



THE LAW SOCIETY OF UPPER CANADA

THE SIX-MINUTE COMMERCIAL LEASING LAWYER 2016

FEBRUARY 18, 2016

LANDLORD RENOVATIONS AND REDEVELOPMENTS:

**When, if ever, do they give rise to a breach of the Landlord's
Covenant for Quiet Enjoyment?**

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INTRODUCTION

When a landlord renovates or repairs its property it must be cautious not to infringe upon the rights of existing tenants. A tenant has a fundamental right to exclusive use and possession of its leased premises and a landlord has a corresponding fundamental obligation not to interfere with that right. If the landlord's construction activities interfere with the tenant's use or possession of the leased premises, the landlord may be in breach of the lease.

This paper will explain the ways in which a landlord's renovation or repair may expose it to liability to its tenants. It aims to clarify the blurry line between a landlord's right to renovate or repair its property, and a tenant's right to be free from interference by its landlord. It will also touch on the remedies available to tenants when their landlord has interfered with their use and possession of the leased premises.

TENANT'S RIGHT TO BE FREE FROM INTERFERENCE

A. The Covenant For Quiet Enjoyment

The covenant for quiet enjoyment is implied by the common law into every lease; it arises simply from the act of letting.¹ Although the covenant employs the word "quiet", it is about much more than noise. It is "an assurance ...against any substantial interference,

¹ Robert D Malen, "The Landlord's Covenant for Quiet Enjoyment in a Shopping Centre Lease" in Harvey M. Haber ed, *Tenant's Rights and Remedies in a Commercial Lease* (Toronto: Canada Law Book Inc., 2014) 201 at 202, citing *Geary v Clifton Co.*, [1928] 3 DLR 64 (ON SC). The common law implication of the covenant is codified in section 23(1) of the *Conveyancing and Law of Property Act*, RSO 1990, c C 34.

by the [landlord] or those claiming under him, with the enjoyment of the premises for all usual purposes.”²

Whether the covenant for quiet enjoyment has been breached is a question of fact.³ In order to answer the question, a Court must assess the degree to which the landlord’s work interferes with the tenant’s use of its leased premises. In *Watchcraft Shop Ltd. v L&A Development (Canada) Ltd.*⁴ a landlord sought to convert part of its building to condominiums. A high profile jewellery store tenant alleged that the landlord’s scaffolding blocked much of the tenant’s storefront and signage from public view, obstructed access to its premises, caused substantial noise from the ongoing construction work, and created dust and dirt in its premises. In the first of many actions, the tenant was successful in obtaining an interlocutory injunction preventing the landlord from interfering with its business. In a subsequent action, the Court noted the difficulty in determining when a landlord has gone too far, stating:

“any act by a landlord which is an interference with the tenants (sic) ability to use the premises for the intended purposes, may constitute a breach of the right to quiet enjoyment...However, not every interference [will constitute a breach].

An interference which is of a brief or trifling nature will not be a breach. Conversely, a substantial and permanent interference will almost certainly constitute a breach. While it is relatively easy to define the limits of the right in reference to these extremes, it is not easy to characterize conduct which falls between the two extremes.”

² *Canadian Law of Landlord and Tenant*, Williams & Rhodes (6th ed) [emphasis added]. The covenant is also an assurance that the landlord has sufficient title to lease the premises. If the landlord’s title is defective in this regard, the lawful interference by a third party breaches the landlords covenant for quiet enjoyment.

³ [1996] OJ No 2252 (Ct J (Gen Div)); [1996] OJ No 5479 [*Watchcraft*].

⁴ *ibid.*

In *Owen v Gadd*,⁵ the tenant leased the ground floor of a building for the operation of a retail shop. The landlord needed to carry out repairs to upper floors of the building and for that purpose erected scaffolding around the exterior of the building, including in front of the tenant's shop. The scaffolding “seriously interfered with the ordinary access of the public to the shop and to the shop window” and, as a consequence, the tenant suffered “a serious and a substantial loss of his business.” The Court found that the placement of scaffolding poles in front of the tenant’s shop window was not merely “trifling or purely transitory”; it constituted a breach of the covenant for quiet enjoyment.

