"Ue, Signor Buonarroti! C'hai pensato di chiedere permesso al padrone?"

Hey, Michelangelo! Did you remember to get the landlord's consent?

Repair, Replacement and Alterations from a Tenant's Perspective[1]

Unless otherwise agreed, common law provides that a tenant takes the premises in that condition in which they are in at the commencement of the Term:

> "It is trite law that in the absence of an express covenant there is no obligation on the landlord of an unfurnished house to keep it in repair and there is no implied covenant by the landlord that it is or shall continue to be reasonably fit for occupation**."**[2]

Statute law [in Ontario the Residential Tenancies Act, 2006, S. O. 2006, chapter 17] has reversed this position with regard to residential tenancies only.

This paper will comment on the repair, replacement and alteration provisions in a commercial lease. As most commercial leases are written for landlords to protect their interests, this paper will predominantly consider these obligations from a tenant's perspective. When used in this paper the term 'lease renewal' also refers to an extension of the lease unless otherwise stated. This paper will not discuss the damage and destruction provisions of a commercial lease.

CONDITION OF PREMISES:

As the tenant takes the premises in that condition in which it is in as of the commencement date unless otherwise agreed, it is imperative that at the offer to lease/letter of intent stage, the tenant determine whether or not the premises are in a

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1 by David V. Westwood, David V. Westwood (Commercial Lease Law) Professional Corporation. Cartoon illustration by Steve Yeates, Illustration and Graphic Design, Toronto, Ontario

2 *Parks v. Hammond*, 2 D.L.R. 679, (Ontario Court of Appeal).

condition acceptable to the tenant. This would include: whether the premises physical layout [ceiling height for example] can accommodate the intended purpose; the premises are structurally sound with sufficient mechanical and electrical systems in good operating condition; the applicable zoning permits the intended use; and the premises are otherwise in compliance with all other governmental laws. I am aware of a situation where a tenant took possession of premises "as is", and when drawings were submitted to the applicable authority for a building permit, learnt [to his expense], that the previous tenant had made unauthorized renovations; consequently the tenant was forced to alter this previous work to meet Code in addition to the tenant's renovations.

A tenant should also request a Phase 1 and if necessary a Phase 2 environmental audit to determine the acceptability of the premises. The premises may have previously been used as or included an automotive use and the possibility of petroleum or other contamination exists, [for example, premises previously occupied by K-Mart, or gas station sites that have been closed].

This environmental audit is essential where the tenant will be carrying on a use that uses or generates hazardous substances, i.e. a gas station. Leases will require the tenant to return the premises to the landlord in a condition in which they were in as of the commencement date. From a landlord's perspective this obligation must be extended in the lease to include the subsoil (see ***Westfair Foods Ltd. v. Domo Gasoline Corp.***[3] below). The audit must be done immediately prior to the tenant taking possession, and then be referenced in the lease as a benchmark unless remediation is required, then the subsequent audit after remediation would become the benchmark. At the end of the term the tenant would be obligated to undertake its own environmental audit and remedy any contamination in excess of the benchmark.

What is the situation where the parties to the lease did not undertake an initial environmental audit? In ***Darmac Credit Corp. v. Great Western Containers Inc.***[4] the tenant was in the drum reconditioning business requiring the use of a caustic cleaning solution. Through the cleaning process the soil of the premises became contaminated and the tenant failed to take remedial action as required by Alberta Environment. The previous tenant was in the lumber business and had not generated any contamination. Pursuant to the lease the tenant was obligated to return the premises to the landlord in the condition it was in as of the commencement date subject to reasonable wear and tear. Lutz, J. held:

> "In my view, in today's commercial world, unless a lease provides otherwise, it is implied within a lease that lands are to be returned uncontaminated. Contaminated lands are not saleable lands. Perhaps, when this particular Lease was entered, environmental concerns were minimal, but they have become prominent in recent years. Although environmental damage was not directly addressed when the lease was entered, the tenants are responsible for any contamination they cause."[5]

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3 [1999], M. J. No 532 (Manitoba Court of Appeal)

4 [1994] A. M. No 915 (Alberta Court of Queen's Bench)

