I CAME IN LIKE A WRECKING BALL:

MANAGING COMMERCIAL TENANCIES AND REDEVELOPMENT PROJECTS

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There are many reasons why a commercial landlord may choose to redevelop its property. Over time properties can become rundown, operate poorly, become outdated, and/or become unprofitable. Communities, industries, and economies also change over time and can sometimes force a landlord to reconsider the way its property looks and operates. Whatever the reason, commercial tenants and landlords may have to deal with redevelopment projects and they should be mindful of this when entering into a lease and during the course of their operations.

1. IT STARTS WITH THE LEASE

A landlord that is considering redevelopment work in its development should try to maintain as much flexibility as possible in its leases to allow for such work. Conversely, a tenant (especially if it has knowledge of upcoming redevelopment work), should try to limit as much as possible the landlord's ability to interrupt or interfere with the tenant's operations. On that basis, the parties should consider the following key lease provisions (where the parties end up will often depend on their respective bargaining power):

1.1. Landlord's Early Termination for Redevelopment Right:

A landlord may want to consider including a provision in its leases that allows it to unilaterally terminate the lease in the event the landlord wishes to do redevelopment work. Terminating the leases would eliminate the complication of having to manage tenancies when undertaking redevelopment projects, however, it would also mean terminating a source of revenue. The landlord's early termination for redevelopment provision appears quite frequently in commercial leases in Ontario and is often the source of much negotiation between parties. When inserting this type of termination right, a landlord should consider, for example:

(a) including language allowing the landlord to exercise its termination right at any time during the lease term (as may be extended or renewed from time to time);

(b) broadly describing the circumstances giving rise to the termination right. For example: (A) "*The Landlord reserves the right to terminate the Lease, in its sole and absolute discretion*" or (B) "*The Landlord may terminate the Lease if the Landlord, in its sole and absolute discretion, wishes to redevelop, demolish, reconstruct, renovate, alter all or a portion of the Development and/or if the Landlord wishes to change the use of all or a portion of the Development or sell the Development*"; and/or

(c) including a short and manageable notice period with little to no formality.

On the other hand, a tenant faced with a landlord's termination right should try to either negotiate its removal from the lease or, if not feasible, try to restrict the landlord's ability to exercise it. If a tenant is unable to negotiate the removal of the landlord's termination right, it should consider, for example:

(a) limiting the period during which the landlord's termination right can be exercised. For example: (A) "*The Landlord may only exercise its termination right after the initial Term of the Lease"* or (B) "*The Landlord may only exercise its termination right after the first X years*

of the initial Term" or (C) "*The Landlord may not exercise its termination right during the months of X to and including Y of any year of the Term"*;

(b) narrowly defining the circumstances giving rise to the termination right. For example: "*The Landlord may terminate the Lease if the Landlord intends to demolish or materially redevelop the Development to such an extent that the Landlord requires possession of the Leased Premises"*;

(c) requiring the production of materials to substantiate the landlord's plan to redevelop the development. For example: "*The Landlord's intention to redevelop the Development is to be evidenced by professionally prepared plans and building permits substantiating the redevelopment work"*;

(d) including language contemplating a reimbursement of tenant's costs. For example: "*Should the Landlord exercise its termination right, the Landlord shall pay to the Tenant as liquidated damages a sum equal to the unamortized portion of the costs of the Tenant's works, improvements and fixtures, such amortization rates and term are to be set according to the Tenant's standard accounting practices which are hereby irrevocably agreed to by the Landlord"*;

(e) making the termination right subject to there not being any alternative premises available for relocation; and/or

(f) including a longer and more manageable notice period to be triggered by a formal written notice.

1.2. **Landlord's Relocation Right**

A landlord may also wish to include in the lease a provision that allows the landlord to unilaterally relocate the tenant to alternative premises. A relocation provision would allow the lease (and the revenue stream derived therefrom) to survive, albeit, at a different location. Relocation provisions also appear frequently in commercial leases in Ontario and are often greatly negotiated by the parties. When inserting a relocation provision, a landlord may wish to consider the following:

(a) whether the relocation should be permanent or temporary. Typically, relocation rights are permanent (rather than temporary), but the circumstances at hand will dictate what is appropriate;

(b) including language allowing the landlord to relocate the tenant at any time during the lease term (as may be extended or renewed from time to time);

(c) including language making this right continuous (i.e. allowing the landlord to relocate the tenant more than once during the lease term, as may be extended or renewed from time to time);

