

## REGISTRATION OF LEASES

### INTRODUCTION:

In Western Australia, the *Transfer of Land Act 1893* (**TLA**) provides for the registration of a lease exceeding three years for freehold land.

Historically, there are many examples where leases have not been registered. In fact, it appears that, in Western Australia, very few leases are registered. It seems that, in most cases, tenants have relied upon the protection afforded to a tenant in actual possession by section 68 of the TLA where the term does not exceed 5 years. However, that section does not protect a tenant's option to renew or extend the lease unless the lease is registered or protected by caveat.

The matter does not end there. Failing to register a lease which has a term exceeding 5 years can have very serious consequences.

### “LIGHTING BY DESIGN” CASE:

The 2007 Supreme Court case *Lighting by Design (Aust) Pty Ltd v Cannington Nominees Pty Ltd [2007] WASC 88* was concerned with a tenant which held an unregistered lease for a term which exceeded 5 years.

In 2004, Lighting by Design (Aust) Pty Ltd (**the Tenant**) entered into a lease for a term of 7 years. The lease was not registered. In 2006, the property was sold to Cannington Nominees Pty Ltd (**the Buyer**) and, in 2007, the Buyer wrote to the Tenant purporting to terminate the lease. In response, the Tenant sought a declaration from the Court that the lease was enforceable against the Buyer.

At first instance, Master Sanderson of the Supreme Court held that, in the absence of protection under section 68 of the TLA, the lease being for a term exceeding 5 years, was destroyed upon the Buyer becoming the registered proprietor of the property.

The Court of Appeal agreed with Master Sanderson's statement of the law but held that the Tenant was entitled to lease the premises from the Buyer; but only because it was found that a new lease had been entered into between the parties by a sufficiently part-performed agreement based on the parties' conduct.

The Court was of the opinion that the unregistered lease with a term of more than 5 years was destroyed upon the Buyer becoming the registered proprietor of the property. Conduct which was seen to give rise to a new lease agreement included the Tenant's continued possession of the premises and the payment of rent, rates and taxes referable to the expired lease.

## RECOMMENDATION

Two main outcomes arise from this case. Firstly, a lease with a term which exceeds 5 years that is not registered is automatically destroyed upon change of ownership of the leased property. Secondly, if the parties continue to act in accordance with the expired lease, these actions can give rise to a new lease agreement enforceable because it has been sufficiently part performed.

While it is clear that it is in a tenant's interest to ensure that a lease with a term exceeding 5 years is registered, it is also in the landlord's interest. If the landlord wishes to sell a leased property, a buyer is likely to seek a warranty in the contract of sale to the effect that existing leases are valid and enforceable. If the lease is destroyed, there is no obligation upon the tenant to abide by the terms of the lease, so a breach of warranty by the landlord/seller is likely to arise.

Therefore, we recommend, in the interests of both the landlord and the tenant, to register a lease where the term exceeds 5 years. The purpose of registration is:

- (a) to avoid uncertainty about the validity of an unregistered lease for a term exceeding 5 years if a transfer of the freehold title of the leased property is registered;
- (b) to negate the possibility of claims for damages (whether by a buyer against a seller or by a tenant against a seller) arising as a consequence of an unregistered lease being held to be unenforceable following the registration of a transfer of the freehold title of the leased property; and
- (c) to ensure that the intended outcome of creating legally enforceable rights and obligations for the duration of the term of the lease is achieved and not unintentionally overridden by a subsequent sale of the freehold title of the leased property.

## FURTHER INFORMATION

If you would like further information, please do not hesitate to call us on 9422 8999 or email us on [contact@youngandconnell.com.au](mailto:contact@youngandconnell.com.au)

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