

ALERT

5 October 2012

Dee-Tech Pty Ltd v Neddham Holdings Pty Ltd (No 2) [2012] NSWSC 517

Enterprise Agreements

Background

In this decision the Supreme Court of New South Wales considered whether a poorly drafted notice of termination will be enforceable.

The law

Generally, a lease will provide for the circumstances in which a landlord is entitled to exercise its contractual right to terminate the lease. The relevant termination may be by re-entry or notice of breach to the tenant of an essential term.

Except in the case of non payment of rent, the landlord must comply with the provisions of section 129 of the Conveyancing Act 1919 (NSW) in order for the termination to be effective.

In order for a notice of termination of a lease to be valid, the notice must make a clear demand for possession. This means the notice to terminate a lease must include an unequivocal act or statement that the landlord is treating the lease as at an end.

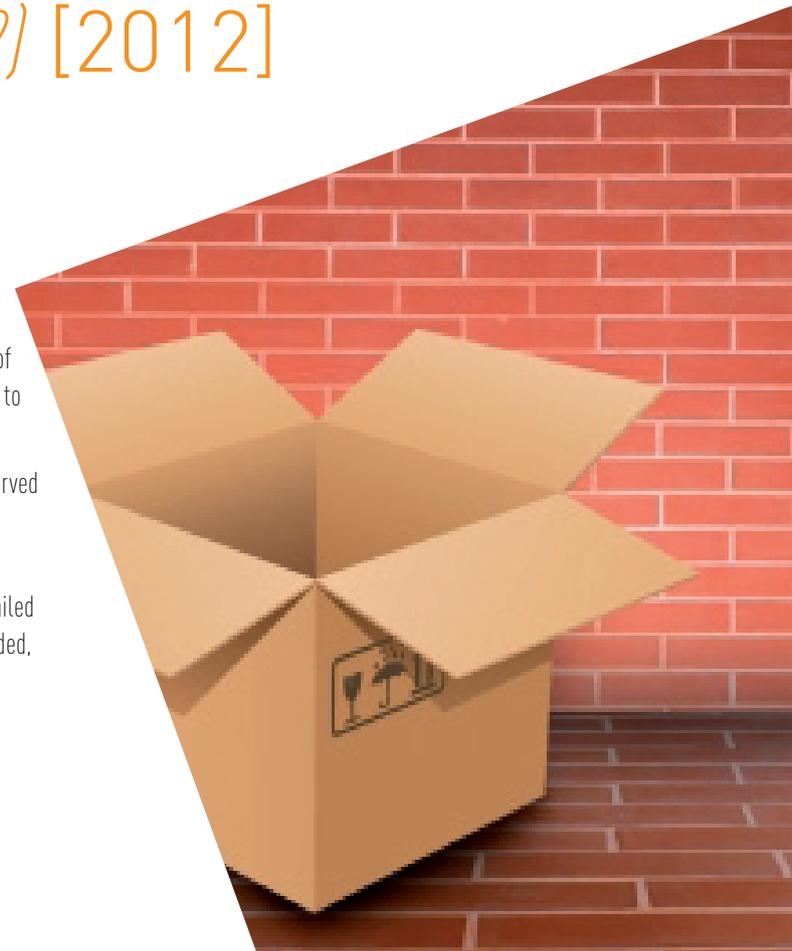
Facts

In this decision, an essential term of the lease in question was that the tenant was to maintain insurances over the property and provide evidence of this to the landlord. A breach of this term meant the landlord could terminate the lease subject to the observance of section 129.

After the tenant failed to comply with this term, the landlord served the tenant with a notice demanding the default be remedied.

The landlord's agent, LJ Hooker, then served the tenant with a document headed 'Notice to Vacate the Premises'. The notice failed to state the date on which the lease would terminate and included, among other things:

'You are in breach of your lease and we have been instructed to terminate this current lease... You are requested to vacate the premises.'



Decision

The court held that the notice to vacate was not legally enforceable because it did not unequivocally communicate to the tenant that the lessor was treating the lease as at an end.

The court noted that this intention would have been communicated if the notice:

- clearly stated that the lease was terminated;
- specified from when the termination was to take effect; and
- demanded repossession of the premises.

In essence, the notice did not contain any demand that the tenant yield up possession of the premises. It simply confirmed the 'request'. Because the lease had not been validly terminated, the tenant was granted relief against forfeiture.

In assessing costs, the court held that the landlord was liable for a portion of the tenant's costs.

Comment

The decision confirms that landlords seeking to terminate a lease following default must ensure the notice of termination complies with the terms of the lease, and clearly states that the lease is at an end and the date from which the lease is terminated. Tenants who receive a notice of termination should consider whether the notice is enforceable and whether any claim for relief against forfeiture may be available. Landlords may be liable for the tenant's costs in situations where the notice is not enforceable.

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