



TERMINATING TENANCY

Three lease-break clauses that allow for redevelopment

BY DAVID N. ROSS

What was new and exciting 40 years ago is now in need of rejuvenation. Old office towers, tired shopping centres, rundown industrial parks — all are potential redevelopment opportunities for building owners. And if a current owner is not prepared to make the effort and take on the risks associated with redevelopment, then there is often a developer that is.

THE BASIC PREMISE

A building owner who is also a landlord wants to maintain a consistent income from its property and, at the same time, have the flexibility to terminate leases and/or relocate tenants when the time is right for redevelopment. Tenants, on the other hand, want to be dealt with fairly by a landlord that is contemplating redevelopment. Sometimes arriving at a suitable middle ground can be a struggle.

When a landlord grants a lease of premises for a fixed term, the tenant is entitled to quiet enjoyment of the premises

as long as it keeps the lease in good standing. As a result, if a landlord has redevelopment in mind during the lease term, it needs to include one or more specific provisions in the lease to terminate the term or relocate the tenant's premises. Landlords that have the foresight to do this can usually avoid ongoing and costly negotiations with their tenants when they want to move forward with redevelopment.

DEMOLITION OR SUBSTANTIAL RENOVATION

One option is to include a provision to terminate so that demolition or substantial renovation can occur. However, from a tenant's perspective, such a provision, without qualification, can be less than satisfactory.

Some of the issues a tenant may raise include: whether there should be a restriction as to when the right to terminate can be exercised (for example, assuming that the tenant has one or more options to extend the term, perhaps only after the initial term has expired); the definition

of the term "substantially renovate" and what parameters should be put around it; the type of evidence the landlord should provide of its genuine intention to demolish or substantially renovate the premises (for example, professionally prepared plans and building permits); prior notice requirements; possible compensation for the remaining (unamortized) value of the tenant's leasehold improvements; whether the landlord will financially assist the tenant in its relocation to new premises; and whether the tenant will be given any rights to lease premises in the new or redeveloped project.

SALE BY LANDLORD

A provision that gives a landlord the right to terminate a lease if it intends to sell the building could also be included in the demolition clause or be written as a standalone provision. This provision often requires that there be an actual agreement of purchase and sale between the landlord and a potential buyer before the right to

terminate arises. In such cases, the notice period is typically relatively short so that termination can be accomplished on or before closing. In cases where the landlord has agreed to compensate the tenant to make a quick exit, the notice period may be even shorter.

REDEVELOPMENT AND RELOCATION

Sometimes a development is completed in phases or located on lands that are underutilized. At some point in time, a landlord may want to make full use of its property. When this occurs, the landlord may have no intention to terminate its leases; rather, it wants to increase density, make better use of existing facilities or diversify the type of development on the site. This type of redevelopment may require temporary or permanent relocation of existing tenants, whether elsewhere in the development or in a nearby development, if the landlord owns or controls one.

In exchange for a relocation right, the landlord may be asked to promise to maintain free and open access between the existing premises and other lands

and premises that become part of the development; maintain a specified parking ratio on the lands; ensure existing exclusive rights extend over the expanded area of the development; obtain the tenant's consent before building, adding to, or enlarging the existing development; and/or refrain from making any alterations or additions to the development that would detrimentally affect the tenant's business operations, impair access to the premises or obstruct the visibility of the premises.

Other issues that typically arise when relocation provisions are being negotiated include the need to adjust rent to account for the larger or smaller size of the relocated premises (and whether there will be any limits on such an adjustment) and whether the tenant is obliged to re-use leasehold improvements from the existing premises in the relocated premises. The tenant may also request "blackout" periods, during which relocation cannot occur.

Beyond these issues, there is the hassle of relocating to a new space. To compensate for the inconvenience, the tenant may expect the landlord to

pay the cost of moving to and (if the relocation is only temporary) from the relocated premises, as well as substantially contribute to the cost of installing new leasehold improvements in both locations.

An area of potential dispute is the similarity of the new premises to the old one. Factors that are considered are location, size and finish. In the case of retail space, accessibility, customer visibility and traffic flow are also taken into account. To avoid future dispute, a tenant may want the right to terminate its lease if the proposed relocated space is not comparable and, subsequently, receive payment for the remaining unamortized portion of the leasehold improvements in its existing premises. ■

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