

EXCLUSIVES - RED FLAG

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How often during negotiations in settling a lease do the parties become bogged down in endless detail that is ultimately resolved by agreeing to utilize general language and, if a problem arises, to settle it then. That philosophy can work with items of repair or subjective items such as signage, but there is one area where it is totally inappropriate, and that area is exclusives.

Exclusives is a minefield. The demanding and granting of exclusives is a hard fought battle between landlord and tenant in almost all types of commercial developments. The swing of the pendulum now seems to be on the tenant's side but that success by the tenant can become a Pyrrhic victory.

Nowhere in a lease is it more evident that the command of language and drafting skills are of extreme importance than in the preparation of the exclusive clause. Equally important is the ability of the parties to communicate with their respective solicitors in order to determine their exact needs. Landlords and tenants, when left to their own devices, are prone to use common terms which, when examined under a microscope are revealed as being "vague" and "ambiguous" -- two words that can be fatal to the enforceability of an exclusive.

A prime example is restaurant leases which often contain exclusives that are based on ethnicity (no other Italian restaurant) or style (no other Chinese style restaurant) or type (no other full service restaurant) or a combination of the foregoing with an extra or two thrown in, such as no other restaurant of similar type and nature to the tenant's.

Many leases contain a clause that in effect states the lease represents the entire agreement between the parties and supersedes any offer, correspondence or discussions between the parties entered into or exchanged prior to execution of the lease. However there is a principle of law that, if provisions are vague and ambiguous, and a meaning cannot be found within the lease itself, the courts can consider evidence which explains the provisions.

A recent decision of the Ontario Court of Justice highlights a number of problems with exclusives (*Showmart Management Ltd. v. 853436 Ontario Ltd.*). In this case the tenant obtained an exclusive wherein the landlord agreed there would not be on the

“Main or Ground level ... a restaurant of similar type and nature to be operated on the Demised Premises”

The tenant was obliged to use the premises

“solely for the purpose of: conducting the business of the sale, at retail, of products found in a delicatessen, save and except for cigarette and tobacco products ...”

In fact, at the time the tenant was negotiating the lease, the tenant was planning to operate a restaurant in conjunction with a delicatessen and the landlord was aware of and did not object to such operation. The landlord now wanted to lease to a restaurant described as a Latin bar and bistro. The tenant believed that the landlord had agreed there would not be any other restaurants located in the building.

The court had to consider the meaning of the word “delicatessen”; the meaning of the word “restaurant”; the meaning of the words “Main or Ground level”; and what constitutes “similar to”. None of these words or phrases were defined in the lease.

Referring to a Funk & Wagnalls dictionary the court concluded a restaurant is a place where refreshments or meals are provided and both the tenant’s premises and the proposed bistro were restaurants. Continuing to refer to Funk & Wagnalls the court concluded a delicatessen to be a store which sells cooked or preserved foods, salads, cheeses, pickles, etc.. This conclusion was fatal to the tenant as the exclusive applied only to the tenant’s permitted use, not its actual use. In other words the landlord was prohibited from leasing to a restaurant specializing in delicatessen food.

Although the word “or” in the phrase “Main or Ground level” is in the court’s language “equally consistent with the clause applying to one floor or to two floors”, the court found that in the context of this lease it only referred to one floor and the floor known as the concourse floor was neither a Main or Ground floor. Accordingly, the exclusive applied only to the ground floor.

The results of this case emphasizes the need for clarity of drafting and communication between client and solicitor. The additional legal costs, the time lost and the emotional wear and tear, all could have been avoided.