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Commercial Leasing Bulletin

Navigating the Hazards of Waivers and Estoppels in Commercial Leasing – Part 1

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No matter how carefully you draft a lease, it can all be for naught if the parties, through their words, conduct, or silence, give up the very legal rights you bargained for. This paper will examine the doctrine of waiver and estoppel and various landlord and tenant conduct that can lead to unintended consequences. Part 1 will introduce the doctrines of waiver and estoppel and examine waiver of relief from forfeiture and continuing breach. Part 2 will cover waiver and estoppel in the context of commercial leasing and the effect of non-waiver clauses on landlords and tenants.

Background

The doctrines of waiver and estoppel are equitable principles that are closely related. Waiver occurs when one party foregoes reliance on some known right or defect in performance by the other party. Waiver will be found only where the evidence demonstrates that the party waiving a right had:

(i) full knowledge of its rights; and
(ii) an unequivocal and conscious intention to abandon them.[1]

Waiver is a unilateral action. It involves one party abandoning or relinquishing their legal right. Estoppel, on the other hand, involves the interaction of two parties.[2] It requires that:

(i) the words or conduct by one party leads to a certain belief by the other party as to their contractual position;
(ii) the party to whom the words were spoken or conduct performed relied upon this belief; and
(iii) it must be to their detriment.[3]

[1] *Saskatchewan River Bungalows Ltd. v. Maritime Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.) at para 20.

[2] *Chan v. Lorman Developments Ltd.* (2007), SKQB 173.

[3] Friedman, G.H.L., *The Law of Contract*, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 566-567.

While there are many different types of estoppel, we will only be examining estoppel by conduct or representation and promissory estoppel.

Estoppel by Conduct or Representation

Estoppel by representation arises when a party represents to another party that it will not rely on its legal rights with respect to an existing fact. Jill E. Martin described it in *Hanbury and Martin: Modern Equity* as follows:

> "[A] person who makes an unambiguous representation, by words, or by conduct, or by silence, of an existing fact, and causes another party to act to his detriment in reliance on the representation will not be permitted subsequently to act inconsistently with that representation."[4]

Promissory Estoppel

If the words and conduct do not relate to an existing fact but rather, a promise of future intention (for example, by creating the impression that a party would not hold the other strictly to the terms of the lease), then it is no longer estoppel by representation but rather, promissory estoppel. Lord Denning explained the doctrine of promissory estoppel as follows in the case of *Combe v. Combe*:

> "The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him..."[5]

It is critical, then, when raising an estoppel defence that there is evidence from which it can be inferred that the party making the promise intended to change the legal relations created by the contract[6] and that the words or conduct must be shown to have given rise to an unambiguous promise.[7] If these requirements are not satisfied, the courts may find that there is merely an indulgence which will not, on its own, give rise to promissory estoppel.

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[4] Martin, Jill E., *Hanbury and Martin: Modern Equity*, 16th ed. (London: Sweet & Maxwell, 2001), at p. 891.

[5] [1951] 2 K.B. 215 (Eng. C.A.) at p. 220.

[6] *John Burrows Ltd. v. Subsurface Surveys Ltd.* (1968), 68 D.L.R. (2d) 365 (S.C.C.).

[7] *Engineered Homes Ltd. v. Mason* (1983), 146 D.L.R. (3d) 577 (S.C.C.).

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Waiver of Relief from Forfeiture

In the context of commercial leasing, waiver and estoppel arise in a number of situations. One of the most common examples of waiver occurs when a landlord accepts future rent or otherwise treats the lease as subsisting, despite having knowledge of a default that would allow the landlord to terminate the lease.

The leading Ontario case on waiver of forfeiture caused by a landlord accepting future rent is *Malva Enterprises Inc. v. Rosgate Holdings Ltd.*[8] In this case, the tenant brought an action against the landlord for its failure to install a conveyor belt and sought an order relieving it from paying rent until the conveyor belt was installed. The landlord counterclaimed for arrears. The landlord's cross-motion was allowed and the tenant was ordered to pay the arrears. The tenant subsequently delivered a cheque to the landlord for the following month's rent, which the landlord accepted, but the landlord notified the tenant that it intended to terminate the lease. The tenant brought an application seeking a declaration that the lease was in full force and effect, but the landlord terminated the lease prior to the return date.

The Court found that acceptance of rent accruing after the tenant's non-payment of rent served to deprive the landlord of its right to forfeit the lease for the previous non-payment of rent even if there were still arrears outstanding. It quoted John Ewart in *Waiver Distributed* as follows:

> "A demand for the payment of rent which fell due after a breach of a stipulation is evidence of an election to continue the tenancy notwithstanding the breach; for the demand necessarily implies the continued existence of the lease (without which there could be no rent), and is inconsistent with election to terminate. *A fortiori*, the institution of an action for the recovery of such rent furnishes similarly satisfactory evidence."[9]

Consequently, the Court found that the landlord's actions in accepting the future rent waived its right to forfeiture that, once waived, could not be revived.