5 Ibid, paragraph 62

Darmac[6] was followed in ***Progressive Enterprises Ltd. v. Cascade Lead Products Ltd.***[7]. In its manufacturing process molten lead was spilt onto the premises floor by the tenant. The tenant took the position that this spillage was part of reasonable wear and tear and therefore the tenant was not responsible for its removal at the end of the term of the lease. There were no governmental standards applicable to surface lead contamination. The court held that the lease contained an implied term that the tenant would return the premises to the landlord in an uncontaminated condition.[8]

This position was subsequently modified by ***Westfair Foods Ltd. v. Domo Gasoline Corp.***[9] . The tenant operated a gas bar and as a result of a gas line leak and in preparation for the decommissioning of the site, the tenant remediated the property to the Level III standards enumerated in the Manitoba Environmental soil remediation guidelines. While the landlord wanted the lands remediated to that condition in which it was in at the commencement of the lease, the lease itself only required the surface of the ground to be restored to that condition in which it was in prior to the installation of the underground tanks and appurtenances, and then subject to reasonable wear and tear. The Manitoba Court of Appeal upheld the initial trial decision[10] noting that Level III standards permitted the premises to be used for future commercial use, and then holding that the tenant had; "returned the property to [the landlord] in the condition in which it was in at the commencement of the lease, subject to normal wear and tear which is consistent with the operation of a gas bar"[11]. Therefore, unless the lease states to the contrary, remediation to governmental standards for the type of property involved, (in ***Westfair*** to the commercial property standards) falls within the reasonable wear and tear exception for that property.

A tenant should insert a due diligence provision in its offer to lease to the effect that it has a period of time to satisfy itself that the premises are satisfactory, failing which the tenant may terminate the offer to lease. If the landlord is passing the obligation to confirm the acceptability of the premises onto the tenant, it is reasonable for the tenant to have the time to "kick the tires".

REPAIR AND REPLACEMENT

A typical landlord lease usually requires the tenant to:

1. Keep the premises and its improvements in first class condition;

2. Repair and replace all mechanical/electrical systems within the premises to the extent that they are not part of the "common areas";

3. Repaint and redecorate the premises as determined by the landlord; and

4. Remove hazardous material from the premises.

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6 supra
7 [1996] B.C.J. No 2473 (British Columbia Supreme Court)
8 Ibid, paragraph 33.
9 Supra, footnote 3
10 [1999] M. J. No 1 (Manitoba Court of Queen's Bench)
11 Supra, footnote 8 at paragraph 20

A tenant should try and amend these provisions as follows:

i. The obligation must be subject to "reasonable wear and tear"; what constitutes 'reasonable wear and tear' will be discussed later;

ii. In lieu of a 'first class condition' obligation, this should be amended to a 'good condition'. Alternatively, if the landlord is insisting on a first class condition, the landlord should have this same standard with regard to its obligation to maintain and repair the common areas. The landlord will then probably suggest that its condition be 'consistent with similar shopping centres of the same age and quality'. This would be acceptable, as long as the obligation was reciprocal to the tenant's obligation.

iii. The obligation to repair or replace the mechanical/electrical systems should be subject to any warranties currently available to the landlord.

iv. The obligation to repair or replace the mechanical/electrical systems should be amended to prevent the tenant being obligated to undertake major repairs without compensation from the landlord, otherwise the landlord would receive an unjust enrichment. This is especially important with regard to the HVAC system. For example, in the last year of a ten year lease where the tenant has no right of renewal or does not desire to renew, the HVAC unit itself or its compressor or fan coil requires repair or replacement. The cost of such repair or replacement is significant yet the tenant cannot depreciate the entire expense because there is less than one year remaining in the term, yet the landlord has received a new unit or new component parts at no expense. This in my opinion is not reasonable. It is not a solution for the lease to state that the tenant undertakes the repairs while the landlord undertakes the replacement, as the issue of who determines when the item requires replacement in lieu of repair remains outstanding.

   My suggestion is to provide that the landlord is responsible to undertake at its sole cost the replacement of the HVAC unit and any other repair in excess of an agreed upon monetary threshold amount. All other repairs are to the account of the tenant.

   An alternative is for the repair/replacement cost to be amortized over a specified period [ten years], with the tenant paying that portion of this cost over the balance of the remaining term and the landlord paying the remainder, determined on a per diem basis. For example, if there are 300 days remaining in the term and the repair cost is $5000.00, then the tenant would be responsible for: $5,000.00 x 300/3650 [no leap years included] = $410.96. To ensure that the HVAC repair is undertaken, the tenant should undertake the repair then submit its invoice to the Landlord. Upon receipt of payment by the landlord, the tenant should transfer any warranty received.

