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Beware of a Lease at Odds with the Offer

Under what circumstances can a tenant refuse to sign a lease? Are inconsistencies between an offer to lease and the lease agreement grounds for repudiation? These questions were dealt with in *365 Bay New Holdings Ltd. v. McQuillan Life Insurance Agencies Ltd.* [2008] 64 R.P.R. (4th) 44 (Ont. C.A.), where the Ontario Court of Appeal dismissed a Landlord's action for damages arising from its termination of a tenancy when the Tenant refused to sign a lease delivered by the Landlord.

On July 9, 2002, 365 Bay New Holdings (the "Landlord") and McQuillan (the "Tenant") entered into a binding offer to lease for the 11th floor in the Landlord's building to commence April 1, 2003 (the "Offer"). The Offer provided that within 10 business days the Landlord would deliver its standard lease agreement incorporating the terms and conditions contained in the Offer and the Landlord and Tenant would use their best efforts to execute the lease within 20 days. However, lease negotiations for a host of new and amended terms (including financial changes) began in September 2002 and continued into December 2002.

The Landlord ultimately tendered a final form of lease for execution and stated that it was not prepared to continue the lease negotiations. Differences between the Offer and the final form lease included the operating hours, payment of a security deposit, the inclusion of a management or administration fee and the Landlord's responsibility to fix a vibration problem on the premises (which had been previously agreed to by the Landlord). The Tenant refused to sign the final form of the lease, did not take possession on April 1, 2003, and rented space elsewhere. The Landlord was unable to re-rent the premises for over one year and brought an action against the Tenant for breach of contract.

The trial judge held that there was no justification for the Tenant's refusal to sign the lease as the parties had come to an agreement regarding its form and content. This decision was overturned by the Ontario Court of Appeal. The written and email correspondence between the parties was indicative of the ongoing disagreement regarding substantive differences between the Offer and the final form of lease delivered by the Landlord. The Court of Appeal ruled that the Landlord could not impose a new lease on the Tenant which was not in accordance with the Offer. Accordingly, the Landlord was not entitled to take the position it did and the Tenant did not breach the Offer by refusing to sign the lease in that form. In any event, *365 Bay* illustrates that landlords should ensure that all material, substantive, financial terms of a tenancy (such as security deposits, administrative/management fees, relocation, demolition clauses) are expressly stated in the offer to lease. If a landlord attempts to negotiate material terms in a lease that are not found in the offer, the tenant may be able to walk away from the deal (even if the offer is binding and unconditional).

Landlords Beware of Duty to Negotiate and Revocable Licenses

In *Clublink Corp. v. Pro-Hedge Funds Inc.* [2009] 84 R.P.R. (4th) 274(Ont. S.C.J.), Clublink Corporation (the "Landlord") owned and operated a golf course where Pro-Hedge Funds Inc. (the "Tenant") leased office space. The Landlord sought a declaration that it was entitled to terminate the lease dated October 1, 2005.

This application was brought to settle multiple issues. The first involved the Tenant's right of first offer in the lease pertaining to 1,500 square feet of additional office space. The Tenant informed the Landlord that subject to the Landlord performing certain leasehold improvements, it wished to lease the additional space. Refusing to accept the Tenant's requests for those improvements, the Landlord notified the Tenant that it would be leasing the additional space to another party.

The second dispute arose when the Landlord suspended the Tenant's use of 16 reserved parking spaces at the front of the premises for one week during the 2008 Canadian Open hosted by the Royal Canadian Golf Association (the "RCGA"). The Landlord made alternate arrangements for the Tenant to use off-site parking spaces (with a shuttle service to the premises). However, the Tenant's president was not happy with the arrangement (especially in light of the muddy conditions of the off-site parking spaces) and refused to move his car to the off-site parking site. In response, the Landlord terminated the lease, alleging that the Tenant had jeopardized the Landlord's relationship with the RCGA.

The Landlord also claimed it was entitled to terminate the lease due to an unauthorized transfer by the Tenant when it changed its name from Pro-Hedge Funds Inc. to Pro-Financial Asset Management Inc. (by Articles of Amendment) and when its sister company (Legacy Investment Management Inc.) used a portion of the premises to conduct business.

The Ontario Superior Court of Justice ruled against the Landlord. With respect to the right of first offer, it found that the Tenant had properly exercised its right and the Landlord had a duty under the lease to negotiate in good faith to resolve any outstanding issues, including the commencement date and any necessary leasehold improvements. It was not reasonable for the Landlord to "precipitously" terminate discussions with

the Tenant and the Tenant was entitled to lease the additional premises.

