

COMMON TRAPS IN ASSIGNMENTS OF LEASE

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Australian Institute of Conveyancers

1 INTRODUCTION

Standard operating procedure in relation to assignments of lease will vary according to the provisions of the relevant lease, the nature of the market and people's perception of the market and where it is heading for example, whether space is freely available or not, the number of prospective occupants for that space and whether or not the lease is a retail lease.

If there is a 'space squeeze' and there are a number of prospective occupants for premises, rapidly rising rents may make it attractive for a landlord to in the case of a request to assign the lease, enter into a new lease rather than consenting to an assignment.

A lease may provide that an assignment of lease may trigger a market rent review.

The key take home message of this paper is that you must follow the procedure contained in the lease and, if the lease is subject to the Retail Leases Act (**Act**), you must also ensure that you have complied with the Act.

2 SECTION 133B CONVEYANCING ACT

s133B of the *Conveyancing Act 1919* is the key provision that is implied into leases, relating to assignment.

s133B provides as follows:

'(1) *In all leases whether made before or after the commencement of the Conveyancing (Amendment) Act 1930 containing a covenant, condition, or agreement against assigning, underletting, charging, or parting with the possession of demised premises or any part thereof without licence or consent, such covenant, condition, or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject:*

(a) *to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent, and*

....'

The section does not impose an obligation on a landlord breach of which would entitle a tenant to claim damages, but rather has the effect that, where consent is unreasonably withheld, the lack of consent is ineffective against an assignment (*Harvey v Walker* (1945) 46 SR (NSW) 180).

It is common for an assignment clause to contain a complete prohibition against assignment or subleasing in the first subsection and then a list of the preconditions on which the landlord may consent to an assignment in following subsections.

Structuring the clause in this way is an attempt to circumvent the provisions of s133B as that section only applies to leases which contain a covenant, condition or agreement against assigning **without licence or consent**. On the face of it, it does not apply to covenants or conditions which prohibit assignment entirely.

The extent of s133B was discussed by the New South Wales Supreme Court in *Tamsco Ltd v Franklins Ltd* [2001] NSWSC 1205. In paragraph 47 of that judgment Young CJ stated that if one wished to set down a series of conditions that the tenant must fulfil before the lease can be assigned, one must not make the assignment subject to consent, but rather draft the lease to remove any reference to consent and to set out the preconditions for the assignment.

His Honour went on to state in paragraph 48 of that judgment that if one did not draft the lease in that way, then s133B did not prevent the parties from specifying guidelines as to whether it is reasonable to grant or refuse the consent to assign. In that case, the question is still whether the consent was unreasonably withheld, but in considering that question you take into account the matters specified in the lease. It is not necessarily the case that just because one of the factors in the clause is not satisfied that consent to the assignment must be refused.

Hamilton J in *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349 (27 April 2000) held that even where there was an absolute prohibition on assignment in the initial part of the clause if a subsequent part of the clause required the landlord's consent, then s133B would apply to that part of the clause.

The judgments in this area rely heavily on the wording of the relevant clause in the lease, so it is important to review a case carefully before seeking to rely on it.

Section 43 provides that Section 133B of the *Conveyancing Act 1919* does not apply to a retail shop lease to the extent that the section is inconsistent with this Act (or any conditions implied in the lease by this Act).

3 THE ASSIGNMENT PROCEDURE - RETAIL LEASES

Assignment of retail leases is dealt with in Part 5 of the *Retail Leases Act (NSW) 1994 (Act)*. All references to sections in this part of the paper are to sections of the Act.

The relevant sections are 39, 40, 41, 41A and 43. I **attach** copies of them to this paper.

There is a new form of disclosure statement from 1 January 2011. A copy of the form of the disclosure statement is available on the New South Wales legislation website at:

<http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2010-677.pdf>

3.1 Landlord not obliged to agree to terminate one lease and grant a new lease

While the *Retail Leases Act* contains the procedure where a landlord is obliged to consent to an assignment on certain conditions, there is no obligation placed on a landlord to agree to the termination of one lease and the grant of a new lease to the replacement tenant. (*Prsa & Anor v Polymeris* [2000] NSW ADT 108).

3.2 Withholding consent - Section 39

Section 39 specifies the grounds on which consent to assignment can be withheld and provides that a landlord is not entitled to withhold that consent in any other circumstances.

