mullins report

MULLINS

Newsletter of **Mullins Lawyers** | Issue Number 56 | December 2008

JOHN MULLINS
EDITORIAL

Over the weekend of 29 and 30 November, we moved premises from Central Plaza One into the Riverside Centre.

It's hard to believe we had been in Central Plaza One for over 10 years, having moved there in April 1998.

At that time we had about 40 people. The one floor we took provided us with room to grow. Over time we took up all the room to grow. We made a number of changes to the floor itself to fit in more people and then when level 22 was bursting at the seams, we had the opportunity to take over part of level 21 and then we subsequently took a lease of rest of that floor.

The CBD rental market has been in a state of significant upheaval over the last 12 to 18 months, brought about by the strong economic boom in the mining sector and the lack of new premises being built. At the start of 2007, we commenced reviewing our position knowing that our lease would expire in April 2009.

All options were considered, with our first option obviously being to stay where we were. The massive increase in Central Plaza One rental made this option undesirable. We sought to find comparable premises at comparable rent. We achieved this by taking an assignment of a lease in the Riverside Centre.

Our lease in Riverside is until 2015, so while it may appear surprising that we have relocated in a time of economic downturn, this course of action was commenced more than 18 months ago and the deal for the assignment of lease agreed about seven months ago.

While the current economic climate looks bleak, we have great confidence in our firm and in South East Queensland in particular.

We look forward to welcoming you all to our new premises, which we hope will reflect the nature and culture of our firm. We have taken the opportunity to do two other significant things - to create a new website and to subtly tweak our logo. The new website was launched in the week that we moved. I invite you to visit our new site when you have time.

We consider our relocation as positive for our firm - a new home for the next exciting phase in our firm's history. We look forward to continuing and strengthening the relationships we have with our clients. We remain a proudly independent firm, focussed on delivering quality legal services and advice to our clients.

Finally as this is our last newsletter for the year, we wish you all a very happy Christmas. Thank you for your support in 2008.

WE HAVE MOVED

On 1 December, we relocated to Riverside Centre

Our new address:
Level 21, Riverside Centre
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FAMILY PROVISION
Claims By Adults

ALYSON HANLY AND MICHAEL KLATT

In recent times, adult children have not faired well in Family Provision Applications.

When considering a claim, the Court considers "the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the deceased and other persons who have a claim upon his or her bounty".

The recent Supreme Court of Queensland decision of *Underwood v Underwood (2008) QSC 159*, considered a family provision application by a de-facto spouse and three of the four adult children of the deceased.

The deceased had an interest in a business that had been held by his family for many years. None of the deceased's children had shown any interest in the business, however his nephews had worked in the business since they were apprentices, were his business partners, and had been effectively conducting the business since 1988. The deceased's interest in the business and the business real property was left entirely to the deceased's nephews in the proportions that would have the effect of equal ownership.

The remaining assets of the deceased (which were less than the business assets) were shared between members of the deceased's immediate family and his de facto spouse. The fact that there was an inequality between the nephews' share and that of the deceased's natural children was not considered enough for adjustment of the beneficiaries' entitlements. The Court turned to the individual claims and the circumstances relevant to each of them.

The Court considered a number of aspects relevant to each of the applicants including the financial and personal circumstances relevant to each.

The Court considered that the deceased's sons were not dependent on the deceased, and had not contributed in any significant way to the estate, and had capacity to provide well for themselves and their families. Therefore, the Court held that adequate provision for each was made in the Will.

With regard to the applicant's daughter, the Court noted that, due to her lack of education, physical disabilities, past offences and a prior drug addiction, her capacity and opportunity for work were greatly diminished. The Court decided that, given the circumstances and that her need was greater than her two brothers, she should receive the same proportion of the estate as her brothers (which would result in her receiving a share of the business or an equivalent monetary value) and an additional $25,000 to cover the expense of her rehabilitation and retraining.

The de facto spouse was awarded an additional $30,000 given her contribution to the deceased's care prior to his death and her deteriorating health. The Court also took into consideration that the de facto spouse also received a spousal dependency benefit from Workers' Compensation which was not part of the estate.

