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## RENOVATING AROUND TENANTS

When renovating or redeveloping a property, landlords must consider the covenant of quiet enjoyment in favour of their tenants. In the common law provinces, this covenant is implied in every lease. Conduct by the landlord that substantially interferes with a tenant's use of its premises for "all the normal purposes" may amount to a breach.

### WHEN IS THE COVENANT OF QUIET ENJOYMENT BREACHED?

Whether a breach of quiet enjoyment has occurred is a question of fact that turns on the severity of the landlord's interference. A "brief or trifling" interference will not cause a breach, whereas a "substantial and permanent" interference will. Courts analyze a landlord's interference with reference to at least five factors, including:

- effect on access to the premises;
- effect on visibility of the premises, including signage;
- duration of the interference;
- intrusion into the premises;
- effect on the tenant's use of the premises.

Since the case law on quiet enjoyment is entirely fact-driven, only very general principles of what constitutes a breach have emerged. Commercial leases sometimes include express terms detailing the limits of the landlord's covenant for quiet enjoyment. An express covenant within a lease will override the covenant implied at law. However, Courts respect the fundamental nature of a tenant's right to quiet enjoyment, and will not allow it to be significantly infringed without express language indicating that intent.

For example, where the lease contains an express right on the part of the landlord to renovate or redevelop a property, a landlord may not exercise that right in a way that materially interferes with the tenant's use of its premises. In *Ostry v Warehouse on Beatty Cabaret Ltd.*, the Court stated that despite being broadly worded, the landlord's renovation right

would not permit any and every type of work, "because at some point the express purpose for which the premises were leased could be wholly defeated."

The Courts have attempted to balance the landlord's right to renovate or redevelop with the tenant's right to quiet enjoyment. In *Speiro Lechouritis v Goldmile Properties Ltd.*, the English Court of Appeal held that "balance" meant the landlord must take "all reasonable precautions" to minimize disturbance to its tenant. This decision is consistent with Canadian common law decisions, which have also held that the landlord must exercise renovation rights in a manner that minimizes interference to its tenants.

Even where a right to renovate expressly excludes liability for breach of quiet enjoyment or where the tenant's right to quiet enjoyment is qualified by the ubiquitous phrase "subject to the other terms of this lease," Courts have nevertheless offered some protection to tenants and their fundamental right to be free from substantial interference.

Landlords must be mindful of when their conduct might interfere with their tenants. When planning to renovate or redevelop, landlords are wise to be proactive, to talk to their tenants in advance and to consult with them in order to address concerns. Courts tend to look favourably on landlords who exercise their right to renovate or redevelop with regard to the tenant's right to quiet enjoyment.

### TENANT REMEDIES

Even when a landlord breaches its tenant's right to quiet enjoyment, the tenant is not entitled to stop paying rent. Only in exceptional circumstances, where the landlord's conduct is so egregious that the tenant has been "constructively evicted," will a tenant be relieved of its rent obligation. This can only be determined by a Court. More commonly, tenants who suffer a breach of the covenant for quiet enjoyment are awarded damages or an injunction.

The monetary loss suffered by the tenant is to be compensated by an award of damages, but if a tenant is claiming an interference that is difficult to quantify, damages may be inappropriate.

An injunction, on the other hand, is a Court order that prohibits a landlord from undertaking certain actions. While an injunction should only be ordered where damages would be inadequate, recent case law suggests judges may be willing to grant them in a variety of circumstances. In *Bloor Street Diner Limited v Manufacturer's Life Insurance Co.*, the Ontario Superior Court boldly stated that "where a tenant alleges wrongful interference with a proprietary interest, an injunction is the preferred remedy." In this case, an institutional landlord of a major Toronto high-street building intended to overhaul the property's retail component. An independent tenant restaurateur, whose patio space and exterior views would be affected by scaffolding etc. during the renovation, successfully argued that the activity would cause such a disruption as to amount to a breach of the quiet enjoyment covenant. The Court ordered a permanent injunction prohibiting the landlord from redeveloping in accordance with the proposed plans for the remainder of the term of the restaurant lease, including renewals. The case is under appeal.

Sometimes, injunctions are ordered on a temporary basis, pending a hearing as to whether a permanent injunction will be granted. A temporary injunction can have as much of an impact as a permanent injunction as it may interfere with the timing of key deals in the redevelopment or cause the landlord to abort the redevelopment

altogether. Even the filing of an application for a temporary injunction can have a major impact. During the period between the filing of an application and the issuance of a ruling, the landlord's fate hangs in the balance - that delay might itself amount to a *de facto* injunction that makes redevelopment impractical.

### **DEROGATION FROM GRANT AND NUISANCE**

Other ways in which interference caused by a landlord's renovation or redevelopment may trigger liability under a lease are: (1) the rule against derogation from grant; and (2) the tort of nuisance.

The rule against derogation from grant has been formulated as follows: "A grantor having given a thing with one hand is not to take away the means of enjoying it with the other." A landlord's grant of a leasehold interest is the exclusive use of the premises for a period of time. Significant disruption may constitute a derogation of the landlord's grant to the tenant.

The tort of nuisance involves a party using its land without "reasonably having regard to the fact that [it] has a neighbour." These claims most frequently arise when the landlord's work outside the premises causes dust, noise, and vibrations inside the premises. In the context of a lease, a substantial nuisance will almost always constitute a breach of quiet enjoyment.

The bottom line is that when a landlord renovates or redevelops its property, it should be careful not to substantially interfere with the right of its tenants to use their premises. While modest interference is acceptable, a landlord may never run roughshod over the tenant's fundamental right of quiet enjoyment.



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