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BARRISTERS & SOLICITORS

"RELOCATION"

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RELOCATION

I. RELOCATION RIGHTS

(a) GENERALLY

It is a well known fact that if you ask any retail tenant what the three key elements to its success are, it is likely to respond: "Location, location, location". After intense negotiation with the landlord for a superior location in the shopping centre, the tenant may see its advantage lost and its business jeopardized if it does not negotiate protections for itself in the lease to ensure that its superior location is maintained throughout the term of the lease without interference by the landlord.

Commercial leases typically contain some form of relocation clause. This arises from the fact that a landlord views its control of the project as of paramount importance and one that is superior to any individual tenant's right to occupy its particular premises. As courts are unlikely to construe a relocation right as an implied term of an agreement, the landlord must specifically provide for this right in the offer to lease and the lease in order to be entitled to it.

(b) WHAT IS A RELOCATION CLAUSE?

A relocation clause allows the landlord to move the tenant from its original location to another premises at the same site. In the office leasing context, the clause allows the landlord to more efficiently utilize space in the building through movement and consolidation. For example, it allows the landlord to assemble contiguous space on one or more floors in a building to accommodate a large space tenancy. In order to be able to lease to a new tenant requiring a full floor, it is not uncommon for a landlord to relocate one or more smaller tenants on that floor to alternate floors. The relocation may result in a loss of superior view, a longer elevator wait for the tenant's clients, noisier premises, and other diminution in prestige of the relocated premises.

In the retail context, a relocation clause allows the landlord to renovate and expand the property without interference by an uncooperative tenant. It allows the landlord to take advantage of business opportunities with new tenants in that it may allow a new tenant access to the only suitable space available in the project. A landlord may seek to relocate a tenant in order to accommodate the expansion of a key tenant, thereby increasing customer traffic to the centre for the benefit of all tenants.

It should be pointed out that in some cases, a tenant may successfully argue that a *constructive relocation* has taken place, in that while the tenant has not itself physically moved, the landlord's activities in the areas surrounding the tenant's premises have effectively resulted in a change in the tenant's location in the context of its new position in the centre.

(c) TYPES OF RELOCATION CLAUSES

Relocation clauses take different forms and are of varying degrees of length and detail. Some landlords prefer a simple clause which merely states that the landlord may relocate the premises with the prior written consent of the tenant, which consent may not be unreasonably withheld. This type of clause provides the landlord with flexibility in negotiating the terms of the relocation without requiring the landlord to make any firm commitments as to how much notice it must give to the tenant, what it will pay for, and so on. Sometimes this provision is further amended to state that in rendering its consent, the tenant may take into account the location of the proposed premises and any compensation offered by the landlord. This type of wording provides the parties with a wide latitude in negotiating the terms of relocation. Any failure to agree upon terms will be determined by the court, which will closely scrutinize the motives of both the landlord and the tenant and the degree of good faith displayed by both during the course of the negotiations.

Where the landlord anticipates renovating or remerchandising the shopping centre in the near future, with the result that relocations are likely to occur, the landlord will probably seek to include a more detailed form of relocation clause in its lease form. Sample relocation clauses from both the landlord's and the tenant's perspective are attached to this paper.

(d) BARGAINING POWER

Key or anchor tenants will usually be successful in negotiating the deletion of the landlord's relocation right. This arises out of their strong bargaining power and/or the fact that the large space occupied by them in the project makes it unfeasible from a practical viewpoint or uneconomical for the landlord to relocate them elsewhere within the project. Most other tenants may be resigned to accepting a relocation clause, but they should negotiate some basic protections with respect to limiting the arbitrary exercise of the landlord's right, choice of the new location and responsibility for relocation costs. The respective bargaining power of the parties will dictate the terms of the landlord's relocation clause.

(e) CONFLICTING PERSPECTIVES

From the landlord's perspective, it wants the right to change anything, anywhere, at any time. From the tenant's perspective, it does not want to move. Failing that, the tenant will seek to be no worse off than it is now.

