

I Can't Hear Myself Think! (Part 2)

My Landlord is Undergoing Renovation/Construction: What are Potential Tenant Rights and Remedies?

**By: Alex Kolandjian and Joshua Prizant¹
Fogler, Rubinoff LLP**

Introduction

Renovation and construction, while often absolutely necessary, can cause several issues for both landlord and tenant. A landlord may have obligations under a lease to renovate or maintain premises, a building or a shopping centre. In addition, a landlord may wish to renovate, remodel or expand a building or a shopping centre for the betterment of tenants and patrons alike. On the other hand, a tenant may have objections to the noise and disturbance created by such renovation or construction and the potential impact same may have on their business, occupancy and enjoyment.

Navigating these issues before they arise through careful drafting and planning is certainly the ideal manner in which to deal with renovation and construction issues. Unfortunately, often times, even with careful drafting and planning, a tenant may find themselves wondering how to best proceed when faced with a landlord's renovations and/or construction impacting their tenancy.

This paper, through the lens of relevant case law, will explore a tenant's rights with respect to renovation and construction issues and the potential remedies available. Finally, sample wording will be provided at the end of this paper to help protect a tenant's interests when entering into a lease.

Rights

The interference with a tenant's use and enjoyment of leased premises may arise due to the hindrance of access or egress to or from the leased premises or the presence of noise, dust, vibration, smells and other physical phenomenon, potentially giving rise to a claim under a number of different categories:

1. a breach of the covenant of quiet enjoyment;
2. a claim in nuisance against the landlord or a third party; or
3. a claim that the landlord has derogated from its grant.²

¹ Alex Kolandjian is partner in the real estate group and Joshua Prizant is a student-at-law.

² *A Commercial Tenancy Handbook*, Richard Olson (Toronto: Thomson Reuters) Chapter 7, Section E(a)

Quiet Enjoyment

A tenant's right to quiet enjoyment of its leased premises has been referred to as "the most basic right of a tenant."³

A tenant's right to quiet enjoyment is implied at common law, and in Ontario has been codified in s. 23 of the *Conveyancing and Law of Property Act*⁴. The definition of quiet enjoyment has changed over time to include non-physical intrusions upon a tenant's leased premises. The 2019 Ontario case *London Prestige Ltd. v. Wellington Harlech Centre Inc.*,⁵ reaffirming the BC decision in *Stearman v. Powers*, sets out that, "(a) landlord's covenant to provide quiet enjoyment, whether express or implied in a lease, means that a landlord must not substantially interfere with its tenant's enjoyment of the premises. To be actionable, a landlord's interference must be grave and permanent such that it renders the premises substantially less fit for the purposes for which it was leased."⁶ This definition has become the accepted standard and test for whether or not a landlord has interfered with a tenant's right to quiet enjoyment of its leased premises. It includes the hallmark qualities for quiet enjoyment in Ontario: grave, permanent and substantial interference with the tenant's enjoyment of its leased premises. Certainly, these terms are ambiguous, and their meaning varies with the case law.

In *London Prestige Ltd.*, the tenant plaintiff operated a car wash on leased premises and claimed damages of \$1.5 million from the defendant landlord for breach of contract, primarily for loss of income resulting from the defendant's construction of several retail buildings that allegedly blocked the view of the car wash from a nearby arterial road, resulting in a loss of customers and income. In addition to the common law right of quiet enjoyment, the lease included a clause that obliged the landlord, "to place the plaintiff in peaceful and undisturbed possession of the leased premises...and the Lessor shall secure to the Lessee quiet and peaceful possession of the leased premises during the term thereof..."⁷ The tenant plead that the landlord breached their right to quiet enjoyment before, during and after the landlord's construction by installing a concrete pad, and placing two large garbage bins on the leased premises. The court held, using the *Stearman v. Powers* test mentioned above, that the garbage bins and concrete pad violated the tenant's right to quiet enjoyment found in the lease. Notably, the court awarded the plaintiff nominal damages in the amount of \$1,000.00 for the breach of quiet enjoyment, despite the fact that the plaintiff was unable to provide proof of damages and provided no evidence regarding the amount of loss that resulted solely from the placement of the garbage bins and concrete pad addition.⁸

In *Bloor Street Diner Ltd. v. Manufacturer's Life Insurance Co.*,⁹ ("**Bloor Street Diner**") the defendant landlord sought to renovate and redevelop the Manulife Centre, where the plaintiff tenant ran their restaurant business. The landlord's plan included first installing a "temporary"

³ George M. Valentini and Ken Herlin, "A Commercial Tenant's Rights and Remedies: An Overview" in Harvey M. Haber ed, *Tenant's Rights and Remedies in a Commercial Lease* (Toronto: Canada Law Book Inc., 2014) 10

⁴ R.S.O. 1990, c. C.34.