   If the tenant subsequently exercises a five year right of renewal, the tenant would reimburse the landlord for the amortized portion determined over the term of the renewal. Following from the previous example, the tenant was responsible for $410.96 of the $5,000.00 expense. Upon the tenant exercising this option it would reimburse the landlord a further:

$5,000.00 x (365 x 5)/3650 =
$5,000.00 x 1825/3650 =
$5,000.00 x .5 =
$2,500.00

From a landlord's perspective, if a threshold amount is used, it should be subject to annual escalation based upon increases in the CPI. Further, the landlord should only be obligated to pay this amount if the tenant had taken out the quarterly/semi-annual HVAC maintenance contract.

v. It is reasonable for a landlord to require a tenant to take out a maintenance contract for the HVAC for the quarterly/semi annual maintenance of the HVAC system. The landlord may require the tenant to use the landlord's HVAC contractor in order to maintain the integrity of any HVAC warranty, or to prevent HVAC plundering, where one HVAC contractor uses parts from another HVAC system in the development.

vi. The tenant should have the right to determine when it will repaint or redecorate. A landlord could then make this a requirement for any renewal of the lease.

vii. With regard to hazardous material, the tenant could try and amend the lease to the effect that its responsibility is only to the extent that hazardous material is brought onto the premises by the tenant or those for whom it is in law responsible. Thus, the due diligence provision at the beginning of the term is essential for the tenant to determine the extent of hazardous substances. If the hazardous substance migrates into the premises from adjacent premises or the common area, this should be the landlord's obligation to repair, however most landlords will resist this obligation.

The extent of the tenant's obligation to maintain, repair and replace is especially significant at the end of the term. The lease will require the tenant to return the premises to the landlord in that condition in which it is obligated to maintain and repair the premises during the term. This should be amended to exempt reasonable wear and tear, though ***Nixon Automotive Ltd. v. Nikolai Plastics Ltd***[12] which is discussed below suggests that if a 'reasonable wear and tear exception' qualifies the tenant's day-to-day maintenance and repair obligations, this exemption will be extended to the end of term obligations.

The obligation to return the premises in this condition usually provides that the tenant must remove such leasehold improvements as the landlord requires. A tenant should delete this requirement and only be obligated to remove its trade fixtures and chattels.

A prudent landlord should add a provision to the effect that, if the tenant fails to return the premises as required at the end of the term, the tenancy is deemed to be continuing on a month-to-month basis until the tenant has restored the premises as required by the lease. By doing so, the landlord continues to collect rent. If the tenant fails to pay rent during

[12] [1978] B.C.J. No 950, (British Columbia Country Court of Vancouver)

the overhold period or complete the restoration, hopefully the landlord has sufficient security to cover these costs.

The lease could require the tenant to return the premises to the landlord in the condition in which the premises were delivered, i.e. before the tenant had undertaken any fixturing of the premises. This would be onerous on a tenant where the tenant is receiving the premises in its "as is" condition, with the tenant undertaking significant alterations to ready the premises for occupancy. Thus at the end of the term, the tenant must remove all of its leasehold improvements and restore the premises to its pre-term condition; a potentially expensive proposition. I would attempt to limit the extent to which the tenant must return the premises to require only the removal of trade fixtures and chattels.

A case on point is ***Stellarbridge Management Inc. v. Magna International (Canada) Inc.*** [13] which dealt with the extent of the tenant's (Magna) obligation to repair and restore the premises at the end of the term. The lease provided the tenant would:

> "repair and maintain the leased premises during the term of the Lease subject to reasonable wear and tear; to surrender the premises at the end of the Lease "in good state of repair and maintenance", subject to "the exceptions herein provided"; and to restore the interior of the leased premises "to its former condition" immediately prior to the installation of fixtures, alterations or changes to the interior, reasonable wear and tear excepted."[14]

Prior to the termination of the lease, the landlord and tenant met to determine the extent of the tenant's obligation to restore the premises. No agreement was reached and the tenant vacated without undertaking any restoration. At the initial trial[15] Magna acknowledged that it had not restored the premises, thus the issue was the proper assessment of damages, specifically what amount would be credited to the tenant on account of 'reasonable wear and tear' [which the trial judge, Her Honour Justice Ellen Macdonald termed a "betterment", though this is not the traditional definition of betterment]. Magna argued that the premises were returned to the landlord in a condition;

> " 'consistent with the reasonable wear and tear expected from industrial manufacturing operations over the course of ten years, save and except for limited repairs identified by [the tenant's consultant]"[16] .

