



FOLEY'S | LIST

Landlord's right of re-entry - the early bird does not always catch the worm

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Introduction

- Landlord's right of re-entry – excluding temporary changes to retail and commercial leases due to COVID-19
- Hypothetical scenario
- Section 146 of the *Property Law Act 1958* (Vic) - 14-days' notice
- Can a landlord terminate a lease without giving a 14-days' notice?
 - General position
 - When the default by the tenant is limited to non-payment of rent
- Standard LIV term
- Discussion of the hypothetical
 - Did the landlord validly terminate the lease?
 - What are some of the possible consequences for the landlord if it has not validly terminated the lease?
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Hypothetical Scenario

- Jasper Singh is the Director of Bridge Road Pty Ltd. (Bridge Road).
- Bridge Road is the owner of a commercial premises in Bridge Road Richmond.
- Bridge Road entered into a lease for the premises with Happy Bar Pty Ltd (Happy Bar).
- The Lease was based on the standard LIV lease provisions.
- Term of the lease was for 10 years from 3 November 2015, with two further 5 year terms for Happy Bar Ltd to exercise.
- Rent was \$300,000 per year and to be paid monthly in advance.

Hypothetical Scenario

In August 2018 the Plaintiff failed to pay rent and outgoings in accordance with the lease.

On 6 September 2018 Bridge Road served a notice of default and re-entry. The notice gave Happy Bar 14 days to remedy the breach otherwise Bridge Road would exercise its right of re-entry. At the time Happy Bar owed rent for August – September 2018 and outgoings for July – September 2018. Total amount owed was \$60,000.

Despite giving Happy Bar 14 days, on 13 September 2018 Bridge Road changed the locks on the premises. Bridge Road did so as the relationship between the parties had deteriorated and it was concerned that Happy Bar may vacate the premises without notice and remove part of the fit out that it did not want removed.

On 17 September 2018 Happy Bar's solicitors stated that Bridge Road had prematurely taken possession of the Premises and had failed to give Bridge Road enough time to remedy the breach.

On 15 January 2019 Bridge Road entered into a new lease for 10 years. The annual rent under the new lease is \$200,000.

Happy Bar has not paid the rent or outgoings the subject of the notice.

Hypothetical Questions

Has Bridge Road validly terminated the lease despite not providing 14 days under the notice?

What are the possible consequences if Bridge Road has not lawfully terminated the lease?

Can a landlord terminate a lease without giving a 14-days' notice?

- Common law and statute
- Lease operates as both a contract and demise - *Progressive Mailing House Pty Ltd v Tabali Pty* (1985) 157 CLR 17
- Nature of the Lease
 - *Braham and Another v Stephan and Another* [2015] VSC 87
 - *Progressive Mailing House Pty Ltd v Tabali Pty* (1985) 157 CLR 17
- Exclusion clauses in the Lease
 - *Apriaden Pty Ltd v Seacrest Pty Ltd and another* [2005] VSCA 139
- Applicable legal principles in relation to termination.
 - Seriousness of the breach.

S 146(1) of the *Property Law Act 1958* (Vic)

- A right of re-entry or forfeiture under any proviso or stipulation in a lease or *otherwise arising by operation of law* for a breach of any covenant or condition in the lease, *including a breach amounting to repudiation*, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—
 - a) specifying the particular breach complained of; and
 - b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
 - c) in any case, requiring the lessee to make compensation in money for the breach—
- and the lessee fails, within a reasonable time thereafter, or the time not being less than fourteen days fixed by the lease to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

Braewoodland Pty Ltd v Gallop & Ors [2018] VCC 2050

- Judge Cosgrave considered whether in that situation the landlord's re-entry of the premises had been unlawful given that it had not complied with s 146 prior to re-entering the premises.
- His Honour held that by the time the landlord had exercised its right of re-entry, the tenant had abandoned the premises and the lease had come to an end despite the landlord failing to provide notice under s 146 (the tenant had argued that the lease had been surrendered). His Honour held that s 146 was not applicable to the facts.