⁵ *London Prestige Ltd v Wellington Harlech Centre Inc*, 2019 ONSC 2364

⁶ *Ibid*, at 31

⁷ *Ibid*, at 30

⁸ *Ibid*, at 52

⁹ *Bloor Street Diner Ltd v Manufacturer's Life Insurance Co*, 2016 ONSC 440

hoarding wall along the tenant's leased premises in order to then build a glass facade, which would obscure the leased premises' view from the street, extend somewhat into the leased premises itself, and substantially reduce the size of the most desirable seating in the restaurant, negatively impacting the tenant's business. Despite the landlord's assertion that they would make a significant effort to mitigate the construction's impact on the tenant's business, the Ontario Superior Court of Justice still ruled that the construction violated the tenant's right to quiet enjoyment, which was secured implicitly via common law and explicitly in the lease. The provisions that renovations should not materially affect "access to, egress from and visibility of the Leased Premises from" adjoining streets and common areas were enforced by an injunction.

Notably, although the wall itself would be temporary insofar as it would only be erected and in place during the construction, the court ruled as "the glass façade will have a permanent negative impact" (emphasis added) on the diner, highlighting that while renovations may technically be temporary, it is their impact that is the true measure of their permanence.

In *0824606 B.C. Ltd. v. Plain Jane Boutique Ltd.*,¹⁰ ("**Plain Jane**"), which will be discussed further below, the court notably ruled that while the implicit common law definition of quiet enjoyment protects against substantial interference with the tenant's right to use and enjoyment of the leased premises, a tenant may further bolster their explicit quiet enjoyment rights via stronger language in the lease. In the lease in *Plain Jane*, the quiet enjoyment clause stated, "Provided the Tenant pays the Rent and performs its other covenants in this Lease, the Tenant will and may peaceably possess and enjoy the Leased Premises for the Term hereby granted, without any interruption or disturbance from the Landlord or its assigns, or any other person or persons lawfully claiming by, from, through, or under the Landlord."¹¹ [Emphasis included in the case].

When a landlord is completing renovations or construction, the case law has demonstrated that the most likely tenant right to be violated is that of the right to quiet enjoyment. The right to quiet enjoyment is a common law right that is implicit in every landlord and tenant agreement, but the case law has shown that careful and diligent drafting can provide the tenant with even stronger rights than those afforded to them by common law, as demonstrated in both *Bloor Street Diner* and *Plain Jane*. The courts have looked at several factors in their decisions to find a breach for quiet enjoyment, including, but not limited to:

- adverse effects on health, including dust and debris;
- duration and effect on business, including construction that is technically "temporary" but has permanent effects;
- the severity of the work being done, and whether it violates an implicit or explicit right to quiet enjoyment;
- impacts on access and egress to the leased premises; and,
- the tenant's ability to prove damages.

¹⁰ *0824606 BC Ltd v Plain Jane Boutique Ltd*, 2018 BCSC 1887

¹¹ *Ibid* at 97

Nuisance

During renovations or construction on their leased premises or adjacent premises, it is more than likely that a tenant will be subject to loud noises, unpleasant smells, excessive dust, and a myriad of other annoyances and disturbances that are common in construction settings. All of these things can reach the actionable level of nuisance if they unreasonably and substantially interfere with the use or enjoyment of land or an interest in land.¹²

In *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*,¹³ the Supreme Court of Canada set out the following two-part test when determining private nuisance:

1. Was interference with the owner's use or enjoyment of land substantial and unreasonable? It cannot be trivial.
2. Was the non-trivial interference unreasonable in all of the circumstances?¹⁴

In a previous paper delivered in a "Six Minute Commercial Leasing Lawyer" presentation, Deborah Watkins and Brian Parker wrote, "if a landlord's behaviour constitutes a nuisance, it will more than likely also constitute a breach of the covenant for quiet enjoyment."¹⁵ Similarly, it has been noted that in the commercial tenancy context, nuisance may simply be characterized as a breach of the covenant of quiet enjoyment.¹⁶ As with the covenant for quiet enjoyment, a tenant pleading nuisance due to construction or renovation must actually prove that the noise, odours or air pollution actually caused the tenant some damage.¹⁷ If a tenant is contemplating whether or not to bring an action for nuisance, they would do well to remember that nuisance claims are extremely fact-driven, and that the subjective nature of complaints against smells, temperatures or noise can be difficult to prove.