With regards to the parking spaces, the court acknowledged that the Tenant's conduct was "annoying" to the Landlord, but it did not amount to nuisance in the legal sense and therefore did not support the Landlord's termination of the lease. As well, the court found that the Landlord was not entitled under the lease to suspend the Tenant's use of the parking spaces even though the lease contained general language which allowed the Landlord "to do such things on or in the Clublink Lands ... as the Landlord, in any use of good business judgement determines to be advisable." This generic language was insufficient to entitle the Landlord to suspend or revoke the Tenant's parking rights, even temporarily, and put the reserved parking spaces to a more profitable use. The court also found that since the Landlord could have reasonably anticipated that the Canadian Open would be held at Glen Abbey, it should have bargained for an express right in the lease to temporarily suspend the Tenant's parking privileges during that time.

Finally, with respect to the alleged unauthorized transfers, the court found first that the simple change of corporate name did not change the identity of the Tenant or affect its covenant since it was, for all intents and purposes, the same corporation, engaged in the same business, with the same employees. Second, it found that no "right of use or occupancy" of the premises had been transferred to its sister company. Instead, the court viewed the sister company's use as merely a temporary grant of permission to use the space which could be revoked at any time, and therefore there was no parting of possession by an agreement to share possession.

The court found that the Tenant was entitled to lease the additional space and was awarded damages as a result of the Landlord's termination of the lease. The lessons to be learned from *Clublink* are as follows: (i) if a landlord wants a right to temporarily suspend any special rights granted to a tenant, do not rely upon broad generic or boiler plate language; and (ii) the mere act of sharing premises in an undefined area may not require the Landlord's consent, unless the transfer provisions expressly include revocable licenses.

Realty Taxes

In 1998 Ontario revamped its tax assessment system and legislation eliminated the requirement to create separate tenant assessments on the assessment roll. Although MPAC (Municipal Property Assessment Corporation) no longer prepares separate tax bills or assessments for each tenant of a commercial building, multi-tenanted properties are valued by assessors using capitalization of income approach. An assessor prepares a valuation summary that lists the tenancies at the property and then each tenancy is ascribed a market rent (not actual rent) which is capitalized. This valuation summary is often referred to as the "assessor's records".

Since 1998 there have been many attempts by landlords and tenants to make reference to the assessor's records as a basis for allocating taxes. In *Orlando Corporation v. Zellers Inc.* [2003], 66 O.R. (3d) 535 (Ont. C.A.), the Ontario Court of Appeal held that assessor's records do not constitute separate assessments. In *Sophisticated Investments Ltd. v. Trouncy Inc.*, [2003] 13 R.P.R. (4th) 291 (Ont. S.C.J.), the court held that assessor's records do not constitute assessed values. In *658425 Ontario Inc. v. Loeb Inc.*, [2007] O.J. No. 4723, affirmed 175 O.A.C. 192 (Ont. S.C.J.) ("*Loeb*"), the court ruled that assessor's records do not constitute a separate value of the Tenant's premises for property tax purposes.

At issue in *Indigo Books & Music Inc. v. Manufacturers Life Insurance Co.* [2009] 86 R.P.R. (4th) (Ont. C.A.) 7, was the reliability of using working papers created by the assessment authorities as a basis to determine a tenant's contribution to property taxes. Indigo Books (the "Tenant") was one of several commercial tenants in the building owned by Manufacturer's Life (the "Landlord"). The parties executed the lease on January 12, 1998, days after the province revamped its assessment system. The lease provided that the Tenant's contribution to property taxes was to be assessed using a separate assessment from the relevant assessment authority, but if the Landlord was unable to obtain (i) from the assessing authorities any separate allocation of the Landlord's Taxes; or (ii) from the taxing authorities any separate assessment; or (iii) *"other information deemed sufficient by the Landlord to make the calculations of Additional Rent"*, then the Tenant's contribution would be determined on a proportionate share basis.

The Landlord calculated the Tenant's contribution to taxes based on its proportionate share. The Tenant argued that the Landlord failed to properly implement the hierarchy of the alternative approaches found in the lease. The Tenant argued that the Landlord's access to the assessor's working papers for the building should have been "deemed sufficient" to make its calculations. The Landlord claimed that its decision was a reasonable exercise of its discretion.

The court found against the Tenant. The determination of the motion centered on the use of the word "deemed". The court noted that "deemed" and "determined" are not synonymous and the former gives considerable (although not unfettered) discretion to the Landlord to decide whether any information is sufficient. The information may be sufficient, but it may be treated as if it was not. However, the court said the Landlord should not be arbitrary.

