

Commercial Landlords Beware: Regardless Of Lease Language, The Landlord Is Responsible For Unsafe Conditions

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Many commercial landlords want their tenants to be solely responsible for all building maintenance. This was especially true this past winter, with roof collapses a common event. In theory, with a properly crafted lease, other than collecting monthly rent checks, a landlord should be able to place all costs and responsibilities on the tenant and forget about the property until the lease term expires. In the past, landlords believed that they could enjoy this rosy scenario so long as their leases obligated their tenants to:

1. Acknowledge that the leased premises were in good order and repair at the inception of the lease,
2. Maintain the premises in good condition, and
3. Make all necessary repairs and replacements.

Similarly, in return for such an arrangement, tenants enjoyed a lower monthly rent and control of their expenses where they had the obligation to repair and maintain the leased premises. Both landlords and tenants have reasonably believed that courts would uphold their expectations regarding maintenance obligations where their leases, negotiated by sophisticated parties, and drafted by

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counsel, assigned those obligations to the tenant. After all, one would expect a court to enforce the expressed intentions of the parties to a lease.

Based on the recent decision of the Supreme Judicial Court in Bishop v. TES Realty Trust, Massachusetts commercial landlords should no longer believe that their leases protect them from maintenance obligations, regardless of what those leases say regarding maintenance. As a result of the Bishop decision, it is simply not possible to enter into a Massachusetts commercial lease that shifts all maintenance obligations to the tenant. In Bishop, the commercial landlord and tenant entered into a lease where the tenant acknowledged that the premises were in good order and repair, agreed to maintain the premises in good condition, and agreed to make all repairs and replacements at the tenant's expense. During the lease term, the tenant sent the landlord a letter stating that the roof was leaking. The tenant put a bucket under the leak to catch the water. When she looked up at the leak, plaster fell from the roof into her eye, causing her to fall backward, trip over the bucket and

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Amazing Clients[®]



Through the Looking Glass: The Way We'll Work Tomorrow, Today Ken Davison, Vice President of Marketing

Today has never looked more like tomorrow at Magor Communications Corporation (Magor) in Ottawa, Ontario. Magor has engineered a simple, easy to use, and affordable technology for remote collaboration that is nothing short of magic. Its HDWorkPlace visual collaboration solutions are improving the way people work, without changing how they work.

Imagine if one of the walls in your office, cubicle or conference room was really a kind of "looking glass" through which you could make high definition (HD) on-demand audio-visual connections, not only with the

physical offices and conference rooms of anyone anywhere in the world, but also with their desktops and electronic files, as well as their whiteboards, presentations, flip charts and other collaboration tools.

This vision of a magic wall (the word "Magor" is Roman for "wall") stirred the imaginations of Chairman Sir Terry Matthews and Executive Vice President of Product Development Dan Rusheleau when they founded Magor in 2007. Now clients are raving about the experience created by integrating commercially available cameras, servers and display screens with innovative audio-bridging devices and software solutions that facilitate virtual connections that mirror in-person collaborative meetings.

With simple mouse-clicks, participants can access subject-matter experts and crucial information sources in HD video from the comfort of their own offices, without the need to go to a dedicated room or to build a complex, expensive dedicated network.

"You have discovered the Holy Grail," one thrilled Magor client said about the point and click simplicity and unique ability to work over non-engineered networks like the Internet.

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Fashion Law

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The stunning models on the fashion runways of Paris, Milan and New York are glamorous and trendy with the latest designs. Established designers such as Céline and Cacharel are dazzling the fashionista world, and so are newer names like Pedro Lourenco and Viktor & Rolf. But fashion is more than runways, glamour and paparazzi. Fashion also is an industry with legal requirements and business considerations. The fashion and apparel sector accounts for nearly 4% of global GDP and exceeds \$1 trillion per year. Bernard Arnault, the CEO of French fashion-luxury house LVMH, is the fourth-wealthiest person in the world, while the founder of the Zara's retail chain is Spain's wealthiest.

