the start of a tenancy, or to repair or maintain the premises during the tenancy.<sup>[4]</sup>

Where premises are in need of repair and it is not the tenant's responsibility under the lease, the general legal position is that the landlord is not obliged to carry out those repairs in the absence of an express term in the lease requiring the landlord to do so.

This position has been criticised by commentators, but in Victoria has recently been confirmed in decisions of Justice Balmford: *Carbure Pty Ltd v Brile Pty Ltd* (2002) V Conv R 54-663 and Deputy President Macnamara: *Muhammed Ali* (2002) V Conv R 58-570.

Where the lease terms reserve the landlord's right to effect repairs,<sup>[5]</sup> or where a landlord has previously voluntarily undertaken repairs<sup>[6]</sup>, the courts will not imply an obligation to repair. Nonetheless there are other statutory requirements that oblige a landlord to effect repairs.

While the common law is reluctant to imply an obligation on the landlord to repair or maintain leased premises, a prudent landlord would be mindful of obligations and requirements of the common law principle of negligence, the *Wrongs Act 1958 (Vic)*, the *Occupational Health and Safety Act 2004 (Vic)* and the *Building Act 1993 (Vic)*.

## 2 Negligence

The High Court summarised a landlord's duty of care in the case of *Jones v Bartlett*<sup>[7]</sup>

- a landlord owes a duty of care not solely under the contract of lease and not only to tenants but also to third parties (such as permitted occupants and visitors) injured as a result of a patent defect in the tenanted premises;
- a landlord may discharge that duty of care by undertaking an inspection of the premises prior to each lease or renewal of a lease, by responding reasonably to defects drawn to notice, and by ensuring that any

repairs are made which such inspection or notice discloses to be reasonably necessary; and

- a landlord may ordinarily discharge its duty by delegating such inspection and repair to a competent person.

As such a practical landlord would ensure inspections are undertaken at the commencement of any lease or renewal and that inspections or repairs were undertaken by persons qualified to do so.

## 3 Wrongs Act 1958 (Vic.)

Under the occupier's liability provisions of the *Wrongs Act*, the definition of "occupier" expressly includes a landlord of premises let under a tenancy who is under an obligation to the tenant to maintain or repair the premises; or could have put itself in a position to enter the premises and carry out maintenance and repairs.

Pursuant to the *Wrongs Act*, an occupier of premises owes a duty of care to see that any person on the premises will not be injured or damaged by reason of the state of the premises or acts or omissions by the landlord in relation to the state of the premises. The *Wrongs Act* also provides a list of considerations to be taken into account when considering whether the occupier's duty of care has been discharged. This is a significant departure from the common law position.

## 4 Occupational Health and Safety Act 2004 (Vic.)

Section 26 of the *Occupational Health and Safety Act* provides that a person who (whether as an owner or otherwise) has, to any extent, the management and control of a workplace must ensure that the workplace and means of entering and leaving are safe and without risk to health. It has been suggested that control refers to the ability of a person to compel or direct a corrective action to secure safety.

A person who has control of premises includes a person who has, under any contract or lease, an obligation to maintain or repair the premises (in which case the duty applies only to the matters covered by the contract or lease). Contractual provisions that indicate a principal's power to exercise control include, among other things, a right of a landlord to enter premises to conduct repairs or maintenance.

Although a lease gives exclusive possession to a tenant, a landlord retains "control", albeit limited, over a premises by virtue of being the registered proprietor and having obligations pursuant to the lease to repair and maintain.

Section 27 of the *Occupational Health and Safety Act* provides that a person who ought reasonably to know that the building or structure or part of the building or structure is to be used as a workplace must ensure, so far as reasonably practicable, that it is designed to be safe and without risks to the health of the persons using it as a

workplace for a purpose for which it was designed. By application a landlord will have knowledge of whether a premises is used as a workplace and the permitted use of the lease will indicate whether the tenant intends to use the premises for a purpose for which the building was designed.

Accordingly, the landlord should be aware of these sections of the Occupational Health and Safety Act.