The tenant will want to ensure that the landlord has a good reason for the relocation. Valid reasons include the expansion or major alteration of the project, remerchandising of the shopping centre and other similar actions intended to increase customer traffic to and in the shopping centre by improving tenant mix and thereby improve the centre for all tenants. The landlord's relocation right should not be exercisable if its sole purpose is to lease the premises to another tenant who will pay a higher rent.

The courts have held that location is less critical for a "destination tenant". Conversely, what is good for a key tenant is generally good for all tenants from the viewpoint of attracting consumers to the shopping centre. Where the relocation clause specifies that the proposed new premises have to be in a location "at least as good as the leased premises *as reasonably determined by the landlord*", this means that the determination must be one which might be reached by a reasonable landlord in the circumstances and the determination must not be "perverse" in the sense of being irrational. The landlord is not required to be correct in its determination but must exercise a rational and honest judgment for the determination. (*C.T.R.E.F. Investment Limited v. H.G.O. Real Estate Ltd. (1993), Ontario Court of Justice, General Division*). The court considers the tenant in the context of the general community of interest of all the tenants in the shopping centre.

(f) NO REPRESENTATIONS BY LANDLORD

The attachment of a plan to a lease outlining parking areas, and other common areas, may imply that these areas will always be available for use by the tenant. In order to minimize the possibility that the tenant may succeed in an application for derogation from grant in the case where the landlord seeks to redevelop the centre by expanding into the parking areas, the practice today when attaching plans to a lease is to include a statement providing that the landlord reserves the right to relocate, alter or re-arrange the buildings and structures shown on the plan, including the leased premises and the common areas, from that shown on the plan.

(g) TENANT'S WISH LIST

In negotiating the landlord's relocation clause at the offer to lease or the lease stage, the tenant should try to obtain the following protections. Its success in achieving these will depend on the relative bargaining strength of the parties.

- (1) Conditions Precedent - The tenant may wish to stipulate that the landlord's relocation right will be exercisable only (i) once during the initial term, and not during any renewal or extension thereof, (ii) in connection with an addition, expansion or reconfiguration of the shopping centre comprising 40,000 square feet or more of rentable area, and (iii) if the addition, expansion or reconfiguration will directly affect the portion of the shopping centre in which the tenant's premises are located.
- (2) Timing - The tenant may require that any relocation not be exercisable during the first 5 (or whatever) years of the term or during the last 18 (or whatever) months of the term or the then current renewal term.
- (3) Notice - The landlord should be required to provide the tenant with proper written notice. 60 days' notice is considered the usual minimum but 120 days is preferable.

- (4) Blackout Periods - Depending on the tenant's business, the move should not be allowed to take place during certain months of the year. For example, retailers seek to avoid relocating during the months of November, December and January, being their peak sales season. Financial institutions and tenants selling mutual funds seek to avoid moves during the peak RRSP months of January and February. The physical move should take place during non-business hours, if possible, or during such other period as shall be mutually agreed upon by the parties.
- (5) Similar Location - The new location should be substantially similar in size, configuration and mall frontage to the existing premises, and located in similar proximity to other major tenants, mall entrances and exits. The visibility of the tenant's premises should not be less favourable to the tenant than it was before.
- (6) Reimbursement of Costs - The landlord should be required to pay for the tenant's relocation costs (including the cost of removing its trade fixtures and equipment, inventory and items of personal property from the old premises and installing them in the new premises) and the costs of improving the new space to a standard equivalent to that before. The landlord will usually require the tenant to relocate its trade fixtures, to the extent possible, to the new premises, failing which the items will be replaced at the landlord's cost.

Landlords are loathe to pay tenants for the cost of providing new fixtures where the fixtures in the tenant's existing premises are nearing the end of their useful life. However, a tenant with superior bargaining power may successfully negotiate the requirement that the landlord provide it with entirely new fixtures. As a minimum, the tenant will want the landlord to provide it with leasehold improvements at least comparable with respect to type, quantity and quality to those originally installed by the tenant.

