

The Law Society Lease

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Introduction

It is now more than 20 years since the Law Society Lease (LSL), adapted for use under the *Retail Leases Act 1994* (NSW) (RLA) was first introduced in 1994. There were subsequent revisions in 2001, 2006 and 2007. The current version is the 2007 LSL.

In an article titled "Law Society's lease now available" in the Law Society Journal, November 1994 by Jim Anderson, the then legal officer at the Law Society, the LSL was unveiled to the profession. Jim Anderson wrote:

"In 1992, the Council of the Law Society resolved that the Society should undertake the preparation of a commercial lease and asked the Property Law Committee to proceed with that task. The Committee was not constrained by any particular requirements as to substance or form and was invited to act on its own initiative in the development process."

The history of the development of the LSL was explained by Jim Anderson.

Mr Garry Barnsley was retained by the Committee to prepare a working draft of the LSL and Mr Peter Cornelius was retained to "act as critic and devil's advocate". These two solicitors worked hard to produce the working draft of the lease for consideration at numerous Committee meetings. It was only in 1994 that the draft lease was settled and ready for presentation to the Committee for adoption.

However, as Jim Anderson explained in the article, it was around this time that the Minister for Business and Regional Development announced the Government's decision to introduce a retail leases Bill (which eventually became the *Retail Leases Act 1994* (RLA)) and the Law Society decided to defer adoption of the draft LSL until the final form of the Bill was settled.

The RLA was passed in May 1994 and after redrafting of the LSL to achieve consistency with the RLA, the final form of the LSL was adopted by the Council in September 1994.

Jim Anderson explained the Committee's philosophy of the LSL as follows:

- the lease is much shorter and in plainer English than usual;
- the rights of the landlord and tenant are more evenly balanced than usual;
- the obligations to maintain the property are expressed with greater clarity and, the Committee believes, fairness than in many leases previously in use;
- the provisions for insurance, abatement and demolition are less onerous on the tenant than usual;
- the conditions applying to assignment are stated more simply than usual;
- the guarantee provides for the extension of a guarantor's liability to a renewal of the lease pursuant to an option; and
- the right to exercise an option is expressed more simply than usual.

Whilst the Committee admitted that the LSL was not perfect, in fact as Jim Anderson stated "there is probably no such thing", Jim Anderson said that "the Committee is confident that the LSL provides "a reasonable balance between the legitimate interests of both landlord and tenant".

Form of the Lease

The current 2007 LSL is made up of two parts:

1. Annexure "A" which consists of the schedule of items of the commercial terms; and
2. Annexure "B" which consists of 13 pages the contents of which must not be altered. Any alterations and additions to lease covenants in Annexure B must be done by inserting provisions at the end of Annexure "A".

Solicitors for Lessees using the LSL are required to certify that the thirteen pages of Annexure B are in exactly the same wording as Annexure "B" of the copyright LSL.

Interpretation of the clauses

The standard clauses in Annexure B of the 2007 LSL are as follows:

1. Form of this Lease
2. Parties
3. The Property
4. Lease Period
5. Money
6. Use
7. Condition and Repairs
8. Insurance and Damage
9. Access
10. Transfer and Sublease
11. Lessor's other obligations
12. Forfeiture and End of Lease
13. Guarantee
14. Exclusions, Notices and Special Clauses
15. Goods and Services Tax
16. Bank Guarantee
17. Security Deposit
18. Strata Conversion

In the writer's experience, firstly as a member of the Administrative Decisions Tribunal Retail Leases Division, now at NCAT, the LSL has often been considered in the context of retail lease disputes. Consequently, as a number of the clauses in the LSL have received consideration in the Tribunal, it is helpful to practitioners to record these decisions.

Clause 4

Clause 4 relates to the lease period and the option to renew.

In *John's Warehouse Pty Ltd v Chang Yam Nominees Pty Ltd [2004] NSWADT144*, the parties entered into the lease on 1 December 1998 with an option to renew for a further period of five years. The Lessee asserted that it served a notice to renew, but the Lessor's

agent Chesterton maintained that it did not receive the notice. The first day the option for renewal could be exercised was on 1 June 2003 and the last day the option for renewal could be exercised was on 31 August 2003.

