

Landlord's Duty to Mitigate

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It has been accepted since *Highway Properties Ltd. v. Kelly Douglas & Co.*, that a landlord has four potential remedies where a tenant is in breach of or has repudiated a lease:

1. the landlord may do nothing to alter the relationship but simply insist on performance and claim for rent or damages on the basis that the lease remains in force;
2. the landlord may elect to terminate the lease while retaining the right to claim for arrears of rent and damages to the date of termination for previous breaches of covenant;
3. the landlord may take possession of the premises and relet the premises on the tenant's account; and
4. in addition to 2 above where the landlord terminates the lease, provided that it serves notice on the defaulting tenant, the landlord may claim damages on the basis of a present recovery of damages for losing the benefit of the lease over its unexpired term.

Where the landlord avails itself of the fourth remedy, courts have generally found an obligation on the landlord to mitigate its damages by finding a new tenant and offsetting the arrears owed by the old tenant against the amounts received from the new tenant. The landlord is not held to a standard of perfection in satisfying this duty to mitigate, but only a standard of reasonableness. Thus, a landlord was found to satisfy this duty even where it has rejected an offer because it contains a non-competition clause, where a landlord has narrowed the market to only the medical profession, and where a landlord accepted a replacement tenant at a decreased rate of rent. Since what constitutes reasonable mitigation is a question of fact, it is often unclear what actions taken by a landlord satisfy or fail to satisfy this obligation to mitigate.

In the recent case of *577129 B.C. Ltd. v. Urban Life Enterprise Ltd.*, the landlord brought a claim against the tenant, assignee, and co-covenantor for outstanding, future, and lost rent. The landlord originally leased the premises to the tenant for use as a restaurant. The lease was later assigned with the consent of the landlord to the assignee. The assignee became ill and advised the landlord that he was unable to continue operating, but that he was searching for a buyer for the equipment which was worth approximately \$20,000. Since the assignee was in arrears, the landlord terminated the lease effective May 31, 2008 and re-let the premises to a new tenant commencing December 1, 2008. The landlord provided the new tenant with a \$50,000 improvement allowance and a rent-free fixturing period.

The court found that the landlord was entitled to sue for rent accrued up to the termination date, but any claim for future or lost rent thereafter was a claim for damages and subject to mitigation as set out in *Transco Mills Ltd. v. Percan Enterprises Ltd.* The court went on to consider the landlord's following actions in determining whether this duty had been satisfied. First, the landlord failed to distraint for rent or allow the defendants to sell their furnishings and equipment and apply the proceeds thereof to rent arrears. This failure was a failure on the part of the landlord to mitigate its loss. The court rejected the landlord's evidence that the furnishings and equipment were worthless despite the landlord's argument that it relied on the opinion of a bailiff who had driven by and informed them that there was nothing of value, given that some of the defendants' furnishings and equipment were used in furnishing the new tenant's restaurant, and given that the assignee had advised the landlord prior to the termination that the furnishings and equipment were worth approximately \$20,000 and that he was looking for a buyer.

Second, the court found the \$50,000 improvement allowance a failure by the landlord to mitigate its loss. This “sweetheart deal” offered to the new tenant involved benefits far in excess of what was being claimed as a loss and was unconscionable when the landlord was claiming that it suffered a loss as a result of the termination.

Third, the court found that the rent-free fixturing period offered by the landlord, which it was claiming as a loss from the previous tenant, was another indication of the landlord’s failure to mitigate. The court ultimately found that the landlord was entitled to rent arrears and damages amounting to three months rent and the defendants were entitled to the same amount, being the discounted value of the furnishings and equipment which belonged to the defendants.

The takeaway for landlords when terminating a lease and claiming damages for the unexpired term is that landlords should act reasonably, realize on assets that may have value, and be careful to ensure that any incentives being offered to any new tenant are reasonable.