

[Interpretation statement IS2539 issued by Adjudication & Rulings in December 1998]

## **LEASE RENEWALS AND EXTENSIONS—SECTION 29, STAMP AND CHEQUE DUTIES ACT 1971**

### **Summary**

This interpretation statement sets out the Commissioner's view on the application of section 29 of the Stamp and Cheque Duties Act 1971. In particular, it focuses on the application of section 29 to instruments of extension and renewal of lease, as it is in this area that difficulties in interpreting the section have arisen. This interpretation statement replaces the relevant parts of the Commissioner's statement published in *Tax Information Bulletin* Volume Six, No.2 (August 1994), at pages 2 and 3.

Under section 29, if an instrument increases the rental payable under any lease, stamp duty will be computed on that instrument only to the extent of the increase.

In order for an instrument to be dutiable under section 29, a particular lease must already exist at the time an instrument increasing or agreeing to increase the rental is executed, and the instrument must be executed "during the term of the lease". Therefore, if an instrument is executed after the term of a lease has expired, section 29 will not apply and any such instrument will be dutiable under section 26 of the Stamp and Cheque Duties Act 1971.

If an instrument is executed to vary the term of a lease so that the lease is extended to cover a further period, effectively a new lease is created and the instrument will be dutiable under section 26. This will be the case whether or not there is a corresponding increase in rental.

If the term of a lease is renewed, effectively a new lease is granted following the termination of the earlier lease. This means that when a lease is renewed and the rental payable under the lease is increased, section 29 will not apply and the instrument evidencing the renewal will be dutiable under section 26.

If the term of a lease is varied by way of a memorandum of extension in Form L of the Second Schedule to the Land Transfer Act 1952, effectively a new lease is created and consequently the instrument will be dutiable under section 26 of the Stamp and Cheque Duties Act 1971.

If an option to extend the term of an unregistered lease is exercised unilaterally and the rental payable under the lease is increased, the instrument will be dutiable under section 29. Where on the other hand an option to extend the term of an unregistered lease is exercised bilaterally and the rental payable under the lease is increased, effectively the parties are varying the term of the lease and accordingly the instrument will be dutiable under section 26.

### **Legislation**

All legislative references in this item are to the Stamp and Cheque Duties Act 1971 unless otherwise stated.

Section 26 states:

- (1) Stamp duty payable on a lease shall be a lease duty computed -
  - (a) At the rate of 40c for each \$100, and for such amount as may be less than \$100, of -
    - (i) The maximum rent that is or may become payable under the lease in any year; or
    - (ii) If the lease is for a term of less than 1 year, the maximum rent that is or may become payable for that term; and
  - (b) At the rate of \$1 for each \$100 and for such amount as may be less than \$100, of any premium, fine, or other consideration whatsoever other than rent, payable under the lease.
- (2) If any lease is granted without consideration, or for a consideration that in the opinion of the Commissioner is inadequate, lease duty shall be computed on the value of the lessee's interest under the lease, determined in accordance with Part III of this Act, at the rate of \$1 for each \$100, and for such amount as may be less than \$100, of that value, to the extent that the lease is without consideration or the consideration for the lease is inadequate.

Section 29 states:

Notwithstanding anything in section 26 of this Act, lease duty shall be computed on every instrument whereby the rent or other consideration, or the value of the lessee's interest, under any lease is increased or agreed to be increased during the term of the lease as if the instrument were a new lease for a consideration equivalent to the increase in rent or other consideration, or the increase in the value of the lessee's interest.

Section 8 states:

For the purposes of this Act, the term "lease" means any instrument whereby at law or in equity -

- (a) Any leasehold interest in land; or
- (b) Any easement over land -

is created or agreed to be created; and includes any instrument by which the rent, consideration, or the value of the lessee's interest in any lease is increased or agreed to be increased.

