RESTORATION CLAUSES: ONE LAST KICK IN THE TEETH

When a commercial lease ends, many tenants see an opportunity to relocate to better premises - larger, cheaper, fancier, more conveniently located, etc. Often, the tenant expects that they will return the premises to the Landlord empty, clean, and in good condition, normal wear and tear excepted.

Unfortunately, many tenants are faced with the costly reality that their lease contains a more onerous "Restoration Clause." The specific language of each lease may differ (and those differences can be significant), but essentially a Restoration Clause gives a landlord the right to compel a tenant to restore the premises to an earlier condition at the end of the lease term at the tenant's sole cost. In some instances, that will require removing redundant equipment (for example, data cabling) or specialized equipment that is not useful for future tenants (for example, raised floors or vaults). However, sometimes the tenant will be required to go further and remove all of the improvements the tenant installed in the premises. Worse still, the language of the Restoration Clause could compel the tenant to remove all improvements, even those that were in place before they took occupancy of the premises, and strip the space back to a shell condition. These Restoration costs could get very expensive and come at a time when the tenant is likely facing other expenses associated with their relocation, such as moving expenses, new furniture, improvements to the new premises, etc. Being forced to restore a space they are moving out of provides no benefit to the tenant, only a headache.

It has traditionally been the case that landlords would only require the restoration of redundant or obsolete improvements, but anything that could be useful to future tenants would remain – i.e. walls, doors, lights, kitchenettes, as an already improved space is helpful in attracting the next tenant.

However, we have recently seen more landlords enforcing the Restoration Clause, in some cases to make it more cost-prohibitive for a tenant to relocate and in other cases to minimize their own expenses in retrofitting a space. **In one instance, we also saw lease language that would allow the Landlord to charge the cost of the restoration work, even if they never performed the work.** During these uncertain times of restrictions, work-from-home mandates, etc., the threat of an unforeseen and unquantified expensive restoration can induce a tenant to forego a relocation and instead renew their lease at their current location. The Landlord then benefits by avoiding any vacancy and secures the tenant for another lease term. Unfortunately, while avoiding the restoration expenses in the short term, the tenant is unable to take advantage of a relocation that might have benefited their business, and the **Restoration Clause often remains in the lease if the tenant fails to negotiate their extension correctly**.

Ideally, a tenant's Realtor will negotiate the Restoration Clause during the initial lease negotiations. It is at that time, when the Landlord is first trying to secure the tenant that the tenant has the most leverage and can either limit the scope of the Restoration Clause or have it removed from the lease entirely. If missed in the initial negotiations, a tenant should use every attempt to alter this clause in any agreement to extend their lease.

However, if a tenant has already signed their lease, they ought to review it to confirm a Restoration Clause exists and its scope. The language of your lease is what governs the relationship with your Landlord, and much can turn on a word or phrase. There is a difference, or at least ambiguity, between the phrases "the improvements", "their improvements," or "all improvements". Are improvements installed by a previous tenant the responsibility of the current tenant? Are improvements installed by the Landlord the responsibility of the current tenant? The scope of the Restoration may not be as severe as first thought. Ambiguity in a contract (such as a lease) can be decided against the party who wrote the contract, i.e. the Landlord (a doctrine called *contra proferentem* – which your lawyer can explain), potentially relieving the tenant of the Restoration responsibility.

There is also the possibility of negotiating the Restoration cost. Perhaps the Landlord will accept a lump sum less than the cost of total restoration. Perhaps they will accept the removal of only those improvements the subsequent tenant does not need (which hopefully won't be everything).

As with many potential costs, it is best to eliminate them at the outset. But if that hasn't been done, ignorance is not bliss, and a tenant ought to determine their potential liability so they can make informed decisions as to how they will proceed.

In Summary:

- Restoration Clauses can cause unforeseen and, in some cases, extraordinary costs for tenants as they vacate a space;
- It is best to have your Realtor negotiate the removal, or scope, of a Restoration clause during initial negotiations; before the lease is signed and when you have the most leverage;
- If your lease does have a Restoration Clause, your Realtor should contact your Landlord to confirm whether they intend to enforce that clause and, if so, to what extent;
- Your lawyer should review the specific language of your lease to advise you on the scope of your responsibility and potential legal arguments in your favour;
- All tenants should be alive to this issue, and others, that create potential costs and liability so they can make informed decisions at the end of their lease when they likely have other costs looming.

Please do not hesitate to contact the author for a complimentary review of your lease or for any other tenancy-related topics.

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