



RealEstateBrief

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Leases are seen as being both a contract and creating an interest in land. The law has generally given a high level of protection to property rights and tenancies have benefited from that. In our first article, Damon Chisholm of our Vancouver office reviews a recent British Columbia case that erodes that protection.

In our second article, Bill Rowlands looks at the operation and drafting of rights of renewal in commercial leases. Bill considers what landlords and tenants may wish to achieve in negotiating renewal rights and looks at the mechanics of exercising such rights.

In our third article, Celia Hitch begins a series on issues that are of particular importance in restaurant leases. In this segment Celia looks at issues involving the identity of the tenant and operator.

Is a Tenant's Right of Quiet Enjoyment at Risk?



Damon Chisholm

Introduction

It has been generally thought that a tenant who has a lease for a specific term (without the landlord holding any early termination rights) would be able to have the courts protect that term from any actions by the landlord to end the lease early. However, a recent abandonment of an appeal to the Supreme Court of Canada of a British Columbia case

has resulted in uncertainty over how secure a commercial tenant can be in relying upon its right to quiet enjoyment of its premises under a lease.

The Evergreen Case

In the case of *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, [2005] BCCA 583 (B.C.C.A.), Evergreen Building Ltd. ("Evergreen"), a landlord of an office building in downtown Vancouver, wished to redevelop its premises in order to improve the economic viability. It sought to demolish the existing building and replace it with high-end residential strata units.

IBI Leaseholds Ltd. ("IBI") was a tenant in the subject property and was in the first year of a five year lease which contained an option to renew for a further five year renewal term. IBI was one of the last remaining long-term tenants in the building. Evergreen gave notice to IBI that it would not be able to comply with the terms of the lease and advised IBI that it expected them to seek alternative space and mitigate their damages. The lease did not contain a clause that allowed for early termination or for termination due to demolition of the building. When IBI refused to vacate, Evergreen commenced proceedings in the Supreme Court of British Columbia for re-entry and a declaration that damages were an appropriate remedy. IBI sought interim and permanent injunctions to enjoin Evergreen from breaching the covenant of quiet enjoyment in its lease, both of which were granted.

Evergreen appealed to the British Columbia Court of Appeal, where the Court overturned the permanent injunction and held that the lease was more akin to a contractual arrangement than an interest in land. In its decision, the Court held that the lower court failed to consider the equities

of Evergreen and IBI, which included the relative hardship of holding Evergreen to the strict terms of the lease as compared to the uniqueness of the premises.

The Theory of Efficient Breach

The reasoning of the Court of Appeal was based on a theory of “efficient breach.” This theory, which evolved in the U.S. in the early 1970’s, is based on the idea that on certain occasions the outcome of a breach can actually improve the situation of both parties. An example of a case of efficient breach is as follows:

Party A and Party B have a contract whereby Party A is to supply widgets to Party B for \$100. A third party approaches Party A and offers \$200 to buy the same widgets. Under the theory of efficient breach, Party A could breach its agreement with Party B so as to sell the widgets to the third party and compensate Party B in damages.

If it costs Party B an additional \$50 to obtain replacement widgets all parties “benefit” from the breach. Party B would obtain its widgets and Party A would end up with an additional \$50 (the \$100 increase less the additional amount required by Party B for replacements). Under the theory of efficient breach everyone benefits or is at least in the same position as prior to the breach.

In the *Evergreen* case, the Court of Appeal held that Evergreen would be able to make a greater profit by building the residential tower and IBI could be compensated by its loss of the lease with an award of damages. The Court stated that specific performance of the lease should not be granted, as it would result in a needless loss of profit for Evergreen. The case was sent back to the lower court for an assessment of IBI’s damages.

The Court of Appeal held that Evergreen would be able to make a greater profit by building the residential tower and IBI could be compensated by its loss of the lease with an award of damages. The Court stated that specific performance of the lease should not be granted.

In reaching its decision on applying the efficient breach theory, the Court of Appeal relied upon the Supreme Court of Canada decision of *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601. However, the Bank of America case was not a case dealing with a lease or land issues, but instead was a determination of damages due to a breach of contract. In fact, the Supreme Court of Canada, at paragraph 61, held:

This is not a case of efficient breach. The respondent’s gains have come at the appellant’s expense. An award of compound interest will prevent the respondent from profiting by its breach at the expense of the appellant.