The 3 main circumstances in which a landlord can withhold consent are:

- (a) if the proposed assignee proposes to change the use to which the shop is put;
- (b) if the proposed assignee has financial resources or retailing skills that are inferior to those of the proposed assignor; and
- (c) if the lessee has not complied with Section 41 of the Act, the procedure for obtaining consent to assignment.

There are also some special exceptions for shops at airports.

3.3 **Examination of ability to refuse consent on basis of change of use**

Do not take at face value the fact that a new tenant is using the premises for the same purpose as the existing tenant.

(a) ***Jewell Bay Pty Ltd v DPT Operator Pty Ltd***

Judicial Member Fox considered the extent of the landlord's ability to refuse consent to assignment on the basis that the use to which the shop is put would be changed in the case of *Jewell Bay Pty Ltd v DPT Operator Pty Ltd [2009] NSW ADT 225*.

This case is an example not to take the permitted use at face value.

Background

The 'Coast' restaurant at Cockle Bay Wharf wanted to assign its lease to Gourmet Pizza Kitchen (**GPK**). The landlord refused consent on the basis that a GPK restaurant would be a change of use from the Coast restaurant.

The permitted use under the lease was 'contemporary modern Australian licensed restaurant with an Italian and Mediterranean bias'.

Coast had not been a financial success for some time and in order to avoid ongoing losses it was placed on the market for sale in September 2008. In February 2009 GPK offered to take an assignment of the lease. GPK had traded in Sydney for about 10 years and, at the time, operated six suburban restaurants.

The Coast restaurant was a restaurant where the dining experience was close to fine dining and Gourmet Pizza Kitchen's offering was mainly of pizzas with various pasta dishes.

Judgment

Fox JM stated in his judgment that the actual use to which the tenant put the premises was not the starting point of his consideration. Instead he was concerned with the possible use of the premises within the authorised use definition.

The parties led evidence as to what the meaning of the permitted use of the Coast restaurant was.

The Tribunal decided that the permitted use meant that the restaurant 'must have an emphasis on fresh seasonal produce, which entails the menu which changes quite often, perhaps to reflect the four seasons, as well as having a daily market menu to reflect that which was fresh in the market in recent days. Inherent in that is wide variety of food items combined or prepared in an

innovative manner, with some opportunity to match up appropriate wines to make up the structured dining experience.'

Gourmet Pizza Kitchen specialised in the mass produced market allowing relatively little variation in the menus. There was evidence that if an item could not be guaranteed to have a 6 month supply, it could not be placed on the menu. This meant that GPK's use was not within the use allowed by the lease and the landlord was entitled to refuse consent to the assignment.

The Tribunal also considered *Castle Mall Fine Foods Pty Limited v Queensland Investment Corporation [2003] NSW ADT 207*. In that case, the panel felt that the landlord was bound by the width of the use which it had allowed to develop over the years, rather than the more restricted use contained in the lease.

3.4 Procedure for obtaining consent to assignment - Section 41

Section 41 of the *Retail Leases Act* specifies the procedure from obtaining consent to assignment. That procedure is implied into all retail leases.

If a tenant does not follow the procedure in section 41, the landlord may still consent to the assignment, but is not obliged to. (*Blinoff v Simmons [2007] NSWCA 2330*)

Section 41 provides that:

A retail shop lease is taken to include the following provisions:

- (a) *A request for the lessor's consent to an assignment of the lease must be made in writing and the lessee must provide the lessor with such information that the lessor may reasonably require concerning the financial standing and business experience of the proposed assignee. The lessee may provide the lessor with a copy of a statement in writing that contains the information that is contained in or required to complete the prescribed form that has been provided to the proposed assignee. The statement may be provided if the assignment is in connection with the lease of the retail shop that will continue to be an ongoing business. The layout of the statement need not comply with that of the prescribed form.*
- (b) *Before requesting the consent of the lessor to proposed assignment of the lease, the lessee must furnish the proposed assignee with a copy of any disclosure statement given to the lessee in respect of the lease, together with details of any changes that have occurred in respect of the information contained in that disclosure statement since it was given to the lessee (being changes of which the lessee is aware or could reasonably be expected to be aware). The lessee may provide the proposed assignee with a copy of a statement in writing that contains the information that is contained in or required to complete the prescribed form. The statement may be provided if the assignment is in connection with lease of a retail shop that would continue to be an ongoing business. The layout of the statement need not comply with that of the prescribed form.*
- (c) *For the purpose of enabling the lessee to comply with paragraph (b), the lessee is entitled to request the lessor to provide the lessee with a copy of the disclosure statement concerned and, if the lessor is unable or unwilling to comply with such a request within 14 days after it is made, paragraph (b) does not apply to the lessee.*
- (d) *The lessor must deal expeditiously with a request for consent and is taken to have consented to the assignment if:*