(d) including language allowing the landlord the right to relocate the tenant not only to alternative premises within the same development but also to alternative premises in other centres or developments owned by the landlord (if any);

(e) broadly defining the circumstances giving rise to the relocation right. For example: (A) "*The Landlord reserves the right to relocate the Tenant to alternative premises for any reason whatsoever, in the Landlord's sole and absolute discretion"* or (B) "*The Landlord may relocate the Tenant if the Landlord, in its sole and absolute discretion, wishes to redevelop, demolish, reconstruct, renovate, alter all or a portion of the Development or if the Tenant's Leased Premises are required for the expansion of an existing tenant of the Development or the Tenant's Leased Premises are required to lease to a proposed tenant of the Development"*;

(f) including language describing in broad terms what premises qualify as relocation premises. For example: (A) "*The Landlord shall provide the Tenant with alternate premises in the Development of a size and configuration, and in a location acceptable to the Landlord*" or (B) "*The Landlord shall provide the Tenant with alternate premises in the Development of a size and configuration, and in a location acceptable to the Landlord, provided that the floor area of the new premises shall not be more than X percent (X%) larger than the floor area of the Leased Premises unless consented to by the Tenant*";

(g) limiting the landlord's responsibility to perform relocation work and for relocation costs. For example: (A) "*The Landlord shall not be required to install or construct any leasehold improvements to the Relocation Premises, and the Tenant agrees that the Landlord shall have no liability whatsoever for any costs, expenses or damages which the Tenant may suffer or incur in connection with the relocation of the Leased Premises to the Relocation Premises including without limitation, disruption, loss of business or loss of profits*" or (B) "*The Landlord shall not be responsible for any work to relocate the Tenant to the Relocation Premises, but shall reimburse the Tenant for the reasonable, bona fide and arm's length out-of-pocket moving costs of the Tenant's furnishings, trade fixtures and inventory from the Leased Premises to the Relocation Premises but only to the extent that such moving costs have previously been approved by the Landlord, acting reasonably (it being understood that in no case will the Tenant be reimbursed or compensated for indirect costs including overhead, overtime charges or loss of profits and the Tenant shall minimize costs by re-using all fixtures and trade fixtures from the Leased Premises where it is feasible to do so in the Relocation Premises)*"; and/or

(h) including a short and manageable notice period with little to no formality.

Conversely, when negotiating a lease that contains a relocation provision, the tenant should try to either negotiate its removal or, if not feasible, try to restrict the landlord's ability to exercise this right and disrupt the tenant's operations. To the extent the tenant is unable to negotiate the removal of the relocation provision, it should consider, for example:

(a) limiting the period during which the landlord's relocation right can be exercised. For example: (A) "*The Landlord may only exercise its relocation right after the initial Term of the Lease*" or (B) "*The Landlord may only exercise its relocation right after the first X years of the initial Term*" or (C) "*The Landlord may not exercise its relocation right during the months of X to and including Y of any year of the Term*";

(b) including language making this right a one-time right (i.e. the landlord can only relocate the tenant once during the term);

(c) narrowly defining the circumstances giving rise to the relocation right. For example: "*The Landlord shall have the right to relocate the Tenant to alternative premises in the Development*

if the Landlord intends to demolish or materially redevelop the Development to such an extent that the Landlord requires possession of the Leased Premises";

(d) where the relocation right is tied to a specific event (such as landlord effecting a redevelopment of the development), requiring the production of materials to substantiate this event. For example: "*The Landlord's intention to redevelop the Development is to be evidenced by professionally prepared plans and building permits substantiating the redevelopment work*";

(e) narrowly describing where or to what premises the tenant can be relocated. For example: (A) "*The Relocation Premises shall contain substantially the same floor area and shall be comparable in location, layout, exposure and access to parking as the Leased Premises, and will not be in proximity to businesses or institutions in proximity to which the Tenant is not legally permitted to operate*" or (B) "*The Relocation Premises shall be comparable to the Leased Premises in terms of size, location, comparable fashion tenant mix, visibility, frontage, and proximity to pedestrian flow, parking and entrances*" or (C) "*The Tenant may only be relocated to premises located in the area outlined in red on the plan attached hereto in Schedule X (the "Relocation Area"). The Landlord shall not have the right to relocate the Tenant to premises that are not located within the Relocation Area"*;

