

PROPERTY LEASING: Back to the Basics

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Rent is an Essential Term of a Lease

There are certain terms that must be agreed upon by the parties in order for a Court to find that there is a lease in place. In *Homestead Properties (Canada) Ltd. v. Robert*, the Manitoba Court of Appeal reiterated that rent is an essential term of a lease.

The landlord had sued the proposed tenants and their lawyer ("Defendant") for past rent. The motions judge found that a valid lease had been agreed to, however, there were some issues as to its terms. The Defendant appealed.

The landlord owned a property from which a restaurant had been operating. In late 2001, the restaurant ceased carrying on business and the Defendant's clients ("Proposed Tenants", who are not involved in the appeal in question) were interested in establishing a restaurant. The landlord allowed the Proposed Tenants to enter the premises and commence operating a restaurant. Lawyers for the parties exchanged correspondence regarding their various legal requirements including whether the

Proposed Tenants would take over the existing lease or enter into a new lease. The solicitor for the landlord outlined in a letter to the Defendant that the landlord was prepared to enter into a new lease on the basis that the lease would be completed on the landlord's standard form of lease, the term would be for 66 months commencing May 1, 2002, and the annual rent would be \$34,200 plus GST. The form of lease contained a clause requiring the Proposed Tenants to pay an annual rent of \$34,200 as well as percentage rent. The Proposed Tenants objected to the percentage rent clause and the lease was never signed.

After the restaurant failed in late 2002, the landlord sued the Defendant.

In seeking summary judgment, the Defendant argued that there was no “meeting of the minds” on the essential terms of the lease and, accordingly, the respondent could not prove its case. The Court of Appeal held that in order for a lease to exist, all the essential terms must be resolved. If a matter remains unresolved, there can only be a lease if that matter was not essential.

The Court stated that it is trite that rent is an essential term of any lease. It further reiterated that the essential elements of a lease as set out by *Williams & Rhodes* (approved in many other cases), are “the parties, a description of the premises to be demised, the commencement date and duration of the term, the rent, if any, and all material terms of the contract not incidental to the relation of landlord and tenant.” Since the positions of the parties with regards to the rent were inconsistent, the Appeal Court determined that rent had not been agreed to, and because rent is an essential term of the lease, no lease existed. Accordingly, the appeal was allowed and summary judgment was granted.

What’s in a Name?

Limitation on Signage Rights Must be Clearly Outlined in the Lease

Heritage Education Funds Inc. v. Canadian Property Holdings (Ontario) Inc., involved an application by the tenant to the Ontario Superior Court of Justice for an interpretation of a term in a lease regarding exterior signage and a declaration that it is entitled to exercise its right under the provision in question.

In November 1990, the landlord’s predecessor entered into a lease with a corporate tenant that subsequently changed its name to Allianz Educational Funds Inc. (“Allianz”). On April 3, 2003, the landlord and tenant entered into an amending agreement granting certain rights to the tenant including the right to erect signs on the exterior of the building. The provision stated: “provided that the Tenant is [Allianz], and is actively operating its business at all times in the whole of the Premises, [...] the Tenant shall have a personal and non-transferable right to supply, install and maintain, at the Tenant’s sole cost and expense, a maximum of two signs which identify

the Tenant’s corporate identification [...]”. The term “Tenant” is defined in the amending agreement as “Allianz”.

The shares of Allianz were purchased by Heritage Financial Group Limited (“Heritage”) in August 2004 and Allianz changed its name to Heritage Education Funds, Inc. After the name change, the tenant sought to rely on its signage rights set out in the amending agreement. The landlord refused to allow the installation of the signs on the basis that the signage rights were granted to Allianz as tenant.

The landlord’s position was that the wording of the clause extended signage rights to Allianz only. The landlord argued that Allianz was a prominent name in the insurance and financial services industry and that the signage rights were granted based on the prestige associated with that corporate name.

The tenant’s position was that it was entitled to the same rights as Allianz since the corporate name change did not create a new corporate identity. It argued that the landlord could have but failed to include a term in the amending agreement making signage rights contingent on the “Allianz” name being used on the sign. Further, there were other provisions in the amending agreement that were conditional on the tenant being Allianz that had not been challenged after the name change.

The Court stated that in order to determine the intention of a party to an agreement, a Court must make reference, on an objective basis, to what the party could have reasonably intended. The Court found that if the landlord had intended to limit the signage rights to the name “Allianz” then it should have been specifically provided for in the lease. The Court declared that the tenant was entitled to exercise its exterior signage rights granted pursuant to the amending agreement.

