

Re: ICSC Law Conference April 30, 2018 – May 1, 2018

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As requested, for distribution

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Harvey M. Haber, Q.C.

Helpful Hints

ICSC Canadian Shopping Centre Law Conference

April 30, 2018 – May 1, 2018

Helpful Commercial Leasing Hints by Harvey M. Haber, Q.C., LSM. C. Med., C. Arb.

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Monday, April 30, 2018 8:45am – 10:15am, Metro Toronto Convention Centre South Building

1. Leasehold Improvements

A tenant should be aware that, other than the tenant's own trade fixtures and merchandise, pretty well everything else that the tenant installs in its premises is considered, in a typical net commercial lease, to be a "leasehold improvement".

This is of importance to a landlord because elsewhere in that lease, there will, most certainly, be a provision indicating that all of the tenant's leasehold improvements become the property of the landlord immediately upon the tenant installing them in the premises (which means that a landlord can if it chooses, include their value when financing the shopping centre) without the landlord being obliged to make any payment for them.

2. Can The Definition of "Leasehold Improvements" Be Varied?

Both a landlord and a tenant should be aware that they can, if they both agree, vary the general law as to what constitutes a "leasehold improvement" or a tenant's "trade fixture" by expressly stipulating in the lease which is which.

3. Definition of "Lease"

A tenant should carefully examine the definition of the term "Lease" in its lease, as the term may include not only the lease, but also any amendments, modifications, additions, schedules, appendices, riders and other documents attached to the lease, or otherwise intended to form part of the lease.

4. Operating Costs Yearly Statement

What if the tenant's lease does not include a commitment for the landlord to provide the tenant with an annual audited statement of Operating Costs (and many leases don't), the Tenant should, nevertheless, still ask for a detailed yearly breakdown.

As landlords want (and need) their Operating Costs to be paid, most will oblige with the requested information (particularly in light of recent case law which says they should).

5. Rent Past Due

A landlord's lease provides that interest on overdue rent is payable at the rate of 2% per month (without indicating a yearly rate). The tenant fails to pay its rent. The landlord sues. What rate of interest will the landlord recover if a court has to determine the issue – 5% per annum.

How come?

Section 4 of the Interest Act (Canada) provides that, where interest is made payable by the terms of any written or printed contract at a rate or percentage for a period less than a year, no interest is recoverable exceeding 5% per annum unless the contract contains an express statement of the annual rate.

What does that mean?

Unless the landlord sets out the yearly rate of interest (which here would have been 24% per annum), the most interest the landlord can recover on overdue rent is 5% yearly.

6. (i). A 5 year lease term began January 1, 2016. When does it end?

Not on January 1, 2021, but on December 31, 2020.

(ii). If the tenant is made up of more than one person (say 3), are each of them jointly and severally liable for all of the Tenant's obligations under the Lease?

If so, can the Landlord proceed against one, two or all of them?

As each of them is jointly and severally responsible, the Landlord can proceed against all or any of them.

(iii). Why should a Lease specify that the Rent is to be paid in Canadian funds?

A Canadian Landlord wants to receive its rent in Canadian funds, not otherwise.

(iv). Notices received after 5p.m. on a business day – are they deemed to be received that day or the next business day?

It depends on what the Lease says. If not stipulated in the Lease, rent is due on that day.

7. Computing the correct time in a Lease is not only vital, it can also be fatal. Let's take 3 examples:

(A). Example 1: Notice to Cure. The Lease provides that the Tenant has "seven (7) days in which to cure any monetary default after written notice from the Landlord of such default"

If the Landlord delivers notice to the Tenant on January 5, 2018 of the Tenant's outstanding rental arrears, by what date must the Tenant have cure the default?

Answer: The Tenant has until midnight, January 12, 2018 to cure the default. As a general rule, when counting the days in a time period, you do not count the first day (which in this case, is the day notice was delivered), but you do count the last day. Thus, in this example, the seven day period would include January 6, 2018 and run up to and include January 12, 2018.

(B). Example 2: Renewal/Extension Option. The Lease provides that the Tenant must exercise its renewal/extension option "at least ninety (90) days prior to the end of the Term".

If the Tenant's Terms ends on October 31, 2015, when must it exercise the renewal/extension option?

Answer: The Tenant has to exercise the renewal/extension option on or before August 1, 2018. According to the Lease, the renewal/extension option must be exercised at least 90 days before the end of the Term. As the words "at least" have been used, the general rule is not followed here, and you must exclude both the first and last days of the period. If you count back ninety days from October 31, 2018, you would get to August 2, 2018. However, if you count back ninety days from October 31, 2018, you would get to August 2, 2018. However, if you exercise the option on August 2, 2019, ninety full days would not have elapsed. You have to go back to August 1, 2018, to have ninety clear days elapse.

