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BARRISTERS & SOLICITORS

"DEALING WITH RENT DISPUTES"

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Lorman Educational Services

Commercial Landlord and Tenant Law in Ontario

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Dealing With Rent Disputes

INTRODUCTION:

This seminar is designed for landlords, tenants, property managers and leasing consultants as well as lawyers. With this in mind I have taken a practical everyday approach to the topic of "Dealing with Rent Disputes" and have avoided debating the fine esoteric points which have little practical impact.

This being said, the first topic; "Using Estoppel and Other Equitable Principles To Resist a Claim", sounds more legalistic than practical. However, resisting a rent claim is of great practical interest to both the landlord and the tenant. Estoppel and its companion waiver are particularly relevant to landlord and tenant matters because the landlord/tenant relationship generally involves interaction between the parties over a long period of time. As a result, although the

parties' relationship is usually governed by a written lease, the conduct of the parties over the years is not always consistent with the lease. In which case the question arises; which should govern, the established practice of the parties or the written lease? While the written lease, as a general rule, governs the relationship estoppel, waiver and other equitable principles come into play where the circumstances are such that it would be unfair to allow a party to deny the established practice and rely on its strict legal rights as set out in the lease.

The second topic is "Interpretation Tools". How do the courts resolve disputes about the meaning of the words and phrases used in a lease? The process followed by the courts when interpreting a lease needs to be understood by both landlords and tenants. The principles of interpretation are largely the same whether one is interpreting the rent provisions of a lease or any other provisions. Indeed the principles of interpretation which we will be discussing under this heading apply to contracts in general. In a nut shell, the courts will interpret a lease by attempting to ascertain the intention of the parties by examining the lease as a whole and giving the words used their plain, ordinary and common meaning. By signing a lease the parties have evidenced an intention to reduce their agreement to writing and be bound by the document. The courts will not, as a general rule, consider "parol evidence" or extrinsic evidence particularly where it contradicts the written document. The court will, however, accept evidence of the "commercial setting" or "factual matrix" in which the lease was made in order to give the document context and assist the court in understanding some of the terms used.

The third topic is "Mediation, Arbitration and Court Proceedings". We are all familiar with the

high cost of going to court. One government study found that the average trial in the Ontario Superior Court of Justice took 3 to 4 days and the cost of taking an average case to trial was almost $40,000.00. This does not include the time and effort that the client, i.e. the landlord or the tenant, must expend on the law suit, in addition to paying the legal fees and disbursements. For this reason there is great interest in alternate methods of dispute resolution ("ADR") which include arbitration and mediation. Is ADR less expensive and more efficient? It certainly can be when both parties are motivated to resolve the dispute in an efficient manor. However, when a landlord is chasing a tenant for unpaid rent, more often than not the tenant is not particularly cooperative and the landlord has no option but to go to court. Conversely, a tenant who is resisting a rent claim will not want to arbitrate or mediate in order to force the landlord to go to court. The tenant will then use the high cost, and the inconvenience, of litigation as one of the reasons why the landlord should settle for less than the full amount owing.

I would like to make one final point by way of introduction. The above are not all of the issues which arise when dealing with rent disputes. The issues addressed by my colleague Eric Gillespie, in his paper, "Dealing with Defaults", which is found further on in these materials, apply to rental disputes as well. Similarly, the principles discussed in this paper are not confined to rent disputes, but apply to other disputes and defaults as well.

A.

USING ESTOPPEL AND OTHER EQUITABLE PRINCIPLES TO RESIST A CLAIM

Equitable Estoppel

Equitable estoppel, like most other equitable principles, is rooted in fairness and is closely related to waiver[1]. Equitable estoppel arises when the parties, in our case the landlord and the tenant, have dealt with each other on one basis and it would be unfair for one of the parties to now change the established basis for dealing with each other and begin to insist on the strict application of the lease. It is not uncommon for one of the parties, well after the tenancy has started, to read the lease closely and discover that the parties have not been conducting themselves in accordance with the terms of the lease. What then?

The doctrine of equitable estoppel has its origins in an old English case known as *Hughes* v. *Metropolitan R.R. Co.*[2] In that case the landlord gave notice to the tenant to make certain repairs within six months. Following the notice the parties entered into negotiations for several months which ultimately failed. The tenant then proceeded to make the required repairs but was unable to do so within the original six-month period stipulated by the landlord's notice. The landlord moved to forfeit the lease six months after the first notice. It was the tenant's position that the six month period for repairs ran from the date on which the negotiations broke off. The court agreed with the tenant:

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1 For a discussion of waiver see - Eric Gillespie's paper in these materials, "Dealing With Defaults";

2 (1877), 2 App. Cas. 439

> "... it is the first principle upon which all Courts of Equity proceed, that if the parties have entered into definite and distinct terms involving certain legal results -- certain legal penalties or legal forfeiture -- afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would have been inequitable having regard to the dealings which have thus taken place between the parties."[3]

The essential factors giving rise to an equitable estoppel are set out in the often quoted case of *Greenwood v. Martins Bank Ltd.*[4] and are as follows:

(1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation was made.

