MADGWICKS LAWYERS

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PROPERTY INSIGHTS

GIVE YOURSELF MORE TIME UNDER NEW COMPLEX LAND TRANSFER TRANSACTION REQUIREMENTS

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PROPERTY

In brief

On 1 August 2019, Land Use Victoria mandated that nearly all land transfer transactions, including complex stamp duty transactions, must now be lodged and managed online which, for complex transactions, results in additional time being required for settlement.

What you need to know

For complex land transfer transactions, lawyers and conveyancers were traditionally required to prepare evidentiary material setting out why the matter was complex and explaining what exemption or concession should be applied to a particular case. This information was then uploaded to the Duties Online workspace for consideration and determination by the State Revenue Office.

Under the new regime, the same evidentiary material is provided to the State Revenue Office through an Electronic Lodgement Network Operator (ELNO) such as PEXA. Upon receipt, the State Revenue Office sets the settlement date for the transfer as the date in which they will have completed the assessment of the complex stamp duty transaction.

What does this mean for your transaction? More time!

Going forward, settlement of a complex transaction will not be able to take place until such time as the stamp duty determination has been finalised by the State Revenue Office and an assessment notice issued via the ELNO. This means you will now need to allow an additional 30 days for settlement of complex transactions.

This is in contrast to the old system where, if you were purchasing a property that required determination of duty by the State Revenue office, settlement could occur and the purchaser's lawyers or conveyancer would retain the original paperwork for lodging at Land Use Victoria until a copy of the transfer and evidentiary materials was submitted for assessment by State Revenue Office within 21 days from submission. Once assessed, the transfer of land could then be lodged for registration at Land Use Victoria. Duty was usually then due to be paid within the timeframe noted on the Assessment Notice. This usually would give a purchaser additional time in which to pay its stamp duty

Example under the new system:

John has decided to sell his residence to his brother and sister-in-law, Bob and Wendy, as their principal place of residence. Settlement under the Contract of Sale is due on 2 September 2019.

As John, Bob and Wendy are related parties, and Bob and Wendy will be claiming a principal place of residence exemption, the transfer is deemed complex and will need to be submitted to the State Revenue Office with the appropriate evidentiary material for determination by no later than 3 August 2019 for settlement to occur in accordance with the Contract of Sale on 2 September 2019.

The new system means stamp duty is now payable at settlement for all transactions including complex transactions.

The State Revenue office have published a lodgement category checklist which can be found here.

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Why have these changes been introduced?

This update to the complex transaction assessment system is to:

- improve electronic settlement rates;
- duty is calculated, collected and paid at the time the electronic transfer occurs (ie. No delay in the State Revenue Office receiving the duty);
- aligns standard and complex transactions so all transactions are managed online;
- increased data security for participants;
- ensure that stamp duty is viewed and agreed by the parties prior to settlement.

If you are unsure if your transaction is complex, please do not hesitate to contact our office to discuss your matter further.

NOT A 'FAN' OF VCAT'S RECENT DECISION, THE SUPREME COURT OF VICTORIA HAS CLEARED THE AIR IN RELATION TO AIR-CONDITIONERS IN LEASED PREMISES

By Nicola Carnevale
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PROPERTY

In brief

The Supreme Court of Victoria has overruled a recent VCAT decision[1] centred around a landlord's repair obligations for an air-conditioning unit (A/C) and whether the tenant could terminate the lease as a result of the landlord's inaction.

What you need to know

- Parties should take care to document their obligations clearly in order to avoid disputes during the term of the lease, especially in relation to specific agreements in relation to installation, repair and make good works as these works are often costly.
- All correspondence, especially that relates to a perceived breach of the lease by one party, must be clear, unambiguous and outline the alleged breach of the lease and the related conduct (or lack thereof). Parties should seek legal advice in relation to perceived breaches to avoid incurring unnecessary costs.
- Unlike the Tenant in this case, a party who is seeking to point to the actions of the other as their repudiation of the lease must continue to demonstrate that they are willing and able to perform their obligations under the lease. Failure to do so will limit their right to recover for their loss incurred by the actions of the other.

