

RELIEF AGAINST FORFEITURE REFUSED FOR PRE-COVID19 DEFAULT



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In the recent case of MIR Holdings Pty Ltd & Anor v Marina Square Retail Pty Ltd [2020] NSWSC 1418 the Supreme Court refused an interlocutory application for relief against forfeiture by two retail lessees whose leases were terminated during the COVID pandemic period for arrears that arose prior to the pandemic period.

Facts

MIR Holdings Pty Ltd and SKRG Pty Ltd (the “**Lessees**”) both operated restaurants from Marina Square Shopping Centre at Wentworth Point, New South Wales owned by Marina Square Retail Pty Ltd (“Marina Square”).

On 11 September 2020 Marina Square served both Lessees with a Notice of Breach of Covenant specifying default for non-payment of rent and other lease charges for the period up to 31 March 2020 (“**Breach Notice**”). The Lessees did not remedy the breaches and on 1 October 2020, Marina Square served a Notice of Re-Entry and Termination terminating the leases.

The following day on 2 October 2020 the Lessees commenced proceedings seeking relief against forfeiture on an interlocutory and final basis. Rein J dismissed the interlocutory application. The Lessees then renewed their application for interlocutory relief before Stevenson J. On 7 October 2020, after the leases were forfeited and before the Lessees renewed their relief application, new third party lessees (the “**New Lessees**”) entered into possession of both premises pursuant to an Agreement for Lease which had become unconditional upon Marina Square obtaining vacant possession of the premises on 1 October 2020.

Third party rights

In considering the effect of the New Lessee’s rights in the premises, the Court considered it will generally not grant relief against forfeiture where a third party has acquired rights over the property. However, if the third party knew of the relevant circumstances, and had notice of a tenant’s claim to seek relief, relief may be granted. The Lessees asked the Court to infer the New Lessees should be taken to have notice of the Lessees’ claim for relief against forfeiture from the Lessee’s registered leases.

The Court found there was no evidence of what the New Lessees knew of the circumstances of the purported termination of the leases save that Marina Square obtained vacant possession of the premises on 1 October 2020. The Court noted that when the matter was first before Rein J, the Lessees were declined relief because of the “*potential impact upon the new lessees*” and that despite Rein J’s observations, the Lessees did not join the New Lessees or cause them to be given notice of their claim for relief against forfeiture or of the proceedings. In circumstances where the New Lessees have an unconditional entitlement to occupy the premises, the Court was not prepared to grant the Lessees’ relief against forfeiture without having heard from the New Lessees.



COVID-19 Leasing regime does not apply to pre-COVID defaults

The Lessees alleged that Marina Square's taking of possession of the premises was contrary to the *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)* (the "Regulations"). In particular the Lessees contended clause 5 of the Regulations prevented the exercise or enforcement of rights in relation to "circumstances" occurring during the prescribed period. Further that clause 6 of the Regulations provides that if a lessee is an impacted lessee, a lessor must not take any prescribed action against a lessee on the grounds of breach of the commercial lease during the prescribed period consisting of a failure to pay rent or outgoings.

Stevenson J held that the Regulations did not apply to the circumstances of the case. The default specified in the Breach Notice was default of paying rent and outgoings for the period up to 31 March 2020 that is, prior to the prescribed period which commenced on 24 April 2020. Clause 5 of the Regulations deals generally with the application of the Regulations as a whole and provides that it applies to the exercise of a lessor's rights in relation to "circumstances" occurring during the prescribed period. What those "circumstances" are is specified in clause 6(1)(a) and (b) namely the taking of possession from a lessee on the grounds of a breach of the lease "consisting of" a failure to pay rent and outgoings which breach occurred "during the prescribed period".

His Honour found that clause 6(1) is directed to breaches of the lease occurring *during* the prescribed period. This was consistent with clause 7(1) of the Regulations which applies to the lessor to participate in written negotiations prior to taking prescribed action "*on grounds of a breach of the impacted lease consisting of a failure to pay rent during the prescribed period*". It is also consistent with clause 9 of the Regulations which obliges any court or tribunal making a decision concerning the recovery of possession of premises to "*have regard to leasing principles set out in the "National Code of Conduct"*". The relevant "Leasing Principle" in the National Code of Conduct provides that "*Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period*". These provisions are all directed to circumstances where a lessee fails to pay rent or comply with its obligations under a commercial lease during the prescribed period.

The provisions are not concerned with defaults prior to the COVID-19 pandemic period and prior to the prescribed period and that failure by the Lessees to comply with the Breach Notice is not of itself a breach of the lease. The "breach" upon which Marina Square relied on to re-enter was the Lessees' failure to pay rent and outgoings due prior to the prescribed period and accordingly the Regulations did not apply.

A rare case of persistent and significant default

The Court noted the well-known general principles for relief against forfeiture summarised by Campbell J in *Wilkinson v S & S Gikas Pty Ltd* [2006] NSWSC 1314:

"[23] The granting of relief against forfeiture is discretionary. In relation to a lease, the principle that is generally applied is that the power to re-enter or forfeit for non-payment of rent is regarded as being in substance security for the rent. Provided the lessor and other persons concerned can be put in the same position as before the forfeiture or re-entry, the Court will usually grant relief against forfeiture upon payment of rent, costs, interest and other expenses. If those terms are offered, it is only in a rare case that the Court would refuse relief against forfeiture. The principle on which that is done is that, once the landlord has got all that the right of re-entry was, in equity's eyes, security for, it would be unconscionable for the landlord to insist on its legal right to re-enter.

[24] However, such a rare case can occur if the tenant is unable to pay future rent, or may reasonably be expected to become so. If there is a sufficiently serious risk that the tenant will not be able to perform its obligations in the future, it may be that the consequence is that it is not unconscionable for the landlord to insist on its strict legal right."



The Court found that this was a rare case in that the difficulty for the Lessees was their default under the leases was persistent and significant and the Court would have, in any event, hesitated to grant the relief. The case is continuing on the Lessees' application for final relief.

Conclusion

The decision confirms the well-established principles of relief against forfeiture including the effect of the intervention of third party rights and the rare exception where relief will not be granted where there is a serious risk the tenant will not be able to perform its obligations in the future. Importantly, the case determines that the *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)* will not apply to circumstances consisting of a failure to pay rent and outgoings prior to the prescribed period.

Landlords wanting to enforce leases for breaches prior to the commencement of the COVID-19 Leasing Regime now appear to have been given the green light.

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