### 5 Building Act 1993 (Vic.)

Section 251 of the Building Act provides that, if an owner omits to carry out work required to be performed under the Act or regulations, the occupier may carry out the required works. The occupier may recover any expenses incurred from the owner or deduct those expenses from any rent due or becoming due. This section applies despite any covenant or agreement to the contrary. Arguably, a tenant can rely on the Building Act to undertake and recover the cost from the landlord for capital or structural works required to the premises.

Section 75EA of the Building Act provides that an owner of any land on which there is a cooling tower system must take all reasonable steps to ensure that a risk management plan exists. This plan should outline the steps to be taken to manage the risk and ensure compliance of the Building Act or the *Health Act* 1958.

Section 221ZZB(1) provides that a plumbing inspector may issue a written order requiring that an owner or occupier rectify or modify any plumbing work so that it complies with the building laws.

While a lease may provide otherwise, a landlord must ensure that the premises conform to the building regulations and failure to do so may result in the tenant recovering costs from the landlord for rectification work and possible penalties under the Building Act.

### 6 Retail leases

All clients, whether landlord or tenant, have the same question when the issue of repairs arises: who has to fix it, and who has to pay?. The drafters of the *Retail Leases Act* 2003 ("the Act") sought to provide an answer for all clients in this regard.

Previously, where the Act applied to a lease, a landlord was required to maintain a premises in "good repair". This obligation applied even if the premises were not in "good repair" at the lease commencement and rent was negotiated based on the poor condition at that time. However, this position has been amended.

Section 52 provides that the landlord is responsible for maintaining the premises in a condition that is consistent with the condition of the premises when the retail premises lease was entered into. To avoid ambiguity, the Act provides that this obligation specifically relates to the repair and maintenance of:

- the structure of, and fixtures in, the retail premises; and
- plant and equipment at the retail premises; and
- the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

Section 52(3) limits a landlord's obligation to repair. It provides that the landlord is not responsible if the need for the repair arises out of misuse by the tenant or the tenant is entitled or required to remove the thing at the end of the lease. Accordingly, the Act relieves the landlord of the obligation to repair where such repair is required due to the tenant's fault or negligence, or where the repair is to

the tenant's fitout or the tenant's fixtures.

There is a difficulty with the wording of section 52(2) because, where a lease is renewed, the condition of the premises at the commencement of the lease will be the condition as at the commencement of the latest renewal of the lease. This section highlights the importance of condition reports for both landlords and tenants.

The Act is clear in relation to urgent repairs. The intention of the Act is to enable the tenant to get on with business. If repairs are required then the tenant needs to be able to attend to those repairs to minimise any loss its business might suffer. The most obvious example of this is a shop front window broken by vandals or act of God.

The Act provides that a tenant may arrange for urgent repairs for those repairs for which the landlord is responsible under the Act or the lease to be carried out if the repairs are necessary to fix damage that has a substantial effect on the tenant's business at the premises and the tenant is unable to get the landlord or the landlord's agent to carry out the repairs.

That provision requires the tenant to take reasonable steps to contact the landlord and the landlord's agent in relation to those repairs. To that end, a prudent tenant would document those efforts, despite the urgency and haste required by the situation. It could be as simple as a file note regarding a phone message and an e-mail to confirm the message that clearly indicates the repairs required and the time frame preferred by the tenant.

If the tenant carries out those repairs, the tenant must give the landlord written notice of the repairs and the cost within 14 days after the repairs are carried out. A statement as to why the repairs were required detailing the times and possible cause of the damage together with a copy of the tax invoice issued by the persons who undertook the repairs would be enough to satisfy the tenant's statutory obligations.

The landlord is liable to reimburse the tenant for the reasonable cost of the repairs and may not recover that cost as an outgoing. Notably the Act does not provide a time limit on the landlord to reimburse the tenant for the cost of repairs. The provision could be interpreted as allowing the tenant 14 days to notify the cost to the landlord and accordingly the same time period would be reasonable for the landlord to make payment.