(C). Example 3: Lease Term. The Tenant is given a "ten (10) year Term from and including the first day of June 2016".

When does the Tenant's Term begin? When does it end?

Answer: The Lease begins on June 1, 2018, and will end May 31, 2028. The general rule of not counting the first day of the time period is not followed here because the Lease is very clear. It provides that the Term is "from and including June 1, 2018".

This means that June 1, 2018 is counted as the first day of the Term. If the Lease had provided "from June 1, 2018", then June 1, 2018 would not have been counted.

8. (i). For the purpose of Notice, is Saturday a business day?

Yes, it is!

- (ii). Is Sunday a business day?

Yes, it is. As the Lord's Day Act is no longer in force.

- (iii). Can a Landlord prohibit the Tenant registering the Lease on title?

Yes! The Landlord can provide in its Lease that the Tenant cannot register the Lease on title. (Why not! Because a Landlord does not want to show the rent that the tenant is paying for its space).

- (iv). What can the Tenant do about it?

The Tenant can seek in its Lease to register a Notice of Lease on title to indicate to the public that the Tenant has a Lease for its space, and also indicate if the Tenant has any special clauses that it wants the public to be aware of, such as a "restrictive covenant".

Extended Term

9. Should a retail Tenant seek to extend its Term until the end of January immediately following the end of its Term in order to take advantage of the Christmas sales?

Absolutely, but only if the Landlord agrees to it

Rent for Remainder of Term

10. What if the Lease provides that if the Tenant is at any time in default under any of the terms of its Lease, the Tenant agrees that the Landlord, without limiting any of the Landlord's other rights under its Lease, may, upon notice to the Tenant, declare all Rent from the date of default, for the balance of the Term, to be immediately paid by the Tenant to the Landlord by Canadian bank money order. Is that enforceable or not?

If both parties agree to it, then it is enforceable.

11. Section 19(2) Notice

Other than for rent, a landlord must give a defaulting tenant, a Section 19(2) Notice under the Ontario Commercial Tenancies Act, before terminating the tenant's lease.

Why?

Because if the landlord does not do so, the landlord's termination is invalid.

12. Commencement Date

A landlord should make sure that each of the landlord's leases has a definitely ascertainable commencement date.

Why?

Because a landlord does not want to lose a lease due to the landlord's failure to provide such a date.

13. Radius Clause

In a commercial shopping centre lease, a landlord should always insist on a "radius clause" (a clause stating that a tenant will not compete with itself within a designated radius from the shopping centre).

Why?

Without that clause, a landlord could end up with a duplication of the same tenant in the shopping centre.

Assignment Without Consent

14. A landlord discovers that an assignment of a tenant's lease has taken place, without the tenant obtaining the landlord's prior written consent, as required under the lease.

Should the landlord promptly respond by informing the tenant that the tenant is in breach of its lease, or should the landlord just quietly accept the situation?

The landlord should immediately give the tenant written notice of the tenant's breach of the tenant's lease.

Is Noise a Breach of Quiet Enjoyment?

15. Does a commitment by a landlord in its lease to provide the tenant with "quiet" enjoyment of the tenant's premises, refer to "noise"?

No, it does not! What it does refer to is a substantial interference by the landlord with the tenant's reasonable enjoyment of the tenant's premises, so as to make it reasonable for the tenant to vacate.

Acceptance of Keys

16. A landlord should include provisions in its lease stipulating that any acceptance of keys from the tenant is not to be construed as a surrender of the lease or as acceptance of a surrender.

Why?

Because otherwise, a court may find that the landlord, by accepting the tenant's keys, has surrendered the lease.

17. Termination Clause

A lease provides that the Landlord, upon receiving a tenant's request to assign the lease, has 3 options, namely:

- i) to agree to the assignment,
- ii) to refuse the assignment on reasonable grounds, or
- iii) terminate the tenant's lease.

For years, the argument has been that (i) and (ii) are inconsistent with (iii). However, our courts have now decided that if the parties have agreed in the lease to item (iii), then the court will also uphold the landlord's right to terminate the lease.

A tenant should, therefore, seek to delete from the lease, the landlord's right to terminate the tenant's lease, or if the landlord will not agree, the tenant should insist on the right to withdraw the tenant's request, so that the Landlord does not have the right to terminate the tenant's lease.