

Newsletter

Outgoings In Commercial Leases

Under most commercial leases, landlords claim reimbursement of outgoings from tenants. In leasing parlance, this is called a net lease ie the rent payable under the lease is net of the outgoings which are charged on top of the rent.

Outgoings are defined in most leases as rates, utilities service charges, insurance premiums, body corporate levies, gardening and general building maintenance, common area cleaning, toilet requisites, air conditioning and plant maintenance, management fees and the like. These are ordinarily expenses which are billed directly to the landlord. They do not include the tenant's operational expenses such as phone, electricity, waste removal and business insurance which are billed directly to the tenant.

Where a tenant occupies part of the building, the outgoings are usually billed in line with the tenant's floor area percentage ie if a tenant occupies 20% of the building net lettable area, the tenant pays 20% of the building's outgoings.

Qld law was amended in late 2009 to allow landlords to pass on land tax as an outgoing. The land tax can only be passed on to tenants who enter into a new lease after the date of legislation. A renewal of an existing lease is not considered a new lease for the purposes of the legislation. The inclusion of land tax may add significantly to a tenant's outgoings charges, so landlords can expect some resistance to it. Noticeably the new land tax legislation does not apply to retail shop leases, which are covered by a separate body of laws.



Common Disputes About Outgoings In Commercial Leases

In our experience the inclusion of some outgoings in commercial leases can be a cause of great tenant dissatisfaction. It is not uncommon for tenants to happily pay their rent but complain bitterly about the imposition of outgoings. This article addresses some common causes of tenant complaints.

1. Maintenance V Capital Expenditure

Tenants often argue that they should not be responsible for capital expenditure incurred by a landlord unless it arises from their negligence or lack of care. This reflects the common view that a tenant should not be expected to improve the capital value of the landlord's building. However problems frequently arise when trying to identify which category the expenditure falls into. Take, for example, the expenditure on air conditioning units. If a compressor needs to be replaced, the landlord would ordinarily pay for it as it would be considered a capital expenditure. However if the compressor needs replacement because the tenant has not properly maintained the unit (as most leases require) the cost should be borne by the tenant. Similarly, if an industrial roller door jams, a tenant would argue that the cost of repair would be a capital expense for the landlord. However if the mechanism jammed because of lack of maintenance by the tenant, the landlord would argue that it is a repair cost to be borne by the tenant, even though the repair cost may be capital in nature.

2 Body Corporate sinking funds

If a commercial lease covers a Community Title Scheme (strata titled) complex, outgoings ordinarily include body corporate levies. Under the law, Body Corporate levies are divided into an administrative fund and a sinking fund. The sinking fund is established to cover future capital expenditure on the complex. It is arguable that a tenant should not have to contribute to this fund.

3 Insurance Premiums

Landlords frequently include loss of rent insurance in their overall insurance cover. Insurance premiums are usually included as outgoings for which the tenant is liable. It is arguable that the loss of rent component should not be paid by a tenant as this is a normal commercial risk which landlords have to bear.

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Real Estate Contracts (Part 4)

This is the final article in the series on real estate contracts which we have written about in previous newsletters. If you have missed any edition of our newsletters you can access them on our web site at www.smithstanton.com.au or simply drop into the office and ask for a hard copy.

How long does it take to complete the sale of a property?

Even though sellers and buyers are usually keen to complete the contract as soon as possible, you must always ensure that sufficient time is allowed for both mortgagees (if you are selling) and financiers (if you are buying) to complete their part of the process, and to allow time to properly search Government departments to obtain information about the property.

A mortgagee needs up to two weeks from the date it is advised about the sale, which is usually only once the contract becomes unconditional, to prepare for settlement. This involves calculating a payout figure and preparing a release of mortgage.

Similarly, after finance is approved, it usually takes another two weeks for a financier to prepare loan documents, arrange signing, and then to finalise its settlement arrangements.

As a rule of thumb, settlement date should not be earlier than at least 14 days after all conditions, e.g. finance approval, building and pest inspections, have been satisfied.

If the date is earlier, and you are not able to complete settlement due to your mortgagee/financier not being ready, you will be in breach of your contract, and you could suffer financial penalties, including the loss of your deposit and all legal fees.



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Using the same argument – commercial risk to be borne by the landlord - it is also arguable that tenants should not have to contribute to premiums for building replacement. The flip side of this argument is that it is usually the tenant's activities which cause damage to a landlord's building. If so, this would justify the tenant paying the premium.

4. Management expenses

Landlords usually include the cost of professional management as an outgoing. Once again it is arguable that if a landlord chooses not to manage his own commercial building, management costs are not a cost which the tenant should bear.

5. Land Tax

Recent changes to Qld law allow landlords to include land tax as an outgoing to be passed on to tenants. However the legislation does not make it clear as to whether land tax is to be passed on on a "single holding" basis. To understand this point it is necessary to delve into the way land tax is assessed.

If a landlord owns (say) four commercial properties, land tax is applied at the statutory rate on the bulked up value of those properties. The higher the value, the higher the rate. If land tax is assessed against the individual properties the land tax would be assessed at a significantly lower rate.

Therefore if a landlord has a number of commercial buildings, the land tax which could apply against a particular building would be at a higher rate than if it was the only building owned by that landlord. The resulting land tax - to be included as an outgoing – would be higher than a tenant should have to pay for occupying that building.

