

PROBLEMS ENCOUNTERED BY TENANTS

Occupation, Use, and Enjoyment of Premises

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I. The Covenant for Quiet Enjoyment

1. What is it?

“The covenant for quiet enjoyment” is the most fundamental covenant obtained by a tenant in a lease but it is often misunderstood¹.

In its most basic form, the landlord, in return for rent, gives the tenant the right to exclusive possession of the premises during the term of the lease, and covenants not to unduly interfere with the tenant’s exclusive possession so long as the tenant is not in breach of the lease. From the tenant’s standpoint, the covenant for quiet enjoyment permits it to exclude all others, including the landlord, from the premises for the term of the lease.

a. Right of Access and Exclusive Possession

The right of access is a key aspect of the covenant for quiet enjoyment because without access, or even with limited access, exclusive enjoyment of the premises is not possible. Further, the covenant for quiet enjoyment implies a representation that the landlord has title to the premises and is lawfully able to pass its right of exclusive possession to the tenant.

¹ Harvey M. Haber, *Tenant’s Rights and Remedies in a Commercial Lease: A Practical Guide* (Aurora: Canada Law Books Inc., 1998) at 121.

2. How Does it Arise?

The covenant for quiet enjoyment arises either expressly in the lease or it may be implied by law. A properly drafted commercial lease, however, will contain an express covenant for quiet enjoyment.

In the English case of *Budd-Scott v. Daniell*, [1902] 2 K.B. 351, the lease in question made no reference to the landlord granting “quiet possession” of the premises to the tenant. Rather, the lease only stated that the landlord “agreed to let” the tenant a house for one year. When the landlord was required, by local statute, to paint the house, the tenant was required to vacate the house for 10 days to accommodate the painting. The tenant claimed that the landlord’s act breached the covenant for quiet enjoyment and the landlord argued that there could be no breach as there was no reference in the lease to a covenant for quiet enjoyment. The court held that the covenant for quiet enjoyment could be implied from the relationship of the parties as landlord and tenant.²

It is noteworthy that the courts have also held that if a lease uses the words “let” or “demise”, but omits “quiet enjoyment”, the covenant of quiet enjoyment is thereby implied.³

Absent evidence of contrary intent, the law will imply a covenant for quiet enjoyment in the landlord-tenant relationship. The implied covenant for quiet enjoyment is absolute and if the parties wish to agree to any variations or restrictions on the right, they must set their agreement out in the lease.

a. Express or Implied Covenant

If the lease contains an express covenant for quiet enjoyment, it will supersede the implied covenant. In this way, the parties are able to expressly exclude in the lease many acts or omissions which would otherwise be construed as actionable breaches of the landlord’s covenant

² *Budd-Scott v. Daniell*, [1902] 2 K.B. 351, cited in *supra* note 1 at 122.

³ *Mostyn v. West Mostyn Coal and Iron Co.* (1876), 1 C.P.D. 145, cited in *supra* note 1 at 122.

to provide quiet enjoyment.⁴ Absent an express covenant, the courts will determine the scope of the implied covenant based on the apparent intention of the parties at the time they entered into the lease.⁵ It is therefore generally wise for a landlord to expressly define the covenant of quiet enjoyment in the lease as doing so enables the landlord to limit the scope of its obligation.⁶ A landlord, for example, will often require provisions in the lease that permit the right to inspect the premises, enter the premises without notice for the purpose of making emergency repairs and to show the premises to potential purchasers on reasonable notice to the tenant. Moreover, a lease will often include provisions which prevent a tenant from seeking compensation for any inconvenience or distress caused by repairs on the premises. The tenant, by contrast, will generally be satisfied if there is no express language in the lease defining the right of exclusive possession as the implied covenant is absolute, unless there is a contrary intention evidenced by the conduct of the parties or a subsequent agreement.

