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Commercial Leasing Bulletin:

2020/2021 Leasing Case Update

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By: Commercial Leasing Group – Minden Gross LLP

Our leasing update last March "Looking Back at 2020" and many of our subsequent bulletins focused heavily on COVID-related cases. Last week we entered into a new phase of the pandemic with the lifting of the mask mandate. We are celebrating this new chapter with a recap of some noteworthy cases from 2020/2021 which are not COVID-related and where the results may surprise landlords and tenants.

Implied term that the premises comply with code requirements

In *Transport Canpar LP v. 3258042 Nova Scotia Limited*, 2020 NSSC 274 (NSSC), a Landlord purchased a building on an as-is basis without a building inspection. The Landlord later leased the building to the Tenant. During a time of unusually heavy snow in Nova Scotia, the roof of the building collapsed. The Tenant brought an action seeking damages for breach of lease and/or negligence. After careful review of the evidence and engineering reports, it was determined that the load-carrying capacity of the roof was significantly lower than that prescribed by the *National Building Code*.

Although the lease did not contain any Landlord representations and warranties about the condition of the premises, the Tenant argued that there was an implied term in the lease that the premises would be reasonably fit for occupation. The lease contained numerous references requiring building approvals from various governmental authorities for any work undertaken by the parties, such as the requirement that all alterations comply with the building code. The Court found that if the parties required alterations and repairs to comply with the building code, they would have assumed at the outset that the premises complied with the building code. As a result, the Court found that the lease contained an implied term that the building was designed and constructed in accordance with the National Building Code.

Landlords beware – the absence of representations and warranties with respect to the condition of leased premises may not preclude a landlord from liability if the premises are not in compliance with applicable laws.

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Intent is important in lease repudiation

A tenant's right to quiet enjoyment is one of the most basic tenant rights. As a result, a landlord who changes the locks and takes possession of leased premises is generally found to have terminated a lease. While a landlord may not intend to terminate the lease by changing the locks, the landlord's intention is not usually relevant and its remedies will be limited regardless.

In *Fenske v. MacLeod*, 2020 BCSC 532 (BCSC), the parties disputed the legal consequences of the Landlord changing the lock on the back door. The Tenant was looking to establish a new wood-fired pizza business and was in the process of renovating the premises. Unfortunately, while the proposed business was to serve takeout food, the building was not zoned for food takeout (though a temporary workaround was available). In addition, the Tenant's costs were quickly exceeding budget.

The dispute started when the Landlord required access to the leased premises to address a hot water issue. Because the Landlord did not have a key, the Landlord drilled out the back door lock to gain entry and changed the lock. Unfortunately, the Landlord did not inform the Tenant of the change in locks. The Landlord thought that the Tenant was accessing the premises through the front door and did not know that the Tenant did not have a key. When the Tenant later tried to access the premises, they discovered that the back door lock had been changed. The Tenant did not contact the Landlord to request an explanation or a new key. When the Landlord later e-mailed the Tenant's lawyer on the zoning issue and raised suspicions that the Tenant was seeking to escape their lease obligations, the Tenant's lawyer responded that the changed lock was a breach of the lease and that the Tenant accepted the repudiation of the lease. The Tenant stopped paying rent. The Landlord proceeded to terminate the lease and sell the Tenant's equipment, but it did not provide notice of default (or a cure period) or notice requesting the Tenant to remove its equipment.

At issue was whether the change in locks constituted an interruption of the Tenant's right of quiet enjoyment and that it amounted to a repudiation of the lease. The Court found that the changing of one lock was only a temporary inconvenience to the Tenant and that it was clear that if the Tenant had requested a new key to the back door, the Landlord would have provided one. The Court found that the Landlord did not intend to repudiate or terminate the lease through the changing of locks and, as a result, the act of changing the lock to the back door cannot be interpreted as a repudiation of the lease.

