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Ripped from the Headlines: MLSE Unpaid Tax Dispute Revives the Question – What is the difference between a Lease and a License?

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By Robert Eisenberg

The latest story making the rounds in the Toronto news has been a report that Maple Leafs Sports and Entertainment ("MLSE"), the parent company of the Toronto Maple Leafs, Raptors, Argonauts, and TFC, has an outstanding property tax bill of approximately $1.18 million going back to 2019 in respect of its occupancy of BMO Field, located on the City of Toronto (the "City") owned Exhibition Place grounds.

According to the new reports, the City claims that MLSE is obligated, as part of its lease for BMO Field, to pay property taxes (as is common in triple net commercial leases). MLSE has publicly disputed the City's characterization of its interest in BMO Field, asserting that it does not have a "lease" but rather a "management agreement" with the City and that it pays a "user fee" instead of "rent".

Ultimately, while the terminology used in the agreement between MLSE and the City will be illuminative, it will not necessarily be determinative. Courts in Ontario have repeatedly held that whether an agreement is a lease or a license (or a "management agreement" which is yet another type of agreement) is not based on the terminology used (such as "rent" vs. "user fee") but rather on the true *nature* of the arrangement between the parties.

While we cannot make any determinations here about the true nature of MLSE's interest in BMO Field, the whole situation provides a useful jumping off point for a brief refresher of the differences between commercial leases and licenses and when each is most appropriate.

Know Your Rights!

In common law jurisdictions, commercial leases are relatively unique in that they are both commercial contracts *and* conveyances of real property. This hybrid duality is the key differentiator between leases and licenses. Leases provide the tenant with both a contractual right to occupy and use premises (and potentially associated rights), but also with a right *in the land itself* (for the first-year law school graduates and Latin language fans – "*in rem*" rights). Conversely, a license does not give the licensee a right in the land itself, but it is only a contractual right to use the land as between the licensor and licensee (an "*in personam*" right).

As a lease is a right in the land itself, it "runs with the land" and is binding on successor owners of the property; conversely, a license is a personal contract between parties and is not, by its nature, binding on subsequent owners/successors in interest.

Practically speaking, the most fundamental differentiator between leases and licenses is the concept of "exclusive possession". Leases confer rights on tenants largely analogous to those of landowners (absent a few exceptions, and any limitations set out in the lease itself), the most basic of which is the right to have exclusive use of the land without interference by the landlord. Conversely, a license

is merely a right to *use* land for a specific time and purpose. It does not give the licensee a greater "package" of rights by way of statute or common law in the way that a lease does.

Another major contrast between leases and licenses is the security of tenure that each confers on the grantee. As a lease is an interest in land itself, it is irrevocable except in accordance with its terms (and by operation of law). This means that unless the lease provides for termination rights, or termination in certain circumstances (ex. damage and destruction), the landlord cannot terminate the lease unless the tenant is in default (either in accordance with the terms of the lease or the *Commercial Tenancies Act*, if there are no default provisions). A license is completely different in that it is, by its nature, revocable. Licenses usually contain a revocability/termination provision, but even absent such a clause, a contractual license (i.e. a license granted for consideration) is, at law, revocable on reasonable notice (unless modified by specific terms of the license itself) while a gratuitous license (i.e. a license granted for no consideration) is revocable at will.

Which Right is Right (for you)?

Of course, leases and licenses each have their benefits and detriments, and an exhaustive analysis of these is beyond the scope of this brief article. However, we can identify a few major factors which should play into whether you elect to proceed by way of lease or license. Of course, the grantor's and grantee's interests may not be aligned on any or all of these points, but that's where the fun of negotiation comes in!

Responsibility for the Property: While one may think that an owner would always prefer a license (easier to get rid of the licensee!) or a grantee would always prefer a lease (harder to be gotten rid of!), that may not necessarily be the case. For example, a property owner may *want* the grantee to become responsible for the property as a whole (including insurance, maintenance and repair, and, as we see in the MLSE example, the payment of property taxes). Since a tenant under a lease more or less steps into the owner's shoes, absent specific wording in the lease most of these obligations would automatically flow to the tenant, whereas they would *not* become the licensee's responsibility under a license, again subject to the wording of the license.

Need for Exclusive Possession: As discussed, the lack of exclusive possession is a hallmark of licenses. Where the grantee does not actually require *exclusive* possession, but rather only a right to use the land (for example, to host a special event), then a license may be sufficient for their purpose as it allows them access and use of the land but no more. In contrast, where exclusive possession is required (possibly for security reasons or where the grantee needs to make alterations to the property) it may prefer to proceed by way of a lease to ensure that its possession cannot be disturbed (physically or legally).

Security of Tenure: As mentioned above, licenses do not provide much security for the grantee; however, that may not always be a major concern. Where the grantee only needs to use the property for a short period of time, or potentially for a very limited (but not critical) purpose, a license could be sufficient for the grantee. Licenses are also generally shorter and simpler, which could help to reduce costs, especially if there is a level of trust and familiarity between the parties. Conversely, where the property is critical to the grantee, they may insist on a lease in order to not only provide security of tenure vis-à-vis the initial grantor but also a right that is enforceable against a potential successor to the initial grantor. Finally, grantors often elect to proceed by way of license when they want to jettison the provisions (and protections for tenants) of the *Commercial Tenancies Act*, since those terms only apply to leases and not licenses.

Ultimately, deciding whether to proceed by way of lease or license is incredibly fact and context specific, and prudent grantors and grantees will think carefully about the package of rights they need and are prepared to give the other party, and then ensure that the nature of their deal is accurately reflected in the documentation.

The MLSE example above provides a cautionary tale of the kind of disputes that can arise where the parties don't carefully put their minds to the specifics of the agreement and instead rely on their own "understandings".

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances.

If you have specific questions about leases, licenses, or property rights in general, please feel free to reach out to Robert by email at reisenberg@weirfoulds.com or by telephone at 416-619-6287.

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