

## Clubs Legal Update: In Brief December 2010

### Club Catering Contracts - The Retail Leases Act bites!

A recent case in the NSW Supreme Court has emphasised the importance of having a proper legal agreement in place before allowing a Caterer to take occupation of Club premises.

Justice Slattery stated: 'It is common commercial wisdom to settle upon the detail of a lease before the proposed tenant enters into occupation. This case is an illustration of what can go wrong when this wisdom is overlooked'.

The case covers a range of legal issues, including the *Retail Leases Act 1994* which can impose additional terms on an agreement.

#### So what went wrong?

*Bigdale Pty Ltd (t/as Enigma at the Royal Motor Yacht Club) v Royal Motor Yacht Club of NSW Port Hacking Branch (2010) NSWSC 1196*

#### Case Summary

The Club negotiated with the Caterer to operate from the restaurant, kitchen and bistro area of the Club. Various terms were agreed and there was an exchange of emails between the parties.

An email from the Caterer's solicitor stated that until a formal written agreement was finalised, a 3 month 'no fault' escape option was available to both parties.

The Caterer then took occupation before the formal agreement was finalised. The parties attempted to negotiate the final terms, but negotiations broke down.

The Club finally served notices on the Caterer requiring it to vacate the premises so a new Caterer could take over. The Caterer sought an injunction to prevent this and claimed (among other things) that the *Retail Leases Act 1994* (**Retail Leases Act**) applied and it was entitled to a minimum 5 year lease.

#### Impact of the Retail Leases Act

Clubs do not generally grant leases of Club premises because of the restrictions under the *Liquor Act 2007*. Instead, caterers are usually granted a 'non-exclusive licence' to use certain areas. The Retail Leases Act can apply to agreements which are not 'leases'. It applies to most agreements granting a right to occupy premises (for value) for the purpose of a restaurant, cafe, coffee lounge, food court or other eating place:

- whether or not there is a right of exclusive occupation;
- whether the agreement is express or implied; and
- whether the agreement is oral or written, or partly oral and partly written.

A minimum term of 5 years can be imposed, even if the parties have agreed on a shorter term.

#### The Decision

The problem for the Club was that the Caterer took occupation **without** a proper signed agreement in place. The Caterer was unsuccessful in obtaining the injunction, but primarily because it delayed seeking Court intervention until things had progressed beyond a point where an injunction was appropriate. However, the Judge expressed his view that it was arguable there was a serious question to be tried on whether the Retail Leases Act applied. This case is yet to be finally resolved, and we will issue a further update once the Court makes a final decision.

'The problem for the Club was that the Caterer took occupation **without** a proper signed agreement in place.'

## What this means for your Club

This case highlights that the Retail Leases Act can apply to Club catering agreements. If a Club does not identify when it applies, it can lead to serious legal complications. For example, the Club runs a risk that a 5 year lease term will be imposed by law, even if the parties have agreed on a shorter term. The Club can also be liable for substantial damages if it wrongfully terminates the agreement.

## Tips for Clubs

1. Each catering agreement will be different, depending on the Club's circumstances. Clubs should make sure they are aware of the law applicable to their situation.
2. We recommend that Clubs get legal advice (including on whether the Retail Leases Act applies) before finalising a catering agreement.
3. If the Retail Leases Act applies, and the agreement is to be for less than 5 years, in most cases a certificate must be given by the Caterer's legal adviser which complies with the Retail Leases Act. Otherwise, a minimum term of 5 years will be imposed by law.
4. The agreement should be signed by all parties **before** the Caterer takes occupation or starts paying any licence fee or rent.

For further information or a confidential discussion, please contact our team.

**Brett Boon**  
Partner

+61 2 8248 5832

bboon@thomsonslawyers.com.au

**David Brand**  
Special Counsel

+61 2 8248 5833

dbrand@thomsonslawyers.com.au

**Phillip Wade**  
Special Counsel

+61 2 8248 5822

pwade@thomsonslawyers.com.au

**Sherif Mouakkassa**  
Senior Associate

+61 2 8248 5837

smouakassa@thomsonslawyers.com.au

**Vivienne Young**  
Senior Associate

+61 2 8248 5838

vyoung@thomsonslawyers.com.au

**[www.thomsonslawyers.com.au](http://www.thomsonslawyers.com.au)**

## Property Development Series

### Article number 1: Getting Started!

Many clubs are located in prime development locations, or own property in such areas. Developing this land for club and non-club uses can be an attractive option to improve club facilities and promote income diversification. In this, the first article of our series on property development, we look at common development types and structures, and the initial steps for clubs to take when considering a development.