The relevant provisions of clause 4 of the 1994 edition of the LSL which is still in similar terms to the current LSL were as follows:

- “4.1 *This lease is for the period as stated in item 1 in the schedule...*
- 4.2 *..*
- 4.3 *....*
- 4.4. *The tenant can exercise the option only if:*
 - 4.4.1 *the tenant serves on the landlord a notice of exercise of option not earlier than the first day stated in item 11D in the schedule and not later than the last day stated in item 11E of the schedule*
 - 4.4.2 *there is at the time of service no rent or outgoing that is overdue for payment; and*
 - 4.4.3 *at the time of service all the other obligations of the tenant has been complied with or fully remedied in accordance with the terms of any notice to remedy given by the landlord.”*

The Lessee’s case was that it had exercised the option to renew the lease by means of a letter dated 15 June 2003 and within the time period specified. The Lessor argued that it did not receive that letter and therefore the option to renew was not exercised. The Tribunal found that proper service of a notice to exercise an option needed to be in writing and required receipt by the Lessor or the Lessor’s agent. Therefore the Lessee failed to exercise the option to renew the lease.

Clause 5

Clause 5 of the LSL relates to the money the Lessee is required to pay under the lease. In ***Batson Holdings Pty Ltd v Rose [2002] NSWADT 110***, the Tribunal reviewed clause 5.15 of the 1994 LSL.

- “5.15 *If the landlord and the tenant do not agree on the amount of the new rent 30 days before the rent review date -*
 - 5.15.1 *the current market rent will be decided by a valuer appointed under clause 5.16; and*
 - 5.15.2 *the current market rent is the rent that, having regard to the terms and conditions of this lease and such other matters as are relevant to the assessment of current market rent, would be reasonably expected to be paid for the property if it were unoccupied and offered for renting for the use to which the property can be put in accordance with this lease; and*
 - 5.15.3 *rent concessions and other benefits that are frequently or generally offer to prospective tenants of unoccupied retail shops, where the property is a retail shop, and otherwise of unoccupied comparable premises, are relevant matters; and*
 - 5.15.4 *the value of goodwill created by the tenant’s occupation and the value of the tenant’s fixtures and fittings are to be ignored.”*

The Tribunal held that in determining the current market rent, the starting point was s 31(1) of the RLA.

Section 31(1) of the RLA was as follows:

- (1) *A retail shop lease that provides an option to renew or extend the lease at current market rent is taken to include provision to the following effect:*
- (a) *The current market rent is the rent that would reasonably be expected to be paid for the shop, as between a willing lessor and a willing lessee in an arm's length transaction (where the parties are each acting knowledgeably, prudently and without compulsion), determined on an effective rent basis, having regard to the following matters:*
- (i) the provisions of the lease,*
 - (ii) the rent that would reasonably be expected to be paid for the shop if it were unoccupied and offered for renting for the same or a substantially similar use to which the shop may be put under the lease,*
 - (iii) the gross rent, less the lessor's outgoings payable by the lessee,*
 - (iv) rent concessions and other benefits that are frequently or generally offered to prospective lessees of unoccupied retail shops.*

The current market rent is not to take into account the value of goodwill created by the lessee's occupation or the value of the lessee's fixtures and fittings on the retail shop premises.

The Tribunal held that the next step was to look at the shop as "if it were unoccupied" and ask "what is the same or a substantially similar use to which the shop may be put under the lease". There was a dispute because the Lessor claimed that there was a bottle shop operating on the premises which if taken into account of, resulted in a much higher effective rent. However, the Tribunal found that as an essential basis of assessing the current market rent was that the premises were unoccupied, the fact that the premises was actually being operated as a bottle shop was to be ignored.

The valuer then was to calculate the effective rent that would reasonably be expected to be paid for the shop having regard to the above two matters. Next the valuer was to determine whether there were any rent concessions or other benefits frequently or generally offered to prospective lessees of unoccupied retail shops. Unoccupied retail shops were to be limited by the type of shop and the location of the shop e.g. if it was a shop in a shopping centre, the valuer was limited to referencing other shops in that particular shopping centre. Lastly, the valuer was to take into account provisions of the lease, to the extent that they were not inconsistent with the RLA.

The 2007 version of the LSL has deleted clauses 5.15., 5.15.2, 5.15.3 and 5.15.4 formerly in the 1994 LSL. These clauses have been replaced by a new clause 5.15 in the 2007 LSL as follows:

"5.15 If the lessor and the lessee do not agree on the amount of the new rent 30 days before the rent review date, the current market rent will be decided by a valuer appointed under clause 5.16".

However, the case above is still relevant in guiding valuers of the factors to take into account when determining current market rent especially because the provisions in clause 5.15 of the 1994 LSL echo most of the factors to be taken into account under the current s 31(1) of the RLA.

