

Property Update

August 2011

Protect your lease or lose it

The decision of the Supreme Court in South Australia, *Epworth Group Holdings Pty Ltd v Permanent Custodians Limited* [2010] SASC 327, is a very important case for retail premises in Western Australia for both landlords and tenants. This decision (which was recently upheld on appeal) highlights priority issues which may arise between an unregistered lease and a subsequent registered mortgage.

Facts of the case

Epworth Group Holdings Pty Ltd (**Tenant**) leased city office premises pursuant to a written but unregistered lease from Y H Epworth Pty Ltd (**Owner**), the registered proprietor of the building in which the premises were situated. The Tenant did not register a caveat to protect its interest under the lease. The lease was for an initial term of two years and one day commencing in August 2008 and contained five further one year terms of renewal. With the permission of the Owner, the Tenant subleased the premises to a law firm which conducted its business from the premises.

For reasons particular to the relevant South Australian legislation, the lease, although one of office premises, was deemed to be a retail shop lease for the purposes of the

Retail and Commercial Leases Act 1995 (SA) (**RCL Act**) and, as such, the provisions of the RCL Act were applicable to the lease.

Under the RCL Act the tenant under a lease of retail shop premises is entitled to a minimum five year term. This is also the case under the equivalent Western Australian legislation, the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) (**Retail Shops Act**).

In March 2009 the Owner granted a mortgage over the property on which the premises were situated to Permanent Custodians Limited (**Mortgagee**). That mortgage was registered on the Certificate of Title to the property for security purposes.

The Owner subsequently defaulted under



the mortgage and on 16 September 2010 the Mortgagee entered into possession of the Owner's premises. The Mortgagee did

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not physically enter into possession of the leased premises.

The Mortgagee then served on the Tenant and on the sub-tenant a notice to vacate and deliver up possession of the premises. In issuing this notice, the Mortgagee did not consider that it was bound by the lease given that the lease was not registered on the Certificate of Title and the Mortgagee had not consented to the lease.

The Tenant commenced proceedings in the Supreme Court of South Australia against the Mortgagee to establish its entitlement to possession.

The decision of the Supreme Court

The following are the key aspects of the decision of Chief Justice Doyle:

- The RCL Act regulates the relationship between the landlord and the tenant in respect of retail premises covered by the RCL Act. It does not regulate the relationship between a tenant and a mortgagee of the retail premises.
- The Mortgagee had not provided consent to the retail lease.
- Because the lease was not registered on the title, the Tenant had not lodged a caveat over the title to the premises, and the Mortgagee had not consented to the lease, the mortgage (because it was registered on the title to the premises) prevailed over the unregistered lease.

Consequences in Western Australia

It is clear that any tenant wishing to protect its interests under its lease and any landlord wishing to protect itself from a potential claim from a tenant for failing to fulfil its statutory obligations should consider the benefits to be obtained by registering their lease.

Who should register?

This decision has important ramifications for Western Australia. They include:

- The Retail Shops Act regulates the position between the landlords and the tenants in respect of retail premises covered by the Retail Shops Act. It does not regulate the position between a tenant and a mortgagee of the freehold of these retail premises.
- Landlords must get the consent of their mortgagees to retail leases. If they don't, they will leave themselves open to claims (both under the Retail Shops Act and from tenants) for failing to provide the agreed lease to the tenant.
- However, tenants leave themselves at risk as against subsequent mortgagees if they don't register their lease on the title to the retail premises or, at least, lodge a caveat over the title to the premises.
- The *Transfer of Land Act* protects leases with a term (inclusive of options) of no more than three years where the tenant

is in possession of the premises. This provision does not apply to leases with a term (inclusive of options) in excess of three years. Most retail leases have a term of at least five years.

- This decision is consistent with recent decisions, such as that in *Lighting By Design (Aust) Pty Ltd v Cannington Nominees Pty Ltd* [2007] 88, that reinforce the importance of registering leases.
- Landlords should make sure that there are practical measures to allow leases to be removed from title to the premises once the lease has expired.
- The *Transfer of Land Act* should be amended to provide a simple mechanism to remove expired leases from titles to land (as is the case in some other states). The current system is cumbersome and is a big factor in leases not being registered.

For more information, please contact:

Peter Beekink
Partner
(08) 9288 6751
peter.beekink@lavanlegal.com.au

Katie Loughridge
Solicitor
(08) 9288 6997
katie.loughridge@lavanlegal.com.au

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