estate, to hold shares or units and to borrow and give security over its assets. It is surprising how many public sector entities simply do not have power to enter into joint ventures. The lenders should certainly check this, even if the public sector participant is not the borrower.

In the second case, it is necessary to check whether the foreign investor needs FIRB approval, and if so, whether it has been obtained and on what terms.

E. Conclusion

In conclusion I come back to The Pocket Lawyer's definition of a joint venture and the suggestion that it is an arrangement that is "not always satisfactory". My experience has been that setting up the joint venture, structuring it, and negotiating and documenting it, can be far from satisfactory and involve long, drawn out negotiations with a seemingly endless list of parties, when lenders, landlords, builders and tenants are taken into account, and an endless list of documents. However, at the end of the day, when all is in place, my experience has been that the clients readily focus on the business objects and put the documents away and get on with making the venture work successfully.

This article is based upon a paper for an IIR Conference on Joint Ventures held in 1989.

The article was current at the date of presentation at the Conference.

UNCERTAINTIES IN LAW ON LEASED PREMISES

- Mark McGuinness, Senior Associate, Baker & McKenzie, Sydney.

An area of tenancy law which is suffering from legislative deficiency and which leads to a great deal of misunderstanding between landlords and tenants is the scope of the obligations on a landlord to effect major repairs and reinstatement of leased premises.

The recent earthquake in Newcastle will cause many tenants of commercial premises to examine their leases to ascertain their rights regarding abatement of rent and structural repairs following substantial damage or destruction.

Similarly, landlords will be looking closely at their obligations regarding repair and reinstatement.

In terms of the immediate consequences of the earthquake, most tenants of badly damaged buildings will, at the very least, expect to receive an abatement in rent until the premises have been reinstated.

While more modern leases contain clauses expressly conferring abatement rights in the event of an act of God such as an earthquake, older leases often incorporate the implied or short form covenants under the Conveyancing Act. These implied and short form covenants do not confer a right to rent abatement in the event of earthquake.

Therefore, in the absence of some other form of statutory protection, some tenants may find they will not be entitled to demand a rent abatement from their landlords.

Any tenant without a right to a rent abatement who stops paying rent or decides to pay a reduced rent, without having first obtained the express agreement of the landlord, runs the risk of being in fundamental breach of the lease and consequently runs the risk of having the lease terminated by the landlord and being exposed to a damages claim.

Furthermore, even if tenants are eligible for abatement, if any non-payment of rent is in respect of a period before the damage or destruction, the tenants still risk forfeiture of their leasehold interest.

The most effective practical remedy for a tenant who has suffered severe damage to premises which seriously impedes or prevents the carrying on of business is to have the right to terminate the lease, find alternative premises and get on with the business.

However, many leases prevent the tenant from independently terminating the lease until the landlord has had the opportunity to elect to rebuild the premises or having elected to rebuild has failed to do so within an express time limit or otherwise within a reasonable time.

Most leases recite that the landlord is under no obligation to rebuild. Thus, many tenants may suffer a lengthy delay and interruption to their business while their landlord obtains assessments from insurers and engineers as to the cost and feasibility of reinstating the premises.

If the common law principle of frustration could be

invoked, then the lease would automatically be discharged and therefore terminated.

The House of Lords has recently held by majority that leases (like other contracts) can be determined by frustration, and while it is likely that Australian Courts will follow the House of Lords, the English decision contained comments to the effect that a lease is not determined by the destruction of the improvements by fire. Presumably, similar reasoning may apply in the case of earthquake damage.

Great care needs to be employed in the interpretation of provisions which allow one or both parties to the lease to terminate the lease.

Difficulties may arise for a landlord if the lease is for part only of a building and if the clause regulating termination only refers to the parties being able to end the lease in the event of damage or destruction to the premises.

In the circumstances, a landlord could easily be faced with the situation of being unable to terminate a lease of, say, a ground-floor restaurant which is capable of being used even though the upper storeys of the building have been damaged.

It is for this reason that, from the point of view of the landlord, clauses governing termination should permit the landlord to terminate if the premises are damaged to the extent that the premises are unfit for the tenant's use, or if any other part of the building is so damaged as to render the rebuilding or reinstatment of the premises or the building impractical, or undesirable in the landlord's opinion.

Clearly, the definitions and description of the extent of the premises are critical to the resolution of the express termination rights conferred by a lease.

Compounding this somewhat one-sided conferral of rights, is the lack of statutory duties to oblige landlords to repair or reinstate damaged premises.

Generally, in the absence of an express covenant, or statutory provision to that effect, there is no obligation upon the landlord to carry out repairs to leased premises. The position is otherwise in relation to residential premises, where the additional warranties regarding fitness for habitation have led to a different development of the law.

On the basis of recent decisions, a tenant of part of a building whose premises are not severely damaged, when confronted with a landlord who is unwilling to reinstate the rest of the building may, depending on the facts of each case, be better advised not to attempt to frame claims or demands upon the landlord in terms of duties to repair or reconstruct.

Tenants in such a predicament who wish to continue to remain in the premises may have better prospects of success if they allege a breach of the covenant for quiet enjoyment (which is the right of the tenant to remain upon the property without interruption or disturbance).

In order to establish a breach of the covenant for quiet enjoyment, it is necessary to prove that there has been some negligence on the part of the landlord.

This allegation is more easily maintained in the case of leases of parts of buildings where it is clear that the landlord owes a duty of care to prevent damage to the leased premises.

In the event of a lease of part of a building, it is easier to argue that the landlord may breach the covenant for quiet enjoyment if it fails to repair the remainder of the building such that the tenant's use and enjoyment of the premises is substantially impaired.

Before a landlord is under a duty to take action to ensure that the condition of the residue of the building under his control does not damage the leased premises, the landlord must receive notice of the necessary repairs. Unfortunately, it is unclear whether this duty arises under the contract of lease or arises out of a tort relationship.

To use the recent events in Newcastle as an example, the damage and destruction in that instance was caused by an earthquake, and it would not be alleged that the necessity for the repair work arose from the landlord's negligence. Consistent with this approach, there are cases which indicate that it is not a breach of the covenant for quiet enjoyment if the landlord fails to rebuild premises which have been damaged by fire.

However, if a landlord persists in refusing to secure the rest of the building, then a tenant of part may be able to establish negligence.

Because of the dearth of statutory and common law rights for tenants in relation to rent abatement following earthquake, the tragedy of Newcastle will probably lead to tenants looking more closely at their own insurance arrangements.

Those unfortunate tenants who only have the Conveyancing Act implied or short form covenants, may have difficulty in obtaining temporary abatement of rent.

Tenants who wish to force their landlord to make extensive repairs or to rebuild are in a better position if their lease relates to part of a building, as with the passage of time they may make out a good argument that the landlord's intransigence amounts to negligent failure to secure the rest of the building so as to prevent disturbance to their leased premises.

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