Clause 5 was again reviewed by the Tribunal in the recent decision of ***Pozetu Pty Ltd v Alexander James Pty Ltd [2014] NSWCATCD 183*** (*Pozetu* is the subject of an appeal to the Appeal Panel not yet heard as of 21 August 2015). The parties entered into the lease on 1 September 2003 with a five year term with an option to renew for a further five years. The issue in this case was the method for the review of the rent in the option lease.

Item 16 of the Schedule of Items in Annexure A of the lease was as follows:

"Method 1 (being an increase of 5% from the previous year's rent) on each anniversary of the commencement of the lease."

The relevant clauses were clauses 5.4-5.6 of Annexure B of the 2001 LSL. Clauses 5.4-5.6 of the 2001 LSL lease are identical to the 2007 LSL lease except the words "Landlord" and "Tenant" have now been replaced by "Lessor" and "Lessee".

"When and how is the rent to be reviewed?"

- 5.4 *The rent is to be reviewed on the rent review date stated in Item 16 of the schedule. If this lease is extended by legislation, the rent review dates include each anniversary of the latest rent review date stated in Item 16 of the schedule (of if none is stated each anniversary of the commencement date which falls during the extension)*
- 5.5 *The tenant must continue to pay rent at the old rate until the new rate is known. After that, the tenant is to pay the new rent from the next rent day. By that rent day the tenant is also to pay any shortfall between the old and new rate for the period since the rent review date. Alternatively, the landlord is to refund to the tenant any overpayment of rent.*
- 5.6 *There are three different methods described here for fixing the new rent on a rent review date. The method agreed by the landlord and the tenant is stated at item 15 in the schedule. The tenant is entitled to a reduction if the method produces a rent lower than the rent current just before the review date."*

In **Pozetu**, the lease contained special clauses in Annexure C of which amended Annexure B. In particular clause 19(1)(b) stated:

"Delete clauses 5.7 to 5.11 inclusive."

This had the effect of deleting the explanation of the various methods of rent review: being fixed percentage increase (Method 1), CPI increases (Method 2). The lessee argued that subsequently no rent review was allowed under the lease. Clause 5.12 remained and this clause set out the procedure for a current market review being Method 3.

Further, Item 13 of the Schedule of Items Annexure A of the lease stated that the rent for the option term was the:

"Greater of:

- (a) current market rent and;*
- (b) 105% of the rent in the last year of the previous term."*

However, s 18(3) of the RLA provided that a provision of a retail shop lease is void to the extent that it:

- (a) reserves or has the effect of reserving to one party a discretion as to which of 2 or more methods of calculating a change to base rent is to apply on a particular occasion of a change to that rent; or*
- (b) ...*
- (c) provides for base rent to change on a particular occasion in accordance whichever of 2 or more methods of calculating a change would result in a higher or highest rent.*

Item 13 of the lease provided for rent to change in accordance with whichever of 2 methods calculating a change resulted in a higher rent and as such, it was inconsistent with s 18(3) of the RLA. The inconsistent words in Item 13 were void and struck out from the lease. On one view, this may mean there was to be no rent review during the term of the lease, a position adopted by the Lessee. However, the Tribunal held that Item 13 was not totally void, it was

only the methodology being the two alternative methods that was struck down, not the words “For the further period in item 12A. From the commencement date to the first rent review date (for example current market rent)”.

In the Tribunal’s opinion, the new rent could be determined pursuant to the terms of the original lease and the option lease. The Lessee having exercised its option would continue to pay rent under the option lease pursuant to clause 5.5 at the old rate until the new rate was known. Consequently the rent for the first year of the option lease (period beginning 1 September 2008) was the rent paid by Alexander James, the Lessee in the last year of the original lease. Thereafter from 1 September 2009, the first rent review date after the exercise of the option, it was to be increased by 5% annually.

In ***Alex Constructions Pty Ltd v Gabriella Fedeli and Domenico Santapadre* [2014] NSWCATCD 217**, the Tribunal again reviewed clause 5 of the 2001 LSL. The parties entered into a lease on 1 November 2003 for a five year term with an option to renew for a further five years.

The relevant clause in this lease was Item 15 of the Lease which provided for the rent review.

“Item 15 Rent review

Rent review date Method of rent review If Method 1 applies, increase by November 1, 2009.

Method 1 & 2 (the increase should show a percentage or amount)

Anniversary date increases annually by the greater of 3% and movements in the CPI.”

