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A BREAK FOR TENANTS?

In our November Real Estate Bulletin we highlighted the importance of handling tenant break options with extreme care. The three cases addressed in that Bulletin illustrate that as a general rule the Court will be ready to find that a break is invalid where it is either given by the wrong party, given to the wrong party, or not given to all parties required by the lease.

On the face of it therefore the case of *MW Trustees Limited and others v Telular Corporation* (2011) decided last month may come as quite a surprise as the Court found in the tenant's favour despite there being defects in the form and service of the break notice. However, looking at the case in more detail it is clear that this decision does not represent a change in the law as there were special circumstances which came to the tenant's rescue.

Facts

The tenant was required to give the landlord not less than 6 months' notice in writing to be delivered by hand or special delivery post in order to exercise the break on 1 March 2010. The tenant first served notice by special delivery on its landlord's immediate predecessor (SLA) as it was unaware of a change in ownership. On being informed of

the change by SLA, it then sent an email to its landlord attaching the original notice. The landlord forwarded the email to its managing agents.

On receiving the break notice, the managing agents responded stating: "*we accept the attached letter and can confirm we are happy for you to break the Lease, however please could you re-address this letter to [the landlord's address]...*". The tenant, however, failed to serve an additional notice on the landlord as directed by the managing agents. On the same day as the managing agents' email, the landlord had also requested details from the tenant regarding the subtenant who was currently occupying the property.

The landlord subsequently challenged the validity of the break on two grounds: first that the form of the notice was defective as it was not addressed to the landlord; and second that sending the notice by email did not comply with the lease requirements for service.

The main issues in the case were:

- whether these defects invalidated the notice and,

- the effect of the managing agents' email on compliance with the lease requirements.

Court's ruling

The High Court found that the tenant had successfully terminated its lease.

The Court decided that, in this particular case, the correct form and service of the notice were not vital because of the effect of the managing agents' email (see further below). In any event, the Court noted that the tenant would have been saved by the principles of the well-known case of *Mannai* and it accepted that "*a reasonable recipient would not have been misled as to the intentions of the tenant because the notice was addressed to the wrong person*" (in this case the landlord's predecessor).

In respect of the second ground of challenge, whilst the tenant had failed to comply with the lease requirements for service, the managing agents' email prevented or estopped the landlord from challenging the validity of the break notice, or amounted to a waiver by the landlord of the requirement to comply with the service provisions contained in the lease.

The particular wording of the managing agents' email not only showed that the landlord acknowledged the service of the break notice but also indicated that it had accepted the effect of the email which was to terminate the lease on 1 March 2010. The Court also took into account the fact that the landlord had made enquiries as to the identity of the subtenants on the same day as receiving the break notice; this again indicated that the landlord was treating the lease as effectively terminated. The Court gave little weight to the fact that the managing agents had directed the tenant to send an additional notice to the landlord at the address given.

Implications for tenants

It is our view that the tenant was fortunate that the Court found in its favour as there were clear defects in service of the notice. The tenant's saving grace was the representation made by the managing agents in its email following receipt of the break notice, which the tenant had relied upon. Tenants should not, however, seek to rely on the success of estoppel arguments to cure problems with defective notices; such arguments will always depend on the particular facts of the case and in the past they have not always found favour with the Courts.

The case is also a reminder to tenants that they should carefully consider the notice and service requirements well in advance of the break date. The task of serving the break notice in this case was entrusted to an employee of the tenant who was not legally trained. Whilst it was noted that the employee had read the lease and formed a view on how the break notice should be served, the employee's failure to comply with



the lease requirements (whilst not fatal in this particular case) allowed the landlord to challenge the break which led to substantial litigation.

Where one party has decided to serve a break notice to terminate the lease, it is always important to ensure that the notice is effective to achieve these goals particularly where the lease has become burdensome, a point which was recognised by the Court in this case. If tenants want greater certainty they will need to handle break options with extreme care and seek legal advice where necessary.

Implications for landlords

The case re-emphasises that a landlord who communicates acceptance of a dubious notice may well lose its ability to challenge the break, which could ultimately harm its commercial interests. Landlords (and their agents) may therefore be wise to exercise restraint in any communication with a tenant who has sought to exercise a break clause, as this may later be used against them if there is any doubt as to whether the break was validly exercised.

The commercial reality, however, is that breaks often provide landlords with an opportunity to negotiate a significant payment from the tenant in return for releasing them from compliance with onerous or ambiguous break requirements in the lease. Landlords should tread carefully in their communications so as not to give rise to an estoppel (as in this case) and at the very least should mark any significant communications negotiating the terms of any possible waiver of the strict lease terms "without prejudice" to ensure they do not affect their strict legal rights under the lease.

Conclusion

The decision in this case was a good outcome for the tenant in the particular circumstances where the landlord by its managing agents had acknowledged the break notice but it should not be regarded as a change in the legal position. It is yet another timely reminder for both landlords and tenants to exercise extreme care in handling break options.

This bulletin summarises complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.



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