The purpose of a section 146 notice is to protect the position of tenants and give them an opportunity, where possible, to remedy breaches of a lease and remain in possession of the demised premises. Section 146(1) states that the right of re-entry or forfeiture is one pertaining to "a breach of any covenant or condition in the lease, including a breach amounting to repudiation".

Here, the tenant, Wickham, acted in such a way as to repudiate all its obligations under the second lease and simply walk away from the property. Its conduct reflected a total rejection of the lease rather than a mere breach of one or two of its covenants or conditions.

Given the conduct of Wickham, I do not consider that the failure to serve a section 146 notice affects the plaintiff's claim. Wickham repudiated the second lease and, consistent with contractual principles, the plaintiff could accept the repudiation and sue for damages for loss of bargain.

Where does the law stand today?

- *Braewoodland* appears to recognise that a landlord may still legally re-enter a leased premises without giving notice under s 146 of the *Property Law Act 1958* (Vic) – County Court decision.
- It is clear that a single or even multiple breaches which amount to repudiation is not sufficient.
- The legality of any landlord's conduct will likely turn on how egregious the tenant's conduct is.
- Notice is not required where a tenant has not paid rent:
 - This section shall not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of nonpayment of rent **whether or not such a breach amounts to repudiation** (s 146(12) of the *Property Law Act 1958* (Vic))

Landlord's right of re-entry

- Section 146 of the *Property Law Act 1958* (Vic)
- Possible non-civil consequence for a landlord for unlawful re-entry:

Bradbrook, Croft and Hay, *Commercial Tenancy Law*, LexisNexis Butterworths, at [21.3]:

An unlawful re-entry by a landlord, could, in the State of Victoria, mount to a breach of s.207 of the *Crimes Act 1958* (Vic), which relevantly states:

- (2) *No person being in actual possession of land for a period of less than three years by himself or his predecessors shall without colour of right hold possession of it in a manner likely to cause a breach of the peace or a reasonable apprehension of a breach of the peace against a person entitled by law to the possession of the land and able and willing to afford reasonable information as to his being so entitled.*
- (3) *Every person who is guilty of a contravention of this section shall be guilty of a summary offence and liable to level 8 imprisonment (1 year maximum) or a level 10 fine or both.*

Standard Form LIV Lease

For the purpose of section 146(1) of the Property Law Act 1958 (Vic), 14 days is fixed as the period within which the tenant must remedy a breach capable of remedy and pay reasonable compensation for the breach.

*The landlord **must** give the tenant, before terminating this lease under clause 7.1 for non-payment of rent, the same notice that it would be required to give under section 146(1) of the Property Law Act 1958 (Vic) for a breach other than the non-payment of rent.*

*Before terminating this lease for repudiation (including repudiation consisting of the non-payment of rent), the landlord **must** give the tenant written notice of the breach and a period of **14 days** in which to remedy it and to pay reasonable compensation for it. A notice given in respect of a breach amounting to repudiation is not an affirmation of the lease [Emphasis in bold added]*

Was Bridge Road Pty Ltd's termination of the Lease legal?

No, re-entry was premature. Bridge Road ought to have waited until the full 14 days had expired to re-enter (standard term).

Bridge Road breached the terms of the lease by failing to give Happy Bar the requisite time to remedy the breach.

In failing to provide Happy Bar the requisite opportunity to remedy the breach and re-entering the premises, Bridge Road has failed to validly terminate the lease.

Possible consequences:

- Has Bridge Road repudiated the lease?
- Can Bridge Road recover the unpaid rent and outgoings?
- Can Bridge Road seek compensation from Happy Bar as they are now receiving less rent from the new tenant?

Has Bridge Road repudiated the lease?