The rent review provisions in this lease again provided for two methods for rent review, the greater of 3% and movements in the CPI. This was a breach of s 18(3)(c) and s 18(4) of the RLA as it provided for base rent to change on a particular occasion in accordance with whichever of 2 or more methods of calculating a change would result in a higher rent and prevented the base rent from decreasing. As the provisions of the RLA prevailed over the lease, the Tribunal held that the provision of the lease was void to the extent that the provision was inconsistent with the provision of the RLA.

However, the Tribunal held that only certain parts and not the whole of Item 15 was to be struck down. Having heard the submissions from the Lessor and Lessee, the Tribunal was of the view that the offending words were “Method 1 & 2 and increases annually by the greater of 3% and movements in the CPI Method 1 & 2.”

Having excised these words from the lease, no rent review was now mentioned in Item 15. However, the latter words in item 15 provided for a resolution.

“Method 2 applies unless another method is stated”.

Therefore in accordance with the latter words in Item 15, Method 2 applied. As no method of rent review was mentioned which was the position in this case, because of the operation of s 18(3)(c) and s 7 of the RLA, then by default, Method 2 became the appropriate rent review method.

These two cases demonstrate the robust nature of the LSL in that it was able to survive excision of certain parts of the rent review method as a result of inconsistencies pursuant to s 7 of the RLA and yet the lease still survived to provide to the parties certainty of contractual relationship.

Clause 6

Clause 6 in the 1994 LSL is similar to the 2007 LSL except for the following:

- there is a new clause 6.1.4 and 6.1.5 in the 2007 LSL about the need to comply with all laws relating to strata schemes;
- the 2007 LSL amended clause 6.3.1 to "the lessee must not do anything that might invalidate any insurance policy covering the property or that might increase the premium unless the lessor consents in which case the lessee must pay the increased premium";
- there is a new clause 6.3.6 "without the prior written consent of the lessor and/or the owners corporation, use the common property for any purpose other than for access to and egress from the property"; and
- the phrase "Landlord" is replaced by "Lessor" and the phrase "Tenant" is replaced by "Lessee".

In ***Viefill Pty Limited v Hagood Holdings Pty Limited & anor*** [2001] NSWADT160, the lease of the shop to the Lessee had a permitted use provision as follows:

"Sale of good and drink which must be consumed on the premises under no condition is food or drink to be allowed to be sold for consumption outside the premises. The Lessee shall not under any circumstances be entitled to sell coffee or tea which is not or is not likely to be consumed on the premises. Further the Lessee shall not be entitled under any circumstances to sell coffee or tea in disposable receptacles."

The relevant clause in the LSL was clause 6.2, "the landlord can consent to a change of use and cannot withhold consent unreasonably".

The Lessee requested a change in permitted use to allow take away food and drinks. However, the Lessor had a shop next door that sold take away food and drink so it rejected the Lessee's request. The Tribunal held that the proper interpretation of clause 6.2 in the 1994 LSL provided that the Lessor "cannot withhold consent unreasonably" must be that a prohibited refusal was one which no commercially reasonable Lessor could make, not just one where no reasons were given. The decision by the Lessors to maintain complementary uses between premises, even where they operated the other premises themselves, was not so unreasonable as to be commercially unsustainable. Clause 6.2 could not be interpreted to make a Lessor's refusal to completely remove a use restriction on the mere request of a Lessee unreasonable. The onus also of proving that the withholding of consent was unreasonable was on the Lessee.

Clause 7

Clause 7 relates to the condition and repairs of the leased property.

Clause 7.1-7.1.2 of the 1994 LSL was as follows:

"Who is to repair the property?"

7.1 The landlord must-

7.1.1 maintain in a state of good condition and serviceable repair the roof, the ceiling, the external walls and the floors of the property and must fix structural defects

7.1.2 maintain the property in a structurally sound condition

...

The tenant must also:

- 7.3.1 *re-imburse the landlord for the cost of fixing structural damage caused by the tenant apart from fair wearing and tear...*
- 7.3.3 *decorate the inside of the property in the last three months of the lease period however it ends ("decorate" here means restoring the surfaces of the property in a style and to a standard of finish originally used e.g. by repainting.)"*

In ***D & D Ventures Pty Ltd v Evans & Anor [2004] NSWADT 130***, a lease was entered into in June 1998, with an initial term of 6 years with two options of 6 years each. The Lessees were assignees of that original lease. The Lessees were claiming for damages alleging breach of clause 7 and also under clause 8 of the 1994 LSL.