In considering whether the "other information" found in the working papers was reliable, the court referred to previous case law. The court noted that the calculations in the working papers are informal and discretionary and are not

governed by legislation. Working papers are not intended to apply to individual premises; rather they demonstrate a value for the entire property. The court held that working papers could not be considered accurate or reliable on an individual basis and concluded that it was within the Landlord's discretion to deem the information in the working papers insufficient to complete the calculation of additional rent.

In *OGT Holdings Ltd. v. Startek Canada Services Ltd.* [2009] 89 R.P.R. (4th) 89 (Ont. S.C.J.) (affirmed by the Ontario Court of Appeal in [2010] 93 R.P.R. (4th) 23 (Ont. C.A.), Startek (the "Tenant") leased space in a shopping center from OGT (the "Landlord"). Under the lease, the Landlord had the option of calculating the Tenant's share of property taxes based on a separate tax assessment or a proportionate share basis. Four years after electing the separate tax assessment method, the Landlord sought to retroactively switch to calculating the Tenant's share on a proportionate share basis and brought an application seeking an order for payment of C$346,692.80 for the readjusted balance.

The Tenant asserted that the Landlord had the option under the lease to calculate the Tenant's share of the property taxes either method and it elected the separate assessment method. The Tenant maintained that the Landlord should not be permitted to retroactively change its election to the detriment of the Tenant. The Landlord claimed that an overriding term of the lease was that it was "net" to the Landlord. The Landlord also attempted to rely on the *Loeb* case where it was forced to calculate Loeb's share of the taxes on a proportionate share basis.

The court dismissed the Landlord's application. The court looked to the terms of the lease and found that although it was a "net" lease, s. 4.02 was an exception which allowed the Landlord "at its option" to use the separate assessment formula. There was no wording in the lease to support the argument that the separate assessment formula would cease to apply in the event that the result was less favorable to the Landlord.

In the Court's opinion, this case was distinguishable from *Loeb* because: (1) Loeb's lease stated that where separate assessments are no longer available, the Landlord "shall" apportion taxes based on proportionate share; whereas Startek's lease gave the Landlord an "option", which it exercised; and (2) Loeb's lease referenced assessments or valuations "*by the municipality*"; whereas Startek's lease contained broader language — it referenced "*a separate. . .apportionment*" "*from the relevant authority or otherwise*."

The court agreed with the Tenant's position that once an election was made by the Landlord, the Landlord could not subsequently resile from that election and the Tenant was entitled to rely on the doctrine of estoppel in defense to the Landlord's claim for the adjusted tax amount. Ironically, by inserting the optional language in the Startek lease, presumably to maximize the Landlord's flexibility, and then by making an election for separate apportionment, the Landlord was unable to use the proportionate share methodology (at least retroactively). This case should not prevent a landlord from changing its methodology on a go-forward basis if the lease provides for another method and the landlord provides reasonable notice so long as the tenant was not induced into entering the lease based on the assurance that a particular method would be used (*i.e.*, detrimental reliance).

Based on these recent Ontario cases: (i) if landlords and large tenants wish to rely upon assessor's records or an income approach, they must expressly provide for this in the lease; (ii) it is risky for landlords to rely on discretionary language in the lease which allows taxes to be allocated in the Landlord's discretion, acting reasonably (*i.e.*, be specific); (iii) based on *Indigo*, it appears that broader language (like "other information") could backfire if it prevents a landlord from choosing another methodology; and (iv) based on *Startek*, landlords should beware of "optional" language and after choosing a particular methodology, they will be prevented from adjusting taxes retroactively using a different allocation method.

Renewal Options in a Bankruptcy Scenario

The following case considers the effect of an assignment of a lease by a trustee in bankruptcy of a bankrupt tenant.

In *853571 B.C. Ltd. v. Spruceland Shopping Centre Inc.* [2009] 85 R.P.R. (4th) 306 (B.C.S.C.), 853571 (the "Petitioner") applied to the British Columbia Supreme Court for a declaration that upon payment of the arrears of rent under the lease and upon the assignment of the lease to it by the trustee in bankruptcy of the Tenant, the Petitioner would have all the rights, title and interests of the Tenant, including its right to renew the lease.

