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PDF 11-31

RELOCATION

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ICSC 2008 U.S. Shopping Centre Conference
Hollywood, Florida
October 22 – 25, 2008

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In Canada, relocation rights were introduced into commercial leases sometime around the mid-1980's. Since then, we have seen some litigation concerning the exercise by landlords of these relocation rights. The decisions in these cases tend to suggest that the courts will enforce the clauses faithfully with their wording. Here is a summary of the decisions.

Retail

In the 1993 decision by the Ontario Superior Court, *C.T.R.E.F. Investment Ltd. v. H.G.O. Real Estate Ltd.*[1], the new premises were supposed to be "at least as good as" the leased premises. The tenant, a real estate company, was not a tenant whose location in the plaza was vital to its prosperity. The tenant refused every offered location until the only locations remaining available were not ideal. The court held that the tenant could not take advantage of its refusals and was required to relocate.

In the 1994 decision by the British Columbia Superior Court, *Final Touch Gift Shop v. Broadmoor Shopping Centre Ltd.*[2], the lease permitted the landlord to relocate the tenant provided there be no material and permanent reduction in access to the premises and the landlord fit up the new premises to the existing standard. The relocation premises had no exterior windows whereas the original premises did. The court concluded that the reference to access included visual as well as physical access to the interior and that it would not be possible for the landlord to satisfy the requirement to fit up the new premises to the existing standard where walls of glass cannot be finished in the same way as a solid wall through which no light passes. The tenant was not required to relocate.

In the 1998 decision by the Newfoundland Superior Court, *St. John's Development Corp v. Eyeland Enterprises Inc.*[3] the tenant's retail space in the mall had both inside and outside exposure. The relocation clause did not protect the tenant in terms of quality of relocation premises. The only protection was in terms of comparable size. The tenant was required to accept relocation premises that did not have outside exposure.

In the 1999 decision by the Manitoba Court of Appeal, *Rivard Ultracuts Ltd. v. Unicity Mall Ltd.*[4], the tenants refused to relocate to comparable premises as required by the lease and sought and obtained injunctive relief. The Landlord intended to demolish the enclosed shopping centre in order to build a power centre. It wanted the tenants to relocate but acknowledged that no premises in the power centre could be comparable *per se* to interior mall space. The landlord ultimately developed around the tenants to the point that the mall was deserted and there was no advantage of doing business in the to-be-demolished mall. Now, the tables turned. The landlord brought a fresh application and succeeded in having the injunction set aside, as the sole

[1] [1993] O.J. No. 1194 (Ont. Sup. Ct.) (QL).
[2] [1994] B.C.J. No. 1479 (B.C. Sup. Ct.) (QL).
[3] [1998] N.J. No. 295 (Nfld. Sup. Ct.) (QL).
[4] [1999] M.J. No. 459 (Man. C.A.) (QL).

remaining purpose of the injunction was to give the tenant an unequal bargaining position in an ultimate settlement. The court noted that "neither side … secured a victory" and the only reason the Court allowed the appeal and set aside the injunction was to prevent an equitable remedy being used for an improper purpose. It forced the parties to return to the bargaining table.

In the 2001 decision by the Ontario Superior Court, *First Windsor Shopping Centres Ltd. v. Langille*[5], the lease gave the landlord the right to relocate the tenant to replacement premises within the property. The landlord planned to demolish the building in which the leased premises were located, expand the shopping centre and move the tenant to premises outside the original parcel of land on which the original building containing the premises was situated. According to the lease, replacement premises were to have visibility and accessibility equal to or better than that of the existing premises. The tenant refused to relocate and the Court held in the tenant's favour, as the replacement premises did not meet the terms of the lease by virtue of (1) not being located on the property, and (2) not having visibility equal or better than that of the original premises.

In the 2002 decision by the British Columbia Superior Court, *Stonegate Enterprises Ltd. v. West Oaks Mall Ltd.*[6], the lease gave the landlord the right to relocate the tenant provided the relocated premises were in a location similar to the existing premises and of a similar size and finish. The landlord undertook a major renovation of an enclosed shopping centre and relocated the tenant from its existing location in between two anchor tenants to new premises at the end of the shopping centre. Also, after the renovation, access to the anchor tenants was primarily from outside of the shopping centre. The tenant argued that the new premises did not provide similar traffic flow, visibility and accessibility as the existing premises. The Court agreed with the tenant and held that the new premises was not similar to the existing premises. The tenant had contracted for a location in an interior shopping centre between two anchor tenants, with an obvious advantage to shopper traffic flow. As a result of the landlord's renovation, the visibility, accessibility and convenience to shopper traffic of the new premises was greatly reduced from that of the existing premises. The landlord was ordered to pay damages to the tenant.