Section 3 states:

For the purposes of this Act, the term "instrument" includes every writing, whether executed in New Zealand or elsewhere, affecting -

- (a) Any property situated in New Zealand; or
- (b) Any property situated or to be situated on the continental shelf beyond the territorial limits of New Zealand, but that pursuant to the Continental Shelf Act 1964 would or will be deemed to have taken place in New Zealand,-

but does not include a will or other instrument operating only by way of a testamentary disposition, or a bill of exchange.

Section 116 of the Land Transfer Act 1952 states:

- (1) The term of any lease may from time to time be extended by a memorandum of extension in Form L in the Second Schedule to this Act signed by the lessor and lessee for the time being and registered before the expiry of the then current term of the lease.
- (2) Subject to the provisions of this section, the memorandum of extension shall have the same effect as if it were a memorandum of lease for the extended term subject to the same covenants, conditions, and restrictions, with the necessary modification, as are contained or implied in the lease. Upon the registration of the memorandum of extension the estate of the lessee thereunder shall be deemed to be subject to all encumbrances, liens, and interests to which the lease is subject at the time of registration of the memorandum of extension. For the purposes of this subsection all references in any Act or in any agreement, deed, instrument, notice, or other document whatsoever to the lease or to the estate of the lessee thereunder shall, unless inconsistent with the context or with the provisions of this section, be deemed to be references to the lease as varied by the memorandum of extension or to the estate of the lessee thereunder, as the case may be.
- (3) The covenants, conditions, and restrictions contained or implied in the lease may be expressly varied, negated, or added to by the memorandum of extension.
- ...
- (4) Notwithstanding that the term of the lease is not extended, the covenants, conditions, and restrictions contained or implied in any lease may be expressly varied, negated, or added to by a memorandum of variation in the said Form L (with the necessary modifications) signed by the lessor and the lessee for the time being and registered before the expiry of the then current term of the lease.
- (5) The memorandum of extension or memorandum of variation may be registered in the same manner as the original lease:  
Provided that, notwithstanding anything to the contrary in section 66 hereof, a memorial of a memorandum of extension or memorandum of variation of any lease in respect of which a certificate of title has been issued under that section shall be entered on all relevant instruments and on that certificate of title, which shall have full validity and effect during the extended term.
- (6) If the land affected by the memorandum of extension or memorandum of variation is at the time of the registration of the memorandum subject to any mortgage, the memorandum shall not be binding on the mortgagee unless he has consented thereto in writing on the memorandum.

### **Application of the Legislation**

Section 26(1) imposes stamp duty on leases of commercial land and buildings. Stamp duty is payable at the rate of 40 cents per \$100 (or part thereof) on the maximum rent that is payable or may become payable under the terms of the lease in any year. If the lease is for a term that is less than a year, stamp duty is payable on the maximum rent that is payable or may become payable over the term of the lease.

Prima facie, every instrument that falls within the section 8 definition of lease is dutiable pursuant to section 26 at the specified rate.

Under section 29, if an instrument increases the rent or other consideration, or the value of the lessee's interest, under any lease stamp duty will only be computed on that instrument to the extent that there is an increase in rent or other consideration or there is an increase in the value of the lessee's interest.

***Example 1 – rental increased at some point during the term of the lease***

C Ltd leases a commercial building from D Ltd for a ten-year period from 1 December 1998 at an annual rental of \$50,000 per annum. Lease duty of \$200 is paid. Under the lease, the rental is to be reviewed after five years by agreement, and if no agreement can be reached, by arbitration. By way of an instrument dated 24 December 2003, the rental is increased to \$75,000 per annum.

The lease provides that the rental payable is to be increased at a specified date in the future, and an instrument effecting this increase has been executed. In this situation section 29 will apply and stamp duty of \$100 will be payable on the instrument.