3. What Constitutes a Breach of the Covenant for Quiet Enjoyment?

A landlord's interference with the tenant's use of the premises will not necessarily result in a conclusion that the landlord has breached its covenant for quiet enjoyment. In *Wesbild Enterprises Ltd. v. Pacific Stationers Limited and Hauck* (1990), 52 B.C.L.R. (2d) 317 (B.C.C.A.), the court held that whether a particular act or omission on the part of the landlord constitutes a breach of quiet enjoyment will depend on the facts of each particular case. Further, the issue of whether a landlord has breached its covenant for quiet enjoyment will depend on whether the alleged breach is of a "grave and permanent nature"⁷ and whether the breach interferes with the tenant's proper freedom of action in exercising its right of possession.⁸ It is noteworthy that the courts have held that in order to meet this threshold, the landlord's interference cannot merely be a temporary inconvenience.⁹

⁴ Ross D. McGowan & Brent Clark, "Important Landlord Covenants" (2001) CLE, cited in The Continuing Legal Education Society of B.C., *Commercial Leasing Disputes – 2001 Update* (Vancouver: Continuing Legal Education 2001).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Firth v. B.D. Management Ltd* (1990), 73 D.L.R. (4th) 375 (B.C.C.A.).

⁸ *Ibid.*

⁹ *Supra* note 4.

Generally, a landlord's breach of the covenant for quiet enjoyment may arise in two ways: if title is defective or if there is substantial interference.

a. Defective Title

Defective title reflects the premise that the tenant is entitled to exclusive possession of the leased premises. As such, unless a contrary intention is expressly stated in the covenant, the tenant is entitled to the use and enjoyment of the premises without the permission of any one else. If permission is needed from a third party, then the landlord did not have the title or right to give exclusive possession in the first place. Thus, where permission to enter the premises must be granted to the tenant by a third party, the covenant for quiet enjoyment is breached and the tenant is entitled to recover damages from the landlord.¹⁰

b. Substantial Interference

Substantial interference constitutes a breach of the covenant for quiet enjoyment where the normal and lawful enjoyment of the leased premises is substantially interfered with by the acts or omissions of the landlord, or by those lawfully claiming under it.¹¹ A breach of the covenant for quiet enjoyment can thus happen where there has been an interference with the enjoyment of the premises, absent an interruption to, or interference with, the title to the premises.¹² The following are situations where the courts held that the actions of the landlord constituted a substantial interference with the tenant's quiet enjoyment: a landlord erecting scaffolding in front of the tenant's store which substantially interfered with the tenant's business¹³ and a landlord creating a significant amount of dirt and dust while renovating another part of the premises.¹⁴

¹⁰ *Supra* note 1 at 127. See also *Ludwell v. Newman* (1795), 6 T.R. 458, cited in *supra* note 1 at 127.

¹¹ *Ibid* at 127.

¹² *Ibid* at 127.

¹³ *Owen v. Gadd*, [1956] 2 Q.B. 99, (Eng. C.A.).

¹⁴ *Amadon Properties Ltd. v. Pacific Apparel Inc.*, [1990] B.C.J. No. 2115 (B.C.S.C.).

4. Nature of the Breach of the Covenant for Quiet Enjoyment

There is a plethora of case law dealing with the nature of the breach of the covenant for quiet enjoyment by the landlord. Generally, for the breach of the covenant for quiet enjoyment to be actionable, the landlord must have reasonably foreseen that its actions would constitute an interruption or, if it had shown reasonable care, then it ought to have been foreseeable.¹⁵ The landlord's intent is irrelevant.¹⁶ It is noteworthy that a landlord is not strictly liable for any interruption to the tenant.¹⁷ Further, note that a landlord can still be found in breach of the covenant of quiet enjoyment even if it has the right, expressly stated in the lease, to do a certain act.¹⁸ This, for example, is most often the case when the landlord has the right to repair. The predicament that occurs is, on the one hand, failure of the landlord to carry out a repair on the premises can constitute a breach of the covenant for quiet enjoyment. On the other hand, the landlord, by carrying out a repair on the premises, may interfere with the tenant's use of the premise, thereby constituting a breach of the covenant of quiet enjoyment.