Spruceland Shopping Centre Inc. (the "Landlord") and Canadian Petcetera Limited Partnership (the "Tenant") had entered into a lease agreement commencing July 1, 1999, for a term expiring September 30, 2009, subject to a right to renew for a further five-year term. On March 20, 2009, the Tenant filed a Notice of Intention to Make a Proposal. Rent was in arrears from February 2009. On April 9, 2009, the Tenant gave notice it was exercising its option to renew the lease. The Tenant failed to file a Proposal and became bankrupt on June 16, 2009. On July 21, 2009, the Tenant agreed to assign a number of leases to the Petitioner, including its lease with the Landlord.

The Landlord opposed the application claiming that the option to renew was available only, if at the end of the term of the lease, the lease was in full force and effect and the Tenant was not in default of any of the terms, conditions or covenants of the lease beyond any applicable cure period. The Landlord submitted that these conditions could not be met since rent was in arrears, approval of the Landlord was

not obtained before the notional assignment of the lease from the Tenant to the trustee in bankruptcy and ultimately to the Petitioner, and the Tenant was insolvent. Therefore, the Landlord submitted that while the Petitioner may be the assignee of the remainder of the term of the lease, no renewal right was available.

The Petitioner submitted that since it was in a position where it could fulfill all the conditions precedent before the requisite deadline prescribed by the lease (namely, the end of the term), it should be entitled to renew the lease. The court agreed and found that: (i) the rental default could be cured by the Petitioner paying all arrears before the end of the term; (ii) an assignment of the lease to the trustee in bankruptcy was not a default of the transfer provisions prohibiting the Tenant's right to assign without first obtaining the Landlord's consent since s. 65(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") prevents any person from claiming a forfeiture of the term of an agreement (*i.e.*, termination) by virtue only of the filing of a Notice of Intention or by reason only that the party to the contract is insolvent; (iii) the Landlord was not entitled to assert any default of the transfer provisions prohibiting the Tenant's right to assign the lease to the Petitioner if the Court used its discretion under s. 29(3) of the *Commercial Tenancy Act* to override any such default and approve the potential default (which this court agreed to consider at a later date if better and further materials to substantiate that the Petitioner is financially responsible are delivered to the court); and (iv) although the Tenant was insolvent and had taken the benefit of legislation for bankrupt or insolvent debtors (which actions were express defaults under the lease), the remedies under the lease were available only "at the option of Landlord," and since the Landlord had taken no steps to treat the lease as forfeited, nor had it re-entered the premises, the mere insolvency of the Tenant or the seeking of the benefit of the *BIA* were no longer considered tenant defaults and the Landlord could not rely on either to take the position that the exercise of the option to renew was void and therefore the rights accruing to the Tenant under the lease remained in force.

Based on *Spruceland*, to preserve its rights in the event of a tenant insolvency or bankruptcy, a landlord should: (i) ensure that all options and special rights granted to a tenant are broadly drafted so they are voided by defaults at any time during the Term rather than just defaults at the time of exercise or at the end of the Term; and (ii) promptly notify the Tenant and its trustee in bankruptcy that such bankruptcy or insolvency constitutes an event of default which forfeits the Tenant's options and special rights.

Estoppel by Conduct

In *HREIT Holdings 36 Corp. v. R.A.S. Food Services (Kenora) Inc.*, [2009] 80 R.P.R. (4th) 64 (Ont. S.C.J.), HREIT Holdings (the "Landlord"), successor in interest to the original Landlord ("Wakefield"), brought an action for arrears of rent against R.A.S. Food Services (the "Tenant") pursuant to a lease agreement dated December 2, 1998, for the period of November 1, 2005, to November 23, 2006. The Tenant disputed its liability to pay based on the conduct of both the Landlord and Wakefield.

In August 1999, Wakefield agreed to waive the increase of basic rent that was applicable in accordance with the terms of the lease. Immediately prior to the assignment to the Landlord, Wakefield advised the Tenant that any continued waiver of rent increase after November 1, 2005, would have to be negotiated with the new landlord. However, following the assignment, the Tenant continued to pay the reduced amount for nearly one year. The Tenant claimed it was entitled to rely upon the waiver of rent previously instituted by Wakefield and that the new Landlord was estopped from claiming the deficit of any rent for the period in question.

The Landlord sought to rely on a clause in the lease which required any waiver to be expressed in writing. The Ontario Superior Court relied on the decision in *Med-Chem Health Care Inc. Re* [2000] O.J. No. 4009 (Ont. S.C.J.) where the court found that a Landlord's course of conduct can be relevant in a determination of whether or not it has any intention to rely on the strict terms of the lease with respect to the amount of rent. In this case, the Landlord had accepted the reduced amount of rent for almost one year.

