

Commercial Leases

INTRODUCTION	1
Introduction	1
This seminar	2
1. A CONTEXTUAL OVERVIEW	4
Historical background	4
The lease as "contract" and as "property"	5
<i>The "property" element</i>	5
<i>The "contractual" element</i>	6
<i>Practical relevance of the distinction</i>	6
<i>The Cash Handling case – the interplay of contract and property</i>	9
The current legal context of leases	10
<i>The "General Law"</i>	11
<i>The Property Law Act 1952 (PLA)</i>	12
<i>The Land Transfer Act 1952 (LTA)</i>	13
<i>Tenancy Protection Legislation</i>	13
<i>Application to practical leasing problems</i>	14
2. RECENT DEVELOPMENTS IN LEASE AGREEMENTS	18
Current developments in agreement to lease - the partnering concept	18
<i>Background</i>	18
<i>Current position</i>	18
<i>Specific features of a typical "partnering" development agreement</i>	19
<i>Effective "partnering" and defining the terms of the lease</i>	20
Lease incentives or inducements: (non-taxable)?	23
<i>Payments by lessors</i>	23
<i>CIR v Wattie [1999]</i>	23
<i>Commercial background</i>	23
<i>Facts of the case</i>	23
<i>Benefits / incentives provided under the collateral deed</i>	24
<i>Tax issues</i>	24
<i>The relevant legislation</i>	24
<i>The Commissioner's arguments</i>	25
<i>Capital / revenue classification – general principle(s)</i>	25
<i>Can the payment be properly attributed to a particular year?</i>	26
<i>Conclusion on the particular facts: "negative premium"</i>	26
<i>Profit</i>	26
<i>Practical conclusions - summary</i>	27
3. PROBLEMS WITH LEASE CREATION	28
Formal requirements for leases of Land Transfer Land	28
<i>Requirement for writing</i>	28
<i>Term of three or more years</i>	28
<i>Term of less than three years</i>	28

<i>The effect at law of unregistered leases for three or more years</i>	29
Equitable remedies for failure to comply with the formalities	29
<i>Specific performance</i>	29
<i>Part performance</i>	29
<i>The doctrine of Walsh v Lonsdale</i>	31
<i>Equitable estoppel</i>	32
<i>Commentary</i>	35
Applying the principles to current new practice; is the deed of lease necessary?	36
<i>Current practice</i>	36
4. THE LANDLORD'S LIABILITY FOR FITNESS FOR PURPOSE	40
An implied obligation to repair?	40
<i>The "Business Efficacy" principle</i>	42
An implied warranty of fitness?	43
Liability in negligence	43
<i>South Australian decisions</i>	43
<i>Recent New South Wales decisions</i>	44
<i>Application in New Zealand</i>	45
Consumer Guarantees Act 1993 (CGA)	45
<i>General application to leased premises</i>	45
<i>Transportable buildings and structures</i>	46
<i>Application to chattels and fixtures</i>	46
<i>Leasing as a "supply of services"?</i>	46
Fair Trading Act 1986	47
<i>General application to leases</i>	47
<i>Person "in trade" making false or misleading representations</i>	47
<i>Recent cases</i>	48
Building Code, Health and Sanitation regulation	52
Conclusions	52
5. QUIET ENJOYMENT, DEROGATION FROM THE GRANT AND THE NUISANCE OF OTHER TENANTS	53
The covenant for quiet enjoyment	53
The obligation not to derogate from the grant	55
The landlord's liability for the nuisance of other tenants	56
Comment	57
6. MAKING GOOD DAMAGE AND / OR LOSS: MAINTENANCE OBLIGATIONS (REPAIR) AND INSURANCE	59
Maintenance (repair)	59
<i>"Repair Defined"</i>	59
<i>Weatherhead v Deka New Zealand Ltd</i>	59
<i>Issue in the case</i>	59
<i>The repair covenant</i>	59
<i>The High Court's Approach to the Covenant</i>	60
<i>The factual matrix</i>	61
<i>Summary of principles – construing a covenant to repair:</i>	61

