



Dealing with difficult landlords

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When selling a business operating from leased premises, what can a seller do to reduce the risk of the lessor refusing its request to consent to the assignment of the lease to the buyer?

If the lessor refuses consent, what can a seller do about it?

Since the change to the *Retail Shop Leases Act* requiring lessors to release assignors (i.e. sellers) from the lease on assignment, lessors are being extra-cautious and refusing such applications more often.

Previously, an assignor would still be liable under the lease for any breaches by the assignee of the lease (i.e. buyer). Now, providing the parties comply with the *Retail Shop Leases Act*, the assignor will be released on assignment, which means that a lessor's only recourse in the event of default is against the assignee. This has become a challenge for lessees selling their retail businesses as lessors want to ensure that they are not allowing an "inferior" lessee to take over the lease.

Most assignment of lease clauses in leases require certain conditions to be met before a lessor must give consent. Whilst the conditions might vary, a lessor is generally concerned to ensure that the proposed lessee is of good character and financial standing and has the required experience to run the business well.

So what can a seller of a business do to maximise the chances of consent to an assignment?

Some tips:

- Read the lease and ensure you understand the assignment of lease clause, which should set out the conditions on which an assignment of lease will be granted.
- Focus on promptly addressing the conditions raised. Often, this is achieved by providing the lessor the following documents with respect to the buyer or any directors of a buyer company:
 - Statement of assets and liabilities;
 - at least 2 business references;
 - outline of relevant business experience (CV); and
 - business plan for the business sold.
- Ensure you have plenty of time with your business sale contract to apply for consent and to deal with any issues that arise, such as providing the lessor with appropriate information sufficient to enable the lessor to determine the suitability of the proposed assignee. The process will normally take about 30 days and allow another 14 days for the leases to be prepared.
- It is not unusual for the lessor (through its lawyer or agent) to make requests for further information, prior to making a final decision whether or not to consent to the assignment. Try and respond as quickly and as reasonably as possible to any requests for further information.
- If meeting with the lessor, first impressions count. The buyer should dress professionally and be prepared to answer questions about themselves and their plans for the business.
- The lessor is entitled to withhold consent until it has sufficient details to make a proper decision about the buyer. The relevant time to test the reasonableness of the lessor's decision is at the time of assignment, not later (if court proceedings are issued). So provide proper reasonable information at the time of asking for consent, otherwise it will be too late to rely on other information afterwards.



Is the lessor required to provide all information requested of it to the lessor?

Courts expect a fair dealing between the parties, so that the lessor can make a quick, commercial decision. Courts have made it clear that a lessor is not entitled to oppressively demand extensive particulars about the lessee and a lessee does not fail because it refuses to respond to each and every detailed issue raised by the lessor. However, where possible, it is best to cooperate with the lessor.

When is it reasonable to refuse consent?

Any refusal must be taken in good faith and not arbitrarily; relevant factors include:

- the inability of the buyer to fulfil the terms of the lease,
- financial instability,
- change of use;
- unsuitability of the premises for the intended use;
- possible future unlawful use.

When is it not reasonable?

It is not reasonable when a lessor uses a request for consent to demand from the proposed assignee benefits over and above those currently in the lease. In other words, a refusal may be unreasonable if the lessor is holding out to get the assignee to agree to things beyond the terms of the lease.

It should be noted that “without prejudice” discussions can be admitted into evidence if there is a dispute. So if a lessor refuses consent because the buyer’s finances are not stable enough to pay the rent and run the business and then the lessor makes a “without prejudice” offer to the buyer of a new lease on the same terms, except with a higher rent, then the offer might be admitted as evidence of the lessor’s bad faith and contradictory behaviour. That is, on one hand saying the refusal is based on the lessor’s belief the lessee can’t afford the rent and then on the other hand offering a lease on higher rent.

Examples of Court Decisions on Refusals

The following are provided as simple examples of some refusals that were examined by Courts. Importantly however, the circumstances of each case will determine the difference between genuine concern by a lessor to get relevant facts and time-wasting tactics or enquiries of an officious lessor looking for an advantage (or just simply being oppressive).

- Refusal because of a genuine belief that the buyer’s financial commitments were such that it would be unlikely to be able to pay the rent for the remainder of the term: reasonable.
- Refusal so as to extract a higher rent from the proposed assignee: unreasonable.
- Refusal to an assignment by an anchor tenant (Woolworths) to a less established chain: reasonable.
- Refusal because the lessor wanted vacant possession of the premises: unreasonable.
- Refusal because the assignee stated that they did not intend to observe the terms of the lease: reasonable.
- Refusal because the assignee proposed a change of the current use, even though the changed use would be permitted under the lease: maybe (dealt by Court as side issue).
- Refusal because of potential discontent amongst other tenants of the lessor: maybe (dealt by Court as side issue).

