

Bill Parker

From: Charmaine Solomon
Sent: Friday, 7 June 2013 9:14 AM
To: Bill Parker
Subject: Fwd: Ag Dept Lease wish to exit lease agreement

Hi Bill

Advice received from David Nicholson.

Regards

Charmaine

Sent from my iPhone

Begin forwarded message:

From: David Nicholson <dnicholson@mcleods.com.au>
Date: 6 June 2013 12:48:29 PM AWST
To: Charmaine Solomon <council@jerramungup.wa.gov.au>
Subject: RE: Ag Dept Lease wish to exit lease agreement

Hi Charmaine,

I note that the Lease is for a term of 60 years commencing on 2 April 2007 and expiring on 1 April 2067.

That term is subject to the right of the Lessee to terminate the lease on a "Break Date" with 6 months written notice, however the only specified Break Date is the 10th anniversary of the Commencement Date, being 2 April 2017. You have indicated that the Lessee wishes to terminate the Lease by 30 June 2013, so termination on that date is not authorised by cl. 2.2.

Termination of the Lease by 30 June 2013 would therefore constitute a breach of the Lease provisions, unless the Shire consented to the termination.

In terms of negotiating a suitable settlement with the Lessee to enable termination to occur as proposed, and ascertaining the legal entitlement of the Shire to recompense for early termination, I note that the Lease only provides for a nominal rental (\$1 on demand) and therefore the Shire would not suffer a loss of rental payments as a result of early termination.

However, the Lease does additionally provide for the payment of "Centre Costs", as stipulated in Item 13 and cl. 3.9 of the Lease. In particular, cl. 3.9(b) of the Lease provides:

"(b) As the Lessee is only paying a peppercorn rental under this Lease and as the Lessor has agreed to the Break Date, the Lessee acknowledges that, from the Commencement Date, the Lessee is liable for the payment of the whole of the Centre Costs Sum."

Clause 3.9(c) further provides:

"If the Lease is terminated due to a breach by the Lessee during the first 10 years of the Term, then the Lessee is required to pay to the Lessor as a genuine pre-estimate of the damage suffered by the Lessor in respect of that early termination (but without prejudice to any other claim for damages that the Lessor may have against the Lessee), the Centre Costs Sum less the Centre Costs paid by the Lessee to the Lessor up to the date of the termination of the Lease"

Given the provision contained in cl. 3.9, it is arguable that the Shire as Lessor would be entitled to payment of the Centre Costs Sum, less any Centre Costs already paid by the Lessee to the Lessor up to the date of termination. I note that the Centre Costs Sum is defined in clause 1.1 to mean "\$290,547.79, being a sum comprised of the amount specified in Item 13 increased annually by 4%

on each anniversary of the Commencement Date for the first 10 years of this Lease". This amount, minus any Centre Costs already paid by the Lessee, would be the amount of the Shire is arguably entitled to by reason of the early termination of the Lease and would be a reasonable starting point in negotiations with the Lessee.

The only other additional payments to which the Shire would have been entitled for the remainder of the term of the Lease are payments in respect of services (clause 3.7) or variable outgoings (clause 3.4) incurred in respect of the Premises. However, as these are payments for costs incurred by reason of the Lessee's occupation of the premises, there is no justification to require payment in respect of those items for the unexpired residue of the term subsequent to the early termination.

I hope this answers your query. Please contact me should you wish to discuss any aspect of the advice above.

Regards,

David Nicholson | Partner
McLeods | Barristers & Solicitors

Stirling Law Chambers | 220-222 Stirling Highway | CLAREMONT WA 6010

T: (08) 9424 6221 | M: 0410 619 971 | F: (08) 9383 4935

E: dnicholson@mcleods.com.au

W: www.mcleods.com.au

IMPORTANT:

(1) This email, including any attachments, may contain information that is confidential and/or privileged. Only the intended recipient may access or use it. If sent to the wrong email address or otherwise received in error, please immediately contact McLeods and delete or destroy all copies. You must also not disclose, copy or disseminate any of the information.

(2) We use virus-scanning software but before opening or using any attachments to this email you should check them for viruses or similar. Our liability is limited to resupplying any affected attachments.

From: Charmaine Solomon [<mailto:council@jerramungup.wa.gov.au>]

Sent: Wednesday, 5 June 2013 11:26 AM

To: David Nicholson

Subject: RE: Ag Dept Lease wish to exit lease agreement

Hi David,

Would you be able to assist the Shire regarding the attached lease.

Ag Dept wish to settle by the 30th June and Bill Parker would like to know what the Shire is entitled to under the existing lease. (Please see Bill's email below).

Thankyou

Kind Regards,

Charmaine Solomon

Coordinator of Governance & Land Administration

Shire of Jerramungup

8 Vasey Street, PO Box 92 Jerramungup WA 6337

Phone: 9835 1022

Fax: 9835 1161

Email: council@jerramungup.wa.gov.au

Our new website is now live. Check us out at www.jerramungup.wa.gov.au

From: Bill Parker
Sent: Wednesday, 5 June 2013 9:30 AM
To: Charmaine Solomon
Subject: Ag Dept Lease

Hi Charmaine,

Can you please send a copy of the Ag Dept lease for the Cameron Business Centre to McLeods.

The Ag Dept wants to settle and I would like to know what we would be entitled to receive under the existing lease if it was terminated at June 30 this year.

Kind Regards

Bill Parker
Chief Executive Officer

Shire of Jerramungup
8 Vasey Street, Jerramungup 6337
Phone: 9835 1022
Fax: 9835 1161
Email: ceo@jerramungup.wa.gov.au