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The use of the words “under any lease” in section 29 indicate that in order for an instrument to be dutiable under the section, a particular lease must already be in existence at the time an instrument increasing or agreeing to increase the rent or other consideration, or the value of the lessee’s interest is executed. This indicates that instruments will not be dutiable under section 29 if:

- a lease is entered into for the first time; or
- during the term of a lease a new lease is agreed upon and entered into (including occasions where by operation of law an instrument effects a new demise).

In these situations it cannot be said that the instrument is entered into under “any lease” (meaning the specific lease in question), as a new lease is, in effect, created. Any such lease will be a fresh demise, dutiable under section 26.

The wording of section 29 also indicates that in order for the provision to apply, the instrument increasing or agreeing to increase the rent or other consideration, or the value of the lessee’s interest, under any lease must be executed “during the term of the lease”. Therefore, if an instrument is executed after the term of a lease has expired, section 29 will not apply and any such instrument will be dutiable under section 26.

***Example 2 - entering into a lease***

F Ltd enters into an agreement to lease a commercial building from S Ltd for a four-year period from 1 December 1998, at an annual rental of \$50,000 per annum.

Stamp duty of \$200 is paid under section 26(1). A new lease has been entered into between the parties, there is no existing lease and therefore section 29 has no application.

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***Example 3 - lease expires, new lease agreed***

H Ltd enters into an agreement to lease a commercial building from L Ltd for a four-year period from 1 December 1998 at an annual rental of \$50,000 per annum. Lease duty of \$200 is paid under section 26(1).

On 31 March 2003 the parties agree to enter into a new lease for a further four-year term, and further lease duty of \$200 is paid under section 26(1).

The existing lease entered into on 1 December 1998 expired on 1 December 2002. Therefore, section 29 does not apply – it applies only if an instrument is entered into under an existing lease. In this instance the lease has expired and the parties have entered into a new lease.

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### *Varying the terms of a lease*

The parties to a lease may wish to vary their existing rights under the lease so as to extend or renew its term, or alternatively to introduce an option to renew or extend the term of the lease at some time in the future.

In *Re Savile Settled Estates, Savile v Savile* [1931] All ER 556, the plaintiff granted two leases, both for a period of 60 years. The plaintiff later sought to vary both leases by substituting a term of 100 years from the date when the leases took effect. Maugham J stated at page 557:

I think there is no doubt that the law, as stated in Halsbury's Laws of England, 2<sup>nd</sup> Ed., vol. 20, p.271, para. 303, is that any arrangement between the landlord and tenant which operates as a fresh demise will work as a surrender of the old tenancy...

...

I should add that, in my opinion, an alteration of an existing lease, so that it will operate for a term extending beyond the original term, can only operate in law as a surrender of the old lease and a grant of a new one...

In *Baker v Merckel* [1960] 1 QB 657, by a lease under seal in 1947, the lessor demised premises to the lessee for a term of seven years from 1 November 1946, at a yearly rent of £150. A supplemental deed made between the lessor and the lessee in March 1949, and endorsed on the lease provided that: "if the tenant shall give notice...to the landlord before Nov 1, 1952, of such his desire the within written lease thereupon shall read, construed and take effect as though the term thereby granted was for a period of eleven years from Nov 1, 1946...". In 1951 the lessee assigned the lease and option to the first assignee, who in turn assigned it in the same year. In 1952 the second assignee exercised the option to extend the term of the lease, and subsequently in that year assigned it to the last assignee, who in 1957 gave up possession owing rent and being in default on the repairing covenant. The lessor brought an action against the original lessee claiming rent and damages for breach of covenant. Sellers LJ at pages 669-670 said:

[T]he supplemental deed of March, 1949, had the effect in law of supplanting the original lease by a new one, the terms of which were derived from reading the two documents together. The effect is to include the option as if it had been in the original lease. There was therefore, whilst the lessor and lessee were in direct contractual relationship, a contractual right by unilateral action of the lessee to enlarge the term from seven to eleven years and to vary by the same action the provisions as to painting of the outside of the premises.

