



Fixed Fee Lawyers
Across 4 Cities

[READ MORE](#)

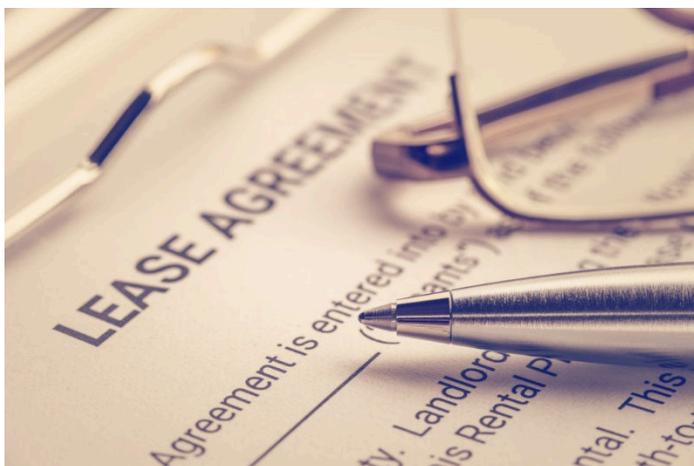
JHK LEGAL

Leases – Unfair Contract Terms

2 August, 2019

Written by JHK Legal Lawyer, Isabella Matassoni

Excellent news – you’ve decided to start up your own café (small business) and have found the perfect vacant premises! However, after reviewing the contract yourself, you notice some clauses which seem alarming including auto-renewal clauses, variation of rental prices at the landlord’s discretion and unlimited indemnity clauses. With pressure mounting from the landlord to execute the lease, you’re left with the ultimate dilemma; do you risk losing the property to another potential tenant and sign the lease now or take the time to have the lease reviewed by a solicitor in respect to unfair contract terms?



Since the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act* (Cth) came into effect in November 2016 (which made amendments to Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (“**ACL**”)), the team at JHK Legal have been regularly assisting clients, in particular small businesses, in reviewing leases, identifying clauses deemed to be “unfair” and assisting with the negotiating to have these clauses removed and/or amended.

Is my lease regarded as a “small business contract”?

Your business can rely on this legislation where:

- ✓ At least one party is a business that employs less than 20 people – whether that be you or your landlord;
- ✓ Upfront price (including rent, operating costs and/or security deposits) payable does not exceed \$300,000, or does not exceed \$1,000,000.00 if the duration is more than 12 months; and

Liability Limited by a scheme approved under Professional Standards Legislation
Legal practitioners employed by JHK Legal Australia are members of the scheme

- ✓ The contract is a 'standard form contract'.

All contracts are presumed to be a 'standard form contract' unless proven otherwise. A number of factors can be considered to infer that a lease contract is not standard in form, including:

1. Where both the landlord and tenant were involved in the preparation of the contract;
2. Both parties have the same bargaining power;
3. Unpressured choice to accept or reject the lease;
4. Ample opportunity to negotiate the terms; and
5. Where the terms of the lease take into consideration specific factors/characteristics of the party/lease.

If you have answered yes to a number of the above factors, your lease may not be subject to the unfair contract terms regime.

Australia Competition and Consumer Commission v Servcorp Pty Ltd [2018] FCA 1044

Since the introduction of the ACL amendments, the Australian Competition and Consumer Commission's ("**ACCC**") powers have expanded to be able to investigate unfair contract terms used for the detriment of small businesses.

2018 saw the ACCC investigate the transactions of Servcorp Pty Ltd ("**Servcorp**") and bring proceedings in the Federal Court seeking a declaration that some of the terms contained within Servcorp's standard contracts were unfair and void. Servcorp specifically provided office spaces for rent.

What clauses should you watch out for?

In reaching the decision in Servcorp, the Court considered, among other things, the significant imbalance the inclusion of the clause would have on one party over the other – and in this circumstance, the imbalance the clause would have to the Tenant over the rights of the Landlord. Declarations were made that the following clauses were unfair and void:

1. Termination as a result of a breach

A landlord cannot terminate the contract without cause (and with no monetary compensation payable to the Tenant). In particular, this clause will be deemed unfair where the Tenant is not granted the same rights – i.e. to terminate the lease with one month's notice, without cause.

Example: The Landlord at any time has the right to terminate this Lease, with one month's written notice to the Tenant, without cause. The Landlord will not be liable for any loss or damage caused to the Tenant as a result of a termination under this clause.

2. Variations to Costs

Where a Landlord is granted the right to vary the price under a Lease agreement without notice or consultation with the Tenant.

3. Forfeiture of Security Deposits where there is no obligation from the Landlord to return it

In this scenario, a responsibility was placed on the Tenant to request the refund of the security deposit within 360 days of the termination of the lease, which if not complied with, would result in the forfeiture of the deposit. It didn't help that the lease itself did not provide the requirement for the security deposit to be refunded at all.

The Court confirmed that if a responsibility is to be placed on one party, the positive obligation of the other should follow. For example, the clause may not have been regarded as unfair had a provision been made in the clause to say, *“where notification is provided within 360 days by the Tenant, the Landlord must return the security deposit, less any monies allowed to be withheld under the provisions of this agreement.”*

4. Automatic Renewal of Leases

Commonly seen in commercial contracts, automatic renewal clauses allow for a contract to be renewed where no termination notice has been provided by a certain date. In particular, clauses that lock a party into a higher price upon renewal.

5. Indemnity and Limitation of Liability

Clauses which limit the liability of the Landlord to no liability for any loss/damage caused are regarded as unfair under the terms.

Example: The Landlord will not be liable for any loss, injury, death, or damage (including consequential damages) to persons, property, or Tenant's business occasioned by ... from any acts or omissions of any other occupant or visitor of the Leased Property, or from any other cause beyond Landlord's control. A Tenant cannot sue the Landlord for such damages.

6. Notice of Breach

It is common practice that a party to a contract generally, unless a breach is material, should have the opportunity to rectify the breach. Clauses which grant a broad right to the Landlord to terminate the lease, notwithstanding the type of breach and without any notice to the Tenant, will be deemed unfair and void.

We recommend always having every commercial/retail lease reviewed by one of our solicitors at JHK before executing. Sometimes negotiating clauses can be daunting and we can assist in ensuring that your rights are protected!

What about the Landlords? – Tips and tricks to avoid being investigated by the ACCC

To show the ramifications of what *Servcorp* meant for the Landlord, the Court ordered:

1. Servcorp (and its employees and agents) participate in a compliance program with the ACCC;
and
2. Pay the ACCC's costs of \$150,000.00.

As such, this places even greater responsibility on Landlord's to ensure they are considering all aspects of their lease, including:

1. Reviewing your Landlord structures;
2. Reviewing the status of your Tenant; and
3. Reviewing any Lease/standard form Lease.

If you're a Landlord who would like assistance in reviewing any of the above, please give the team at JHK a call to discuss.