5. Remedies

When a tenant alleges a breach of the covenant of quiet enjoyment, the tenant must choose a remedy that is appropriate to protect its interest in the premises and to avoid any liability under the lease. If the tenant chooses to affirm the lease, then it may seek injunctive relief and damages. Conversely, if the tenant chooses to treat the landlord's actions as amounting to a repudiation of the lease, thereby releasing the tenant from further obligations, then the tenant may treat the lease as at an end and pursue an action for damages.¹⁹

a. Damages

The measure of damages to a tenant for breach of a covenant is all the loss to which the tenant has been put, naturally flowing from the breach. The measure of damages will not be confined

¹⁵ *Harrison, Ainslie & Co. v. Muncaster*, [1891] 2 Q.B. 680, cited in *supra* note 1 at 127.

¹⁶ *Shun Cheong v. Gold Ocean City et al.* (4 March 2000) Vancouver No. C975045 (B.C.S.C.).

¹⁷ *Supra* note 1 at 127.

¹⁸ *Ibid* at 127.

¹⁹ *Supra* note 4.

to the value of the term of the lease.²⁰ For example, the tenant could be entitled to loss of profits, out of pocket expenses (which could include moving expenses, staff salaries, loss of net earnings and increased rent costs), aggravated damages and punitive damages.²¹ A lease may also contain a limitation clause on recovery of damages. For example, in *Amadon Properties Ltd. v. Pacific Apparel Inc.* (1990), 13 R.P.R. (2d) 186 (B.C.S.C.), the lease contained a provision restricting damages for breach of the covenant for quiet enjoyment to direct damages only. Economic loss was excluded.

b. Injunctive Relief

By definition, an injunction is a discretionary order requiring a party to either do or refrain from doing something. Injunctions are either mandatory or prohibitory and are further classified as being interim (meaning for a short period), interlocutory (meaning until, for example, the trial date) or permanent.

In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Supreme Court of Canada set out the three-prong test for an interim or interlocutory injunction. Specifically, the court held:

1. there must be a serious issue to be tried;
2. it must be determined whether the applicant would suffer irreparable harm if the application was refused; and
3. an assessment of the balance of convenience must be made.

Injunctive relief will generally not be granted when the following factors apply:

- the injury to the tenant is minimal;
- the injury can be quantified;

²⁰ *Haack v. Martin*, [1927] S.C.R. 413.

²¹ *Parkes v. Howard Johnson Restaurants Ltd.* (1970), 74 W.W.R. 255 (B.C.S.C.), *Denovan v. Lee* (1991), 16 R.P.R. (2d) 292 (B.C.S.C.).

- the injury can be adequately compensated in money; and
- it would be oppressive to the landlord to grant the injunction.²²

It has long been considered the law that a tenant would automatically receive an injunction to prohibit continued interference by the landlord with the tenant's right to quiet possession. This was because it was assumed that a tenant's enjoyment of quiet possession of particular premises was unique to the tenant and therefore not compensable in damages. A recent case from our Court of Appeal has repudiated that unspoken assumption.

i. The *Evergreen* Case

In *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2005 BCCA 583 (CanLII), the landlord considered that the operation of its building was no longer economically viable and therefore sought to redevelop the property. The landlord advised the tenant that it would not be able to fulfill its obligations under the lease and advised the tenant that it should mitigate its damage by locating alternate premises. The tenant brought an action for both an interim and permanent injunction enjoining the landlord from breaching the covenant for quiet enjoyment. The Supreme Court considered Evergreen's argument relating to "efficient breach" in aid of a remedy. Briefly, this theory suggests that, "where the plaintiff's expectation interests arising from a breach of contract can be met by an award of damages, it is economically efficient to permit defendants to breach their contracts with a view to increasing their own profits."²³ The Supreme Court, although noting that the theory would only apply on a contractual view of the lease, granted both injunctions.