... what was done in 1949 was not a mere agreement for the future; it was the granting and obtaining by mutual agreement of a right which the lessee could at his option exercise and which at once became an enforceable part of the contract. The agreement itself did not enlarge the original term, but it provided that it might be extended without any further consent of the lessor and was therefore a substantial alteration of a character to which the rule applies.

Whilst the agreement for the option was consensual and in law effected a new lease, the exercise of the option...was unilateral...Here the notice had the effect of enlarging the demise, of its own force. It was in fulfilment of and in accordance with the agreement and not inconsistent with it or a variation of it. No new bargain was struck in 1952. That which had been agreed as permissible became effective.

Pearce LJ at pages 671-672 said:

I think it would be wrong to hold that the demise was unaffected by the option until its exercise in 1952.

...

It is not easy on the authorities to avoid the implication of a surrender and fresh grant where such a change is made in the term, viz., a variation of a term of seven years with an option for a further four years.

In *O F Gamble Pty Ltd v Whitmore Pty Ltd* (1990) 2 WAR 327, Commissioner Anderson QC made the following relevant comments at pages 332-334:

Any variation having the effect of extending the term of a lease is, as I have observed, held to work a surrender and fresh grant. In *Baker v Merckel* [1960] 1 QB 657, it was held that the insertion into a lease by supplemental deed of an option to extend the demise from seven years to eleven years had the same effect. It had the effect of supplanting the existing lease by a new one. It was not necessary for the option actually to be exercised. The mere insertion, by variation, of an option to extend, sufficiently changed the estate to bring the doctrine of surrender and fresh grant into operation.

Counsel for the defendant pointed out the distinction between the facts of *Baker v Merckel* and the facts of the instant case. In the instant case, the option does not provide for the enlargement of the existing term; but, instead provides that the lessee can “require the lessor...to grant to the lessee a new lease of the property for a further term of eight years...on the same terms and conditions...”. The point of distinction is that in *Baker v Merckel* the option was to extend the existing demise, whereas in the instant case the option is for the grant of a new lease. This seems to be a very fine distinction.

...

In my opinion, a demise with a covenant of renewal is an estate or interest in the land that is different from a demise containing no covenant of renewal, and this is so regardless of whether the covenant of renewal is in a form which provides for the enlargement of the existing term, or is in a form which provides for the grant of a new lease. I would therefore hold that the introduction into a lease by deed of variation of an option of renewal works a surrender of the old lease by operation of law and a grant of a new lease.

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It is true that, when an option of renewal is exercised, the position is that there is a new lease, a new demise. Plainly, that new lease or new demise does not come into existence until the option is exercised; but that is not to say that if the option of renewal is introduced by variation, the variation is not also effective to create a new lease.

In *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477, the question to be decided was whether a document between the lessee and the landlord in 1961 increasing the rent, and/or a similar deed between the two parties in 1968 had the effect of creating a new contract of tenancy between those persons, and consequently a surrender and cesser of the 1941 contract of tenancy.

The Court found that a mere agreement between landlord and tenant for an increase in rent did not necessarily result in a surrender of the existing tenancy and the creation of a new one. Delivering the judgment of the court, Russell LJ stated at page 496:

It is not possible simply to convert the existing estate in land into a different estate by adding more years to it, and even if the parties use words which indicate that this is what they wished to achieve the law will achieve the result at which they are aiming in the only way in which it can, namely by

implying a fresh lease for the longer period and a surrender of the old lease: see *In re Savile Settled Estates* [1931] 2 Ch 210; *Baker v Merckel* [1960] 1 QB 657.

On the basis of the above discussion it is evident that:

- Any arrangement between the lessee and lessor which operates as a fresh demise will work as a surrender of the old tenancy.
- Some terms of a lease can only be varied by an instrument which operates as a surrender and regrant, e.g. the lengthening of the term of a lease.

