

# Leasing Commercial Space: Negotiating for

## Ayo N. Ogor

The owner of a small strip mall is having trouble finding reliable tenants for long-term leases. To trim costs, he has cut down drastically on repairs and renovations. The mall is beginning to look run-down and unattractive. One of the tenants is a coffee shop in year three of a ten-year lease, when a huge national competitor moves in across the street, causing the coffee shop's revenues to drop by 40%.

Economic uncertainty can threaten the viability of both landlords' and tenants' businesses. To retain reliable commercial tenants in the present economic climate, landlords are becoming increasingly willing to negotiate on leases.

Commercial tenants should be aware of possible rights they can negotiate into existing leases. Commercial landlords should be aware of how to protect their interests and those of their mortgagees (lenders), while ensuring that they continue to satisfy tenants.

### Set-off Right

*What this is:* The right of the tenant to undertake work on behalf of the landlord and deduct the cost from the rent payable.

*Tenant's position:* Tenants want to compel the landlord to carry out repairs without having to go to court. In the example above, renovations may improve the tenant's ability to compete. If the landlord does not cooperate, set-off rights allow the tenant to make the repairs and deduct the cost from the rent.

*Landlord's position:* Landlords do not want tenants unilaterally deciding on standards for the property. Landlords who cannot avoid granting this right should ensure they receive ample notice to complete the repairs before the rent is set off. The amount and the issues for which the tenant can set off should also be strictly defined.

### Kick-out Right

*What this is:* upon occurrence of certain events, such as a major drop in revenue, the right to terminate before the expiry of the lease. In the above situation, a kick-out right would allow the tenant to terminate the lease without penalty.

*Tenant's position:* Tenants are increasingly requesting this right, particularly in industrial leases, due to the uncertain economy. Alternatively, they may seek the right to reduce the amount of space they lease, or to change locations in the complex. In the above example, this right would allow the tenant to move further away from the competitor.

*Landlord's position:* If granting this right, landlords may reserve the right to recoup any financial incentives given

with the lease, such as rent-free periods, leasehold allowances, and broker commissions. They should ensure this right does not survive beyond the original term of the lease, and that mortgagees' consent is obtained beforehand.

### Assignment and Subletting Clauses

*What they are:* clauses determining the tenant's rights to sublet or assign the lease to a third party. In the above situation, this would allow the tenant to find a subtenant and move out if there is no kick-out right.

*Tenant's position:* Tenants want maximum ability to sublet or assign leases, and even obtain recognition for new tenants. Without this, the original tenant would still have to sign any documentation required for dealings with the landlord, such as written requests for repairs. Tenants are also increasingly requesting non-disturbance clauses that protect assignees or subtenants, so that even if the landlord eventually defaulted on the mortgage, the lender would be required to respect the subtenants' rights if they continue to pay rent and fulfil their obligations under the sublease.

## CHANGES TO ONTARIO DRIVING LEGISLATION: Is Your Business Threatened?

### Anthony E. Bak

Transportation is the lifeblood of many businesses. Let's say that "ABC Delivery Service" prides itself on meeting its customers' needs. One Friday afternoon, one of its customers, a pharmacy in a small southern Ontario town, needs an urgent delivery. ABC guarantees the distributor that the stock will reach the pharmacy before 6:00 pm. The driver lives in the direction of the destination and is as interested as the customer in completing the delivery before 6:00 pm. Several delays make it touch and go whether the driver will reach the pharmacy in time, so once on a clear, open road, he speeds up. Unluckily for him, he is stopped by the Ontario Provincial Police. The driver, with a 15-year safety record, is astounded to be charged with "stunt driving": he is suspended from driving for one week effective immediately and his vehicle is impounded. He learns that if he is subsequently convicted, he will receive six demerit points and a fine up to \$2,000. Worse, he might receive a further suspension and possibly even jail time.

Welcome to the world of recent amendments to the Ontario *Highway Traffic Act*.

Businesses that operate fleets of vehicles need to take particular notice of these changes, since they may have

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