On appeal, the court set aside the permanent injunction. The Appeal Court held that the lower court had erred in finding that the breach by the landlord of the covenant for quiet possession (that being the re-entering and retaking possession of the premises) could not be remedied by damages in lieu of specific performance. Specifically, the Court of Appeal stated that, "the chambers judge should have considered the equities between the parties, including any factors

²² *Supra* note 4.

²³ *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2005 BCCA 583 (CanLII).

relating to the uniqueness of the property demised and the relative hardship, if any, of holding the landlord to the strict terms of the lease.”²⁴ Further, the Court of Appeal held that theory of “efficient breach” only served to muddy the waters. The issue of remedy was remitted to the Supreme Court, while the interim injunction remained in place.

To date, the law has not evolved to the point that the remedies available for the breach of a lease are totally co-extensive with those remedies for breach of other contracts.²⁵ In spite of the Court of Appeal’s decision in *Evergreen*, the distinction between a lease as a demise of land and a lease as a contract has not totally eroded.²⁶ Nonetheless, it is no longer to be presumed that an injunction will be granted if the landlord breaches the covenant of quiet enjoyment. The court will now consider all the usual principles in assessing whether an injunction is to be granted. This case does not stand for the proposition that landlords can breach the covenant for quiet possession with impunity and it does not adopt the doctrine of “efficient breach” as the law of British Columbia.

c. Declaratory Relief

This relief requires an application before the court to determine or clarify the rights of the parties under the lease. The declaration settles any differences of interpretation of the lease in respect of particular past or anticipated conduct. Once rendered, the declaration will bind the parties to act in accordance with its findings. If a party later acts inconsistently with the declaration, the other party will be in a position to immediately bring proceedings seeking a remedy.

Parties to a lease will wish to employ this approach so as to avoid the potentially disastrous consequences of acting unilaterally and later being found to be wrong. For example, a tenant may wish to seek a declaration as to the effect of a breach of the lease before asserting that it is entitled to treat the lease as at an end and vacate the premises.

²⁴ *Ibid.*

²⁵ Williams & Rhodes, *Canadian Law of Landlord and Tenant*, (Toronto: Thomson Carswell, 2006) at c. 9:1:6.

²⁶ *Ibid* at c. 9:1:6.

d. Alternate Dispute Resolution Mechanisms

A tenant can also consider resorting to alternate dispute resolution mechanisms to resolve disputes. For example, most modern leases will contain an arbitration clause. Depending on the nature of the dispute, alternate dispute resolution may be a viable option as it is less confrontational than other court-based remedies and the process offers a high degree of confidentiality.²⁷

II. Fundamental Breaches of Lease other than the Non-Payment of Rent

1. Fundamental Breach

a. What is it?

Parties to a lease may expressly provide that a breach of an obligation will result in a specific consequence. For some obligations, the parties may specify that a breach will give the innocent party the right to elect whether to carry on with the lease and sue the wrongdoer for damages or to terminate the lease and be relieved of future obligations.²⁸

Parties to a lease will seldom exhaust the consequences of every possible breach. Therefore, when one party breaches a term where the consequences are not specified, the innocent party must determine whether the breach is fundamental in law. This is important because very different courses of action are permitted with respect to a fundamental breach.²⁹

Historically, in determining whether the innocent party should be relieved of its obligation to further perform, the courts gave some consideration to the effect of the breach. However, it was not until the 1960s that the courts clarified that, where parties to a contract have not expressly defined the repercussions of a breach in their contract, the consequences should depend solely upon the nature of the breach and the foreseeable events to which the breach gives rise.³⁰ In

²⁷ *Supra* Note 4

²⁸ Manitoba Law Reform Commission, *Fundamental Breach and Frustration in Commercial Tenancies*, (Manitoba: Law Reform Commission, 1996) at 3.

²⁹ *Ibid* at 3.

³⁰ *Ibid* at 4.

