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Article Information

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Sneakerboy runs through the COVID-19 Leasing Regime

In the recent decision of Sneakerboy v Georges Properties Pty Ltd (No 2) [2020] NSWSC 1141 (Sneakerboy), the NSW Supreme Court gives some welcome guidance on applying the Retail and Other Commercial Leases (COVID-19) Regulation 2020 (COVID-19 Leasing Regulation) and the National Cabinet Mandatory Code of Conduct (Code) (together, COVID-19 Leasing Regime).

Facts

Sneakerboy is a retail tenant selling luxury sneakers and streetwear. It operates its business online and from five stores in three states of Australia, including premises in Sydney (**Premises**).

Sneakerboy was often late in rent payments before the COVID-19 pandemic. Commencing February 2020 Sneakerboy experienced a sudden decline in revenue that it attributed to the COVID-19 pandemic. On 25 March 2020, prior to the commencement of the COVID-19 Leasing Regime, the landlord re-entered the Premises and terminated the lease. Sneakerboy applied to the court for relief against forfeiture of the lease.

In an initial decision, the court granted Sneakerboy relief against forfeiture of the lease and asked the parties to confer and agree on orders for implementing the COVID-19 Leasing Regime (*Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd* [2020] NSWSC 996). However, the parties were unable to resolve their differences and in this second decision, the court gave guidance on how to apply the COVID-19 Leasing Regime principles.

Key Takeaways

The court considered a number of the difficult issues that have been facing landlords and tenants in applying the COVID-19 Leasing Regime.

- **Retrospective application of the COVID-19 Leasing Regulation:**
  - The court considered the expression 'COVID-19 pandemic period' in the Code and concluded, based on the statement of purpose in the Code, that this is the 'period during which the JobKeeper program is operational' [104]. The JobKeeper program commenced operation on 1 April 2020.
  - The court held that 'insofar as [the COVID-19 Leasing Regulation] required application of the leasing principles [of the Code]', the COVID-19 Leasing Regulation 'had retrospective effect to 1 April 2020 in relation to rent and outgoings for the period from that date' [105], ie, from the start of the COVID-19 pandemic period.
  - In our view, the COVID-19 Leasing Regulation will not necessarily have retrospective effect on other points. It will be necessary to consider whether the relevant clause in the COVID-19 Leasing Regulation actually requires 'application of the leasing principles of the Code'. In relation to rent, clause 7(4)(b) of the COVID-19 Leasing Regulation expressly requires the parties to renegotiate rent having 'regard to the leasing principles set out in the National Code of Conduct'.
- **'Subsequent reasonable recovery period':** the court accepted Sneakerboy's submission that a 'subsequent reasonable recovery period' should be **no less than six months** [148] after the COVID-19 pandemic period. However, in doing so, the court commented that '[six months] does not seem to be a long time… for trade to recover'. It appears that the 'reasonable recovery period' could be longer and determined on the facts of each case.
- **Consequences of repeal of COVID-19 Leasing Regulation:** the court found that so long as negotiations for rent

relief are concluded prior to the repeal of the COVID-19 Leasing Regulation, the negotiated rent relief could continue for the period of the reasonable recovery period [127, 128]. Tenants who are unable to conclude negotiations by the date of repeal (currently 24 October 2020) will not have the benefit of the COVID-19 Leasing Regulation in securing rent relief.

- **'Tenant's trade'**: the court held that the 'tenant's trade':
  - will generally require consideration of the whole of the particular tenant's turnover, **as well as costs and profit**. This is important for landlords who may be negotiating with tenants that have suffered a reduction in turnover but have remained profitable due to cost cutting or government or landlord concessions;
  - refers to the 'whole of [the tenant's] business rather than the business conducted at the particular premises the subject of the lease' (ie includes all retail stores and internet sales) [113]. This is important for landlords who may be negotiating with tenants with other locations or an internet business that are still trading relatively well.
- **'Reduction in tenant's trade'**: the court considered the issue that has been troubling many landlords and tenants in rent relief negotiations – how to determine a tenant's loss in turnover when a tenant's turnover reduction may not be known at the time of renegotiating the lease terms. The court did not rule out a party making multiple requests for rent relief 'where the circumstances warranted it', although stated that the most usual position would be for one renegotiation [125].
- The court considered that appropriate periods for turnover comparison:
  - **businesses with regular trade:** for a business with regular trade, finding an appropriate turnover comparison period may be unproblematic and it 'may be appropriate to compare the turnover for a month or so before the commencement of the renegotiation with the equivalent period in the previous year' [122].
  - **businesses with seasonal trade:** for a business with seasonal trade, it could be very difficult to find an appropriate turnover comparison period. The exercise 'may require comparison between the turnover for a month or so in 2020 with a longer trading period before the onset of the COVID-19 pandemic' [122]. This approach still presents difficulties for parties negotiating lease terms as it does not necessarily require a 'like for like' monthly comparison. The court did emphasise that the Code requires 'good faith commercial negotiations', suggesting that there is still flexibility on this point.
- **Prohibition on prescribed actions after prescribed period:** the court clarified the operation of clause 5 of the COVID-19 Leasing Regulation. Clause 5 restricts a landlord taking 'prescribed actions' (eg terminating the lease) for events arising during the 'prescribed period' (ie 24 April 2020 to 24 October 2020). If a default event occurs during the prescribed period, a landlord cannot take a prescribed action at all, regardless of whether the landlord proposes to take the prescribed action during or after the prescribed period [65].
- **Failure of negotiations:** the court points out that it is not entirely clear what happens if the parties do not succeed in renegotiating a lease or refuses to enter into negotiations or does not do so in good faith [79]. The court considers in detail potential jurisdictional issues arising from a failed renegotiation – a tribunal or court may not have the power to resolve a dispute [89, 91, 93].

Conclusion

The case gives some helpful guidance on:

- the approach to the COVID-19 Leasing Regulation and the Code as an overall 'COVID-19 Leasing Regime' (even though the Code is not legislation or regulation); and
- a number of difficult issues that landlords and tenants have been facing in applying the COVID-19 Leasing Regime.

Despite this guidance, many practical issues continue to present themselves.

It is not clear yet whether the COVID-19 Leasing Regulation will be extended beyond the current automatic repeal date of 24 October 2020. In any case, rent relief can continue for a reasonable recovery period after the COVID-19 pandemic so long as an agreement is reached prior to the repeal.

Landlords wanting to enforce leases for breaches prior to the commencement of the COVID-19 Leasing Regulation should take a cautious approach in light of the potential retrospective application of the COVID-19 Leasing Regulation on some points.