In *Irvine Recreations Ltd. v Gardis*,⁶ the tenant leased the premises for use as a bowling alley. The landlord commenced major renovations to the restaurant directly above the leased premises. The renovation included work to the building’s plumbing system, the result being that the landlord’s contractors were constantly in and out of the leased premises for approximately five and half months, drilling holes in the ceiling and storing building materials in the leased premises itself. Dust and gravel arising from the work regularly dirtied the bowling alley and faulty plumbing resulted in human excrement on the floor of the leased premises on several occasions. The Court held that the landlord breached the covenant for quiet enjoyment.⁷

In *1039198 Ontario Inc. v Ash Pharmacies*,⁸ the tenant leased three units in a shopping plaza for the operation of a pharmacy. The landlord’s renovations of the plaza were largely cosmetic. They included painting the exterior façade, doing some stucco work, replacing some dead trees, improving the lighting of the plaza, and one or two days of bulldozing to replace the pylon sign. Finding there to be no breach of the covenant for quiet enjoyment, the Court stated “the work was carried out with dispatch. The entire thing was completed within about 3 to 4 weeks. The work directly in front of [the tenant’s] store (painting, erecting a sign and putting in lighting) went on for no more than

⁵ [1956] 2 All ER 28 (Eng CA). Notably, Court found that the covenant for quiet enjoyment had been breached, notwithstanding that the repairs were “urgently needed,” done with “great expedition,” and the landlord “took all proper steps as good landlords to minimise the disarrangement.”

⁶ [1982] SJ No 194 (QB) [*Irvine Recreation*].

⁷ The Court cited the Supreme Court of Canada decision in *McNichol v Malcolm* (1907-8), 39 SCR 265 for the proposition that the landlord is liable for breach of the covenant by its independent contractors.

⁸ [1998] OJ No 4397 (Ct J (Gen Div)).

two or three days and the disruption of the store's business was minimal". The Court characterised the disruption as "brief and transitory...[and] certainly not substantial enough to constitute a breach of the covenant for quiet enjoyment."

In *Michael Santarsieri Inc. v Unicity Mall Ltd.*,⁹ the landlord of a large shopping centre sought to demolish the centre and replace it with several retail outlets. With the exception of two tenants, all of the tenants vacated their premises. The leases of the two remaining tenants gave the landlord the right to relocate the tenants if the landlord exercised its right "from time to time alter, expand, improve, diminish, maintain, operate, renovate, remerchandise and supervise the Project". The two tenants refused to vacate their premises and asserted their right to remain in the shopping centre for the remainder of their respective tenancies. The landlord padlocked the premises and bulldozed the building. The Court found that the demolition and replacement with new freestanding buildings was not an "alteration" and therefore beyond the scope of the express rights of the landlord. In padlocking and demolishing the building, the landlord breached the covenant for quiet enjoyment and trespassed on the property of the tenants.

The above cases roughly delineate the scope of the covenant for quiet enjoyment. While the tenant is expected to endure some interference, if the landlord substantially interferes with the tenant's use of premises, the covenant will be broken. The Courts have considered the following factors in determining whether the interference is sufficiently severe to constitute a breach of the covenant for quiet enjoyment:

- Effect on access to the premises;
- Effect on visibility of the premises, including signage;
- Duration of the work;
- Intrusion into the leased premises itself;
- Effect on the operation of the tenant's business.

⁹ 2000 MBQB 202.

B. Nuisance

In the realm of property law, nuisance consists of an unreasonable interference by one person with the use and enjoyment of the land of another. When a landlord renovates or repairs areas adjacent to its tenant's leased premises, the creation of dust, noise or odour may expose the landlord to claims in nuisance. Determining whether a nuisance has been committed, in the case of *Mandrake Management Consultants Ltd. v Toronto Transit Commission*,¹⁰ the Ontario Court of Appeal stated:

“The ultimate question to be asked is whether the defendant is using the (adjacent) property reasonably having regard to the fact that the defendant has a neighbor.”