Conclusion

The Court of Appeal in the *Evergreen* case has now taken the theory of efficient breach beyond the pure contractual setting and has applied it to a real property setting, treating all leases as identical in nature to that of a basic contract (and seemingly ignoring that leases have historically been held to be interests in land as well as contracts). This is also somewhat disturbing as the extension of this theory was based on a Supreme Court of Canada decision that expressly stated that it was not an efficient breach case. Due to the abandonment of the appeal to the Supreme Court of Canada by IBI, commercial

tenants in British Columbia can no longer comfortably rely upon their right to quiet enjoyment of their premises for the term of their lease and any rights to renewals thereof. Landlords now arguably have the ability to unilaterally terminate a lease, regardless of the terms, in order to generate the maximum profits from the property, as long as the tenant can be compensated in damages.

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Drafting and Protecting Renewal Rights



William (Bill)
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Introduction

Many commercial leases contain at least one right in favour of the tenant to renew or extend the lease at the end of its initial term. While it may be five or 10 years down the road before this provision becomes operative, the actions taken by the tenant then to exercise the right and the conduct of the tenant during the lease term can have an impact on the availability of the right. Accordingly, when negotiating and drafting renewal rights, particular care should be paid to the wording used.

In this article I will be referring to “renewal” rights. Sometimes (and perhaps more often) these are structured as “extension” rights. Although there are some technical differences in law, the issues discussed in this article generally apply equally whether the tenant’s right is labeled a renewal or extension, and accordingly I will simply refer to renewals.

Notice of Exercise

In almost all cases, the tenant will be required to give a formal notice to the landlord in order to exercise a renewal right. It is likely that elsewhere in the lease the manner of giving notice will be prescribed (such as, for example, by registered mail). If that method of notice is mandatory, in order to properly exercise its renewal right the tenant must follow it strictly. If, rather than being set out as the only allowed method of giving notice, the lease sets out only a permissible method of notice, then the tenant may use other methods so long as the method chosen by the tenant is not less advantageous to the landlord and the notice is actually communicated to the landlord (see *Ross v. T. Eaton Co.* (1992), 11 O.R. (3d) 115 (C.A.) and *DW Squared Ltd. Partnership v. Oxford Properties Canada Ltd.* (2002) 43 R.P.R. (4th) 165 (Ont. C.A.)). Since the onus would be on the tenant to show that an alternate method was contemplated by the terms of the lease, no less advantageous to the landlord and actually received by the landlord, it is obviously much

safer to follow a particular method described in the lease.

The lease will also prescribe the time period by which the notice must be given. If the tenant does not exercise its renewal right, the landlord will obviously be taking the space to market and will need some time to do so prior to the end of the tenant’s lease. Accordingly, landlords require a range of six to 12 months notice prior to the end of the term. Typically, the more unique the space, the longer the notice period (as a longer period will be required to lease the space).

Landlords may also have an outside date before which the notice cannot be given for administrative purposes.

Since a renewal right is a benefit to one party only, the courts have generally required strict compliance by a tenant with the prerequisites to exercising such rights. Accordingly, if the tenant misses the notice period, courts will generally not grant any relief to the tenant, with the result that the renewal right is lost. See, for example, *Bedard v. 1526924 Ontario Ltd.*, [2005] O.J. No. 2439 (S.C.J.), where the tenant missed the renewal deadline and the court held that there was no basis for granting any relief in favour of the tenant. Like all rules, there are exceptions. Situations where a court may grant relief from strict compliance are discussed below.

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Other Prerequisites

It is very common for renewal provisions prepared by landlords to require other prerequisites to the exercise of the renewal right by the tenant.

One very common prerequisite deals with defaults by the tenant. A wide variety of language is seen in leases. You might see requirements such as “the tenant not then being in default and never having been in default,” “the tenant not then being in material default,” “the tenant not then being in default beyond any curative period,” “the tenant not then being in default and not having been previously in persistent or continuing default,” or a variation or combination of the foregoing.

From the landlord’s perspective, the renewal right is seen

as a privilege in favour of the tenant, that the tenant should only be entitled to retain if it has been in good standing throughout the term. This is what many landlord standard form leases provide for. On the other hand, the tenant will not want a technical or minor default, which has been cured, or a default that is unknown to it, to put it off side and result in it not being able to exercise the renewal right. Accordingly, parties often get to a negotiated middle ground, such as a requirement that the tenant not then be in default for which a notice of default has been issued and not having been in material or persistent default in the past.

Another common prerequisite insisted on by landlords is that the tenant at the time of exercising the renewal right be the original tenant. In the landlord's view, this right is being granted on the basis of the identity of the original tenant and, should the lease be assigned, the landlord will argue it should not be obligated to accept a renewal term with somebody it did not do the original deal with.