In the office context, the tenant may require the landlord to reimburse the tenant for not only direct moving costs, but also the cost of reprinting reasonable amounts of stationery, business cards, change of address notification cards, directories, signage, re-wiring computers, moving and installing fibre optic cables in the premises, and other out-of-pocket costs. The landlord may seek to impose a cap on these costs.

- (7) Abatement of Existing Rent - Rent should abate for any period during which the tenant's operation is closed for business as a result of the relocation.

- (8) Reimbursement of Salary Costs - If the tenant's business is closed for more than 14 days (or whatever), then the tenant may seek to have the landlord reimburse the tenant for the regular salaries of those full-time employees of the tenant which the tenant is in good faith unable to temporarily relocate to another of the tenant's stores in the same trade area.
- (9) Lost Profit - A tenant with superior bargaining power may successfully negotiate reimbursement of the profit which it is able to demonstrate to the landlord was lost during the period of closure.
- (10) New Rent - The tenant will want to ensure that the minimum or basic rent and additional rent are not increased if the relocated premises are larger than its old premises. The landlord, on the other hand, may agree to maintain the same per square foot rate for minimum or basic rent as the old premises, but apply it to the larger rentable area of the relocated premises. The landlord will also resist any limitation on or "capping of" the additional rent payable by the tenant in respect of the relocated premises.
- (11) Loss of Business - The tenant may seek reimbursement of its loss of business during any "down time", although the landlord will resist this. Generally speaking, landlords will not compensate tenants for any lost profits due to a decline of business in the relocated premises, due to the many variables and uncertainties involved in making such determination.
- (12) Overlapping Occupation - The tenant may stipulate that it will not be required to vacate its old premises until 14 days (or whatever) after it shall have opened for business in the relocated premises. A rent free period may be negotiated for the relocated premises, especially during any such overlap period of occupation.
- (13) Temporary Premises - In order to avoid "down time", the tenant may require the landlord to provide it with temporary premises at little or no cost.
- (14) Extension of Term - If the tenant is required to close for business for more than 60 (or whatever) consecutive days, then the tenant may wish to have the option of extending the term of the lease by the corresponding time period.

A sample relocation clause, drafted from the tenant's viewpoint, reflecting the tenant's "Wish List", is contained in Appendix "A" (Version #3).

(h) TERMINATION RIGHTS

It may be beneficial to provide both parties with a right to terminate the lease if they are unable to reach agreement on the terms of relocation. From the landlord's viewpoint, it may need this right if it has no suitable alternative location to which to relocate the tenant. From the tenant's viewpoint, it may prefer to terminate the lease in lieu of accepting what it perceives as inferior premises. In such cases, it is common for the landlord to reimburse the tenant for the undepreciated capital cost of the leasehold improvements paid for and installed by the tenant (less any salvage value and less the value of any encumbrance). Any tenant allowances or inducements paid for by the landlord upon the initial installation of the tenant's improvements will be taken into account so as to avoid duplication of payment by the landlord. In order to avoid future disagreements as to value of the leasehold improvements, the parties may wish to specify the value of these improvements directly in the lease.

(i) A FINAL NOTE

The critical importance to the landlord of a relocation clause is most evident when an uncooperative tenant seeks to coerce the landlord into agreeing to its unreasonable demands under the threat of causing costly construction delays. While the tenant must be vigilant against the threat of losing what it originally bargained for, the landlord must consider the community of interests in and the well-being of the shopping centre as a whole. A well-drafted relocation clause will address the landlord's first priority, namely, to move the tenant first, so that construction may proceed, and then argue about compensation later. It is this priority which motivates landlords to restrict the tenant's remedies under the lease to compensation in damages, rather than injunctive relief.

Finally, a tenant may turn a relocation into an advantage. Tenants with well-drafted relocation provisions in their leases have often been the recipients of newly constructed and furnished premises at no cost to themselves, extensions of term, reduced rent and other benefits which come from a superior bargaining position.