- (i) *the lessee has complied with paragraphs (a) and (b); and*
- (ii) *the lessor has not, within 28 days (or another period prescribed instead by the regulations) after the request was made or after the lessee complied with those paragraphs, whichever is the later given notice in writing the lessee either consenting or withholding consent.*

3.5 **Ability for tenant to ask landlord to provide it with a copy of the disclosure statement - section 41(c)**

The tenant is only entitled to ask the landlord to provide it with a disclosure statement under section 41(c) to enable it to comply with section 41(b), that is to provide the proposed assignee with a copy of the disclosure statement.

The tenant is not entitled to use section 41(c) as a means to establish an automatic consent to the assignment under section 41(d). Accordingly, when seeking to establish automatic consent under section 41(d), the tenant must provide evidence that it asked for the disclosure statement specifically to comply with section 41(b) and possibly even that it did not already have a copy of the disclosure statement. (*Indian Taj v Gilany* [2004] NSWSC 1249 (16 December 2004))

3.6 **Automatic consent - section 41(d)(ii)**

Section 41(d)(ii) provides that the landlord must either consent or withhold consent to the assignment within 28 days after the tenant requests consent to an assignment in order to avoid automatically consenting to the assignment.

However, the provision will only operate if the tenant has followed the procedure specified in paragraphs (a) and (b) of Section 41 and the request for consent is complete.

Accordingly, it may be necessary for the tenant to send an initial letter to the landlord asking what details the landlord requires concerning the financial standing and the business experience of the proposed assignee. In that case it will not be the first letter that constitutes the request for a consent to assignment under Section 41, but the letter which provides the landlord with the required information. It is important that that letter contain an actual request for consent.

A response to a request for consent by the landlord in the form of '*I will not consent unless you do the following things:*' is not a sufficient response under s41. (*Indian Taj v Gilany*)

3.6 **Multiple requests for consent - section 41(d)(ii)**

Fox JM stated in *Jewell Bay Pty Ltd v DPT Operator Pty Ltd* that once a request for consent had been refused by the landlord, any later requests had no relevance. This was because if they were to have any relevance, it would encourage parties to indulge in a series of repeated requests in the hope that one of those, by chance, happened not to be answered by a refusal within 28 days and so provided an automatic consent to the assignment.

3.7 **Release of assignor and guarantor - section 41A(1)**

In 1999, the *Retail Leases Act* was amended to release the assignor, guarantor and covenantor of a retail lease in certain circumstances.

It is commonly believed that the release provided by section 41A is a full release. Following on from this, many lawyers contend that the deed of consent to assignment should contain a full release of the assignor.

However, the section only applies to leases entered into after 1 March 1999 and section 41A(1) provides that the release:

- (a) is only in relation to the payment of money by the assignee;
- (b) will only operate if the assignor gave (before the start of the period of 7 clear days before the assignment date):
 - (i) the lessor a copy of the assignor's disclosure statement as referred to in section 41A; and
 - (ii) the proposed assignee a copy of the assignor's disclosure statement as referred to in section 41A(b); and
- (c) is only available in connection with the assignment of the lease of a retail shop that will continue to be an ongoing business.

Section 41A(2) provide that the section does not apply if the assignor's disclosure statement contains information that is materially false or misleading or incomplete.

Andrew Lang suggests that the release of obligations to 'pay money' will cover rent, outgoing and other monetary liabilities, but possibly not claims for damages eg a failure to repair (*Lang's Commercial Leasing in Australia*, Vol 1 para 47-725)

On the face of it, you may be surprised that all assignors do not give the relevant disclosure statement so as to take advantage of the release.

In reality, the assignor's disclosure statement requires quite detailed disclosure of items.