Look out for forthcoming articles in this series in our 2011 newsletters!

#### Options

Development projects may take any number of forms. Some common examples are:

- The development of club land (other than the land on which a club's premises is located) for retail, residential, commercial or leisure uses.
- The redevelopment of a club's existing premises for club, retail, commercial, residential and/or leisure uses. This may involve the refurbishment, and/or relocation, of the club premises in the completed development.

#### Step 1: Be prepared

The first step is to assess the legal, commercial, financial and construction issues connected with the development and obtain appropriate professional advice where required. This would usually include:

##### **Project Feasibility**

Will the completed development give the club a positive return over time? This should include an investigation of the highest and best use for the club's land holdings to identify the best development option.

##### **Cost and financing**

The estimated cost of the development should be established. Once a cost estimate is ready, financing options can be explored. They might include financing the development:

- through borrowings from a finance provider;
- from existing club funds and income;
- by the club and a joint venture partner; or
- solely by a joint venture partner.

##### **Zoning**

Identify the current zoning of the land and if any re-zoning will be required for the development to go ahead.

##### **Tax**

What are the tax implications of the development (including any stamp duty and CGT) and will the development affect any sporting club tax exemption held by the club?

##### **Future opportunities**

An assessment should be done of the likely opportunities arising from the development. For example, if it involves retail components what is the interest of possible key tenants in the development? This is particularly important for medium to large scale retail projects where an anchor tenant (or the absence of one) can make or break a development.

##### **Structure**

The appropriate structure for the development will depend on the cost and type of development. Common examples are:

- If the club is undertaking the development itself, it may engage a builder directly. The club may then lease and/or sell the completed development (or parts of it), or, operate its own businesses from the completed development.
- If the club enters into a joint venture with a developer who will construct the development at their cost, the developer will take a share of future income or profit from the development.

How a development is structured will determine the type of contracts that are necessary and how the risks and benefits are to be allocated between the parties

- The development could be a sale of the club's land to a developer, and then a lease back/repurchase of purpose built new club premises in the completed development.
- The developer could carry out the development and lease the completed development, or part of it, from the club on completion.

## Step 2: Getting the right people

Once the club has decided on its preferred option, it will need professional advisors and proper structures in place to carry out the development. This will often include:

### Design Management

To ensure the development is designed for construction to an appropriate standard at an appropriate cost. The club might engage an architect and a quantity surveyor.

### Project Management

To ensure that the development is constructed on schedule and on budget, an experienced project manager can be retained to manage the project on the club's behalf.

### Risk Management

The club needs to explore options to ensure that the development is completed if the developer or builder is unable to complete it as planned (e.g. due to an insolvency event). The club also needs to ensure that it has appropriate contracts in place with all parties involved in the development, so that each party clearly understands its role and the standards the club requires it to meet.

### Reporting

To ensure that the club is kept up to date during the development, structures should be put in place for regular reporting. This would normally be facilitated by the project manager.

## Tips for Clubs

When starting a property development, some clubs may be at a disadvantage when dealing with property developers and builders etc, most of whom have many years of experience in the property industry. Early planning and seeking independent professional advice can help the club by:

- identifying the options available;
- adequately exploring the viability and affordability of the options; and
- helping the club to obtain the maximum benefit from the development and to minimise the risks involved.

For further information or a confidential discussion, please contact our team.

### Brett Boon

Partner

+61 2 8248 5832

bboon@thomsonslawyers.com.au

### David Brand

Special Counsel

+61 2 8248 5833

dbrand@thomsonslawyers.com.au

### Phillip Wade

Special Counsel

+61 2 8248 5822

pwade@thomsonslawyers.com.au

### Sherif Mouakkassa

Senior Associate

+61 2 8248 5837

smouakassa@thomsonslawyers.com.au

### Vivienne Young

Senior Associate

+61 2 8248 5838

vyoung@thomsonslawyers.com.au

[www.thomsonslawyers.com.au](http://www.thomsonslawyers.com.au)