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ICSC - CANADIAN LAW CONFERENCE 2018

End of term repair, removal and restoration obligations – What is the scope of the tenant's obligation?



BEST PRACTICES FOR LANDLORDS

- ✓ **Examine the state of repair:** If Tenant is required to repair the premises to “the condition at the commencement of the Lease”, consider conducting an initial on-site inspection and take pictures, notes and videos to confirm condition at possession; have property managers examine premises regularly to ensure Tenant compliance with “in term” repair obligations; and require all tenants to fill-out an environmental questionnaire and attach as a schedule to the Lease.
- ✓ **Define leasehold improvements broadly:** Ensure the definition is all-encompassing to avoid certain articles being captured as Tenant trade fixtures or Tenant personal property.
- ✓ **Determine when title vests for leasehold improvements:** Specify that title to the leasehold improvements shall vest upon installation.
- ✓ **Expressly set out removal obligations:** Landlord should include the right to impose end of term removal obligations for leasehold improvements installed by or on behalf of the Tenant during the term.
- ✓ **Timing for removal of Tenant's personal property and/or trade fixtures:** Restrict Tenant's right to remove its personal property and/or trade fixtures at any time during the Lease term, except for in the usual course of business or which are excess for Tenant's purposes or if Tenant is substituting new and similar trade fixtures. Expressly provide that if Tenant fails to remove its personal property and/or trade fixtures at the end of term, then they shall, at Landlord's option, become the property of Landlord, without compensation, and Landlord shall have right to remove, sell or dispose of such personal property and/or trade fixtures, at Tenant's sole cost and expense.
- ✓ **Review “in term” and “end term” repair obligations:** Ensure consistency and avoid repair obligations at end of term which did not exist during the term of the Lease.
- ✓ **Align Tenant's repair obligations with actual condition of the Premises:** If the expectation is for Tenant to repair to a “first class” or “like new” condition, then this should be expressly stated in the Lease.
- ✓ **Avoid repairs being subject to reasonable wear and tear:** “Reasonable wear and tear” has been inconsistently applied by the courts and should be avoided to the extent possible.
- ✓ **Return of security deposits:** Security deposits should only be returned following expiration of the Lease and satisfactory completion of Tenant's repair and restoration obligations.
- ✓ **“Owner-like” obligations for repair:** Tenant's repairs obligations should be consistent with that of a “prudent owner”.

BEST PRACTICES FOR TENANTS

- ✓ **Examine the state of repair at the commencement of the Lease:** Conduct an on-site inspection; take pictures, notes and videos to confirm condition at possession; bring in consultants to examine building systems which exclusively serve the premises.
- ✓ **Obtain a baseline environmental assessment:** For pad locations or strip malls in particular, consider obtaining a Phase I or (if required) Phase II ESA to establish a baseline of contamination.
- ✓ **Beware the definition of leasehold improvements:** Distinguish between Tenant's personal property and/or trade fixtures and leasehold improvements; carve-out existing leasehold improvements from Tenant removal and restoration obligations.
- ✓ **Determine when title vests for leasehold improvements:** Negotiate title to vest at expiration of term to allow for depreciation for income tax purposes and sale on assignment of Lease.
- ✓ **Expressly set out removal obligations:** Differentiate between "standard" and "non-standard" leasehold improvements; limit removal obligations at end of term to "non-standard" leasehold improvements only.
- ✓ **Timing for removal of Tenant's personal property and/or trade fixtures:** Expressly state Tenant can remove its personal property at any time during the Lease term.
- ✓ **Review "in term" and "end term" repair obligations:** Ensure consistency and avoid repair obligations at end of term which did not exist during the term of the Lease.
- ✓ **Align Tenant's repair obligations with actual condition of the Premises:** Take into consideration the age and class of the building/shopping centre; avoid obligations to repair to a "first class" or "like new" condition unless this is the current standard and condition and Landlord has taken on a mutual obligation in the Lease.
- ✓ **Obligations for repair:** Ensure Tenant's repair obligations do not exceed that of a "prudent tenant", having regard to the particular use of the Premises.
- ✓ **Include standard carve-outs to Tenant's repair obligations:** Tenant should exclude from repair obligations repairs arising as a result of: (i) Landlord's default, negligence or wilful misconduct (including those for whom the Landlord is at law responsible); (ii) structural defects, weaknesses or faulty design; (iii) reasonable wear and tear and perils/hazards against which Landlord ought to have insured. Consider negotiating a clause in the Lease which expressly stipulates that all repairs or replacements that are not the obligation of the Tenant as set out in the Lease are the responsibility of the Landlord.

Your Dedicated Team



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Any questions? **Let's talk.**

