

Article Information

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Rent holidays, non-payment of rent and rights of re-entry clarified

In these difficult times, many landlords and tenants will decide to suspend rent obligations. A recent appeal decision of the New South Wales Civil and Administrative Tribunal (NCAT) is a timely reminder of the issues that can arise in this situation if drafting is unclear about when rent must be repaid.

The *Charlie Bridge Street Pty Ltd v Petrazzuolo* [2019] NSWCATAP 184 case considers whether a landlord must notify a tenant before re-entry of premises due to non-payment of rent. It considers the interaction of lease terms for re-entry for non-payment of rent and the re-entry provisions in the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**). The lease at issue was in the form of the Law Society Commercial Lease – it is widely used and readers may find their leases have the same drafting as the lease in this case.

Facts

Raffaella and Laura Mary Petrazzuolo (**Landlord**) leased retail premises to Charlie Bridge Street Pty Limited (**Tenant**). The lease was in the form of the Law Society Commercial Lease. The lease was for a term of five years with an option to renew for a further five years. The Landlord granted to the Tenant a 50% rent discount for the first 12 months of the initial term.

After the rent discount period had expired, the Tenant requested that the 50% rent discount continue for a further two months. The Tenant also requested for the discounted amount to be '*amortised back at a later stage in the lease*' due to difficulties in trading. The Landlord agreed to apply the rent discount for a further two months and after that two month period had expired, issued a tax invoice (**September invoice**) for the discounted amount in addition to that month's rent.

A few days later, the Tenant queried the inclusion of the discounted amount in the September invoice. The parties communicated further about the amount of the invoice. However, the Tenant and the Landlord did not reach an agreement on the amount of the September invoice. The Tenant did not pay any portion of that invoice.

The following week, the Landlord notified the Tenant by email that the Tenant was in breach of the lease for unpaid rent. The Tenant still did not pay any part of the September invoice and four days after the notice was given, the Landlord arranged for the locks to the premises to be changed and retook possession of the premises.

The Tenant lodged a Retail Leases Application seeking damages and relief against the forfeiture of the lease.

The lease stated the Landlord could re-enter the Premises:

- if rent or any other money due under the lease was 14 days overdue for payment (**clause 12.2.2**); or
- the Tenant failed to comply with a Landlord's notice under section 129 Conveyancing Act (this is a notice setting out details of a breach and requiring remedy or compensation within a reasonable time) (**clause 12.2.3**); or
- in a situation when the Tenant did not comply with any term of the lease but a Landlord's notice under section 129 was not required, with at least 14 days notice from the Landlord of the Landlord's intention to end the lease (**clause 12.2.4**).

The Conveyancing Act does not require notice for non-payment of rent.

The question at issue was whether:

- clause 12.2.2 should be read as a standalone provision from clause 12.2.4 so that a landlord may re-enter without notice as soon as rent is 14 days overdue; or
- clause 12.2.4 is a 'catch all' requiring 14 days notice for all breaches of the lease not requiring a section 129 notice, including non-payment of rent, even though clause 12.2.2 separately provides for re-entry for non-payment of rent.

Decision

The NCAT Appeal Panel held that the Landlord was not required to give the Tenant notice and dismissed the appeal. The NCAT Appeal Panel found that clauses 12.2.2 and 12.2.4 of the Law Society Commercial Lease operate independently from each other [34]. Clause 12.2.2 gives a separate basis for re-entry under the lease.

This case is authority for the following propositions:

- a landlord is not required under the Conveyancing Act to give notice to a tenant prior to re-entry due to non-payment of rent; and
- a tenant and a landlord are free to make their own agreement with respect of notice requirements for non-payment of rent [23] without restriction from the Conveyancing Act.

Reasoning

The Tribunal in the first instance held that clause 12.2.4 was invalid, relying on Santow J's decision in *MI Design Pty Ltd v Dunecar Pty Ltd* [2000] NSWSC 996 to the effect that:

- clause 12.2.4 purports to require the landlord to give at least 14 days notice to the tenant for non-payment of rent even though notice of breach for non-payment of rent is not required under section 129(8) Conveyancing Act; and
- section 129(10) states that section 129 applies regardless of "any stipulation to the contrary". Therefore, any provision in a lease requiring a landlord to issue a notice to a tenant due to non-payment of rent is ineffective because it is a 'stipulation to the contrary' of section 129(8).

The Tenant appealed on the grounds that the Tribunal made an error of law. The Tenant relied on *MI Design* in which the NSW Supreme Court held that notice was required as a pre-condition to re-entry [54]. However, the NCAT Appeal Panel distinguished *MI Design*, finding that the case was decided on breaches of the Liquor Act 1982 (NSW) rather than unpaid rent [32].

The NCAT Appeal Panel held that although section 129(1) Conveyancing Act requires notice of re-entry for a breach of lease, section 129(8) specifically exempts non-payment of rent from this pre-condition for re-entry. Section 129(8) states that nothing in section 129 affects the general law position for re-entry, forfeiture and relief in the case of non-payment of rent. However, it does not restrict leases from requiring notice for non-payment of rent. The parties are free to contract on this issue and clause 12.2.2 is not affected by the Conveyancing Act [23].

As the issue of whether clause 12.2.4 is valid did not arise, the NCAT Appeal Panel set aside the order made by the Tribunal in the first instance that clause 12.2.4 of the Law Society Commercial Lease is contrary to section 129(10) Conveyancing Act.

Conclusion / Call to Action

Charlie Bridge Street Pty Ltd v Petrazzuolo [2019] NSWCATAP 184 confirms that the Conveyancing Act does not require a landlord to notify a tenant of re-entry for non-payment of rent.

It is open to a landlord and a tenant to agree that notice is required. The Law Society Commercial Lease does not require notice for re-entry after rent is 14 days overdue.

Key Takeaways

- we suggest that parties using the Law Society Commercial Form Lease clarify the drafting on these points;
- bear in mind that the Law Society Commercial Form Lease already includes a grace period for non-payment of rent of 14 days; but
- re-entry is such a significant step that giving of notice may be reasonable so that the tenant has a final opportunity to rectify non-payment.

If the parties do wish to agree to notice for re-entry following non-payment of rent, this must be expressly included in the lease – tenants cannot rely on the Conveyancing Act.

If parties are in a lease with the same drafting as this case, in these difficult times:

- tenants that are tightly managing cashflow by delaying repayment of rent should be aware that landlords can re-enter at the end of the 14 day grace period without further notice; and
- landlords may wish to carefully consider whether they use this right of re-entry as the rental market is likely to be very difficult in the coming months.