In one such case, *MSM Construction Ltd. v. Deiuliis*,¹⁸ the tenant defendant and plaintiff by counterclaim operated a hairdresser business in a strip mall. The landlord plaintiff and defendant by counterclaim then leased the space next to the hairdresser to the proprietor of a store selling fish. After complaining for several months to the landlord without receiving a remedy, the tenant stopped paying rent, claiming that the smell amounted to a nuisance and that the nuisance frustrated the purpose of the lease. The Divisional Court ordered that the withheld rent be repaid, but allowed the tenant's crossclaim for lost profits due to the nuisance.

¹² *St. Pierre v Ontario*, (1987) 1 SCR 906 at 10

¹³ *Antrim Truck Centre Ltd v Ontario (Ministry of Transportation)*, 2013 SCC 13

¹⁴ *Ibid* at 19

¹⁵ Deborah A. Watkins and Brian Parker, "Landlord Renovations and Redevelopment: When, if ever, do they give rise to a breach of the Landlord's Covenant for Quiet Enjoyment?" *Six Minute Commercial Leasing lawyer 2016*, pg 5

¹⁶ *Commercial Tenancy Handbook*, *supra* note 1 at Chapter 7, E(d)

¹⁷ *Shapes South Ltd v ADMNS Pembina Crossing Investment Corp*, 2013 MBQB 208

¹⁸ *MSM Construction Ltd v Deiuliis*, 1985 CarswellOnt 1588

Derogation from Grant

Tenants have a right protecting them from a landlord's derogation from grant. In *Zawaly v Yochim*, the court summarized the purpose of this right, stating, "(t)his doctrine was initially concerned with forcing a grantor or lessor to honour the terms of his bargain. If he knew the purpose contemplated by the lessee or grantee at the time of entering into the transaction, he should not be allowed to pocket the money and at the same time use his land in such a way as to prevent the lessee or grantee from accomplishing his purpose."¹⁹ While similar to a tenant's right to quiet enjoyment, derogation from grant differs slightly. The covenant of quiet enjoyment is a covenant of the landlord to not interfere with the tenant's possession of its leased premises, whereas a derogation from grant requires an act that renders the leased premises substantially less fit for the purpose for which they were leased.²⁰

In the construction and renovation context, derogation from grant may arise not only when a landlord completes construction on the leased premises itself, but also if the construction effects the adjacent leased premises. For example, in *Country Style Food Services Inc. v. 1302471 Ontario Ltd.*,²¹ the Ontario Superior Court of Justice ruled that a landlord's actions constituted a derogation from grant when the landlord changed construction plans that negatively and substantially impacted the tenant's expectations and business. The defendant tenant, a franchise coffee and donut shop, entered into a lease with the plaintiff landlord for a new franchise location. The lease included a site plan for not only the leased premises, but the entire shopping centre. The landlord deviated from the site plan in a way that the franchisee argued negatively impacted their business. The landlord claimed that nothing in the lease required them to follow the site plan, and therefore there could not be a derogation from grant. The court disagreed, and ruled that, "(i)n a real sense, the tenant leased not only the restaurant premises but the premises in the context of the entire mall as outlined in the site plan. If the landlord wished to retain the right to change its configuration of the site, it was incumbent upon it to reserve that right in the lease."²²

Derogation from grant may be an especially useful cause of action for a tenant to plead when the landlord's construction or renovation does not directly impact the covenant for quiet enjoyment, but does, in an ancillary fashion, negatively impact the tenancy.

A tenant should be well advised that as with quiet enjoyment and nuisance, there needs to be a significant level of disruption that substantially interferes with the tenancy before a court will grant any sort of relief.

Remedies

Tenant remedies in this context are substantially similar to those of other aggrieved parties. They can pursue damages, equitable remedies such as injunctions, or specific performance. As with all claims for damages, a tenant will need to show that they suffered damages due to the landlord

¹⁹ *Zawaly v Yochim*, 1989, 12 ACWS (3d) 278 at 7.

²⁰ *Commercial Tenancy Handbook*, *supra* note 1 at Chapter 7, E(b)

²¹ *Country Style Food Services Inc v 1302471 Ontario Ltd*, 2003 CarswellOnt 456

²² *Ibid* at 76

breaching their rights. As seen above, especially regarding subjective criteria such as noise and odours, claims against a landlord conducting construction and renovations may be difficult to establish on the facts. When advising a client, special care should be given to the nature of the right that is breached when deciding what remedy should best be used in that scenario.

