NEWS Release

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Can a Landlord Just Say "No"?

The meaning of "consent not to be unreasonably withheld"

Right to Assign & Sublease

A tenant is free to assign its lease of commercial premises (or sublet them) unless the lease provides otherwise. It is common for commercial leases to stipulate that the tenant will not assign the lease or sublet the premises without the landlord's prior written consent. Generally, leases also state that the landlord's consent is not to be unreasonably withheld.

When is it reasonable for a landlord to say "no"? When can a landlord be compelled to consent?

Legislation

Ontario's *Commercial Tenancies Act* states that if a lease prohibits assignment or subletting without the landlord's consent, that consent cannot be unreasonably withheld, but this requirement does not apply where the parties have expressly agreed otherwise. Similar provisions are found in the commercial tenancy legislation for Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, Northwest Territories, Nunavut, and Yukon. The Civil Code of Quebec contains a similar provision; however it notably omits the phrase "unless the lease contains an express provision to the contrary". As a result, while parties throughout much of Canada may expressly agree that the landlord's consent may be unreasonably withheld, a provision to that effect is unenforceable in Quebec.

The commercial tenancy legislation for Manitoba, Ontario, New Brunswick, Prince Edward Island, Northwest Territories, Nunavut, and Yukon gives tenants (and, in some jurisdictions, assignees and subtenants) the right, where a landlord unreasonably withholds consent, to apply to court for an order requiring the landlord to consent.

Court Decisions

Whether a landlord's refusal is unreasonable has been the subject of litigation. And yet, despite the prolific case law on the subject, it is often difficult to predict the outcome. The courts have consistently stated that reasonableness is a question of fact that can only be determined on a case-by-case basis. Some guidelines do emerge from the cases, however.

In the prominent 1925 decision from *Houlder Bros. & Co. Ltd. v Gibbs*, the English Court of Appeal stated that a landlord's reasons for withholding consent must be related to the character of the proposed transferee. Character was understood to include considerations of whether they were capable of upholding the financial obligations under the lease. This case has been cited often, yet also criticized as being too restrictive. Recent cases have taken a more relaxed approach, recognizing that a landlord may reasonably withhold consent for other reasons.

In *Sundance Investment Corp. v Richfield Properties Ltd.*, a landlord was concerned that if the proposed assignee were to assume the lease, the shopping centre would suffer from traffic congestion. In turn, a major tenant would likely experience profit losses. The landlord argued that since it collected percentage rent from the major tenant, it too would likely suffer a loss. The Alberta Court of Appeal held that the landlord's concern that the assignment would compromise its current commercial position was a reasonable conclusion. On that basis, the court held that the landlord was not being unreasonable in withholding consent.

In *1455202 Ontario Inc. v Welbow Holdings Ltd.*, the Ontario Superior Court reiterated that reasonableness is a question of fact which can only be determined in the circumstances of a particular case and held that prior court decisions were not precedents dictating the results in subsequent

cases. The court provided the following guidelines:

1. As a general rule, it is reasonable for the landlord to withhold consent if the assignment will diminish the value of its rights under the lease or the landlord's interests in the leased premises.

2. It is not reasonable for the landlord to make consent conditional on amendments to the terms of the lease that will provide the landlord with more advantageous terms.

In *Tradedge Inc. (c.o.b. Shoeless Joe's) v Tri-Novo Group Inc.*, the landlord refused to consent to the assignment of the lease on the basis that the assignee would not agree to pay an increased rent.

The landlord argued that the increased rent was a reasonable condition because it was designed to compensate for the relative weakness of the proposed assignee's financial covenant. The Ontario Superior Court disagreed, accusing the landlord of having a "collateral agenda" and concluding it was unreasonable for a landlord to withhold consent for the sole purpose of securing a new advantage not contemplated by the terms of the lease.

The case law generally leads us to the conclusion that a landlord reasonably refuses consent when it does so to prevent prejudice to its commercial position. While no bright-line emerges from the case law as **the** test for reasonableness, it is unreasonable for the landlord to use the consent requirement to obtain a benefit that is not provided for in the lease.

The bottom line is that, if consent is required to be given or withheld on the basis of reasonableness, the landlord cannot "just say no". It must be reasonable (whatever that means). For this reason, leases often contain a list of circumstances under which the landlord's refusal to consent will be considered reasonable.

ANNOUNCEMENTS

***DAOUST VUKOVICH LLP** is pleased to announce that **GASPER GALATI** has been admitted to partnership. Since his call to the Ontario Bar in 2007, Gasper has dedicated his career to litigation and alternative dispute resolution. Gasper's growing practice covers a broad range of complex litigation matters, and he has significant experience handling commercial leasing, contract, insolvency and construction law disputes, as well as debt collection matters. He has appeared as counsel before the Ontario Superior Court of Justice, the Ontario Court of Appeal and many administrative tribunals. Gasper can be reached at **416-598-7050 (ggalati@dv-law.com)**.*

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