(f) including language making the landlord responsible for work to be performed in the relocation premises to ready them for tenant's operations. For example: "*The Landlord shall provide (and carry out, if required), at its expense, leasehold improvements in the Relocation Premises equal to or better than the standard of those leasehold improvements in the Leased Premises as of the receipt of the Relocation Notice, pursuant to design specifications and drawings prepared at the expense of the Landlord and mutually approved by the Tenant and the Landlord (both acting reasonably)*";

(g) including language making the landlord responsible for tenant's relocation costs. For example: (A) "*The Landlord shall reimburse the Tenant for direct costs associated with the relocation, including, without limitation, (i) making new or relocating existing trade fixtures, if any, in the Relocation Premises to a standard equal to or better than those existing in the Leased Premises at the time of the Relocation Notice pursuant to design specifications and drawings prepared at the expense of the Landlord and mutually approved by the Tenant and the Landlord, both acting reasonably (including costs of architects and consultants, if any); (ii) moving (including packing) the Tenant's property, furnishings and equipment from the Leased Premises to the Relocated Premises; (iii) reprinting of a limited supply of stationery and supplies; (iv) disconnection and reconnection of telephone and computer equipment and systems; and (v) relocation of any signage*" or (B) "*There will be no charge-backs or other costs to the Tenant in connection with relocation to the Relocation Premises (whether through Operating Costs or otherwise)"*;

(h) including language limiting interruptions to tenant's business operations. For example: (A) "*The Relocation Premises will be made available to the Tenant prior to the Tenant having to cease business in the Leased Premises with the intent that there will be no interruption of the Tenant's business beyond X hours*" or (B) "*During the period of such relocation, all Rent and other charges provided for hereunder shall abate for that period of time during which the Tenant is unable to carry on business in the Development as a result of the relocation*";

(i) including a termination right if the relocation premises are not acceptable. For example: (A) "*The Tenant shall be entitled to surrender this Lease if in its sole unfettered opinion, the*

Relocation Premises offered by the Landlord are not satisfactory to the Tenant (for whatever reason whatsoever); such option to be exercised on sixty (60) days' written notice to the Landlord given within thirty (30) days of receipt of the Relocation Notice (the "Tenant Surrender Notice"). The Landlord shall have ten (10) days from receipt of the Tenant Surrender Notice to withdraw the Relocation Notice (and if so withdrawn, the Tenant Surrender Notice shall be null and void and the Tenant shall continue to lease the Leased Premises as thought the Relocation Notice was never provided by the Landlord). If, however, the Tenant elects to surrender the Lease as aforementioned and the Landlord does not withdraw the Relocation Notice as aforementioned, then the Lease shall terminate effective as of the effective date of relocation specified in the Relocation Notice and the Landlord shall reimburse the Tenant, by no later than the effective date of relocation specified in the Relocation Notice, the unamortized portion of the cost of the Tenant's works, improvements and fixtures (such amortization rates and term are to be set according to the Tenant's standard accounting practices which are hereby irrevocably agreed to by the Landlord)" or (B) "*The Tenant shall be entitled to surrender the Lease if in its sole opinion the Relocation Premises offered by the Landlord are not comparable to the Leased Premises; such option to be exercised on sixty (60) days' written notice to the Landlord given within thirty (30) days of receipt of the notice from the Landlord showing the proposed location of the Relocation Premises*"; and/or

(j) including a longer and more manageable notice period to be triggered by a formal written notice.

1.3. **Landlord Repair and Alterations Right**

In addition to, or as an alternative of, a relocation and/or termination right, a landlord may also which to turn its mind to the landlord's repair and alteration rights. The landlord may want to consider, for example:

(a) including broad landlord alteration and repair rights. For example: *"The Development is at all times subject to the exclusive control and management of the Landlord. The Landlord shall operate and maintain the Development in such manner as the Landlord determines from time to time having regard to size, age and location. Without limiting the generality of the foregoing, the Landlord may, in its control, management and operation of the Development: (a) obstruct or close off all or any part of the Development (including the Leased Premises), including terminate, suspend, or amend the Tenant's right to use any of the Common Areas and Facilities, change the location and size of any of the Common Areas and Facilities or use parts of the Common Areas and Facilities for promotional or other activities, and do such other acts with respect thereto as the Landlord, acting reasonably, shall determine to be advisable (including for the purpose of effecting maintenance, repair and/or construction); (b) from time to time, change the area, level, location, arrangement or use of the Development or any part thereof; (c) construct other structures or improvements in the Development and make repairs, replacements, changes, alterations, additions, subtractions or re-arrangements of or to any of them (including, without limitation, lighting facilities and heating, ventilating and air-conditioning systems), build additional storeys on the Development, and construct additional buildings or facilities adjoining or near the Development as well as install (or permit public utility companies to install) utility lines, drainage and other pipes, conduits, wires or ductwork where necessary through the ceiling space, column space or other parts of the Development (including, the Leased Premises) and to maintain, repair or replace same; (d) construct multiple deck, elevated or underground Parking Facilities, and expand, reduce*