At trial, Magna was awarded a "betterment" discount of thirty-five percent (35%) on certain heads of damages, in other words the damages awarded to Stellarbridge were reduced by this percentage as this constituted the 'reasonable wear and tear factor'. The appeal and cross appeal pertained only to the damage award.

In the Ontario Court of Appeal decision, Justice Cronk acknowledged that Magna was not obligated to restore the premises to that of a brand new facility, but subject to reasonable wear and tear as so provided in the lease. Justice Cronk then noted that the

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13 71 O.R. (3d) 263, (Ontario C. A.)
14 Ibid, paragraph 7
15 [2002] O.J. No. 1008, (Ontario Superior Court)
16 Ibid, paragraph 15

onus was on Magna to substantiate its right to the thirty-five percent (35%) betterment discount. At paragraph 61 Justice Cronk stated:

> "In ***Levesque v. J. Clark & Son Ltd.,*** [1972] N.B.J. No. 206, (Q.B.), the lessee covenanted in a lease to maintain the leased premises in a good condition and to return the leased premises on termination of the lease in the same condition in which they were leased, "reasonable wear and tear only excepted". The lessee relied on the reasonable wear and tear exception at trial to deny any liability to the landlord for proven deficiencies in the conditions of the premises at the end of the lease. In rejecting this position, Dickson J. stated at paragraph 12:
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> > Similarly, little evidence was adduced by the defendant to show that individual items claimed were due to reasonable wear and tear. In this regard I think it is well established in law that where proof is given that premises are not in good repair and condition on the termination of a tenancy the onus is then on the tenant to prove that the matters complained of result from the reasonable wear and tear excepted. See Halsbury (3d ed) Vol. 23, at page 581, where it is also pointed out that the tenant, if reasonable wear and tear is excepted, still "must take care his premises do not suffer more than the operation of time and nature would effect and he is bound by reasonable applications of labour to keep the (premises) as nearly as possible in the same condition as when it was demised" [emphasis added]"

Continuing at paragraph 62:

> "As well, in Haskell[17], supra, Talbot J. indicated with respect to a tenant's obligation to keep leased premises in a state of good repair that: 'If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the [reasonable wear and tear] exception' (at p.59)".

As Magna had not established its entitlement to a thirty-five percent (35%) betterment, the court rejected the trial judge's application of this discount, and noted that while this disqualification would result in a windfall to ***Stellarbridge***, it was solely as a result of Magna failure to adduce evidence to substantiate its percentage discount.

Another recent case concerning the condition of premises upon the termination of the lease is ***3031632 Manitoba Inc. (c.o.b. Hotel Fort Garry) v. Manitoba Lotteries Corp***.[18] This decision referenced the trial decision of ***Stellarbridge Management Inc. v. Magna International (Canada) Inc.***[19] and was decided prior to the Court of Appeal decision in ***Stellarbridge.*** In the ***Fort Garry*** decision the Court reduced the damages awarded against the Manitoba Lotteries Corp by $167,641.00 to $1,540,000.00, as this reduction was on account of 'reasonable wear and tear'.[20] In light of the ***Stellarbridge*** Court of

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17 Haskell v. Marlow, [1928] 2 K. B. 45 (C.A.)

18 [2004] M. J. No 175 (Manitoba Court of Queen's Bench)

19 [2002] O. J. NO 1008 (Ontario Superior Court of Justice)

20 [2004] M. J. No 175, page 12

Appeal decision, it is arguable that Manitoba Lotteries Corp should not have received the benefit of this discount.

Another consideration is whether the tenant has a right of renewal or a right of extension. If it is a right of renewal, then the renewal term is a separate and distinct tenancy agreement, it is not a continuation of the initial lease. As Harvey M. Haber, Q.C. noted in ***Landlord's Rights and Remedies in a Commercial Lease***[21]:

> "A lease that is *renewed* for an additional term beyond the original term stops for an "instant" at the end of the original term, prior to the commencement of the renewal term; that is, the renewal creates a new lease."