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Facts

- The parties entered into a lease for a Pilates and Barre Studio. Neither party disputed that A/C is required for the conduct of the business.
- Special Condition 1 (SC) of the Lease required:
  - the Landlord to install the A/C to service the premises;
  - the Tenant will, at its own cost, take out and maintain a maintenance contract with a reputable air-conditioning contractor for the service of the A/C; and
  - the Landlord will be responsible for the associated capital repairs.
- At the commencement of the Lease, there was a relatively new (6 years old) air-conditioning unit installed in the premises which was suitable for use.
- During the lease the A/C was not working. The Tenant demanded that the Landlord fix the A/C. The Landlord asked if the Tenant was servicing the A/C. The Landlord received no further response from the Tenant and did not repair the A/C.
- The Tenant terminated the lease on the basis that the Landlord had repudiated the lease.
- It was determined in the VCAT decision that the Tenant had not entered into a maintenance contract for the air-conditioning.

Supreme Court Decision:

Construction of SC 1

The Court confirmed that the appropriate test for determining the parties' intention in relation to a term of a commercial contract is "what a reasonable businessperson would have understood those terms to mean".[2] Also, the term should not be interpreted as producing a commercially inconvenient or nonsense result.[3]

In this case, the Landlord successfully argued that the SC required the Landlord to install A/C at the beginning of the Lease. As the existing A/C was relatively new it would make no commercial sense to make the Landlord remove the existing A/C and install a completely new system.

VCAT had accepted the Tenant's position that the obligation of the Landlord to install A/C to service the premises was an ongoing obligation on the Landlord to maintain the A/C. However, the Court rejected VCAT's position and agreed with the Landlord that common sense suggests that the parties hadn't intended for the Landlord to have an ongoing repair obligation when the SC also required the Tenant to undertake a maintenance contract. Ultimately, the Landlord was not under an obligation to repair the A/C.

Repudiation

Repudiation is an objective test of whether a party's conduct is reasonably considered as an unwillingness or inability to perform the contract and therefore allows the other party to terminate.[4]

Justice Croft outlined why the Landlord had not repudiated the contract:

- Tenant had failed to give the Landlord notice of their breach.
  - The Court found that notice must be clear and unequivocal in identifying the Landlord's obligation and their alleged failures to meet those obligations.
- Objectively, considering all of the circumstances, the Landlord was not unwilling to perform the contract.
  - The Landlord had queried whether or not the Tenant was servicing the A/C. The Court found that this did not indicate the Landlord's refusal to carry-out their obligations under the Lease.
- Repudiation is "a serious matter and is not to be lightly inferred"[5]
  - There was no time stipulated for the Landlord to repair the A/C.
  - An objective assessment of the communications suggests that the Landlord believed that the Tenant was responsible for the service of the A/C.
  - The repair was relatively simple and not capital or structural in nature.
- Ultimately, a party who is not willing and able to perform their own obligations under the contract cannot rely on the other party's breach to terminate the contract.[6] Here, the Tenant had not serviced the A/C (as per the SC) and was therefore disentitled to terminate the Lease and claim that the Landlord had repudiated the Lease for failing to repair the A/C.

Conclusion

This was an important and commercial decision from the Supreme Court of Victoria that re-established clear principles in relation to the interpretation of contractual clauses and the requirements for terminating due to another party's repudiation of the deal.

Landlords and tenants should seek legal advice in relation to the drafting of their leasing arrangements and when enforcing the obligations of those arrangements during the term of the lease.

[1] Valuer and Retail Leases Update – Failure by landlord to repair air-conditioning allows tenant to terminate lease; also Sth Melb Pty Ltd v Red Pepper Property Group Pty Ltd [2018] VCAT 1684.

[2] Electricity Corporation v Woodside Energy Limited (2014) 251 CLR 640 at [35]

[3] Ibid.

[4] Repudiation Reminder: Terminating a lease on the basis of repudiation

[5] Shevill v Builders Licensing Board (1982) 149 CLR 620 at 633 per Wilson J; Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17 at 32.

[6] DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423 at 423-3.

HOW IS TELECOMMUNICATIONS LEASING DIFFERENT TO ANY OTHER TYPE OF COMMERCIAL LEASING? PART TWO

By Lauren Milne
Legal Executive

PROPERTY

Carrying on from Part 1 of my article titled: How is telecommunications leasing different to any other type of commercial leasing? I will now delve a layer deeper into the world of telecommunications leasing.

