

Lease renewals

Forgotten or failed to renew your lease? Tips to avoid ending up in court August 2021

A tenant's ability to renew its lease for a further term is an important aspect of the bargain a landlord and tenant strike for the lease of a commercial property. However things can go awry when the parties don't renew their lease at renewal time. The Property Law Act 2007 (PLA) gives a tenant the ability to go to Court for an order renewing its lease if its landlord refuses to renew it. This can be a saviour for a tenant but it means that a landlord needs to tread carefully if it wants to end a lease that has not been renewed.

In this article we discuss rights of renewal and the tenant's ability to seek relief, and we offer tips for both landlords and tenants to try to avoid issues arising in the first place.

Please note that this article addresses the situation where the tenant has a right of renewal under the lease. This guide doesn't apply if there is no right of renewal or if the tenant has used all of its rights of renewal.

WHAT IS A RIGHT OF RENEWAL?

When landlords and tenants first enter into a lease of commercial premises, they will often agree that the tenant will have one or more rights of renewal. A right of renewal means that, at the end of the current term of the lease, the tenant can renew the lease for a specified period of time. The tenant's right to renew is usually conditional on the tenant doing certain things (as set out in the lease), for example, giving the landlord notice of its desire to renew by an agreed date and complying with the terms of the lease.

RELIEF UNDER THE PROPERTY LAW ACT

If the tenant stays in the premises after the lease expires but has not renewed the lease, generally the lease will convert from a fixed term lease to a periodic tenancy (typically a month to month lease). Either party can terminate the tenancy by giving a specified period of notice. However, provisions in the PLA mean that, if the landlord tries to end the lease in this way (whether shortly or years after the expiry date) and the tenant has a right of renewal, the tenant can ask the Court for an order renewing the lease.

Court's discretion

The PLA allows a tenant to apply to Court for an order to renew the lease if the landlord refuses to renew it. This relief is available to the tenant even if the tenant hasn't complied with the conditions of renewal set out in the lease and even if it has breached the lease.

The Court has a very wide jurisdiction to grant relief. The Court has said that the intention behind the provisions is to protect a tenant from their landlord "taking commercial advantage of their inadvertent mistake [of not giving notice to renew the lease], where to do so would have a disproportionate effect on the lessee".

Factors the Court takes into account

The factors that the Court is required to weigh up and consider in light of the circumstances are:

- the reasons for the failure to give notice (e.g. whether that was unintentional);
- if the landlord had done anything to cause the default;
- the tenant's conduct, especially whether it had been a good tenant;
- prejudice to the tenant if relief not granted;
- prejudice to the landlord if relief not granted;
- the landlord's motivations for refusing to renew and understanding of the tenant's intentions; and
- the interests of third parties, and how they may be affected.

Cases

In one case the Court heard under the PLA, the Court found for the tenant and ordered a renewal of the lease even though the tenant had intentionally failed to give notice to renew the lease at the required time in order to try negotiate better lease terms, including a rent reduction. The Court took into account, from the tenant's side, that many of the tenant's staff would lose their jobs and the tenant would lose its hefty investment in fitting out the premises if the lease was not renewed.

In another case, the tenant's past failures to pay rent on time did not prevent the Court from ordering a renewal of the lease.

AVOIDING COURT IS BEST

The Court's power to order a renewal of a lease in this way could certainly prove to be a lifeline for a tenant who has failed to renew its lease. As the Court has taken into account in past cases, the prejudice to a tenant of having to move out of its established premises can be substantial. However, tenants should – of course - try to avoid the need to go to Court given the costs involved and that there is no certainty that the Court will find in its favour.

From the landlord's perspective, the availability of the PLA provisions to the tenant can make it risky for the Landlord to end the lease given that the tenant could obtain an order from the Court renewing the lease even though the landlord is exercising a contractual right to terminate the lease (and even where the tenant has not been a good tenant).

TIPS

Set out below are some tips for lease renewals for both landlords and tenants to try to avoid getting into the situation where a tenant must resort to Court action.

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- **Know what you're getting into:** At the lease negotiation stage, landlords should think carefully about the length of the term and the length and number of rights of renewal the tenant should have. By leasing a property a landlord is giving up its use of it. Circumstances can change over time and the landlord may decide in the future that it wants to get rid of its existing tenant and lease the property to a new tenant on better terms. Or it might want to take possession of the property itself. Unless it can reach agreement with the tenant, it won't be able to do these things.

In one PLA case the Court did not have sympathy for a landlord who it considered was refusing to renew the lease because it wanted to exploit other potential commercial opportunities for the property. The Court said:

The very nature of a lease is that for the period in which it is in effect, the lessor is denied the right to take possession of the land it has leased. It does not appear that renewal of the Lease will cause any undue or improper prejudice to [the landlord]. Rather, [the landlord and tenant] will simply be required to adhere to and perform the terms of the bargain that they freely entered into at the outset of the Lease.

- **Understand the renewal process:** We have encountered landlords and tenants who don't understand how lease renewals work, for example, they mistakenly believe that a lease automatically renews on the lease renewal dates set out in the lease. This can lead to the parties not following the renewal procedures in the lease and the lease never being renewed.

- **Be proactive and act early:** We recommend that both landlords and tenants diarise the lease renewal dates and the deadlines for the tenant to give its notice of renewal. They should communicate with each in writing about the renewal well in advance of the relevant dates and make their intentions and requirements clear. For landlords, we recommend you extend the notice period out to give you time to find another tenant if the tenant does not renew. If a landlord or tenant doesn't hear from the other party they should follow up and not let things slide. The parties should always document the renewal in a deed of renewal of lease.
- **Take advice:** If you are unsure about the renewal process or if it seems that unfortunately things might not go to plan we recommend you seek legal advice at an early stage to try to reduce risk and avoid Court. This is particularly important if the existing tenant has not renewed but is not planning to move out.

FOR FURTHER HELP

If you need help with the renewal of your lease please call or email one of the Jackson Russell lawyers listed. If, unfortunately, your renewal does end up in Court, our litigation team can help.

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