



## **LEASE RIGHTS OF RENEWAL - Answers to commonly asked questions**

### **What is a right of renewal?**

It is an option granted to the tenant to enter into a new lease with the landlord. It is not an extension of the existing term of the lease.

A right to extend the term of the lease is distinct from a right of renewal.

An extension of the term of the lease rather than the granting of a new lease has certain consequences [refer questions 6 and 7 of this article].

### **Does a landlord have a choice whether or not to renew the lease?**

No - as long as the tenant complies with any pre-conditions contained in the lease (for example, the tenant not to be in breach of the lease or that the new lease to be guaranteed by the guarantor), the landlord cannot refuse to grant the new lease.

If the landlord refuses to grant a new lease when the renewal is properly exercised, the tenant can apply for relief under section 120 of the Property Law Act 1952.

### **How is a right of renewal exercised?**

Usually by notice in writing to the landlord within certain timeframe's set out in the renewal clause.

A deed of renewal is usually entered into after the renewal is exercised. This deed of renewal is the formal granting of the new lease.

### **What if no deed of renewal is entered into?**

If there is no deed of renewal, the landlord and tenant would need to rely on other evidence to show that a new lease had been granted, eg correspondence recording that the right of renewal had been exercised and subsequent payments of a new rent or other actions which may prevent the tenant or landlord from contending that a new lease had not been granted.

### **Can a tenant decline to proceed with a renewal if the tenant does not agree with the rent proposed by the landlord?**

Usually, the rent is determined after, and as a consequence of, the renewal being exercised. Agreeing on the rent is not usually a pre-condition to entry into the renewed lease. Unless the lease provides otherwise (which would be unusual), the tenant is committed to the renewed lease on exercising the right of renewal. The rent then has to be determined in accordance with the rent review provisions of the lease.

### **Does a guarantor have to sign a renewal?**

A guarantor (whether it is the initial guarantor or any subsequent guarantors introduced when the leases are assigned) guarantees the current term of the lease but does not have to guarantee a renewed lease.

HOWEVER , in practice, the position is usually different:

- The 4<sup>th</sup> edition 2002(2) form of the Auckland District Law Society lease (ADLS lease) allows the landlord to require the current guarantor (at the time that the renewal is exercised) to guarantee the renewed lease.
- A High Court decision [1] has interpreted the renewal clause in the 3<sup>rd</sup> edition of the ADLS lease as giving an extension of the existing term of the lease, and not a renewal of the lease. This means that under the 3<sup>rd</sup> edition of the ADLS lease, the original guarantor and any subsequent guarantors would be liable during the extended term, even if they do not sign any further documents. Although this decision is the current law it will be interesting whether it is followed in future decisions.

[1] If a lease has been assigned, are the original tenant and guarantor liable under a renewal of lease?

No - the original tenant and guarantor are not liable under the renewed lease where the lease has been assigned.

HOWEVER, in practice, the position is sometimes different: :

- The original tenant and guarantor are not liable because the new lease will be signed by the assignee and the original contractual relationship between the original tenant, the guarantor and the landlord is lost.
- However, if the renewal clause is interpreted as an extension of the term, as it was in the *Powell* decision, then the contractual relationship between the original tenant, guarantor and landlord would continue and therefore, the original tenant and guarantor would continue to be liable to the landlord if the lease is renewed by an assignee.
- Whether subsequent tenants and guarantors, who, in turn, have assigned the lease, would be liable where a renewal has been interpreted as an extension of the term, will depend on whether a covenant was entered into between the subsequent tenant and guarantor and the landlord to create a contractual relationship. If such a covenant was entered into (which is usual), then subsequent tenants and guarantors, who have assigned the lease, would also be liable under such an extension of term.

If a landlord sells the property, section 112 of the Property Law Act 1952 means that the new landlord can pursue the existing tenant and, most probably, the original tenant [2] , for any breaches of the lease.

### **What if the tenant does not exercise the renewal in the timeframe stipulated in the lease?**

Recent decisions [3] indicate that the landlord must remind the tenant that the lease is due for renewal and therefore give the tenant every opportunity to renew the lease. The tenant otherwise has the right to apply to the court for relief against the lease being terminated by the landlord.

## Caution

As the wording of renewal clauses differ from each other and the circumstances surrounding the exercise of a renewal will differ, the comments in this article must be read subject to the particular wording of the relevant clauses and subject to the particular circumstances surrounding the exercise the right of renewal.

It is recommended that you consult a solicitor for assistance in interpreting the wording of a clause and assessing all relevant circumstances surrounding the exercise of a renewal.

If you have any queries about leases please contact John Dunlop, as senior solicitor at Hesketh Henry ([john.dunlop@heskethhenry.co.nz](mailto:john.dunlop@heskethhenry.co.nz))

- [1] *Powell v Tinline Properties Limited* [2002] 1 NZLR, 568.
- [2] *Cashmere v Morris* [1993] 3 NZLR, 587.
- [3] *Koo v Tuatara House Limited* (unreported, High Court, Auckland , M1578-IM02;
- *Mac's Cove Tender Centre Limited v Boyd* (2003) 4 NZ Conv, C193, 654;
- *Walsh and Mulligan v Utting* [2004] 1 NZLR, 403.

If you have any queries about leases please contact John Dunlop a senior associate at Hesketh Henry on email: [john.dunlop@heskethhenry.co.nz](mailto:john.dunlop@heskethhenry.co.nz) or by phoning +64 9 375 8726