Therefore, if the tenant must return the premises in the condition in which it was in at the commencement of the term, on a renewal it is arguable that it is that condition in which it was in as of the commencement of the renewal term; however if it is an extension, it is that condition in which it was in at the commencement of the initial term. Consequently, in this specific circumstance a landlord would prefer an extension of term, whereas the tenant would prefer a renewal.[22]

While a tenant must repair the premises and keep the premises in a good, or first class condition, its repair obligation does not require the tenant to improve the premises:

> "A covenant to repair does not involve a duty to improve the property by the introduction of something different in kind from that which was demised, however beneficial or even necessary that improvement may be by modern standards. So a lessor of old premises not constructed with a damp course or with water-proofing for the outside walls was not bound by his repairing covenant to render the place dry by water-proofing the walls. If a defect in design had given rise to dry rot, the elimination of that existing rot and the replacement of affected timber is … an obligation imposed by a covenant to repair, but there is no obligation to undertake the structural alteration which is needed to prevent a recurrence of the rot, for that is improvement and not repair. So if an old house built with defective foundations can be saved from demolition only by an operation of under pinning and putting in new foundations, that is an improvement and not the liability of a tenant under a covenant to repair. Where, owing to

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21 Harvey M. Haber, Q. C., ***Landlord's Rights and Remedies in a Commercial Lease, A Practical Guide***, (Aurora: Canada Law Book Inc., 1996), at page 163

22 Note that this is not the sole criterion upon which the landlord should base this decision. If there are covenants that do not run with the land, i.e. personal covenants, such as an option to purchase by the tenant, or a first right to lease certain premises, these covenants would continue into the extension term but would be inapplicable during the renewal term. Therefore, a landlord may prefer a renewal option to defeat these personal covenants. While the obligation to repair is a covenant that runs with the land [see Spencer's Case (1583), 5 Co Rep. 16a, 77 E.R. 72 (C.A.)], where a lease drafts the continuation of the lease as a renewal, a landlord can achieve the requirement of having its tenant return the premises to that condition in which it was in as of the commencement of the initial term by specifically stating so in the lease, i.e. "and the Tenant shall return the Premises to the Landlord in that condition in which it was in as of the Commencement Date" [assuming that "Commencement Date" is a defined term being the first day of the term]. Please refer to Peter A. Sim, ***Covenants That Run With the Land,*** p 59, in Harvey M Haber Q. C. ***Tenant's Rights and Remedies in a Commercial Lease*** (Aurora: Canada Law Book, 1998).

> inadequate foundations, a pier carrying an end of a girder which supported a main wall subsided necessitating the rebuilding of the pier and wall with newly designed foundations, this constituted an improvement of the premises and did not fall within the lessee's covenant "to repair, amend, renew ... the premises." It is incorrect to say without qualification, that a repairing covenant does not oblige the covenanter to remedy inherent defects; it is true only in the sense explained above, and the mere fact that the renewal of some part is rendered necessary in consequence of an inherent defect does not prevent the renewal of that part being a matter of repair."[23]

If the Landlord wants the premises to be returned in a condition which is better than the condition in which it was initially demised, this must be explicitly stated.[24]

REASONABLE WEAR AND TEAR

A standard tenant amendment is to exempt from its obligation to maintain and repair, "reasonable wear and tear". "Reasonable wear and tear" was defined in Haskell, surpa, where Talbot, J. stated at page 58 - 59[25]:

> "The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition, but is not liable for what is due to reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.
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> For example, if a tile falls off the roof, the tenant is not liable for the immediate consequences; but if he does nothing and in the result more and more water gets in, the roof and walls decay and ultimately the top floor, or the whole house, becomes uninhabitable, he cannot say that it is due to reasonable wear and tear, and that therefore he is not liable under his obligation to keep the house in good repair and condition. In such a case the want of repair is not in truth caused by wear and tear. Far the greater

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23 Woodfall's Landlord and Tenant, Vol. 1, 27th ed., at page 637

24 Brian G. Clark *"**We Never Agreed to That! Tenant Repair Obligations on Determination of a Lease. Six-Minute Commercial Leasing Lawyer 2006**'* (Law Society of Upper Canada) 2006

25 Quoted in ***Coccimiglio***, infra, at paragraph 9.
Note that the interpretation of Talbot, J. in Haskell, supra, was overturned by the Court of Appeal in ***Taylor v. Webb***, [1937] 2 K.B. 283, but was subsequently specifically accepted by the House of Lords in ***Regis Property Co. Ltd. v. Dudley***, [1959], A. C. 370

> part of it is caused by the failure of the tenant to prevent what was originally caused by wear and tear from producing results altogether beyond what was so caused. On the other hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce a considerable defect in condition, but the whole of the defect is caused by reasonable wear and tear and the tenant is not liable in respect of it."