(2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation was made.

(3) Detriment to such person as a consequence of the act or omission.[5]

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3 Ibid at 448

4 [1993]A.C. 51

5 Ibid at 57

Detrimental Reliance

The third factor holds the key to equitable estoppel and is often referred to as the need for "Detrimental Reliance". This occurs where one of the parties has relied on the words or conduct of another and changed their position to their detriment, then the other party will not be permitted to revert to their previous position. When reviewing cases involving equitable estoppel one will find that without detrimental reliance the claim is rarely successful. It is also worth noting that the mere fact that money has been paid does not in itself amount to a change in position or detrimental reliance[6].

Estoppel by Conduct and by Convention

Recent cases have identified different forms or types of estoppel which have evolved from the root concept of equitable estoppel and have applied them to landlord and tenant cases. A good example is the recent British Columbia case of *Canacemal Investment Inc.* v. *PCI Realty Corp.*[7] which identified two kinds of estoppel. In that case the landlord had incorrectly under billed a tenant for its proportionate share of taxes throughout the term of the lease. The tenant argued that since both parties were mistaken concerning the rentable area of the ground floor of the shopping centre (which impacted the calculation of the tenant's proportionate share of taxes) the landlord was estopped from requiring the tenant to pay more than what had been billed.

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6 *Hydro Electric Commission of Township of Napean v. Ontario Hydro,* (1982), 132 D.L.R. (3d) 193 (Ont. S.C.).

7 [1999] B.C.J. No. 2029.

Estoppel by Convention

The first form of estoppel which the court discussed was estoppel by convention. The court stated the principle as follows: When parties have acted upon the agreed assumption that a given state of facts is accepted between them as true, then each will be estopped against the other from questioning the truth of the state of facts so assumed but only if the party claiming the benefit of the estoppel has relied on the assumption to its detriment. A considerable degree of formality, or at least conscious dealing between the parties must exist in order to create a convention to replace the actual facts as the basis of the transaction. If a party has reason to know of the inaccuracy of the assumed facts, the doctrine is not available.

In this case, the parties did deal with each other on the agreed assumption that the proportionate share calculation was correct. However, there was no detrimental reliance. The tenant had not changed its position in any detrimental way as the result of the mutual assumption of an incorrect state of facts. Remember, the mere fact that money has been paid does not in itself amount to detrimental reliance.

Estoppel by Conduct

The court also held that there was no estoppel by conduct. After reviewing the three point test from the *Greenwood v. Martins Bank Ltd.* case, the court again found there had not been any detrimental reliance. Moreover, there was no representation to the tenant and there was no intentional alteration of legal relations. Where both parties act under a mistake as to one party's legal rights, courts will not give effect to estoppel by conduct. The mistake must amount to a

representation intended to affect the legal relations between the parties. Note; what the court called estoppel by conduct is not very different from equitable estoppel.

Promissory Estoppel

Equitable estoppel is based on the principle that a person is precluded from retracting a statement upon which another has relied. Originally this was confined to statements of fact or representations by words or conduct of past or present facts that induced the other person to act or change their position in reliance on the representation. However representations or promises about future events were, originally, not considered capable of founding an estoppel. This changed after Lord Denning's decision in *Central London Property Trust Ltd. v. High Trees House Ltd.* [8]. Today "Promissory Estoppel" is well established.

Promissory estoppel arises where one party has by 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 can not afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. He must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.[9] In the *Central London Property v. High Trees* case Lord Denning held, *obiter*, that a landlord, having promised to

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8 [1947] 1 K.B. 130

9 *John Burrows Ltd. v. Subsurface Surveys Ltd.* [1968] S.C.R. 607 at 615

reduce rent payable under a lease was bound by his promise and could not subsequently demand the rent originally due.

In *Long* v. *Inter-Habitation Inc.*[10] the court applied the principle of promissory estoppel in a landlord and tenant matter involving the payment of operating costs. In that case the tenant had only paid base rent and not operating costs, as required by the lease, for a period of over 7 years. This came as a result of negotiations with the landlord relating to the landlord permitting another store in the plaza to sell baked goods in competition with the tenant. The landlord promised not to charge operating costs to compensate for the increased competition, however the lease was never amended. When the property was purchased, the course of conduct established between the previous tenant and the previous landlord was held to be binding on the new owner of the property even though the new owner knew nothing about the variation of the payments.

