

Legal Alert

Property & Development

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Lease Agreements in South Australia

On 22 February 2019, in the case of *Pastina Pty Ltd v Hosanna Excelsis One Universal Church Inc* [2019] SASC 18, the Supreme Court of South Australia set a new precedent for lease agreements under the Retail and Commercial Leases Act 1995. Judicial interpretation may extend a holding over period that goes beyond 6 months to 5 years automatically!

Introduction

The case of *Patina Pty Ltd v Hosanna Excelsis One Universal Church Inc* [2019] SASC 18 (‘the **Case**’) was heard on appeal to the Supreme Court of South Australia on 22 February 2019. The Honourable Justice Doyle presided in the case, handing down a judgment that set aside the initial orders made by the Magistrate and set a new precedent for South Australian property law.

The new precedent is significant to both Landlords and Tenants in South Australia. Specifically, impacting the term of leases by monthly periodic tenancy or by holding over.

The New Precedent – Operation of section 20B

Essentially, this judgment sets a precedent for how section 20B of the Retail and Commercial Leases Act 1995 (‘the **Act**’) will be interpreted for future matters. On the basis of this judgment, all Landlords and Tenants should consider the following;

- If a lease agreement gives the Lessee a right to tenancy by holding over upon expiration of the Lease, unless the initial lease was for a period of 5 years, when the period of holding over extends past 6 months, the hold over will be automatically extended to a five year term lease;
- For a lease of less than five years, containing a right to renew (e.g. 3 year lease with right to renew for 2 years), if the Lessee holds over on the second lease for more than 6 months, the hold over will automatically become a new 5 year lease. In such cases, the second lease cannot merely be extended by the number of years necessary to equal 5 years in combination with the first lease.

Case Summary

The Plaintiff is the registered proprietor of land situated at South Terrace, Adelaide (the Lessor). The Defendant (the Lessee) commenced leasing a portion of the premises on that land on 1 May 2010. The lease was for a term of 5 years, as required by section 20B of the Act, with one right of renewal for five years.

The Lease also provided for ‘holding over’ of the Lease, which allowed the Lessee to continue occupying the premises after expiration of the Lease with the Lessor’s approval. The terms of holding over, as stated in the Lease, were that the Lessor “*does so under a tenancy for a fixed term of one month and then from month to month which either party may terminate upon one month’s notice ending on any day*”.

The lease expired on the 30 April 2015. The Lessee did not exercise the right to renewal, but commenced holding over. Over 2 years later, on 21 October 2017, the Lessee vacated the premises.

Section 20B(2) of the Act provides that, in the case of a contravention (breach) of the lease, ‘the lease is not invalidated ... but the term of the lease is extended to bring the term (or aggregate) to five years’.

Section 20B(3) of the Act provides six independent exceptions to the requirement of a five year minimum term and the extending effect of section 20B(2), one of which was relied on by the Lessor in this case.

The exception in section 20B(3)(b) provides that section 20B ‘does not apply to a lease if – the lease arises when the lessee holds over after the termination of an earlier lease with the consent of the lessor and the period of holding over

does not exceed 6 months'. However, the section 20B(3)(b) exception does not apply if the exception in section 20B(3)(d) applies.

Section 20B(3)(d) provides that section 20B 'does not apply to a lease if – the lessee has been in possession of the retail shop premises for at least 5 years'.

The basis of the Lessor's claim was that section 20B(3)(b) does not operate to exclude the Lessee from Section 20B, as the Lessee held over possession of the premises for a period exceeding six months. And as such, by the operation of section 20B(2), a second lease for a term of five years came into effect upon the commencement of the holding over.

The Lessor claimed that section 20B(2) came into operation when the Lessee breached the contract by reasons of its vacation of the premises on 21 October 2017, and the condition in which it left the premises.

The judgment concluded that section 20B applied to the lease by holding over that commenced on 1 May 2015, and that none of the exceptions in section 20B(3) apply to prevent the extending effect of section 20B(2).

What does this mean for Landlords and Tenants?

It is important for you to consider the term and any rights to renewal of your existing leases.

In the circumstance of a lease that arises by holding over after a five year lease has run its full course, the exception in section 20B(3)(d) will apply to exclude that lease from the extending effect of section 20B(2). In this case, both Landlords and Tenants are safe from being locked into another 5 year lease.

However, please note that changes to the premises during the period of the original lease can affect how the term of a lease is assessed. Under these circumstances, the premises may differ between the original lease and the subsequent lease. In such a case, the term of the subsequent lease must reach 5 years, otherwise holding over proceeding the subsequent lease will be subject to the extending effect of section 20B(2).

In this case it was ruled that 'the original premises are simply not the premises under the lease by holding over, and hence not "the retail shop premises" for the purposes of [section] 20B(3)(d)'. This is so, even though the parties gave effect to the change in the premises through a variation of the original lease rather than the creation of a new lease.

It was concluded that the operation of section 20B(3)(d) must be determined as at, and only as at, the date of commencement of the lease by holding over (1 May 2015).

It is pertinent for both existing and future Landlords to ensure they are not placing themselves in a disadvantageous situation by varying the terms of an initial lease. They may be creating a subsequent lease, the commencement date of which may be used to determine the effect of section 20B should any disagreement arise in the future between the Landlord and the Tenant.

If the term of the subsequent lease does not amount to five years, any holding over following the expiration of that subsequent lease may be extended to a term of five years following 6 months of holding over, as the exception to this provided by section 20B(3)(d) would not apply.

Protecting your interests

It would be wise for Landlords to re-evaluate the terms of their existing lease regarding holding over or rights to renew.

In addition, Tenants who are currently holding over on a lease or who intend to do so, should be aware that they can be locked into a new five year lease after holding over for 6 months, if they have not already held a lease over that premises for a minimum of 5 years.

The impact of this precedent should be considered when entering into new lease agreements, to ensure the terms of the agreement will not allow for a Lessee to gain an extended second term of the lease for 5 years, if this is not the outcome you are looking for as a Landlord.

Contact details

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