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No Signed Lease?

*Landlords are locking tenants into new leases with an implied lease. **How?***

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WHAT IS AN "IMPLIED LEASE" AND WHEN CAN IT BE IMPOSED ON A TENANT?

Put simply, sometimes the actions of the Landlord and the Tenant can unwittingly trigger an "Implied Lease", even though no one has signed a formal Lease document.

Leases are not normally binding until both the Landlord and the Tenant have signed the Lease, right?

Well, sometimes this is not the case. As was found recently in the Supreme Court, the actions of a Landlord and / or a Tenant can lock the parties into a long term agreement, where they didn't think they were locked into anything.

BACKGROUND

Jacob* had been a Tenant in a shopping centre for the last five years. His lease was due to expire in six months, so he started discussions with the Landlord about a new Lease. The Landlord provided Jacob with a Letter of Offer, outlining the terms upon which they would like to renew Jacob's Lease.

The terms were not quite what Jacob was hoping for, with an 18% increase on his base rental. They were also offering another five year lease, when Jacob was hoping to sign for only three years this time. Discussions commenced in an attempt to reach an agreement and negotiations were progressing well. Three months out from expiry, Jacob signed a Letter of Offer, happy with the revised terms they had now agreed. This included a small 2% rent increase and a three year term. He sent the signed offer back to the Landlord to finalise the documentation.

BUSINESS CLOSED DUE TO COVID

Fast forward one month and Jacob's business was closed down due to the government enforced COVID lockdowns in NSW. Jacob's business remained closed for 5 months. During these five months, his lease expired. Because Jacob had not yet signed a formal Lease (only the Letter of Offer), Jacob assumed that his existing Lease was now in holdover on a month to month arrangement.

While Jacob's business was closed, he received a draft Lease from the Landlord, recording all of the new terms agreed in the signed Letter of Offer. Given Jacob's business was closed and he was unsure how long it would be closed for or the potential financial implications of the closure, he made a deliberate decision not to sign the Lease just yet. He thought that he would reconsider this, once his business had reopened and he had a better understanding of the future outlook.

During the period of closure, Jacob continued to receive the automatically generated monthly rent invoices from the Landlord.

Upon reopening his business, after five long months of closure, Jacob was hopeful that his business would recover from the huge impact of no revenue for five months and bounce back over time. Not too much time hopefully!

Two months after the reopening and after Jacob working long hours and incredibly hard to try and get his business back on track, he made the heartbreaking decision that it couldn't be saved and he would need to close the business.



AN "IMPLIED LEASE" IS ISSUED

Given that Jacob had not signed the new Lease, that had been issued months earlier, he felt comfortable in providing the Landlord with one month's written notice that he would be ending his month to month tenancy and moving out.

It was then with great surprise that he received a notice from the Landlord to advise that, whilst the Lease had not been signed and returned, it was in effect anyway and he was locked into a new three year "Implied" Lease. He was unable to close his business.

You can imagine his shock and panic. Why? I haven't signed a Lease? My situation has changed and I can no longer extend? Is this real? Is this legal?

TRIGGERS OF AN IMPLIED LEASE

- 1. Paying the increased rent.** What Jacob had failed to notice was, the Landlord had applied the 2% rent increase to his monthly invoice and Jacob had continued paying as the increase was so small, it wasn't really noticeable on a monthly basis.
- 2. The signed Letter of Offer** indicated that terms for a new Lease had been agreed between the Landlord and the Tenant, given the Lease was about to expire, it showed an intention to renew.
- 3. The Tenant had continued to occupy** the space and the Landlord had also changed the rent to match the terms of the signed offer, which the Tenant had paid.

SOLUTION

Jacob used the services of an experienced Tenant Representative to meet with and negotiate an outcome with the Landlord. The outcome negotiated included the following:

- 1.** Being able to exit the Lease after 12 months, rather than three years
- 2.** Paying a reduced rent.

The trade off provided the Landlord more time to find a replacement Tenant and allowed Jacob an opportunity to continue trading without losing money.

*Clients name has been changed to protect privacy.

Tips and key takeaways to avoid this risk

- A court is required to determine the existence of an Implied Lease. This is a lengthy and costly process that is potentially best served by a Tenant Representative negotiating a commercial outcome prior to any litigation.
- Start your negotiations early, (ideally 6 months out from expiry), so that you can have finalised your position, one way or another, well before the expiry of your current lease.
- Be sure of your position, before you sign a Heads of Agreement.
- Be cautious when the Landlord or their Agent tells you "the Letter of Offer isn't binding" ... you might find it is later on ...
- Don't take possession of a premises until you have a Lease signed by you and the Landlord.
- If your Lease has expired and you are occupying as a month to month Tenant (without a new Lease signed yet), check your monthly invoices to make sure changes to the charges have not happened without you realising. If changes are made to the invoices, reject these changes as the deal is not yet finalised.



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A Voice For Tenants

Your Leasing Co. specialises in being a Tenant Representative and negotiating lease terms for Tenants. If you have any questions about renewing your lease or entering a new Lease, you can call Kelly Cunningham for a free, no obligation conversation.

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