<i>Weatherhead's argument</i>	62
<i>The Court of Appeal</i>	63
<i>Drafting advice</i>	64
Insurance	64
<i>General</i>	64
<i>Benefit of lessor's insurance and subrogation</i>	64
7. ASSIGNMENT AND SUB-LETTING	66
Preliminary points on assignment and sub-leasing	66
Distinction between assignments and sub-leases	68
<i>Privity of contract and privity of estate</i>	68
<i>Effective assignments and sub-leases</i>	68
Problems with sub-leases	68
<i>Olympic Corporation Ltd v Orcatory Road Properties Ltd</i>	68
<i>Neva Holdings Ltd v Wilson</i>	70
<i>Comment</i>	71
Assignments - continuing liability of original contracting parties	72
<i>Liability of original lessee (and guarantors)</i>	72
<i>Liability of assignees (and their guarantors) who covenant directly with landlord</i>	72
<i>Liability following variation of lease by landlord and assignee</i>	73
<i>Liability following the exercise of a right of renewal</i>	75
<i>Liability following extension of lease</i>	75
<i>Liability following extension of the lease by statute</i>	76
<i>Liability while "holding over" pursuant to s 105 PLA, or by express agreement</i>	76
<i>Liability following disclaimer by Official Assignee</i>	77
<i>Accord and satisfaction</i>	77
Transfer of reversion	77
8. CARPARKING – LEASE OR LICENCE?	79
Fringe Benefit Tax liability: the provision of car parks for employees	79
<i>Ruling by the Inland Revenue Department</i>	79
<i>Summary of ruling</i>	79
<i>Ruling effective 1 November 1999</i>	79
<i>The relevant legislation</i>	79
<i>Risk to employers</i>	80
<i>Broad interpretation: "The premises of the employer"</i>	80
<i>Carpark licence does not meet the test</i>	80
<i>Exclusive possession and parties' intentions</i>	80
Practical application:	81
<i>Public car parks</i>	81
<i>Specific carpark spaces required</i>	81
<i>Exclusive possession and specified spaces are important</i>	81
<i>Issues for practitioners</i>	81
<i>Drafting issues</i>	81
9. LEASE DRAFTING – ISSUES ARISING FROM RECENT LITIGATION AND CURRENT MARKET TRENDS	83

Introduction	83
Recent court decisions	83
Ratchet clauses	84
<i>BOMA derived leases</i>	84
<i>ADLS standard lease</i>	85
Guarantees – enforceability for subsequent owners of the reversion	85
Assignments – liability of intermediate assignees	86
Benefit of rental bonds	86
Redecoration / refurbishment / reinstatement	86
Standard amendments to ADLS lease	86
<i>Conversion to a gross lease</i>	86
<i>"Lessor amendments"</i>	87
<i>"Lessee amendments"</i>	88
10. WHEN THINGS GO WRONG – REMEDIES	91
A – Remedies allowing continuation of the lease	91
Distress for rent	91
Other remedies allowing the lease to continue	93
<i>Proceedings for recovery of rent</i>	93
<i>Proceedings for damages for breach of covenants</i>	93
<i>Injunction</i>	94
<i>Specific performance</i>	94
B – Remedies involving termination of the lease	94
Re-entry and forfeiture	94
Effecting re-entry and forfeiture	95
Relief against forfeiture	96
Contractual Remedies	98
<i>General</i>	98
<i>Frustration</i>	98
<i>Cancellation and repudiation</i>	98
<i>Examples of repudiation:</i>	99
<i>The need for privity of contract</i>	100
<i>Effect of cancellation on a registered lease</i>	101
<i>Relief under s 9, CRA</i>	101
<i>Damages</i>	101
<i>Re-entry and forfeiture v cancellation - relative advantages</i>	103
11. COMMERCIAL ASPECTS OF RESIDENTIAL TENANCIES	104
Scope of the Residential Tenancies Act 1986	104
Application of the Act to commercial leases	104
Application of the Act to corporate tenants	105
The desirability of registering long-term residential tenancies	106
Excluding long fixed-term tenancies from the RTA	107
12. COMMERCIAL TENANCIES PROTECTION LEGISLATION?	108
Introduction	108
Problems requiring commercial tenant protection	108