Because many of the day to day issues of the fashion industry are legal issues, it is prudent to consult a lawyer who has experience in the fashion business before embarking on a business venture involving fashion. Some of the legal issues involving fashion include the following:

Legal Protection of Designs

What legal protections are available for fashion designs? Should I trademark my logo or company name? Can I get copyright protection for my fashion or jewelry designs? Is it possible to patent a design?

Generally, a copyright cannot protect the shape or style of fashion designs because clothing is considered a "useful article" under copyright law and, therefore, they are ineligible for copyright protection. However, designs that are imprinted on clothing can be copyrighted, as can original jewelry designs. Moreover, logos and company names or slogans are eligible for trademark protection. Even design patents can be used to protect some fashion creations.

Licensing

Should a brand license its copyrights, trademarks and designs? Yes. A license can increase revenues and profits because the brand owner does not need to invest in the manufacture of the product. Sales of fashion-licensed products generate about \$1 billion per year. For example, Calvin Klein has been very successful in licensing the Calvin Klein trademarks. Calvin Klein's annual revenue from licensing reportedly exceeds \$200 million.

Counterfeiting and Infringement

What are the risks to a brand from counterfeiting and infringement? How do I keep my brand from being "knocked off" or imitated? Billions of dollars of counterfeit products are available on the internet: how does a brand owner or designer protect itself from this overt theft?

Copying of fashion designs is rampant throughout the world. Some retail stores specialize in selling cheaper copies of the latest designs. As noted above, it is difficult to protect the design of apparel. However, it is illegal to copy a trademark that appears on the apparel. Examples of trademarks include those of Chanel, Burberry, Prada, Gucci, Dolce & Gabbana, Nike, Louis Vuitton and many others. It is both a criminal and civil offense to engage in trademark counterfeiting. The FBI, U.S. Customs and local police watch for violators of these laws.

Consumers should use these guidelines when deciding whether a product is genuine or counterfeit:

1. Do your research and use common sense. If the price of a product is "too good to be true," it is often not genuine. If you have never seen a \$100 Rolex watch before, it is because Rolex does not make any.
2. Inspect the product. Examine the product carefully for workmanship and details. The zipper handles, and even the tiniest stitching should be premium quality.
3. Packaging is important. Luxury-goods makers do not package their expensive products in a plastic bag. If the item does not look right, it may be fake.

Launching a Business

How do I launch a successful fashion business? What business entity should I choose? The choices include sole proprietorship, partnership, corporation, or limited liability company.

License or Franchise?

Should my stores be licensees or franchisees? Benetton adopted an approach where its stores were licensees, but Benetton did not charge a royalty or franchise fee. Benetton thereby avoided the onerous franchise disclosure requirements under U.S. law.

Employment Issues

What employment issues will I encounter? Is there a danger of employment discrimination suits? In 2005, Abercrombie & Fitch settled two class action lawsuits brought by the Equal Employment Opportunity Commission (EEOC). The EEOC charged Abercrombie & Fitch with racial and gender discrimination. Similarly, WalMart has been sued for sex discrimination for alleged unequal pay to men and women.

The Model's Rights

What are the rights of a fashion model to control the uses of his or her image in advertising? Modeling agencies use contracts that are very short and contain few legal provisions. The advertiser may feel free to use the model's image in many different media, while the model may believe the uses are limited. These issues require consultation with an attorney.

Retail Store Leasing

Many prominent fashion companies prefer to make their sales through dedicated stores that bear their name. Doing so requires fashion companies to enter into commercial leases for retail stores. Should I select a prestigious location, such as Rodeo Drive in Beverly Hills or Newbury Street in Boston? Or should I place my retail store in a less expensive location?

Fashion companies need to consult with real estate experts before making this decision. They should select a competent and honest broker and a lawyer experienced in retail leasing. If the store is in a mall, the company may wish to have either an exclusive or a radius restriction, which restricts the landlord from having similar competing stores in the surrounding area.

