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"WHEN CAN A TENANT WITHHOLD RENT?"

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LEASING LAWS

When Can a Tenant Withhold Rent?

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Leases commonly include a 'no set-off' provision such as, "Rent shall be paid without deduction, set-off or abatement." Lawyers are often asked, 'Can a tenant withhold rent and claim a set-off in the face of a no set-off clause?'

It is worth noting that in the absence of a 'no set-off' clause, Section 35 of the Commercial Tenancies Act provides: "A tenant may set off against the rent due a debt due to the tenant by the landlord."

As a general rule, no set-off clauses are enforced, except where a judge finds that it would be manifestly 'unjust' or 'inequitable' or 'unconscionable' to allow a landlord to collect rent without taking into account the claims of the tenant. This is known as 'equitable set-off'.

Not every claim by a tenant will qualify for an equitable set-off. While judges have broad discretion, as a practical matter, one can expect that they will only override a lease and order equitable set-off in a fairly narrow band of cases.

The best way to understand equitable set off is to compare two court decisions on the subject, which came to opposite conclusions.

The first case is *Mayfair Tennis Courts Ltd. v. Nautilus Fitness & Racquet Centre Inc.*, ([1996] O.J. No. 1358), where the court did not allow the tenant's claim for equitable set-off.

The second case is *Manufacturers Life Insurance Co. v. Firstbrook, Cassie and Anderson Ltd.*, [1999] O.J. No. 4736, where the claim for equitable set-off succeeded.

In the *Mayfair Tennis* case, the tenant, Nautilus, leased space in two Mayfair Tennis clubs for its fitness centres. In the year prior to the expiry of Nautilus' leases, Nautilus claimed that Mayfair began soliciting its customers.

Nautilus based its claim on Mayfair's intention to operate its own fitness clubs in the former Nautilus premises, after the leases expired.

Following the expiry of the leases, Mayfair sued Nautilus for unpaid rent. Nautilus claimed a set-off against the rent for its loss of business as a result of Mayfair's solicitation of Nautilus customers.

The court found that while Nautilus was free to pursue a claim against Mayfair for the wrongful solicitation of its customers, the claim was not sufficiently tied to the tenant's obligation to pay rent to override the no set-off clause in the lease and qualify for an equitable set-off.

In the *Manufacturers Life* case, the tenant had for a number of years disputed the landlord's calculation of additional rent charges.

The lease required the landlord to provide an auditor's report verifying the additional rent charges, which it never did.

Relying on the no set-off clause in its lease, the landlord claimed it was entitled to its rent even though the tenant claimed set-off for overpayment of additional rent charges, which overpayment had yet to be proven in court.

The court found there was strong evidence of overcharges, although the final amount had not been established. Furthermore, the landlord had breached its lease by failing to deliver an independent auditor's report and year-end reconciliations.

As a consequence, the landlord could not rely on other provisions in the same lease which limit the tenant's right to set-off. The court held that it would be manifestly unjust to allow the landlord to recover its rent in full in the face of the evidence of overcharges and the landlord's breach of the lease.

One can therefore conclude that a court may permit an equitable set-off, where there is evidence that the landlord breached the lease and the amounts claimed by the tenant arise directly out of the lease and not from a collateral or related matter.