ASSIGNMENT OF MOTEL LEASES

Lessor's Consent

When a motel business is sold by way of assignment of the lease, normal commercial practice is that the landlord/lessor must consent to such assignment to the purchaser. (Often the lessor will have first right of refusal to purchase the business or take up the residual of the lease, however that is a separate matter and is dealt with separately.)

The wording of different leases will vary, however usually the words give effect to the landlord's right to withhold consent to assignment, however not to do so unreasonably or with undue delay (both of which are positions protected at law). In our experience, this aspect often seems misunderstood by lessors.

The procedure for obtaining consent to assignment is generally that the incumbent lessee, usually via the lawyers, will present information to the lessor relating to the background and financial position of the proposed purchaser. This is intended to illustrate that the purchaser is "respectable, responsible, solvent and suitable" or words to that effect. If the proposed purchaser has an unsatisfactory business or tenancy track record, a history of insolvency, or appears to be assuming an unusually high level of debt such that there is a rational concern about its ability to pay rental and perform its other obligations under the lease, withholding consent on that basis may be reasonable.

Where the current lessee is in breach of the lease, be that in terms of payment of rental or the need to address maintenance issues which have not been complied with under the terms of the lease, the lessor may require the rental be paid and maintenance to be brought up to date as a condition of providing its consent.

Sometimes lessors seek to meet with prospective purchasers, which seems fine if all are in agreement with that. We get the impression though that in many instances, the lessor sees this situation as similar to an employment application. In plain language, the lessor does not need to like the purchasers, and personal dislike alone would not ordinarily be a proper basis for withholding consent.

An issue that we seem to be encountering more frequently of late, is where the lessor seeks to impose conditions on the consent in order to obtain advantage/s which it currently does not have under the lease. Examples include where a lessor seeks to change the wording of certain clauses relating to rent reviews, maintenance obligations or maintenance funds, and more recently to require variations to the lease to include provision for a Rental Bond or Bank Guarantee for the rental payable under the lease.

The latest version of the Deed of Lease released by The Law Association of New Zealand, (Seventh Edition, November 2024), includes provision for such bond or guarantee which the lessor may seek to have included in a Deed of Lease being negotiated. These clauses are not included in almost all Motel Leases currently in place. The Seventh Edition Deed of Lease is used mainly for commercial or industrial premises which will almost always have shorter terms than most motel leases, often with rights of renewal. In such situations, most often the commercial/industrial lessee is not investing considerable capital to acquire the lease, as would be the case when purchasing a motel business. It is understandable that the commercial/industrial landlord would seek some protection from a defaulting lessee who may seek to walk away from their obligations. For the motel operator, the considerable capital invested in the acquisition of that lease could be at stake should they be in breach of their lease obligations.

Where disputes around this point have arisen in the past, we have seen legal advice stating that a request for a variation to an existing lease as a condition of consent to assignment is an improper attempt by the

lessor to obtain a collateral advantage which it currently does not have under the lease. We are advised that under the Property Law Act 2007 (sections 225 and 227) that consent to assignment is not to be unreasonably withheld or delayed, and that it would be deemed to be unreasonable to require such consideration for consent, or to seek to impose on the lessee an unreasonable condition or precondition.

When a lessor is appearing to be acting unreasonably in this situation the vendor of the business being sold will consider the prospect of losing the sale, either because the consent is withheld or delayed, or because the purchaser understandably becomes reluctant to enter into a lease contract with what would seem to be an unreasonable landlord. This is where the vendor's lawyer becomes important, by pointing out to the lessor's lawyer that such conduct may breach the Property Law Act and may expose the lessor to a claim for damages and costs for any loss suffered as a consequence of the collapsed sale. Of course, each case turns on its own facts, including the terms of the lease, the grounds for withholding consent and whether the refusal was unreasonable in the circumstances.

This article is not intended to offer legal advice or opinion, independent professional legal advice should always be sought on such matters. It is hoped that the contents will provide a perspective that is often overlooked or misunderstood in these matters.

Any questions or comments on this subject would be very welcome.

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