

Article Information

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NSW Supreme Court confirms lease termination permitted for non-COVID breach

In the recent decision of *First Renewable Pty Ltd v Nasteovski* [2020] NSWSC 1508, the NSW Supreme Court gives further guidance on applying Retail and Other Commercial Leases (COVID-19) Regulation 2020 (Regulations) and the National Cabinet Mandatory Code of Conduct (Code) (together, COVID-19 Leasing Regime).

Facts

First Renewable Pty Ltd (**First Renewable**) leased from Zoro Nasteovski (**Lessor**) a strata factory unit in St Peters (**Premises**).

The lease prohibited assigning and subletting of the Premises without the Lessor's consent.

However, on or about 31 August 2019, First Renewable entered into a sublease with Bodhi Satori Pty Ltd (**Bodhi**), a company owned and controlled by the sole director of First Renewable. First Renewable did not seek the Lessor's consent to the sublease.

On 29 September 2020 the Lessor served on First Renewable a 'Notice of Breach', itemising breaches of the lease, including 'sub-letting [the] premises without [the Lessor's] consent' and called for remedial action 'to remove any sub-tenants from the Premises or alternatively seek [the Lessor's] consent [to the sublease]'.

First Renewable did not remove the sublessee from the Premises and did not seek the Lessor's consent to the sublease to Bodhi. On 16 October 2020, the Lessor re-entered the Premises.

First Renewable applied to the Court to seek relief against forfeiture of the lease and the sublease.

First Renewable claimed that:

- it was entitled to the benefit of the COVID-19 Leasing Regime; and
- an inference should be drawn that the Lessor was 'aware' of the existence of the sublease for various reasons, principally because Bodhi sometimes paid First Renewable's rent to the Lessor.

Key Takeaways

In dismissing First Renewable's application for relief against forfeiture of lease the Court considered application of the COVID-19 Leasing Regime.

Key points included:

- **whether a sublessee can rely on the benefits of the COVID-19 Leasing Regime from a head lessor:** generally, a sublessee cannot rely on the benefits of the COVID-19 Leasing Regime as against the head lessor. The Court did suggest that the Regulations might apply to a head lessor / sublessee relationship if there was a contract between the sublessee and the head lessor or if the head lessor had granted consent to the sublease. The Court based its reasoning on a textual analysis of the definitions of 'lessor' and 'lessee' in the Regulations [21].
- **whether payment of rent by a sublessee to a head lessor constituted 'consent' to a sublease:** the head

lessor did not give consent to a sublease by accepting the sublessee's payment of the head lessee's rent to the head lessor [16].

- **whether the COVID-19 Leasing Regime could apply to breach for lease covenant prohibiting subtenancy:** the Regulations did not apply for a breach unrelated to rent [26(e)].

Nastevski confirms that a lessor may take a 'prescribed action' against a lessee for a breach of an 'impacted lease', unless the breach is a breach specified in the Regulations, ie a failure to pay rent and outgoings or a failure to open during the hours specified in the lease.