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Our Ref: JC1:GH:M191774

10 February 2020

Town of Walkerville
PO Box 55
WALKERVILLE SA 5081**Attention: Scott Reardon****By email only: sreardon@walkerville.sa.gov.au**

Dear Scott

39 SMITH STREET, WALKERVILLE

We refer to your email of 23 January 2020 in relation to the condition of the building at 39 Smith Street Walkerville.

This area of the law is continuing to evolve, and is more complex where a Council (as a statutory body) is the proposed Landlord.

Your questions are separately dealt with below.

1. Can Council grant a new lease or extend its existing lease of the building in its current condition and without undertaking any repairs?

In short, we are not aware of any limitation on Council granting a lease, licence or other rights of occupancy in relation to all or part of the land/building. However, if structural and/or capital maintenance and repairs are required, then Council may be exposed to legal, financial and reputational risks. This is discussed further below.

2. Does Council have any liability if it grants a new lease or extends the term of the existing lease?

In short, if the premises are in a condition which has a foreseeable risk of injury, damage or loss, then the Council as landlord may be liable if any injury, damage or loss occurs.

Any liability of Council depends on the existence of any defects with the land and building (for which a tenant is not responsible) and such defect has caused personal injury or damage to property.

We comment as follows:

- (a) a distinction is drawn between a landlords' repair obligations pursuant to a lease, and a duty of care a landlord has to its tenant.

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- (b) landlords have a duty of care to tenants and their invitees.
- (c) the liability exposure of a landlord will depend on the control it has over the premises.
- (d) a landlord's liability for leased premises is generally governed by the Civil Liability Act 1936. Section 21 states that a landlord not in occupation of premises will have liability limited to injury, damage or loss arising from an act or omission of the landlord in carrying out an obligation to maintain or repair the premises, or a failure of the landlord to carry out an obligation to maintain or repair the premises.
- (e) in *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313:
 - (i) it was held that a landlord owes a duty of care to a tenant to make leased premises as safe for purpose as reasonable care and skill on the part of the landlord can make them.
 - (ii) it was held that landlords have a duty to determine the existence of hidden defects and to remedy them accordingly, and that "this can be done at the start of a tenancy and can be performed by a lay person unless the circumstances require the attention of an expert."
 - (iii) Chief Justice Gaudron stated more generally that "having regard to the control which, at the beginning of a lease, a landlord exercises over the state of the premises, and, also, to the extent to which members of the [premises] are then dependent upon the landlord for their safety, a landlord's duty at that point cannot, in my view, be limited to defects of which he or she is aware".
- (f) in *Sleafer v Lambeth Metropolitan BC* [1960] 1 QB 43, the tenant was unable to open his front door due to a minor defect which caused it to jam. The tenant pulled hard on the only external handle, the letterbox knocker. That came off and he fell backwards against an iron balustrade and suffered injury to his back. He sued the landlord for allowing the door to get into that state. It was held that in relation to a minor defect of that kind, no question of any obligation on the landlord could arise.
- (g) in South Australia, the liability of a landlord for injury, damage or loss attributable to the dangerous state or condition of the premises is to be determined in accordance with the common law relating to negligence, but the court must consider several factors provided by legislation in determining the standard of care to be exercised by a landlord. The factors to be taken into account in determining a landlord's standard of care include:
 - (i) the gravity and likelihood of the probable injury;
 - (ii) the circumstances of the entry onto the premises (ie tenant v trespasser);
 - (iii) the nature of the premises;
 - (iv) any knowledge that the landlord has or ought to have of the likelihood of persons or property being on the premises;
 - (v) the age of any person entering the premises;

- (vi) the ability of any person entering the premises to appreciate the danger; and
 - (vii) the burden on the landlord eliminating the danger or protecting a person entering the premises from the danger as compared to the risk of danger to the person.
- (h) a statutory authority will have a duty of care to exercise their statutory powers in the following circumstances:
- (i) the statutory authority creates a danger in the exercise of its functions, or by coming within a factual category where duties of care have been held to arise. For example, employer/employee, driver/passenger or carrier/consignee;
 - (ii) the particular circumstances of the statutory authority's occupation of premises or its ownership or control of a structure in a highway or public place attracts to it a duty of care; or
 - (iii) the statutory authority places itself in such a position that others reasonably rely on it to take care of their safety.
- (i) the control that statutory authorities have over the safety of people or their property is also of fundamental importance (see *Brodie v Singleton Shire Council* (2001) 206 CLR 512).
- (j) where a statutory body does exercise its statutory powers, it has a duty to take reasonable care in doing so, if the exercise of those powers creates or increases a reasonably foreseeable risk of physical loss or damage to another.

The comments above are provided as general advice only. If specific advice is needed as to any particular defect or area of concern, please contact us.

Yours faithfully
MELLOR OLSSON


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