In the 2005 decision by the Ontario Superior Court, *Nicholby's Franchise Development Inc. v. 1263448 Ontario Ltd.*[7], the relocation clause was not to be exercised "for the purpose of depriving the Tenant of the use and enjoyment of the Premises or in order to relet the Premises to another party". The landlord sought to demolish the interior of the leased premises and consolidate them with common areas and other leasable premises to create a large leasable unit for a grocery store. The tenant argued that the landlord was relocating for the purpose of reletting their premises to the grocery store tenant. The landlord argued that the leased premises would no longer exist following the redevelopment, and the landlord's purpose was to improve the shopping centre, not to relet the Premises to another party. The landlord also argued that to allow the tenant to resist relocation in this context would effectively negate the purpose of the clause. The Court agreed with the tenant and granted an injunction in its favour.

[5] [2001] O.J. No. 5584 (Ont. Sup. Ct.) (QL).
[6] [2002] B.C.J. No. 1098 (B.C. Sup. Ct.) (QL).
[7] [2005] O.J. No. 4396 (Ont. Sup. Ct.) (QL).

In the 2007 decision by the Queen's Bench of Alberta, *San Francisco Gifts Ltd. v. Londonderry Shopping Centre*[8], the landlord brought a motion for summary judgment to relocate the Tenant pursuant to a relocation clause in the lease. The relocation clause stipulated that the new premises must be of similar size in square footage, have similar frontage and should have no less pedestrian traffic flow. The landlord offered the tenant a choice of two alternate vacant spaces but the tenant refused to relocate to either one. The tenant argued that the two alternate spaces did not satisfy the requirements in the relocation clause. The court considered the three requirements and concluded that although the alternate spaces provided similar square footage, the frontage and pedestrian traffic flow of the alternate spaces were not similar enough. With respect to pedestrian traffic flow, the tenant argued that the escalator casement in front of one of the spaces impacted traffic. The tenant produced a marketing study demonstrating that substantially more people turned right (towards the current leased space), than left (towards the vacant space) when disembarking the escalator. Furthermore, the current lease space was on the same side as the food court whereas vacant space #1 was on the opposite side. Since students, a target customer base of the tenant, tended to access the food court from the side of the mall that the current leased space was on, the tenant argued that moving the business to the opposite side would result in reduced student traffic flow directly in front of the store. As to frontage, the tenant rejected vacant space #2 because it was a corner location, whereas the current leased space was in-line. The court found that considering whether the alternate spaces provided "similar" frontage required both a quantitative analysis and a qualitative one. As a result, the court found that there were genuine issues for trial; the motion for summary judgment was dismissed.

In the 2007 decision by the Ontario Superior Court of Justice (affirmed, Court of Appeal), *Millennium Veterinary Hospital Corp. v. SR & R Bay Ridges Ltd.*[9], the landlord wanted to relocate the tenant to the lands just outside the shopping centre in which its leased premises were currently situated. The court concluded that the relocation clause could not be interpreted as allowing the landlord to relocate the tenant outside of the shopping centre.

Office

There is one other Ontario decision dealing with a relocation dispute, arising in an office setting: *Bennett v. Exchange Tower Limited*[10]. The issue was whether the landlord provided a comparable alternate location, as required by the relocation clause. The parties agreed substantially as to the factors that go into determining whether a property is or is not comparable, and they agreed that although the term does not mean "identical", it does mean "similar." It was acknowledged that the location within a floor plan and elevator access and exposure are important criteria in determining comparability of office space, and that the location offered by the landlord was substantially inferior in terms of location though similar in respect of the other relevant criteria. The landlord argued that, in effect, all the criteria should be combined in determining comparability. The tenant maintained that to be comparable, a property must be comparable in each area of relevant inquiry. The court held that the latter is the preferable view and that where a proposed comparable property is substantially inferior in an important respect,

[8] Unreported.
[9] [2007] O.J. No.2848, aff'd [2008] O.J. No.1352 (Ont. C.A.).
[10] [22 February 1999] Toronto 99-CV-163514 (Ont. Gen. Div.) (unreported).

the property cannot be said to be comparable in the sense of being "similar." Another issue to be ruled on in this case was what the term "reasonable expenses" included, since the landlord was obliged to pay the tenant's "reasonable expenses" in connection with the relocation. The court found that the tenant, a lawyer, did not have an entitlement to be paid for his time and business interruption loss as a condition of his complying with the relocation clause, if and when comparable premises were offered to him.

