NEWS ReLease

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REMOVAL AND RESTORATION

Landlords and tenants should approach removal and restoration obligations carefully. These obligations often seem clear at the conclusion of negotiations, but become ripe for dispute as the tenancy approaches the end of its term. While the common law provides some rules in this regard, these rules lack clarity. Consequently, leases often contain terms that replace or supplement the common law.

This News ReLease highlights some concepts to be kept in mind when negotiating lease provisions concerning removal and restoration.

Removal

Primer on Chattels and Fixtures

We start with terminology.

Chattels are items that are not attached to the premises by any means other than their own weight.

Fixtures are items that are attached to the real estate.

An Ontario Court of Appeal decision from 1902, *Stack v. T Eaton Co* ("***Stack***") outlines the following basic principles with regard to chattels and fixtures:

(i) articles not attached by anything other than their own weight are NOT fixtures. They are chattels, *unless the circumstances show that they were intended to become a part of the real estate*;
(ii) articles even slightly affixed to the real estate are fixtures, *unless the circumstances show that they are intended to continue as chattels*;
(iii) the *circumstances* necessary to show the alternate intentions must be *obvious*; and
(iv) the intentions of the person affixing the item is material *only so far as it can be presumed from the circumstances*.

Unfortunately, since the generalities in *Stack* and the reliance on *intention* demonstrated by *circumstances* provide little practical value in disputes over affixed property, further precision is warranted.

At law, fixtures are subdivided into two categories: *tenant fixtures* and *landlord fixtures*. The commercial real estate industry often distills these into *trade fixtures* and *leasehold improvements*, respectively. At law, tenant fixtures are things that have been affixed to the real estate for the purpose of the tenant's trade. Courts have held that a tenant has the presumptive right to remove tenant fixtures, so long as the removal does not materially damage the premises. This essentially allows a tenant to restore certain fixtures to the status of a chattel. In contrast, at law, landlord fixtures are attached to the real estate with the intention of becoming a part of it. Unless the lease states otherwise, landlord fixtures become the property of the landlord once they are installed and therefore must not be removed by the tenant.

Case law suggests that determining whether a fixture is a *landlord fixture* or a *tenant fixture* requires analyzing whether the item was installed for the betterment of the premises, **or** for the betterment of the item installed. In a 1998 decision of the Ontario Court of Appeal, *859587 Ontario Ltd v Starmark Property Management Ltd*, concerning a landlord's right of distraint (which cannot be used on *fixtures*), a built-in spray paint booth was bolted to the floor and vented through the roof of the premises. The Court found that the spray paint booth was a tenant fixture because it was installed for the purposes of the tenant's business. As it was installed for the better use of the item itself (e.g., for stability purposes) rather than for the better use of the premises, it was found to be a tenant fixture.

What to Address in the Lease

Leases often try to differentiate between a *trade fixture* and a *leasehold improvement*.

Landlords and tenants usually try to spell out what can and/or must be removed from the premises at the end of the term. For instance, landlords of office space tend to call out cabling for removal due to the headache of cutting and removing cables.

Tenants of restaurant space tend to want the flexibility to take with them or leave behind, at their discretion, certain kitchen facilities, including built-in ovens and refrigerators. Landlords and tenants of industrial space may focus on manufacturing or warehousing plant items. In all asset classes the parties pay attention to finishes and climate equipment. And then there is the risk of environmental contaminants lurking in fixtures – no one wants that removal responsibility!

Essentially, there are no short-cuts. There is a lot of ″stuff″ that does not lend itself to industry ″norms″ or easy classification.

Restoration

Distinct from the removal topic, restoration can be characterized as a component of a tenant's repair obligations under a lease. This issue concerns the condition in which the tenant must leave the premises at the end of the term. Clearly, if any level of removal is required, the result can entail damage for the landlord to contend with, whether by leaving behind a hole or a wound.

Restoration obligations vary in leases. Tenants are typically not required to put the premises into a condition that is better than the condition they were in at the beginning of the term. A tenant may be required to restore the premises to "base building" condition or only deliver it back in a "broom swept" condition. Alternatively, tenants may be required to leave the premises in the condition in which they found them (in which case, preserving some evidence of that condition for future reference will be key). Some leases require the tenant to deliver vacant possession of the premises in the condition they are required to be kept throughout the term. Where that standard is "first-class", a tenant may be concerned that it cannot meet the standard. An exception for "reasonable wear and tear" is often incorporated, although that phrase has proven to have an unreliable meaning.

Timing

Another consideration: the timing of a tenant's removal and restoration obligations should be addressed in the lease. For example, will the tenant have additional time after term expiry to perform removal and/or restoration? If so, parties should consider which lease provisions, if any, will continue to operate. This might include, among other things, payments for utilities and other rent categories, as well as insurance coverage. A right of holdover is not implied by a removal and restoration obligation.

Takeaway

Ideally, all matters relevant to removal and restoration obligations will be crystal clear in the lease. Landlords and tenants should be realistic when setting their expectations and not place their faith in common law principles. Carefully considering the matters outlined above can help the parties to express terms that provide certainty and avoid disputes, delays, and unforeseen costs.

ANNOUNCEMENT

Daoust Vukovich LLP is pleased to welcome **DYLAN ARMSTRONG and JOSHUA (JOSH) YOUSSEF TAWADROS** to the firm as Associate Lawyers. Both Dylan and Josh articled at the firm prior to being called to the Ontario Bar in 2023.

Dylan, who is joining our leasing department, is a graduate of Queens University. Dylan can be reached directly at 416-597-5742 and at darmstrong@dv-law.com.

Josh is a graduate of the University of Western Ontario. Josh's practice will include leasing, litigation and real estate. Josh can be reached directly at 416-479-4354 and at jyoussef@dv-law.com.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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20 Queen Street West, Suite 3000, Toronto, Ontario M5H 3R3 | Tel: 416~597~6888 | Fax: 416~597~8897 | Web: www.dv-law.com

DYLAN ARMSTRONG
416-597-5742
darmstrong@dv-law.com

MARY ANN BADON
416-598-7056
mbadon@dv-law.com

FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

KRISTINA BEZPROZVANNYKH
416-597-9306
kbezp@dv-law.com

CANDACE COOPER
416-597-8578
ccooper@dv-law.com

HEATHER CROSS
416-591-3046
hcross@dv-law.com

DENNIS DAOUST
416-597-9339
ddaoust@dv-law.com

ALLISON FEHRMAN
416-304-9070
afehrman@dv-law.com

GASPER GALATI
416-598-7050
ggalati@dv-law.com

PAUL HANCOCK
41-597-6824
phancock@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MELISSA M. MCBAIN
416-598-7038
mmcbain@dv-law.com

PORTIA PANG
416-597-9384
ppang@dv-law.com

JAMIE PAQUIN
416-598-7059
jpaquin@dv-law.com

BRIAN PARKER
416-591-3036
bparker@dv-law.com

DINA PEAT
416-598-7055
dpeat@dv-law.com

MANEET SADHRA
416-479-4357
msadhra@dv-law.com

JACK SARAIVA
416-597-1536
jsaraiva@dv-law.com

CHRISTINE SHAHVERDIAN
416-598-7049
cshahverdian@dv-law.com

JOSHUA YOUSSEF TAWADROS
416-479-4354
jyoussef@dv-law.com

LUCIA TEDESCO
416-597-8668
ltedesco@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

DEBORAH WATKINS
416-598-7042
dwatkins@dv-law.com