MINDEN GROSS LLP

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RECENT DEVELOPMENTS *of* IMPORTANCE IN PROPERTY LEASING

Distress Remedy – *A Minefield*

The right of distress allows a landlord, without any judicial process, to seize, take into possession, and sell the goods and chattels of its tenant to satisfy any unpaid rent. There are many technical rules when exercising the right to distrain and landlords need to be aware of their potential personal liability.

Generally speaking, a landlord will lose its right to distrain if any of the following occur: the tenant becomes insolvent and files a proposal under the *Bankruptcy and Insolvency Act* (or the tenant becomes bankrupt); the tenant surrenders possession of the premises and the landlord accepts; the landlord ends the lease; the landlord sues for unpaid rent and obtains judgment; the tenant pays the amount owing to the landlord or its agent; or a receiver is appointed by a court.

In *Delane Industry Co. v. PCI Properties Corp.*, the Tenant withheld rent due to a dispute with the Landlord.[1] The Landlord wrote to the Tenant demanding payment for $120,358 in unpaid rent. The Tenant did not pay, and the Landlord issued a distress warrant. The proceeds from the sale of chattels were $9,500 - a lot less than the rental arrears. The Landlord terminated the lease for non-payment of rent. The lower court found that the Landlord had to

1 Referred to recently in *Midwest Ventures Ltd. v. 0935203 B.C. Ltd.* 2014 Carswell BC 3446

issue a fresh demand letter that specified the amount owed when distress did not produce sufficient proceeds to cover rental arrears. The Landlord appealed.

The British Columbia Court of Appeal agreed with the trial judge that a notice of default given by the Landlord during distress did not effectively end the Lease upon completion of the distress and held that the Lease would not be terminated under a "cumulative remedies clause". What was surprising was the Court's rejection that a landlord, who issues a new notice of default, can rely on rental arrears that accrued before the completion of distress as justification for terminating the lease.

The Court of Appeal disagreed that it was open to the Landlord to give the Tenant another notice of default, stating the unpaid rent based on breaches before or during distress as "such a course would amount to a nullification of [the Landlord's] election of distress – and hence its irrevocable waiver of the past breaches – up to the completion of distress."

The Court stated that it was a clear principle of contract law where Party A breached a term, which allowed Party B to end the agreement, but Party B chose to affirm the contract (e.g., by opting for the distress remedy instead of ending it). As such, Party B could not rely on the same breach (e.g., original unpaid rent) to end the contract. Although the Landlord lost its right to end the contract for the original unpaid rent, the Landlord could sue for the balance owing after distress was completed. The Landlord could give a new notice of default based on any new default, but it would have to comply with requirements in the Lease for defaults (and termination) and state clearly the amount of rent, post-distress, said to be due and owing.

Dual Limitation Regime – *Finally Some Judicial Guidance*

When the *Limitations Act, 2002* came into force in Ontario on January 1, 2004, it replaced Parts II and III of the former *Limitations Act*. Part I of the old act (dealing with real property interests) was renamed the *Real Property Limitations Act* ("*RPLA*").

The new *Limitations Act* was designed to simplify the application of limitation periods by providing a basic limitation period of two years based on the principle of discoverability. Given the two limitation regimes, the obvious question is which statute applies – the new *Limitations Act* with a two-year limitation period? or the *RPLA* with a six-year limitation period? The *RPLA* does not specifically address leases, although "rent" is defined to include "all annuities and periodical sums of money charged upon or payable out of land" and the *RPLA* refers to "arrears of rent".

Opinion was divided on whether lease disputes would fall under the *RPLA* or the new *Limitations Act*. Over time, support grew for applying the six-year limitation period under the *RPLA* to landlord claims for unpaid rent and applying the two-year limitation period under the new *Limitations Act* to a tenant's claim for overpayment of rent. And since most tenant defaults can arguably be converted into a rental default by virtue of the Landlord's self-help remedies and indemnity clauses, the predominant view was that landlords can go back six years whereas tenants are limited to two years. However, a recent case appears to dramatically limit scenarios where a landlord can take advantage of the six-year limitation period under the *RPLA*.

In *Pickering Square Inc. v. Trillium College Inc.*, the parties entered into a lease for a five-year term expiring on May 31, 2011. Under the lease, the Tenant was required to operate its business "continuously, diligently and actively" at all times. If it did not, the Landlord was entitled under the Lease to collect an extra charge from the Tenant for each day it failed to operate its business in the premises (the "Per Diem Charge"). The clause described the Per Diem Charge as a liquidated sum representing the minimum damages that the Landlord is deemed to have suffered because of the Tenant's failure to operate. The Court noted that the clause expressly stated that the Per Diem Charge was, "in addition to the Minimum Rent and Additional Rent", payable under the Lease.

After the Tenant vacated the premises in December 2007, the Landlord brought an action for payment of the Per Diem Charge. Later, the parties entered into a settlement agreement that required the Tenant to resume occupation of the premises by October 1, 2008. The Tenant did not re-occupy the premises. In February 2012, the Landlord began a second action against the Tenant for payment of the Per Diem Charge. The Tenant brought a summary judgment motion claiming that the limitation period began to run on October 1, 2008; therefore, the Landlord's action was barred by the two-year limitation period under the *Limitations Act*.

The Landlord argued that the appropriate limitation period was six years because the Per Diem Charge fell within the definition of "rent" under the Lease, which included "any and all sums of money or charges required to be paid by the Tenant."