To lease a space for a telecommunications facility, carriers usually only require a lease over part of an owner's land or building rather than leasing the whole of a lot or the whole of a building.

As discussed in part 1 of this series, a number of different types of facilities exist including monopoles, rooftops, small cells and IBC's to name a few, each with different location requirements.

A mobile phone base station compound site which would include a monopole, base and shelter for 1 carrier, will usually consist of a fenced off area around 8 m x 6 m.

A rooftop site may include a leased area for an equipment cabin, then licensed areas on the corners or other locations on the rooftop for the panel antenna locations.

A small cell is typically a set of small antennas, serviced by a small equipment housing on a pole, such as a light pole, or on the ground near the pole, usually less than 1 m2 in size.

An In-Building Cellular Enhancement System ("IBC") usually installed in conjunction with a Distributed Antenna System ("DAS") is a facility that allows us to have network coverage within a building such as a shopping centre, hospital, university or multistory office building. Cabling and antennae hubs are installed throughout the ceilings of each floor and connect to a communications room, usually on the ground level of the building.

These facilities are installed to improve coverage and increase the capacity of a network within the types of buildings listed above or within a sporting arena where there is likely to be a higher concentration of network users in the one location. Additionally, our mobile phones can become confused if there are too many available facilities casting out transmission signals in the one area. These IBC and DAS facilities are designed to be the primary service a mobile phone will select to receive transmission from within the building and drown out the other surrounding and available facilities.

Due to the nature of the service that carriers are providing, they often have very specific terms they require within their leases that are not common in other types of commercial leases.

Often landlords and their lawyers treat these provisions with suspicion and look at them as if the carrier (who is often a much larger corporation than the landlord) may be trying to throw its weight around and take advantage of the little guy.

From experience, once the practicalities of running a successful telecommunications network are understood, it becomes evident that having power over others is not the motivation behind the commercial and legal provisions within a carrier's lease document. I'm going to look into some of the common provisions that can often cause confusion and provide some background as to their existence.

Hold the Phone!

A holding over provision in a lease allows for the tenant to remain in occupation of the premises after the expiry of the lease term with the implied or express consent of the landlord, normally on a month to month basis determinable by either party on a month's notice.

A carrier will however require (especially for high impact sites e.g. a compound site with a monopole) the ability to hold over for preferably 18 months, with 12 months often the absolute minimum.

Some may think of this position as excessive. One month pushed out to 18 months? That is quite a leap! However, practically speaking, it is not long at all to locate a new suitable site, come to a commercial, then legal agreement with the owner of the land, erect the new facility (which can often involve road closures and the use of large heavy equipment such as cranes), testing of the technology installed at the facility, rectification of any defects in the technology, then the switching on of that site while simultaneously turning off and decommissioning the facility at the terminated site.

At times I have experienced landlords who feel as if the carriers are taking them for a ride and trying to push out the holding over period "just because". This simply is not the case.

For the reasons explained in Part 1 of my article, a carrier cannot simply switch off a telecommunications facility and take its time erecting the replacement site. If one site is down, it seriously impacts the network and affects all customers who require coverage within the area in which the facility is located.

The impact on the carrier's business, their customers and their customers' businesses would be significant and severely detrimental.

Communication Breakdown!

Another point of contention often surrounds the carriers request to have the ability to access their site 24/7. Especially when they require access after hours to a facility located at secure site such as an office building. Again, this comes down to the importance of having a reliable network at all times.

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The media widely reports when a carrier has part of their network "go down" and the inconvenience this causes for thousands of users. What would happen if you were the customer and you rang the carrier because you couldn't make or receive calls and they said, "Sorry, we are required to give 24 or 48 hours' notice to the landlord to access the building where our equipment is housed to do urgent rectification works. So unfortunately you won't have coverage for the next couple of days until we are able to fix whatever has gone wrong…"

We would all be up in arms! People would be roaming the streets unsure of how they are to live their lives without access to the world they so heavily rely on nowadays – access to their mobile phone and more importantly to the network that allows their mobile phones to function.