From the tenant's perspective, there are situations where it may feel that an assignment should not result in the renewal right being lost. For example, many tenants will negotiate a right to assign to affiliates or related companies and will want the renewal right to continue in that circumstance. Also, if the business at the premises is sold as a going concern (and perhaps as part of a sale of a larger portfolio of locations) the tenant can again make a reasonable argument that this should not result in the renewal right being lost. These issues must be dealt with when the option is negotiated and drafted.

A related requirement might be that at the time of the exercise of the renewal right the tenant actually be in possession or occupation of the premises. In this situation, a sublease to another party would put the tenant off side. Also, having the premises unoccupied may result in the tenant being unable to exercise a renewal right. Of course, if the premises were not occupied it is far less likely that the tenant would have any interest in renewing the lease. Landlords should note, however, that occupancy has been defined by the courts to mean either physical occupancy or legal occupancy, the latter being the right to have occupancy even though not physically in occupation (see *Nortel Networks Ltd. v. Kanata Research Park Corp.* (2005), 73 O.R. (3d) 598 (S.C.J.)).

The law regards an option to renew as a privilege given to one party only and in view of such being a privilege, generally tenants must strictly comply with the terms and conditions.

Relief from Non-Compliance

Occasionally, tenants will not exercise their renewal rights in strict compliance with the terms and prerequisites of the lease and look to the courts to give them some relief.

As indicated above, the law regards an option to renew as a privilege given to one party only and in view of such being a privilege, generally tenants must strictly comply with the terms and conditions. However, there are exceptions.

The first exception is where a court finds the landlord, by its conduct, waived strict compliance with the renewal requirements. The concept of waiver arises where a contractual provision benefits one party and the other party is held to have waived compliance. Once waiver has been established, the provision cannot be suddenly reinserted by that other party and insisted upon. For example, in *1357277 Ontario Inc. (c.o.b. Pape Village Coin Laundry) v. Grekos* [2004] O.J. No. 2535 (C.A.), the court held that where the tenant had written to the landlord requesting a renewal after the notice period had passed and the landlord responded by submitting an offer to renew, the landlord waived the requirement for timely notice.

As for an ongoing requirement to not be in default, a landlord's activities of accepting rent and not acting on the defaults throughout the lease term could be held as a waiver of strict compliance with that precondition.

See, for example, *Gordstone Enterprises Ltd. v. 622559 Saskatchewan Ltd.* (2006) 49 R.P.R. (4th) 266 (Sask. Q.B.). In *DW Squared* (supra), the court found the landlord had accepted notices and rent payments through its security desk on numerous occasions without complaint, and as a result the landlord had waived strict compliance with the notice provisions for the purposes of delivery of the renewal notice.

A second (and somewhat similar) legal principle that might be available to protect the tenant is the doctrine of estoppel. This principle applies where one party makes a representation to another which affects the legal relations between them. If the party receiving the representation acts upon it to its disadvantage, the party that made the representation cannot revert back to its original position.

Applying the principle of estoppel, where a landlord deliberately fails to bring to the attention of a tenant a default, with

the intention by the landlord to defeat the option to renew, the landlord will be estopped from relying on that default to defeat the renewal. See *Kelly, Douglas & Co. v. Ladner Shopping Centre Ltd.* (1979), 106 D.L.R. (3d) 265 (B.C.S.C.), as quoted in *Gordstone Enterprises Ltd.* (supra).

Courts have a general right to grant relief from forfeiture in leasing situations. A common example is where a landlord re-enters the premises and/or terminates a lease for non-payment of rent. If the tenant brings the lease into good standing shortly thereafter, the courts will generally grant the tenant relief from forfeiture and put the lease back into place.

However, this right to relief from forfeiture is very unlikely to be successful to relieve the tenant from non-compliance with a prerequisite to a renewal right. The courts have distinguished between their jurisdiction to grant relief from forfeiture for the non-observance of terms and conditions in a lease as opposed to failure to comply with conditions precedent to the exercise of a renewal right. In *Clark Auto Body Ltd. v. Integra Custom Coalition Ltd.* [2007] B.C.J. No. 61 (B.C.C.A.), the court applied the English decision of *Union Eagle Ltd. v. Golden Achievement Ltd.* [1997] A.C. 514 (H.L.), in noting the principle that contractual provisions should be upheld. Specifically, if the parties have come to an agreement on terms and conditions to be complied with in order for the renewal to be exercised, those parties should be able to act with certainty on

If the tenant brings the lease into good standing shortly thereafter, the courts will generally grant the tenant relief from forfeiture and put the lease back into place. However, this right to relief from forfeiture is very unlikely to be successful to relieve the tenant from non-compliance with a prerequisite to a renewal right.

the basis that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract would create unwanted uncertainty.