Hongkong Fir Shipping Co. Ltd. v. Kawaski Kisen Kaisha Ltd., [1962] 2 Q.B., England's Court of Appeal held that a determination of the consequences of a breach of contract is dependant upon the answer to the following question:

[D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

An affirmative answer to this question suggests that the breach is a "fundamental breach" and as a result the innocent party is discharged from its future contractual obligations. Conversely, a negative answer suggests that the innocent party remains obligated to perform under the contract, and may only sue for damages.³¹

In *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.* (1989), 57 D.L.R. (4th) 321, the Supreme Court of Canada adopted this approach and stated that a fundamental breach occurs as follows:

Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract.

If it cannot be held that the innocent party is denied of substantially the whole benefit of the contract (in other words, if the breach is not a fundamental one), the innocent party must perform his or her obligations and will only be able to sue the wrongdoer for damages. However, if an innocent party is denied of substantially the whole benefit which the parties intended him or her to obtain (in other words, if the breach is a fundamental one), then the innocent party will have the option of continuing the contract and suing the wrongdoer for the breach or ending the contract.³²

³¹ Manitoba Law Reform Commission, *Fundamental Breach and Frustration in Commercial Tenancies*, (Manitoba: Law Reform Commission, 1996) at 4.

³² *Ibid* at 5.

b. Application of Fundamental Breach to Commercial Leases

In the past, contract law principles such as fundamental breach were not applied to commercial leases. The courts now commonly resort to these principles to settle the issues in cases involving leases. This shift in approach began more than 30 years ago, when the Supreme Court of Canada decided the case of *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.* (1971), 17 D.L.R. (3d) 710 (S.C.C.).

The threshold for fundamental breach was considered in British Columbia in *Firth v. B.D. Management Ltd.* (1990), 73 D.L.R. (4th) 375 (B.C.C.A.) where the court stated the following:

To constitute fundamental breach the landlord's conduct must be such as to go to the very root of the contract – not merely to part of it – so that it makes further performance impossible or it deprives the tenant of substantially the whole benefit which it was the intention of the parties to the lease that the tenant should obtain as consideration for the rentals it was obliged to pay. Unless the alleged breach is of this character the tenants' remedy lies in damages for breach of its contract not in rescission of the lease agreement.

The issue of fundamental breach was addressed in both *Wesbild Enterprises Ltd. v. Pacific Stationers Ltd.* (1990), 52 B.C.L.R. (2d) 317 (C.A.), (B.C.C.A.) and *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1989), 59 D.L.R. (4th) 1 (B.C.C.A.), where the court held that an innocent landlord or tenant can elect to terminate the lease without having to fulfill his or her remaining promises when the other party commits a fundamental breach of a lease covenant.

In *Wesbild*, the court held that a landlord breached a provision in the lease requiring it to obtain the tenant's consent to any substantial alteration of the premises. The tenant operated a stationery and office supply store, and the landlord had altered the access way to the premises to the point where it became very difficult to make deliveries to the premises. The substantial alteration to the access of the premises was determined to be so fundamental to the particular business that was carried on by the tenant that the court held that the landlord's breach was fundamental to the lease agreement. As a result, the tenant was able to treat the lease as at an end.

In *Lehndorff*, the tenant requested the landlord to consent to an assignment of a lease. The landlord refused. The court held that the landlord ought to have consented to the assignment. In not consenting, the court held the landlord was in breach. The court also held that, in this particular lease, the assignment was a term of such importance that its breach gave the tenant the right to end the lease.

2. Fundamental Breaches: When Can a Tenant Be Discharged from Performance?

a. When the Landlord Derogates from its Grant

A commercial lease contemplates a grant by the landlord of premises to a tenant for a defined term in consideration for rent. A landlord derogates from its grant when it substantially interferes with or diminishes the grant that was originally passed. This interference or diminishment may constitute a repudiation of the lease by the landlord.

The threshold for derogation from grant, which requires the court to determine the intent of both the landlord and the tenant, was set out in *Firth v. B.D. Management Ltd.* (1990), 73 D.L.R. (4th) 375 (B.C.C.A.) as follows:

Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the appellant must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let.