In reaching its decision, the Tribunal placed considerable importance on the nature, condition and mode of installation of the glass roofing over the outdoor dining area at the time the Lessee acquired possession. The gaps between the roofing and the adjoining walls and roof were visible and the fact that water leaks would occur during rain was patent. The Tribunal held that it could not be said that the Lessors failed during the relevant period to "maintain the roofing or to fix any structural defects in it". On the other hand, the leakage into the passageways resulting from the installation of the supports for the air conditioning units within the box gutters overhead could appropriately be described as a structural defect.

In ***Perpart Pty Limited v Foeman Material Pty Limited [2003] NSWADT 25***, the Tribunal was directed to clause 7.3.1 and 7.3.3 of the 1994 LSL. The Lessee tried to argue that condition of walls was such that they did not need repainting and that the clause only applied if surfaces were badly damaged. The Tribunal rejected the Lessee's argument. It held that the intent of the clauses were that the surfaces of the property were to be restored every three years to a style and standard of finishing originally used, always allowing for fair wear and tear e.g. a polished marble floor. The clause obliged the Lessee to attempt to restore the polished surface every three years but it did not require the Lessee to fix the hollows and chips which may have arisen from normal walking use of floor.

Clause 7 in the 2007 LSL is in similar terms to clause 7 in the 1994 LSL except for the following:

- the words "'Lessor" and "Lessee" replaced the words "Landlord" and "Tenant";
- clause 7.1.1 in the 2007 LSL added the words "external doors, associated door jambs"; and
- there is a new provision 7.3.4 in the 2007 LSL where the property is a lot in a strata scheme.

Therefore the interpretation of the two cases above is still relevant today.

In ***Zouk v Lyons Road Pty Ltd [2005] NSWADT 143***, the Tribunal considered clause 7 of the 2001 LSL. During the course of fit-out works in the lease, exposed asbestos was discovered on the premises and fit-out work ceased. The Lessee refused to pay rent whilst various matter relating to the asbestos were still un-remedied. The Lessor then advised the Lessee that it would terminate lease and recover possession if the failure to pay continued which it did when the Lessee failed to pay. The Tribunal found that various removal works was carried out by Lessor, such as contracting a removal contractor and a Workcover approved assessor and replacing the electrical top box backing board. The Tribunal found that the removal of residual dust of the type causing concern to Lessee's consultants was

unlikely to constitute work within the obligations of the Lessor under clause 7.1. There was also no clear evidence of water penetration and dampness from the Lessee. Therefore, the Lessor was not in breach of any obligations under clause 7 of the 2001 LSL in respect of asbestos contamination or water penetration. The Lessor was not entitled to terminate the lease and the Lessee had to resume paying rent.

In ***Denis Isler v Damien John Toon and Kylie Joy Peterson (unreported)***, the parties entered into a lease on 23 September 2003 for three years also based on the 2001 LSL.

The relevant clauses in the 2001 LSL were as follows:

“Who is to repair the property?”

7.1 *The landlord must-*

7.1.1 *...*

7.1.2 *maintain the property in a structurally sound condition; and*

7.1.3 *maintain essential services...*

7.4 *If an authority requires work to be done on the property and it is structural work or work needed to make the property safe to use then the landlord must do the work unless it is required only because of the way the tenant uses the property. But if it is any other work or is required only because of the way the tenant uses the property then the tenant must do the work.”*

The lease also contained the following additional terms, inserted as Miscellaneous Provisions Items 27 and 34 as follows:

“Item 27 That the Lessee will from time to time forthwith comply with and relieve the Lessor from all liability in respect of all statutes, ordinances, proclamations, orders or regulations present or future affecting or relating to the use of the premises by the Lessee and will comply with all requirements (including the carrying out of alterations or additions) relating to those of the premises by the Lessee which may be made or noticed or orders which may be given by any Governmental, semi-governmental, city, municipal, health licensing, civic or other authority having jurisdiction or authority over or in respect of the use of the premises by the Lessee provided that all notices or orders received by the Lessor from any such authority shall within a reasonable time after receipt by the Lessor be served on the Lessee.

Item 34 Notwithstanding any provision to the contrary in this Lease:

(c) *the Lessee shall be responsible for:*

(i) *all electrical repairs but not the replacement of electrical wiring required through age.”*

There was a defect notice issued from Ausgrid in February 2014 identifying a number of electrical defects in relation to the premises that were required to be rectified. The majority of the defects related to the internal wiring and connections within the premises and the storeroom. The agent for the Lessor obtained two quotes for the electrical work, one for mainly electrical works outside the premises and the other for electrical works inside the premises.