The Court had to determine whether the Landlord's claim was for "damages", where the *Limitations Act* would apply, or if it was for "rent", where the *RPLA* would apply. The Court stated that with the new *Limitations Act*, "the

legislature created a single, comprehensive general limitations law that is to apply to all claims for injury, loss, or damage except, in relevant part, when the *RPLA* specifically applies." As such, the Court was of the opinion that the new *Limitations Act* should be interpreted broadly and the *RPLA* should not. The Court noted that the definition of "rent" in the *RPLA* refers to "all annuities and periodical sums of money charged upon or payable upon the land." It concluded that "rent" in the *RPLA* applies to "rent service or rent reserved, and means the payment due under a lease between a tenant and landlord as compensation for the use of land or premises."

The Court did not agree that the Per Diem Charge was "rent" under the *RPLA* just because it was defined as "rent" in the Lease. The Court opined that "'rent' in the *RPLA* is not an empty vessel that the parties may fill at their discretion. It must be interpreted in light of the context, scheme, and object of that statute and the law of limitations in Ontario." As such, the Court found that the Landlord's claim was for damages; therefore, the new *Limitations Act* would apply.

The Court agreed that the two-year limitation period began on October 1, 2008 (when the Tenant failed to resume occupation), but the Court found that the Tenant's breach was continuous and that the Landlord suffered damages for each day that the Tenant failed to conduct its business in the premises. Accordingly, the Landlord's Per Diem Charge claim was time-barred for the period before February 2010 (two years before the Landlord began its action), but not for the period between February 2010 and the last day of the Term - May 31, 2011.

In *Simone v. Investor's Group Trust Co. Ltd.*, the Court considered when a limitation period begins. The Tenant ran a tanning business in a shopping centre that was nine separate, but close, buildings. A fitness facility ("Snap Fitness") started a lease with the Landlord in the same shopping centre. Snap Fitness operated one tanning bed for exclusive use of its members. The Tenant demanded enforcement of its exclusive use clause. The Landlord maintained that the exclusive use clause applied only to the building where the Tenant's unit was located and not to the entire shopping centre. In June 2010, the Tenant sent an e-mail to the Landlord complaining its sales were down by 10% due to the fitness facility. When the Tenant brought an action against the Landlord in April 2013, the Landlord applied for summary dismissal of the claim based on expiry of the limitation period.

Was the Landlord entitled to immunity from liability because the Tenant did not file its claim within the two-year limitation period in Alberta's *Limitations Act*? The Court rejected the Tenant's argument that there was a fresh injury each month the Tenant's business lost sales after Snap Fitness opened. To view it as such would mean the limitation clock would start again with each monthly loss in sales. This would undermine the purpose of limitation legislation and would fail to protect the Landlord from what other courts described as "ancient obligations". The Court cited *Peixeiro v. Haberman*, which set out that "neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period."

The Court stated that if the Landlord violated the Tenant's exclusive use, it would constitute a single event of default (as opposed to a continuing default). Since the Tenant's claim came after the two-year limitation period expired, the Landlord was "entitled to immunity from liability in respect of the Tenant's claim" and the Court summarily dismissed the matter.

Lowering the Threshold for Fundamental Breach

A tenant may be justified in ending a lease under the principle of fundamental breach. Contract law recognizes that when a party to a contract commits a breach so significant that it deprives the other party of the very essence of that which is contracted, such a breach goes to the "root of the contract". If a court finds that there has been a fundamental breach, the wronged party may then walk away from the contract and, additionally, claim damages against the defaulting party.

Since the 1990s, some tenants have successfully argued that the landlord's breach was a fundamental breach and the tenants were entitled to treat the lease as at an end. More recently, *Berhe v. Colbenz Holdings Ltd.* was added to that line of cases.[2]

In *Behre*, the Tenant owned and operated a hair salon that specialized in African hairstyling and sought to expand its business by offering nail, massage, and tanning services. After learning that the Tenant's expanded business would compete with another long-standing tenant, who offered traditional men's haircuts, the Landlord tried to impose restrictions on the Tenant's intended business plan by limiting its advertising and services to African hairstyling. The Tenant left the premises and brought an action against the Landlord for damages for breach of contract. The trial judge held that the Landlord's restrictions on the intended business amounted to a fundamental breach of the Lease and

2 Referred to recently in *Francescutto v. Delta Hotels No. 48 Holdings Ltd.* 2014 BCPC 203

the Tenant was entitled to treat the Lease as at an end. The British Columbia Court of Appeal dismissed the Landlord's appeal.

Compare *Behre* with the Ontario Court of Appeal's decision in *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.* where the Court held that a six-week delay by the Landlord in delivery of possession was not a fundamental breach. The Court acknowledged that the breach would have material consequences for the Tenant, but the delay in occupancy had not substantially deprived the Tenant of the whole benefit of the contract.

One could argue that the complete inability to operate due to a significant delay in occupancy deprives a tenant more than imposing use restrictions (which did not prevent the Tenant from continuing its existing specialty business).

Breach of Quiet Enjoyment

In *Stearman v. Powers (c.o.b. Walkabout Casual Wear)*, the Tenant signed a five-year Lease in November 2008. The Tenant stopped paying rent in October 2009 and left in November 2009. The Landlord brought an action for unpaid rent and other incidental charges under the Lease. The Supreme Court accepted that the Landlord expressly covenanted with the Tenant for quiet enjoyment with an implied term of fitness. The Supreme Court also accepted the Tenant's evidence that an odour discouraged customers from entering the store, created an uncomfortable work environment, and that the odour could not have been detected until after using the HVAC system. The Supreme Court held that the odour breached the Landlord's covenant of quiet enjoyment, which substantially deprived the Tenant of the whole benefit of the Lease and entitled her to terminate. The Landlord was also responsible for all proven damages flowing from the breach.

The Court of Appeal reversed the decision. It found that the trial judge had failed to give effect to the terms of the Lease and improperly found a breach of the implied covenant for quiet enjoyment. It found that there was no evidence that the odour was caused by any act or omission of the Landlord or someone acting for him. Furthermore, the Court of Appeal emphasized the terms of the Lease, which provided that the Tenant accepted the premises "as is, where is", and that the Tenant was responsible for the service and repair of the HVAC system.