A derogation from grant may be any change, diminishment or interference with the premises that makes the premises substantially less fit for its intended purpose. The following are examples of landlord conduct which may be construed as a derogation from grant:

- renovations or alterations to the tenant's premises;
- reduction or alteration of common areas;
- reduction or alteration of services provided to the premises; and

- changes to the commercial mix or composition of tenants in the building.³³

The following are examples of landlord conduct which was not construed to be a derogation from grant:

- constructing a new building for a competing tenant;
- affecting the business of a tenant by canceling flights at a municipal airport; and
- granting a non-exclusive easement over parking spaces to a fast food restaurant entitling the customers of the restaurant to use the certain parking spaces in a shopping centre.

b. Access to the Leased Premises

In some circumstances, interference with access to the premises may be so substantial that the tenant is entitled to terminate the lease. Specifically, if the landlord has actively participated in the interference with access or has encouraged it, it is likely that the courts will find that the landlord has breached the covenant for quiet enjoyment.

One issue that is of concern for tenants and overlays the covenant for quiet enjoyment and derogation from grant is interference with the tenant's rights by another tenant of the landlord. For example, if one tenant of the landlord in an industrial park produces noxious fumes from its lawfully operated business and those fumes have an impact on a neighboring tenant of the landlord, there will be an interference with the innocent tenant's right to quiet possession of its premises, but the landlord will be restrained in its ability to remedy the matter. In this way, a non-fundamental breach of a lease may be converted into a fundamental breach permitting the tenant to treat the lease at an end because of the landlord's inability to remedy the breach.

³³ *Supra* note 4.

III. Nuisance

1. What is it?

“Nuisance” is defined as the wrongful interference with a neighbour’s property.³⁴ A tenant’s right to quiet enjoyment includes the right not to be exposed to external nuisances which would unreasonably interfere with the tenant’s use of the leased premise.³⁵ Nuisances include, but are not limited to, noise, vibrations, noxious odours and air pollution.

2. Claiming Nuisance

Quite often a tenant who is subjected to a nuisance will opt to vacate the leased premises and cease rent payments, claiming that the disturbance is a fundamental breach and thereby permitting the tenant to treat the lease as at an end. However, determining whether a disturbance is adequate grounds to terminate a lease, based upon a breach of the landlord’s obligation to provide quiet enjoyment to the tenant, is difficult.³⁶

Not all nuisances will suffice to be a breach of the tenant’s right to quiet enjoyment. Generally, a claim in nuisance will not be actionable against the landlord unless the landlord causes or permits the nuisance that is affecting the tenant’s use of the premises.³⁷ In determining whether a nuisance is actionable, the courts will consider the surrounding area in which the premises are located and the act which is alleged to be causing the nuisance.³⁸ The tenant, on the other hand, must show that the nuisance in question is severe and that the conduct actually disturbs the tenant’s ability to use the premises for the purpose in which the tenant leased it.³⁹ If these thresholds are established, then the courts are likely to conclude that a particular act or omission of the landlord amounts to a wrongful disturbance with the tenant’s right to quiet enjoyment.

³⁴ Richard Olson, *A Commercial Tenancy Handbook* (Toronto: Thomson Carswell 2006) at c. VI.O.

³⁵ *Supra* note 4.

³⁶ *Supra* note 4

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

Even if a wrongful disturbance is found, the courts have held that such interference does not necessarily result in a tenant's right to terminate a lease. Termination of the lease, due to a claimed nuisance, will hinge on the facts of each particular case and termination should only prevail in the most clear cases.

Examples of nuisances which were held not to entitle the tenant to terminate the lease are:

- a leaking roof;
- the noise from a neighbouring babysitting service;
- fish odours emanating from the premises of an adjoining tenant; and
- failing to repair a furnace and roof coupled with the presence of rats.⁴⁰

Note that in these types of aforementioned situations, the courts have held that although the nuisance did not entitle the tenant to terminate the lease, the nuisance did entitle the tenant to a claim in damages for the disruption caused by the nuisance to the tenant's use of the premises.