### 7 When repairs are required:

Contact Russell Kennedy to

- 7.1 confirm the application of the relevant legislation;
- 7.2 review other legislation that could affect your activities;
- 7.3 review the particular terms of your lease; and
- 7.4 prepare an ongoing legal strategy to resolve existing problems.

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[1] Warren v Keen [1951] 1 QB 15

[2] City of Ballarat v Waller [1924] VLR 115

[3] Warren v Keen [1951] 1 QB 15

[4] Carbure Pty Ltd v Brile Pty Ltd [2002] V Conv R 54-663

[5] Sleafer v Lambeth Borough Council [1960] 1 QB 43

[6] Asher v Seaford Court Estate Ltd [1950] AC 508

[7] [2000] 176 ALR 137

# LEASE OR LICENCE - ISSUES FOR COUNCILS

EMMA CREAN, Senior Associate (pictured) MARION COLE, Articled Clerk



## 1 WHEN DO YOU USE A LEASE AND WHEN DO YOU USE A LICENCE?

The difference between a lease and a licence is that a lease grants to a tenant exclusive possession over the property. A licence grants a right to use the property, but not to the exclusion of others.<sup>1</sup>

Although a document might be called a "Licence", in the case of a dispute the court will look to the actual nature of the possession granted to a tenant. While a tenant might have a licence which permits the landlord to allow other parties to use the property, if the landlord does not exercise this right, and the tenant in fact has exclusive possession, then a lease might be inferred, irrespective of the title of the document. The use to which the premises has been put will be considered in determining whether exclusive possession has been granted.

An example of this would be where a kindergarten is granted a licence over certain premises, with the wording in the licence that Council reserves the right to allow other groups to use the property. If Council provides the kindergarten with the only keys to the property and no other groups use any part of the property, then the kindergarten arguably would have a case to say that it has exclusive possession, and as such, should be granted a lease over the property.

If however, the document titled "Licence" preserves the right for Council to allow other groups to use the area occupied by the kindergarten from time to time and a play group meets there once a week and neighbourhood watch use the kinder classroom every Tuesday night then the use to which the premises is being put is likely to mean that a Licence is created.

Another scenario is if the document governing the kindergarten's occupation is a Lease and Council is making other space within the leased premises available to other groups from time to time. Council would be in breach of its obligation pursuant to the lease to provide exclusive possession to the Kindergarten.

In short, if a landlord intends to grant exclusive possession to a tenant a lease is appropriate. If the property is actually used by more than one group from time to time and no one group has exclusive possession then a licence is more appropriate.

## 2 WILL THE RETAIL LEASES ACT 2003 (VIC) APPLY?

The Retail Leases Act ("RL Act") applies to leases which are entered into after 1 May 2003 for retail premises. Retail premises is defined in section 4 to include premises that under the terms of the lease are used, or are to be used, wholly or predominantly for the sale or

hire of goods by retail or the retail provision of services.<sup>2</sup> The RL Act does not provide a definition of retail, and as such, we must look to how courts and tribunals have defined retail, in order to understand what sort of leases are to be captured by the RL Act.

### 2.1 What have the courts defined as retailing?

In *Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333 Nathan J noted, "The essential feature of retailing, is to my mind, the provision of an item or service to the ultimate consumer for fee or reward. The end user may be a member of the public, but not necessarily so".

The essential elements of retailing as defined by Nathan J are then:

- The provision of an item or service;
- To an ultimate consumer (who may or may not be a member of the public);
- For fee or reward.

### 2.2 Use of peppercorn rent no exemption

Peppercorn Rent is nominal rent which does not reflect or equate with the market value. It is still rent, but is not regarded as a payment or requiring a receipt. The RL Act operates, regardless of the rental charged (with the exception of rental in excess of \$1,000,000 per annum) and as such, the charging of so-called peppercorn rent will not escape the obligations imposed under the RL Act.

The case of *Brimbank v Westvale*<sup>3</sup> demonstrated that even where nominal rental was charged (\$100 per annum in this case) the RL Act can still be found to apply. Williams J considered that entering into discussion as to the commerciality of the leasing arrangement, or the commerciality of the use to which the tenants put the premises would be to undermine the RL Act.