When a carrier is asking for 24/7 access to a site, it is not because they want the freedom for their contractors to have the flexibility to do maintenance work after having dinner with their family. It is purely so that if some emergency breakdown occurs, it can be fixed with minimal interruption to the network. Obviously security access protocols would need to be put in place for access to a secure premises and this is always readily agreed to by the carriers.

So Sue Me!

The next issue that often comes up is insurance. A landlord often seeks to have a carrier take out an insurance policy that specifically notes the landlord on that policy.

Carriers will have an insurance policy such as a global insurance policy that covers each and every site within their portfolio for certain losses. Each site has the same level of insurance cover. This site over here has no less coverage than that site over there. All parties that the carrier undertakes to insure for a particular site (as outlined in their lease) is protected under the carrier's global insurance policy.

The idea of a carrier being required to take out individual insurance policies for thousands of sites, is simply not viable and is unnecessary when the landlord is getting no less cover from a global insurance policy.

It's Nice to Share

The right to assign or sub-let is a big issue. Usually in commercial leasing, a tenant is required to seek the consent of a landlord prior to assigning the lease or sub-letting the premises.

This is another situation where, due to the size of the portfolio, it is not viable to seek the consent of all or even a portion of landlords to assign leases withina carrier's portfolio.

The most common situation where a carrier would assign part or all of its portfolio is where it is selling all or part of its network or due to the reorganisation of its business where it wishes to transfer its assets over to a related body corporate.

The administrative nightmare of seeking consent from thousands of landlords is simply not a viable option for any company with such a large portfolio.

Sub-letting or site sharing is another requirement that causes a lot of pushback from landlords.

The Telecommunications Act 1997 requires carriers to co-operate with one another and share their facilities wherever possible. This is to ensure that there is not an unnecessarily large number of facilities scattered around our country when the number required to support all of the carriers networks could be a lot less and used in a more effective manner.

Due to this obligation, often carriers will require the ability to share the space within their premises without consent. Again, it comes down to the viability of being required to seek consent on a large scale. While it is usual in commercial leasing that a tenant seeks the consent of the landlord to sub-let, carriers hold the position that it is reasonable that they are not required to seek the consent due to:

- the frequency in which carriers are required to share sites;
- the requirement to share sites being imposed by legislation;
- the fees they charge each other to share are usually minimal; and
- ultimately, the lead carrier who is sub-letting its premises remains liable to the landlord.

If we look at this closer, the likelihood of a corporation other than a carrier or another type of communications company sharing the space within the premises is close to zero.

A landlord may be concerned with who will have use and access to the land. Whilst this is a reasonable concern, landlords do not need to be worried that the carrier's premises will be the scene of wild parties or unruly tenants. The area they lease is minimal and would only be large enough to house a small amount of the shared carrier's equipment. Due to the nature of the facilities, there is not much use on the infrastructure contained within the premises other than by another telecommunications or communications company.

Some landlords feel that they are getting cheated out of rent and that the carrier sub-letting their premises is making an income out of sharing the space when the landlord could be collecting additional rent.

There are two points to note here. Firstly, as carriers are obliged by law to co-operate with each other and share their infrastructure, what they charge each other is usually minimal.

The carriers only take a lease of an area large enough to house their equipment and infrastructure. In the case of a monopole site, the area of land leased would be large enough to house an equipment cabin and monopole.

If the carrier is going to share its site with another carrier, the incoming carrier are likely to want to locate their equipment on the existing monopole, however would only seek to put their equipment in the equipment cabin already located within the premises if there is a situation where space on the land is limited. Carriers prefer to have their own shelter for these types of facilities and practically speaking there is unlikely to be any space in the existing equipment cabin to house the other carrier's equipment.

Generally speaking, the landlord would likely be approached by the incoming carrier and they would seek to lease an area of land separately to the lead carrier to erect their cabin, however still share space on the monopole with the lead carrier.

The main point that should be noted here is that sharing of sites is not looked at by the carriers as a money-making exercise to charge high rents to another carrier and dupe the landlord out of receiving an income from its land. It is viewed as a necessity. A way to minimise the impact they are having on the environment by keeping the number of facilities and amount of equipment to a minimum.

Stay tuned for Part 3 of my Telecommunications Series where I highlight more variations to usual commercial leasing positions.

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