An example of a nuisance which was held to be fundamental and thereby entitle the tenant to terminate the lease was the leakage of an odourous and greasy fluid from a neighbouring restaurant tenant into a grocery store.⁴¹

It is noteworthy that the landlord is also obliged to ensure that one tenant does not breach another tenant's right to quiet enjoyment.⁴² Accordingly, if one tenant is creating a nuisance which is having a negative impact on another tenant, the landlord will be obliged to require the offending tenant to cease and desist from the activity causing the nuisance.

As noted above, landlords should also be alive to this issue in leasing premises to tenants with conflicting uses, as the landlord may find itself in an impossible position where one tenant's lawful use of its premises interferes with the rights of another tenant.

⁴⁰ *Supra* note 34 at c. VII.E.d.

⁴¹ *Ibid* at e 33 at c. VII.E.d.

⁴² *Supra* note 4.

IV. Other Fundamental Breaches of Lease

1. Single Breaches

a. Assignment or Sublease without Consent

If a tenant assigns or subleases the premises without the consent of the landlord, then the landlord's remedy is to terminate the lease, as this breach is considered fundamental. However, if the landlord accepts a rent payment after learning of an assignment or sublease without consent, then the landlord will be found to have waived the requirement for consent and will therefore not be able to terminate the lease. Note that a landlord may accept rent "under protest", which reserves its position while considering a course of action.⁴³

2. Continuing Breaches

a. Failing to Repair or Maintain the Leased Premises

Unless there is an express covenant to the contrary or an implied covenant, there is no duty on the tenant to upkeep or repair the leased premises, apart from the tenant's implied covenant to use the premises in a "tenant-like" manner. However, most commercial leases impose an obligation on the tenant to repair the premises.⁴⁴

In the situation where the tenant is in occupation of the premises and has failed to repair, the landlord's recourse will generally be to give notice of the default in respect of the repair and, if the lease permits, make the repair and claim the cost from the tenant.⁴⁵ If the tenant has substantially damaged the premises and refuses to repair, the breach may be considered fundamental, thereby permitting the landlord to terminate the lease.

⁴³ *Supra* note 34 at c. VI.D.d.

⁴⁴ *Ibid* at c.VI.E.

⁴⁵ *Ibid* at c. VI.E.

b. Carrying on a Use on the Premises that is not Permitted or is Illegal

i. Carrying on a Use that is not Permitted

In general, the courts perceive restrictive covenants as being in restraint of trade and therefore construe them strictly. That being said, it is common, for example, in shopping mall leases to restrict the use of the premises by the tenant to a particular use. If the restriction of use is clear, it will generally be considered enforceable.⁴⁶

Use clauses can be difficult to construe. A use clause that allows the operation of a type of store, such as a supermarket, rather than the sale of a range of products, may permit a use that is not readily apparent. For example, supermarkets today offer a wide range of merchandise well beyond food. A lease permitting the operation of a “supermarket” may include further products such as pharmacy wares. In interpreting use clauses, the courts have examined the language of the lease and in some cases looked to the conduct of the parties and business reality within which the lease was concluded to determine the scope of use.⁴⁷

If there is a dispute as to the use of the leased premises, the remedies of a landlord are to serve a Notice of Default requiring the tenant to cease the non permitted use. If the tenant fails to comply with the Notice of Default, then the landlord can terminate the lease or sue for an injunction and damages for breach of the covenant.

ii. Complying with Zoning Bylaws

In the absence of a representation from the landlord with respect to zoning, the tenant should ensure that its contemplated use of the premises is permitted by zoning and other municipal bylaws. A tenant will likely be bound by the terms of the lease and the obligation to pay rent even if zoning bylaws do not permit the contemplated use, unless the landlord made a misrepresentation that the zoning did in fact permit the contemplated use.⁴⁸

⁴⁶ *Supra* note 34 at c. VI.F

⁴⁷ *Supra* note 33 at c. VI.F.

