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PROPERTY

- Leasing Update

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The Paper Chase

By Angela Mockford

Lease documentation takes many forms, from short form deal sheets to long form ground leases. Choosing the right form for your situation can help ensure you get the lease you expected - and that it is legally binding.

There are a number of reasons why lease documentation can vary significantly from transaction to transaction. Timing of delivery dates, types of financing and the stage of a project's development all influence the form of a deal. But did you know that in some cases, a deal on paper is not a deal at all?

More conservative landlords and some tenants will insist upon executing a full-blown, lengthy, detailed and comprehensive offer to lease, followed by a full-blown lengthy, detailed and comprehensive lease. More liberal landlords, and most other tenants, are content with a short-form letter agreement, followed by a comprehensive lease. But there are always variations on these themes.

The trick is in knowing which "paper" provides you with a binding agreement, and which could lead to an argument that there was no "meeting of the minds", and therefore, no deal.

PAPERING THE DEAL

Here is an overview of some of the more common ways to document your lease deal:

Letter agreement with landlord's form of lease attached

This is one of the most efficient ways to conclude a lease agreement, and, not surprisingly, is a popular choice with both landlords and tenants. It is extremely difficult for a tenant or its solicitor to argue that it was not aware of, and did not agree to, the contents of the landlord's form of lease if that document is attached to the offer.

Letter agreement with "precedent" form of lease attached

This document is another popular choice with parties who have a relationship spanning more than two locations. If the "lease execution" clause is properly drafted to make it clear that certain sections of the lease are to be considered incorporated verbatim, while others are amended by the offer, there is even an argument that the offer might stand on its own and that a further lease document is not required.

Other letter agreements and third party forms

These are generally the shortest letter agreements, and can range from a broker's, agent's, or publisher's pre-printed form to the deals we love to call "cocktail napkins". The irony is that while these short deals appear to many clients to result in

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agreements being made more quickly, they sometimes lack the essential legal elements of a lease, leaving it to the lawyers to ensure that the deal is actually made at the lease stage. In a letter agreement, almost more than in any other offer, the "lease execution" clause should be carefully drafted to refer to the form of the lease to be signed.

Landlord's detailed form of offer

This document is a very good choice if the offer form is sufficiently detailed (particularly about elements such as landlord's work, tenant's work, insurance, restoration obligations, default, demolition and relocation). If, however, the landlord's form of offer is essentially a letter agreement, then the form of the lease to be signed must be clearly set out.

Non-binding letter of intent

The "why bother?" of the leasing world, the non-binding letter of intent has found favour with certain U.S. retailers. It is often used as both a sword and a shield in lease negotiations, since a tenant who insists that "there is no deal" may be the first to complain that a lease clause "does not conform to the letter of intent". In addition, care must be taken in the drafting of such documents to make it clear that the document is intended to be non-binding – because, if it otherwise contains the legal elements of a lease, a court might be disposed to find it binding.

Straight-to-lease documents

This can be one of the more time-consuming lease forms to negotiate. However, this method – using a landlord's form – can take the guesswork out of the negotiation (compelling the parties to pay attention to every issue and clause), can encourage the lawyers to be creative and succinct (as the negotiations often take place during a "lockdown" in a boardroom for three or four hours), and can discourage "fishing", as few parties are willing to pay lawyers to negotiate when the deal is not "serious". By contrast, using a tenant's form of lease in a straight-to-lease negotiation can actually make for a longer negotiation process, since many tenant's forms were created in the United States, and contain provisions that import poorly into the Canadian market.

A DEAL IS NOT MADE BY PAPER ALONE

What difference does it make which form you choose? In certain cases, it can make the difference between "deal or no deal."

Of the six required elements of a lease, the first five are self-explanatory (parties, premises, commencement date, duration of term, and rent). The sixth requirement (other matters neither intrinsic to the relationship of landlord and tenant nor sufficiently defined by law, but material and required to be agreed) is more elusive. For example, in one Ontario case, the matters of a garbage enclosure were a "sixth requirement", because the tenant, a restaurant, had made it clear these matters were important to it.

In other Ontario cases, Courts have confirmed that an offer that is conditional upon execution of the lease is a "contract to make a contract", and therefore not an agreement. What is perhaps the most surprising to those of us who are used to the back-and-forth of lease documentation is that Ontario courts have also held that in circumstances in which the lease deviates from the offer in a material fashion (such as by including an administration fee that was not in the offer), the other party may be entitled to repudiate the entire deal. And that's not to mention the spectre of "estoppel" or "waiver" by conduct (the proposition that you can actually amend your deal by what you do, not just what is written down).

CALL THE PAPER EXPERTS

So what to do? The good news is that there is no need to navigate these deep waters alone. Whichever form of lease documentation you prefer to use, it's wise to obtain input from a trusted legal advisor experienced in drafting and negotiating all forms of leases (and to involve that person as early in the process as possible) to ensure that the deal you make is the one you expected to make - and moreover, one you can enforce! □

The Landlord, the Knock Off, the Potential Liability

By Elisabeth Patrick & Albert Formosa

You're a landlord, and your tenant is selling knock-off merchandise that violates copyright or trademark laws. In some other countries, the landlord's liability for such violations has been the subject of court proceedings. Is Canada next?

Could a Canadian landlord be found liable for its tenants' infringement of copyright and trademarks rights? While Canadian courts have not yet dealt with this issue, it has

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Angela is a commercial landlord or tenant's best asset. With over ten years of experience in commercial leasing, she takes a modern, practical and cost-effective approach towards the negotiation of relationships between landlords and tenants. For Angela, it's all about getting the deal done on time and on budget—without sacrificing quality, the relationship, or the client's best interests. Her strengths include negotiating and drafting all manner of lease documentation, developing or improving standard forms for clients, and advising in cases of lease interpretation disputes—all with an eye on the bottom line. Contact Angela at 416.947.5096 or mockford@weirfoulds.com.

