

Leasing issues update

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Jane Holland - Senior Associate

Fixing a date

The date written on the top of the document cannot always be taken as correct, as the recent case of *Willmott v Johnson* makes clear.

The case involved a vendor who received an offer to purchase some land from a trust. The vendor signed the offer and also added to the agreement the full names of the trustees.

The agreement was initially dated 30 November but the purchaser did not initial the vendor's alteration until 3 December. The agreement was conditional and the condition was due for satisfaction "within five working days of this agreement being signed by both parties".

The court found that the agreement had not been made until 3 December, hence the condition date ran from that date, and not 30 November.

Although the case deals with a real

estate sale and purchase agreement, the decision also applies to agreements to lease.

If a provision in an agreement is triggered from the date of the agreement, it is important that both parties agree the actual date of the agreement to avoid potential breaches and disputes.

Think before you consent

A recent English case, *Aubergine Enterprises Ltd v Lakewood International Ltd*, has highlighted the danger to landlords of providing indicative consent before all lease formalities are completed and pre-conditions have been met.

In this case, the landlord "consented in principle" to the proposed assignment of the tenant's lease although noting that a formal deed, which was a condition of consent under the lease, had yet to be completed.

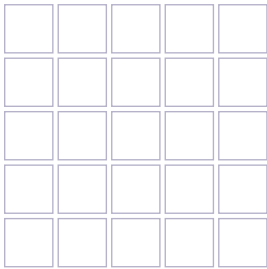
The judge decided that the "consent in principle" was deemed to be consent to the assignment despite the fact that some of the conditions of consent had not yet been fulfilled.

Whilst this was a settlement dispute and did not involve the landlord, this does serve as a reminder of the importance of properly wording any correspondence on behalf of the landlord when consent is sought.

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Contact us for further advice on the wording that you should use in correspondence with tenants.

When is a renewal not a renewal? When it's an extension

The High Court decision of *Powell v Tinline Properties Limited* calls into question the common view that a renewal of lease generally results in the creation of a new lease.

The court confirmed that whilst this is often the case, the right of renewal could be framed as a right to extend the term.

In that case, any party who leases the premises during the original term (or any guarantor to that party's obligations) continues to be liable under the lease provisions until the renewal term(s) of the lease expire.

Although each case must be determined on its own facts (and on the wording of the lease document involved), this case

involved an Auckland District Law Society (ADLS) Third Edition lease. The new Fourth Edition of the ADLS lease makes it clear that any further terms are not extensions of the original term.

If this is an issue for you, we recommend you talk to us further.

Feedback time

In the last edition of our property newsletter we reported the launch of the new Fourth Edition of the ADLS lease and promised to update you on initial market reactions.

Although the new version has now been around for a few months, it is not widely used as yet and many agreements to lease still refer to the Deed of Lease being prepared in the Third Edition form.

Some landlords are less than keen to use the Fourth Edition as a number of the amendments (such as the partially modified ratchet) favour the tenant. The significant advantage for the landlord in

using the Fourth Edition is that the list of outgoing recoverable is slightly wider than in the previous edition.

However, we have noticed a growing trend of landlords using the Third Edition and simply amending it to include the extra outgoing from the Fourth Edition.

For tenants, there are other advantages to using the Fourth Edition, apart from the modified ratchet, although the downside is the obligation to pay certain extra outgoing. Some tenants are already deleting these extra costs when signing up to the Fourth Edition lease form.

As always, the final form of the lease depends on the bargaining power of each party, but obviously it is important to go into negotiations armed with the necessary information.

We will be happy to provide you with further information on the differences between the Third and Fourth Edition ADLS lease.

For further information, please contact:

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