On this basis it is evident that if an instrument is executed varying the term of a lease so that the lease is extended to cover a further term, the lease will be dutiable under section 26. This will be the case whether or not there is a corresponding increase in the rental or other consideration, or the value of the lessee's interest in the lease.

***Example 4 – parties agree to vary the terms of the lease so as to extend its term***

K Ltd leases a commercial building from B Ltd on 1 December 1993 for a term of three years at a rental of \$100,000 per year. Lease duty of \$400 is payable.

On 30 October 1996 the parties enter into negotiations and decide to vary the lease and extend its term for another 3 years, increasing the rent payable to \$150,000.

The variation of a lease so that its term is lengthened operates as a surrender and regrant by operation of law. On this basis lease duty is assessable pursuant to section 26, and stamp duty of \$600 is payable on the new lease.

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***Renewals and extensions of lease generally***

Many leases include a provision granting the lessee a right to extend the term of a lease or to renew the lease for a further term or terms at the end of the current term. This right may be presented as a covenant on the part of the lessor to grant a further term or terms, or as an option to renew or extend the lease in favour of the lessee. Alternatively, the parties to a lease may wish to renew or extend a lease by varying their existing rights under a lease during the term of the lease or after the lease has expired.

A distinction between an “extension” of a lease and a “renewal” of a lease is generally accepted, albeit that it is sometimes difficult to determine.

In *Brooke v Clarke*, 1B & Ald. 399, the Court considered the term “extension” at page 399:

“Extension”, is a term properly used for the purposes of enlarging, or giving further duration to, any existing right, but does not import the re-vesting of an expired right; that would not be an ‘extension’ but a ‘re-creation”.

In *Muller v Trafford* [1901] 1 Ch. 62, the Court found that a covenant by an under-lessee with his sub-lessee to grant an “extension” of the latter’s term on the under-lessee obtaining a further term from the freeholder, “is not a covenant to renew”.

In *Regor Estates v Wright* [1951] 1 KB 689, the Court found that a “renewal of a tenancy” meant an agreement for a fresh tenancy following on the termination of the earlier one.

In *Green v Wilson & Horton* (1983) 2 NZCPR 94, Savage J at page 102 said:

I think it is clear that a renewal of a lease for more than three years, which in effect is **the grant of a new lease**, is required to be in writing and thus comes within s 2(1)(b) Contracts Enforcement Act 1956.

And later at page 103:

A further difficulty that would lie in the way of the plaintiff is that for a lessee to take advantage of a right of renewal, **which is in effect an option to a new lease...**

*Halsbury's Laws of England (4th ed. reissue (1994) vol 27(1), para 467)* states:

Where a lease contains an option to renew the lease the exercise of the option will ordinarily involve the creation of a new lease, and as regards the new lease there will be no privity of contract between the landlord and the original lessee under the old lease which contained the option to renew: however, the right given to a tenant may be simply to extend the term, in which case privity of the contract will endure between the parties, even during the extended term.

*Halsbury's* indicates that where a lease contains a renewal option, the exercise of the option will not ordinarily constitute the extension of the original lease's term.

In *Brooker's Land Law* Volume 2, Ch 11, Leases, at 11-125:

A preliminary question, which may be of importance, is the construction of the lease provision to determine whether the lessee has been granted an option to renew the lease, **meaning to be granted a new lease** on the same or substantially the same terms as the expiring term, or alternatively, **an option to extend the present lease term for a further period**.

Woodfall, *Landlord and Tenant*, Release 38 at page 18/3 states that:

Sometimes a lease contains an option to extend the term rather than an option to renew it. The grant of a lease pursuant to **an option to renew creates a new interest, whereas the extension of the term keeps the old term in being**, with the consequence that the original tenant is bound by the extension, even where the option is exercised by an assignee. *Baker v Merkel* [1960] 1 QB 657.

The following points can be taken from the above discussion:

- The “renewal” of a lease, in its ordinary sense, implies the granting of a new lease following on from the termination of an earlier lease.
- The “extension” of a lease, in its ordinary sense, implies a continuation of the old lease for a further period, but does not import the re-vesting of an expired right.