The form of disclosure statement in schedule 2 of the Act requires the assignor to certify and the assignee to acknowledge that:

- (i) The assignor has provided the assignee with the lessor's disclosure statement in respect of the lease together with details of any changes to the information contained in the disclosure statement since the statement was given.*
- (ii) The assignee has been advised that there are no outstanding notices in respect of the lease.*
- (iii) The assignee has been advised that there are no outstanding notices from any authority in respect of the retail shop.*
- (iv) The assignee has been advised that there are/are not any encumbrances on the lease.*
- (v) The assignee has been advised that there are/are not any encumbrances on, or outside ownership of, any of the fixtures and fittings within the retail shop.*
- (vi) The lessor has/has not conferred any rent concessions or other benefits on the assignor during the term of the lease. The concessions and benefits conferred on the assignor are:*

(vii) *The assignor has provided to the assignee sales figures and relevant information as to the trading performance of the retail shop for the past three years or for such period as the lease has been in operation if that period is less than three years. The total (aggregate) sales figure for the past 3 years, or such lesser period as the lease has been in operation, is as follows:*

(i) *(period/year)\$*

(ii) *(period/year)\$*

(iii) *(period/year)\$*

The correct manner in which to complete an assignor's disclosure statement has been the subject of separate presentations. I note that the statement itself seems to contemplate some form of documentation issued prior to the disclosure statement containing advice of the nature in paragraphs (ii) to (v).

I would suggest that it is necessary to ask both the local council and the landlord for the information necessary to complete items (ii) and (iii) of the assignor's disclosure statement.

It is likely that even if an assignor's disclosure statement is provided, that it will not be correctly completed. Accordingly, it is important when acting for a landlord to resist any request to include a release of the assignor in the assignment documentation and also, when acting for the tenant to attempt to include a formal release of the assignor in the assignment documentation even if the assignor's disclosure statement looks as if it may have been correctly completed.

However, the main barrier to the acceptance of this statement is the requirement for the assignor to provide the assignee with sales figures and relevant information as to the trading performance of the retail shop for the past 3 years, or such less a period as the lease has been in operation.

Many assignors might not be willing to disclose the true figures in such a public manner. If the figures were materially false or misleading or incomplete, then the release provided by the disclosure statement would not operate (Section 42(A)(2)). The form of the assignor's disclosure statement is in Schedule 2A of the *Retail Leases Act*.

Accordingly, when valuing premises, whether or not the previous tenant/guarantor has been released on assignment may be relevant.

The release will extend to the end of the term of the lease, but not to any option lease. If the original lease is varied to extend the term, it is unlikely that the original tenant and guarantors would remain liable under the extended term unless they had specifically agreed to do so.

4 THE ASSIGNMENT PROCEDURE - COMMERCIAL LEASES

4.1 Top 4 tips from the courts

A review of the case law shows that there are 4 critical points when dealing with an assignment of lease. They also apply, to some degree, to a tenant's request for the landlord's consent to the grant of a sub-lease.

(a) The parties must follow the procedure specified in the lease.

- (b) The tenant must make a request for consent to the assignment by the landlord.
- (c) A delay by the landlord, including continued requests for information, can be deemed to be a withholding of consent.
- (d) The seven propositions of Balcombe LJ in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513,519 and 521 as summarised by Young CJ in *Tamsco Ltd v Franklins Ltd*.

The two most common issues are that the tenant:

- (i) never actually requests the landlord's consent to the assignment; and
- (ii) does not provide sufficient information to the landlord in relation to the proposed assignee.

4.2 ***Tamsco Ltd v Franklins Ltd***

The decision of the New South Wales Supreme Court in *Tamsco Ltd v Franklins Ltd* is a helpful summary of the law relating to both the procedure for an assignment of lease and also the issues surrounding when it is reasonable for a landlord to refuse consent to an assignment.

(a) **The facts**

Franklins leased a supermarket at Riverwood Plaza Shopping Centre. Franklins was in the process of selling a number of its stores and wanted to sell this one.

The lease provided that Franklins needed the consent of the landlord to assign, sublease, licence or otherwise part with possession of the premises and provided that the landlord would not withhold, refuse or delay its consent if a number of conditions were complied with.

The key condition examined by the court was:

"The proposed assignee is a respectable and financially responsible person being an experienced retail trader with management and size comparable to that of Franklins in conducting a business of the kind similar to the Permitted Use, the onus of proving same to the satisfaction of the Landlord (acting reasonably) being upon Franklins..."

The initial letter from Franklins to the landlord was a request for consent in principle to the assignment of the store to Greg Sweeney and Mark Waller, subject to formal assignment documents being signed.