While renovating or repairing areas adjacent to tenant's premises may expose a landlord a claim of nuisance, it likely does not create exposure beyond the covenant for quiet enjoyment. The traditional view was that to breach the covenant for quiet enjoyment “there must be some physical interference with the enjoyment of the demised premises and that mere interference with the comfort ... such as might arise from noise, invasion of privacy, or otherwise is not enough.”¹¹ However, the covenant has since been expanded to include more than direct physical interference. In *McCall v Abelesz*¹² Lord Denning stated that “the covenant is not confined to direct physical interference by the landlord. It extends to any conduct of the landlord or his agents which interfere with a tenant's freedom of action in exercising his rights as tenant.”¹³ Therefore, if a landlord's behaviour constitutes a nuisance, it will more than likely also constitute a breach of the covenant for quiet enjoyment. In essence, the contemporary scope of a breach of the covenant for quiet enjoyment overlaps with a nuisance created by the landlord.

¹⁰ [1993] OJ No 995 (CA).

¹¹ *Brown v Flower*, [1911] 1 Ch 219.

¹² [1979] QB 585.

¹³ *ibid*; see also *Tucker v Scott*, [1980] OJ No 2820 (Co Ct); *Albamor Construction and Engineering Inc. v Simone*, [1995] OJ No 2099 (Ct J (Gen Div)).

C. Derogation From Grant

The rule against derogation from grant is that:

*“A grantor having given a thing with one hand is not to take away the means of enjoying it with the other.”*¹⁴

Describing the rule against derogation from grant, in *Zawaly v Yochim*, the Ontario District Court stated “a person who ...lets land, knowing that the [tenant] intends to use it for a particular purpose, may not do anything which hampers the use of the ...land for the purpose which both parties contemplated at the time of the transaction.”¹⁵ And in *Firth v BD Management*, the British Columbia Court of Appeal stated that in order to find a derogation from grant, the tenant “must demonstrate that there has been some act [of the landlord] which renders the premises substantially less fit for the purpose for which they were let”¹⁶

In *Country Style Food Services Inc. v 1304271 Ontario Ltd.*,¹⁷ the tenant leased a free-standing building for the operation of a coffee and doughnut restaurant. The restaurant was one of the first premises leased on land that the landlord thereafter intended to develop into a shopping plaza. A site plan of the proposed plaza was attached to the tenant’s lease. About a year after the tenant opened for business, the landlord commenced development of the plaza; however, the finished plaza was substantially different than that contained in the site plan attached to the lease. The tenant alleged that the new configuration materially reduced the viability of its business by negatively impacting access to its drive through lane, reducing visibility of the restaurant, and causing traffic congestion in the plaza. The Court held that the tenant “leased not only the restaurant premises but the premises in the context of the entire mall as outlined in the site plan and that the landlord’s unilateral change to the configuration constituted a derogation from grant.”

¹⁴ *Zawaly v Yochim*, [1988] OJ No 2934 (Dist Ct), citing *The Law of Real Property*, Megarry & Wade (5 ed).

¹⁵ *ibid.*

¹⁶ [1990] BCJ No 2035 (CA) [emphasis added].

¹⁷ [2005] OJ No 2730 (CA).

By renovating or repairing their tenanted properties, landlords may derogate from their grant when (1) the premises are less fit for the tenant's use while the renovation or repair work is ongoing, or (2) the completed renovations result in a reconfigured property rendering the leased premises less fit for the tenant's use.

The rule against derogation from grant overlaps with the covenant for quiet enjoyment. Comparing the two concepts, the Newfoundland Supreme Court stated that the:

*“principle of non-derogation from grant encompasses aspects of the covenant for quiet enjoyment. Though there is authority otherwise, it appears the stronger view is that the two obligations are not identical...In the cases of leases, the covenant for quiet enjoyment will extend to many of the acts which might be construed as a derogation from the lessors grant; but acts not amounting to a breach of the covenant ... may nevertheless be restrained as being a derogation of the grant”*¹⁸

Woodfall's Law of Landlord and Tenant,¹⁹ takes a slightly different view, stating that the distinction between the covenant for quiet enjoyment and the rule against derogation from grant “would seem to be that the obligation not to derogate from grant is concerned with the retained part which makes the demised premises less fit for the purpose for which they were let whereas the covenant for quiet enjoyment is concerned with enjoyment of the premises.”

