



## **Commercial Leases**

### **Giving Notice—Is it still necessary when repudiating a tenant’s lease?**

**By Eugenia Borgese**

A recent decision weakens the statutory protection for tenants, introduced as long ago as 1882, by which landlords are required to give notice to tenants if they consider that the tenant has breached a lease. This area of leases is a frequent source of contention and the need for certainty on legal entitlements is paramount.

Until recently, the process in the event of an alleged breach of a lease was clear. If a rent agreement was breached, the landlord did not need to issue a notice but could simply re-enter the premises. This would immediately force the defaulting tenant to seek relief against loss, which was usually readily granted, but was only given on condition that the rent was brought up to date.

With other non-rent defaults, the landlord needed to give notice to the tenant specifying the breach and requiring it to be remedied before the landlord’s right of re-entry or forfeiture became enforceable. This gave the tenant the opportunity to remedy the breach within a reasonable time of the notice being served.

In a recent case, there were serious rent and other breaches of a lease over a large hotel. The tenant who had taken over a dilapidated hotel had arranged that he did not need to make certain rental payments if he were to make agreed improvements to the property. The parties disagreed about what that involved and the landlord re-entered the property without giving notice on the basis that the tenant had repudiated the lease as a result of various non-rent defaults. The tenant made an application to the Court on the basis that no notice had been provided to him prior to the landlord’s re-entry.

In refusing the tenant’s application, the Court said that in certain circumstances the failure of a landlord to give notice to the tenant will not automatically result in the Court finding in favour of the tenant if such a result would be inequitable. That is, the landlord was able to succeed in enforcing its re-entry without having first providing the tenant with the notice required under the Conveyancing Act.

This decision creates uncertainty for landlords and tenants in relation to how a court will view unremedied and unadvised breaches of a lease by a tenant in the future. Landlords may find that if they fail to provide notice and re-enter the property on the basis of repudiatory conduct, the Court may not exercise its discretion in favour of the landlord. Similarly, a tenant must now consider the risk that a non-rent breach can amount to repudiation without the landlord issuing a notice. This uncertainty highlights how important it is to have the conditions in any lease clearly drafted at the



outset and for proper advice to be obtained by landlords before acting on a breach of a lease by a tenant and by tenants where a breach of the terms of a lease have occurred.

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