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Dear Roger

LEASE OF SEA VU CARAVAN PARK

1. Background

- 1.1 In July 2006, the Council entered into a long term lease ("the Lease") of the premises known as Sea Vu Caravan Park to Glen and Helen Herbert.
- 1.2 The initial Term of the Lease was 21 years.
- 1.3 The original Lease includes provisions requiring the Lessees to complete certain specified capital works (as set out in the Fourth Schedule) within the initial ten year period, in exchange for which they paid a discounted rent during that period.
- 1.4 The Fourth Schedule of the Lease specified that in total a sum of \$600,000 was to be expended by the Lessees over this period on the Works, with a note that "*The above works schedule is indicative only and the nature of the works may be changed by mutual consent of the Lessor and Lessee from time to time*".
- 1.5 The Fourth Schedule included provision for power head upgrades, remodelling and renovation of amenities building, and replacement of galvanised water pipes, amongst other matters.
- 1.6 In November 2013, the Council considered and received a report indicating that the works had been materially completed (including that at least some works had been completed on each of the three items set out in paragraph 1.5 above).
- 1.7 Council accepted the report and resolved to remove the Early Termination Clause from the Special Conditions.
- 1.8 In December 2016, market rent was set for the lease of the Caravan Park, and the consent of the Council to a transfer of the Lease was granted.

- 1.9 The new Lessee has identified that the three capital works items set out in paragraph 1.5 above require additional attention, and on 11 April 2017 a report was presented to the Council seeking allocation of funds to complete these works.
- 1.10 Special Condition 6 of the Lease required that the Council make an application for exemption to the application of the *Retail and Commercial Leases Act 1995* (“the Act”).
- 1.11 No such application was made by the Council.

2. Summary of Advice

- 2.1 The lease does not require the Council to undertake any specific capital works. Any capital works undertaken should be viewed as an upgrade or replacement of a Council-owned asset.
- 2.2 If the Council decides to undertake any capital works, then under the Act, the Council cannot recover such capital expenditure from the Lessees.
- 2.3 The Lease required the original Lessees to complete certain capital works, as specified in the Fourth Schedule to the Lease, and to an estimated value of \$600,000, in exchange for a rent reduction.
- 2.4 To avoid the impact of the Act, an application for exemption for this, and other relevant parts of the lease, from the application of the Act, was to be made. No such application was made.
- 2.5 The Lease is legally binding despite the absence of such application being made.
- 2.6 Council accepted in 2013 that the works required to be completed by the original Lessees had been completed to Council’s satisfaction, and thereby waived or otherwise released or varied the relevant Special Condition.

3. Reasons for Advice

- 3.1 Capital works are building or engineering works that create an asset, as well as constructing or installing facilities and fixtures associated with, and forming an integral part if those works.
- 3.2 This would typically include constructing buildings, structures or mechanical installations, and upgrading or extending existing buildings.
- 3.3 Capital works will include renewing or replacing an existing assets or component of an asset that has reached the end of its useful life, construction of a new asset that did not previously exist, growth or enhancement increasing the capacity of existing assets beyond their original design capacity to service potential, and disposal or decommission to remove an asset that is no longer required.
- 3.4 This definition is drawn from various case law, as there is no clear definition of capital works or capital expenditure in either the Act or in the Lease.

- 3.5 On this definition, the three items identified as requiring attention are capital works, involving renewing or replacing either existing assets or components of an asset.
- 3.6 The outgoings are defined in the Lease as including, amongst other things:
- All costs of the Lessor in connection with the operations, supply, maintenance, repair, replacement and renovation of Building Services and all other facilities that may be provided from time to time;*
- All costs of the Lessor in connection with the maintenance, repair, replacement and renovation of the Building from time to time;*
- 3.7 Clause 5.1.1 of the Lease sets out that:
- The Lessee must pay all Rates and Taxes and Outgoings levied, assessed, charged or incurred in respect of the Premises, the Building or the Land or upon the owner or occupier of the Premises, the Building or the Land.*
- 3.8 This appears to place the obligation to complete capital works on the Council as Lessor, but with an entitlement to recover the cost as an Outgoing from the Lessee.
- 3.9 Clause 8.1.1 of the Lease further sets out that:
- The Lessee must keep, maintain and repair the Premises, the Lessee's Equipment and any Building Services situated within the Premises in good repair, order and condition.*
- 3.10 This does not extend to Capital Works or Capital Expenditure, but only to general maintenance and repair.
- 3.11 Clause 1.4 of the Lease includes provision that if the *Retail and Commercial Leases Act 1995* ("the Act") applies, then the Lease will be interpreted in accordance with the Act, and the Act will override the terms of the Lease in the event of any inconsistency.
- 3.12 The definition of a retail shop, for the purposes of a retail shop lease, is broad, and includes any business premises at which goods are sold to the public by retail, or at which services are provided to the public, or to which the public is incited to negotiate for the supply of services.
- 3.13 The Caravan Park is business premises at which accommodation services are provided to the public, and accordingly the Act applies and the lease is a retail shop lease.
- 3.14 Section 13 of the Act makes certain obligations about making or reimbursing capital expenditure under a retail shop lease void, and this will therefore override any provisions of the Lease and prevent the Council from requiring the Lessee to complete capital works or reimburse the Council for such capital works.
- 3.15 Special Condition 2 of the Lease, nevertheless, required the Lessees to undertake and complete the Works set out in the Fourth Schedule of the Lease, during the initial 10 years of the Lease.

- 3.16 At the time of assignment of the Lease to the current Lessees, the 10 year time frame had expired.
- 3.17 Further, the Council had accepted in 2013 that the Works had been completed in accordance with the requirements of the Lease, which represents an express or implied variation or waiver of this condition of the Lease.
- 3.18 In addition, Special Condition 6 requires that an application be made to the Court to exempt certain provisions, including that Special Condition, from the application of the Act.
- 3.19 According to Council records, no application was made under Special Condition 6.
- 3.20 Special Condition 6.4 of the Lease provides that "If the exemption application is for any reason not successful then this Lease will be of no force or effect."
- 3.21 Council's records indicate no application was ever made, not that such application was not successful, and therefore Special Condition 6 does not have the impact of making the Lease of no force or effect.
- 3.22 Finally, we note that there is nothing to compel the Council to complete any capital works, particularly given the specific disclaimer in Clause 21.10 by Council as to the structural suitability of the Premises of the business.
- 3.23 A decision to complete any such capital works must be viewed as a decision to upgrade or replace a Council-owned asset.
- 3.24 While it is ordinarily expected that a lessor will replace or upgrade assets to ensure they remain in the same condition as at the commencement of the lease, a failure to complete such capital works would not, in our view, represent a breach of the Lease, but may impact on relations between the Council and the current Lessees.

If you have any further questions, please contact Chris Morey.

Yours sincerely
KELLEDYJONES LAWYERS



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