Assignment of lease between lessees as joint tenants-is lessor's consent required?

Context

The decision of *Lockrey v Historic Houses Trust of New South Wales* [2012] NSWSC 654 raises an interesting issue about the necessity of seeking the consent of the lessor where there is an assignment of a lease between joint tenants who already hold the lease when one joint tenant sells the business operated on the leased premises to the other joint tenant. A secondary issue raised by the proceedings concerns whether the lessor's consent was unreasonably withheld under the processes under *Retail Leases Act* 1994 (NSW) ("the Act") upon the grounds of lack of provision of information as to the remaining lessee's financial standing.

Facts

A cafe in the Sydney CBD was leased by HHT for 5 years from 2007 to L and S as joint tenants .In 2009,S entered into a contract with L to sell his share of the business to L for about $355,000 subject to "the landlord having provided consent to the transfer of the vendor of his interest in the lease to the purchaser". There was also a provision in the contract of sale of the business by which L warranted the he had "made an application to the Landlord to have the Vendor released from all obligations ...pursuant to the lease" and "until released the Purchaser agreed to indemnify the Vendor against any liability under the lease". The principal liability appeared to be rental arrears of approximately $130,000 at the date of the request for consent to the assignment. In response to the request, HHT indicated that it was "unwilling to consent to the assignment" until it was provided with "verifiable information regarding L's financial standing".

Analysis

Was there an assignment?

L argued that the assignment to S was not an assignment within the meaning of the lease or the Act but a release by one joint tenant and therefore consent was not required under the lease nor did the provisions of s 39 and 41 become relevant. The argument ran that as each joint tenant was seized of the whole estate or interest there was nothing to assign. Particular reliance was placed by L upon the House of Lords decision of *Burton v Camden London* Borough *Council* [2000] 2 AC 399 where Lord Millett (dissenting) ,in dictum, suggested exactly that proposition. However, the majority found that a release by one joint tenant of an interest in a lease was an assignment for the purposes of certain legislation which prohibited assignment. Lord Nicholls, for the majority, found that this argument was too nuanced for this purpose and that any change in the identity of the lessees would amount in practical terms to an assignment of the lease. This would be the situation His Lordship said, whether the co owners of the lease held as joint tenants or tenants in common.

In essence, therefore, consent was required, a fact that must have originally occurred to S and L as consent had been sought and refused. Stevenson J then dealt with the efficacy of the refusal of consent under the lease and the Act.

"reasonable withholding of consent"

A clause in the lease, permitting assignment with the consent of the lessor, was a modified mirror of Sections 39 and 41 of the *Retail Leases Act* 1994(NSW) to which it was subject. A clause in the Lease permitted the withholding of consent on the grounds that the proposed assignee had " financial resources, business experience, retailing , or restauranting skills inferior to those of the (assignor)"[s. 39(1)(b) of the *Retail Leases Act* 1994].There was a further provision in the lease which mirrored s 41(a) of the Act which provided that ,with the request for assignment, the assignor must provide the lessor with "such information as the lessor may reasonably require concerning the financial standing and business experience of the proposed assignee".If after this information had been supplied, s 41(d) of the Act(replicated in the lease) deemed consent to have been given.

Stevenson J found that, given the circumstances of the arrears, notwithstanding that L was already a co lessee, that it was reasonable for HWT to seek further information as to the financial standing of L which information was never supplied[57].Therefore ,consent could not have been "deemed" to have been given pursuant to s 41(d) of the Act.

Conclusion

It is respectfully submitted that, despite the clever argument advanced by L ,this decision is clearly correct. A change in the identity of the lessees is a change in the legal personality of the persons to whom the lease has been granted and has significant financial and other ramifications for a lessor. The fact that a change of this nature arranged between the lessees may have "released" one of the joint tenants from liability under the lease was wishful thinking at its best as there was still privity of contract between the lessor and the both lessees and liability under that contract would have had to be expressly discharged by agreement supported by consideration. The situation here was exacerbated by the fact that the lessees were jointly and severally liable for the arrears and S could not effortlessly exit this liability (if this had been contemplated) by being released as a retiring joint tenant. This decision is in line with the principles expressed in other decisions as to what amounts to an assignment or a parting of possession (*Lam Kee Ying v Lam Shes Tong* [1975] AC 247) where there is effectively a change of legal personality in the lessee, or indeed, from a practical point of view ,a change of control over the lessee. The provision giving qualified consent to assignment is meant to catch any such changes regardless of the nature of the holding of the lessees.

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