Damages

If a client pursues damages, the most common remedy for any of the above-discussed violations, it is important to consider that since the covenants of a lease are generally considered separate and not interdependent, it is rare that a breach of covenant will allow the tenant to stop paying rent.²³

In *0824606 B.C. Ltd. v. Plain Jane Boutique Ltd.*,²⁴ ("**Plain Jane**") the defendant tenant owned a women's clothing store in a high-profile location in downtown Victoria. The tenant quickly fell into arrears after the plaintiff landlord began construction on and around the leased premises, which included placing scaffolding around the store. The landlord sued the tenant for past rent owing on the tenant's lease, three months' accelerated rent, and prospective rent payable for the remaining term of the lease. The tenant counterclaimed for, among other things, a breach of quiet enjoyment. The counterclaim was successful, and the court notably awarded damages not just for the lost profits during the time when the scaffolding was present and construction was being completed, but also for permanent loss of some of Plain Jane's customers who left and never came back.²⁵ The tenant did need to pay back the past rent and three months accelerated rent, which was offset against their award of damages for breach of quiet enjoyment and proceeds from the sale of distrained property.

Termination

Termination of the lease is a possible, yet unlikely, remedy for breaching the covenant of quiet enjoyment. In order for a contract to be terminated for a breach of quiet enjoyment, there must be a fundamental breach of such a nature that it amounts in law to an eviction.²⁶ If, during construction, the breach of quiet enjoyment is severe enough, a court may terminate the contract and order that paid rent be returned to the tenant.²⁷ In *1723718 Ontario Corp. v. MacLeod*,²⁸ the tenant was a doctor and leased space from the landlord in order to run a medical practice. In December 2008, the boiler heating the leased premises broke down, rendering the leased premises too cold for the tenant to run their medical practice. The tenant notified the landlord, and when the problem wasn't remedied within a few weeks, the tenant informed the landlord that they considered the landlord to be in breach of both the right to quiet enjoyment and the covenant to repair. The court ruled that the landlord's unwillingness to repair the boiler was a fundamental breach, and that the tenant was within their rights to terminate the contract.

²³ *Tenant's Rights and Remedies in a Commercial Lease*, *supra* note 2 at 4

²⁴ *Plain Jane Boutique*, *supra* note 8

²⁵ *Ibid* at 116

²⁶ *Tenant's Rights and Remedies in a Commercial Lease*, *supra* note 2, pg. 14

²⁷ See *Shun Cheong Holdings BC Ltd v Gold Ocean City Supermarket Ltd.*, 2000 BCSC 574 (BCSC), *aff'd* 2002 BCCA 451 (BCCA)

²⁸ *1723718 Ontario Corp v MacLeod*, 2010 ONSC 6665

Injunction

Injunctions may also be used when regular damages, or even termination, are not sufficient or appropriate. In *Bloor Street Diner*, discussed above, the court granted the tenant a permanent injunction against the proposed construction. The court ruled that an injunction, not damages, was the appropriate remedy for three reasons

- (a) the construction would have interfered with the tenant's proprietary interest;
- (b) the construction would have undermined the tenant's ability to offer patrons an enjoyable dining experience and would have threatened the viability of the restaurant; and,
- (c) the construction would have amounted to trespass on the leased premises, and granting damages where there is trespass, "amounts to an expropriation without legislative sanction."²⁹

Conclusion

A tenant has several rights that may be violated if their landlord decides to undertake renovations or construction, including the right to quiet enjoyment, the right to not be subjected to nuisance, and the right against derogation from grant. A tenant's right to quiet enjoyment may be violated where detrimental effects on health can be attributed to the work being completed, access or egress to or from the leased premises are negatively impacted and/or where the work causes severe and substantial interference with the tenant's business. While the assertion of claims predicated on nuisance and derogation from grant are less common, they may be appropriate where there is substantial interference with the tenancy or the breach of the lease is so fundamental that it makes the leased premises substantially less fit for the purposes for which they were leased.

If tenant rights are violated, counsel should consider that the remedies available to their client will greatly depend on the nature of the breach. Damages are the most common, but if the breach is of a fundamental nature and deprives the tenant of the purpose of their lease, a tenant may be successful in obtaining an injunction or even terminating the lease.