In *Fitkid (York) Inc. v. 1277633 Ontario Ltd.*,[10] the Court points to other conduct that is considered a waiver of landlord's right to forfeiture, in addition to accepting rent. The tenant operated arts and crafts, gymnastics, and swimming programs for children in the leased premises. Because of a dispute over rent adjustments and who was responsible for roof repairs, the tenant withheld rent. In response, the landlord issued a notice of default on March 6, 2000, demanding payment of the arrears (calculated based on the arrears from the rent reconciliation, difference in adjustments

[8] (1993), 14 O.R. (3d) 481 (Ont. C.A.) [*Malva*].

[9] Ewart, J.S. *Waiver Distributed*, (Cambridge, MA: Harvard University Press, 1917) at p. 168.

[10] 2002 CanLII 9520 (Ont. S.C.J.)

between the January and February rent, and March rent based on the higher adjusted amount). The tenant paid the March rent on March 16 based on the pre-adjustment levels.

Meanwhile, the parties continued to discuss the roof (including negotiating the sharing of costs) and the tenant paid and the landlord accepted rent for April based on the pre-adjustment levels. When the tenant advised the landlord that they had called municipal building and health inspectors to inspect the roof over the pool, the landlord replied on April 11, advising that the issue of the rent arrears and the roof were separate and demanding payment of the arrears by April 13, failing which the landlord would exercise its rights under the law. No payment was received by April 13, and the landlord authorized the bailiff to terminate the lease on April 17 based on the arrears owed.

The tenant argued that the landlord wrongfully terminated the lease. While notice of default had been given on March 6, 2000, the tenant argued that the landlord's subsequent conduct constituted waiver of the right of forfeiture. The Court agreed and found that the landlord's conduct after the March 6, 2000 notice of default in accepting the April rent, negotiating the roof repairs with the tenant (including demanding the tenant share the cost), and revising the demand for arrears all indicated that the landlord treated the tenancy as continuing and constituted a waiver of the right of forfeiture for the earlier breach. As a result, the termination of the lease was unlawful.

Continuing Breach

In the case of *Malva* discussed above, the Court found that once the landlord waived its right of forfeiture by accepting future rent, the landlord cannot revive its right. The Courts do not, however, treat all defaults the same. Where a default is continuing, the landlord can still terminate the lease, so long as the default continues to occur, notwithstanding the landlord's earlier conduct, which may have constituted a waiver.[11] The concept of continuing breach was outlined by Dixon J. (as he then was) in the Australian case of *Larking v. Great Western (Nepean) Gravel Ltd. (in Liquidation)*:

> "If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the

[11] Wilken, Sean, *The Law of Waiver, Variation and Estoppel*, 2nd ed. (New York: Oxford University Press 2002) at 493.

> state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.
>
> The distinction may be difficult of application in a given case, but it must be regarded as one depending upon the meaning of the covenant. It is well illustrated by the construction given to the ordinary covenant that premises will be insured and kept insured against fire. Such a covenant is interpreted as imposing a continuing obligation to see that the premises are insured, so that the covenant cannot be broken once for all, but, on the contrary, failure to insure involves a continuing breach until the omission is made good."[12]

Some other examples of continuing breach include the following:

- breach of a continuous operating covenant[13]
- a tenant's violation of a clause in a lease which prohibits a certain use[14]
- failure to keep the leased premises in a good state of repair[15]
- failure to comply with insurance obligations[16]
- over-serving patrons which was contrary to tenant's obligation to act "in a manner consistent with the best interests of the Building as a whole," as the patrons were so intoxicated that they vomited and urinated around the building and caused other disturbances.[17]

Acceptance of future rent and occupation by an assignee or sublessee in violation of a covenant against assigning or subletting are not, however, continuing breaches.[18]

Conclusion

Waivers and estoppels emphasize how behaviour, even if unintended, can have enormous and unexpected consequences. Part 2 will cover other examples of waiver and estoppel in commercial leasing and the effect of non-waiver clauses on landlords and tenants.

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[12] (1940), 64 C.L.R. 221, at p. 236.

[13] *Pickering Square v. Trillium College Inc.* 2016 ONCA 179.

[14] *Sim v. Large* (1980), 22 B.C.L.R. 278 (B.C. S.C.) and *Griffin v. Tomkins* (1880), 42 L.T. 359 (Eng. Q.B.)

[15] Bennett v. Herring (1857), 140 E.R. 784, 3 C. B. (N.S.) 371.

[16] *Larking v. Great Western (Nepean) Gravel Ltd. (in Liquidation)*, *supra*, note 12.

[17] *1383421 Ontario Inc. v. Ole Miss Place Inc.*, [2003] O.J. No. 3752 (Ont. C.A.)

[18] *Walrond v. Hawkins* (1875), L.R. 10 C.P. 342.

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