



Property & Development Alert

April 2009

There have been some important judicial decisions in the last 12 months that affect the rights and interests of property owners and developers. Here we provide an update on some of those decisions and what they mean for you.

High Court clarification for purchasers of land subject to a commercial lease

The decision of the High Court in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd & Ors* [2008] HCA 10 provides clarification and certainty for purchasers of property subject to a commercial lease.

Brief Facts of the Case

The current land owner purchased the land subject to a commercial lease without taking an assignment of that lease. Therefore, there was no contractual relationship between the current land owner and the tenant. The tenant fell behind in rent and was consequently in breach of the lease.

Despite the lack of contractual relationship, the current land owner sued the tenant and the guarantor under the lease.

The current land owner relied upon Section 117 of the Conveyancing Act 1919 (NSW), which states that rent and the benefit of every covenant or provision contained in a lease that “touches and concerns the land”, runs with the land (ie, for the benefit of the land owner).

Decision of the High Court

The High Court determined that a covenant to pay rent touches and concerns the land. The right to enforce that covenant (ie to sue for arrears etc) also touches and concerns the land.

In relation to the liability of the guarantors, the High Court held that since a covenant to pay rent runs with the land, a guarantee to pay that rent also runs with the land and can be enforced by a purchaser of the land.

This means that the tenant has obligations to the owner of the land – irrespective of whom the landlord was when the lease was signed.

The High Court gave judgment in favour of the current owner against the existing tenant and the guarantors of the lease for:

1. Arrears of rent
2. Loss of bargain damages for the rest of the term of the lease
3. Damages for the costs of reletting the premises after termination (reinstatement damages)
4. Interest; and
5. Costs.

What does this mean for you?

If you are buying a property subject to a commercial lease, it is always good practice to take an assignment of that lease. However, if you haven't done this, or cannot negotiate that right with the vendor, then this is a very welcome decision, particularly if the lease contains a personal guarantee.

Supreme Court decision broadens the right to support for land

A decision of the Supreme Court in *Piling v Prynew Nemeth v Prynew* [2008] NSWSC 118, has clarified that the right to support from adjoining land includes the right to support for the buildings on the land. The decision has also broadened the rights of individuals to take action against their neighbours for breaches of development consent conditions. This decision has important ramifications for developers and landowners.

Brief Facts of the Case

The Prynew's (via their contractors Piling) undertook a large excavation on their block as part of a plan to construct new a residential flat building. The Nemeth's owned the block next door. A condition of the Prynew's development consent was that a retaining wall system was to be installed at the boundary of the two blocks so as to provide a lateral support to the foundation material of the Nemeth's premises while the site was being excavated. During the first stages of demolition and excavation the Nemeth's house sustained considerable damage.

Decision of the Supreme Court

Historically, the Common Law right of support for land did not extend to a right of support for buildings on the land. Section 177 of the Conveyancing Act 1919 (NSW) introduced a statutory right of support for land.



In this decision, the Supreme Court determined that the purpose of s177 was to include a right of support for buildings on land, as well as the land itself. The Court also ruled that s177 of the Act did not include liability for an omission.

Liability under the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)

Having found the Prynew's liable to the Nemeth's in negligence, the Court then found that the EP&A Act does give a private cause of action for damages with respect to a breach of a condition of development consent, provided that the relevant condition prescribed a specific precaution for the safety of others.

What does this mean for you?

The Court has clarified that the right of support to land extends to support for buildings on the land. As a result of this decision, the amount that can be claimed for damages for loss of support to land has been greatly increased.

In addition, the decision broadens an individual's right to bring an action against neighbours undertaking development by establishing that under certain

circumstances, a breach of development consent conditions under the EP&A Act can provide a private right of action to an individual who has suffered damage as a result of those breaches of development consent.

A right to deny a tenant's exercise of option

Under s133E of the Conveyancing Act 1919 (NSW), a landlord can serve on a tenant a prescribed notice which precludes a tenant's entitlement to exercise a lease option if the tenant is in breach of the provisions of the lease.

A prescribed notice can only be served on a tenant in certain circumstances and the strict requirements of the legislation must be complied with. Firstly, the lease must contain a provision which states that the tenant's right to exercise the option is dependent upon the tenant satisfying all obligations under the lease. Secondly, a valid prescribed notice must:

1. be in writing;
2. be served within 14 days after the tenant has exercised the option, or

alternatively 14 days after breach of the lease, if the option has already been exercised;

3. specify in detail which obligations under the lease the tenant has breached; and
4. state that, subject to an order under s133F of the Conveyancing Act 1919 (NSW), the landlord proposes to preclude the tenant from their entitlement to a renewal lease.

Supreme Court decision

A recent decision of the Supreme Court in Sydney West Area Health Service v Saracek [2008] NSWSC 744 held that a notice was ineffective to preclude a tenant's right to an option because it did not refer to the tenant's rights under s133F of the Conveyancing Act 1919 (NSW).

What does this mean for you?

The decision confirms that the courts will require strict compliance with the legislation should a landlord seek to rely on a prescribed notice. Landlords should ensure that they comply with the legislation when issuing a prescribed notice to a tenant.

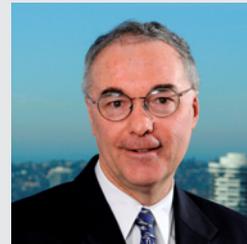
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