On whether the presence of the odour was a fundamental breach of the Lease, the Court of Appeal found that the Tenant was able to carry on business and was not forced to shut down due to safety and health risks. Furthermore, the Court of Appeal stated that the Tenant was unable to prove loss of sales due to the odour. As such, it held that the trial judge erred in finding that the Tenant had been substantially deprived of the whole benefit of the Lease and, therefore, was not entitled to terminate or repudiate the Lease. The Court of Appeal set aside the trial judge's order and remitted the Landlord's claim back to the Supreme Court.

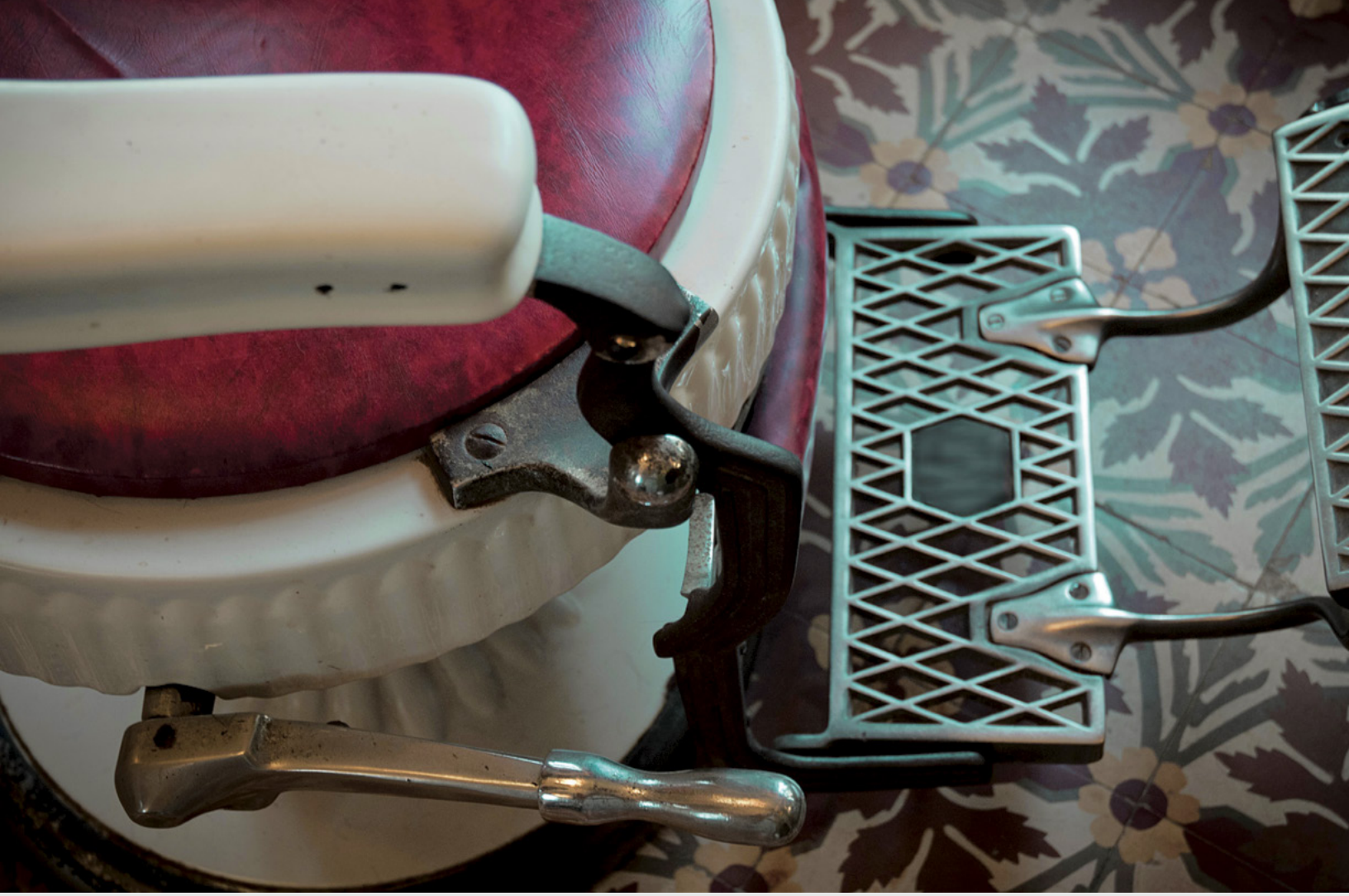
Frustration of Contract

In general, frustration of contract requires an unforeseeable event that makes the agreement incapable of completion. In *First Real Properties Ltd. v. Biogen Idec Canada Inc.*, the Landlord entered into an Offer to Lease with the Tenant. Central to the negotiations was the renovation of the existing premises to add windows for natural light. A work schedule was included in the Offer that stipulated that the Landlord would undertake "at its sole cost and expense" to "create openings in the existing perimeter wall and prepare for installation, supply and install seven new exterior windows." The cost estimate for the windows was $48,000 and the "Landlord's cap" was set at $169,000.

An RFP was tendered to execute the work. Preliminary architecture and engineering studies indicated that the proposed plan would cost closer to $400,000. The Tenant rejected a revised plan that fell within the Landlord's $169,000 cap because it would result in significantly less natural light.

The Landlord and Tenant agreed to explore a settlement. The settlement negotiations included adding one year to the Lease Term in exchange for a commitment to install the windows at the Landlord's expense. A new Lease was prepared with a term of 11 years with a cap of $500,000 and submitted for execution. The Landlord was under the impression that the Tenant representative who negotiated the Lease had the authority to bind the Tenant, but the Tenant denied it and claimed that the new Lease required higher-level approval. In the end, the Tenant refused to sign the new Lease and the Landlord brought an action for damages for the Tenant's non-performance of the executed Offer or the unexecuted draft Lease.