In *Clark Auto Body Ltd.* (supra), the renewal provision required that there be no outstanding notice of default when the tenant exercised. At the time of the exercise there was about \$1,200 of rent unpaid, for which a notice had been issued. The court refused to relieve the tenant from the consequences of this, and the renewal notice was not effective.

Conclusion

The principles from the case law referred to above can be applied to the renewal provisions negotiated at the time the agreement to lease and lease are entered into. By paying attention to the terms and conditions at that time, the potential for subsequent disputes will be minimized. Specifically, the landlord can strive to limit the ability of the tenant to exercise the renewal option to those situations where the landlord feels it is appropriate. On the other hand, a tenant facing a landlord's standard renewal clause can negotiate for some protection, so that what it sees as minor variations from the strict terms do not have the drastic consequence of resulting in the renewal right being lost.

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Avoiding Heartburn: Restaurant Leases – Part 1



Celia Hitch

Introduction

I recently had the opportunity to lead a session about restaurant leasing at a commercial leasing conference in Washington. Apparently, as a result of that work, I was invited to speak at a conference in New York City. That conference was entirely about negotiating restaurant leases.

I admit to wondering, when I first started gathering my thoughts for these sessions, what I would talk about and why restaurants merited their own session – let alone their own conference! After not much time, though, I started to remember that restaurants – although they often exist in a mixed retail environment or as an adjunct to an office facility – really do bring with them a panoply of issues which need special consideration.

This is the first of a series of three articles on restaurant leasing. In this article, I will discuss the identity and attributes of the tenant and the operator of the restaurant, as well as how the lease document can contemplate changes to these during the term.

Who is the Tenant?

Restaurant tenants, like most other retail tenants, come in a variety of sizes. The difference with restaurants is that many large restaurant chains exist to franchise their locations, so the day-to-day occupant will not be the party the landlord is contracting with. Alternatively, the large restaurant chain may have its operator sign the lease but build in a right to require an assignment of the lease to the chain. At the opposite end of the spectrum is the owner/proprietor who has a vision for his or her own restaurant – a vision which sometimes conflicts with the day-to-day realities of a retail environment.

At either end of the spectrum, the tenant named on the lease is often not the day-to-day directing mind of the operation.

One of the interesting linguistic differences between American and Canadian lawyers in this area is that Canadians talk about “covenant,” as in, “what is the covenant that the landlord is getting?” Americans are confused by this, since they correctly see the lease as chock full of covenants and are not quite sure which one is being referred to. By “covenant” in this case, though, we Canadians are really asking what is the net worth of the tenant? At the end of the day, no matter how it is phrased, the key question is, where is the money that is going to pay to construct the restaurant and, once that is done, where is the money that is going to pay the rent? Whether the chain or the operator is on the covenant is a key question for the landlord.

Apocryphally, I have been told by leasing people that it is usually the third restaurant which is successful. They mean the third restaurant in that location. The first may succeed if it is a national chain which has deep enough pockets to sustain months – possibly even a year or two – of losses before its business takes off but, for independent restaurateurs, their

dream is often overtaken by their lack of cash flow before their business starts to run in the black.

Assignment

This means that a sophisticated restaurant tenant (or at least one with a sophisticated lawyer!) will pay extra attention to the assignment provisions of the lease, to make sure that there is an “exit strategy” that will enable the tenant to leave if the cash starts to run out. Landlords are not fond of thinking of lease assignment provisions as an “exit strategy” but, in this case, it is both necessary and meaningful for both parties to focus on what will happen if or when the restaurateur decides to sell the restaurant – regardless of the reasons for doing so.

There are, in fact, certain restaurateurs who have been quite successful in creating a restaurant operation, with their name attached to it, and then selling it once the restaurant experiences its initial success. For these restaurateurs, obtaining flexible assignment provisions is integral to their business strategy and their landlords need to know that this is part and parcel of what they are bargaining for.

What would a restaurant tenant want to focus on in this area? Its starting requirement will be that the landlord has to act reasonably in deciding whether or not to give its consent to an assignment request, so it will want to negotiate to eliminate or reduce any period of time during which the

landlord can unreasonably withhold its consent.