Is the lessor required to give reasons for a refusal?



A lessor is not required to give reasons for a refusal. Further, if they do give reasons and the matter then goes to Court, the lessor will still not be prevented from relying upon other reasons that were not raised or known at the time the refusal was made.

Refusal – What to do next?

Under the *Retail Shop Leases Act*, a “retail tenancy dispute” exists under a retail shop lease if:

- (a) under the lease, the lessee may assign the lease only with the lessor’s consent; and
- (b) the lessee has given the lessor full particulars of a proposed assignment of the lease and asked the lessor, in writing, to consent to it; and
- (c) the lessor has not given an answer to the lessee within 1 month after the request and the particulars are given to the lessor.

A “retail tenancy dispute” also exists between a lessor and lessee if, in relation to consenting to an assignment of a retail shop lease, the lessor:

- (a) purports or seeks to impose on the prospective assignee as lessee, an obligation that is not the lessee’s obligation under the lease; or
- (b) purports or seeks to withdraw from the prospective assignee a right conferred on the lessee under the lease; or
- (c) purports or seeks to impose, as a condition for consenting to the assignment, a condition that the lessee considers unreasonable.

Importantly, the *Retail Shop Leases Act* makes it clear that the above examples do not limit the circumstances in which a retail tenancy dispute might exist between a lessor and lessee under a retail shop lease.

QCAT

So in Queensland, if a seller thinks that a lessor is unreasonably refusing consent, either by a lessor imposing an unreasonable condition or an obligation outside a retail shop lease or withdrawing a right conferred under a retail shop lease, then there may be a “retail tenancy dispute”. In which case, the seller could take the matter to the Queensland Consumer and Administrative Tribunal (QCAT) to resolve the dispute. Whilst QCAT is generally considered a relatively inexpensive and quick manner in dealing with a dispute, the process to completion may still take many months (estimated 4 – 6 months) and if lawyers are engaged in the process, will cost a significant amount of money.

Currently in Brisbane, indicated timelines are as follows:

Step	Time
Start	lessee lodges dispute
Mediation	2 – 6 weeks later
Directions Hearing	2 – 3 weeks later
Compulsory Conference	6 – 8 weeks later
Tribunal Hearing	8 weeks + later

Therefore, if the matter is not resolved at mediation or prior to hearing, it may take 4 to 6 months or longer for the Tribunal to make a decision. If legal representation is engaged throughout the



process, significant legal costs will be incurred (estimated at \$5,000 if resolved at mediation up to \$40,000 or more to complete a hearing).

Supreme Court

Alternatively, the lessee could issue Court proceedings for a “declaration” by the Court that the lessor was unreasonably withholding consent. Whilst this may be quicker than a QCAT application if the Court is prepared to grant a declaration at the original chamber application (2 - 4 weeks), it may not. If not, the Court may consider a trial necessary which would mean potentially up to a year before a decision is received by the court.

Currently in Brisbane, indicated timelines are as follows:

Step	Time
Start	Application
Chamber Application	2 -4 weeks
Directions Hearing - Trial	3 months - 12 months

As a barrister would be required as well as a solicitor for this application, it is estimated that legal fees may be anywhere between \$25,000, if resolved at chamber application, to \$75,000 or more to complete a trial if unable to be resolved sooner.

Self Help

Otherwise, if the seller and buyer were both very confident that the lessor was acting unreasonably, they could proceed with the sale of the business and the assignment of the lease, without the lessor’s consent. This is a risky strategy because whilst the lessor reasonably refuses consent, the lessee does not have the right to assign the lease without breaching it. So if the lease was assigned without consent and the lessor argued that the lessee (i.e. seller) was in breach, the lessee would have to convince a Court that (more likely than not) the lessor was acting unreasonably (i.e. capriciously or arbitrarily). If the lessee was unable to do that, then the lease could be terminated and the buyer would not have the premises to operate the business.

Conclusion

A seller and buyer should ensure that they follow the upfront steps recommended to satisfy the lessor of their requirements for consent to an assignment to the lease. Where a seller is convinced that their lessor may act oppressively, they should ensure that a reasonable time (up to 6 months or more if possible) is allowed for completion in order to resolve a dispute in the tribunal or court. Whilst the process of applying to QCAT or the Court could potentially be a long one and costly, a lessor threatened with a dispute may concede sooner rather than later. Whilst self-help is an option, it is a risky one and should only be considered with careful legal advice.

What to do next: If you would like more information on dealing with this issue, or for all queries regarding business sales and assistance, call Joe Kafrouni or Rob Montes on (07) 3354 8888 or joe@klaw.com.au or rob@klaw.com.au.