II. SPECIAL TERMINATION RIGHTS

Generally speaking, other than in the case of damage and destruction, termination rights must be specifically provided for in the offer to lease if the party wishes to avail itself of the right. The following are some examples of special termination rights.

(a) TERMINATION IN LIEU OF RELOCATION

Where the offer or lease contains a relocation clause allowing the landlord to move the tenant elsewhere within the project, the landlord should provide itself with a right to terminate the lease if no suitable alternate premises are available for occupancy by the tenant. Failure to so provide may result in the landlord having to relocate or "buy a surrender of lease" from another tenant in order to accommodate the relocating tenant.

Similarly, the tenant may wish to provide itself with a right to terminate the lease if it chooses not to relocate to what it perceives as inferior premises, or if it wishes to take the opportunity to permanently retire from operating its business in lieu of forming part of a redeveloped centre, or if it believes that the landlord's changes to the common areas will result (or have resulted) in a material adverse effect on the tenant's business operations in the centre.

Where the landlord has given itself the right to enter upon the tenant's premises in order to make alterations in connection with a redevelopment of the shopping centre, and the landlord is required to permanently retake such a large or critical portion of the tenant's premises as to make it unfeasible for the tenant to carry on business, either from a physical or economic standpoint, in the balance of the premises, then the tenant may wish to provide itself with the right to terminate the lease.

In all of the foregoing cases, the tenant should seek fair compensation from the landlord for the closure of its business. The landlord will usually agree to pay to the tenant an amount equal to the undepreciated capital cost of those leasehold improvements paid for and installed by the tenant (less any salvage value and less the value of any encumbrance). Any tenant allowances or inducements paid for by the landlord upon the initial installation of the tenant's improvement will be taken into account so as to avoid duplication of payment by the landlord. The landlord will usually not pay for the tenant's trade fixtures and equipment, furnishings, decorations, inventory and other items of personal property, as these can usually be re-deployed. The cost of the leaseholds will be amortized on a straight-line basis assuming a useful life of the term of the lease, or as determined by the Income Tax Act, or some other reasonable time period.

The tenant may feel that the foregoing formula does not adequately compensate it for the loss of its business. From the landlord's perspective, the landlord is loathe to pay the tenant top dollar for old improvements in a store which is in need of being renovated anyway. A tenant with superior bargaining strength or the landlord's desire to keep intact a valued relationship with the tenant may result in the tenant receiving additional reimbursement in the event of termination.

(b) TERMINATION UPON DEMOLITION

If the landlord anticipates that its future redevelopment activities will be so extensive as to require demolition of all or a portion of the building, it may wish to insert a demolition clause in its offers to lease and leases. A sample clause is attached to this paper.

SAMPLE CLAUSES

APPENDIX "A"

RELOCATION CLAUSES

A. RELOCATION BY LANDLORD (VERSION #1)

Section 6.01(b)

Without limitation, the Landlord may, in its operation of the Shopping Centre:

- (i) change the area, level, location, arrangement or use of the Shopping Centre or any part of it;
- (ii) construct other buildings, structures, or improvements in the Shopping Centre and make alterations of, additions to, subtractions from, or rearrangements of the Shopping Centre, build additional stores in any part of the Shopping Centre, and construct additional storeys, buildings or facilities adjoining or near the Shopping Centre;
- (iii) install kiosks and other installations, permanent or otherwise, in or on the Common Elements;
- (iv) **diminish, expand, alter, relocate or rearrange the buildings, parking facilities and other parts of the Shopping Centre and, with the consent of the Tenant, which consent will not be unreasonably withheld, relocate or rearrange the Premises from that shown on Schedule "B", the purpose of which Schedule is solely to show the approximate location of the Premises; and**
- (v) do and perform such other acts in and to the Shopping Centre as, in the use of good business judgment, the Landlord determines to be advisable for the proper operation of the Shopping Centre.