Conclusion

It has become increasingly important for tenants of commercial buildings to take legal advice before committing to a lease. Ideally, advice should be sought when the lease terms are being negotiated rather than after signing a letter of intent or agreement to lease, even if those documents are conditional on the entry into a satisfactory formal lease. If you need to advice on any matters raised in this article you should talk to Bruce Smith, Leslie Wood or Catherine McKenzie.



Questions And Answers About Wills And Estates

We are often asked questions about wills and estates. The following is a snapshot of some of the questions and our responses to them.

Question: If I want to leave my home to my two children in my will, how will they hold the property?

Answer: Property law provides that in this case the children will hold the property as tenants in common unless you specifically say otherwise. There are two ways you may own property. One is as a joint tenant and the other is as a tenant in common. The difference between these two methods of holding property is that on death, as a tenant in common, each child has the right to give their interest in the property to anyone they choose by their will, whereas as a joint tenant, their interest in the property will automatically pass to the other surviving joint tenant.

Question: What happens to jointly owned property and bank accounts when one joint owner dies?

Answer : If you own property as joint tenants the surviving joint owner becomes the sole owner of the land. The Department of Resources and Management, (the Titles Office) where the title is registered, is notified by completing a Request to Record Death. The property is then transferred to the surviving joint holder's name. The Titles Office will require the Title Deed and the Death Certificate in order to complete the registration. The same rule applies if you have bank accounts in joint names. The surviving joint owner of the bank account will take ownership of the funds in that account. The bank will require you to provide it with a certified copy of the Death Certificate.

Question: What is Probate?

Answer: Probate means proving that a particular will is the last will of the deceased person. The process involves placing a probate notice in a newspaper which is circulated in the area in which the deceased died, and then filing the last will, death certificate and other appropriate documents at the Supreme Court. The Probate Registrar then reads and considers the documents and if they are in order, issues Probate. Once Probate issues the executors of the will then have the official authority to act in the administration of the estate.

Question: What documents should I bring with me when I come to make my will?

Answer: If you are cancelling a former will (if you have made one) then you could bring this along to the appointment, although it is not critical if you cannot locate the original or a copy.

It is important to know the whereabouts of the title deed (if there is one) to any property you have an interest in. If the deed cannot be located then you should bring a rates notice for the property so that a search can be conducted to ascertain the registered owners, the way in which the ownership is recorded and whether a title has issued for the particular property.

If you have business structures, for example a family trust, a company or a self managed superannuation fund then you should bring the deeds or documents relating to these entities with you. If you have industry superannuation, you should bring a copy of your current nomination of beneficiary form with you.



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can talk to”*

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Smith & Stanton News

Welcome to Anita

We welcome our new Conveyancing Manager, Anita de Domenico. Anita has worked almost exclusively in conveyancing work in leading firms in North Queensland for many years. She comes to us with a depth of conveyancing experience and a professional approach to this extremely busy and complex practice area. Anita is also completing a business degree which complements her day to day tasks.

Naomi

Just before Christmas 2009, our accounting manager/receptionist Naomi announced her engagement to Anthony affectionately known as AJ. She is wearing a beautiful diamond ring which might catch your eye as you walk into our reception next time you visit us. Naomi also begins her first year of a law degree and we wish her every success in this venture. This continues a trend, as two other employees have also commenced their legal studies after being employed by us and now have their law degrees.

The Smith & Stanton Christmas party

Our Smith & Stanton Christmas party was held at Peter Martin Art Gallery in Nundah (www.martingalleries.com.au) Peter, the artist in residence for Clovelly wines organised the winery to provide us with a mouthwatering dinner accompanied by Clovelly wines. Unexpectedly Peter put us to work before we enjoyed our dinner. Peter had prepared canvasses and paints and challenged us to paint a triage which reflected the high and low points of 2009. The result is now hanging in our office and serves to remind us of the rewards of working together towards common goals.

Organ & Tissue Donation

If you have recently renewed your Driver's Licence you may have noticed that the organ and tissue donation option is no longer available. Have you ever wondered why this is so? The ability to nominate a preference on your Driver's Licence ceased to exist in July 2005. At this time the Australian Organ Donor Register (AODR) commenced. The AODR is a National Register that allows you to indicate your preference in relation to organ and tissue donation. The information on this database may only be accessed by health care provisionals.

If you have a clear preference about whether you wish to consent or object to donation then you need to record your preference on the AODR. There are two ways you can do this. You can either complete and lodge a form at Medicare or visit the AODR website – www.donorregister.gov.au.

If you record your intention to donate, it is important to remember that health care professionals will still need to communicate with family members prior to donation to confirm that the donor has not changed their mind since registering. If you consent to donating your organs but your family have a strong objection to the donation, then the donation will not proceed. Therefore we recommend that if you wish to consent to donation, that you discuss your preference with your family, so that the organ donation may occur.

The AODR is the best way to record your intentions in relation to organ donation. However, some people wish to record their intentions in their Will. This is not a practical option as Wills are not often available at the time the decision needs to be made in relation to organ donation. Therefore, if you have strong wishes in relation to consenting or objecting to organ donation we suggest you record your intentions on the AODR.



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