

## THE PROPERTY LAW ACT

The Property Law Act 2007 ("the Act") replaces the 55 year old Property Law Act 1952 and comes into force on 1 January 2008. Part 4 of the new Act makes some significant changes to the law regarding leases, some of which are discussed here.

### Application of Act

In general, from 1 January 2008 the Property Law Act 2007 applies to every lease or sublease made on, before, or after 1 January 2008. This means the Act has retrospective effect and as a general rule will apply to existing leases. There are a few exceptions which are noted below.

### Short-Term Leases

The Act introduces the concept of the "short-term lease". The requirements for a short-term lease are that the lease is unregistered and that:

- The term of the lease commences within 20 working days of the date of contract.
- The term of the lease is for a term of one year or less, or is a periodic tenancy for periods of one year or less, or is a statutory tenancy (i.e. terminable on 20 working days' notice).

One of the key aspects of a short-term lease is that it need not be in writing (unlike all other leases and dispositions of land). Accordingly, a short-term lease may be made orally or in writing. Another benefit of a short-term lease is that the Tenant has priority over any other unregistered interest (e.g. other unregistered leases or agreements for sale of the land) providing the Tenant does not have notice of those interests. In addition, the implied obligations on Tenants under short-term leases in terms of maintaining and repairing leased premises are less onerous than under standard leases.

The short-term lease provisions only apply to leases entered into after 1 January 2008.

### Implied Term of Lease

The Act provides that where a lease has been entered into without an expressly agreed term and the Tenant has taken possession of the premises, that lease is able to be terminated by either party by giving 20 working days' notice at any time. This replaces common law "monthly tenancies". This only applies to leases entered into after 1 January 2008.

### Holding Over

The new Act also confirms that Tenants who hold over without the Landlord's consent after the expiry of the lease term remain bound by all of the covenants in the expired lease. Accepting rent does not constitute consent to holding over by the Landlord.

### Termination on Occurrence of Future Event

Historically, it has not been possible to grant a lease with a term expiring on the occurrence of a future event (e.g. the supermarket in the same mall as the tenancy ceasing to operate). Under the new Act this is now possible. Because this leaves the ultimate term of the lease uncertain, there is a statutory default term of 10 years if the future event does not happen first (unless the lease itself sets a date). Careful drafting will still be required when preparing a lease that terminates on the occurrence of a future event. Note that this provision only applies to leases coming into operation on or after 1 January 2008.

### Joint Tenancies

The new Act now provides that when there is a joint periodic tenancy to two or more Tenants, either Tenant may give a notice to quit without the consent of the other Tenant.

## Subleases

The Act deals specifically with subleases. The established rule that the term of a sublease cannot exceed the term of the head lease remains. However, the Act provides that if the term of a sublease is stated (including where the term is inadvertently miscalculated) as being longer than the head lease term, the sublease term is deemed to expire at the same time as the head lease. If the head lease is subsequently renewed for a longer term, then the term of the sublease will also be extended for that longer term to the extent that that is consistent with the stated term in the sublease. This only applies to subleases entered into after 1 January 2008. In addition, the termination or surrender of a head lease where a new head lease is being entered into in replacement will not automatically terminate the sublease. Note that the new Act uses the new term "Superior Lease" in place of the established term "Head Lease".

## Implied Covenants

The new Act, like the Property Law Act 1952, provides for certain terms to be implied in leases which are set out in Schedule 3 of the Act. The new implied terms are similar to the old implied terms although there are a few new implied terms, including the following:

- There is an implied term that the Tenant will not make alterations to the leased premises without the consent of the Landlord, which may not be unreasonably withheld.
- There is an implied term that the Tenant may terminate the lease if the leased premises are used for a specific purpose and the premises can no longer be used for that purpose.
- A term is implied into all short-term leases that the Tenant will use the premises in the way that a reasonable Tenant would. The usual implied term that the Tenant will yield the premises up in the same condition as they were in at commencement, fair wear and tear excepted, does not apply to short-term leases.

