

Transfer Provisions Under a Commercial Lease

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Analyzing Commercial Lease Contracts

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TRANSFER PROVISIONS UNDER A COMMERCIAL LEASE

INTRODUCTION

This paper discusses the topic of transfer provisions in commercial leases. It will generally follow the format of the typical transfer clauses in a landlord's standard form lease with occasional segways to see how the contractual provisions may clarify or add to the common law, either for the benefit of the landlord or the tenant.

A common complaint from tenant's counsel is "why does the transfer provision have to be so long?" Why can't we simply say "the tenant will not assign or sublease without the prior written consent of the landlord, which shall not be unreasonably withheld"?

Usually the landlord's clause already says the landlord will not unreasonably withhold consent, but generally landlords want to clarify and add to the common law as follows:

- (a) clarify or add reasons why the landlord can refuse consent;
- (b) add the right to take back the space;
- (c) add a right of first refusal to take the deal offered to the assignee or sub-tenant;
- (d) add the right to impose conditions as part of granting its consent; and
- (e) add that if the tenant alleges that the landlord is unreasonably withholding its consent, the tenant's only remedy is to seek a court order determining the matter and that the tenant is not entitled to the full range of remedies such as lease termination or damages.

On the tenant side, tenants will want to clarify when it is unreasonable for the landlord to refuse consent and may also want to be released on assignment. Without a release on an assignment by the original tenant, the common law requires that the original tenant remains liable. Unless a tenant has substantial bargaining power, such release is unlikely to be granted by the landlord.

Tenants will want flexibility to assign or sublet their premises or allow change of control or other restructuring while landlords want to ensure that the tenant's assignment, sublease and transfer rights do not adversely affect the operation, financeability, value, status, use or control of the project. Landlords will have undertaken a careful selection process in choosing the tenant based on what it

brings to the operation and value of the project, both in terms of business history and financial covenant, and want to ensure this selection process is not undone by assignment and subleasing.

OFFER TO LEASE

The first step is often the offer to lease. The landlord's form of offer to lease will set out the main business terms and will contain a covenant to execute the landlord's standard form lease, sometimes subject to amendments requested by the tenant and approved by the landlord, acting reasonably.

It is critical both from the landlord and tenant's point of view that the offer addresses the subject of the transfer of the lease. When reference is made to the transfer of the lease, this means a transfer of the tenant's interest under the lease either by way of assignment, sublease, licence or charge or mortgage of the tenant's leasehold interest granted under the lease. More on this later.

In the offer the landlord will want a prohibition on transfer of the lease except in accordance with the provisions of its standard form lease. If this prohibition is not present in the offer, then at common law the agreement formed by the acceptance of the offer to lease will be freely assignable. The landlord may then be obligated to enter into a lease with a party other than the original tenant with no approval rights. For a landlord who has underwritten the lease based on a particular tenant's financial covenant, this is a less than desirable result. Arguably, the original tenant is not released upon assignment and, as a result, the landlord could insist both parties enter the lease as tenant, which may create enough difficulties for the original tenant and its assignee to bring them to the table to work something out with the landlord. For example, if the lease contains a continuous operating covenant it will be difficult for the original tenant to comply with that obligation.

In the offer the tenant will want the offer to state that the landlord's consent to an assignment or sublease will not be unreasonably withheld. This is a fair point, as courts will not imply an obligation on the part of the landlord not to unreasonably withhold consent unless same can be shown to have been the parties' intentions. Accordingly, some offers from tenants contain a clause to the effect that the tenant shall not assign or sublease without the consent of the landlord, such consent not to be unreasonably withheld. If the landlord agrees to this, it is critical that the landlord at least add provisions to the effect that such clause in the offer is "subject to the terms and conditions of the assignment and sublease provisions in the landlord's standard form lease" and ensures that the assignment clause in the landlord's standard form lease governs to the extent of conflict with the offer. The landlord must avoid a situation where the offer to lease contains a stand alone