Collectively, the covenant for quiet enjoyment, the tort of nuisance, and the rule against derogation from grant impose some limitations on how a landlord may renovate or repair a property with existing tenants. A landlord may be liable if its renovation or repair:

- substantially impacts the access to leased premises;
- substantially impedes visibility of the leased premises;
- continues for a long period of time;

¹⁸ *Aircraft Maintenance Enterprises Inc. v Aerospace Realties (1986) Ltd.*, [1992] NJ No 4 (Nfld Sup Ct).

¹⁹ Looseleaf ed by K. Lewinson et al. (London: Sweet & Maxwell, 1996) at 11.301.

- intrudes significantly into the leased premises itself;
- creates an unreasonable amount of dust, noise, or odour; or
- renders the leased premises substantially less fit for the tenant's use.

The critical issue is the effect that the renovation or repair has on the tenant's use and operation in the leased premises. While a tenant is required to endure some interference by its landlord, an interference that substantially impacts the tenant's use may expose the landlord to liability.

LANDLORD'S RIGHT TO RENOVATE & OBLIGATION TO REPAIR

Many leases expressly grant the landlord the right to renovate the premises or the adjacent areas, such as common areas in a shopping centre. Many leases also impose an obligation on the landlord to keep the shopping centre, including the common areas, in a good state of repair. While including such clauses is evidence that the parties agreed that the landlord has the right or obligation to conduct renovation or repair work, their inclusion does not appear to give the landlord *carte blanche*. Courts have held that the landlord's express right to renovate or its obligation to repair must be balanced against the tenant's right to quiet enjoyment. This typically means that the landlord must take reasonable steps to minimize disruption to its tenants.

In *Ostry v Warehouse on Beatty Cabaret Ltd.*,²⁰ the tenant leased the ground floor of a three storey building for the operation of a nightclub. The landlord intended to renovate the upper floors of the building, including the addition of a new fourth storey. In order to complete this major undertaking, the entire structure of the building had to be strengthened, from the basement through the leased premises and upwards. The undertaking involved erecting over twenty thick concrete, wood, or steel pilasters around the exterior of the leased premises, as well as some in the premises itself. The work also required concrete construction in the leased premises to accommodate the installation of an elevator shaft.

The tenant alleged that the work breached the covenant for quiet enjoyment, which simply provided that the tenant may "peaceably possess and enjoy the leased premises...without interruption or disturbance." The landlord relied on its express right in the lease to "repair,

²⁰ [1992] BCJ No 13 (Sup Ct) [*Ostry*].

remodel, alter, improve or add to the leased premises or the whole or any part of the building.” The Court held that the landlord’s right to renovate must be balanced against the tenant’s right to quiet enjoyment, stating that the landlord’s right “cannot be subordinate to the covenant for quiet enjoyment. If it were, it would be unnecessary. It cannot permit any work the landlord may wish to do...because at some point the express purpose for which the premise were leased could be wholly defeated.” The Court held that “it is implicit that the exercise of the landlord’s right is limited to work that does not cause any significant loss to the tenant.”

The tenant was generally open for business only on Thursday, Friday, and Saturday nights. The landlord scheduled all the work to be completed over a six week period, between noon on Sunday and noon on Thursday. The landlord also arranged for a complete cleaning of the premises on Thursdays to make it fit for operation as a nightclub over the weekend. The Court found that the schedule was “designed to minimize the effect of the construction on the [nightclub’s] business” and that the construction inside the premises was localized to a few specific areas. On this basis the Court held that the work would “not appreciably affect the operation of the nightclub” and therefore the landlord was within its rights under the lease.

In *Speiro Lechouritis v Goldmile Properties Ltd.*,²¹ the tenant leased the ground floor and basement of a seven storey building for the operation of a restaurant. In order to fulfill its obligation to keep the building in a good state of repair, the landlord brought in contractors to clean the exterior walls and windows, and to repair seals between the frames and the walls. The work, which was completed over a six-month period, required that scaffolding and sheeting be fixed to the outside of the building. As a result, from the outside, the restaurant appeared to be closed; from the inside, it was dingy and dusty.