The glamorous and upscale world of fashion and couture has many different business and legal aspects. If you are engaged in the fashion world, it is prudent to have experienced and knowledgeable counsel who can guide you through the maze of potential problems. ❖❖❖

Amazing Clients®

Through the Looking Glass: The Way We'll Work Tomorrow, Today Magor Communications Corporation

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The Magor HDWorkPlace systems can feature one, two or three large-screen displays that offer crisp, life-like images of the people with whom you are meeting, along with audio that is incredibly sharp, no matter how far a participant is sitting from a microphone.

Furthermore, with HDWorkPlace, participants are in complete control over their own visual experience. With simple mouse-clicks, they can choose which people or shared collaboration materials they want to focus on. They can zoom in or out on speakers or their white-boards, pull up desktops, files or presentations on a whole screen or parts of a screen, or share control of files with other participants.

The look and feel is much like that of having people right outside a window to your office, and unlike video-conferencing technology, speakers appear to be looking at you no matter where you are sitting in a room, and their lip movements are in perfect sync with their words. There are also fewer static interruptions, recovery times for rare glitches are measured in milliseconds, and there are no annoying screen refreshes or lengthy re-start procedures typically found with traditional video conferencing systems.

Ken Davison, the Vice President of Marketing for Magor, says that "there is a huge 'wow' factor" whenever a prospective client witnesses the actual performance. He adds that, from its inception, Magor was dedicated to a philosophy that "we study how people actually work and how they want to work, and then we engineer a solution to fit those desires and to minimize the need for training and support."

This philosophy is a cornerstone on which Sir Terry Matthews and the Wesley Clover International Corporation have successfully founded or funded more than 80 technology companies, including Newbridge Networks, a worldwide data networking leader.

The philosophy is also responsible for the engineering of a system architecture that requires minimal training to operate. "A user can become proficient in a couple of days," says Davison, noting that Magor does offer a relatively short on-line manual for tech support that is nothing like the thick manuals for some teleconferencing operations.

"Our peer-to-peer architecture also allows participants to be seamlessly added or dropped while a meeting is in progress, without disturbing other participants," he adds. "This unique capability means that Jim can call Bob with a question, Bob can decide that Jim really needs to talk to Frank to get the answer, Bob can bring Frank into the discussion, and Bob can then drop off the call, leaving Jim and Frank to collaborate."

Davison explains that the "secret sauce" is the patented and elegant software engineering that facilitates delivery of audio and video data in tighter "packets" that can travel across lower bandwidths using ordinary Internet access. "The interoperability of our systems with desktops, iPads, smartphones, and Web-based systems, and the lack of any need for a dedicated transmission line are totally unique," he says.

"Companies are being forced to run leaner and each knowledge-worker must wear multiple hats. They must handle frequent interruptions, be able to answer crucial questions and make quick, informed decisions. When workers have all their desktop and office materials at hand, and can access subject-matter experts as they need them, they collaborate better," Davison adds, noting that telecollaboration not only reduces trips



KEN
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Vice President of Marketing,
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out of the office, but enables more intra-office meetings without having to move to a central location.

Davison is also ecstatic about Magor's newest big-fish client, Christie, a global leader in visual technologies that makes display systems for movie cinemas, operational control rooms, and training simulators used by fighter pilots and other aviators. "This (Christie) is a billion dollar company that sees the value in both our peer-to-peer architecture and advanced collaboration capabilities," he says.

Davison says that clients who utilize Magor HDWorkPlace systems can realize benefits far beyond the cost savings associated with reduced travel expenses. He points, for example, to the results of a white paper published by international growth consultants at Frost & Sullivan, which is available at <http://www.magorcorp.com>.

Among other things, the white paper notes that the velocity of collaboration is a key component in modern productivity, and it depends heavily on whether collaboration tools are actually utilized because of relative ease of use or ignored.

Frost & Sullivan concluded that a modern telecollaboration process possessing the qualities associated with Magor systems would offer productivity gains from:

- Collaboration that occurs more easily, more frequently and with greater speed;
- Collaboration that enables viewing, sharing and editing of files and applications;
- Collaboration that is wider, occurring among more participants using more collaboration tools in more locations at once.