Secondly, it will want to assess the landlord’s list of what constitutes a reasonable ground for refusing consent. If the landlord requires a tenant with a strong financial covenant but accepted the original tenant with no covenant, there is an argument that the landlord is trying to better its position on an assignment. On the other hand, a landlord that is dealing with a restaurateur like the one referred to above, who starts up restaurants and then sells them when they are doing well, may well accept a shell company with no covenant from the original tenant but knows it is bargaining with a sophisticated and experienced restaurateur with a track record of success. In those circumstances, it may be fair for the landlord

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to require a stronger financial covenant from the assignee than from the original tenant.

What about the requirement many landlords have that the tenant has to have a successful history of operating businesses similar to that being operated in the premises? This would preclude, for instance, an assignee that is composed of one or more parties who have worked in the industry for a number of years but who have not previously owned their own restaurant. The original tenant may want to seek some flexibility to accommodate this possibility.

A right to change the use may be requested by the tenant in the initial lease negotiations. If the tenant can only assign or sublet for another restaurant use, it will have limited its exit strategy (especially where it seems that any restaurant use will fail in the space). Many landlords, though, will resist this in their efforts to control tenant mix. This could be one of the main points of contention in the offer negotiations.

Lastly, a landlord may want to protect itself by seeking an indemnity from the principals behind the corporate tenant. The tenant may be prepared to agree to this, especially if the tenant is a shell corporation with no assets, but the indemnifiers will want to understand thoroughly what their obligations are, if and when those obligations will diminish or fall away, and what will happen to that indemnity obligation if the lease is assigned.

Landlords will rarely reopen an indemnity at the time of an assignment, so the time to clarify all of this is at the time the lease is being negotiated.

Franchising

The other possibility – especially with national chains – is that they may want to keep the lease in their name but have fairly unlimited rights to sublet the premises to a franchisee which will operate a restaurant under their banner.

For landlords, this is generally understood when initiating the negotiating process with these types of tenants but there are still precautions that landlords may want to take to

ensure that they get what they are bargaining for. Especially for strong national tenants who will not agree to cede much control to the landlord, it is important for the landlords to ensure that they are somehow protected. A requirement that the premises be operated in a first class manner and to the same standards as the tenant applies to the rest of its franchisees is a good starting point.

The landlord would always want to be advised of who is actually occupying the premises, regardless of whether or not it has the right to consent to the franchisee. As well, the landlord would normally want to receive a copy of the franchise agreement and any sublease so that it can be fully conversant with the particulars of the relationship. Realistically, most landlords do not read these but file them away. Nonetheless, they will want to refer to them if a problem arises.

From the franchisor tenant's point of view, the landlord's standard form of lease may require that the tenant give to the landlord any money which the tenant receives in connection with the assignment or subletting of the premises. This is really there to ensure that the tenant cannot collect "key money," or a value attributable to a below-market rent – money which the landlord sees itself as being entitled to, as it made the original investment in the real estate. Regardless of what position any party wishes to take on that issue, in a franchise situation, a franchisor tenant wants to be very sure that its landlord understands that franchise fees belong to the franchisor tenant and not to its landlord.

uation, a franchisor tenant wants to be very sure that its landlord understands that franchise fees belong to the franchisor tenant and not to its landlord.

Conclusion (for Part 1)

Having reviewed issues relating to the initial and future identity of the tenant and restaurant operator, in future issues I will look at operational matters such as specific issues that arise from the restaurant use, liquor licences, patios and other restaurant issues.

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Events

International Council of Shopping Centers' (ICSC) 2007 Canadian Convention – Deal Making and Trade Exposition

September 24–26, 2007

Metro Toronto Convention Centre
Toronto, ON

Lang Michener is proud to be an exhibitor at the ICSC 2007 Canadian Convention – Deal Making and Trade Exposition. ICSC is the definitive international association for the shopping centre industry and the annual Canadian Convention attracts thousands of participants from the Canadian real estate industry. Members of Lang Michener's Toronto Real Estate Group will be in attendance at the Lang Michener booth throughout the trade show.

6th Annual RealLeasing Conference

Presented by Real Estate Property Association of Canada
October 4, 2007
Metro Toronto Convention Centre
Toronto, ON

The Lang Michener Real Estate Group is a proud sponsor of RealLeasing 2007. This conference provides an opportunity for high-level executives to analyze and enhance their leasing strategies and to gain greater insight into the trends, challenges and issues that permeate the industry.

The 6th annual RealLeasing conference will be a high level executive forum examining the key issues, practices and strategies in office, industrial and retail real estate leasing.

The program is equally targeted for landlords and tenants as for all the intermediaries and third parties including brokers, lawyers, lenders and insurers.

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