The moral of the story is that simply creating a right that is personal to the tenant then in possession of the premises does not allow a landlord to restrict the wording of the sign or to deny signage rights as a result of a change in name.

Who is Liable for Payment of Insurance Deductibles?

In *Lincoln Canada Services LP v. First Gulf Design Build Inc.*, the Ontario Superior Court of Justice



revisited the subject matter of the 1970's Supreme Court of Canada trilogy of decisions (*Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*; *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*; *Eaton (T.) Co. Ltd. et al. v. Smith et al.* - the "Trilogy") concerning subrogation¹ bars in the context of lease agreements. In those cases, the Courts examined the rights of landlords and tenants to be free of the risk of liability for damage arising from their negligence where one party had agreed to obtain insurance for a particular type of loss.

In *Lincoln*, pursuant to the terms of the lease, the tenant agreed to maintain fire and standard extended perils insurance coverage, including coverage for sprinkler leakages, without reference to a deductible. The lease further required that the policy contain a waiver of any subrogation rights the tenant's insurers may have against the landlord whether or not the damage was caused by the act, omission or negligence of the landlord.

A sprinkler leak occurred in the building in which the tenant's premises were located. The losses sustained by the tenant were less than the

¹ Where an insurance company pays its insured client for injuries and losses then sues the party which the injured person contends caused the damages.

deductible under its insurance policy and the tenant brought an action against the landlord for damage to its inventory and other repair costs associated with cleaning up the water.

The landlord argued that the insurance provisions in the lease prevented the tenant from claiming against the landlord for damage covered by the required insurance policy. Further, the landlord submitted that the wording of the subrogation bar demonstrated that the parties intended that the landlord not be responsible for such losses. The tenant argued that the language of the subrogation bar only restricted the insurer and not the tenant from claiming against the landlord.

In respect of this issue, the Court stated that it does not follow that just because the tenant's insurers have waived their subrogation rights, the tenant is permitted to sue instead. Upon examining the Trilogy, the Court found that the principle arising from these cases was that by agreeing to insure against a specific loss for which the other party would otherwise be liable in negligence, the insuring party has relieved the other from the risk of liability of the loss. Accordingly, by the tenant's agreeing to insure against damage from sprinkler leakages,

the landlord was relieved from the risk of liability for sprinkler leaks.

The tenant argued that it could claim the loss of the deductible against the landlord. The landlord rejected the distinction between the deductible and the amount covered by the insurer.

On this point, the Court held that the amount of a deductible is an issue between the insured and the insurer and should not have an effect on the allocation of risk as between the parties to the lease.

The lease also contained an indemnity clause in favour of the tenant for losses, costs and damages suffered as a result of the landlord's negligence. With regards to this provision, the tenant took the position that the indemnity overrides the insurance provisions. The landlord was of the view that the indemnity clause must be read in the context of the tenant's obligation to obtain insurance. On this point, the Court held that the tenant's argument must fail. The landlord may only be liable for negligence for those types of damage against which the tenant is not required to insure.

Depending on the wording of the insurance provisions of a lease, when taking out insurance against a specific type of loss, a landlord or tenant should be aware that it is likely responsible for any

damages relating to that type of loss. If the parties intend that a release or indemnity clause should override insurance/waiver of subrogation language, the lease should specifically say so.

This case is a concern to those who usually assume that so long as the lease contains an indemnity clause that applies to negligence, the innocent party should be able to claim against the negligent party for the insurance deductible and any other amounts not covered by the insurance policy.

No Mandatory Injunction if it Won't Serve a Function

Although a lease is a commercial document that is usually entered into freely by the parties, certain provisions may not be enforceable. In situations where the continuous operation of a strong tenant is of utmost importance to a landlord, landlords have attempted to ensure their rights subsist in novel ways. One example is including in the lease a consent by the tenant to a mandatory injunction. However, although a tenant may agree in the lease to a mandatory injunction requiring it to continuously operate, there is no guarantee that a Court will grant it.

Longwood Station Ltd. v. Coast Capital Savings Credit Union, involved an application by the plaintiff landlord for an interlocutory mandatory injunction requiring the defendant tenant to continue in business at the landlord's premises until the expiration of the term of the lease. The tenant found it necessary to move to larger premises. When it could not find suitable premises in the landlord's property, it abandoned the premises and undertook to pay rent until the expiration of the term of the lease in July 2008.

The lease contained a continuous operation clause and a provision whereby the tenant acknowledged that its continuous operation was of the utmost importance to the





landlord and it consented to an injunction or an order compelling the tenant to continuously operate its business in the premises.