or alter them or the Parking Facilities; (e) relocate or rearrange the various buildings, parking areas (including but not limited to the Parking Facilities) and other parts of the Development from those existing at the Commencement Date and, at the Tenant's cost, rearrange the Leased Premises as may from time to time be required by the Landlord, acting reasonably, for the benefit of the Development or other tenants or occupants thereof, and the Landlord and the Tenant shall co-operate with each other in that regard, and shall execute such further agreements and lease amendments as may be required to give effect to this provision; (f) alter, expand or reduce the extent of the Lands on which the Development is located, from time to time; and (g) do and perform such other acts in and to the Development as, in the use of good business judgment, the Landlord determines to be advisable for the more efficient and proper operation of the Development";

(b) including language clarifying that the exercise of a landlord's alterations and/or repair rights will not constitute a breach by the landlord nor entitle the tenant to any sort of compensation. For example: *"It is agreed that if as a result of the exercise by the Landlord of its rights in Section X, the Landlord shall not be subject to any liability, nor shall the Tenant be entitled to any compensation or diminution or abatement of Rent, and no alteration or diminution will be deemed to be a constructive or actual eviction of the Tenant.";* and/or

(c) including, to the extent applicable, an acknowledgement by the tenant that there will be redevelopment work occurring during the tenant's tenancy as well as an acknowledgement by the tenant of the possible interruptions that may occur as a result of such redevelopment work (including noise, dust, and debris, as applicable).

Alternatively, a tenant may want to include some limitations to the landlord's ability to do work in the development. The tenant may want to consider, for example:

(a) including language prohibiting landlord from interrupting tenant's operations. For example: (A) "*Notwithstanding the foregoing Section X or anything herein contained to the contrary, the Landlord shall not have the right to alter or relocate the Leased Premises during the Term (as may extended or renewed from time to time), provided that the foregoing shall not prohibit the Landlord from performing its maintenance and repair obligations under the Lease"* or (B) "*In performing its rights under Section X, the Landlord shall use reasonable efforts to minimize interference with the Tenant's use, enjoyment and access of the Leased Premises*" or (C) "*The Landlord will not permit any alterations to the Development, which may: (i) interfere with access to and from the Leased Premises; (ii) interfere with the Tenant's operations in the Leased Premises; (iii) obstruct the visibility of the Leased Premises; and (iv) obstruct the visibility of the Tenant's signage at the Development"*;

(b) including rent abatement language in case the tenant's operations are affected by the landlord's alterations and/or repair rights. For example: (A) "*During any period of repair or alteration by the Landlord to the Leased Premises or the Center, all Rent payable under the Lease shall abate if the Tenant is prevented from carrying on business from the Leased Premises for more than one business day*" or (B) "*All Rent payable hereunder shall abate for any period of time in excess of one (1) day during which the Tenant is unable, in the Tenant's reasonable opinion, to access and/or use the Leased Premises for the Tenant's Permitted Use*";

(c) including a no-build restriction. For example: (A) "*The Landlord shall not construct, or permit to be constructed, any building, improvement or structure within the No-Build Area (as outlined in the plan attached hereto in Schedule X), other than landscaping, curbing and*

directional signage" or (B) "*The Landlord shall not construct, or permit to be constructed any building, improvement, structure, signage, kiosk, tree or other obstruction of any kind whatsoever in front of, or near, any part of the Leased Premises or the Tenant's signage at the Development, so as to negatively affect the accessibility to, or the visibility of, the Leased Premises or the Tenant's signage at the Development*";

(d) including language limiting the effects the landlord's alteration and/or repair work has on parking. For example: "*The Landlord shall not allow the number of parking stalls located at the Development to fall below X regular sized parking stalls*"; and/or

(e) including language ensuring that the landlord's alteration and/or repair work will not impact the development's access points: "*The Landlord shall not change or relocate the access points (as identified in the plan attached hereto as Schedule X) to and from the Parking Facility from and to the adjoining roadway, save in the case of an order from the applicable governmental authority, without first obtaining the prior written consent of the Tenant (not to be unreasonably withheld)*".

