

Leases (when a tenant does not pay rent)

What can a landlord do when a tenant does not pay rent?

This question has often been asked by our landlord clients. The brief answer is, a landlord can either:

- 1. allow the tenant to remain in possession and sue for the rent, or**
- 2. forfeit the tenancy and evict the tenant.**

This article focuses on the latter method, that is, forfeiture of the lease. It discusses its implementation, limitations and outcomes.

How does a landlord forfeit a lease and recover possession?

Generally, a lease can be forfeited by:

1. the landlord physically re-entering the premises and evicting the tenant through self-help; or
2. physically re-entering by demanding possession of the premises; or
3. initiating a proceeding for possession in the Supreme Court by issuing a writ.

In respect of commercial premises, as opposed to residential premises, there is no legislative prohibition against the recovery of possession by physical re-entry, that is without being required to take proceedings in court for possession.

The issue of a writ for possession allows the Supreme Court to adjudicate and determine the disputes between the parties, however it is costly, time-consuming and procedurally intricate. Rent continues to be due and unpaid, and depending on the financial position of the tenant and any guarantors, those costs and rent may turn out to be irrecoverable.

Physical re-entry, though relatively cheap and simple, entails some risks. In order to avoid those risks, the landlord must ensure that the right to forfeit the lease arises before any action is taken and also that such right must be lawfully effected. This is further discussed below.

When does the right to forfeit arise? How can forfeiture be effected?

Under the prescribed New South Wales Law Society Lease¹, a lease is forfeited when the landlord **lawfully** enters and takes possession of the premises or **lawfully** demands possession of the premises². The landlord is entitled to enter and take possession or demand possession when rent or any other money due under the lease is 14 days in arrears³.

What is meant by “lawfully enters and takes possession” or “lawfully demands possession”?

This is not expressly defined under the lease and therefore we should refer to case law for principles governing physical re-entry.

At common law, a right of re-entry cannot be exercised unless the landlord first makes a formal demand for the rent. However, in NSW, no demand is necessary where the rent is more than one month in arrears⁴. The landlord must serve sufficient notice, subsequent to a breach of the covenant to pay rent, indicating the landlord’s unequivocal intention to terminate the lease and thereby take possession of the premises.

¹1994 Copyright Law Society Lease, hereinafter referred to as “Law Society Lease”

²Clause 12.1 – Law Society Lease

³Clause 12.2 – Law Society Lease

⁴*Conveyancing Act 1919* s85(1)(d); s85(2)

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Physical re-entry can be effected in 2 ways:

1. by self-help; or
2. by demanding possession.

Self-help

From case law, a lessor may use as much force as is **reasonably necessary** to expel the tenant and remove the tenant's goods from the rented premises, and in doing so the landlord is protected from liability for trespass or assault⁵. To avoid direct confrontation with the lessee, the landlord may enter into the premises when the premises is unattended and change the locks to the premises.

Demanding possession

Re-entry can also be effected by demanding possession. This can be done by demanding the return of keys and vacant possession. The tenant may not be compliant in such a case, which in turn may necessitate the landlord's physical re-entry

Risks relating to physical re-entry

The following should be kept in mind when the landlord physically re-enters the rented premises.

1. The landlord may be civilly liable if more force is used than necessary. There is always a possibility of a conflict of evidence concerning what happened at the premises should such a dispute arise.
2. The tenancy may not be duly determined when the landlord goes into possession, whereby the landlord may be criminally liable for trespass and/or assault.
3. Although the landlord is protected from liability for trespass and/or assault, the possibility of criminal liability for breach of peace or reasonable apprehension of breach of peace remains.
4. The landlord may wrongfully interfere with a third party's goods.

What are the outcomes of forfeiture?

When a lease has been effectively terminated by forfeiture, including through physical re-entry, the lease is at an end. The lease is not revived merely because the tenant is allowed to take possession again or is allowed to continue to occupy the premises. Legally, it means that the parties have entered into a periodical lease, whereby the tenant has to pay rent on a monthly basis, and this lease can be terminated by either party on one month's notice⁶.

If a lease is forfeited as a consequence of non-payment of rent, the landlord may not be able to recover future rental over the entire period of the lease. Under the Law Society Lease, the landlord is only entitled to recover damages for losses (including rental) over the entire period if the landlord does every reasonable thing to mitigate the losses and tries to lease the property to another tenant on reasonable terms⁷. This is a commercial decision which the landlord has to make after giving consideration to the likelihood of re-letting the premises at the same or higher rental.

It is to be noted that when the lessor has instituted proceedings in court for possession, the lessor is refrained from taking further action by physical re-entry and is confined to recovery of possession by judicial process.

Note: In this article, the words "tenant" and "landlord" have been used in place of "lessee" and "lessor".

Comasters is able to act for landlords in dealing with defaulting tenants.

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Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

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⁵Hemmings v Stoke Poges Golf Club 1920
⁶Clause 12.4 - Law Society Lease

⁷Clause 12.6 - Law Society Lease