

## July 2003 Newsletter

*This newsletter deals with the situation where an exchange of letters may be sufficient to create a lease, the duty of disclosure to insurers and important changes to company law that apply from 1 July 2003.*

### PROPERTY LAW

#### RETAIL LEASES

Does the lack of an executed agreement mean no retail lease?

The Administrative Decisions Tribunal has recently held that the exchange of a number of letters may be sufficient to create a lease under the Retail Leases Act ("RLA"), even where there is no executed lease in registrable form (*Randi Wixs Pty Ltd v Pokana Pty Ltd* (No.2) (2003) NSW ADT 4)

In that case, the tenant had been in occupation of the premises for a number of years. The lease had expired and the tenant remained under a holding over. The mere fact that the tenant remained in occupation under a holding over was not sufficient to create a new lease under the RLA.

The landlord served the tenant with a valid Notice to Quit. Subsequent to the issue of the Notice, the landlord and tenant negotiated a new higher rental without reference to the former lease. The tenant paid the higher rent and continued to occupy the premises.

There was also correspondence between the landlord and the tenant concerning the issue of a new lease. The term of the new lease,

and the size of the bank guarantee were agreed.

The landlord's solicitor submitted a new lease, which did not correspond in its terms to the agreed terms. The tenant refused to sign it. The matter was then litigated.

The Tribunal concluded that the exchange of letters and the agreement to pay the increased rent constituted a valid retail lease under Section 8 of the RLA. For a statutory lease to be created under this Section, it is not necessary for there to be an executed lease. A Section 8 lease can come into effect once the tenant takes possession of a retail shop and starts to pay rent to secure occupation of that shop. It did not matter that the tenant was already in occupation as its continued occupation was pursuant to the new agreement, not the holding over.

The moral of this story for landlords is:

- do not let a new tenant occupy premises before the lease is signed. If you do, you may end up entering into a statutory lease which is inconsistent with the lease you wish the tenant to execute;

- if the tenant is in occupation under a holding over, make sure the expired lease enables you to increase the rent so you can refer to that expired lease when you increase the rent.

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## INSURANCE LAW

### THE DUTY OF DISCLOSURE TO INSURERS

When seeking insurance, you have a legal duty to disclose to the proposed insurer facts which:

- you know, or which a reasonable person in your circumstances could be expected to know;
- would be relevant to the insurer in their decision to accept the risk, and if so, on what terms.

In the recent case of *Permanent Trustee Australia Limited v FAI General Insurance Company Limited (In Liq)*(2003) HCA 25, the High Court had to consider the request to FAI by Permanent for an extension of its insurance cover for a period of 30 days “pending the obtaining of information relating to a renewal”. At the time the extension was sought, Permanent did not disclose to FAI that Permanent had decided that if it obtained reasonable cover elsewhere, it would prefer not to renew with FAI (because of doubts as to the credit rating of FAI).

A major claim first came to notice during the extension period and FAI refused to pay the claim on the grounds that it would not have agreed to the 30 days extension if Permanent had disclosed the likelihood that it would not renew its business with FAI.

The High Court held:

- that the duty of disclosure under the *Insurance Claim Act* only related to things affecting the insurance risk;
- that moving the business elsewhere did not affect the risk during the 30 days period; and
- therefore, that the claim should be paid.

The High Court was wary of giving an insurer an “out” in not disclosing a fact that didn’t affect the risk.

By way of contrast, if in the extension application FAI had specifically asked whether or not Permanent had decided to renew with FAI, then any misrepresentation might have allowed FAI a remedy under the Trade Practices Act. Permanent had been very careful in its conversations with FAI and was found not to have been fraudulent or guilty of misrepresentation by silence.

It is important to make full disclosure to insurers of all matters that may affect risk to reduce the chance of the insurer refusing a claim.

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## COMPANY LAW

### IMPORTANT NEW PROVISIONS THAT APPLY TO COMPANIES FROM 1 JULY 2003.

**Annual returns:** Annual returns for companies are abolished with effect from 1 July 2003. Instead, ASIC will now send you or your agent an annual statement package on your review date (based on the anniversary of your company's registration date) that will include a company statement to review and an invoice statement to pay. You must pay the annual review fee within 2 months and review the company statement and notify any changes within 28 days. If the information is correct, no documents are

required to be lodged with ASIC, however you must still pay the review fee.

**New Form 484:** You must still advise ASIC about changes to company details throughout the year when they occur. The form for notification of changes to company details is a new Form 484 Change to Company Details which is three forms in one:

- Section A for change of registered office and/or principal address and name of ultimate holding company;
- Section B for changes to company officers and to special purpose company status; and
- Section C for changes re shares and members' register.

If there is only a change in one section and not the others, only that section should be filed. No fee is payable if lodged within 28 days of the effective date of the change but late fees apply if lodged outside of the 28 day notification period (\$65 if lodged within a further one month and \$260 if not lodged within a further one month).

**Solvency resolution:** The directors of most companies must pass a solvency resolution within 2 months of the review date. If the directors pass a positive solvency resolution, there is no need to lodge any notification of a positive solvency resolution. If the directors pass a negative solvency resolution, they must lodge a Form 485 within 7 days after the resolution is passed. If the directors have not passed a solvency resolution within 2 months of the review date, they must lodge a Form 485 within 2 months and 7 days after the company's review date unless the company has lodged a financial report with ASIC in the last 12 months.

**Public companies – other changes:** Public companies need only advise changes to member's details and share structure at time of review and there is no longer a requirement for directors of public companies and their subsidiaries to cease at the age of 72 years unless appointed by a special resolution.

**Proprietary companies – other changes:** Proprietary companies must within 28 days of the change advise changes to issued shares, changes to their ultimate holding company and changes to the top 20 members being changes to name and address of members, increase or decrease in shares held by members, new members and cessation of members. In addition, Form 201 Application for Registration as an Australian Company will now include the requirement to notify details of issue of shares and members.

### **Transitional provisions**

The most generous transitional arrangement is that if changes to company details using new Form 484 are received by ASIC between 1 July and 30 September 2003, ASIC won't charge late lodgement fees, **regardless of the date of change.**

Other transitional arrangements are:

- if a company's review date is between 1 July and 30 September 2003, a company has until 28 October 2003 to bring its records up to date without incurring a late review fee;
- for the new rules about telling ASIC of changes to share and member details, if the change occurred before 1 July 2003 (when it was not required by law to be notified), then the company will have until 28 days after their first review date to update these details; and
- ASIC will accept and not charge late fees for 'old' Forms 203 (change to address) and 304 (change to officeholders) lodged by 30 September 2003.

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