⁴⁸ *Canadian Medical Laboratories Ltd. v. Stabile*, [1997] O.J. No. 684, (Ont. C.A.), cited in *supra* note 33 at c.II.c.iii.

iii. Carrying on an Illegal Use

Unfortunately, situations arise when the landlord discovers that the tenant is carrying on an activity on the leased premises that is contrary to the law. Examples of such tenant conduct are growing marijuana or the illegal handling of dangerous chemical or toxic waste.⁴⁹ Though these acts are considered a breach under the lease and the landlord can thus pursue remedies, it is suggested that remedies under the lease should only be pursued only after the police have dealt with the matter.⁵⁰

Most leases will contain a provision that requires the tenant to adhere to all laws and bylaws affecting the leased premises and most commercial leases provide the landlord with the right to frequently inspect the premises.

c. Contaminating the Premises

It is implied within a commercial lease that the premises are to be returned to the landlord uncontaminated.⁵¹

In *O'Connor v. Fleck* (2000), 79 B.C.L.R. (3d) 280 (B.C.S.C), the court, in trying to determine whether or not it was an implied term of the lease that upon expiry the tenant would return the premises uncontaminated, posed the following question:

...The question is whether a term that the premises would be returned uncontaminated is necessary to give the business efficacy to the contract, such that it would go without saying and is inevitably necessary to give effect to the intention of the parties.

The court concluded that the answer to this question was in the affirmative and thus held that such a term arose by implication. As a result, a tenant returning a leased premise that is contaminated can be found to be in breach of the implied term of the lease.

⁴⁹ *Supra* note 33 at c.VI.P.

⁵⁰ *Supra* note 33 at c.VI.P.

⁵¹ *Progressive Enterprises Ltd. v. Cascade Lead Products.*, [1996] B.C.J. No. 2473 (B.C.S.C.).

V. Termination of Lease Other Than by Breach or Expiry of Term

1. Demolition Clauses

Many modern commercial leases contain terms that result in termination without breach or expiry. One example of this is a demolition clause.

In older or outdated buildings, a landlord will often require a demolition clause which enables it to terminate the lease prior to the expiry of the term in order to demolish some or all of the premises. A demolition clause will usually require particular preconditions to be met and a notice period before the lease can be terminated. It is crucial that the notice provision be clear and enforceable. For a notice provision to be enforceable, it cannot be conditional. Therefore, the demolition clause should not state that a notice of termination will only be effective if the building permit or other approvals are obtained before the termination date. Further, the preconditions for demolition should be clearly set out in the lease to avoid any dispute between the landlord and tenant as to its validity.⁵² From the tenant's standpoint, it will wish to have as lengthy a notice period as possible so as to permit it to move its business with minimum interruption.⁵³

2. Destruction of the Premises

What happens if the premises are destroyed by a fire, a tornado or other such natural causes? What happens when the repairs and/or reconstructions to the premises take longer than the specified period?

In these situations, either the landlord or the tenant can reserve the right to elect to terminate the lease. Often however, a lease will have a clause to the effect that if the premises are only partially destroyed, the rent will abate for the period that the premises are not useable.⁵⁴ Without this clause, the destruction of the premises does not allow the tenant to abate rent unless the

⁵² *Supra* note 33 at c. III.E.h.

⁵³ *Ibid* at c. III.E.h.

⁵⁴ *Ibid* at c. III.E.h.

landlord evicts the tenant.⁵⁵ If the tenant cannot occupy the premises because of a breach of the lease by the landlord or by the negligence of the landlord, the tenant may have a claim in damages, which may include the rent paid for non-fit premises.⁵⁶

When addressing the issue of destruction of the premises, both the landlord and the tenant should pay particular attention to the situations in which either of them may terminate the lease, the situations under which either of them may demand that the premises be repaired, and the issue of liability for consequential loss.⁵⁷

⁵⁵ *Marvin Investments Ltd. v. Manitoba*, 2001 MBCA 133, cited in *supra* note 33 at c. III.E.i.

⁵⁶ *Curry v. Farrel*, 57 O.L.R. 451, cited in *supra* note 34 at c. III.E.i.

⁵⁷ *Supra* note 33 at c. III.E.i.