England’s Court of Appeal stated that “it is axiomatic that where the provisions of any contract, including a lease, come into conflict, they are to be interpreted and applied so as to give proper effect, if possible, to both of them.” The Court enforced what it held must have been the understanding of the parties at the time the lease was executed, stating “the tenant’s enjoyment of the demised premises might be made temporarily less quiet and less profitable by the carrying out of structural repairs...[and that] the lessor’s rights and obligations were neither to ride

²¹ [2003] 1 EGLR 60 (UK CA) [*Goldmile*].

roughshod over the lessee's entitlement nor to be unreasonably impeded by them." The Court held that the balance between the two obligations required the landlord take "all reasonable precautions"²² to minimize disturbance to the tenant. The Court found there to be no breach of the covenant for quiet enjoyment since the landlord (1) consulted the tenant in advance about the work, (2) addressed the tenant's concerns by delaying the commencement of the work until after the tenant's busy Christmas season, and (3) spread out the increase in additional rent over a full year. Notably, the Court stated that such conduct "may make the difference between the reasonable and unreasonable execution of repairs."²³

The case law establishes that the tenant's right to quiet enjoyment is not subordinate to the landlord's renovation and repair rights; nor are the landlord's renovation and repair rights subordinate to the tenant's right to quiet enjoyment. Rather, the competing rights must be harmonized. Therefore, even when the lease grants the landlord an express right to renovate or imposes an express obligation to repair, the landlord must consider the potential impact on its tenants and take reasonable steps to minimize a disruption. Courts look favourably on landlords who consult with their tenants prior to commencing renovations or repairs for the purpose of addressing tenant concerns about the potential disruption caused by the work.

CONTRACTING-OUT OF THE COVENANT FOR QUIET ENJOYMENT

There are two methods that landlord-drawn commercial leases typically employ to reduce a landlord's liability to tenants for interference caused by renovations or repairs: (1) the covenant for quiet enjoyment is expressly limited to exclude any assurance against interference arising from the landlord's renovation or repair;²⁴ and (2) the lease contains an exculpatory clause that excludes liability for damages suffered as a result of the landlord's renovation or repair. These methods have inconsistent records of success.

²² England's Court of Appeal held that the appropriate standard was "all reasonable precautions," rather than the higher standard of "all possible precautions" at para 10.

²³ See also *Century Products Limited v Almacantar (Centre Point) Limited et al.*, [2014] EWHC 394 (Eng Ch Div), rev'd on other grounds [2014] EWCA Civ 922 (Eng CA).

²⁴ Often the covenant for quiet enjoyment is qualified by the caveat that it is "subject to the other terms of the lease." As discussed below, this imprecise qualification on a tenant's fundamental right to quiet enjoyment, without more, is unlikely to eliminate a landlord's liability for a substantial disruption.

A. Limit the Covenant for Quiet Enjoyment

If the lease does not mention quiet enjoyment, the covenant will be implied by law.²⁵ However, if the lease contains an express covenant for quiet enjoyment, as most contemporary commercial leases do, the express covenant will displace the implied covenant.²⁶ Accordingly, commercial leases typically contain an express covenant for quiet enjoyment that makes the covenant subject to the other terms of the lease, and sometimes even subject to interference arising from the landlord's renovation or repair activities. The tenant is, in effect, waiving its right to quiet enjoyment if the landlord undertakes renovations or repairs. As a waiver, the qualification of the covenant must be very clear.

Typically, however, the express covenant for quiet enjoyment simply contains the caveat that it is "subject to the other terms of the lease." This general and imprecise restriction may not be enough to convince a Court that the tenant intended to waive its fundamental right to quiet enjoyment.

