Rent Review Clauses

ANZ Executors and Trustee Company Ltd Re: Queensland Treasury Corporation, Qld Supreme Court, Mackenzie J., No 0214 of 1991, 10 April 1991, unreported.

Ropart Pty Ltd v Kern Corporation Ltd, , NSW Supreme Court, Rolfe J., No 2152 of 1991, 15 May 1991, unreported.

Both landlords and tenants should understand properly the market review provisions when negotiating leases.

Whilst the taxation aspects of leasing incentives have been given wide coverage, related issues arise as to whether incentives such as cash premiums and rent-free periods should be taken into account when "open market rent" review provisions are being reviewed. Generally such incentives have been disregarded in this context.

Contradictory conclusions have been reached in Queensland and NSW recently. In both cases the lease specified incentives were to be disregarded when the rent was reviewed. The Queensland Supreme Court held that the effect of incentives was to be reflected in the market rent; while the NSW Supreme Court held that the valuer should not take incentives into account if the lease specifies that they are to be disregarded.

The NSW decision is preferable both from a commercial and legal perspective as it avoids uncertainty for both parties.

There are many variations in market rent review clauses and parties to lease agreements should be aware of the following issues:

- Time periods for a rent review may be imposed and it is becoming common for one party to insist that they are adhered to. Some leases specify that if the tenant does not object to what the landlord considers to be the market rent within a fixed period after notice is served, the rent set out in the notice shall apply. It is very important not to overlook such notices.
- It is possible for a lease to allow either party to commence a rent review. This is significant because a considerable period of time may elapse before the rent review is finalised and during that time, the rent proposed by the party commencing the review may be the rent payable.
- The term used to describe the rent payable is important. The terms, "the open market rent", "the market rent", "a reasonable rent" or "the best rent that can be obtained", can have different meanings depending on the circumstances.
- Rent should be determined as if the premises were bare, whether or not the landlord has fitted out the premises as an incentive to rent.
- Assumptions about whether the premises are fit for immediate occupation by a new tenant can affect the rent review.
- It may be necessary to specify that some matters are disregarded when determining rent; for example, increased value as a result of a tenant's fit-out of the premises or as a result of goodwill generated by the tenant.

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Termination of Contract

Amann Aviation Pty. Ltd. v Commonwealth of Australia [1990] 92ALR 601

This decision of the General Division of the Federal Court of Australia concerns a contract to conduct an aerial coast watch service, repudiation by the Commonwealth and assessment of damages where the contract would not have been profitable. The judgements make frequent reference to cases on construction contracts and the principles enunciated are equally applicable to construction contracts.

The case turned on the interpretation of clause 2.24 of the contract which provided, so far as relevant for present purposes:

> "Whenever... the contractor fails to carry out the contact or comply with a condition of the contract to the satisfaction of the Secretary then in either of those events the Secretary may, by notice in writing, require the contractor to show cause in writing to the satisfaction of the Secretary, why the contract or any specified portion thereof should not be cancelled. If the contractor fails to show cause in writing, as so required, the Secretary shall be entitled to treat the contract or any specified portion thereof as having been cancelled..."

Amann did not have the required number of aircraft by a certain date and was in breach. The Secretary [of the Department of Transport], without giving a notice to show cause, gave Amann a notice terminating the contract.

Amann elected to treat the contract as at an end on account of the Commonwealth's repudiation and Amann claimed damages.

The Court held that, since the clause requiring a show cause was the agreed procedure before termination, it had to be complied with before the Commonwealth could validly terminate. In this contract, the right to terminate given by the clause was in lieu of, not in addition to, the common law right to terminate. This emphasises the importance when drafting a termination clause of stating expressly whether the procedure laid down in the clause is in addition to or in substitution for common law rights of termination.

The judges expressed views on the role of the Secretary. Davies J. at p.607 said:

> "Clause 2.24 thus empowered the Secretary to treat the contract or any specified portion thereof as cancelled in the event of a breach of any term of the contract; but it required him before doing so to give notice to the contractor to show cause in writing to the satisfaction of the Secretary. As the Secretary was not a party to the contract, he was bound to act without actual bias and not capriciously and only after giving due attention to the interests of both parties. That was the purpose of the provision for notice. The provision would be frustrated if the Secretary could act only in the interests of the Commonwealth without taking account of matters that, after notice, the contractor put forward as a reason why cancellation should not be affected... In considering cancellation, the Secretary would have regard to the ordinary principles of law as to rescission of contracts, for they reflect fair and accepted rules for regulating commercial disputes. But such principles would not be determinative, merely a guide."

Sheppard J, at pp.616 - 617, came to the conclusion that it would be 'unlawful' for the Secretary to act capriciously, arbitrarily or in bad faith, but that the Secretary was not properly to be characterised as a certifier as in *Dixon v South Australian Railways Commissioner* [1923] 34 CLR 71 and *Perini v Commonwealth* [1969] 2 NSWR 530.

Sheppard J was also of the opinion that the arbitration clause was in terms that would entitle an arbitrator to decide whether the power had been properly exercised by the Secretary.

(It will be interesting to see what the Court of Appeal in NSW has to say on the question of show cause notices under the National Public Works Conference General Conditions, in the appeal referred to in Issue #11 Australian Construction Law Newsletter at p. 48.)

On the question of damages, the contractor had incurred considerable expense in purchasing aircraft and in preparation in reliance on the contract but the contractor was unable to demonstrate that the contract would have been profitable. The contractor was therefore not entitled to recover anything for loss of profits. Nevertheless, the contractor could recover the expenses incurred, unless the Commonwealth could show that the returns from the contract would have been insufficient to recoup this expenditure.

The Commonwealth argued that the damages should be discounted to reflect the probability that, in any event the contract would have been validly terminated later on account of the contractor's breaches. The trial judge assessed as 50% the prospect that the contract would have been cancelled later and reduced the damages. The Appeal Court took the view that it was improbable that the contract would have been terminated and the Court refused to discount the damages.

The case is on appeal to the High Court.

- Philip Davenport

Trade Practices - representations in lease negotiations - effect of disclaimers - BOMA Method of Measurement

Seabridge Australia Pty Limited v JLW (New South Wales) Pty Limited, Federal Court of Australia, General Division, Beaumont J., Sydney, 12 April 1991.

1. Whether a written representation made by a Lessor or a Lessor's agent made during negotiations for Lease can be relied upon by a Lessee for the purposes of Section 52 of the Trade Practices Act.

2. Whether general disclaimers in a written statement will preclude reliance for the purposes of S52 on a specific statement made in negotiations for a Lease.

In this case Jones Lang Wootton ("JLW") as agent for Lezam Pty Limited ("Lezam"), the Lessor, made a representation to Seabridge Australia Pty Limited ("Seabridge"), the Lessee, by way of a letter that the area in metres squared which was to be the subject of the Lease was greater in area than it was later found to be in fact. The Lessee pleaded that this representation had been made, and further pleaded that it is common and usual practice for "net lettable areas" to be "calculated in accordance with standards of measurement in the guidelines adopted by the Building Owners and Managers Association ("BOMA"); and that it had relied upon this representation. The Lessee claimed further that JLW and Lezam had engaged in misleading or deceptive conduct contrary to S52 of the Trade Practices Act in that each failed to identify the area of the premises represented to the Lessee as being the "net lettable area"; and represented the "net lettable area" to be 2,229.09 square metres when in fact it was less, and by reason of