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Supreme Judicial Court of Massachusetts decisions changing landscape of commercial leasing

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A keystone of commercial leasing is certainty, especially in the ability to contractually allocate risks, obligations and costs. Since 2002, three decisions from the Supreme Judicial Court of Massachusetts (SJC) have undermined this central principle. The resulting uncertainty has created problems in the negotiation and enforcement of commercial leases. The landmark 2002 Wesson case was the first. Before the SJC's Wesson decision, unless the landlord and tenant otherwise agreed, the landlord's and tenant's lease obligations were independent of each other, i.e., if a landlord failed to perform its obligations, a commercial tenant could sue for damages, but it generally had no right to withhold rent or terminate its lease. The Wesson decision reversed that standard by holding that unless the parties expressly agreed in the lease that such obligations were independent of each other, the obligations of a commercial landlord and tenant were mutually dependent. As a result, without language in a lease expressly overriding the dependent covenants doctrine adopted by Wesson, if a landlord fails to perform a repair or deliver a service, a tenant could use the threat of withholding rent or terminating the lease to leverage concessions, particularly in a down-turning market. Tenants obviously support this decision, which applies to all commercial leases whether signed before or after the decision, while landlords deride the decision for its unnecessary judicial interference with parties' contractual agreements, particularly in light of the underlying facts of the case. In Wesson, the tenant, over a period of several months, notified the landlord of roof leaks. The landlord repaired the leaks. After a two-month period in which there were no leaks or complaints, the tenant notified the landlord that tenant was terminating the lease due to the alleged chronic and serious roof leaking. While the SJC rejected the tenant's argument that it was constructively evicted, noting there was insufficient evidence to indicate the premises were unsuitable for the tenant's business even if the leaks made business more inconvenient or costly, the SJC decided that the tenant could terminate the lease. In adopting the doctrine of dependent covenants, the court reasoned that modern leases were less a conveyance of an interest in land and more a contract for services. Thus, in order for a tenant to have a right to terminate a lease using this doctrine, it was sufficient for the tenant to establish that the landlord failed to perform a promise that was a significant inducement for the tenant to enter into a lease. In the Wesson case, the SJC decided that the landlord breached its implied promise to provide a dry space for tenant's printing business. As a result of the Wesson case, savvy landlords add language to leases to maintain the principle of independent covenants, particularly as to the covenant to pay rent. Regardless, might the SJC's reliance on an implied landlord promise in Wesson signal a shift in the winds, indicating that one day the SJC will create a warranty of suitability for commercial leases similar to the warranty of habitability earlier created with respect to residential leases?

The Cummings case, decided in 2010, was the second. In Cummings, the SJC considered the legality of a liability and indemnity provision that made the tenant responsible for various claims, except for claims arising solely from the landlord's negligence. The SJC determined that a statute (G.L. ch. 186, Â§15), which provided, in essence, that a liability or indemnity provision in a lease could not exonerate a landlord from its own negligent acts or omissions, applied not only to residential leases, but also to commercial leases. The SJC then held that the portion of a liability provision in the Cummings lease that required the tenant to be solely responsible for injuries to persons and damage to property when the landlord may be partially negligent was void. Interestingly, though the landlord could not shift the damages and costs associated with landlord's negligence to the tenant, the SJC stated that the landlord could require the tenant to maintain insurance to protect the landlord in case of an injury caused by its negligence. The SJC stated that requiring insurance did not violate the statute because an insurance requirement shifted the risk of loss arising from landlord negligence to the insurance company, not the tenant.

In light of the Cummings decision, how should a landlord respond to a tenant's proposal to self-insure and what are the risks of permitting a tenant to self-insure?

In the third decision, the 2011 Bishop case, the SJC interpreted another statute (G.L. ch. 186, Â§19). In general, this statute provides that if a tenant notifies a landlord of an unsafe condition in the tenant's space that was not caused by tenant, and the landlord fails to remedy the unsafe condition in a reasonable time, then the landlord is liable for damages that arise from the unsafe condition. Before Bishop, many believed this statute, enacted 40 years ago, applied only to residential leases. While applying the statute in a residential context makes sense because the bargaining power of the parties is most often slanted in the residential landlord's favor, applying the statute to commercial leases may have unintended consequences. In Bishop, a commercial tenant was wholly responsible for roof repairs. Nevertheless, the tenant complained to its landlord that the roof leaked when it rained. During a later rainstorm, the tenant was injured when it tripped over a bucket it had placed on the floor to catch dripping water. The tenant sued the landlord for damages. In defense, the landlord argued that even if the statute applied to commercial leases, the landlord was not liable in this instance because the tenant caused the problem when it failed to repair the roof as required by the lease. The SJC disagreed and held that once a tenant sends a notice of an unsafe condition to a landlord, any requirement in the lease for the tenant to repair that condition was void in light of landlord's repair obligation that arises under the statute. However, the SJC did affirm a landlord's right to be reimbursed by a tenant to the extent there is an express provision in the lease requiring that reimbursement. After Bishop, a landlord who fails to act in response to a tenant notice concerning a condition at tenant's premises that in the first instance is tenant's obligation to repair will do so at its peril; if that condition is later found to have been unsafe and damages arise, the landlord will be responsible. After Bishop, if tenant notifies landlord of a serious environmental problem at the premises not caused by tenant, doesn't the landlord have to promptly undertake the remediation even though the lease required tenant to do such remediation? What additional security or reserves will lenders require in light of the Bishop case?

With the Wesson, Cummings and Bishop decisions, the SJC created ambiguity in commercial leasing when landlords, tenants and lenders might have been better served if the SJC simply enforced the lease provisions negotiated and agreed upon by the parties, especially as commercial landlords and tenants often have equal bargaining power. To avoid the unintended consequences of these decisions, landlords have and will continue to draft provisions, often onerous for tenants, to

"work around" these SJC decisions and attempt to bring certainty to the allocation of risks, obligations and costs in commercial leases. Future SJC decisions will determine whether these "work around" solutions will be enforced or whether the SJC will void these solutions or adopt a comprehensive warranty of suitability.

1 Wesson v. Leone Enterprises, Inc., 437 Mass. 708 (2002).

2 Norfolk & Dedham Mutual Fire Insurance Company v. Morrison, 456 Mass. 463 (2010).

3 Bishop v. TES Realty Trust, 459 Mass. 9 (2011).

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