MADGWICKS LAWYERS

FEBRUARY 2020

PROPERTY INSIGHTS

NEW CHANGES PROPOSED TO THE RETAIL LEASES ACT

By Rohan Ingleton
Partner

PROPERTY

In brief

The Retail Leases Amendment Bill 2019 was introduced into the lower house late last year. There are proposed changes to the Act, which I will summarise below.

What you need to know

Property managers will need to be on top of the latest changes - if these become law it will affect what can be recovered from a tenant, different disclosure obligations, when security deposits are to be returned to a tenant and the provision of a new early rent review to market prior to the exercise of an option.

Background

The changes are proposed to take effect no later than 1 October 2020 and the following is a summary of what is proposed:

1. Tenants may now be liable for compliance with Essential Safety Maintenance obligations.

2. Provision of disclosure statements at least 14 days before the tenant enters the lease.

3. Security deposit is to be returned within 30 days of the lease ending.

4. New disclosure regime on exercise of an option.

5. Tenants may seek early rent reviews prior to exercising an option for a further term.

6. A new cooling off period of 14 days after exercise of the option can be exercised by the tenant.

Further details will be provided in coming months together with the changes that should be made to a retail lease to take account of the proposed changes.

Conclusion

This is the first major change to the Act since 2005 and updates of the progress of the Bill will be provided in coming months.

PUSHING THE BOUNDARIES: WHAT TO DO WITH MISALIGNED PROPERTY BOUNDARIES IN VICTORIA

Bethany Visser
Associate

PROPERTY

As a purchaser of property, you might assume that what you are buying is all the land occupied within its physical boundaries. Similarly, you may assume that at settlement you will receive all of the land as described in the property's certificate(s) of title.

While you may assume it is the seller's responsibility to ensure that your contract with them accurately describes the property, such an assumption, while maybe natural, is risky and can leave you without any legal recourse.

Continued on page 2

How the land, as the subject matter of your purchase, is defined will rest on the interpretation of various sections of your contract. And whether you would have a claim against the seller for failing to deliver good title will, likewise, usually rest on any conditions in your contract which operate to limit the seller's warranties to you in relation to the land.

ALSO IN THIS ISSUE

Continued from page 1

The Identity Clause

Common to Victorian contracts of sale of real estate, including versions of the Law Institute of Victoria and Real Estate Institute of Victoria approved standard form of contract is the "identity clause". An identity clause refers to a condition of sale which requires the purchaser to accept that the land sold is identical with the title particulars. The rationale behind this clause is that a purchaser, having been provided a copy of the certificate of title in the Vendor's Statement, as required by law, is able to check the measurements of the actual occupation of the property prior to exchanging contracts. It then follows that any omission or mistake in the description, measurements or area of the land does not invalidate the sale or give the purchaser a right to compensation.[1] Most identity clauses operate to cover misdescriptions in relation the both the physical nature of the land sold and how the land is described in the contract.

Recent Case

A recent case in point, *Wollert Epping Developments Pty Ltd v Batten [2019] VSC 618 (11 September 2019)*, involved a purchaser who bought farmland in Victoria with the intention of developing it into a residential housing estate.

After the contract had become unconditional, the purchaser, as part of seeking planning approval from council, had the land surveyed to determine the location of fence boundaries compared to the property's title. The survey showed that the land's southern fence boundary was misaligned with the title boundary and part of the land was occupied by the neighbouring property.

The seller refused to take any steps to remedy the misalignment and the purchaser took the matter to court in seeking a declaration to the effect that the seller had to remedy the encroachment prior to settlement.

The court, in determining that the land sold under the contract was described by reference to the Certificate of Title, agreed that the seller was and/or would be in breach at settlement, noting the seller was not in possession of the encroached land which the parties recognised as encumbered by the neighbouring owner's putative adverse possession claim.

That was not, however, the end of the matter. The contract contained an identity clause that was found to protect the seller with the effect of making the Seller's breaches not actionable and leaving the purchaser without a remedy. The court also found it relevant that the purchaser, being an experienced property developer had decided to obtain a survey of the property after entering the contract and should be taken to know that it was very likely that the farm land fences did not sit precisely on the title boundaries.