But the most amazing part of Magor's innovation just may be its cost. While teleconference systems can involve hundreds of thousands of dollars in up-front technology investments, and \$10,000 or more in monthly fees, the Magor HDWorkPlace solutions can be installed for \$20,000 to \$50,000 and require no dedicated lines, monthly system fees, or so-called "white-glove" support services.

"We think that is an unmatched value in the marketplace," says Davison.

He credits his lawyers at Burns & Levinson with providing value to Magor as well, particularly citing the work of partner Len Gold for his assistance in the company's first round of external financing. "Len is not just a lawyer, but a good and flexible partner who adds value by facilitating key contacts for us in addition to doing very good legal work." ❖

- John O. Cunningham, freelance writer/editor



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injure herself. The tenant sued the landlord for her injuries, despite the lease provision requiring the tenant to perform all maintenance.

The trial court held that because this was a commercial lease, and as the lease provided that repairs were the tenant's obligation, the landlord owed no duty to repair the roof and, therefore, had no liability to the tenant. On direct appellate review, the Supreme Judicial Court overturned the trial court, and held the landlord responsible for maintenance of the leased premises notwithstanding the terms of the lease. The Supreme Judicial Court predicated its decision upon a statute, G.L. c. 186 §19, which it had not previously construed. That statute provides that any, "...landlord of real property (except an owner-occupied two or three-family dwelling) shall within a reasonable time following receipt of a written notice from a tenant...of an unsafe condition, not caused by the tenant... exercise reasonable care to correct the unsafe condition...except that such notice need not be given for unsafe conditions in that portion of the premises not under the control of the tenant...Any waiver of this provision in any lease or other rental agreement shall be void and unenforceable...."

The Court specifically held that this statute applies to commercial leases. In other words, regardless of the business sophistication and intent of the parties, under Massachusetts law, they cannot agree to have a tenant be solely responsible for maintenance. Massachusetts courts will not enforce any provision to the contrary. The Court did note, however, that if a lease does provide that the tenant has the duty of repair, but the tenant still gives a landlord written notice of an unsafe condition, the landlord may bill the tenant for the cost of the repairs it performs.

Regardless of what a Massachusetts lease says, the landlord has at least initial responsibility for an unsafe condition once the tenant provides written notice. It is now incumbent upon commercial landlords to review their leases and insurance coverage in light of this decision. Additionally, even though the Court requires written notice from a tenant for the imposition of liability, it is prudent practice for commercial landlords to inspect their premises to assure the absence of unsafe conditions, as well as conditions that may soon become unsafe – not knowing how broadly the statute may ultimately be interpreted and in the hope that earlier detection will mean lower repair costs. Landlords should account for the risks and costs imposed upon them by this decision in determining their rental rates. Those risks include not only the initial cost of repair, but also potential liability to tenants and every other person rightfully on the leased premises. A tenant, on the other hand, may still want to correct the unsafe condition itself if it wants to control the cost and/or quality of the repairs. ☺

WHAT'S NEW?

Preview: Homestead Exemption Change

As we go to press, a new law clarifying the rights of Massachusetts homeowners to declare an estate of homestead has just gone into effect. The changes in this law, which have been long sought by attorneys throughout the Commonwealth, not only provide an important "automatic" homestead benefit for many Massachusetts residents, but affect long-established rules regarding estate planning, asset protection, real estate conveyance and elder law. While the many aspects of this law are too extensive to cover in full because of limited space in this issue, our clients and contacts alike should watch for a Client Update which will be e-mailed to our contacts and made available soon on the Publications page of our website, at www.burnslev.com/publications.

Check out some of our other most recent Client Updates and Bulletins below on our website. All articles or publications provide general information and do not constitute legal advice.

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"SEC Adopts Final "Say-on-Pay" Rules and Proposes Amendments to "Accredited Investor" Standards" (March 2011)

Automotive Dealer Bulletin

"GM Facilities Upgrade Mandate" (March 2011)

Design & Construction Update

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