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COMMERCIAL LEASING TIPS TO KNOW WHEN REGISTERED & BENEFICIAL OWNERSHIP ARE SEPARATE

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For many commercial properties, it has become common for a property to have both a registered owner and a beneficial owner. Therefore, it has become increasingly important for registered and beneficial owners to be aware of certain pitfalls they can avoid in the commercial leasing context.

1) Expressly State the Identity and Status of the Beneficial and Registered Owners on the Lease

Directly informing the tenant of the fact that there is a beneficial owner and identifying the beneficial owner can be extremely important in preventing the tenant from voiding a lease and in ensuring that the beneficial owner still has remedies against the tenant for breaching the terms of the lease. In *Laidar Holdings Ltd. v Lindt & Sprungli (Canada) Inc.* [2018] BCSC 66, the tenant tried to walk away from the lease and took the position that it was entitled to void the lease. The landlord did not accept the termination of the lease and sued the tenant. The tenant argued that the lease was void or voidable because the lease identified Laidar Holdings Ltd. as the registered owner of the property and bare trustee for Shery Wittenberg when, in fact, Laidar Holdings Ltd. was the beneficial owner of the property and Shery Wittenberg was the registered owner and bare trustee of the property for Laidar Holdings Ltd. Fortunately for the landlord in this case, the tenants had knowledge that Shery Wittenberg was the registered owner. At paragraph 232 the court stated,

In my view, the fact that Dr. Wittenberg was the person Lindt viewed as the decision-maker is not an answer to this issue. However, in my view there was no uncertainty about the Landlord. Lindt signed the Lease with Laidar as Landlord. [The tenant's]' attention was directed to the issue of the identity of the Landlord. She was aware that Ms. Wittenberg was the registered owner. She advised Lindt that the Lease was acceptable to her and waived the tenant-solicitor's condition.

Due to the fact that the tenant was advised of the landlord situation when they had agreed to the lease, they could not seek to use this mistake to render the lease void. At paragraph 248 the court ruled that,

The parties were clearly in agreement concerning the physical space that was to be rented. By the time the solicitor's condition was waived and the Lease signed, the parties were in agreement that Laidar was to be the Landlord. This is evidenced by what the parties said and wrote to one another in coming to their





agreement. Both parties were aware that Shery Wittenberg, not Laidar, was the registered owner.

In the example above, the landlord was fortunate that the tenant had actual knowledge of the identity of the registered and beneficial landlords. However, to avoid voiding a lease, it is prudent to expressly set out in the lease the identity of both the registered and beneficial owners. In the following example, the landlords were not as fortunate. In *Price Security Holdings Inc. v Klompas & Rothwell* [2019] BCCA 36, the beneficial landlord, was not permitted to collect on arrears from the tenant because there was nothing in the lease to show such an intention. The court stated,

... I do not agree with Price Security that it can be found that the Landlord and Tenant intended to extend the Landlord's benefit under the Lease (and the overholding tenancy) to beneficiaries of trusts of which the Landlord may be or become the trustee. There is nothing in the Lease to evince such an intention, and there was no extrinsic evidence that such an intention existed at the time the Lease was entered into. The mere possibility that the Landlord held, or may in the future hold, the Property in trust for another person is not sufficient, in my view, to establish and intention on the party of the contracting parties to extend the benefits of the Lease to the beneficiary of the trust.

While the key point in this case was that there was no evidence the Tenant and Landlord shared an intention that a “potential” beneficial owner would receive the benefits of the Landlord under the Lease, the court also considered other factors. Among the factors considered, was that this situation only arose because Price Security deliberately structured their position as beneficial landlord to take advantage of certain tax benefits. As a result, the court decided that the beneficial landlord could not “have his cake and eat it too”. The court held that,

It may be that the relaxation of the doctrine of privity will not prejudice the Tenant. However, it must be borne in mind that Price Security made the decision to have the Property held in trust for it by the Landlord. It admits that it did so to achieve tax savings. If it wishes to take advantage of a trust structure, it should be prepared to accept the limitation of such a structure, particularly when it was open to it to ameliorate those limitations.

Therefore to avoid this result, it would be good practice to ensure that the beneficial and registered landlords are both expressly inserted into the lease and that there is supporting evidence that the tenant had knowledge of the identity of both the registered and beneficial landlords and their status on the lease.

2) Wording Insurance and Indemnification Clauses

In *The Commercial Lease: A Practical Guide* (5th Edition) Harvey Haber suggests:





The Landlord should ensure that the Lease, in the context of insurance and indemnification, has the following wording, “for greater certainty, solely for the purpose of enforcing the Tenant’s indemnification of the Owner in this Section, the parties agree that the Landlord shall be the agent or trustee of the Owner”. This is because otherwise the Owner is not a party to this Lease, and in order to include the Owner as part of the indemnification clause from the Tenant, the Landlord is designated as the agent or trustee of the Owner.

... The Landlord should also ensure that the proceeds of the insurance should be payable jointly to the Landlord, the Owner and the Tenant and expressly state this on the Lease.

Again, it is important to insert the beneficial owner into the lease, particularly the insurance and indemnification clauses if the beneficial owner hopes to have access to any insurance proceeds that would be payable to the registered owner and the tenant.

3) Wording Covenants for Quiet Enjoyment

There are a number of effects on both the landlord and the tenant when a party is relying on either a covenant for quiet enjoyment that is implied by the common law or an express covenant for the same. Landlords should be cautioned against inserting an absolute covenant for quiet enjoyment into the lease as it is a commitment against interruption by those who have a superior title to that of the landlord (i.e. the beneficial owner), meaning that if the beneficial owner takes any action that disturbs the “quiet enjoyment” of the tenant, the beneficial owner and the registered owner will be in breach of the covenant for quiet enjoyment. This covenant is more burdensome than the covenant implied by common law, which is a qualified covenant from the landlord assuring against interruption by either the landlord or by those claiming under it. This means that only the registered owner must abide by the covenant for quiet enjoyment, and even if the beneficial owner takes any actions that are contrary to the covenant, the covenant has not been breached. Thus, it is important when drafting such clauses to consider whether it is intended to bind both the registered and beneficial owner. These clauses should be carefully worded to ensure that both the landlords, whether registered or beneficial, and the tenant are satisfied by the terms.

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