While the Landlord was not found to have repudiated the lease in this circumstance by changing one lock, landlords should ensure that they do not interrupt a tenant's right of quiet enjoyment and provide clear, written notice at the time of changing any lock.

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"Persistent, substantial, or reprehensive" conduct required for landlord to terminate lease

When the landlord and tenant relationship sour, landlords may be tempted to terminate a lease. However, Landlords must act carefully to make sure that they provide proper notice of default and that they have adequate grounds for terminating a lease.

In *VMAT (Oakville) Inc. o/a Suvai Classic Indian Restaurant v. Trafalgar Terrace Enterprise Inc.*, 2020 ONSC 2111 (Ont. S.C.J.), the Landlord provided notice to the Tenant listing two breaches: (1) the Tenant's hot water tank was non-conforming to municipal by-law; and (2) the Tenant caused flooding and water damage to the building. A further notice was later sent alleging that the Tenant had not maintained the overhead fan cleaning or obtained fire suppression system re-validation. The Tenant was given 30 days to remedy the breaches. Although some of the breaches (like the cost to clean the overhead fan) were quantifiable, the notice did not include an amount for the reasonable cost of the repairs.

The Court found that the breaches specified by the Landlord were insufficient to lead to forfeiture of the lease. There was no by-law the Tenant had to comply with for the hot water tank. The water leakage occurred in the past (and was not caused by the Tenant's negligence or intentional conduct) and the Landlord cannot rely on a past breach that has been remedied to justify an eviction. The Tenant cleaned the overhead fan and made reasonable efforts to bring the fire suppression system into compliance.

Referring to *Clublink Corporation v. Pro-Hedge Funds Inc.*, [2009] O.J. No. 2660 ("*Clublink*"), the Court held that "courts do not look favourably on forfeiture unless the tenant's behavior has been persistent, substantial or reprehensible." Moreover, the notice of default was deficient for failing to include an amount for compensation as required by the *Commercial Tenancies Act* ("*CTA*"). The Court found this was intentionally omitted because the Landlord did not wish to have the breach remedied but instead wanted to evict the Tenant.

This case demonstrates that a landlord cannot terminate a lease for just any breach. A tenant's misconduct must be of sufficient gravity to warrant termination. Landlords should also include an amount for compensation where a breach is quantifiable in damages so that a tenant has an opportunity to cure the default.

Withholding Consent to an Assignment of Lease

It is clear that a landlord cannot, as a condition to granting consent to an assignment of lease, require amendments to a lease to give themselves more advantageous terms. But what happens when a landlord relies on both reasonable and unreasonable grounds to refuse consent to an assignment of lease?

In *Tabriz Persian Cuisine Inc. v. Highrise Property Group Inc.*, 2021 ONSC 4065 (Ont. S.C.J.), the Tenant sought damages from the Landlord for its refusal to even consider consenting to various proposed assignments until the Tenant satisfied a number of pre-conditions. These conditions included removing a patio installed by the Tenant on the common area without the Landlord's or condominium corporation's consent, and ceasing the legal action relating to the patio between the Landlord, Tenant, and condominium corporation.

Although the Tenant agreed to remove the patio, they never did. As a result, the Court found the Landlord acted reasonably in requiring the patio to be removed before consenting to the assignment. However, the Landlord's demand that the Tenant cease their lawsuit against the Landlord and condominium corporation was a collateral purpose and therefore not connected to the request to assign the lease. Faced with both reasonable and unreasonable grounds for refusing consent to an assignment of lease, the Court held that where a Landlord has sufficient reason to withhold consent, the fact that the Landlord has another improper purpose does not matter.

While it is not always easy to determine whether or not a landlord is acting reasonably in withholding consent, Section 23(2) of the *CTA* allows tenants to make an application to the Superior Court for an order determining whether or not consent is unreasonably withheld.

We will continue to provide regular updates on commercial leasing issues in Canada. If you have any questions or would like to obtain legal advice on any leasing issues or commercial leasing litigation, please contact any lawyer in our Commercial Leasing Group.

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