A Lesson on Permitted Uses

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Anyone who has drafted or reviewed a commercial lease is familiar with a “permitted use” clause. A permitted use clause is intended to define and limit the type of business that a tenant is entitled to operate from a particular premises. Whether to protect the tenant mix in a shopping centre or ensure compliance with the exclusive rights of other tenants, landlords put significant effort into negotiating appropriate use clauses with their tenants. The case of *JCP Drugs Ltd. v. Daniels Leslieville Corp.*, [2019] O.J. No. 4886 is an example of why it is so important to pay close attention to permitted use clauses in commercial leases.

**The Permitted Use**

In *JCP Drugs*, the landlord was the owner of a new high-end mixed-use condominium development. It entered into an agreement to lease with a tenant for the operation of a “pharmacy and family medical clinic” for premises located on the ground floor of the development. The agreement contained standard language requiring that the tenant execute the landlord’s standard form of lease.

Prior to granting possession of the premises to the tenant, the landlord learned that the tenant intended to dispense methadone from the premises as part of its pharmacy practice. The landlord sought confirmation from the tenant that it would not be dispensing methadone from the premises, which the tenant refused to provide.

The landlord subsequently delivered its draft form of lease to the tenant, which contained certain limitations and obligations that would have limited the tenant’s ability to dispense methadone from the premises. The tenant objected to the form of lease delivered by the landlord, arguing that the lease delivered by the landlord was not its “standard” form of lease. The landlord argued that the lease was its standard form of lease, but that certain modifications were made to the lease to address what the landlord perceived as the tenant’s failure to be fully transparent on the scope of its pharmacy practice.

The landlord refused to deliver possession of the premises until the tenant signed its standard form of lease. However, the tenant refused to sign the lease and applied, among other relief, a determination by the court that the use of the premises as a “pharmacy and family medical clinic” included a right to prescribe and dispense methadone and any other such medication lawfully used to treat chronic pain and opioid use disorder.

**Pharmacy Includes the Right to Dispense Methadone**

At the hearing of the application, the tenant abandoned certain aspects of its claim as it had found alternate premises from which to operate its pharmacy. In addition, the landlord confirmed that it no longer disputed the tenant’s claim that the tenant’s right to operate a “pharmacy and family medical clinic” included the right to prescribe and dispense methadone. However, the landlord maintained, among other arguments, that the agreement to lease was not binding as a result of the tenant’s failure to disclose to the landlord that it would be dispensing methadone from the premises, which formed a large part of its pharmacy practice.

The Court found that the tenant was not required to disclose the fact, or the extent, of its methadone sales to the landlord. Further, it held that the dispensing of methadone was permitted under the permitted use clause contained in the agreement to lease. The Court determined that the common law contemplates that sophisticated parties will undertake their own due diligence on matters viewed as material before entering into an agreement. In essence, the Court concluded that, if the landlord did not want its tenant to dispense...
methadone from the premises, it should have negotiated this limitation into the permitted use clause contained in the agreement to lease.

**Takeaway**

The main takeaway from the decision in *JCP Drugs* is this: when negotiating a permitted use clause, be sure to ask questions about (and fully understand the scope of) the tenant’s business before coming to terms on the language of the permitted use clause. Often landlords will assume that they understand the limits and risks arising from certain permitted use language (particularly where the same language has been adopted in other lease transactions for similar tenants). However, as business models evolve, so too must your permitted use clauses.

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