DEFINITION OF THE DAY: GREEN LEASE

A "green lease" is a lease that requires both the landlord and the tenant to adopt environmentally friendly practices. The main aim of a green lease is to have the parties: (a) reduce the consumption of water, energy and non-renewable resources; (b) increase recycling and use sustainable materials in fixtures and improvements; and (c) utilize sustainable practices for building systems, such as indoor air controls.

There is a strong call for commercial leases to become greener due to the fact that commercial buildings produce a significant portion of total greenhouse gas emissions and use a large proportion of Canada's water consumption. An increasing number of studies illustrate the economic advantages – such as energy savings – when landlords build and manage green buildings.

Going forward, the popularity of green leases will only increase as resources become more scarce, climate change progresses and a more environmentally-aware population continues to call on both landlords and tenants alike to become more environmentally friendly.

been considered in other jurisdictions, with conflicting results.

A look abroad

In China, the landlord of the Silk Market was found liable for its tenants' trademark infringement in a proceeding brought by North Face. The Beijing No. 2 Intermediate People's Court held that the landlord had an obligation to strictly manage the market, including a duty to verify the source of goods and the authenticity and legality of the proof of trademark authorization. In an earlier decision, the Beijing High People's Court had upheld a decision of the Supreme People's Court in holding a landlord and tenant stallholders jointly liable for trademark infringement.

By contrast, the Australian Federal Court held that it is not reasonable to expect landlords to police trademark infringement and that landlords could not be expected to be able to distinguish between counterfeit and authentic goods. The Court held that there was a difference between the legal right of a landlord to control the range of goods being sold on its premises, and the ability to permanently control the actions of its tenants to halt all trademark infringement. It went further and held that landlords could not be held liable for their tenants' conduct except in the case of the most blatant misconduct.

Closer to home, in February 2008, police raided three buildings known as the "Counterfeit Triangle" in New York City, seizing goods with a street value of more than $1 million, and obtaining an order temporarily closing the 32 stores. The stores were all in buildings owned by the same landlord, and the merchandise included Burberry, Coach, Fendi, Gucci and Prada knock-offs, according to police. The status of the landlord's liability in that case has not been settled.

A Canadian Perspective

A Canadian court has not finally determined the issue of a landlord's liability for trademark or copyright infringement. However, following international cases, it appears that a finding of liability would depend on three factors: the knowledge of the landlord, the control by the landlord, and the financial benefit to the landlord.

Knowledge

Canadian landlords have reported receiving cease and desist letters from major brands advising that certain tenants were infringing trademark and copyright rights, and that the landlord would be held liable. These cease and desist letters are likely designed to prevent landlords from claiming they never had knowledge of the activities on their premises. The more knowledge a landlord has about particular instances of infringement by its tenants, the more likely it will be held liable. If you receive such a letter, be sure to clarify the purpose of the cease and desist letter with the sender. Recently, a landlord was able to sufficiently address the cease and desist letter by providing the sender with information regarding the particular tenant, which enabled the sender to go after the tenant directly.

Control

In the North Face case in China, the government agency in charge of industry and commerce had previously directed the landlord to review the effectiveness of its tenants' trademark authorizations and check the legal identity of its tenants and their business licenses. These types of obligations are not imposed on Canadian landlords, resulting in less likelihood of liability in most cases.

Financial Benefit

In the U.S., the operator of a flea market was found liable for the infringing activities of its tenants. The Court found that the landlord had knowledge of the infringing activities, and that it engaged in various other "policing" activities. As well, the landlord derived financial benefits from the infringing activities by booth rental, booth reservations, admission fees and concession sales. While the landlord at a shopping mall does not derive the same sort of financial

benefits from its tenants (i.e. no admission fees), it's arguable that a percentage rent scheme could tie a landlord's financial benefit to the success of its tenants.

Assess your liability risk

While the issue of a landlord's liability for trademark or copyright infringement has not been finally determined in Canadian courts, given the international jurisprudence, it is likely just a matter of time before it is. If you have retail tenants, a liability assessment may be in order. The more knowledge of the infringing activities that you have, and the more control over your tenant's business and the more financial benefit you derive from the infringing activities, the greater your risk of liability. □

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Case Highlight

Drugs and Groceries

Our quarterly look at interesting cases focuses on the question of whether – in this era of expanded product lines – a drug store is really a drug store.

A recent British Columbia case – *Diane Investments Inc. v. Mancal Properties Inc.,* 2008 BCSC 421 (B.C.S.C.) – involved a restrictive covenant in a lease that prohibited property from being used, among other things, as a grocery store, dairy products store or convenience store.

The dispute centred on whether a national drugstore chain breached this restrictive covenant.

On the groceries issue, the Court found that the covenant didn't prohibit the sale of groceries, but provided that a "grocery store" could not be operated on the property. While the drugstore sold groceries, it did so at a much lower volume and with much lesser variety of foodstuffs than ordinarily found in a grocery store. In terms of dairy products, the same reasoning applied.

In dealing with the convenience store restriction, convenience items amounted to only 13-15% of the drugstore's total sales and 15-20% of the store's floor area. The Court held that the similarities were not sufficient to consider the drugstore a "convenience store".

On those bases, the Court concluded that the operation of the drugstore did not offend the restrictive covenant.□

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