1.4. **Tenant's Right to Quiet Enjoyment**

In addition to the above, if a landlord is considering performing redevelopment work while a tenant is operating in its premises, the landlord may want to be particularly mindful of the tenant's right at law to quiet enjoyment. The covenant for quiet enjoyment is implied by common law in every lease (and in Ontario has been codified in section 23(1) of the *Conveyancing and Law of Property Act* [1]). It should be noted, however, that the implied covenant at law for quiet enjoyment may be superseded by an expressed covenant in the lease.[2] Accordingly, a landlord may want to consider the addition of language addressing some limitations to the tenant's right to quiet enjoyment (and limitations to the landlord's liability in the event of interference). For example: "*Notwithstanding the foregoing or anything contained in this Lease, it is agreed that the Landlord's exercise of its rights in Section X, Y, and Z shall not constitute a breach of any covenant for quiet enjoyment*". The landlord should be explicit with its language limiting the tenant's right to quiet enjoyment (and limiting the landlord's liability in the event of interference); the addition of general language making the right to quiet enjoyment "*subject to the terms of the lease*" may not be sufficient for a Court to limit the tenant's fundamental right to quiet enjoyment.[3]

On the other hand, the tenant should be mindful of the impact that any such limitations can have on its operations. Accordingly, it may want to push back on the addition of qualifiers reducing its right of quiet enjoyment. For example: "*The Tenant may peaceably and quietly hold and enjoy the Leased Premises for the Term without interruption by the Landlord or any other person lawfully claiming by, through or under the Landlord*".

2. **MANAGING THE TENANCY DURING REDEVELOPMENT WORK**

Once the landlord is ready to undertake its redevelopment work in the development, it should take some time to reflect how best to manage the redevelopment work and the commercial tenancies affected by such work. A landlord should consider, amongst other things:

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[1] *Conveyancing and Law of Property Act*, RSO 1990, c C34, s 23(1).
[2] See *Mayrand v 768565 Ontario Ltd (1989)*, 70 O.R. (2d) 582, 7 (reversed on other grounds), citing Malzy v Eichholz, [1916] 2 KB 308 (C.A.).
[3] See *0824606 B.C. Ltd. v. Plain Jane Boutique Ltd., 2018 BCSC 1887*, citing *Goldmile Properties Ltd. v. Lechouritis* (2003), [2003] EWCA Civ 49 (Eng. C.A.).

(a) The scope of the redevelopment work to be conducted at the development (including time frame for completion);

(b) How the redevelopment work will be phased in the development;

(c) How many tenancies will be affected by the redevelopment work;

(d) How does the landlord want to manage its commercial tenancies affected by the redevelopment work; and/or

(e) What do the leases provide.

In terms of managing its commercial tenancies, the landlord will typically consider one of the following options:

(a) Terminating the lease (either by the landlord exercising a termination right negotiated in the lease or, to the extent there is no termination right in the lease, negotiating an early termination of the lease with the tenant);

(b) Relocating the tenant to alternative premises (either by the landlord exercising its relocation right negotiated in the lease or, to the extent there is no relocation right in the lease, negotiating an amendment to the lease relocating the tenant); and/or

(c) Carrying out the redevelopment work while the tenant continue to occupy and operate from the leased premises.

2.1. **Termination and Relocation**

The termination of the lease or the relocation of the tenant will be, for the most part, dictated by what the parties were able to negotiate either in the lease or in the subsequent relocation agreement or early termination agreement.

2.2. **Carrying on Relocation Work Around the Tenants**

Where the landlord is planning on doing redevelopment work around its tenant (i.e. without relocating its tenant to unaffected areas or without terminating the tenant's lease), it must be mindful not to be in breach of the tenant's right to quiet enjoyment (referred to above). Whether the redevelopment work constitutes a breach of quiet enjoyment will depend on the facts at hand[4], including the severity of the interference by the landlord's redevelopment work with the tenant's operations. It should be noted that not every interference with a tenant's use of its premises will be a breach of the tenant's right to quiet enjoyment.[5] An interference that is "brief or trifling nature" will not constitute a breach, however, a "substantial and permanent interference" will likely amount to a breach. [6] The language of the lease in question may be significant in the determination of whether there is a breach. The Courts have provided some examples of conduct which have been found to constitute a substantial interference with the tenant's right to quiet enjoyment:

[4] *Watchcraft Shop Ltd. v L&A Development (Canada) Ltd*., [1996] OJ No 2252, para 29 [Watchcraft].
[5] *Ibid*, at para 31.
[6] *Ibid*.