If it is unclear as to the nature of a further term contemplated, it will be necessary to look at “the true construction of the respective rights and obligations as expressed in the relevant documentation - Per Henry J in *Sina Holdings Ltd v Westpac Banking Corporation* [1996] 1 NZLR 1 at page 5.



### ***Renewals of lease – application to the Stamp and Cheque Duties Act 1971***

The “renewal” of a lease, in its ordinary sense, implies the granting of a new lease following on the termination of an earlier lease. On this basis, if a lease is renewed as well as the rental being increased, section 29 will not apply and the instrument evidencing the renewal will be dutiable under section 26.

#### ***Example 5 – option to renew a lease***

M Ltd leases a commercial building from G Ltd on 1 December 1993 for a term of ten years at a rental of \$50,000 per year. The lease contains an option to renew the lease for a period of 5 years. Lease duty of \$200 is payable.

In June 2003, M Ltd exercises its right to renew the lease for a further five years and the rental is increased to \$70,000 per year.

In this situation stamp duty of \$280 is payable under section 26(1). The renewal of a lease constitutes the surrender of the lease followed by the regrant of a new lease. Therefore, section 29 will not apply.

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### ***Extensions of lease – application to the Stamp and Cheque Duties Act 1971***

The word “extension”, when used in its proper and usual sense in connection with a lease, means a prolongation of the previous leasehold estate. This could be seen as supporting the view that when an option to extend a lease is exercised it is merely a continuation of the existing lease, and therefore stamp duty on the instrument evidencing the extension is assessable under section 29.

However, there are a number of ways the terms of a lease could potentially be extended which could influence the application of section 29, dependent on whether the lease is registered or unregistered.

#### ***Registered leases***

If a lease is registered under the Land Transfer Act 1952 (LTA), the parties may agree to extend the term of the lease by way of memorandum of extension under section 116 of that Act.

Under section 116 of the LTA, the term of a registered lease may be extended by the registration of a memorandum of extension in Form L in the Second Schedule to the Act. The use of Form L is mandatory, and the memorandum of extension must be signed by the lessee and lessor. The memorandum of extension must be filed before the expiry of the current term of the lease.

Section 116(2) of the LTA stipulates that upon registration of the memorandum of extension the memorandum shall have the same effect as if it were a memorandum of lease for the extended term subject to the same terms and conditions contained or implied in the lease. Under this section, all references in any Act or in any agreement,

deed, instrument, notice, or other document are deemed to refer to the lease as varied by the memorandum of extension.

The wording of section 116 of the LTA is clear that a memorandum of extension must stand on its own terms and conditions rather than on those of the previous lease. The memorandum of extension is treated as having the same effect as a memorandum of lease, and references to the lease are deemed to refer to the lease as varied by the memorandum of extension.

As discussed previously, some terms of a lease can be varied only by an instrument which operates as a surrender and regrant, e.g. when the term of a lease is lengthened. Under section 116 of the LTA, the length of term of the premises demised is clearly being altered: the parties are entering into a bilateral arrangement whereby the terms of their lease are materially varied.

On this basis, if the term of a lease is varied by way of a memorandum of extension in Form L of the Second Schedule to the LTA, the effect is that a new lease is created and accordingly the instrument will be dutiable under section 26 of the Stamp and Cheque Duties Act. Section 29 will not apply, as the extension (by way of variation) constitutes a new lease and section 29 applies only to instruments increasing the rental payable under an existing lease.

This view is supported by comments made in *Law of Stamp Duty in New Zealand*, 3<sup>rd</sup> ed., where Adams states at page 186 that:

*Stamp duty on extension of leases* – An extension of a lease – e.g., one executed in the form prescribed by s.116 of the Land Transfer Act 1952 – is liable to the same duty as a lease, for it is in fact a fresh demise...