The landlord sent a memo to his solicitors which was distributed to Franklins and Franklins assumed that the landlord was likely to refuse consent to the initial application.

Later the national asset manager of Metcash (one of the new proposed assignees) wrote to the landlord noting the landlord's concerns and indicating that the proposal was now that the Franklins lease would be assigned to IGA Distribution Pty Ltd.

The landlord responded to Franklins stating again its strong opposition to the lease assignment. The reasons given were that:

- (i) the lease clearly stated that the assignee must be an experienced retailer. IGA/Metcash were distributors not retailers;
- (ii) IGA/Metcash were only a vehicle in which to allow a group of inexperienced retailers to trade from the store and the landlord required an assignment of the lease to a retailer with a proven track record in the marketplace; and
- (iii) the landlord had had adverse experience with IGA at the Taren Point store which had left that shopping centre with substantial losses.

One of the proposed assignees responded to the landlord asking the landlord to reconsider and also asking whether the landlord would consent to an assignment of the Franklins lease to Metcash and a sublease to another company.

The court noted that this response was a clear request for assignment but it was a request for a different assignment to that which was previously considered. The problem with this request was that it was made by the solicitor for the proposed assignee and not the tenant.

The landlord's solicitor responded to Franklins rejecting the assignment of the lease to IGA Distribution Pty Ltd and a further proposed subletting to a third company. The landlord did not consider that the preconditions for assignment and subletting had been met.

The landlord was in negotiation with Coles and did not consider the name IGA Riverwood was as big a name as Coles or Woolworths. There was some evidence that other tenants opposed an unknown operator acquiring the lease and the store was supposed to be occupied by an anchor tenant.

The potential assignees then sought a declaration from the court that:

- (A) the landlord had unreasonably withheld its consent to an assignment of the lease;
- (B) Franklins was entitled to assign the lease without being in breach of the lease to each of the potential assignees (Tamsco Ltd, Metcash Trading Ltd and IGA Distribution Pty Ltd); and
- (C) the second and third assignees are each entitled, if the lease was assigned to either of them, to sublease the premises to Tamsco Ltd.

(b) **The Court's response**

The Court held that:

- (i) the potential assignees were entitled to apply to the court for a declaration, even though they were not parties to the lease; and
- (ii) where a lease includes a covenant requiring a tenant to obtain the consent of the landlord to an assignment, the tenant must actually seek the consent. This is the case even if the assignee is a person to whom there could be no reasonable objection, and the landlord may re-enter the premises for breach if no application for consent is in fact made. The court referred to the decision in *Barrow v Isaacs & Son* [1891] 1 QB 417 in relation to this point.

His Honour did not consider that the rule in *Barrow and Isaacs* should be too rigidly applied. His view was that as long as the tenant properly communicated its request for a consent to assignment that is enough. It must be the tenant who does this, not the proposed assignee. The Court did note that the tenant may involve the proposed assignee in some of the correspondence and negotiation, and will usually need to do so, as the assignee will have to provide details as to its financial position.

In this case, His Honour was not completely happy that the tenant had requested the landlord's consent to the assignments, but thought there was just enough evidence to get the issue "over the line".

(c) **Examination of the 'reasonableness' of the refusal to consent**

His Honour then considered the reasonableness of the landlord's refusal to consent to the assignment. He stated that one usually commences with the 7 propositions of Balcombe LJ in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*.

His Honour summarised those principles as set out below and then analysed them. The summary and the analysis are very helpful.

- '(i) The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having its premises used or occupied in an undesirable way, or by an undesirable tenant.
- (ii) As a corollary of one, a landlord is not entitled to refuse this consent to an assignment on grounds which have nothing whatever to do with the relationship of the landlord and tenant in regard to the subject matter of the lease.
- (iii) The onus of proving that consent has been unreasonably withheld is on the tenant.
- (iv) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by the reasonable man in the circumstances.
- (v) It may be reasonable for the landlord to refuse its consent to an assignment on the grounds of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease.
- (vi) It may be permissible, though this is not clear in the authorities, to have regard to the consequences to the tenant if consent to the proposed assignment is withheld.
- (vii) Subject to the previous principles, it is in each case a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld.'

There was some suggestion in previous cases that it was unreasonable for a landlord to refuse consent if the landlord's main aim is to obtain some collateral advantage, such as the surrender of the lease. His Honour stated that there was no independent rule that this was the case and that it was just an illustration of the second principle of Balcombe LJ.