(a) In *Watchcraft:* the landlord owned a large commercial building. The tenant leased premises on the ground floor of the commercial building for the purpose of operating a jewellery store. The landlord decided to convert the building from offices to condominiums which required extensive renovations to the building. The tenant alleged that the landlord's scaffolding blocked a large portion of the tenant's storefront and signage, obstructed access to the leased premises, caused substantial noise, and created dust and dirt in the leased premises. As a result of the scaffolding, the tenant argued that it suffered "a serious and a substantial loss of his business.". The Court found that the placement of scaffolding poles in front of the tenant's shop window was not merely "trifling or purely transitory" and constituted a breach of the covenant for quiet enjoyment.

(b) In *Irvine Recreations Ltd. v Gardis*[7]: the tenant leased certain premises in a building for the purpose of operating a bowling alley. The landlord commenced major renovations to the restaurant space directly above the leased premises. The renovations resulted in many disruptions, including: contractors and subcontractors constantly accessing the tenant's leased premises to perform the work; drilling of a number of holes through the cement main floor into the tenant's leased premises; storage of pipes and other building products in the hallway of the leased premises; presence of dirt, dust and water; excessive heat in the leased premises (as a result of landlord changing plumbing and heating pipes as well as closing ventilation pipes); and, as a result of the landlord's plumbing work, leaking pipes and overflowing toilets causing, on several occasions, human excrement on the floor of the leased premises. The landlord's renovation work carried on for a number of months and were not completed until mid-December 1974 (despite the parties having agreed that the work would be done during the months of June, July and August of 1974). In this case, the Court found that there had been a breach of the covenant for quiet enjoyment.

(c) In *Bloor Street Diner Ltd. v. Manufacturers Life Insurance Co*.[8]: the tenant leased certain premises in a building for the purpose of operating a restaurant. The tenant learned that the landlord was moving forward with plans to redevelop the building in which the leased premises were located (including adding more than 50,000 square feet of new interior retail space). To effect the proposed redevelopment work, the landlord proposed to install, for at least 8 months, a hoarding wall along the length of the leased premises which would intrude several feet into the leased premises. The tenant alleged that as a result of the redevelopment work the leased premises would lose all of its natural light, would suffer a significant reduction in seating capacity, would lose those seats closest to the street (which the tenant argued were the most desirable and most profitable), and would result in the remaining seats being surrounded by construction on all sides and from above. The tenant sought a permanent injunction enjoining the landlord from redeveloping the building during the term of the tenant's lease. The original lease contained provisions allowing the landlord to make minor changes to the leased premises, including a requirement that the changes "*will not materially affect the flow, continuity or design*" of the leased premises and "*will not materially detrimentally affect access and egress from or visibility of the Leased Premises from Bay Street, Bloor Street and the Common Areas and Facilities*".[9] The Court found that the

[7] *Irvine Recreations Ltd. v. Gardis*, 1982, 33 DLR (3d) 220.
[8] *Bloor Street Diner Ltd. v Manufacturers Life Insurance Co*., 2016 ONSC 440.
[9] *Ibid* at para 24.

landlord's renovation plan represented substantial interference that is of a grave and permanent nature and therefore would be a breach of the lease. Accordingly the Court granted the tenant, amongst other remedies, a permanent injunction for the balance of the term of the lease enjoining landlord from commencing any construction, renovations and/or alteration of the building that would adversely affect access, egress and visibility to the tenant's leased premises (as same would be contrary to the terms of the lease).

(d) In *Owen v Gadd*[10]: the tenant leased the ground floor of a building for the purpose of operating a retail shop. The landlord erected, on the pavement in front of the shop, scaffolding for the purpose of carrying out repairs to the landlords' upper leased premises. The access to the tenant's shop and the shop window was obstructed by the scaffolding. The landlord did not give notice to the tenant that there was work to be done. When the tenant complained, the landlord attempted to minimize the disruption to the tenant's operation by moving the scaffold poles to a less problematic area and by completing the work quicker than what was originally contemplated (it was completed in 11 days rather than the originally estimated 6 weeks). The tenant nevertheless claimed that it had suffered substantial loss as a result of the scaffold poles and the construction work (which the tenant was of the view seriously interfered with the ordinary access of the public to the shop and to the shop window). The Court held that the scaffold poles constituted a substantial interference and constituted a breach of the covenant for quiet enjoyment.