In *Goldmile*,²⁷ the covenant for quiet enjoyment was qualified by the phrase "except as herein provided." Notwithstanding, the Court held that landlord's obligation to repair conflicted with the tenant's right to quiet enjoyment and that the "two covenants must be construed and applied... on the basis of parity, not of priority." In effect, the Court's ruling ignored the qualifying phrase that might otherwise have subordinated the covenant for quiet enjoyment to all the other terms of the lease (including the landlord's rights and obligations to renovate and repair). A landlord's best protection would be qualification of the quiet enjoyment covenant by explicit reference to the particular sections of the lease that grant the landlord rights to renovate and/or impose obligations to repair, and perhaps even go so far as to reference the types of disruption that the tenant may experience. As a practical matter, it may be difficult to negotiate such limitations.

²⁵ *supra* note 1.

²⁶ *supra* note 1, citing *Malzy v Eichholz*, [1916] 2 KB 308 (Eng CA); *Mayrand v 768565 Ontario Ltd* (1989), 63 DLR (4th) 424 (ON HC), reversed on other grounds (1990), 72 DLR (4th) 706 (CA).

²⁷ *supra* note 21.

While an express covenant for quiet enjoyment displaces the implied covenant, it does not dislodge the rule against derogation from grant.²⁸ Therefore, even when the covenant for quiet enjoyment is explicitly qualified to exclude an assurance against interference from renovations and repairs, if these works render the tenant's premises substantially less fit for the purpose for which they were let, the landlord may nevertheless be liable for derogating from its grant.

B. Exclusion Clauses

The parties may agree to exclude liability for breach of the covenant for quiet enjoyment arising from the landlord's renovation or repair by including an exculpatory clause in the lease. Courts tend to construe exculpatory clauses strictly. To be enforceable, exculpatory clauses must: (1) clearly apply to the circumstances; and (2) not be given under unconscionable circumstances, such as where the parties have unequal bargaining power.

In *Irvine Recreation*²⁹ the landlord claimed that it was not liable for interference occasioned by its work because the lease excluded any liability for the landlord's failure to keep the premises in a good state of repair, specifically excluding liability for damage resulting from "water pipes or plumbing in or about or above the said demised premises." The Court held that the clause excluded liability for breach of the landlord's obligation to repair, but that the landlord's work which led to the tenant's complaints was not a repair; it was a major renovation. On this basis, the Court held that the exclusion clause did not apply in the circumstances and therefore afforded no protection to the landlord.

In *Bryandrew Holdings Ltd. v Sifton Properties*³⁰ the tenant took an assignment of the lease in the landlord's shopping mall for the operation of a hardware store. At the time of the assignment, the landlord had plans to expand the mall. As a condition of consenting to the assignment, the landlord required that a clause be added to the lease which excluded liability for "reconstruction." The expansion, which included building a second level on the mall was a major undertaking involving the erection of substantial columns and hoarding on the ground level. The work rendered tenant's business unviable, to the

²⁸ *supra* note 2, citing *Grosvenor Hotel Co. v Hamilton*, [1894] 2 QB 836.

²⁹ *supra* note 6.

³⁰ [1994] OJ No 2399 (Gen Div), varied on other grounds [1997] OJ No 1416 (CA).

point that it was effectively closed. The Court refused to enforce the exclusion clause, since at the time of effecting the assignment the landlord did not disclose the scope of its intended expansion to the tenant. The Court found that, although the landlord was aware of the nature of the expansion and the effect it would likely have on the tenant's business, the tenant had been given "no warning of its magnitude." On this basis, the Court held that the exclusion clause was unconscionable.

Although unenforceable in Canada, an interesting American case reviewed the covenant of quiet enjoyment in the context of a renovation and might give landlords guidance on conduct that will insulate them from liability. In *Frittelli Inc. v 350 North Canon Drive, LP, et al.*,³¹ the tenant leased premises in a shopping mall for operation of a gourmet doughnut shop. The lease granted the landlord the right to remodel the shopping centre and excluded liability for damages due to the renovations. Prior to commencing the renovations, the landlord met with the tenant to discuss the planned renovation, which included erecting scaffolding along the façade of the shopping centre. The landlord arranged for temporary signs to identify its tenants, moved the tenants' awnings so they remained visible, cleaned dust that accumulated in the tenants' premises, and offered rent concessions to affected tenants. The Florida Court of Appeal upheld the limitation of liability, stating that "it is well established that the tenant to a commercial lease may agree to limit the scope of the covenant for quiet enjoyment" and that "the parties' intent, as expressed in the agreement, was to exempt the lessor from liability" related to the remodelling.

