

Time for commercial lessees to pick up the Land Tax bill?

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Worthwhile read for: Landlord, Tenant

In September 2016 the case of *Vikpro Pty Ltd v Wyuna Court Pty Ltd ATF Wyuna Court Unit Trust* [2016] QCA 225 was heard before Holmes CJ, Phillipides and Phillip McMurdo JJA in the appeal division of the Supreme Court of Queensland. The outcome of the case was a fundamental, 360-degree change in respect of the party that bears the land tax liability in a commercial lease arrangement.

Facts

The tenant leased land under a lease which provided that the lessee was liable to pay, or otherwise recompense the lessor for land tax incurred during the period of the lease. The lease was entered into in August 2006 for a 70-year term. Prior to the amendments to the Land Tax Act (see below), Clause 11.2 was unenforceable against the lessee.

Legislative Changes

The *Land Tax Act 1915* (Qld) (repealed) (**1915 Act**) rendered unenforceable contractual provisions that required the lessee to pay all taxes and rates in respect of demised land. Therefore pursuant to section 44(1A) of the 1915 Act, the landlord's rights to recover land tax from a tenant under a commercial lease entered into after 1 January 1992 were suspended.

44A Provision to pay land tax etc. unenforceable

1. A provision in a lease entered into after 1 January 1992 requiring a lessee to-

- pay land tax; or
- reimburse the lessor for land tax;

is unenforceable.

This section was removed and replaced by transitional provisions in 2009. The enactment of the *Land Tax Act 2010* (Qld) (**2010 Act**) sought to reverse this position.

Sections 88 and 89 of the transitional provisions to the 2010 Act provided as followed:

88 Application of this Act

1. This Act applies to—

- a post-commencement liability; and
- an act or omission done or omitted to be done for this Act on or after 30 June 2010.

This section applies subject to section 93.

89 Continued application of repealed Act

Despite its repeal, the repealed Act continues to apply to—

- a *pre-commencement liability*; and
- an act or omission done or omitted to be done for the repealed Act before 30 June 2010.

Section 86 defined “post” and “pre” commencement liabilities:

- A “post-commencement liability” was defined as meaning ‘a liability for land tax arising on or after 30 June 2010’.
- A “pre-commencement liability” was defined as meaning ‘a liability for land tax, within the meaning of the repealed Act arising before 30 June 2010’.

Lessee’s Claim

The lessee contended it was not liable to pay land tax levied in relation to the land because provisions of the 1915 Act still continued in a relevant manner.

Judgments

The Court held the deliberate failure by the Government to re-enact a provision equivalent to section 44(1A) of the 1915 Act illustrated an intention to reverse this position in the 2010 Act. Thereby, this allowed a landlord with appropriate lease provisions to recover land tax (imposed on or after 30 June 2010) from a tenant.

Chief Justice Holmes rejected the Appellant’s contentions, and held that the transitional provisions (sections 88 and 89), when read together, clearly drew a distinction between the continuation in the same manner under the 1915 Act of pre and post-commencement liabilities to land tax. Principally, Her Honour confirmed that the 2010 Act contemplated the following:

- The provisions relating to pre-commencement liabilities to land tax would continue to apply in accordance with the repealed 1915 Act.
- The provisions relating to post-commencement liabilities (i.e. land tax incurred on leased properties) would be dealt with in accordance with the provisions of the 2010 Act.

Her Honour confirmed that the Explanatory Notes to the Transitional Provisions did nothing to indicate that the legislature contemplated that a lessee’s relief from liability to land tax should continue as it had under the 1915 Act, but rather the clear implication from the repeal of section 44A of the 1915 Act was to change a lessee’s immunity from payment of land tax.

Phillip McMurdo JA agreed with the reasons of Chief Justice Holmes, however Phillipides JA was in the minority.

What does this mean for leasing arrangements?

This case has two major implications for lessors of commercial or industrial premises:

1. A lessor may now offer a lease to a potential lessee in Queensland on terms that include recovery of land tax from the lessee for the duration of the lease.
2. It appears that there has been a general practice of lessors including such clauses in leases despite their unenforceability under the 1915 Act. Should a lessor and lessee have a current existing lease agreement in Queensland that contains such a clause, that clause will now be enforceable against the lessee.

As a proceeding before a superior court of Queensland, this case provides a great deal of certainty for

lessors and lessees.

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