In reviewing the interrelationship between waiver and the doctrine of estoppel, the court found that the terms could be used more or less interchangeably. The court therefore found that the Tenant was not liable for the increased amount of rent because the Landlord had either waived its right to collect rent at the higher amount during the relevant time period or was estopped from collecting the higher amount on the basis of equity. Once again, the moral of the story here is that landlords should act promptly to preserve their rights and remedies under a lease.

Landlord Misrepresentation & "Entire Agreement" Clause

In *Punto e Pasta Manufacturing Inc. v. Henderson Development (Canada) Ltd.* (2009) 79 R.P.R. (4th) 210 (B.C.S.C.), the Tenant brought an action for negligent or fraudulent misrepresentation against the Landlord claiming that the latter misrepresented the identity and nature of the commitments of some of the existing and prospective tenants of the International Village.

The Tenant owned a small Italian restaurant and during lease negotiations the Tenant reviewed floor plans and the Landlord leasing representative spoke of "Benetton" (an Italian Corporation) as a major tenant of the fashion boulevard. The Tenant was impressed since Benetton would be familiar to its Italian patrons. They also discussed the expected tenancies of a pub and liquor store. The Tenant believed these

amenities would ensure a high volume of foot traffic in areas close to the premises he was considering. They also discussed the Landlord's intentions with respect to the food market, which the Tenant considered important as it would give him ready access to supplies.

Before signing the offer to lease, the Tenant toured the shopping center and was shown the location for Benetton and the pub and he was told 65-70 per cent of the mall was leased. The Tenant thought the Landlord was referring to units, not square feet. Later the Tenant sought a loan commitment from his bank and gave a personal guarantee for repayment after receiving assurances from the leasing manager that the shopping center would be occupied by certain tenants, as well as a food market. The lease was executed on February 25, 2000, however, leases with Benetton and the other tenants mentioned never materialized and a food market was never opened. The Tenant operated his restaurant from May 2000 until November 2001, when the restaurant was closed due to poor business.

The Landlord sought to rely on an "Entire Agreement" clause in the offer to lease which read: "It is understood and agreed between the parties that there are no covenants, representations, agreements, warranties or conditions in any way relating to the subject matter of this Offer to Lease except those set out in it." In interpreting this clause, the court noted that it functioned to exclude reliance on any representations *pertaining to the subject matter of the lease* (*i.e.*, the premises) but in this case the representations relied on by the Tenant pertained to the identity of other tenants. Since the representations were not made with respect to the premises being leased, the "Entire Agreement" clause did not exempt the Landlord from liability for negligent misrepresentation.

Doctrine of Latent Ambiguity and Waiver

In *Calloway Reit (Westgate) Inc. v. Michaels of Canada ULC*, 2009 ONCA 713 (Ont. C.A.), the Ontario Court of Appeal dealt with the interpretation of the "completion date" in a lease. Michaels (the "Tenant") had been open for business since July 5, 2007 but it had not paid any rent since the lease was executed with Calloway (the "Landlord") on December 19, 2005. Under the lease, the "Rental Commencement Date" could not occur before the "Completion Date". The issue before the Court was whether the Tenant's interpretation (that all the buildings in the shopping center had to be constructed before the "Completion Date" could occur) was correct. The Landlord claimed that the Tenant's obligation to pay rent was triggered by the completion of the Tenant's premises plus another specified area, and therefore rent became due on June 29, 2007.

According to the Ontario Court of Appeal, the internal inconsistencies in the lease gave rise to a "latent ambiguity" with respect to the determination of the Completion Date and the Rental Commencement Date. In the circumstances of latent ambiguity, an interpretation should be reached that accords with good business sense, and that avoids a commercial absurdity. The Court of Appeal held that it is not commercially reasonable, as the Landlord proposed, to read out the condition for the "Completion Date" that the Landlord construct all buildings in the shopping center. However, it is also not commercially reasonable to interpret the definitions of "Completion Date" and "Rental Commencement Date" to allow the Tenant to take possession, carry on business in the premises, and use the common elements and other services provided by the Landlord without having to pay rent (with the exception of any specific rent abatement provisions). The court noted that the Tenant chose to accept the Landlord's delivery of possession and the Landlord's services, even though all the buildings on Exhibit B were not completed. In these circumstances, the Appeal Court held that the Tenant had effectively waived strict compliance by the Landlord with its obligation to complete all the buildings as a condition precedent to the triggering of the Tenant's obligation to pay rent. ■

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