This case highlights the importance of considering each case on its merit. Another case which highlights this is the recent decision of *Daley v Barton & Anor; Barton v Daley (2008) QSC 228 (24 September 2008)*. In that case an adult child who was in a secure job, owned property worth at least $800,000 with a mortgage of $290,000, and had outstanding loans to his mother of $225,000, was awarded the amount of $560,000 to be paid from the estate of his father who had left his whole estate to his wife of less than two years.

Options to Renew Commercial Leases – **Who has the Power?**

CHRIS HARGREAVES

We were recently involved in a matter where the tenant (our client) had, habitually throughout the lease, paid rent two to three weeks late. Our client attempted to exercise its option in accordance with the lease, however the landlord rejected that exercise on the basis of the late rental payments. We received instructions from the tenant to apply to the Court for appropriate relief which would allow our client the right to exercise the option.

There was no outstanding rent at the time the application was heard. Although the landlord was prepared to offer a new lease to our client on different commercial terms, it would not accept an exercise of the option to renew. The Court granted relief to our client and permitted the exercise of the option. The Court placed importance on the ongoing commercial relationship of the parties, and the fact that the landlord's position had not been adversely affected in any tangible way by our client's conduct.

In most commercial leases, landlords can refuse to let a tenant exercise an option to extend the lease if the tenant has failed to comply with the lease conditions. Section 128 of the *Property Law Act 1974* ("the Act") allows the Court to let the tenant exercise the option despite the landlord's refusal.

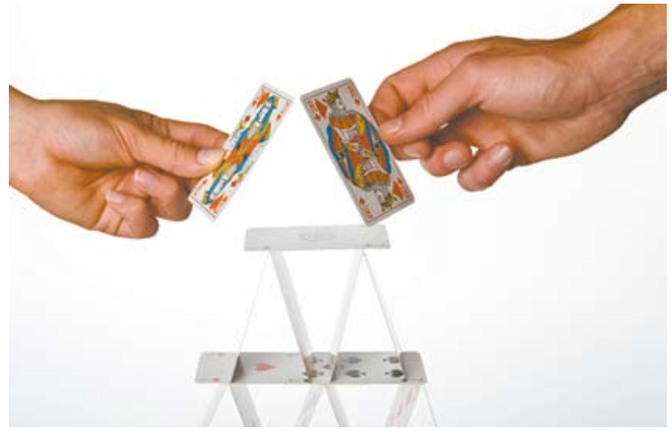
There are a number of reasons why a landlord may wish to prevent a tenant from exercising an option. If the lease is on terms particularly favourable to the tenant, the landlord may want to take the opportunity to renegotiate terms. This may also be the reason why a tenant may wish to seek Court intervention.

On the strict interpretation of many standard leases, the landlord may be entitled to refuse the exercise of the option as a result of any breach, no matter how insignificant it may be. The Act offers the tenant the possibility of relief in those circumstances.

Once a tenant attempts to exercise an option, the landlord may deliver a notice under the Act which specifies an act or omission by the tenant which they deem to constitute a breach of the lease, and that, as a result, the landlord will not allow the exercise of the option. The tenant may then choose to apply to the Court for relief against forfeiture.

There are no strict rules about when the Court will grant relief to a tenant in this type of matter. In general terms, the more serious the breach and the more prejudiced the landlord, the more likely it is the Court will not grant relief.

To ensure you understand your legal position in relation to the exercise of a lease option, it pays to seek legal advice whether you are a landlord or a tenant.



FRANCHISE INDUSTRY WELCOMES HIGH COURT DECISION

CARLA CRAWFORD

On 27 August 2008, the decision of the High Court in *Master Education Services Pty Ltd (MES) v Ketchell (2008) HCA 38* was handed down. The Court unanimously held that a franchise agreement will not be void if a franchisor is non-compliant with clause 11(1) of the *Franchising Code of Conduct* ("the Code").

The Code

Clause 11(1) of the Code provides that a franchisor must not enter, renew, extend or receive a non-refundable payment under a franchise agreement, unless it has received a written statement that the franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code.

The facts

In 2003, MES brought proceedings against Ketchell to recover unpaid fees. In her defence, Ketchell claimed that MES had not obtained the correct certificates required by clause 11(1) and consequently the agreement was void. The issue of non-compliance was considered by the NSW Supreme Court and at first instance MES was awarded the franchise fees and costs even though the provisions were mandatory under the Code.

On appeal it was held that non-compliance with the Code rendered the agreement void and unenforceable.