The British Columbia Supreme Court noted that the landlord faced the additional obstacle of Courts' general reluctance to make orders that require the ongoing supervision of the Court. The Court reviewed the test to be satisfied on such an application and cited the Ontario case of *Tritav Holdings Ltd. v. National Bank of Canada* as a case involving a similar fact situation.

The Court held that there was a serious issue to be tried, but the allegation of irreparable harm was tenuous and the balance of convenience did not favour the landlord. There was less than one year of the term remaining and the tenant was not an anchor tenant. The landlord could mitigate its loss by seeking a new tenant. In dismissing the application, the Court found that it was not an appropriate situation for the Court to exercise its jurisdiction to order a mandatory injunction.

Doctrine of "Community of Interest"

The doctrine of "community of interest" is an exception to the rule of privity of contract and has been applied to permit the enforcement of restrictive covenants in the context of shopping centre leases. It allows one tenant to insist that another tenant live up to its contractual obligations. In the following case, the doctrine was applied to a strata development.

In *Lee Men International Enterprises Co. v. Siegle Properties BC Ltd.*, an occupant in a strata development sought remedies from the strata corporation and other tenants based on breach of contract and negligence. The developer of the project agreed to restrictive covenants in certain purchase agreements with purchasers of the strata units. The plaintiff alleged that other occupants had been selling products in breach of the restrictions on their use and they conflicted with those uses granted to the plaintiff. The plaintiff claimed that the strata corporation failed to enforce these restrictions and was thus in breach of its duty.

The Court found that the covenants contained in the initial purchase agreements were between the developer (not the strata corporation) and the purchaser and therefore there was no privity between the purchasers and the strata corporation. Further, the restrictive covenants were not registered against the land nor did they run with the land.

The plaintiff submitted that the doctrine of "community of interest" applied as the initial purchase agreements and leases entered into by the developer created a community of interest among owners and occupants such that occupiers had standing to insist that another occupier live up to its contractual obligations, namely, the restrictive covenants.

The Court refused to apply the doctrine where the restrictive covenants had expired or no longer applied and they expressly contemplated that

subsequent use would be governed by the strata by-laws. Since there was no violation of the by-laws, the claims against the strata corporation could not stand.

Options to Renew/Extend – What if the Conditions Have Not Been Satisfied?

Often it is a condition precedent to an option to renew that the lease be in good standing or the tenant not be in default. In certain circumstances a tenant default, such as the non-payment of rent or other amounts owing under the lease, is within the control of the tenant. In other situations, the tenant may have attempted to comply with the terms of the lease but was unable to. The law appears clear that in order for a Court to use its jurisdiction to grant a tenant relief from forfeiture, the tenant must have made diligent efforts to comply with the terms of the lease which are unavailing through no default of its own.

In *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*, the British Columbia Court of Appeal examined whether a Court would grant a tenant relief from forfeiture in a situation where the tenant failed to comply with a condition precedent to the exercise of its option to renew. The lease, entered into between the landlord's predecessor and tenant, contained an option to renew provided there was no outstanding default. The option was exercisable on not less than six months notice prior to the expiry of the term on November 30, 2006. The tenant was aware that there were amounts owing to the landlord, yet elected not to pay them. The landlord appealed an order allowing the tenant's application for relief from forfeiture.

In January 2006, a dispute arose between the landlord and tenant regarding alleged amounts owing for GST on rent in the amount of \$5,292.14. The tenant eventually paid \$4,006.79 but did not explain why it did not pay the full amount. The

tenant delivered to the landlord a notice to renew the lease on May 29, 2006. Eleven days later the landlord sent a notice of default to tenant on account of non-payment of the balance owing for GST. On August 23, 2006, the landlord served the tenant with a notice of termination. The tenant paid the balance owing for arrears of GST the next day and filed a petition with the Court claiming relief from forfeiture.

The issue before the British Columbia Court of Appeal was whether a tenant who is in breach of covenants in a lease, the performance of which are conditions precedent to the exercise of an option to renew the lease, is entitled to relief from forfeiture. The Court noted that "it is essential to distinguish between the court's equitable jurisdiction to grant relief from

forfeiture for the non-observance of covenants in an existing lease and from the failure to comply with conditions precedent to the exercise of an option to renew a lease." In a situation where a tenant applies for relief from forfeiture to allow it to retain the balance of the term, equity recognizes that a tenant may be permitted to cure its default. However, where

the relief from forfeiture sought concerns the exercise of an option to renew, the tenant must comply with the conditions precedent.