B. RELOCATION BY LANDLORD (VERSION #2)

Notwithstanding anything contained in this Lease to the contrary, the Landlord shall have the right, at any time upon not less than sixty (60) days prior written notice to relocate the Tenant (including its sub-tenants and all other permitted occupants) to other Rentable Premises in the Building (the "Relocated Premises") and the following terms and conditions shall be applicable:

- (i) the Relocated Premises (which term shall mean the Premises after relocation) shall be reasonably comparable to the Premises in terms of GLA but the Landlord may elect to relocate the Tenant to Relocated Premises which have a greater rentable area than the Premises provided that in such event, Minimum Rent, the Tenant's Proportionate Share of Taxes and its Proportionate Share of the costs set out in Section 6.02 will be calculated as if the Relocated Premises contained the same GLA as the Premises;
- (ii) the Landlord shall provide, at its expense, leasehold improvements in the Relocated Premises comparable to the standards of the leasehold improvements in the Premises;
- (iii) the Landlord shall pay for the reasonable moving costs (if any) of the Tenant's trade fixtures and furnishings from the Premises to the Relocated Premises;
- (vi) the Landlord agrees to use its reasonable efforts to effect the relocation with a minimum of disruption to the Tenant's business; and
- (v) all of the terms and conditions of this Lease shall apply to the Relocated Premises.

C. RELOCATION BY LANDLORD (VERSION #3)

The Landlord shall, in the event of a major re-development of the building which is for the betterment of the shopping centre to the benefit of all tenants, have the right upon sixty (60) days notice (the "notice of relocation") to relocate the Tenant to other premises in the building (the "Relocated Premises") and in such event the following terms and conditions shall be applicable:

- (i) the Relocated Premises shall contain approximately the same rentable area and frontage as the Leased Premises, and shall be on a main mall in a location substantially similar to its current location in regard to proximity to major tenants and mall entrances and exits;
- (ii) the Landlord shall construct the Relocated Premises at its cost including all leasehold improvements (and furnishings and trade fixtures which cannot be moved) to a standard similar to the Leased Premises;
- (iii) the Landlord shall pay for the costs of moving the tenant's furnishings and trade fixtures from the Leased Premises to the Relocated Premises;
- (iv) as compensation for all other costs, expenses and damages which the Tenant may suffer or incur in connection with the relocation including disruption and loss of business, annual Basic Rent and Additional Rent other than Percentage Rent shall not be payable for the first full calendar month following the relocation;
- (v) the annual Basic Rent rate for the Relocated Premises shall be the annual Basic Rent rate stipulated under this Lease;
- (vi) the Relocated Premises shall be deemed to be the Leased Premises following the relocation;
- (vii) all other terms and conditions of the Lease shall apply to the Relocated Premises except as are inconsistent with the terms and conditions of this Section;
- (viii) at the Tenant's option, the Lease shall expire on the date set forth herein for expiry or five (5) years after the Tenant opens for business in the Relocated Premises. The annual Basic Rent for the Extended Term, if any, shall be agreed upon by the Landlord and the Tenant at least thirty (30) days prior to the expiry of the original term, and shall be based upon the fair market rental for premises of a similar size and a similar use in a similar building;

- (ix) in no event shall the Tenant be required to vacate the Leased Premises until seven (7) days after it shall have opened for business in the Relocated Premises;
- (x) in no event shall Tenant be required to relocate during the months of September, October, November or December; and
- (xi) the Landlord shall not relocate the Leased Premises for the sole purpose of leasing all or any part of the Leased Premises to another tenant.