Other factors determining what constitutes reasonable wear and tear include[26];

- the age of the premises,
- the permitted use of the premises,
- the actual use of the premises, and
- the length of term.

The onus on establishing that the damage to the premises is within the scope of the 'reasonable wear and tear' exception is that of the tenant.[27]

The permitted use will also effect the 'reasonable wear and tear'[28] exemption. If in the normal course of the permitted use the premises deteriorated, the tenant would not have to return the premises in that condition in which it was in at the commencement of the term, if the lease contains a reasonable wear and tear provision. In ***Manchester et al. v. Dixie Cup Company (Canada) Limited***[29] the lease required the tenant during the term to keep the premises in good and substantial repair, reasonable wear and tear excepted, and at the end of the term to return the premises in good repair, reasonable wear and tear excepted. The tenant's use resulted in wax penetrating the walls of the premises, notwithstanding frequent maintenance by the tenant. In his decision Roach, J. A., initially stated that the wax incrustation resulted in the premises not being in good and substantial repair. However, he then referenced the exclusion of 'reasonable wear and tear' from this standard and stated:

> "A covenant that imposed upon a tenant the duty to put a building in a state of good and substantial repair, except the present non-repair, would be meaningless and it would make no difference how that non-repair had been caused. Therefore, the covenant with which we are here concerned cannot be construed as imposing on the tenant a duty to put the premises in a state of good and substantial repair. The respondent's duty under this covenant was to keep the premises in the state of repair in which they were at the commencement of the term, excepting only such non repair as might be caused during the term by reasonable wear and tear, …"[30]

He then concluded that the tenant was not responsible for the cost of removing this wax from most of the premises, but was responsible for the repair cost to a certain portion of

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26 ***Levesque v. J. Clark & Son Ltd.*** [1972] N. B. J. No 206, (N. B. S. C.) and ***Norbury Sudbury Ltd. v. Noront Steel*** (1981) Ltd., 11 D. L.R. (4th) 686

27 See ***Stellarbridge Management Inc. v. Magna International (Canada) Inc.***, supra and Levesque supra

28 See ***Westfair Foods Ltd. v. Domo Gasoline Corp.*** supra

29 [1951] O. R. 686, (Ontario Court of Appeal)

30 Ibid, page 11

the premises concluding that the tenant's efforts to maintain this latter area were not reasonable.[31] Obviously then, the facts will determine whether the damage was reasonable or not.

The same conclusion was reached in ***Nixon Automotive Ltd. v. Nikolai Plastics Ltd.***[32] where the repair obligation during the term excepted 'fair wear and tear ordinarily incurred by reason of the use of the premises for the purpose for which they were leased', but did not have this exception for the end of term requirement. Instead it required the premises to be returned in 'good repair'. The court held that even though the premises were not returned in good repair the reasonable wear and tear exception also applied to the end of term obligation, though it was not so stated.

In ***Gentra Canada Investments Inc. v. 724270 Ontario Inc. (Receiver of)*** [33] the tenant's obligation was to keep the premises in "good order and first class condition" and at the end of the term to leave the premises in "good order condition and repair". There was no reasonable wear and tear exception. The court concluded that this standard did not require the tenant to maintain and repair to the condition of then current technology, but only to the standard of the premises as they were in at the commencement of the term:

> "… these covenants require the tenant to keep the building in first-class condition, which is well above the average, but is not a luxury standard and is not the same as "as new". The standard requires an aggressive approach to repair of "wear and tear" but realistically no amount of maintenance can fully compensate for the normal aging process. As part of repairs, the tenant may from time to time have to replace subordinate parts of the fabric or structure. In doing so the tenant may but is not bound to replace those parts with the finest technology of the day. It must use that which is equal to the 1964 materials and workmanship if available, or the equivalent, having regard to the objective of maintaining it as a first class building. An element of commercial reasonableness is involved in these decisions, such that functionality, aesthetics and cost must be balanced to achieve a first-class result at a reasonable cost. It is not reasonable to demand that the tenant undertake construction which would substantially improve the building but is more than necessary to repair, even though that may be what a prudent owner, spending his own money, might decide to do; and the further into the lease term, the more important this principle becomes[34].