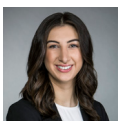
What you need to do

Misaligned property boundaries, like in the above case, are not uncommon and can prejudice the development potential of a property and the ability to obtain finance, or create boundary disputes with third parties, including adjoining neighbours, an owners corporation or statutory bodies. If you are a purchaser contemplating the purchase of a property, measuring the physical land is the only sure way to know much land you are purchasing and whether all the land, as physically occupied, matches the title plan.

As for the contract for the sale of the land, purchasers should be mindful that the contents vary widely, as do the identity clauses they often contain - no matter the nature of the transaction. A prospective purchaser should always obtain legal advice on a proposed contract before they sign. If the actual dimensions of the land in question are particularly critical to the purchaser's plans for the property, a lawyer can also assist in negotiating the contract's terms in seeking to preserve the purchaser's rights in this regard.

[1] Such conditions are subject to the equitable principle at law that a "significant" discrepancy, that being 5pc or greater diminution in area will generally justify avoidance of the contract by a purchaser.

AGAINST THE LAW TO CLAW (BACK)? LEASING INCENTIVES AND CLAW BACK PROVISIONS IN THE SPOTLIGHT IN VICTORIA



By Nicola Carnevale
Lawyer

PROPERTY

In brief

VCAT has recently applied a decision by the Queensland Supreme Court regarding clawback clauses which has the potential to affect how the clauses are applied in Victoria.

Background

When negotiating lease agreements, landlords can offer incentives to tenants as part of the bargain. Lease incentives often come in the form of a rent-free period, a reduction in rent over a period of time or a contribution to the tenant's fit-out of the premises.

It is commercially common for landlords to include a "claw back" provision which allows the landlord to recover the incentive (or part of) if the lease is terminated before the expiration date. The landlord's view is that incentive was provided on the basis that the tenant would occupy the premises for the term and if the tenant causes the lease to expire early, the landlord should have the ability to recover part of the benefit of the inducement.

Continued on page 3

Continued from page 2

This is often calculated on a pro-rata basis and the landlord recovers that part of the incentive that is proportionate to the balance of the term remaining after the early termination.

GWC Property Group Pty Ltd v Higginson & Ors [2014] QSC 264 (GWC Property Group)

In 2014, the Queensland Supreme Court held that a clawback clause allowing the landlord to recover the fit-out incentive granted under the lease was not enforceable.[1] The Court held that the clawback clause was more alike a penalty and the repayment of the unexpired part of the incentive is "in excess of any genuine pre-estimate of damages"[2] as the landlord was already entitled to contractual damages for the breach of the lease – being the proceeds that the landlord would have gained had the lease naturally expired. If the landlord is also entitled to recover part of the incentive from the tenant as well as contractual damages, the landlord would have received additional payments for the tenant's breach over and above the actual damage that it suffered.

Finetea Pty Ltd v Block Arcade Melbourne Pty Ltd (Building and Property) [2019] VCAT 1529 (Finetea)

VCAT has recently applied the test adopted by the Queensland Supreme Court when considering the landlord's right to clawback an incentive for a failed venture at the Block Arcade on Collins Street.[3] The incentives consisted of a rent credit of $355,000 and a contribution to fit-out works of $200,000. The lease included a special condition which included a clawback clause requiring the tenant to repay to the landlord the part of the incentive related to the unexpired term of the lease.

The tenant's counsel relied on the GWC Property Group case mentioned above. Penalties are considered by the courts as excessive, "extravagant and unconscionable in amount" and "out of all proportion".[4]

Senior Member Walker acknowledged that the landlord can claim the costs of re-instating the premises, loss of rent and outgoings of the premises until the premises is re-let to a new tenant. These costs are the actual loss suffered by the landlord due to the tenant's default. The decision also considered that the rent-free period formed part of the bargain struck between the parties – it was the price that the landlord paid for the tenant to enter into the deal.

In applying the GWC Group case, it was determined that to recover the incentive amounts would amount to double recovery by the landlord which imposes a punishment on the tenant and is therefore not enforceable.

What do you need to know?

