

COMMERCIAL LEASES QUIZ

How much do you know about commercial real estate leases? Test your knowledge with this quiz authored by WeirFoulds LLP partner Angela Mockford.



1 Your landlord presents you with a year-end statement for operating costs and realty taxes. The actual amount claimed exceeds the estimates your landlord gave you by 10 per cent. Are you required to pay the amount set out in the statement? **Yes or no?**

2 Your lease does not contain any reference to a 15-per-cent administration fee, but your landlord has added it to your operating costs and realty taxes. Are you required to pay it? **Yes or no?**

3 You are selling the shares of your company. The lease provides that the tenant has the right to assign the lease and sublet, but only with landlord's consent. Does the sale of shares require the landlord's consent? **Yes or no?**

4 You have filed a notice of intention to file a proposal in bankruptcy. You have not paid rent in two months. Can the landlord lock the doors? **Yes or no?**

5 Your current offices are excess for your needs and you want to downsize. You can send your landlord a formal notice of downsizing? **True or false?**

6 Your lease requires you to obtain a waiver of subrogation from your insurer, in favour of your landlord. You have recently obtained a policy with a new insurer, and it is refusing to provide the waiver of subrogation. Can you force your landlord to accept your new insurance? **Yes or no?**

WeirFouldsLLP

See answers on page 32

1 YES. Generally speaking, an estimate is just an estimate, and the lease may even say so. A tenant is, in the normal course, required to pay all amounts set out in the lease. However, if the tenant can demonstrate detrimental reliance on the estimate, it may be able to argue successfully that it is not required to pay the full amount, especially when it reaches a significant increase (such as 10 per cent or higher). It also depends upon the year to which the statement relates: if the year to which the statement relates is too long ago, the landlord's claim may be statute barred.

2 NO. Even when a lease contains a "net lease" clause, making it clear that the tenant is responsible for all costs of the tenancy, the *Denninger* case provides that such a cost is a "cost of operation" to be borne by the landlord — if it is not expressly set out in the lease to be payable. However, if you have paid the fee in the past, you may, by your conduct, have waived your right to refuse to pay it in the future.

3 NO. An assignment is a transfer of the tenancy to another entity; a sublease gives a lesser interest "under" the tenancy to another entity. A sale of the shares of your company is a "change of control," which does not result in a change in the corporate entity; thus, the tenant remains the same. In the absence of language in the lease prohibiting a "change of control," or other language buried in the lease that prohibits a change of this nature, you do not require landlord consent. (For example, the definition of "transfer" in your lease may catch a transfer of interest through a sale of shares in the tenant.)

4 NO. Even if the lease provides that the filing of the notice of intention is a default, the Bankruptcy and Insolvency Act prevents the landlord from enforcing under its lease, unless it deals with the bankruptcy trustee.

5 FALSE. Unless you have an express right to this effect in the lease, you as the tenant are liable to fulfill your obligations under the lease for the entire space, unless the lease provides otherwise. It may be that there are other reasons why your lease may be terminable (ie. fundamental breach), but not just on account of your desire to downsize.

6 NO. You are technically in breach of your lease, although there is a limited argument that if the landlord has, in the past, accepted your insurance without the waiver, it has by conduct waived the requirement. You may be able to prevail upon your landlord by explaining that if it is listed as an additional insured on the insurance policy, it enjoys protection under your insurance policy, and thus no waiver of subrogation is required.

YOUR RANKING?

Two or fewer correct: Time to hit the books.

Three or four correct: Nicely done.

Five or six correct: You're moving on up.

CANADIAN LEGAL NEWSWIRE



it's fresh.
it's free.
it's weekly e-news!

Sign up today at

www.canadianlawyermag.com

FROM THE EDITORS OF CANADIAN LAWYER AND LAW TIMES