This decision was upheld in the Ontario Court of Appeal[35] where the court stated in paragraph 4:

> "We agree with the conclusion of Lane J. as to the proper standard of repair under the lease. If it had been the intention of the parties to the lease to provide for a "luxury" standard as opposed to a "first class"

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31 Ibid page 12

32 [1978] B.C.J. No 950, (British Columbia Country Court of Vancouver)

33 [1994] O.J. No 2044 (Ontario Court of Justice, General Division)

34 Ibid, paragraph 62

35 [1995] O.J. 771 (Ontario Court of Appeal)

> standard as specified, the necessary wording could easily have been inserted in the lease."

A prudent tenant or landlord should document the condition of the premises immediately prior to the occupancy by the tenant. This could be through video tape, photographs, or an agreed statement as to the condition of the premises. Failure to establish the initial condition of premises could be fatal to a claim for damages.[36]

In ***1163133 Ontario Ltd. v. Lazer Mania Inc***.[37], the court relying on the 'net net lease clause' and a provision which stated:

> "The Tenant shall pay its own hydro, gas, water, heating costs, air-conditioning costs and for all other services and utilities as maybe provided to the premises." [38]

concluded that the tenant was responsible for the cost of replacing the HVAC unit serving the premises. Contrast this with the decision in ***Shenkman Corp. v. O. A. C. Holdings Ltd.***[39] where the obligation to repair does not include replacement where the replacement results in an improvement. Métivier, J. in Shenkman stated in paragraph 21:

> "However, the terms of the lease refer repeatedly to "repair" and not "replacement". Repair includes the replacement by way of a modern equivalent of something already there but which has become dilapidated. ***708-1111 West Hastings Ltd. v Coopers & Lybrand Vancouver Ltd***., [1990] B. C.J. No 713. (QL). However, the definition of "repair" does not include an improvement. On all of the evidence before me, I find that the new roof involved a change of such a nature and to such an extent that it was not a "repair" such as contemplated in the lease. It was, in fact, a greatly improved roof, and a replacement."

Métivier, J. reached this conclusion notwithstanding that the lease in question provided that the tenant accepts the building "in a good state of repair".[40] Thus ***Park v. Hammond***[41] must be qualified to reflect that while the tenant may take the premises in that condition in which it is in as of the commencement of the term, its repair obligation does not require it to better the condition of the premises.

While the lease may exempt the tenant from repairing damage that constitutes 'reasonable wear and tear', the lease does not have a requirement for the landlord to undertake such repair. This is a reasonable exclusion as a landlord would certainly not agree to be responsible for such repair, as the premises are in the care, custody and control of the tenant.

STRUCTURAL REPAIRS

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36 See ***Coccimiglio v. Spectrum 2000 Communications Group Inc.*** [1998], O. J. No 4456.
37 [2005] O. J. No. 2179 (Ontario Superior Court of Justice)
38 Ibid, paragraph 15
39 [1997] O. J. No 880 (Ontario Court of Justice)
40 Ibid, page 2
41 Infra

In ***708-1111 West Hastings Ltd. v Coopers & Lybrand Vancouver Ltd.***[42], the lease permitted the landlord to include in common area costs, "… all expenses connected with building repair, maintenance and decorating…"[43]. A head lease required the landlord to; "make structural repairs to the exterior walls, (including plate glass, windows and doors) roof, foundations, bearing structure and public areas of the building"[44] . The issue was whether the landlord could recharge the cost of replacing the roof membrane. Wetmore, J., stated at page 4:

> "***Granada Theatres Ltd. v. Freehold Investment (Leytonstone)Ltd.*** [1959] 1 Ch. 593, is the only case cited to me where there is a covenant to repair and a landlord's covenant to repair structural matters… Similarly, the roof repairs were found to be structural. At pg. 605, Jenkins L. J. deals with the matter of the magnitude of repair as an element in determining whether the work is structural:
>
> > 'Next, as to the roofs, it appears to me that even the work recommended by Tidey, which, according to his estimate, involved the use of some 350 new slates but which, in fact, would have called for the provision or refixing of, I think, nearer 500 slates in all, if one allows for slipped slates and lost ones, would amount to a structural repair of a substantial nature. I do not think that a matter of 350 to 500 slates out of a total of 12,000 slates on a roof could be regarded as a mere trifle. The question, when one is dealing with such things as slates, is necessarily to some extent one of degree. It was put in the course of the argument that if a gale blew off two slates, for example, the work of replacing them could hardly be said to be a structural repair of a substantial nature. But obviously different considerations must apply if there were a hurricane stripping the house of all its slates …'"