Accordingly, the RL Act applies irrespective of the commerciality of the rent.

## 3 EXEMPTIONS TO THE RL ACT

There are exemptions under the RL Act which include:

- 3.1 where the occupancy costs (rent plus outgoings) exceed \$1,000,000 per annum;
- 3.2 where the tenant is the landlord's employee or agent;
- 3.3 where a tenant is a listed corporation or a subsidiary of such a corporation;
- 3.4 Leases of less than 1 year; and

- 3.5 Where the premises are exempt by virtue of Ministerial determination. These exemptions to date include:
- 3.5.1 Premises located above the first three storeys;
- 3.5.2 Barristers' Chambers;
- 3.5.3 The 15 year exemption. Essentially, this determination will apply:
- (a) if the lease term is 15 years or longer and is entered into on or after 24 August 2004 or
  - (b) to a renewal term of less than 15 years originating from an initial term of more than 15 years where the renewal is on or after 24 August 2004 (for example, a lease for a term of 20 years from 1 August 1985 to 31 July 2005 that is renewed for a term of 5 years from 1 August 2005) or
  - (c) to a new term by way of variation of lease of less than 15 years which originated from an initial term of more than 15 years entered into on or after 24 August 2004 (for example, a lease for a term of 20 Years from 1 August 1985 which is varied by agreement to apply for a term of 5 years from 1 August 2005).

In addition, the terms of the lease must impose one or more of the following obligations on the tenant:

- (d) impose an obligation on the tenant or any other person to carry out any substantial work on the premises that involves the building, installation, repair or maintenance of:-
  - (1) the structure of, or fixtures in, the premises; or
  - (2) the plant or equipment at the premises; or
  - (3) the appliances, fittings or fixtures relating to the gas, electricity, water, drainage or other services; or
- (e) impose an obligation on the tenant or any other person to pay a substantial amount in respect of the cost of the matters set out in paragraph (d) above; or
- (f) in any significant respect disentitle the tenant or any other person to remove any of the things specified in paragraph (d) at or any time after the end of the leases to which paragraphs (a) to (c) apply.

The Small Business Commissioner may certify that the lease is one to which the determination applies.

#### 4 SECTIONS 190 AND 191 OF THE LOCAL GOVERNMENT ACT 1989 (VIC) ("LG ACT")

Councils are restrained in their dealings with land by several sections of the LG Act. The two sections of note are:

- section 190 which deals with the restriction on Council's power to enter into leases, and
- section 191 which deals with the restriction on Council's powers to transfer, exchange or lease land without consideration.

##### 4.1 Section 190 LG Act

Section 190(1) restrains Council from leasing land to any person for more than 50 years. Council is required under section 190(3) to publish notice of the proposed lease if it is to be:

- 4.1.1 for 1 year or more; and
  - (a) the rent for any period of the lease is \$50,000 or more a year; or
  - (b) the current market rental value of the land is more than \$50,000 or more a year; or
- 4.1.2 for 10 years or more; or
- 4.1.3 a building or improving lease.

A person will have a right to make a submission under section 190(4) if a notice is published under section 190(3).

If Council wishes to enter into a lease with, for example a kindergarten, and the term of the lease is over one year, and the market rental value of the land is over \$50,000 per annum, then Council is obliged to publish a notice of the proposed lease, at least four weeks before entering into such a lease. Even if Council is not proposing to charge the kindergarten market value rental, the requirement under section 190(3) is what the market value rental is, not what is charged. Similarly, if Council is seeking to enter into a lease with a kindergarten for over 10 years, it must publish a notice of this intention.

##### 4.2 Section 191 LG Act

A Council's power to transfer, exchange or lease land without consideration is contained in section 191 of the LG Act. A council may transfer, exchange or lease any land with or without consideration to:

- the Crown; or
- a Minister; or
- any public body; or
- the trustees appointed under any Act to be held on trust for public or municipal purposes; or
- a public hospital within the meaning of the *Health Services Act 1988*.

Such a transfer, exchange or lease will be regarded as valid in law and equity, and does not come under the requirements of sections 189 and 190.

