

Leasing in an Uncertain Economy

January 1, 2009

As uncertainty in financial markets continues, affecting all aspects of the economy, commercial landlords ought to consider the manner in which they approach lease agreements and their negotiation, as well as the parties with whom they conduct business. In the current economic climate, it is likely that landlords will encounter greater challenges in ensuring that tenants' obligations under their lease agreements are fulfilled. Below are examples of proactive steps that landlords can take to protect their interests, both prior to signing a lease agreement and during the lifespan of the lease itself.

With Whom are you dealing?

Entering into a lease agreement with a legal entity that is no longer in existence or never existed in the first place can be a costly mistake. Inquiring as to whether the tenant has the financial capacity to meet its financial obligations under the lease is also imperative.

Perform corporate searches and obtain status certificates to verify that a prospective tenant's legal entity is valid and active.

Insert a conditional period in favour of the landlord for review of the tenant's audited financial statements.

Think about performing bankruptcy searches, execution, lien and other relevant searches.

Ask for references from previous landlords and/or perform credit checks.

Make sure you are dealing with the entity with the assets, and not a subsidiary or other related or unrelated entity with a similar name and no assets.

Protect Yourself at the outset

Demand letters of credit from a prospective tenant.

Insist on deposits and security deposits.

If a tenant has no or limited assets, demand an indemnity or guarantee from someone who does.

If an allowance or an inducement is payable, it may be worth considering taking a security interest in some of the tenant's assets (PPSA registrations).

Protect your right to consent to any proposed assignment or transfer. Ensure that the original tenant and/or indemnifier/guarantor remains liable upon any transfer or assignment of the lease and specify that the tenant shall be responsible for any fees relating to a

request for assignment or transfer. These types of requests may become more common and it is crucial that you remain in the driver seat even in a difficult market.

Incorporate language in your standard lease allowing the landlord to terminate the lease upon request for an assignment or transfer of the lease.

When dealing with new developments or redevelopment projects, landlords should consider inserting provisions at the offer stage that allow the landlord to terminate the offer should an anchor tenant fail to open/proceed.

Landlords should also consider inserting a condition that will entitle the landlord to terminate the offer should circumstances arise where the project is no longer economically feasible.

Maintain Vigilance During the Lease Term

Watch out for the "chronic rent payment default".

Avoid paying any lump sum allowance or inducement to the tenant for construction of their leasehold improvements in advance of the tenant opening for business in the premises.

"Midnight Run" Ensure your rights are protected and seek advice from our team who will gladly assist and inform as to the best course of action.

Ensure that notices of default are consistently given on a timely basis in accordance with the requirements of the lease.

These simple tips and additional safeguards, all are aimed at understanding the tenant's covenant and limiting your potential financial exposure. WeirFoulds can assist you in reaching this goal and confronting whatever obstacles these uncertain times may bring.

New Property Tax Changes are afoot. The following is a brief summary of some of the changes that may affect you:

New January 1, 2008 assessment values will determine municipal taxes in Ontario for 2009-12, with increases phased in 25% per year. Appeals for 2009 must be filed by March 31, 2009.

New rules apply to appeals. The assessment authority must prove the assessed value is correct; the onus is no longer on the taxpayer to prove the value is incorrect. Taxpayers will be entitled to the lower of the correct assessed value or a value that is equitable in comparison to similar real property in the vicinity.

Ensure vacancy and non-profit tenant tax rebate applications for 2008 are filed by February 28, 2009.

Ensure that new construction (applications for building permits made after March 22, 2007) are entitled to immediate business education tax reductions.

Ensure tax allocation clauses in new leases produce no shortfall in tenant recoveries.



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