In *Towcon Holdings Inc. v. Pinnacle Millwork Inc.*, the tenant entered into a lease with the landlord's predecessor ("Bailey") for a term that expired on November 13, 2005. Pursuant to the lease, the tenant had an option to renew the term for a period



of five years provided the tenant was not then in default.

Bailey and the tenant had an informal relationship and they often entered into agreements regarding the premises that were not reduced to writing. When the tenant lost a major customer and could not pay four months arrears of rent, Bailey agreed to treat the amounts owing as a receivable in order for the tenant to be in good standing and eligible to exercise its option to renew. Bailey's approach was to work with the tenant to assist it in turning around its business. The tenant alleged that it orally exercised its option to renew with Bailey prior to the sale of the building. Bailey denied this assertion and the landlord brought an application seeking an order terminating the lease and for a writ of possession.

The Ontario Superior Court of Justice found that Bailey did agree that the tenant could exercise its right to renew without putting it in writing. In coming to this conclusion the Court noted that Bailey knew the business was having difficulty and that the termination of the lease would be catastrophic for the tenant. It would be extremely expensive for the tenant to move given the equipment it employed in its business. The only way that the tenant could pay the arrears owing which had been converted into a receivable was to stay in business. The tenant could not stay in business without the extension of the lease.

When Bailey sold the building, it agreed to indemnify the landlord against any loss or damages it may suffer as a result of claims advanced by the tenant pertaining to matters arising prior to the date of closing. As such, Bailey could be liable to the landlord for damages if the tenant was successful

in this action. The Court found that it was unlikely that Bailey would have reversed its position that it was trying to assist the tenant in turning around its business by maintaining that the lease was at an end.

The Court also examined the issue of whether by demanding and accepting rent and insurance premiums on the precise terms as contemplated by a renewed lease, the landlord had confirmed the lease. It was held that the landlord had confirmed the lease by its conduct for several reasons - the landlord had the tenant's last months' rent cheque and the landlord did not apply this amount to what it alleged to be the last month of the tenancy. Moreover, the landlord accepted the tenant's monthly rent cheques and the increased insurance premiums that the landlord demanded that the tenant pay.

In the event that the Court erred on the above issues, it examined whether it should grant the tenant relief from forfeiture. In determining that the tenant should be granted the relief sought, the Court examined the equities between the parties. It found that the tenant had not been in default of its obligations under the allegedly renewed lease as it had paid its rent and the increased insurance premiums on time. In the event that the tenant would be granted relief from forfeiture, it would not cause a loss to the landlord. Conversely, if relief from forfeiture was not granted, it would force the tenant to cease carrying on business and would put the tenant's forty employees out of work. [MG](#)

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Professional Notes

Michael A. Goldberg published “SIB Rules and Employees of Partnerships: Next Time Maybe an Announcement?” in the July 2008 edition of *Tax Notes*.

Stephen J. Messinger will act as Chairman at the ICSC Forum on “New Urbanization: Moving From Now to Wow!” scheduled for September 16 at the Carlu Event Theatre in Toronto.

As part of the 2007-08 Meritas Leadership Institute Class, **Samantha A. Prasad** presented “Why Sustainability Matters to Meritas” at the 2008 Meritas Annual Meeting in Chicago on May 8. Samantha was also asked to serve as a Mentor for the 2008-09 Meritas Leadership Institute Class and to serve on the Advisory Committee for the Meritas 2009 Annual Meeting. Samantha spoke on “Succession Planning Issues Involving a Corporation” at the STEP Ontario seminar in Toronto on May 20. The conference was broadcast across Ontario.

The **Commercial Leasing Group** will be participating in the RealLeasing Conference to be held September 18 and the ICSC Canadian Conference to be held on October 27-29. Both conferences will be held at the Metro Toronto Convention Centre in Toronto.

Minden Gross’ **Tax Group**, as part of Meritas Tax Canada, sponsored and participated in the 10th National

Conference hosted by the Society of Trust & Estate Practitioners (STEP) held at the Metro Toronto Convention Centre in Toronto on June 5-6. Wills and Estates lawyer **Howard S. Black** was a panellist discussing a case study entitled “A Trustee’s Nightmare”.

Firm News

Minden Gross LLP is pleased to welcome **Alicia W. McKeag** to our Corporate/Commercial Group and **Shaun A. Miller** to our Litigation Group.

Raymond M. Slattery, David T. Ullmann, Martin Maierovits and **Brian J. Temins** acted for a group of companies comprising the Hard-Rock Paving group in its sale of certain assets to each of Brennan Paving Limited and Waterford Sand & Gravel Limited. The sale of assets was made pursuant to a Vesting Order as Hard-Rock Paving was under CCAA protection.