The Lessees tried to terminate the Lease pursuant to clause 8.2.4 of the lease. However defects in electricity, not resulting in a ceasing of electricity supply was not physical damage. Damage must mean physical connection damage. Accordingly, the Tribunal held that being the incorrect clause regarding a work orders from an authority, the Lessee could not seek to terminate the lease pursuant to clause 8.2.4. The correct clause for Lessor's works was clause 7.12 of the lease.

The Tribunal held that pursuant to clause 7.12, the Lessor was obliged to maintain the property in a structurally sound condition and pursuant to clause 7.1.3 to maintain electrical services, e.g. electricity. However, Item 27 and 34 of the lease override the standard terms of the lease as pursuant to such clauses the Lessees are to undertake any work required by an authority and are responsible for all electrical repairs. This is particular so for Item 34, which commenced with the words “notwithstanding any provision to the contrary”. Further the Tribunal held that even if the Lessees could argue that pursuant to clause 7.4, the Lessor was required to attend to the Ausgrid defect notice in total, the Lessor in fact was undertaking responsibility for all of the repairs in any event. The Lessor agreed to attend to the external defects of the property and also arranged for an incoming buyer of the property to attend to the internal defects. In addition, a breach of clause 7.4 by the Lessor does not give rise to a right of termination by the Lessees. In any event, there was no breach by the Lessor as the Lessor had agreed to do the repairs notwithstanding that under Item 27 and 34 of the LSL, it was the Lessees's responsibility. Consequently the vacation of the premises by the Lessees was repudiatory conduct by the Lessees in breach of their obligations under the lease rendering the lessee liable to damages.

Again the above decisions are still relevant because the 2007 LSL is in similar terms to the 2001 LSL except for the following:

- the words "Lessor" and "Lessee" replaced "Landlord" and "Tenant" in the 2001 LSL;
- the words "external doors, associated door jambs" were added to clause 7.1.1 in the 2007 LSL; and
- new provisions in the 2007 LSL relating to when the property is a lot in a strata scheme.

In the recent decision, ***Yan Gu and Chunhua Tao v Nicole Panetta, Neill Hendry and Giovanni (John) Panetta [2014] NSWCATCD 247***, the Tribunal reviewed clause 7 of the current 2007 LSL. This was a case where the Lessees tried to make a claim in contract for reimbursement of the cost of carrying out the structural repairs to the building based on clause 7.1 of the LSL. One of the issues was the effect of the special condition to be interpreted along with clause 7.

There was a special condition annexed to the Lease in Annexure A of the Lease.

“4 (a) The tenant acknowledges that the premises is leased to the tenant in its current condition and state of repair and shall not require the Landlords to make any repairs nor provide any finishes, fixtures, fittings, equipment or services other than as provided in this lease. Further subject to clause 7.1 in Annexure B, in the event of it being necessary to replace any items for any reason whatsoever then the tenant will effect such replacement at its own expense.

(b) The landlord agrees to contribute \$100,000.00 to facilitate the tenant to operate the business with the basic facilities, the tenant is responsible to obtain the consent of the local council or any public authorities in the course of any partitioning, alterations or additions made to this property at its own cost. The tenant is also required to apply any construction certificates from the local council before the commencement of the works and must apply to the local council for the Occupation Certificate when the construction works and produce a copy of the Occupation Certificate for the landlord's retention and record.”

The starting point for the Tribunal was the terms of the lease in special condition clause 4. The Tribunal found that the opening words in special condition clause 4 were needed as otherwise the Lessor would be in breach of clause 7 of the lease. Those opening words had the effect of relieving the Lessor of the obligations to make repairs, which it would otherwise have had to do under clause 7.1.

The second sentence of clause 4(a) which states “*further, subject to clause 7.1 in Annexure B, in the event of it being necessary to replace any item for any reason whatsoever then the tenant will effect such replacement at its own expense*” may at first seem inconsistent with clause 7 of Annexure B of the Lease. However, the Tribunal believed that the drafter of the lease tried to accommodate the actual situation at the time of commencement of the lease where the premises were in an unsafe and not structurally sound condition. The second part of clause 4(a) was not well drafted and was inconsistent with clause 7.1. To read it as consistent with the lease, the Tribunal believed that the words “*subject to clause 7.1 in Annexure B*” should be substituted with the words “*notwithstanding clause 7.1*” as the intention was that the Lessees make all the repairs and the clause in Annexure A overrides the printed clause in Annexure B. Alternatively the clause may be read to apply to the future, that is ‘necessary to replace’ referring to after any works have been undertaken and completed.