Was the draft Lease enforceable? The Court found that the final draft Lease was not enforceable. The Landlord submitted that the product of the negotiation was enforceable and claimed rent on an 11-year term. The Landlord argued that if the draft Lease was not enforceable, then the Offer was enforceable and claimed for rent based on the shorter term of 10 years. The Landlord also argued that the "indoor management rule" or the ostensible authority of the Tenant representative to conduct



the affairs of the Tenant in Canada meant that the agreement was binding. However, the Court found that in law, the draft Lease was unenforceable, as it had not been signed.

Was the Offer enforceable or was it frustrated by the cost of the windows? The Court explained that frustration occurs when a situation arises for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from which was undertaken by the contract." The Court characterized the discovery that the wall could not receive the windows as an unforeseeable event that occurred with no fault of either party and that there was no provision in the Offer to adjust the rights and obligations of the parties in this scenario. Accordingly, the Court ruled that the Offer was frustrated and unenforceable. This case is scary for landlords as it allowed a tenant to walk from a binding lease contract due to expensive windows.

Option to Renew

Cases dealing with options to renew appear to be increasing. In *419219 Alberta Ltd. v. 238709 B.C. Ltd.*, the Tenant sought a declaration that its option to extend its Sublease had been validly exercised and, accordingly, the Sublease was in good standing. The Court found that signing, executing, and delivering the estoppel certificate extended the Sublease and replaced the Tenant's requirement to give a separate notice. The estoppel certificate was in writing and delivered within the required time. Also, the Landlord prepared the estoppel certificate and delivered it to the Tenant for signing, showing the Landlord's clear intention that the Tenant would be bound by the statements contained in the estoppel certificate.

Tenants Beware of Tainting Your Exercise Notice with Proposed Changes to the Lease: Be sure to keep them separate and distinct. If you decide *not* to exercise your option unless you obtain certain amendments, then negotiate the amendments separately before you exercise the option to extend/renew and well before your exercise period ends. The extension/renewal and lease amendments may be documented in the same agreement, but avoid making your exercise notice conditional on new proposed amendments.

In *441 Main Inc. v. Silver Pawn Pictures Inc.*, the Tenant had a renewal option that did not include an option to purchase the premises. The Tenant continually asserted

that it had the right to purchase, but the Landlord did not accept this position. The Tenant gave notice in writing to the Landlord to exercise the renewal option and noted it wanted to buy the premises from the Landlord. The Landlord rejected it and issued a notice to the Tenant to vacate the premises. The lower Court held that the notice of renewal was valid, but the Landlord appealed. The Manitoba Court of Appeal found that the judge erred when he found that the Tenant's notice to exercise its option was neither ambiguous nor conditional. By including a sentence about the purchase of the property, the Tenant tried to impose a new term or condition in the Landlord-Tenant relationship that did not exist under the Lease. In essence, the Court characterized the notice as a counter-offer that did not exercise the option under the Lease.

In *Rinaldo Hair Stylist Ltd. v. bcIMC Realty Corp.*, the Ontario Court of Appeal dismissed a case where the Tenant, a hair styling company, held a Lease with the Landlord for a 10-year term expiring May 30, 2008. The Lease had a renewal option for two additional five-year terms, subject to written notice by May 31, 2007. The Tenant approached the Landlord's leasing agent to expand the premises to open a men's spa and to add 10 years to the existing term of the Lease. The leasing agent declined the Tenant's request to assist with the expansion and reminded the Tenant of its renewal option under the Lease. Despite negotiations, the parties were far apart on renewal terms as of March 2007. In July 2007, after the Tenant was silent for two months, the agent notified the Tenant by letter of the Landlord's decision to end negotiations and to look for other leasing prospects.

The Tenant brought an action against the Landlord and argued that the Landlord lead the Tenant to reasonably believe that the Landlord wanted to renew or extend the existing term. At issue was whether the Landlord led the Tenant to believe that it had waived the strict written notice requirement under the Lease. The trial judge granted the Landlord's application to dismiss the action. It found no conduct that could reasonably have led the Tenant to infer that the Landlord was willing to waive compliance with the renewal notice. The Ontario Court of Appeal dismissed the Tenant's appeal and held that any negotiations after the deadline were not about the renewal option, but were instead negotiations in respect of a potential new arrangement.

Landlords Beware of Acquiescence: If you want to take the position that your tenant's option to renew/extend has been voided by a default, play it safe by delivering your default notice before you receive the tenant's exercise notice. In *Hebert v. Beal*, the Court had to determine if the Tenant was in breach of the Lease and then prevented from renewing it for an additional term of five years pursuant to the terms of the Lease. The Tenant had previously taken over a "Dooly's" franchise and negotiated a new Lease with the Landlord. Eight months after, the Tenant decided to operate the business independently under the name "Uncle Larry's." The Tenant sent notice exercising its option to renew the Lease but the Landlord declined as the Tenant was in breach of various terms of the Lease, including the Tenant's failure to obtain the Landlord's consent to alter the premises and its failure to operate the franchise.

The Court noted that while the Tenant began operating its independent business in 2007 and modified the premises in 2009, the Landlord never raised any issues until they received the renewal notice in 2013. The Court found the Tenant's testimony more reliable and accepted its evidence that the Landlord had given oral consent, had approved the alterations, and was consequently aware of them. The Court also accepted that the Landlord was aware of and in agreement with the operation of the independent business years before receiving the letter of renewal. **Take Note:** A landlord should not wait to assert a tenant default until after it receives the tenant's election to exercise an option to renew or extend.

