

OPTION TO EXTEND PART OF THE DEAL

Renewal of lease agreement and the “huur gaat voor koop” rule- Part 2

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WHAT is the role of the deceased landlord’s wife to a lease? How is the wording of a renewal clause to be understood when the period in a fixed lease is incorrectly calculated?

What is the position of a tenant who holds a lease through cession or assignment and the assignee’s legal relationship to the widow of the deceased landlord? These were some of the questions that the court in *Hitzeroth v Brooks* [1956(3) AD 444] had to look at.

Landlord Alexander Hitzeroth concluded a lease with a Mrs. Thelma O. Rodkey on September 24, 1951. The lease was for a period of nine years eleven months with the option to renew within a month of the termination of the lease. The renewal was for a further period of nine years eleven months on the same terms contained in the first lease.

The lease contained a clause that allowed for subletting or cession, and Mrs. Rodkey ceded the lease to a Margaret S. Brooks about seven years into the lease period. Alexander Hitzeroth died in February 1956 and the cession of the lease took place in October 1958; acknowledged by the executor of the late Hitzeroth’s estate. The date of expiration in the lease was September 30, 1961 which was an incorrect calculation.

Brooks exercised the option to renew in September 1961. The court established August 31, 1961 as the month the lease ended and renewal had to take place within the month of August - not September. The tenant therefore did not renew within the renewal period and the court found the notice of renewal to be out of time.

As for Mrs. Hitzeroth’s contention that she was a “third party” and not bound to the lease, the court concluded that she was a direct party. The fact that she ratified the cession and accepted rentals from Brooks, the court held that she was bound to the original lease. Brooks, to whom the lease was ceded, was her tenant and she was accordingly bound to the renewal of the lease.

Does a right of renewal bind an innocent purchaser to an existing lease?

To put it another way, a purchaser is not informed of a written lease, but in fact is misled into believing that the tenancy is a monthly one and terminable at

a calendar month’s notice. The purchaser is also blissfully unaware that there is a renewal clause.

Can the renewal clause be separated from the lease itself?

The court in *Shalala and Another v Gelb* [1949 AD 851] arrived at the decision that the right to renew clause is an inseparable part of the lease. The right to renew in a lease is linked to the tenant’s right to occupy. The buyer/owner who is misled by the seller/previous owner-landlord is bound by a right of renewal.

“An option to purchase contained in his lease confers upon the tenant the right to acquire dominium of the property: the option to renew relates to an extension of the tenant’s right of occupation of the property to the continuation of the relationship of landlord and tenant.”

In *Uys & another v Sam Friedman Ltd* 1935 AD the court settled the tenant’s right to a renewal clause as follows:-

1. The right to renew is no different from any other term or condition of a lease.
2. A renewal clause is not severable from the lease.
3. A tenant’s right to renew can be exercised, even if the landlord is insolvent.
4. A trustee of an insolvent landlord is bound by a renewal clause.

Meaning of the following words used in this article:

<i>Assignee</i>	a party to whom a right is legally transferred
<i>Assignment-</i>	the transferring of a legal right, e.g. a tenant transfer a lease to another person who then becomes the lawful tenant
<i>Cession-</i>	the act by which a party (e.g. a tenant) assigns or transfers a lease
<i>Dominium-</i>	the right of ownership of a property and its and control
<i>Subletting-</i>	a tenant enters into a lease to rent a dwelling to another, thereby becoming the “landlord”

Dr. Sayed Iqbal Mohamed, Chairperson, Organisation of Civic Rights; Member of the KwaZulu Natal Rental Housing Tribunal and Council of Canadian Administrative Tribunals. www.ocr.org.za For advice, contact Pretty Gumede or Loshni Naidoo on 031 3046451