Many councils have asked what constitutes a public body for the purposes of this section. Section 3 of the LG Act defines it as "any government department or municipal council or body established for a public purpose by an Act of the Parliament". This in turn requires the examination of the founding legislation of such bodies, however as an example both VicRoads and the State Emergency Service are two organisations which fall within the definition of public body contained in section 191, and as such, Council can lease, transfer or exchange land with these bodies without consideration, and such a transaction will be valid in law and equity.

## 5 CAN YOU INCORPORATE A SERVICES AGREEMENT INTO EITHER A LEASE OR A LICENCE?

In considering service agreements, Council should be aware of the certain duties imposed by section 186 of the LG Act. In particular, before a Council enters into a contract for the purchase of goods or services to a value of \$100,000 or more, it must comply with the public notice and tendering requirements contained in that section of the Act.

In negotiating the terms of leases or licences there is often a services agreement between Council and the lessee or licensee. This can be dealt with through a

separate services agreement, or as a schedule to the lease or licence. Regardless of which method is used, the requirements of section 186 of the LG Act should be considered.

## 6 CHECKLIST

- Lease or licence: exclusive possession or right to share premises?
- Commercial or Retail Lease: provision of goods or services to an end user for fee or reward?
- Have obligations under the RL Act been complied with? Notice requirements, disclosure statements, reporting obligations, repair obligations?
- Is the lease or transfer one to which the LG Act applies?
- Is there a service component to the lease or licence?

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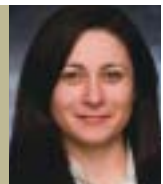
1 *Radaich v Smith* (1959) 101 CLR 209

2 section 4(1)(a) RL Act

3 [2006] VSC 100

# WHEN CAN A LANDLORD REFUSE CONSENT TO AN ASSIGNMENT OF LEASE?

**SANDRA ROMEO**,  
Solicitor



**It is essential for a landlord to ensure that its tenant is able to comply with its obligations under the lease. Therefore, most leases will contain an express covenant dealing with the rights of the tenant to assign the tenant's interest under the lease to another tenant or to sublet the premises.**

In Victoria, a landlord's power to refuse consent to a request for assignment of a lease, or subletting of a premises, is restricted by the provisions of the *Property Law Act 1958*, the *Retail Leases Act 2003*, the common law and the conditions in the lease.

## 1 Property Law Act 1958

The majority of commercial leases contain an express covenant declaring that the tenant may not assign the lease without the express written consent of the landlord and where consent is to be obtained, such consent cannot be unreasonably withheld.

When a lease is silent as to the grounds on which the consent can be refused, it is implied by virtue of section 144 of the *Property Law Act 1958* that it should not be unreasonably withheld, unless the lease contains an express provision to the contrary.

## 2 Retail Leases Act 2003

The Retail Leases Act 2003 does not contain any overriding requirement on the part of a landlord to act reasonably. Section 60 of the Act sets out a list of circumstances in which a landlord can withhold consent to assignment. These include:

- (a) the proposed use is not permitted under the lease;
- (b) the landlord considers the assignee lacks sufficient financial resources or business experience to meet the obligations under the lease;
- (c) the assignor has not complied with the assignment provisions under the lease;
- (d) the assignor has not provided the assignee with business records for the previous 3 years or such shorter period as the proposed assignor has carried on business at the retail premises.

A landlord is taken to have consented to an assignment of a lease if it has not provided written notice to the tenant consenting or withholding consent within 28 days.

The lease may also contain a provision allowing a landlord absolute discretion to refuse consent to a sub-lease or licence, or mortgage of lease or to the tenant in any other way encumbering its estate or interest in the lease. Therefore, if a tenant anticipates sub-letting a leased premises some time in the future the tenant should negotiate the right to do so when negotiating the other terms of the lease.