APPENDIX "B"

LANDLORD'S RIGHT TO EXPAND THE SHOPPING CENTRE

Notwithstanding anything to the contrary contained in this Lease, the Landlord may construct additional leasable premises and Common Elements in the Shopping Centre (the "Expansion"), in which event the following apply:

- (i) After sixty (60) days' written notice to the Tenant, the Landlord may enter the Premises to perform, at the Landlord's cost, construction and related activities required for the Expansion (the "Expansion Work"). The Expansion Work may include, without limitation, reinforcement of the walls and ceiling in the Premises, construction of additional structural columns in the Premises, alteration of electrical, mechanical, plumbing, sprinkler and other base building systems located in or serving the Premises, work on conduits, ducts and other systems passing through the Premises and modification (including expansion and reduction) of portions of the Premises and the Common Elements. The Landlord will, after finishing the Expansion Work, restore the Premises as far as practicable to the condition in which they existed prior to the Expansion Work.
- (ii) The Landlord will complete the Expansion Work reasonably expeditiously taking appropriate measures to minimize interference with the Tenant's business. The Shopping Centre will remain open for business during the Expansion Work, although the use of certain Common Elements may be temporarily disrupted. The Landlord will not be liable for any loss, damages or liabilities incurred by the Tenant, including without limitation, loss of business or profits lost or claimed by the Tenant to be lost as a result of the Expansion or the Expansion Work.
- (iii) If, as a result of the Expansion Work, the Tenant, acting reasonably, determines that it must cease business operations entirely in the Premises, then all Minimum Rent, Percentage Rent and Additional Rent will abate until the Tenant is again able to carry on business in any part of the Premises.
- (iv) If the Landlord determines that it must permanently use part of the Premises (the "Required Area"), then it may send written notice to the Tenant (the "Notice") requiring the Tenant to vacate the Required Area on a date (the "Possession Date") at least sixty (60) days from the Tenant's receipt of the Notice. In that event, the Tenant will vacate the Required Area on the Possession Date, but this Lease will nevertheless remain in effect with respect to the remainder of the Premises, and Rent will be reduced on a pro rata basis.

- (v) If, acting reasonably, the Tenant determines that after the loss of the Required Area, the operation of the Tenant's business will be materially and detrimentally affected so that the Tenant will be unable to operate its business in the balance of the Premises, the Tenant may (by written notice given within thirty (30) days after it has received the Notice), terminate this Lease on the Possession Date. In that event, sixty (60) days after the Tenant vacates the Premises in accordance with the terms of this Lease, the Landlord will pay the Tenant the undepreciated capital cost of those leasehold improvements installed in the Premises by the Tenant at the Tenant's expense which the Tenant is required by this Lease to leave in the Premises, calculated for each item on the basis of the initial cost thereof to the Tenant (as substantiated to the Landlord by reasonable evidence) depreciated for the period which shall have elapsed between its installation and the date the Tenant terminates this Lease pursuant to this paragraph, on the basis of an assumed rate of depreciation on a straight-line basis to zero (and at least to the maximum extent permitted under the Income Tax Act of Canada) over (1) the normal life of each such item, or (2) the Term of the Lease remaining unexpired at the date of its installation, or (3) five (5) years, whichever is the shortest period of time, less any residual or salvage value if the Tenant is permitted or required to remove it and less the amount of any encumbrance thereon (but this shall not imply any authority to the Tenant to create any encumbrance prohibited by this Lease).

APPENDIX "C"

DEMOLITION CLAUSE

DEMOLITION

Notwithstanding any provision to the contrary in this Lease, if the Landlord intends to demolish or substantially renovate, remodel or make alterations to the Development or any part thereof, then the Landlord shall have the right, upon giving the Tenant not less than one hundred and eighty (180) days prior written notice, to terminate this Lease, whether or not the Premises are directly affected and this Lease will terminate on the date specified in the notice. The Tenant shall deliver vacant possession of the Premises to the Landlord on such termination date without compensation of any kind whatsoever to the Tenant, whether for loss of its leasehold interest, Leasehold Improvements or otherwise, and without any further obligation by the Landlord to the Tenant after such termination. The Tenant will execute such assurances as the Landlord may request to surrender all of its right, title, and interest in this Lease and the Premises to give effect to the early termination of this Lease.

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