It was the Tribunal’s view that whichever way clause 4(a) might be interpreted, the obligations of the Lessors were negated, otherwise they would have been in breach of the lease from day one given the dilapidated state of the premises. Hence, there was no contractual requirement for the Lessors to pay for or reimburse the Lessees for the cost of the structural repairs over and above \$100,000.00 as contractually agreed.

Clause 8

Clause 8 of the 1994 LSL relates to insurance and damage. Clause 8 in the 1994 LSL is in identical terms to the current 2007 LSL except the words “Landlord” and “Tenant” are now replaced with “Lessor” and “Lessee”.

The relevant provisions of clause 8 were as follows:

“8.2 If the property or the building of which it is part is damaged...

8.2.2 if the property is still usable under this lease but its usability is diminished due to the damage, the tenant’s liability for rent and any amount in respect of outgoings attributable to any period during which usability is diminished is reduced in proportion to the reduction in useability caused by the damage.

8.2.4 if the landlord fails to repair the damage within a reasonable time after the tenant requests the landlord to do so the tenant can terminate this lease by giving not less than 7 days’ notice in writing of termination to the landlord.”

The Lessees in ***D & D Ventures Pty Ltd v Evans & Anor [2004] NSW ADT 130*** tried to argue clause 8 for rent abatement due to the premises not being usable as a result of the Lessor’s failure to rectify the defects. However the Tribunal held that sub-clause 8.2.2 did not apply because the reason why the outdoor area was not “usable” during wet or windy conditions was not that either the roofing or any other part of the premises had suffered damage. Instead the fibreglass roof had been constructed in a way so as to let water and dust debris in. The Tribunal rejected the Lessee’s argument that presumably the roof would have been waterproof when it was first installed.

Cross Claim

There was a cross claim by the Lessors in the above case for unpaid rent by the Lessee. It has been established that if a lease is terminated prematurely by conduct of the tenant amounting to repudiation (with the Lessor accepting the repudiation) or abandonment of possession (with Lessor retaking possession), the Lessor may sue for the balance of unpaid rent. The onus was on the Lessee sued to establish that the Lessor has failed to take reasonable steps to re-let the premises.

Clause 11

In ***Mattana Coiffure Pty Limited v Sotiropoulos [2003] NSWADT 210***, the lease was entered into in 17 April 2000 for 5 years without option. The relevant provision was clause 11.3 of the 1994 LSL as follows:

"11.3 If the property is part of a building owned or controlled by the landlord-

11.3.1.....

11.3.2 if the property has facilities and service connections shared in common with other persons, the landlord must allow reasonable use of the facilities and service connections including –

11.3.2.1.....

11.3.2.2.....

11.3.2.3. the right for the tenant's customers to park vehicles in any area set aside for customer parking, subject to any reasonable rules made by the landlord."

There were DA plans lodged by the Lessor to alter and make additions to the ground floor shop and construct one three bedroom dwelling over two levels at the rear of the premises. This would interfere with the Lessee's toilet/laundry. There was a letter on 16 June 2003 where the Lessor gave two options to the Lessee; either rebuild immediately or a two stage building program. The Lessee accepted the building interference option.

This resulted in structural works in treatment room No 2 which lowered the ceiling height and resulted in the construction of temporary toilet facilities. However, the temporary toilet facilities were inadequate and the Lessor failed to rectify the problem. The Tribunal held that the general conditions within the salon, as a result of the Lessor's building activities as evidenced by the toilet facilities, would have had a detrimental and depressing effect on all of the staff and would have tested the loyalty of the clients. There was also a loss of convenience to clients for loss of the rear car park entrance. The Lessor had an obligation to allow the Lessee parking space and access and a denial of that was one of the heads of damage.

Clause 12

Clause 12 provides for the grounds for forfeiture and termination of the lease. Clause 12 of the 2001 LSL is on identical terms to the current 2007 Law Society Lease except for the following:

- the words "Lessor" and "Lessee" replaced "Landlord" and "Tenant" in the 1994 LSL; and
- GST was added as an essential term of the 2007 LSL.

In ***Tour Creative Agency Australia Pty Ltd v Paayman & Anor [2004] NSW ADT 284***, the parties entered into a lease in October 2001. The Tribunal looked at the construction of sub paragraph 12.2.4 of the LSL.

