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Playing the Name Game: Getting to Know Your Landlord or Tenant

One of the essential elements of a binding agreement to lease is the identity of the parties. The parties must be named. The names must be correct. The parties must have legal capacity to contract. This may seem straightforward, but it can actually be quite perplexing. In some cases, the party named as landlord is actually a property manager, or the party named as tenant turns out to be an incorrect combination of the legal and business names of the entity, or a defunct or even non-existent corporation.

The importance of identifying the proper parties to a lease cannot be overstated. In many cases, a landlord's recovery rights under the lease will be limited to the named tenant. If the named tenant does not exist, or if the corporate entity is inactive or defunct, it will be difficult for the landlord to enforce the tenant's lease obligations in a judicial arena.

Likewise, tenants should ensure that the named landlord actually has legal capacity to grant the rights and privileges afforded under the lease. Otherwise, the tenant risks contracting with a party that does not own the premises.

Some of the important issues that landlords and tenants should consider when identifying the proper parties to a lease are addressed below.

Corporations

While there are several types of legal entities that may enter into lease agreements, the corporation is the most commonly used business structure. At law, a corporation is a legal entity that is distinct and separate from its shareholders. A corporation has all the rights and liabilities of a person, including the right to enter into contracts and own property.

Before entering into a lease agreement with a corporate entity, a corporation profile report and certificate of

status/compliance should be obtained from the applicable government ministry to confirm: (1) that the entity exists; (2) the proper legal name of the entity; and (3) the current status of the entity (an "inactive" or "dissolved" status is problematic).

A duly authorized representative of the corporation must execute the lease on behalf of the corporation. While many agreements still refer to the "affixation of corporate seals" as a means of authenticating the company's signature, this practice is outdated, as companies are no longer legally required to obtain a corporate seal in Ontario. The signature of a duly authorized representative(s) of the corporation is sufficient to bind the corporation.

A corporate tenant may be a "shell" company (that was incorporated for the sole purpose of shielding liability). In other words, the tenant's business operations may be carried out through a parent or related entity, such that the company with the leasehold interest never does more than simply hold the lease (i.e. it incurs liability but never builds any assets to support it). In that situation, it is prudent for the landlord to seek indemnifiers to back stop the tenant's obligations under the lease.

Similarly, a corporate landlord may be a property manager who does not actually own the premises. A title subsearch should always be performed to confirm registered ownership.

Pre-Incorporation Contracts

Sometimes, an individual or a corporation will enter into a lease agreement "in trust for a company to be incorporated". In that case, the named party is executing the agreement on behalf of a corporation that does not yet exist, which leads to the question: who exactly is liable under the lease?

Both the *Business Corporations Act* (Ontario) and the *Canada Business Corporations Act* state that where a party enters into a contract in the name of, or on behalf of, a corporation which is yet to be incorporated, the named party will be personally bound by the contract until the new company is formed and adopts the agreement, at which point the named party will be automatically relieved from liability.

If a party enters into an agreement for the benefit of a company to be incorporated, the other party should not agree that the named party is without personal liability, unless an indemnifier with a satisfactory financial covenant is offered. Allowing the named party to sign without personal liability (and without an indemnifier) raises two major risks: (1) the other party loses the benefit of being able to hold the named party to any obligations arising in the period before the company is incorporated, and (2) in the extreme scenario where the named party fails to incorporate the company, the other party has no one to turn to in case of loss or damage.

Partnerships

A landlord or tenant may be a partnership. A partnership is “the relation that subsists between persons carrying on a business in common with a view to profit”. There are three types of legally recognized partnerships in Ontario: general partnerships, limited partnerships and limited liability partnerships. Unlike a

corporation, a partnership is not a legal entity that is distinct and separate from its partners.

From a best practice standpoint, each partner in a general partnership should execute the lease on behalf of the partnership, although the case law states that, in most cases, a partnership will not be able to deny the enforceability of an agreement simply because the agreement was not executed by all of the partners.

If the landlord or tenant is a limited partnership (meaning it consists of at least one general partner with unlimited liability and one limited partner with limited liability), the general partner must execute the agreement on behalf of the partnership, whether alone, or together with the limited partners.

Individuals

Sometimes an individual will enter into a lease in its personal capacity. If so, certain prerequisites must be satisfied to create a legally binding contract. For example, the individual must be 18 years of age or older in Ontario. Proper identification, such as a driver’s licence or passport, should be obtained to verify the identity and age of the individual before executing the lease. For evidentiary purposes, the individual’s signature to the lease is usually witnessed, though this is not a legal requirement in Ontario.

Due diligence is a key factor in any successful business relationship, so don’t be shy – get to know your landlord or tenant!

ANNOUNCEMENT

We are pleased to welcome back MONICA PAK. Monica was both a summer and articling student with us and has now joined the firm as an associate in the commercial leasing department. Monica was called to the Ontario Bar in 2013 after receiving her law degree from Queen’s University. Monica can be reached at: (416-598-7049) (mpak@dv-law.com)



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients’ needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

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