Based on common law principles, a contract is complete and enforceable when the parties have reached agreement on its essential terms or when enough of the essential terms of the contract can be ascertained. In the context of a renewal/extension option in a lease, a clause is void for uncertainty if it is merely an agreement to agree in the future. Generally speaking, cases fall into three categories: (1) where the rent is simply "to be agreed", generally this is merely an agreement to agree and consequently unenforceable; (2) where the rent is to be established by a stated formula (e.g., based on "fair market rent"), but no machinery is provided to get the rental rate (e.g., if the parties fail to agree, an independent third party will determine it), the courts may enforce the clause and supply the missing machinery by determining rent based on the formula; and (3) where the formula and the machinery for applying the formula are provided to produce the rental rate, the clause will be held enforceable.

The case of *Delphi Management Corp. v. Dawson Properties* falls into category (1). The Tenant brought an application under the *Commercial Tenancies Act* for a declaration that it validly renewed its Lease for another five-year term. The Tenant owed rent when it purported to give notice of its intention to renew. The Landlord entered into a new binding lease agreement with a third party for the premises. The Court noted that the current renewal right provided that the monthly rent would be determined by agreement, without reference to market rates or arbitration, and held that the renewal right was

unenforceable as it was merely an agreement to agree.

Delphi also shows that the courts will not help a tenant who failed to comply with the precise terms of an option to renew or extend, subject to two general exceptions: estoppel and waiver. Pursuant to the Lease, the Tenant was required to comply with three preconditions in order to renew its lease: (1) due and regular payment of rent; (2) performance of all covenants; and (3) a written request delivered to the Landlord. Even though none of the preconditions were satisfied, the Tenant sought relief from the forfeiture of its option to renew under Section 20 of the *Commercial Tenancies Act.* The Court noted that Section 20 did not apply to this situation, as the Tenant's non-compliance with the preconditions did not result in the loss of an existing right, but rather the loss of a privilege to renew.

The Court also dismissed the application because: (1) there were no equitable grounds (such as waiver or estoppel) that would justify the Court ignoring the Tenant's default and the Landlord did not waive its right to insist upon due compliance, nor was it estopped from demanding strict compliance with the renewal provisions; (2) even if there was conduct upon which the Tenant could plead, the Lease contained a non-waiver clause; (3) the Tenant's notice was not clear and unequivocal; and (4) innocent third parties had acquired rights to claim a leasehold interest contrary to that of the Tenant.

Update: Realty Taxes

The authors previously reported on two cases in their 2014 article:[3] (1) *Terrace Manor Ltd. v. Sobeys Capital Inc.* ("Terrace Manor"); *and (2) Sobeys Capital Inc. v. Bayview Summit* ("Bayview Summit"). In both cases, the landlords unsuccessfully appealed the lower court decisions.

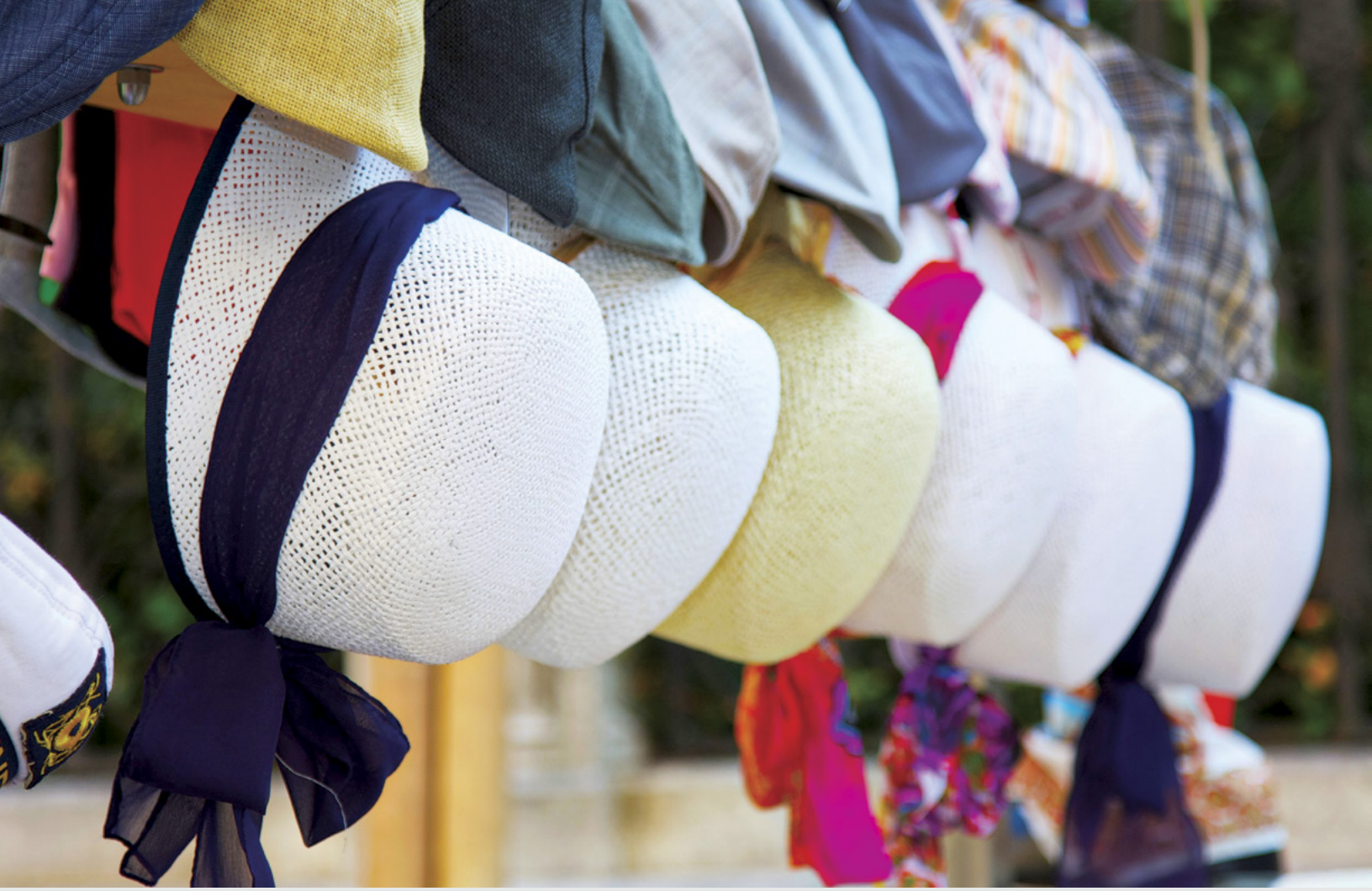
Terrace Manor involves an appeal from judgment to dismiss the Landlord's application for declaration that the terms of its Lease with the Tenant (Sobeys) required that the property taxes payable by the Tenant be calculated on a "proportionate share" basis. At issue on appeal was whether the Tenant's share of property taxes under the Lease should have been calculated on a proportionate share basis or whether there was "sufficient official information" to determine what the Tenant's taxes would have been if the Municipal Property Assessment Corporation ("MPAC") had assessed them separately.