High Court's decision

The question on appeal to the High Court was whether a franchise agreement was void where it had been entered into without complying with clause 11(1) of the Code.

The High Court stated the section did not expressly state that non-compliance would result in agreements being rendered void. Rather, the section was concerned with ensuring compliance by franchisors.

The High Court considered that the purposes of the Code included regulating the conduct of the industry to improve business practices, providing some protection to franchisees and reducing litigation.

Even when an agreement is not void, a franchisee will still have a range of remedies available...

To render void every franchise agreement where a franchisor had not complied with the Code, would mean franchisors could avoid their obligations while potentially placing franchisees in breach of their obligations to third parties. It was preferable, therefore, for the franchisee to seek relief appropriate to the circumstances and seriousness of the breach.

Practical implications

The decision brings certainty to the consequences of non-compliance with clause 11(1) of the Code. However, the Court has not clarified which particular instances of non-compliance may result in a franchise agreement being declared void. Even when an agreement is not void, a franchisee will still have a range of remedies available, including damages and court-ordered variation of terms, which may be more damaging to a franchisor than an agreement being void.

We can assist you to establish and maintain an internal compliance program to ensure these types of questions arise infrequently.

Keeping Cool in the Meltdown

OLIVIA VERSACE

With the words "global financial meltdown" and "credit crunch" ringing in your ears it might be a good time to reflect on how your business is placed to weather the storm that apparently is on its way. Here are some tips on how to keep cool in the midst of a meltdown….

Tip 1 - Review contracts with suppliers and customers - there may be contractual terms that can assist you in these uncertain times. If terms need to be re-negotiated, you should be familiar with your rights and responsibilities under the current contract so you can enter into negotiations confidently.

Tip 2 - Look at your debtors and your arrangements with them. At this time in the cycle "cash is king". You do not want to suffer at the hands of the sudden bankruptcy of a major customer. By the same token, you should try to pay your own bills promptly – funding your business by using other people's money and paying bills slowly makes you vulnerable to bankruptcy.

Tip 3 - Review debt arrangements - talk to your bank but before you do, be sure of your legal position under your banking facilities and security documents. In this climate it is smart to reduce debt if at all possible. The less debt you have and the less security you need to provide, the safer your business will be.

Tip 4 - Consider raising capital - the cost of debt has increased and, as a result, many companies are looking to raise capital through equity to finance acquisitions and future growth. Taking on a new investor, issuing new shares and/or floating your company might be worth considering.

Tip 5 - Consider implementing an exit strategy - it may not be a great time to exit your business at the moment but the work you put in now to prepare for an exit could mean that you are ideally placed to exit when the market improves.

If you would like further information about our Exit Assist product please contact us.

Leases: Legally when are parties bound?

FIONA SEARS

In these uncertain economic times it is becoming increasingly important to ensure that when signing Letters of Offer or Heads of Agreements with respect to leasing transactions, the parties are clear about whether they intend to be legally bound immediately, or whether they wish to preserve the right to withdraw later before formal lease documentation is signed.

A recent decision of the Supreme Court of Queensland *(Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd (2008) QSC 177)* indicated that, where a document does not include an express provision that the parties do not intend to be bound by the document signed, the document may constitute a binding offer which is capable of completion. When considering these issues, the Courts take into account all circumstances of the case, including any written documents, verbal representations and conduct.

Below are some tips to consider when entering into negotiations for premises leases:

I want to be bound

The document you are signing should contain a clear and unambiguous statement noting that the parties *intend to be bound* immediately upon the execution of the document. The lease then becomes a secondary document used to simply restate the terms negotiated in a more formal way. An example of this could be:

"The parties agree that upon the execution of this letter/offer that they will immediately be bound by the terms and conditions of such letter/offer."

The letter should also include the landlord's standard form of lease, and preferably allow the parties to refer any dispute on the terms of a formal lease to be determined by an expert.

I don't want to be bound

The document you are signing should contain a clear and unambiguous statement noting that the parties *do not intend to be bound* until such time as all parties have executed the formal lease. An example of this could be:

"*This offer is not intended to create legal relations*" or "*this letter/offer is always subject to/conditional upon execution of formal lease documentation on terms satisfactory to the parties.*"

While these statements are simple, they could mean the difference between being required to complete a transaction that you thought was still open for negotiation and being able to walk away from a deal without penalty.

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