The Act also confirms that whilst Tenants must keep leased premises in good condition, Tenants are not required to put the premises back in good condition if they were not in good condition when the lease began. The implied terms only apply to leases entered into after 1 January 2008.

## Insurance

Important changes have been made to insurance for leased premises. Effectively, where Landlords have agreed or are required by the lease to insure the premises and where insurable loss or damage occurs, the Landlord cannot pursue the Tenant in respect of that loss or damage (even if the Landlord in fact failed to insure or if there is a shortfall), unless the Tenant caused the loss or damage, or the Tenant's actions have rendered the insurance monies irrecoverable.

## Landlord's Consent

Probably the major change to lease law brought about by the new Act relates to Landlord's consent.

Firstly, there is a general requirement applying to leases coming into operation on or after 1 January 2008 that wherever the Landlord's consent is required under a lease, the Landlord must not unreasonably withhold or delay that consent, and if consent is withheld, written notice must be given by the Landlord to the Tenant (section 224).

Secondly, there is a set procedure for the following types of consent (sections 225 to 228) that applies to all leases whether they were entered into before, on, or after 1 January 2008:

- Consent to the transfer or assignment of the lease.
- Consent to the subletting of the lease or parting with possession with the leased premises.
- Consent to change of use of the leased premises from the use specified in the lease.
- Consent to the mortgage of the Tenant's interest in the lease.

Where any of these consents are requested by the Tenant (whether in relation to the whole or any part of the lease or premises), the Landlord must not unreasonably withhold or delay that consent, and if consent is withheld, written notice must promptly be given by the Landlord to the Tenant giving the Landlord's reasons for withholding consent in writing.

In addition, consent will be deemed to be unreasonably withheld if:

- The Landlord requires payment of an amount of money (although the reasonable legal or other expenses of the Landlord are permitted).
- The Landlord imposes an unreasonable condition or precondition.
- The Landlord withholds consent because the Tenant is bankrupt, or is in receivership or liquidation.

These requirements apply despite anything to the contrary in the lease.

An alarming issue for Landlords is that if the Landlord fails to comply with the statutory requirements, the Landlord will be liable in damages not only to the Tenant, but also to other persons affected, including Guarantors, Sublessees, and potential Assignees (e.g. purchasers of a business operating from leased premises).

It is possible to include a provision in a lease absolutely prohibiting assignment, subletting, or mortgaging the lease or changes of use, in which case the statutory requirements will not apply.

### **Assignments of Lease**

The new Act confirms that assignees become bound by all of the obligations on the part of the Tenant under the lease, and that the assignment of a lease does not release the assignor or any previous Tenants of that lease, unless the lease is varied to increase the liability of the Tenant.

### **Landlord's Remedies**

The Act introduces a code for how Landlords may exercise their rights on default by a Tenant. The new provisions apply to enforcement action taken after 1 January 2008, whether under leases created before, on or after 1 January 2008.

The new provisions invalidate any provision in a lease that provide that the lease will be automatically cancelled if a breach occurs, and require certain forms of written notice to be given by Landlords where the Tenant fails to pay rent or breaches any covenant of the lease before the Landlord can take enforcement action. In relation to failure to pay rent, the Landlord's notice must give the Tenant at least 10 working days notice to remedy the default.

The Act means that there are now strict requirements to be fulfilled before Landlords can take enforcement action under leases, and this is an area where Landlords must take appropriate advice before taking such action.

### **Abolition of Right to Distrain**

The right of a Landlord to distrain for rent has been abolished, effective from 1 January 2008. This applies to existing leases and any provision granting the Landlord the right to distrain for rent will be of no effect.

### **Facsimile Execution**

Facsimile execution clauses in agreements for sale and purchase or agreements to lease often make reference to the Contracts (Enforcement) Act 1956. This Act is repealed by the Property Law Act 2007, and accordingly from 1 January 2008 references to the Contracts (Enforcement) Act 1956 should be replaced by references to sections 24 to 27 of the Property Law Act 2007.