The Ontario Court of Appeal noted the issue was the interpretation of a clause that if a separate assessment for taxes for the Leased Premises is not available, the Landlord and the Tenant shall "use their reasonable diligent efforts to obtain sufficient official information to determine what such separate assessments would have been if they had been made", and that the Landlord shall determine the Tenant's share "reasonably and equitably allocating a portion of the taxes levied, rated, charged or assessed against the Shopping Centre to the Leased Premises having regard to the generally accepted method of assessment and applicable elements utilized by the lawful assessment authority in arriving at the assessment of a similar development if that method is known." The Court held that the application judge was correct in finding that MPAC's records were official and that there was sufficient official information "to determine what a separate assessment would have been." The application judge noted that "MPAC's assessment for the plaza was created from assessment data, on a unit by unit basis, as shown on the valuation records" and that "the valuation records are official because they come from and are authorized by MPAC, who produces them to record the assessment data it collects under the *Assessment Act*." The Court dismissed the appeal.

In *Bayview Summit*, the Ontario Court of Appeal confirmed that it is reasonable for parties to choose to rely on MPAC working papers in allocating taxes among units of a building. It was immaterial whether the working papers were reliable since the Landlord and Tenant had both agreed in the Lease to base the allocation of realty taxes on those documents. The Court concluded that the working paper method was the parties' preferred method of allocating taxes and that the proportionate share method was an alternative to be used only in the event that such information was not available. Based on *Bayview Summit,* it appears that precise wording in the lease is key. If the realty tax clause suggests using the working papers in certain circumstances, it may imply an acceptance by the landlord of that methodology, which in turn could prevent the landlord from relying on *Indigo Books & Music Inc. v. Manufacturers Life Insurance Co.* to support its position that working papers are not reliable.

In the Appeal Court ruling in *Northwest Plaza Ltd. v. Zellers Inc. and Target Canada Co.*, the Tenant was an assignee of a Lease originally signed in 1972 for space in a shopping centre. The Lease did not state the method of apportionment of taxes. From 1972 to 2005, New Brunswick used a "cost approach" to assess a property's fair market value, during which taxes were "apportioned" based on the Tenant's percentage share of the shopping centre's total leasable area. In 2006, the Province moved to the "income approach", which required the assessing authority to determine the fair market value by reference to the total rent paid to the Landlord. The Landlord continued to apportion property taxes consistent with the

3 All "Updates" refer to the Summer 2014 Minden Gross newsletter available at www.mindengross.com/.



cost approach beyond 2005, to which the Tenant objected. At issue was under which approach should property taxes be apportioned? The trial judge found in favour of the Tenant and the "income" approach.

The New Brunswick Court of Appeal dismissed the Landlord's appeal, noting that the Landlord's resistance to the income approach to apportionment was due to the Tenant's fixed rent (i.e., no increase in the Tenant's share of the tax bill, even though the assessed value for the entire development had increased). The Court noted that the terms of the Lease did not empower the Landlord to use its discretion to adopt a methodology for apportioning property taxes. The Court also noted that there was a presumption that any apportionment of property taxes would be based on the methodology employed by the assessing authority for setting a property's fair market value — a presumption that was not displaced. The Province's current use of the income approach method, along with its objective basis and easy application, favoured the Tenant's interpretation of the Lease. This is yet another case that emphasizes the importance of precise wording in the lease.

Update: Insurance Protection Extends Beyond the Lease

In *Williams-Sonoma Inc. v. Oxford Properties Group Inc.*, the Landlord hired EllisDon Corporation, an independent contractor, to perform a construction project on the premises. Mid-project, a vandal broke into the Tenant's office space and opened a fire hose, leading to extensive damage. The water damage was allegedly close to $7 million. The Landlord pursued EllisDon for failure to properly secure the fire hose area.

The Lease provided that the Tenant was to secure independent insurance for water damage. The Lease further contained an exclusionary clause, which provided that "subject to 8.3.2 and 8.3.3, each of the Landlord and Tenant hereby releases the other and waives all claims against the other and those for whom the other is in law responsible with respect to occurrences insured against or required to be insured against by the releasing party, whether any such claims arise as a result of the negligence or otherwise of the other or those for whom it is in law responsible." EllisDon relied on this provision and

argued that the Landlord was responsible for their actions and this clause extended to them as a non-party.