***Example 6 – parties agree to vary the terms of the lease so as to extend its term***

A Ltd leases a commercial building from B Ltd on 1 December 1993 for a term of three years at a rental of \$100,000 per year. A condition of the lease provides that the parties may agree to extend the term of the lease for a further 3 years at some time in the future. Lease duty of \$400 is payable.

On 30 October 1996 the parties enter into negotiations and decide to extend the term of the lease for another 3 years and increase the rent payable to \$150,000 under section 116 of the LTA.

Lease duty of \$600 is payable on the new lease. The extension of the term of a lease under section 116 of the LTA operates as a surrender and regrant by operation of law. On this basis lease duty is assessable under section 26 of the Stamp and Cheque Duties Act 1971.

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*Unregistered leases*

If a lease is not registered for the purposes of the LTA, the lease may be extended or varied by deed executed by both landlord and tenant. Extensions of equitable leases may be effected by deed or written agreement. The parties may agree before the end of the term to the extension, or alternatively the lease may not contain an option to

extend the term of the lease and the parties may agree before the end of the term to vary the terms of the lease so as to extend its term.

The application of section 29 to the situation where an instrument merely realising a right that is already available under an existing lease is executed is not clear. It is apparent, for example, that there will be situations when a lessee may have an option, to be exercised bilaterally or unilaterally, to extend the term of a lease. If such an option is taken up, is a new leasehold interest created or is the term of the old lease merely increased? This is relevant in so far as section 29 relates to instruments whereby the rent or other consideration, or the value of the lessee's interest, under any lease is increased or agreed to be increased during the term of the lease.

In *Baker v Merckel* an option to extend the term of a lease was exercised unilaterally. The Court in that case found that the original variation of the lease was consensual and in law effected a new lease. The new lease which was to be gathered from reading the original lease and the supplemental deed, required nothing more than the option to be exercised by way of a unilateral act, and therefore the exercise of the option was merely an extension of the current lease rather than the creation of a new lease: that creation took place when the earlier lease was created. The Court drew a distinction between a consensual act varying the terms of a lease and a unilateral act arising out of and in accordance with the terms of a lease. Sellers LJ at page 670:

Whilst the agreement for the option was consensual and in law effected a new lease, the exercise of the option...was unilateral...Here the notice had the effect of enlarging the demise, of its own force. It was in fulfilment of and in accordance with the agreement and not inconsistent with it or a variation of it. No new bargain was struck in 1952. That which had been agreed as permissible became effective.

*Baker v Merckel* supports the view that a distinction can be drawn between a consensual act varying the terms of a lease which amounts to the surrender and regrant of a lease, and a unilateral act arising out of and in accordance with the terms of a lease which has the effect of extending the existing lease's term.

On this basis, if an option to extend the term of an unregistered lease is exercised unilaterally, section 29 is of potential application in assessing duty on any increase in rental.

Until an option is exercised, it can only be said to offer a future possibility that the lease will be extended. If the parties to a lease decide to exercise the option, they are in effect agreeing to a consensual variation of the terms of the lease and accordingly a fresh demise is created. This situation is to be distinguished from that where a lease contains an option to extend the term of the lease by virtue of a party's unilateral act without any element of bargain. As a result of the unilateral act there is an enlarging of the existing demise.

#### ***Example 7 – option to extend the term of lease***

By deed dated 1 December 1993, K Ltd leases a commercial building from J Ltd for a term of two years at a rental of \$100,000 per year. Lease duty of \$400 is payable. Under a condition of the lease, the lessee may extend the term of the lease for a further year, before its expiry, by notifying the lessor of that intention. In that event the rent for that year will be increased to \$150,000.

Before the expiry of the lease, the lessee exercises the option to extend the lease for a further year. The exercise of an option to extend the term of a lease implies the continuation of the existing lease, and accordingly duty is assessable under section 29. Duty of \$200 is payable.