His Honour acknowledged that it could be quite difficult for the Court to determine what the real reason for the refusal of consent was, however, the mere fact that the landlord has in mind some collateral purpose or backup scheme did not necessarily mean it would be unreasonable for the landlord to refuse consent.

The plaintiffs submitted that the landlord took an attitude that made it plain that the landlord would not consider any other reasonable application for the assignment. It was disregarding the fact that the tenant had a lease with options for over 30 years to run and was putting pressure on the tenant so there would be a surrender of the lease and the new lease created by the landlord at a higher rent.

His Honour held that the evidence did not support the submission. The landlord's evidence was that it was not appropriate to consent to a transfer of the lease because of tenant disquiet and that the second supermarket in the centre would need to be competitive with Woolworths. His Honour accepted that evidence.

His Honour held that the assignee or sublessee did not meet the tests specified in the lease but that even if one put that aside, the tenant did not show that the landlord's approach was unreasonable.

The Court did note that there was very little evidence put forward by the plaintiffs.

His Honour also upheld the words of Meagher JA in *Haberecht v Chapman* (1993) (ANZ) Conv R 277, 279:

"Even if their reasons were wholly fallacious, a landlord would be entitled to take the view that potential discontent among his tenantry was sufficient reason to refuse consent."

4.3 ***Provident Capital Ltd v Zone Developments Pty Ltd* [2001] NSW SC 843**

The court in *Provident Capital Ltd v Zone Developments Pty Ltd* [2001] NSW SC 843 examined the proposition that if a landlord, when a submission is made to it for consent, does not give an answer within a reasonable time, then there is a withholding of consent or, as is put in some of the cases, a constructive refusal of consent.

The Court considered Balcombe LJ's second and third principles of assignment.

This case is an example of circumstances where the tenant did not provide sufficient material to ensure that the request for consent satisfied the provisions of the lease.

His Honour Young CJ held that a landlord had no obligation at all to do anything until an application was made for a consent under the lease.

His Honour also stated that "*when a consent to an assignment of lease is being sought on behalf of an assignee who expressly says that it is a trustee for a discretionary trust and the landlord is considering the question as to whether the proposed assignee is solvent, it must consider the assets of the assignee itself as well as the trust and work out what are the businesses of the assignee so that it can see to what funds it can resort.*"

The lease required the tenant to provide to the reasonable satisfaction of the landlord material to prove the proposed assignee was solvent. The assignee had not provided sufficient financial details of the trust to prove that the proposed assignee was solvent.

Accordingly the conditions for the giving of consent had not arisen and therefore even if the landlord had delayed it had not withheld its consent.

4.4 **Grounds of refusal not taken at the time of refusal**

A landlord may rely on a ground of refusal not taken at the time of actual refusal, particularly if that ground was not known to the landlord at an earlier time (*Secured Income Real Estate (Australia) Limited v St Martins Investments Proprietary Limited* (1979) 144 CLR 596).

4.5 **Using assignment request to resolve unrelated issues**

A landlord is not entitled to use the assignment process as a vehicle to resolve matters unrelated to the assignment eg whether an item erected by a tenant had become a fixture (*Daventry Holdings Pty Ltd v Bacalakis Hotels Pty Ltd* (1986) ANZ ConvR 539).

It is permissible to seek to resolve those issues at the same time as the assignment process, provided that the resolution is not made a condition of the landlord's consent to the assignment. (*Dirani v Tarabay & anor* [2007] NSWADT 272 (23 November 2007))

In *Dirani* the landlord sent a letter to the tenant during the assignment stating words to the effect that 'if the tenant did not resolve the breaches of the lease, the landlord would terminate the lease and there would be no lease to assign'. The landlord was held not to have made the resolution of the breaches of the lease a condition of the assignment.

I do note that in many assignment clauses the requirement that breaches be resolved before consent be given is an express requirement before the landlord will give consent to the lease.

4.6 **Information required by the landlord in relation to the potential assignee**

A landlord's solicitor is entitled to seek further details in relation to the proposed assignee and guarantors in order to consider the application within the terms of the assignment clause and to cover any omissions or deficiencies in the application (*Lang's Commercial Leasing in Australia* Vol 1 para 12-210).