"12.2 The landlord can enter and take possession of the property or demand possession of the property if:

12.2.1 the tenant has repudiated the lease; or

12.2.2 rent or any other money due under this lease is 14 days overdue for payment; or

12.2.3 *the tenant has failed to comply with a landlord's notice under s 129 of the Conveyancing Act 1919; or*

12.2.4 *the tenant has not complied with any term of this lease where the landlord's notice is not required under s 129 of the Conveyancing Act 1919 and the landlord has given at least 14 days written notice of the landlord's intention to end this lease."*

The Tribunal found that it was not the intention that sub paragraph 12.2.4 be regarded as a separate ground on which the Lessor was entitled to end the lease. For this lease, the only relevant breach by the Lessee was non-payment of rent for which no notice would be required as a result of sub section 129 (8) of the *Conveyancing Act 1919*. This meant that if sub paragraph 12.2.2 and 12.2.4 were interpreted to operate as separate grounds on which the Lessors were entitled to end the lease, in those circumstances where the rent was outstanding for 14 days, no notice would be required. However if the Lessors decided to end the lease prior to the 14 days in which the rent was outstanding they were required to give 14 days written notice. Hence, the right interpretation was that the inclusion of sub paragraph 12.2.4 of the lease can only have been included for the purpose of over-riding the exception contained in s 129 (8) of the *Conveyancing Act 1919* namely that 14 days' notice be given regardless of how long the rent is outstanding.

In ***Yan Gu and Chunhua Tao v Nicole Panetta, Neill Hendry and Giovanni (John) Panetta [2014] NSWCATCD 247***, the Tribunal also reviewed clause 12 of the 2007 LSL. The Lessors made a claim against the Lessees for unpaid rent and damages for breach of lease from the Lessees. After the Lessees left the premises, the Lessors re-let the premises to a party associated with the letting agent for a much lower rent with a three month rent free period. The Lessors sought substantial damage for the lost rent and consequent shortfall in rent.

The Tribunal reviewed clause 12.6 as follows:

"12.6 If there is a breach of an essential term the lessor can recover damages for losses over the entire period of this lease but must do every reasonable thing to mitigate those losses and try to lease the property to another tenant on reasonable terms."

The general proposition was that the Lessors have a very low onus to overcome a claim by a Lessee for failure to mitigate. However, the Tribunal held that clause 12.6 placed a positive obligation on Lessors to act reasonably. Here, the fact that the new lease was entered into without negotiation and with an interested party directly connected to the leasing agent was problematic. The Tribunal was not satisfied that the Lessors fulfilled clause 12.6 "to do every reasonable thing to mitigate those losses and try to lease the property to another tenant on reasonable terms". Rather the Lessors made an expedient decision to not truly test the market and obtain a tenant from a proper letting campaign. A campaign of only six weeks was too short. There was no proper assessment of the market rent obtainable and the campaign if it can be called that appeared very limited and the offer from the leasing agent was not properly checked by an independent agent or valuer advising the Lessors.

Accordingly, the Tribunal found that the Lessors had not complied with their obligations under clause 12.6 of the Lease. The Tribunal allowed the Lessors to claim only 3 months' rent as the usual vacancy period for a turnover of tenants.

Clause 13

Clause 13 of the LSL sets out the obligations of a guarantor under a lease. In ***Heatherway Pty Ltd v Dykes & Wildie [2006] NSWADT 354***, the lease was entered into in December 1998 between Lessor (Heatherway) and the Lessee (NCF). The issue in this case was

whether the guarantors under a lease were still liable to the Lessor for rent default at a time where the Lessee was no longer controlled by the guarantors. There were two separate sales:

1. In February 2000, the original guarantors signed a sale of business agreement selling all the shares in the Lessee to the Hammonds.
2. By agreement dated May 2000, the Lessor and the Lessee (now controlled by the Hammonds) signed a sale of business agreement for sale of the Coffs Harbour premises and a Port Macquarie business.

The Tribunal decided that the guarantors' liability for rent default that occurred before the sale of the business extended beyond the sale. The Tribunal noted that the May 2000 sale was on its face an agreement for a second sale of the Coffs Harbour business, primarily used to obtain the consent of the franchisor to the transfer of the business/franchise. However, the Tribunal held that the agreement even if valid and binding, was in essence only an agreement for the sale of two businesses and did not include a lease of the premise. The lease and sale of business were two separate agreements. As no new lease was subsequently entered into, NCF occupied the premise under the terms of the old lease. The original guarantors were therefore still liable for rent default owed before they sold the business to the Hammonds.

Although this case was decided under the 1994 LSL, this interpretation by the Tribunal still applies because clause 13 of the 1994 LSL was identical to the 2007 LSL except the words "Landlord" and "Tenant" were replaced with "Lessor" and "Lessee" in the 2007 LSL.