Counsel can best protect their tenant client's rights by knowing which rights may be violated, keeping abreast of current case law, and properly appreciating the factual and contextual intricacies of each unique situation. While certain clients may have more clout with a given landlord and can therefore demand more security during the drafting stages of their lease, every tenant's rights can be best protected by counsel who can recognize, in advance, the potential risks that can arise if and when the landlord decides to renovate or perform construction on the leased premises or the building or shopping centre in which the leased premises are located. Below are some sample clauses that can serve to protect a tenant's interests during renovation or construction.

²⁹ *Bloor Street Diner*, *supra* note 6, at paras 66-68

Sample Clauses

Quiet Enjoyment

The Landlord represents, warrants and covenants that the Landlord has full right and lawful authority to enter into this Lease for the Term and any renewal thereof and that the Landlord is lawfully seized of the Landlord's Lands and has good title in fee simple to the Landlord's Lands and the Building, free and clear of all tenancies and encumbrances which would restrict the ability of the Tenant to operate a _____ in the Premises, or which would restrict the Landlord from entering into this Lease and granting to the Tenant the rights granted to it pursuant to this Lease and that at all time during the Term and any renewal thereof, the Tenant shall have quiet enjoyment of the Premises undisturbed and uninterfered with by the Landlord or by anyone claiming by, through or under the Landlord.

Interference with Operation

1. In doing any construction work, making any repairs or doing any maintenance in the Shopping Center after Tenant takes possession of the Premises, Landlord shall use its best efforts to prevent any interference with the operation of and access to the Shopping Center and the business of Tenant or any subtenant, assignee or licensee of Tenant. Without limiting the foregoing, Landlord shall not perform any construction work, other than routine maintenance, on or within the Tenant's Protected Area, on the roof or exterior of the Premises, or within the Premises (if Landlord has the right or obligation to do so under any provision of this Lease), during the period of November 15 through January 1, except with Tenant's prior consent or if required by law or in the event of an emergency. In the event of any material interference with the operation of or access to the Shopping Center or the access to or visibility of the Premises or the business of Tenant or any subtenant, assignee or licensee, which persists for more than 48 hours after Landlord's receipt of written notice from Tenant of such violation, all Base Rent and Additional Rent shall abate until such interference has been remedied.
2. In the event of interference with Tenant's operations in the Premises, the Base Rent and Annual Additional Rent shall be equitably abated if the interference continues for more than forty-eight (48) hours. In the event of any such interference continues for a period of more than forty-eight (48) consecutive hours following written notice from Tenant, then Base Rent and Annual Additional Rent shall abate from the expiry of the forty-eight (48) hour period based on the degree of impact such interference has on Tenant's operations within the Premises, as measured by the proportionate reduction, if any, in Tenant's Gross Sales until Tenant is able to resume its operations in the Premises (it being agreed that Tenant, upon the request of Landlord, shall provide Landlord with details pertaining to Tenant's Gross Sales during the three (3) year period immediately preceding the date of such interruption or, if such interruption occurs in the first three (3) years of the term, such shorter period as may be available). In the event such interference shall continue for longer than six (6) months, Tenant shall have the option to terminate this Lease or continue to operate with rent abatement until such interference has ceased.

No Build

The Landlord covenants that it shall not cause or permit to be constructed or erected any buildings, improvements or structures, or materially change the parking spaces and, if applicable, the accesses within, the No Build Area. Any amendments to the site plan which materially affect the No Build Area, the Tenant's access, or parking or visibility shall require the Tenant's prior written approval, not to be unreasonably withheld or delayed.

Minor Changes to Leased Premises

The Landlord shall have the right at any time upon sixty (60) days written notice (the "Minor Changes Notice") to effect any minor changes to the Leased Premises ("Minor Changes") subject to the following terms and conditions:

- (i) The changes must be minor in nature and any premises in respect of which the landlord extends or terminates the Lease must be minor in nature (not to exceed in the aggregate five (5%) percent of rentable area of the Leased Premises);
- (ii) Such Minor Change shall be such as not to materially detrimentally affect access to egress from or visibility of the Leased Premises from ____ Street, ____ Street and the Common Areas;
- (iii) The cost of effecting such Minor change shall be borne by the Landlord, including any necessary changes to Leasehold improvements.
- (iv) Basic Rent and Tenant's Proportionate Share shall be proportionately altered to take account of any such Minor Change;
- (v) In effecting the Minor Change the Landlord shall not materially interrupt or disrupt the Tenant's business and the Landlord shall have obtained the Tenant's prior written approval, not to be unreasonably withheld or delayed, as to the scheduling of the Minor Changes; and
- (vi) The Minor Changes will not materially affect the flow, continuity or design of Leased Premises.