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Can Commencement Dates be Contingent on Uncertain Events?

One of the essential requirements for a valid lease has always been an identifiable commencement date. A longstanding common law principle holds that the commencement date cannot be based on the occurrence of an event that is to occur at some unspecified time in the future (such as the issuance of a building permit). However, in some situations, such as leases for unconstructed premises, it is necessary for the commencement date to be contingent on a future event. To create a valid lease in these circumstances, parties have pegged the commencement date to occur on the earlier of a fixed future "outside" date and the occurrence of the future event, be it the expiration of a fixturing period or the opening for business by the tenant in the premises. But, what happens if the commencement date has not been structured in this manner and is contingent on the occurrence of events with uncertain dates?

Identifiable Commencement Date No Longer an Essential Term?

In the 1981 Ontario Court of Appeal case of *Canada Square Corp. et al. v. Versaford Services Ltd. et al.*, the landlord planned to construct a commercial building and approached a tenant to operate a rooftop restaurant in it. The parties signed a lease for a period of 30 years, which was to commence once the building was substantially completed. As the building neared completion, the tenant delivered a letter to the landlord stating that it did not have the resources to proceed with the restaurant project. The landlord brought an action against the tenant for breach of contract. In response, the tenant argued that there was no valid contract between them. The Court found

that the parties' words and actions showed an intention to create a binding agreement and concluded that there was a valid contract.

The tenant also argued that the terms of the lease, including the commencement date, were uncertain and therefore unenforceable. The Court found that at the time the tenant attempted to get out of the lease, the future event had already occurred as the building was substantially completed; therefore, the commencement date was certain and enforceable. The Court commented however that even if the future event had not occurred when the tenant claimed there was no lease, the lease would nevertheless have been valid. The Court recognized that this arrangement was sensible and practical in the context of the leasing of unconstructed premises.

Bad Faith Conduct

In the 1994 Ontario Court of Justice decision of *Schramek v. C Corp (Ontario) Inc.*, the Court adopted the comments from *Canada Square*. The landlord and tenant entered into an offer to lease in which the landlord was to construct a store for the tenant. The term was to commence on the opening for business by the tenant in the premises. The landlord reneged on the agreement by refusing to construct the store, citing a changed economic climate. The landlord's refusal effectively barred the trigger event for the commencement date. The Court held that the landlord acted in bad faith and, under the circumstances, could not be permitted to avoid its commitments. The Court recognized the parties' expectations at the time the agreement was signed and concluded that the lease was binding despite the contingent commencement date.

A More Relaxed Approach

The Ontario Superior Court of Justice further relaxed the rule on commencement dates in the recent decision of *2030068 Ontario Ltd. v. Coffee Time Leasing Corp.* The landlord planned to develop a strip mall which would include a Coffee Time franchise operated by the tenant. The term of the lease was to commence on the earlier of the expiry of the fixturing period and the opening date of the franchise business. Due to financial concerns, the landlord did not develop the property. As a result, neither of the events occurred to trigger the commencement of the lease. The landlord argued that the lease was void because it did not contain a discernible commencement date. The Court cited *Canada Square* and held that the lease was not void despite the fact that the commencement date was contingent upon an uncertain event. The Court noted that, in the context of a development

project, it made commercial sense to include a commencement date that was contingent on a future event.

Implications of the Case Law

These cases suggest that the old common law requirement for a fixed commencement date has been relaxed. In certain circumstances a court will permit an uncertain future date to be the commencement date of a lease. It is important to note however that all three decisions involved leases in the context of development projects. With only a few decisions in Canada to date, it is unclear whether this new criteria for commencement dates is applicable to all circumstances, but landlords and tenants should be aware that the lease *may* be valid even if the commencement date is contingent on a future event that has an uncertain date at the time of execution of the lease agreement.

Relocation and Frontage: Quality Not (Just) Quantity

In relocation clauses we often see an obligation on the part of the landlord to provide the tenant with relocated premises with frontage similar to that of the tenant's existing premises. The term "similar frontage" has generally been understood to mean similar length, but this understanding was challenged in the 2007 unreported decision of the Queen's Bench of Alberta, *San Francisco Gifts Ltd. v. Londonderry Shopping Centre*.

The landlord exercised its relocation right and offered the tenant a choice of two vacant spaces. The tenant refused to relocate on the basis that neither space provided "similar frontage". It argued that the first vacant space did not provide the same amount of pedestrian traffic in front of the store and the second

vacant space was a corner location, which required reconfiguration of the frontage to match the existing space. The Court ruled that the determination of whether the proposed spaces provided similar frontage required not only a quantitative analysis but also a *qualitative* one. It was not enough that the landlord provided a similar length of frontage, it was also required to match the qualitative aspects of the frontage of the existing premises.

In light of this decision, if landlords want to avoid matching the qualitative aspects when relocating tenants, the relocation clause should state that the new premises will have a "similar length of lineal feet of frontage", as this will provide an objective criteria for determining whether the new premises are appropriate.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

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