The Court of Appeal agreed with the Superior Court and considered the term "in law responsible" under Section 8.4 of the Lease, wherein the Landlord indemnified its tenants from loss as a result of the Landlord's "officers, agents, servants, employees, contractors, customer or licensees." Under this clause, the Landlord took responsibility for EllisDon, the contractor. If water damage was not excluded by Section 8.3 of the Lease, the Landlord would have indemnified the Tenant and been responsible for EllisDon's damage. As a result, the Court determined that EllisDon was the responsibility of the Landlord and, thus, protected by the Lease.

Update: Shelf Life of an Indemnity

1212763 Ontario Ltd. v. Bonjour Café is a scary case for landlords because even with express language in the indemnity agreement that referred to the Term "and any extension thereof", a former assignee was completely released from all its obligations for the extended term in which there was a rental increase, and not just for the rental increase. This decision suggests that the indemnifier's consent must be obtained for any increase in obligations for an extended term, and failure to do so will result in the termination of the indemnity obligations for the extended term. As such, it is advisable for landlords to incorporate express language in their leases, consents, and indemnity agreements, which stipulates that: (1) liability will continue during the initial Term of the Lease and "any renewals or extensions thereof"; and (2) contemplates rental increases during the renewal/extension terms. The authors question whether a clause in the indemnity, which provided that the assignee would remain liable for the fair market rent during any extension period, would have been sufficient to avoid termination of the indemnity and enabled the Landlord to recover some rent from the Tenant during the extension term.

Abatement Remedy

Bosak v. 3930441 Canada Inc. et al. will send chills up the spines of landlords as rent abatement was not a contractual remedy that was negotiated by the Tenant (although it could have been) and yet it was granted by the Court. Here the Landlord leased property to the Tenant for a term of 12 months, which included an option to purchase the Premises. The Premises included a motel with restaurant/bar, banquet hall, and 38 rooms; a rental house; four apartment units; and chattels and equipment. The Tenant pleaded that after taking possession, it discovered that some of the representations made by the Landlord of the condition of the Premises were inaccurate.

Under the terms of the Lease, the Landlord's obligation to repair was limited to the replacement of major mechanical systems or major repairs to the structure or roof. The evidence produced indicated that there were major mechanical and structural systems that needed repair or replacement, which included the roof; heating and cooling system of the restaurant/bar and banquet hall; water supply system; hot water tanks; and electrical system. The Landlord, pursuant to an Order in November 2013 and in December 2013, was required to sufficiently repair the Premises, which it failed to do, in addition to providing an abatement of rent. The Tenant brought a motion for interlocutory injunctive relief for these issues.

In order to be successful, the Tenant had to meet the test for an interlocutory injunction where the following had to be answered: (1) is there a serious issue to be tried? (2) will the moving party suffer irreparable harm not compensable if the injunction is not granted? and (3) does the balance of convenience favour the granting of an injunction? As the parties agreed that there was a serious issue to be tried, the court moved on to the second and third part of the test.

The Tenant pleaded that due to the condition of the Premises, they were unable to pay their rental obligations due in November 2013 and were at risk of losing their investment in the property, which included the option to purchase, in addition to becoming insolvent. The Court held that the Tenant was suffering irreparable harm due to the "significant ongoing expense of repairs and replacements and because of the loss of income due to the inoperable condition of the restaurant/bar and the limited use available for the banquet hall."

For the third question, the Court had to find where the balance of convenience lay. It found that it favoured granting an injunction to require the Landlord to conduct sufficient repairs to allow the Tenant to conduct business as "they are covenanted to do by the lease agreement" and a previous court order.

With regards to the abatement of rent, the Court found that the Tenant was justified in receiving an abatement in the amount of 50% until the repairs were completed and restored to the standard set out in the lease agreement, as the "Tenant is paying for something he is not receiving."

Duty of Good Faith

The question for the Supreme Court in *Bhasin v. Hrynew* was "Does Canadian common law impose a duty on parties to perform their contractual obligations honestly?"

Prior to the decision of the Supreme Court in *Bhasin*, the common law did not recognize "any generalized and independent doctrine of good faith performance of contracts." As such, the Supreme Court described the law pertaining to good faith as an "unsettled and incoherent body of law that has developed piecemeal and which is difficult to analyze." However, the unanimous decision in *Bhasin* establishes that Canadian common law imposes a duty on parties to perform their contractual obligations honestly and that the duty of honesty in contractual performance provides that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. The Supreme Court provided that this duty applies to all contracts.

The facts: Beginning in 1989, Harish Bhasin was an enrolment director with Canadian American Financial Corp. ("Can-Am"), a company that markets education savings plans to investors through enrolment directors. In 1998, Bhasin replaced his old contract and signed a commercial dealership agreement with Can-Am for a term of three years that allowed for early termination for misconduct or other cause. The relationship between Bhasin and Can-Am soured in 1999 and, ultimately, Can-Am did not renew the agreement with him.

The Supreme Court noted that Can-Am had acted dishonestly during the time leading up to the notice of termination, with respect to its intentions to renew Bhasin's agreement and the involvement of another enrolment director and competitor, Larry Hrynew, who Can-Am appointed as the single provincial trading officer to review its enrolment directors for compliance with securities laws. Hrynew's appointment provided him with access to each enrolment director's confidential business information. As the Supreme Court noted, Hrynew wanted to capture Bhasin's business and was found to have pressured Can-Am not to renew their agreement with him. As such, when Bhasin refused to allow Hrynew to audit his records, Can-Am gave notice of non-renewal.

The Supreme Court found that Can-Am dishonestly exercised the non-renewal clause as they misled Bhasin about Hrynew's role as auditor and that it was connected to its performance of their agreement and the exercise of the non-renewal provision. The Supreme Court provided that the duty of honest performance flows from a general organizing principle of good faith that underlies contract law.