If the lease comes to an end early, a landlord's attempt to recover part of an incentive under a clawback clause may be challenged by a tenant. Prior to entering into a lease, landlords should consider the commercial effect of the incentives granted under leases in light of these cases and understand that recovery of the moneys associated with the incentive is unlikely.

Tenants should also consider their rights if a landlord seeks to recover incentive payments under a lease.

It should be noted that GWC Group is binding in Queensland as it was a decision handed down by the Queensland Supreme Court. The VCAT decision applied the Queensland case, however it has not been tested in the higher Victorian courts.

It is also interesting to note that the Finetea case considered both a rent-free period and a contribution to a fit-out incentive. Where the rent-free period is substantial and a landlord must offer a greater incentive to the subsequent tenant, the landlord may argue that mere recovery of rent and outgoings for the balance of the term is simply not enough and its actual loss is more substantial.

Landlords and tenants should seek legal advice in relation to incentives and the effect on rights of recovery and market rent reviews.

1 GWC Property Group Pty Ltd v Higginson [2014] QSC 264.

2 Ibid. [39]

3 Finetea v Block Arcade Melbourne Pty Ltd (Building and Property) [2019] VCAT 1529.

4 Ibid [331] citing Mason and Wilson JJ in AMEV-UDC Finance Ltd v Austin [1986] HCA 63.

MADGWICKS ARE NOW ON SPEAR!

Madgwicks are pleased to advise that we are now on SPEAR Electronic Lodgement Network.

SPEAR and Land Victoria have been working on electronic lodgement of plans of subdivision for some time now, and on 1 November 2019, Land Victoria stopped counter service for most transactions including lodging of plans of subdivision.

Plans of subdivision must now be lodged electronically via SPEAR or by leaving the plan and associated documents in the "drop-box".

As well as plans of subdivision, the following plan-based dealings which can also be lodged via SPEAR:

Transfer of Land Act 1958

- Survey-based applications - sections 15, 26P, 60, 98CA, 99 and 103(2)
- Creations/notifications/acquisitions of easements - sections 45, 72 and 88(2)
- Crown Grants and Crown Leases – section 8(2)
- Requests to Waive Survey

Local Government Act 1989

- Vesting of a closed road in council - section 207D
- Road exchange - section 207E

Subdivision Act 1988

- Change lot entitlement/liability - section 33(1)
- Removal of accessory lot/notice of restriction - section 38 and 38A
- Amend scheme of development - section 38B and 38C

Major Transport Projects Facilitation Act 2009

- Request Action by the Registrar - section 259

What does this mean for you?

Quicker lodging of your plan!

Have a look around the SPEAR website as you can search current applications and look up current registration processing times.

Please contact Madgwicks Property Department if you would like more information regarding the SPEAR ELN.

Our Team

Laurance Davis
PARTNER

D: +61 3 9242 4774
E: laurance.davis@madgwicks.com.au

Rohan Ingleton
PARTNER

D: +61 3 9242 4719
E: rohan.ingleton@madgwicks.com.au

James Christodoulakis
PARTNER

D: +61 3 9242 4739
E: james.christodoulakis@madgwicks.com.au

Jen Severn
SENIOR ASSOCIATE

D: +61 3 9242 4772
E: jen.severn@madgwicks.com.au

Bethany Visser
ASSOCIATE

D: +61 3 9242 4783
E: bethany.visser@madgwicks.com.au

Nicola Carnevale
LAWYER

D: +61 3 8673 0011
E: nicola.carnevale@madgwicks.com.au

Jessica Pemberton
LAWYER

D: +61 3 9242 4763
E: jessica.pemberton@madgwicks.com.au

Luke Udvardi
LAWYER

D: +61 3 9242 4701
E: luke.udvardi@madgwicks.com.au

Carmel Moorhead
LAWYER

D: +61 3 9242 4738
E: carmel.moorhead@madgwicks.com.au

Lauren Milne
LEGAL EXECUTIVE F.INST.L.EX

D: +61 3 9242 4731
E: lauren.milne@madgwicks.com.au

Our Office
Level 6, 140 William Street
Melbourne VIC 3000

T + 61 3 9242 4744
F + 61 3 9242 4777

www.madgwicks.com.au

www.meritas.org

MERITAS®
LAW FIRMS WORLDWIDE