Wetmore J then concluded that while the membrane was not structural, its purpose was that of a roof. He then asked and concluded:

> "What is a roof? Surely, inter alia, it is that part of a structure designed to keep out the rain and snow descending from above.
>
> The total destruction of the membrane is then like the loss of all of the slates in a fierce wind. The cases cited to me clearly hold that to be a landlord's responsibility. [45]

Thus he concluded that the replacement of the membrane was a structural repair, and an obligation required to be performed by the landlord without recharge to the tenant.

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42 [1990] B. J. C. No 713. (British Columbia County Court)
43 Ibid, page 2
44 Ibid, page 3
45 Ibid, page 5

ALTERATIONS

The contemporary commercial lease will not permit a tenant to make repairs, alterations, replacements, decorations or improvements (hereinafter individually and collectively called an "Alteration") to the premises without first obtaining the Landlord's written approval. Such approval is conditioned upon, inter alia; (a) the tenant submitting and the landlord approving architectural, engineering/structural drawings; (b) an indemnification in favour of the landlord against liens, costs, damages and expenses as the landlord requires, with the landlord reserving the right to discharge such liens, (c) the tenant obtaining all governmental consents and permits pertaining to the Alteration, (d) the workers retained by the tenant for the Alteration being approved by the landlord with union affiliations compatible with the landlord's unionized workers; and (e) a landlord right of inspection and supervision of the Alteration work to ensure that it complies with all requirements.

The provision could also permit the landlord to withhold its consent if the Alteration involved changes to the structure of the premises or changes to the exterior, including painting. A retail development may be constructed with a certain exterior image, and a landlord would be loath to permit a tenant to change that image. A retailer may, for example, want to paint the exterior of its premises yellow, or use a type of signage different from the balance of the centre, both of which could be unacceptable to a landlord.

However, there are certain provisions a tenant should request:

i. It should be able to undertake interior, non-structural Alterations without the consent of the landlord, though a prudent landlord would want to put a cap on the cost of such work such as:

> "The Landlord agrees that the Tenant may undertake interior, non structural Alterations without the consent of the Landlord, provided the cost of such work 'per occurrence' does not exceed twenty-five thousand dollars. For the purpose of this Lease 'per occurrence' means such Alteration that bona fide and reasonably is or should be performed, within a reasonable period of time as part of one project notwithstanding that the days on which the actual work is performed may not be consecutive".

ii. The tenant should then add an annual escalator to this twenty-five thousand dollar cap;

> "which amount will increase annually by the percentage increase in the CPI" [and this itself requires the Lease to define CPI]."

iii. It is reasonable for a landlord to require as a condition of its consent to a structural Alteration that the tenant restore the premises to that condition in which it was in prior to such Alteration. In my opinion an exception to this is if the structural change is required as part of the initial demise; however, this is a matter of initial negotiation.

iv. The landlord will want the ability to remove any liens that may result from such Alteration. This is reasonable, but should be restricted to prevent the landlord from paying the amount directly to a lien claimant.

CONCLUSION

It is the tenant who must establish that the damage to the premises falls within the 'reasonable wear and tear' exception. The tenant must then quantify such damage.

The facts in each situation will determine the extent of reasonable wear and tear. Therefore it is imperative for a tenant to have both an opening 'benchmark' to establish the condition of the premises at the commencement of the term and a closing 'benchmark', noting the condition of the premises at the end of the term.

Repair includes replacement, but not to the extent of an improvement.

It is in the interest of both the landlord and tenant to delineate clearly their respective responsibilities with regard to repair, replacement and alteration obligations. As most leases are landlord oriented, the landlord will have initially set out its position. The tenant, at the offer to lease/letter of intent stage must then at that time advise the landlord what it is prepared to accept with regard to these obligations.

The tenant should consider a due diligence period during which it can inspect the premises to determine if it is acceptable. If it is not acceptable, the tenant must be able to terminate the lease.

No deposits should be provided to the landlord until the tenant has waived its due diligence or accepted the premises.