'This does not mean that a landlord may oppressively demand extensive particulars or insist upon the equivalent of answers to interrogatories. Nor does it mean that a tenant will fail unless he response to each and every detail or issue raised by the landlord. What is required is fair dealing between the two parties to the end that the landlord may make a reasonable decision.' (*Daventry Holdings Pty Ltd v Bacalakis Hotels Pty Ltd* per Thomas J p543)

4.7 **Additional security**

It may be possible to overcome objections to a tenant by requiring the new tenant to provide additional security. Whether or not a landlord is entitled to do this will depend on the terms of the lease. Some leases may prevent the provision of additional security.

4.8 **Register the transfer of lease**

If the lease, including any option term, is for a period of more than 3 years, ensure that the lease and the transfer of lease is registered. This is to limit any claim by a potential assignee that it is not bound by the lease if the property is sold based on the principles of indefeasibility of title.

5 **ASSIGNMENTS - PRACTICAL ISSUES**

There are 3 key things, from a practical perspective, that can assist with the smooth relationship of the landlord and the tenant in relation to assignments of lease. Some of these issues will need to be addressed when drafting the lease.

(a) **Make good obligations**

The assignee will most likely (but not always) take over the tenant's make good obligations under the lease.

If the obligation of the tenant at the end of the lease is to return the premises to the condition they were in at the start of the lease, very real practical difficulties can arise when attempting to prove the condition of the premises were in at the start of the lease. These difficulties will increase if the premises were sold during the course of the tenancy.

I recommend a condition report be prepared at the start of every lease. This condition report should then be provided by the assignor to any assignee of the premises and also by the landlord to any purchaser of the building in which the premises are located.

Where the tenant must return the premises to the landlord in the condition they were in at the start of the lease, the deed of assignment of lease can assist by clearly specifying the ownership of the different parts of the fitout.

(b) **Disclosure statements**

I recommend that disclosure statements issued under the Act be kept along with sufficient details to prove when they were provided to each party. This is imperative if an assignor needs to prove that it is entitled to a release from obligations to pay money under s41A of the Act.

(c) **Release of assignor and guarantor**

Unless the assignor and guarantor are specifically released on assignment, then they will remain liable for any breaches of the lease by the assignee, not only during the original term of the lease, but also during any period of holding over under that lease.

This law will apply to a retail lease if section 41A has not been complied with. (*Dirani v Tarabay & anor* [2007] NSWADT 272 (23 November 2007)).

Accordingly, it seems prudent for an assignor to maintain its insurance in relation to the premises until it is aware that the assignee has either legally vacated the premises (other than by way of a further assignment) or entered into a new lease with the landlord.

Building owners may wish to continue to ask for this insurance.

(d) **Return of the bank guarantee**

The lease is likely to be silent on whether or not the bank guarantee will be released on assignment. I recommend that, if you are acting for a tenant, the release of the bank guarantee on assignment be negotiated as one of the conditions of the assignment.

The common law provides that a tenant is not released from liability under the

lease on assignment. This altered by the *Retail Leases Act* if a lease is subject to it and can also be altered by the provisions of the lease.

However, in the majority of commercial leases a tenant is not released on an assignment of lease. The position at common law gives the landlord some grounds for seeking to retain a bank guarantee provided by the original tenant until the expiry of the tenant's liability under the original lease.

This was particularly of concern to landlords during the GFC where the future of an incoming tenant might be uncertain and also where the outgoing tenant might be an overseas company and might not maintain a presence in Australia.

(d) **Serving the notice of request for consent in accordance with the lease**

The lease will specify how notices are to be served under it. The lease may also specify that if the tenant wishes to assign the lease the tenant must give the landlord "notice" of its request. In this case, the tenant must ensure that it follows the procedure for service of notice in the lease.

(e) **Experience of the directors**

Andrew Lang suggests that it would be useful for an assignment clause to require the tenant to provide details of the business experience of the assignee's directors, if the potential assignee were a company. (*Lang's Commercial Leasing in Australia* Vol 1, 47-730).

It might also be helpful to require financial information in relation to the directors of the proposed assignee company.

This presentation and any attachments are only for information purposes, and to assist you in understanding your legal rights and obligations in a general sense. It is not tailored to any particular fact, situation or specific requirements, and must not be relied on as legal advice.

