

Commercial Leases and Landlord Consent

Commercial leases will almost always have a provision prohibiting a tenant from assigning the lease or from subleasing, licensing or otherwise sharing possession of all or part of the premises (a “Transfer”) to a third party without the consent of the landlord. The provision will usually go on to say that the landlord cannot unreasonably withhold its consent. Even if a lease does not say this, in Ontario, unless the lease specifically says that the landlord can unreasonably withhold its consent, section 23 of the *Commercial Tenancies Act* (“CTA”) states that landlords cannot “unreasonably withhold consent.” What, then, does “reasonable” mean in the context of a tenant’s request for a landlord’s consent to a Transfer?

General Principles

A landlord does not have the onus of proving that they were acting reasonably in withholding consent. Instead, the onus is on the tenant to show, that a reasonable person in the landlord’s position would have granted consent to the Transfer and that it was unreasonable for the landlord not to have granted its consent to the Transfer.

Ontario courts have generally applied an objective test to determine what is reasonable within the context of the CTA. While there remains a subjective element to this test which relates to the specific facts of each case, the courts will apply a general test of “reasonableness” when determining if a landlord has unreasonably withheld its consent based upon the information available to the landlord at the time of its decision.

So when is it reasonable or unreasonable for a landlord to withhold consent to a proposed assignment?

The following factors have been considered by the courts in determining whether a landlord’s consent to a Transfer was unreasonably withheld:

- (i) economic impact on the landlord;
- (ii) financial capabilities of the assignee; and
- (iii) where the landlord attempts to exact a better deal on some other collateral benefit

Economic Impact

In *Suncor* (2010),¹ the tenant operated a gas station and wanted to assign the lease to a third party. The landlord refused to consent on the basis that the assignment to Husky would erode the financial value of the property. The Court found that the landlord would in fact be better off from an economic perspective if it

consented to the assignment since Husky was a growing brand of gas stations and the current tenant, Sunoco, was virtually disappearing in Canada. As a result, the Court determined that the landlord had unreasonably withheld its consent to assign the lease to Husky.

Financial Capability of the Transferee

A tenant seeking consent to a Transfer has a duty to provide the landlord with sufficient business and financial information regarding the assignee, subtenant or licensee (a “Transferee”) to enable the Landlord to make an informed decision on whether the proposed Transferee has sufficient business experience and financial wherewithal. In determining the acceptability of an assignee, a landlord does not have to take into account the fact that the tenant is not being released from its obligations as a tenant.

In *Westridge* (2008),³ the landlord refused to consent to the assignment of the lease because there was no third party corroboration of the financial statements and the assignee’s resume did not indicate that it had ever operated a restaurant business before. The Court concluded that it was not unreasonable for the landlord to refuse consent based on the tenant’s inability to demonstrate that the assignee could properly operate a business and pay the required monthly rent. Therefore the refusal to grant consent was valid.

A similar decision was reached in *Kenny* (2016)⁴ where the landlord was also justified in withholding consent on the basis that the tenant had only provided an assignee’s business proposals but no business plans or financial information on the assignee. The Court therefore held that it was reasonable for the landlord to withhold consent due to the lack of information provided to the landlord to make a proper determination.

Collateral Benefit

Courts have held that it is unreasonable for a landlord to withhold its consent to a Transfer in order to obtain a collateral benefit.

In *Cvokic* (2008)⁵ the tenant, who was the owner of a pizza store, sued the landlord due to numerous disagreements between the parties. After commencing the lawsuit against the landlord, the tenant put their business up for sale. However, the tenant was not able to complete a deal with the proposed purchasers because the landlord refused to grant consent for the tenant to assign the lease to the proposed purchaser. The landlord wanted the lawsuit against them dismissed prior to granting consent. As a result, the Court found that the landlord's refusal to consent to the assignment was unreasonable because it was for a collateral purpose.

In *Tradedege Inc.* (2008),⁶ the landlord refused to consent to the assignment of the lease unless the proposed assignee agreed to pay additional rent. The Court held that the refusal to consent to the assignment was unreasonable because the reason was unrelated to the financial stability or business acuity of the proposed assignee. It was motivated by a collateral purpose, namely the Landlord's desire to increase the rent.

Important Points to Keep in Mind:

A tenant should consider these important points when attempting to effect a Transfer to a third party:

- a tenant has an obligation to provide its landlord with sufficient information regarding the proposed Transferee's business experience and financial situation to allow the landlord to make a proper determination;
- if a landlord refuses its consent, the onus is will be on the tenant to show that the landlord acted unreasonably in withholding its consent;
- a landlord cannot refuse consent in order to obtain a benefit unrelated to the Transfer for which the landlord's consent is being sought; and
- the requirement of a landlord to act reasonably in considering a whether to give its consent to a Transfer does not mean that the landlord has to consider any amendments to the lease requested by the tenant or the Transferee, no matter how reasonable the amendments requested may be.

¹ *Suncor Energy Products Inc. v. 2054889 Ontario Ltd*, 2010 ONSC 6159, 195 ACWS (3d) 831 [Suncor].

³ 1405593 Ontario Inc. v. *Westridge Shopping Centred Ltd*, 169 ACWS (3d) 419, 2008 CarswellOnt 5112 [Westridge].

⁴ *Kenny Alwyn Whent Inc. v. J Mao Dentistry Professional Corp.*, 2016 ONSC 584, 2016 CarswellOnt 2645 [Kenny].

⁵ *Cvokic v. Belisario*, 2008 CarswellOnt 4177, 169 ACWS (3d) 883 [Cvokic].

Tradedege Inc. v. Tri-Novo Group Inc., 2007 ONCA 562, 2007 CarswellOnt 5178 [Tradedege Inc.].

Pallett Valo Leasing Law Practice

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