



## LEGAL LINES – WA Property News October 2003

---

### LANDLORD & TENANT – UPDATE ON RECENT CASES

Below are highlighted a couple of recent decisions, which will be of interest to tenants and landlords.

#### **Abatement of rent – Tenant must give prior notice of dispute**

The recent decision by the New South Wales Court of Appeal in the case of *Edex International Holdings Pty Ltd v Marmalade Films Pty Ltd* ([2003] NSWCA8, 6 February 2003) illustrates the requirement for tenant's to give notice to a landlord when making a claim for abatement of rent.

In that case there were problems with the premises with ingress of water after rain. The problem was fixed by the landlord, but rising damp became a problem in various parts of the premises. The problem was not reported by the tenant to the landlord for some time. The tenant verbally advised the landlord in May 2000 that it was vacating the premises because of the water problems. The tenant then vacated the premises in July 2000, paying rent up to the end of August 2000 without giving any written notice to the landlord requiring any abatement of rent for the period in respect of which the rent was paid.

The court held that the tenant could not claim abatement of rent for any period during which they occupied the premises and paid the rent without protest to the landlord. However, the tenant was held to be entitled to a partial abatement of rent in respect of the period after September 2000.

Tenants should take note from this decision that if a tenant wishes to make a claim for abatement of rent, the tenant must notify the landlord of its claim for abatement before paying the rent.

#### **Assignors continuing liability for a breach of lease by Assignee**

In the case of *Chelfield Pty Ltd v Goldsea Pty Ltd* [2003] QSC 040, 2 tenants had assigned 2 leases in 2 shopping centres to the assignee. Both the leases and the deeds effecting the assignment contained covenants to the effect that the assignors were not released from their obligations under the leases by reason of the assignment. The assignee defaulted under the leases and the landlord terminated the leases by re-entering the premises. The landlord did not serve any notices on the assignors in respect of the assignee's breaches prior to terminating the leases.

The landlord then served statutory demands on the assignor companies in respect of the outstanding arrears. The assignors were held liable under the leases, even though the landlord had not served any notices on the assignors prior to terminating the leases.

*Jackson McDonald Barristers & Solicitors*  
St Georges Centre  
81 St Georges Terrace, Perth WA 6000  
GPO Box M97, Perth WA 6843

Telephone: (08) 9426 6611  
Facsimile: (08) 9321 2002  
Web Site: [www.jacmac.com.au](http://www.jacmac.com.au)  
Email: [jacmac@jacmac.com.au](mailto:jacmac@jacmac.com.au)

Therefore, if an assignor remains liable under a lease for the performance of the lease by the assignee, but wishes to be given notice of a breach by the assignee, then the assignment document must expressly provide that the landlord must give notice of any default, not only to the assignee as tenant, but also to the assignor.

This decision will only be relevant in Western Australia to leases to which the Retail Shops Act does not apply. This is because section 10(3) of the Retail Shops Act makes void any provision in a lease which seeks to retain the right for the landlord to recover from the assignor any monies that are payable by the assignee.

**Andreas von Altenstadt**  
**Senior Associate**  
**Jackson McDonald**