These cases provide direction on contracting-out of liability for a landlord's interference with the tenant's premises. The parties should consider implementing the following:

- Where possible, limit the covenant for quiet enjoyment with reference to the sections of the lease that grant the landlord rights to renovate and repair;

³¹ 202 Cal.App.4th 35 (2011).

- Include an exclusion of liability clause in the renovation or repair section of the lease with specific cross-reference to the covenant for quiet enjoyment;
- Communicate the scope of any renovation or repair, as best as can be done, so the tenant can appreciate the potential impact on its business.

Since Courts narrowly construe exclusion clauses, landlords might wish to further bolster the intended exclusion of liability by consulting with tenants in advance of the renovation or repair, working with tenants to address potential concerns, and conducting the renovation or construction in a manner that minimizes disruption to the businesses of the tenants.

TENANT REMEDIES

A tenant's general remedy is for damages naturally resulting from the landlord's breach, including any lost profits.³² In order to recover, a tenant must show that the landlord's breach resulted in monetary loss to the tenant. Detailed records evidencing a decline in profits corresponding to the period during which the landlord conducted the renovation or repair are required to prove the damages suffered by the tenant.³³

A tenant may also ask the Court to issue an injunction restraining the landlord from commencing or continuing the work. Injunctions are not ordered as a matter of course; they are only issued where it appears to the Court that money damages would be inadequate to remedy the breach.

If a tenant believes that its landlord's renovation or repair has substantially interfered with its rights and where it intends to bring an action to remedy the situation, the tenant is strongly advised to continue paying rent.³⁴ It is well settled law that the covenants in a lease are independent.³⁵ This means that a landlord's breach of the covenant for quiet enjoyment does not,

³² *Haack v Martin*, [1927] SCR 413; *Dasham Carriers Inc. v Gerlach*, 2013 ONCA 707.

³³ See *Shapes South Ltd. (cob Shapes Women's Fitness Centres) v ADMNS Pembina Crossing Investment Corp.* 2013 MBQB 208 where the tenant's claim was summarily dismissed for failing to provide evidence of loss suffered as a result of the landlord's renovation.

³⁴ *Tucker v Scott*, [1980] OJ No 2820 (Cnty Ct).

³⁵ *Sirdi Sai Sweets Inc. v Indian Spice & Curry Ltd.*, 2014 ONSC 7221.

in and of itself, give the tenant the right to stop performing its obligations under the lease.³⁶ While the landlord will be liable for its breach, if the tenant withholds rent it will also be in breach; however, the tenant's breach will be a much clearer breach, with potentially more severe repercussions. A tenant's remedy for the landlord's interference is to commence a court action for damages sustained as a result of the landlord's interference, or to ask the Court for an injunction preventing the landlord from commencing or continuing its interference-causing behaviour. To be clear that the tenant's payment of rent is not construed as consent to the landlord's conduct, the tenant may mark its rent payments with the phrase "under protest." For a more detailed discussion about remedies for breach of the covenant of quiet enjoyment the reader is referred to "Quiet Enjoyment: Turning Up the Volume on Interference", also written by the author (paper delivered at the ICSC Toronto Law Conference, March 6-7, 2008).

CONCLUSION

When a landlord intends to renovate or repair its property, it must consider the rights of its tenants. A tenant's right to use its leased premises for the intended purpose is fundamental to its leasehold interest. If the landlord intends to intrude on this right, it can only do so with the express consent of the tenant. If the lease does not contain clear wording granting the landlord the right to interfere with the tenant's use and possession, landlords should be aware of the peril that awaits their possible breach of the express or implied covenant for quiet enjoyment, or of the law of nuisance or derogation from grant. If landlords consult with their tenants about the contemplated renovations and repairs, and take reasonable steps to minimize the resulting disruption, they may actually help their cause in the long run. If a landlord is cavalier with its right to renovate or repair, paying little heed to its tenant's right to quiet enjoyment, liability for damages, or even an injunction, may result.

³⁶ Unless the interference amounts to a constructive eviction or fundamental breach.