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BARRISTERS & SOLICITORS

"KEEPING YOUR MERCHANDISE MIX UNDER CONTROL"

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LEASING LAWS

Keeping Your Merchandise Mix Under Control

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One of the most troublesome clauses in a retail lease is the use clause. Landlords are forever trying to rein in the scope of their tenants' businesses. Tenants are fond of writing use clauses that effectively say, "we'll carry on whatever business we carry on under whatever name we like".

A few recent Ontario cases underline the significance of the use clause.

In *Loblaws Inc. v. 1098748 Ontario Ltd.*, Loblaws sought to change the banner and name of one of its supermarkets from a 'Loblaws' to a 'No Frills' discount supermarket. The lease allowed the tenant to use the premises for the business of a supermarket for the sale of food and other non-food items as carried on by the tenant in a majority of its similar stores.

The trade name clause in the lease said that a change in trade name required the landlord's consent, not to be unreasonably withheld. The landlord did not like the concept of the switch to a discount food operation, and refused its consent to the trade name change. The court concluded that the landlord had unreasonably withheld its consent.

In the court's view, a 'No Frills' store was not a different or other supermarket than carried on in the majority of Loblaws' other stores; both 'Loblaws' and 'No Frills' were banners for a supermarket selling food and non-food items.

The court noted that similar conclusions had previously been reached in the case of *Oshawa Group Ltd. v. 1113443 Ontario Inc.* In that case, the court held that a similar use clause did not allow the landlord to refuse consent unreasonably when the Oshawa Group sought to change the banner of one of its stores from 'IGA' to 'Price Chopper'.

Contrast those cases with *Zellers Inc. v. Brad-Jay Investments Limited*, in which Zellers' lease contained a use clause that called for "a department store". The shopping centre was the Jane-Finch Mall in Toronto, in a neighbourhood notorious for drugs and gangs. The lease allowed the tenant to 'go dark' as long as it continued to pay rent. The lease also required the tenant to obtain the landlord's consent, not to be unreasonably withheld, for any assignment or sublease that would result in a change of use of the premises.

The tenant closed down and sought a new tenant for the premises. After three years of actively searching, the tenant was only able to find one operator interested in the premises: Close-Out King, which operated liquidation outlets. The landlord withheld consent to the proposed sublease; it said the use would be detrimental to the shopping centre's image. The tenant took the matter to court, arguing that since Close-Out King was the only prospective tenant to surface in three years, the landlord was being unreasonable.

The tenant also argued that since the landlord had earlier consented to the tenant's operation of a clearance centre at the premises, the landlord was unreasonable in not allowing the assignment to Close-Out King, another clearance store operator.

The court held in favour of the landlord. It respected the landlord's retail consultants' investigations and findings that established the basis of the landlord's refusal.

One might conclude that the Zellers case has more to do with reasonableness than use clauses. But from a merchandise-mix standpoint, all these cases are about the landlord's ability to control what goes on in its shopping centre. As far as that goes, there is no doubt that a tightly worded use clause (even 'department store' held up better than 'the sale of a variety of merchandise' would have) is a much better device than a broad one (using concepts like, 'as carried on in the tenant's other stores').

The moral of the story?

It's worth taking some time to think through the use clause carefully.