The Supreme Court summarized the principles as (1) there is a general organizing principle of good faith that underlies many facets of contract law; (2) in general, the implications for particular cases are determined by resorting to the body of doctrine that has developed; and (3) it is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

However, as the Supreme Court emphasized, the duty of honesty in contractual performance "does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance."

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Special acknowledgement and thanks to Carly Caruso, Associate, and Ryan Fenton, Student-at-Law, for their assistance.

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Firm News

Minden Gross LLP was honoured with an award for its contribution to the Progress Place Transitional Employment Program at the Progress Place Gala held on June 16, 2015.

Lawyers and students from Minden Gross LLP helped serve dinner for the Lawyers Feed the Hungry Program on May 6, 2015; it was also announced in *Ontario Reports* on July 3, 2015. Eleven lawyers and students participated. From left to right, top row: **Enzo Sallese**, **Matt Maurer**, **Ryan Chua**, **Mark Freake**, **Geoffrey Brown**, **Carly Caruso**; bottom row: **Melodie Eng**, **Ben Bloom**, **Joan Jung**, **Steven Pearlstein**, and **Lindsay Firestone**. [**see photo**]

A team of 12 Minden Gross LLP members toured downtown on the Big Bike on June 19, 2015, for the Heart & Stroke Foundation. The team raised over $1,600 to help develop life-saving treatments. Thank you to all who supported us.

The Canadian Legal Lexpert Directory 2015 acknowledged nine lawyers as leaders in their fields. The firm received leading ranking in Property Leasing and Property Development. Congratulations to our lawyers **Howard Black, Eric Hoffstein**, **Joan Jung** (Estate & Personal Tax Planning); **Reuben Rosenblatt, QC, LSM** (Property Development); and **Michael S. Horowitz**, **Christina C. Kobi**, **Stephen Messinger**, **Adam Perzow**, and **Stephen Posen** (Property Leasing).

Professional Notes

Adam Perzow acted as counsel for Menkes Developments and Healthcare of Ontario Pension Plan (HOOPP) to enable software developer, PointClickCare, to take over all of Target Canada's former HQ space (185,000 sf. over four floors) at AeroCentre V in Mississauga in June 2015.

Stephen Posen spoke on "Landlord's Rights and Remedies: Tenant Defaults" at Springfest on April 30, 2015.

The Toronto Lawyers Association selected **Matt Maurer** to sit as the TLA Designate on the Ontario Bar Association Provincial Council on June 24, 2015. CREW TV interviewed Matt about incorporating real estate holdings on June 2, 2015. He also continues to publish his blog on Slaw.ca, including "Small Claims Court Awards $2,500 in Damages and $5,300 in Costs" on July 14, 2015.

Arnie Herschorn, representing Minden Gross LLP, opened the market at the TMX to celebrate National Blood Donor Week on June 8, 2015.

Irvin Schein published his blog at irvinschein.com, including "Who Really Owns Your Leafs Tickets?" on June 25, 2015.

Joan Jung, **Michael Goldberg**, and **Matthew Getzler** of the Tax Group attended the Minden Gross-sponsored STEP National Conference held on June 18 and 19, 2015. The Tax Group also presented a CCH Webinar on May 12 on "Income Splitting: Opportunities and Pitfalls".

Joan Jung published "Ordering an Interim Distribution" in the May 2015 edition of *STEP Inside*. Her article "Effect of BIA Proposal on ABIL Claim" was published in *Tax for the Owner-Manager*. She was elected to the executive of the Toronto Branch of STEP Canada and will serve as newsletter officer for 2015-2016. She became a contributing editor to Federated Press' journal *Personal Tax and Estate Planning*.

Michael Goldberg and **Ryan Chua** published parts I-IV of "The Effective Use of Trusts in Connection with Income Splitting" in *The Estate Planner* and *Tax Notes* from March to July. Michael also published "Highlights from the 2015 Federal Budget Proposals" in the June 2015 *Wealth Management Times* and hosted the fourth and final session of Tax Talk: Year 2 on May 20, 2015. To register for the start of Tax Talk: Year 3 in September, contact Sarah Betts at sbetts@mindengross.com.

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Samantha Prasad was a guest speaker for the Osgoode Law School's LLM Corporate Tax Law Program with Prof. Neil Brooks on Estate Freezes on May 15, 2015 and presented "Income Splitting and the Tax Attribution Rules for the Owner Manager" at Federated Press' 4th Tax-Effective Succession Planning for the Owner-Manager on May 12-13 2015. She presented "Tax and Family Business Succession Planning Issues" at the LSUC 5th Annual Business Law Summit on May 7, 2015 and published articles in *The Tax Letter* and *The Fund Library* including "Income-splitting with family trusts" on June 11, 2015.

Hartley Nathan, QC, and **Ira Stuchberry** published "The Role of the Chairman" in the May 2015 edition of *The Directors' Briefing* and "Duties of Directors of Not-For-Profit Entities: Due Diligence Before and After Becoming a Director" was published by the Charity and Not-for-Profit Law Section of the Ontario Bar Association on April 10, 2015.

David Ullmann was quoted in the *Globe and Mail* article "Judges rip into squabbling Nortel lawyers" on May 14, 2015, and was elected to the Ontario Bar Association Section Executive for Information Technology & Intellectual Property Law.

Eric Hoffstein presented "Frightening Away Litigation: *in terrorem* and 'no contest' clauses" at the LSUC's Six-Minute Estates Lawyer 2015 on May 6, 2015.

Reuben Rosenblatt, QC, LSM, presented "King Lear (and His Children) Should Have Had a Lawyer" at the LSUC's 12th Annual Real Estate Law Summit on April 23 and "Recent Developments" at the Ontario Bar Association's Real Property: Reviving the Lost Art of Requisitions program on March 10, 2015.

Brian Temins attended the CVCA conference in Vancouver in May 19-21, 2015.