

Supreme Court deems a monthly "holding over" to have a 5 year term

Landlords and Tenants (and their respective agents and property managers) should be aware of a February 2019 decision of the SA Supreme Court relating to Tenants that hold over after the expiry of a lease term for longer than 6 months.

1. The Court ruled that:
 - 1.1 a new lease is created when a Tenant holds over after the expiry of the Lease term; and
 - 1.2 if the Retail and Commercial Leases Act applies and the Tenant has not been in possession of the current premises for at least 5 years when the holding over commences, then such "new lease" will have a statutory 5 year term if the holding over period exceeds 6 months.

Importantly, such statutory 5 year term overrides any clause stating that the "holding over" monthly tenancy can be terminated by either party on one month's notice.

2. While some Landlords may wish for their Tenants to be bound for a further 5 years, the implication of an unexpected 5 year term could be disastrous for other Landlords. For example, those Landlords with plans to redevelop the premises or who might be negotiating with another Tenant to lease the premises, or where the Tenant's holding over rent is significantly lower than the current market rent.
3. The implication of a 5 year term could also be disastrous for a Tenant that was planning to vacate in the near future or otherwise did not wish to remain in the premises long term. Conversely, a Tenant that wished to remain in the premises but who is unable to secure an extension from the Landlord, may view the implication of a statutory 5 year term as a benefit.
4. **Risk Mitigation/Recommendation:** If any Tenant holds over after the expiry of a Lease term and has not been in possession of the current premises for at least 5 years when the holding over commenced, then the Landlord and the Tenant (and their respective agents and property managers) should each diarise at least 2 months prior to the holding over period reaching 6 months to seek legal advice so that a plan to either assert or avoid the statutory 5 year term (depending upon the desired outcome) can be implemented.
5. Importantly, such legal advice should be obtained before any particular action is taken, to ensure there is not some other reason which might exclude such statutory 5 year term (for example, an exception under the Retail and Commercial Leases Act applying).

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