

PROPERTY INSIGHTS

'A ROSE BY ANY OTHER NAME' A REFRESHER - FRANCHISEE LICENCES COULD BE RETAIL LEASES



By Cynthia Mechaalani
Associate

PROPERTY

In brief:

In the 2013 Supreme Court decision of *Subway Systems Australia v Ireland*¹ reference was made to the Tribunal's finding in *Ireland v Subway Systems Australia Pty Ltd & Anor Retail Tenancies*² that a franchisee licence was in fact a retail lease. In preparing franchisee licences, the parties will need to turn their minds to whether the arrangement substantively amounts to a retail lease.

What you need to know:

What is a retail premises?

The recent decision in *CB Cold Storage*³ has raised discussions about the meaning of "retail premises" and the widening circumstances that could satisfy the definition and thus be subject to the *Retail Leases Act* (Vic) 2003 (Act).

In determining whether a lease is retail in nature, one should consider the following:

- ▶ Section 4 of the Act sets out the definition of "retail premises" along with certain exclusions;
- ▶ Section 12(a) of the Act excludes leases that are less than one (1) year;
- ▶ the various Ministerial Determinations set out what are not retail premises;
- ▶ Ultimate Consumer Test upheld in the *CB Cold Storage Case* (see the article by [Jaclyn Tang](#) for further information); and

- ▶ the various case law that set out the surrounding factors to be considered when determining whether the premises is retail in nature.

You should also keep note that it is not possible to contract out of the Act (see article by [Rohan Ingleton, Partner](#)) such that any explicit wording to that effect will not be sufficient in determining that the purported licence is not a retail lease.

What do franchise arrangements look like?

Traditionally, the franchise relationship is structured in such a way that the franchisor enters into a head lease with the owner of the property. The franchisor will then subsequently enter into a franchise agreement with the franchisee and grant them a licence to the property.

In 2015 the revised Franchising Code of Conduct was issued and regulates the conduct of parties to the franchising arrangement.

Why could franchisee licences be considered retail leases?

It is widely understood that "If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck." In essence, whilst the parties may choose to call or categorise an agreement as a licence, if on

the balance, the substance and surrounding circumstances support the finding that it is a lease, then it should be treated as such.

Parties to a franchisee licence should have regard to the following, amongst other considerations, which would be considered when determining if the licence amounts to a lease:

- ▶ the terms of the agreement;
- ▶ whether exclusive possession has been granted;
- ▶ the intention of the parties;
- ▶ the circumstances of the transaction; and
- ▶ relevant case law.

As such, if the licence is substantively a lease and meets the definition of "retail premises" then the Act will apply to those purported licences.

Conclusion

Whilst the appeal of the VCAT decision did not consider the validity of the licence being characterised as a sub-lease, parties in a franchise arrangement should turn their mind to whether their purported licence is in fact a lease and in particular, a retail lease. Ultimately, if it acts like and looks like a lease then it is likely to be a lease in substance and the Act may well apply.

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¹ [2013] VSC 550

² [2012] VCAT 1061

³ IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd [2017] VSCA 178

REPUDIATION REMINDER: TERMINATING A LEASE ON THE BASIS OF REPUDIATION



By Rebecca Giacomini
Lawyer

PROPERTY

In brief:

Failure to understand what constitutes repudiation can be a serious risk when terminating a lease and it is vital parties are aware of the process. If you attempt to terminate on the basis of repudiation, you are required to prove that repudiation has occurred – remember whilst repudiation has long been recognised as a common law right to terminate a lease, whether a party has repudiated is a question of fact. Therefore understanding exactly what constitutes repudiation thus allowing you to terminate a lease on that basis is key!

What you need to know:

- ▶ Repudiation is more than a breach of the terms of your lease, it represents an unwillingness to perform the lease, and involves a total abandonment of the lease as a whole or of a fundamental obligation under it.
- ▶ It is not a state of mind. Repudiation only occurs where a defaulting party demonstrates through its conduct "an intention no longer to be bound by the contract...or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way".¹
- ▶ You cannot terminate on the basis of repudiation unless you are able to demonstrate your readiness and willingness to perform the lease at the time of termination.

¹ Shevill v Builders Licensing Board (1982) 149 CLR 620 at 625-6.

Be proactive

One option available to parties is to include a clause in the lease that defines a breach of particular obligations as repudiatory. These types of clauses act as good protection against disputes over whether a lease has been repudiated or not.

Recent Case

In the case of *Loughran v Hasham (Building and Property)* [2017] VCAT 2067, the Tenant successfully argued that the Landlord repudiated its lease. The Landlord's actions that amounted to repudiation of the lease were as follows:

- ▶ Continually refusing to carry out structural repairs which were their responsibility and necessary to enable the property to be used for the permitted use;
- ▶ Failing to issue the tenants with tax invoices so they could claim GST as input credits for their business;
- ▶ Claiming to occupy the property and naming the tenants as squatters; and
- ▶ Making unauthorised visits to the property and attempting to break into the property and lock the tenants out.

Conclusion

If you are considering terminating a lease on the basis of repudiation it is important to note that a party does not necessarily repudiate a lease by failure to observe its obligations. Given repudiation can be so uncertain, it is wise to consider whether it would be better to terminate pursuant to a term of the lease, if one is available.

MADGWICKS IS READY FOR 100% DIGITAL CONVEYANCING – ARE YOU?



By Jen Severn
Associate

PROPERTY

The date to have finalised transitioning to 100% digital conveyancing is fast approaching – don't get left behind!

The Madgwicks Property team is an early adopter of online conveyancing and is ahead of the game, already transitioning to 100% digital conveyancing well ahead of the 1 August 2019 deadline. Madgwicks e-Contracts is a completely paperless, centralised, online system that complements PEXA. It allows for the preparation, distribution and signing of contracts of sale electronically for single or multi-lot developments.

The benefits of Madgwicks e-Contracts is that it allows for less human error, saves on time and costs associated with preparation of paper contracts of sale, the electronic contract is available to all parties to the transaction and increases efficiency for signing by all parties.

Communication with purchasers is also available at the touch of a button; those Section 9AC notices taking days to send is a thing of the past! Not to mention the positive environmental impacts of a paperless system.

Interested in how Madgwicks e-Contracts can work for you? Please contact our Property Team to discuss how we can help you transition seamlessly to our e-Contracts, PEXA and Duties Online before the mandated date of 1 August 2019.

KEY PEXA DATES

1 MARCH 2018

All survivorship applications, transmission applications and standalone transfers must be lodged electronically.

1 OCTOBER 2018

All combinations of transactions available in PEXA to be lodged electronically e.g. a case comprising a withdrawal of caveat, discharge of mortgage, transfer and mortgage.

1 AUGUST 2019

All transactions to be lodged electronically.

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It is intended to provide general information on topics current at the time of publication. No person should act on the basis of the contents of this publication without seeking formal legal advice.