(e) In *Ostry v Warehouse on Beatty Cabaret Ltd.*[11]: the tenant leased certain premises on the ground floor of a three storey building for the purpose of operating a cabaret. The tenant made a number of significant improvements to the leased premises. The landlord decided to renovate the upper floors of the building to create more units (including raising the roof of the third storey and adding an entirely new fourth storey to the building). To do this, the whole structure of the building had to be strengthened from the basement through the ground floor and upward. The landlord's renovation work was a major undertaking. The lease contained a provision that allowed the landlord "*to repair, remodel, alter, improve or add to the leased premises or the whole or any part of the building of which the leased premises form a part or to change the location of the entrance or entrances to the building and the leased premises without compensation or responsibility to the tenant and for such purposes, if necessary, to enter into, pass through, work upon and attach scaffolds or other temporary structures to the leased premises, putting the tenant to no unnecessary inconvenience*". The Court held that, based on the language of the lease, the landlord had the right to undertake the seismic (structural) retrofitting work (i.e. for the purpose of strengthening the perimeter walls for the raising of the roof on the third floor and the addition of a fourth floor) since the work would not appreciably affect the operation of the cabaret (and in light of the fact that the landlord had scheduled the work around the tenant's operations and arranged for a complete cleaning of the premises). The Court held, however, that the moving of a small wall reducing the space behind the bar of the leased premises would constitute a breach of the tenant's quiet enjoyment and could not be performed.

2.3. **<u>Remedies for Breach of Quiet Enjoyment</u>**

[10] *Owen v Gadd*, Plaint No. L. 1187.
[11] *Ostry v. Warehouse on Beatty Cabaret Ltd*., 1992 CarswellBC 653.

The most common remedies for breach of quiet enjoyment are damages, termination of the lease and injunctions:

(a) Damages: damages are the most frequent remedy awarded for breach of the covenant of quiet enjoyment. The measure of damages will be the loss naturally flowing from the landlord's breach. In order to avail itself of this remedy, the tenant will need to record and illustrate the losses suffered by the landlord's breach. Subject to the terms of the lease, damages may include an amount for the tenant's lost profits, if the tenant is able to provide evidence (such as receipts, sales records, invoices, etc.) to prove its losses and that those losses were caused by the landlord's default.[12]

(b) Termination of the lease: if the landlord's default rises to the level of depriving the tenant of substantially the whole benefit of the lease, then there will be a fundamental breach of the lease, entitling the tenant to treat the lease as at an end.[13] The tenant should be mindful of the fact that there is a high threshold to prove a fundamental breach and it is not common for a Court to find a landlord in fundamental breach.

(c) Injunction: injunctions are an equitable relief. An injunction can require the landlord to either do or not do something. Injunctions may be obtained for a short period, until the disposition of an action or permanently.[14] Depending on the type of injunction, the tenant must meet certain tests to obtain the remedy. Injunctions are typically only granted when the Court is of the view that damages would be insufficient to address the breach.

3. **CONCLUSION**

When a landlord intends to redevelop its property, it must plan accordingly by securing the necessary provisions in the lease to allow the landlord to perform redevelopment work and should, in the course of its operations, be mindful not to infringe on the tenant's rights provided under the lease and at law (including the right to quiet enjoyment). A tenant, on the other hand, must be mindful of the consequences of redevelopment work and plan accordingly when negotiating the provisions of the lease (for example, if signage and/or access to parking are of significant concern for the tenant, then the tenant should add language protecting these rights in the lease).

[12] *See London Prestige Ltd. v. Wellington Harlech Centre Inc.,* 2019 CarswellOnt 7549.
[13] Richard Olson, *A Commercial Tenancy Handbook* (Toronto: Thomson Reuters) at § 8:30 [*Commercial Tenancy Handbook*]; see *Spirent Communications of Ottawa Ltd v. Quake Technologies (Canada) Inc.,* 2008 CarswellOnt 590.
[14] *Commercial Tenancy Handbook,* at § 8:32.