- In contract law, in order for a party to validly terminate a contract, the default position is that the party must be ready and willing to perform the contract. A party who is in breach of a contract may nevertheless have the right to terminate that contract, but only if the breach committed by that party is not repudiatory or of an essential term or such as to deprive the other party of the substantial benefit of the contract (see *Emhill Pty Ltd & Anor v Bonsoc Pty Ltd (No 2)* [2007] VSCA 108).
- In contract law, repudiation occurs when a party (whether by words or conduct) has clearly evinced an unwillingness or an inability to render substantial performance of the contract in question, or an intention to no longer be bound the contract or fulfil it only in a manner substantially inconsistent with that party's obligations under the contract (see *Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Ltd & Anor* (2007) 233 CLR 115).
- Finding of repudiation requires an objective analysis and a clear absence of a readiness and willingness by the party to perform the contract (see *Shevill v Builders Licensing Board* (1982) 149 CLR 620).
- Where a landlord wrongfully terminates or purports to terminate a lease, this may amount to a repudiation of the lease by the landlord. In that situation, there may be serious consequences for the landlord.
- Where repudiation has occurred, the aggrieved party can either accept the repudiation in which case the contract comes to an end, or elect the continued performance of the contract. If the repudiation is accepted by the aggrieved party, the contract is terminated and the parties are discharged from any further obligations to perform the contract, although the accrued rights and obligations remain.

Has Bridge Road repudiated the lease?

- *McDonald Multiple Pty Ltd v Presto Smallgoods (NSW) Pty Ltd* [1978] 1 NSWLR 337
 - Lease had a clause which gave the landlord the right to re-enter the demised premises if the rent was in arrears for 14 days.
 - The rent was due on 1 November 1977 and was not paid until 16 November 1977.
 - On 15 November 1977, the landlord sent the tenant a letter that at that day the lease had been determined based on the requirements of the clause. That day the lessor changed the locks at the premises.
- *Ingram v Patcroft* [2011] NZSC 49 ("*Ingram*"), the Supreme Court of New Zealand
 - Lessor of a commercial premises prematurely re-entering and impounding the lessees' fixtures, fittings and chattels and preventing access to the lessees by changing the locks.
- *Hirst v Vousden* (2004) 6 NZCPR 135
 - *How can it be said that lessees are obliged to keep making rental payments pursuant to a contract (i.e. not merely because they are holding over or are in possession at the sufferance of the lessor) when the lessors are refusing to acknowledge the existence of the lease contract? And how can a purported cancellation of the lease on that ground then be valid? Thus, even if the [lessees] were not entitled to assert a setoff or to seek a rent reduction or to cease rental payments, the [lessors] had disentitled themselves from relying on that point. The eviction was therefore unlawful.*

Has Bridge Road repudiated the lease?

- Considering reasons provided in *McDonald Multiple Pty Ltd* and *Ingram*, it is likely that Bridge Road has repudiated the lease.
- If it has repudiated the lease, it cannot seek damages against Happy Bar for obligations that had not arisen at the time of the re-entry. It may still be able to recover a debt owed by the Happy Bar at the time of the re-entry.
- Bridge Road would not be entitled to any further loss of rent or outgoings or costs of re-advertising and the like. These losses were incurred due to the Bridge Road's unlawful termination of the lease.
- Bridge Road may have also exposed itself to a claim from Happy Bar for loss and damage it has incurred from Bridge Road's repudiation of the lease. As a non-exhaustive list, the two main categories of damages that Happy Bar may pursue are:
 - (a) Loss of profit. Happy Bar would have to prove that the business was profitable.
 - (b) Loss or damage arising from the actual re-entry and Bridge Road's interference with any of Happy Bar's property which was at the premises.

Takeaways

- In Victoria, s 146(1) of the *Property Law Act 1958* (Vic) requires that reasonable notice be given to a tenant when the tenant has defaulted (some exceptions apply).
- There are limited exceptions to the requirement to give notice under s146(1), one of which is for non-payment of rent (s 146(12)).
- However, parties can enter into contracts that require the landlord to comply with s.146(1).
- Standard LIV clause require landlords to provide notice that complies with s 146(1) also for non-payment of rent.
- Not only does a landlord need to give notice to the tenant which contains the requisite details, the landlord must provide the tenant the full number of days given to the tenant under the notice to remedy the breach.
- Based on the circumstances, failure to give the tenant the requisite time to comply with the notice may cause further risks to the landlord other than just the tenant seeking relief against forfeiture for non-payment of rent.
- Rather than early entry, consider whether there are other options available.

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