### 3 The Common Law

The courts have adopted both broad and narrow views of what may constitute an unreasonable refusal. The broad view is that the test is what a reasonable landlord would do in the circumstances. The narrow view, and that which is more commonly accepted, is that the landlord's refusal must be directed at the purpose of the covenant and not some collateral purpose. Lord Justice Balcombe in *International Drilling Fluids Ltd v Louisville Investment (Uxbridge) Ltd* (1986) CH 513 at 520 set out the following propositions of law:

- The purpose of the covenant against assignment without consent of the landlord, such consent not to be unreasonably withheld, is to protect a lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant; and
- a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatsoever to do with the relationship of the landlord and tenant and in regard to the subject matter of the lease."

This means that in general the refusal must be based on issues that relate to the character or personality of the assignee, matters affecting the occupation of the premises or matters affecting the subject matter of the lease. The financial stability of the assignee is also an accepted ground for refusal.

Examples of situations where courts have determined that refusal was reasonable include:

- 3.1 a genuine belief on the part of the landlord that the assignee is unlikely to be able to pay the rent for the remainder of the lease term;
- 3.2 the proposed transfer seeking to limit the obligations of the proposed new tenant's guarantor.

Examples of situations where courts have determined that refusal was unreasonable include:

- 3.3 where the landlord refused consent in order to obtain a higher rental from a proposed assignee;
- 3.4 where the landlord required that the proposed assignee must accept a variation to the terms of the lease.

In the recent Judgment of *Kids Campus Holdings Pty*

*Ltd v Kelly & Anor* [2007] VSC 282 the plaintiff tenant sought to include a condition in the transfer that restricted the assignee's liability by reference to a trust as well as a further condition limiting the guarantor's liability to the remainder of the transferred term only.

The landlord refused consent on the grounds that the trust "was entirely beyond the knowledge and control of the landlords" and the transfer failed to compensate the landlord for the increased commercial exposure, and that the transfer contained no effective replacement guarantor .

It was held that the reasons provided were not unreasonable, because "the trust structure, coupled with the reality that a transfer would in due course bring the guarantees to an end provided an obvious and reasonable basis for withholding consent at the time it was withheld."

This case also discussed the issue of the time frame in which a landlord should provide the reasons for the refusal to the tenant. On the facts of this case there was a delay of 2 months from the date that the landlord advised that it would not consent. Although on the facts this did not render the reason for refusal as unreasonable, it was considered unreasonable behavior with regard to the issue of costs in the proceeding.

### 4 Terms of the lease

As stated above, even where the legislation does not place a requirement on the landlord to act reasonably, most leases are likely to contain an express covenant imposing the obligation. A landlord should therefore consider whether it is prepared to accept this when negotiating the terms of a lease.

### 5 When consent to assignment is required:

5.1 If you are a landlord Russell Kennedy can assist with:

- 5.1.1 ensuring the lease is drafted to include appropriate assignment provisions,
- 5.1.2 ensuring that the requirements of the lease are complied with by the tenant;
- 5.1.3 ensuring legally appropriate reasons for any refusal are provided within any necessary time frames.

5.2 If you are a tenant Russell Kennedy can assist with:

- 5.2.1 ensuring that you do all things necessary to comply with the terms of your lease and any relevant legislation in seeking consent;
- 5.2.2 preparing the transfer documentation;
- 5.2.3 advice as to your position if the assignment is refused.

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## UPCOMING SEMINAR

# LEASING NEGOTIATIONS AND TIPS FOR AVOIDING TENANCY DISPUTES

### TOPICS COVERED

- Repair issues for landlords and tenants
- Tips for avoiding tenancy disputes
- Lease Assignments and Subleases
- Questions and Answers: Retail Leases Act 2003

### SPEAKERS INCLUDE

**Michael Redfern**, *Consultant*, Russell Kennedy  
**Emma Dunlevie**, *Senior Associate*, Russell Kennedy  
**Samantha Taylor**, *Senior Associate*, Russell Kennedy  
**Sandra Romeo**, *Solicitor*, Russell Kennedy

### WHO SHOULD ATTEND

- Landlords and tenants
- Leasing Administration Managers
- Estate Agents

### THURSDAY 11 October 2007

Registration - 8:30am  
Start - 8:45am  
Finish - 10:45am  
Followed by morning tea

### RUSSELL KENNEDY

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