Related To Relocation, But Not Really

In a case where the landlord was pursuing a redevelopment opportunity and needed its tenants to get out of the way *(Evergreen Building Ltd. v. IBI Leaseholds Ltd.*[11]*)*, the landlord pressed its recalcitrant tenant to leave, but the plan backfired. The tenant had a lease for five (5) years, with a right of renewal, for an entire floor in an older, 10-storey building. One year into the term, the landlord informed the tenant that it planned to demolish the building and replace it with a residential condominium. The lease did not contain a termination right and the tenant refused to go, claiming security of tenure under its lease. The landlord commenced proceedings for re-entry and sought a declaration that damages were the appropriate remedy. The tenant applied for an injunction to prevent the landlord from breaching the covenant of quiet enjoyment.

The landlord argued that it should be allowed to terminate the contract and pay damages to the tenant, based on the common law doctrine of "efficient breach of contract". Under this doctrine, provided the innocent party is fully compensated for the breach, both parties can be released from their contractual obligations where the benefits of the breach would be so great that even with the innocent party being made whole, the breaching party would still turn a profit. The tenant argued in *Evergreen* that its lease gave it an interest in land; such interests have always been protected by the courts by way of an injunction preventing the landlord from interfering with the tenancy. The tenant maintained that the building had many unique architectural features that it could not find in other buildings. In deciding whether the injunction should be granted, the Court applied the classic test: (i) is there a "serious issue to be tried," (ii) will the party seeking the injunction suffer irreparable harm (harm which cannot be adequately compensated by damages), and (iii) is the balance of convenience in the favour of the party seeking the injunction (i.e. the inconvenience of not granting the injunction outweighs the inconvenience to the other party of granting the injunction). The Court considered these 3 factors and granted the injunction.

The injunction expired shortly thereafter and the parties went back to Court, with both parties re-iterating their arguments. The judge emphasized that the lease conveyed an interest in land; the landlord had no right to re-enter and re-take possession; and the theory of efficient breach was better suited to a contract breach and did not enable the landlord to take back the leasehold interest. It declared the injunction to be permanent.

The landlord appealed to the British Columbia Court of Appeal. The Court of Appeal found that the lower Court did not appropriately exercise its discretion in deciding to grant an injunction. The Court of Appeal held that the court must not automatically grant an injunction on the basis

[11] [2005] B.C.J. No. 2552 (B.C.C.A.) (QL).

of protecting an interest in land. Although, it must be said that contract remedies do not preclude injunctions, awards of damage are far more common for breach of contract. The Court ruled that it was necessary to consider all of the equities between the parties, particularly that it would be unfair to the landlord to allow one tenant to prevent the landlord from re-developing the building. The permanent injunction was revoked, an interim injunction was re-instated and the case was sent back to the lower court to be reconsidered (on the basis that the lower court would apply the law as stated by the Court of Appeal).

The tenant obtained leave to appeal to the Supreme Court of Canada, but later dropped the matter as it became moot. (The property was declared a heritage site; the re-development did not proceed.)

The Conclusions We Draw

All of this case law reveals that landlords generally encounter some risk in dealing with tenants who are prepared to fight when faced with a relocation right being invoked by their landlord. It is often frustrating for landlords, who have invested financially and emotionally in a 'better plan' or the 'next big deal', to contend with tenants who don't necessarily embrace their landlord's grand plans. These cases send a message to landlords, to venture cautiously and carefully into the exercise of their relocation rights.

As is evident from the cases summarized above, tenants hold a significant degree of leverage where landlords attempt to exercise relocation rights. It is reasonably likely, if there is some degree of error in attempting to exercise the right, that injunctive relief can be obtained.

To address this commercial reality, it has been suggested by some practitioners that landlords ought to write broader relocation rights into their leases (e.g. "The Landlord may at any time relocate the premises to any other premises in the Complex."). The writer does not favour this approach. Leaving aside the issue of whether astute tenants would agree to such terms, there remains the risk that the courts will imply protective terms in favour of the tenant (given their apparent tendency to assist tenants to remain in the location they initially bargained for). Although every clause can be undermined by creative interpretation means, this does not suggest that landlords should abandon the attempt to achieve a well-written one that covers all the important terms, e.g. factors of comparability, degree of comparability that will suffice, responsibility for build-out, timing/notice, costs of disruption/moving, purpose of relocation.

Perhaps it's time to introduce "motherhood and apple-pie" acknowledgements within relocation clauses, whereby the tenant acknowledges that the general purpose of the clause is to allow the landlord to take back the premises to put them to another purpose, that the clause is not to be interpreted in a limiting manner, and that any ambiguity is to be construed generously in favour of the landlord and its objectives at the time that the landlord bona fide seeks to exercise the right. Do you know any tenant who will sign that clause?