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RETAIL LEASES ACT 1994

39 Grounds on which consent to assignment can be withheld

- (1) The lessor is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):
 - (a) if the proposed assignee proposes to change the use to which the shop is put,
 - (b) if the proposed assignee has financial resources or retailing skills that are inferior to those of the proposed assignor,
 - (c) if the lessee has not complied with section 41 (Procedure for obtaining consent to assignment),
 - (d) the circumstances set out in section 80E.
- (2) This section does not preclude any right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the consent, so long as the lessor has substantiated those expenses to the lessee at the request of the lessee.

40 Key-money on assignment prohibited

- (1) A person must not, as lessor or on behalf of the lessor, seek or accept the payment of key-money in connection with the granting of consent to the assignment of a retail shop lease and any provision of a retail shop lease is void to the extent that it requires or has the effect of requiring the payment of key-money in connection with the granting of consent to the assignment of the lease.
- (2) If a person contravenes this section:
 - (a) the person is guilty of an offence and liable to a penalty not exceeding 100 penalty units, and
 - (b) (whether or not the person is convicted of an offence under paragraph (a)) the lessee is entitled to recover from the lessor as a debt any payment made or the value of any benefit conferred by the lessee and accepted by or on behalf of the lessor in contravention of this section.
- (3) This section does not preclude any right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such a consent. The lessee is entitled to have those expenses substantiated by the lessor before making such a payment.
- (4) This section does not prevent a lessor from securing performance of the assignee's obligations under the assigned lease by requiring the provision of a security bond or other bond or a guarantee from the assignee or any other person.

Note: This section and section 39 do not prevent the lessor and a proposed assignee entering into a new lease of the retail shop as an alternative to an assignment of the existing lease.

41 Procedure for obtaining consent to assignment

A retail shop lease is taken to include the following provisions:

- (a) A request for the lessor's consent to an assignment of the lease must be made in writing and the lessee must provide the lessor with such information as the lessor may reasonably require concerning the financial standing and business experience of the proposed assignee. The lessee may provide the lessor with a copy of a statement in writing that contains the information that is contained in or required to complete the prescribed form that has been provided to the proposed assignee. The statement may be provided if the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business. The layout of the statement need not comply with that of the prescribed form.
- (b) Before requesting the consent of the lessor to a proposed assignment of the lease, the lessee must furnish the proposed assignee with a copy of any disclosure statement given to the lessee in respect of the lease, together with details of any changes that have occurred in respect of the information contained in that disclosure statement since it was given to the lessee (being changes of which the lessee is aware or could reasonably be expected to be aware). The lessee may provide the proposed assignee with a copy of a statement in writing that contains the information that is contained in or required to complete the prescribed form. The statement may be provided if the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business. The layout of the statement need not comply with that of the prescribed form.
- (c) For the purpose of enabling the lessee to comply with paragraph (b), the lessee is entitled to request the lessor to provide the lessee with a copy of the disclosure statement concerned and, if the lessor is unable or unwilling to comply with such a request within 14 days after it is made, paragraph (b) does not apply to the lessee.
- (d) The lessor must deal expeditiously with a request for consent and is taken to have consented to the assignment if:
 - (i) the lessee has complied with paragraphs (a) and (b), and
 - (ii) the lessor has not, within 28 days (or another period prescribed instead by the regulations) after the request was made or after the lessee complied with those paragraphs, whichever is the later, given notice in writing to the lessee either consenting or withholding consent.

Note: Clause 20 of Schedule 3 provides that the form set out in Schedule 2A is taken to be prescribed for the purposes of section 41 until regulations are made prescribing the form and repealing Schedule 2A.

41A Protection of assignors and guarantors

- (1) A person who assigns a retail shop lease in connection with the lease of a retail shop that will continue to be an ongoing business, or a guarantor or covenantor of the person, is not liable to pay to the lessor any money in respect of amounts payable by the person to whom the lease is assigned if the former lessee gave (before the start of the period of 7 clear days before the assignment is effected):
 - (a) the lessor a copy of the assignor's disclosure statement as referred to in section 41 (a), and
 - (b) the proposed assignee a copy of the assignor's disclosure statement as referred to in section 41 (b).
- (2) This section does not apply to a former lessee, guarantor or covenantor or a lessor if the assignor's disclosure statement contains information that is materially false or misleading or incomplete.

43 Application of Conveyancing Act 1919

Section 133B (Covenants against assigning) of the [Conveyancing Act 1919](#) does not apply to a retail shop lease to the extent that the section is inconsistent with this Act (or any conditions implied in a lease by this Act).