Mistake and Rectification

Another equitable principle which arises in landlord and tenant matters which may be used to resist a claim is the equitable principle of rectification of a mistake in the lease. In order to succeed on a claim for rectification one must convince the court that the parties had an agreement but they did not write it down correctly.

In *HF Clark Limited v. Thermidari Corp. Limited,*[11] Justice Brooks JA, in an often quoted

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10 [1999] O.J. No. 3305

11 [1973] 33 DLR 3d 13 (Ont. C.A.)

passage, sets out the equitable principle of rectification as follows:

> "When may the court exercise jurisdiction to grant rectification? In order for a party to succeed on a plea of rectification it must satisfy the court that the parties, all of them, were in complete agreement to the terms of their contract but wrote them down incorrectly. It is not a question of the court asking to speculate on the parties intention, but rather to make an inquiry to determine whether the written agreement properly records the intention of the parties as clearly revealed in their prior agreement. The court will not write a contract for businessmen or others but rather through the exercise of its jurisdiction to grant rectification in appropriate circumstances, it will reproduce their contract in harmony with the intention clearly manifested by them, and so defeat claims or defences which would otherwise unfairly succeed to the end that business may be fairly and ethically done.[12]

In deciding this question, the court does not look at what the parties today think the provision means or what one of the parties intended it to mean. The court must decide what, if anything, the parties agreed to at the time the agreement was made. For example a situation where a claim for rectification may succeed is where the offer to lease differs from the lease ultimately signed by the parties. One of the parties could claim rectification of the lease so that it conformed with the offer and the offer would generally be good evidence of what the parties agreed to at the time.

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[12] Ibid at 18.

The decision of the Ontario Court (General Division) (as it was then known) in *Strategeas v. Lloyd Parish Holdings Limited*[13] provides in interesting glimpse into the law of rectification. In this case the tenant purchased a restaurant business in 1981. The purchase agreement provided that the tenant would enter into a lease in the "usual form". The tenant signed a Dye and Durham lease form which was reviewed by his lawyer prior to signing. Dye and Durham's lease form grants the landlord a right to terminate the lease in the event the property is sold. In 1990, nine years after the lease was signed, the landlord found a buyer for its property and relying on the termination right in the lease gave notice of termination. The tenant applied to have the lease rectified.

The court found that the termination clause could not be considered a usual covenant. The clause was found to be completely contradictory to the granting of the lease as it gave the landlord the power to destroy the tenant's investment in the restaurant. The court went on to find that given the importance of the clause, the landlord's solicitor had an obligation to point out the clause to the tenant's solicitor and not just assume that the tenant was aware of the clause and had accepted it.

It is indeed unusual for a court to suggest that the landlord's solicitor ought to have drawn the tenant's solicitor's attention to the termination clause. What this demonstrates is that equity is about fairness and the courts will often stretch principles in order to ensure a fair result.

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13 (1991), 17 R.P.R. (2d) 293 (Ont. Ct. (Gen. Div.))

B.

INTERPRETATION TOOLS

The Intention of the Parties

The starting point for interpreting a lease, or any contract for that matter, is to ascertain the true intention of the parties to the agreement. The intention of the parties is to be ascertained from the agreement, in our case the lease, which the parties signed. The signing of a lease is considered evidence that the parties intended the lease to be the exclusive record of their agreement, and the courts in interpreting the lease are respecting that intention. The courts will consider extrinsic evidence limited to establishing the commercial setting or factual matrix in which the lease was made. Evidence of the prior negotiations or what the parties subjectively intended when they signed the lease is irrelevant. If it were otherwise there would be little point in signing a lease for whenever there was a dispute either party could testify that they intended something totally different from what the lease provided thereby making the written document irrelevant.

In determining the intention of the parties and in order to understand the meaning of the words used the courts will accept extrinsic evidence of the "commercial setting" or the "factual matrix" in which the lease was made. This is not evidence of the parties' subjective intention, but is evidence designed to assist the court in understanding the meaning of the words used by the parties in the lease. For example in *London Drugs Ltd. V. Truscan Realty Ltd.*, [14], the use clause

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[14] *London Drugs Ltd. V. Truscan Realty Ltd.*,[1998] B.C.J. No. 1366 (S.C.)5

permitted the tenant to operate a "food supermarket" on the leased premises. Within months of signing the lease in January, 1985, the question arose as to whether the tenant's use clause permitted the tenant to operate an instore pharmacy. To determine what the parties intended by "food supermarket" the court examined the surrounding circumstances as they existed at the time the parties signed the lease in January 1985. The court concluded that in January1985 the parties did not intend that a "food supermarket" include the operation of a instore pharmacy. The court focussed its inquiry on the commercial setting up to January 1985 and the fact that prior to signing the lease none of the tenant's stores had instore pharmacies. The court was not persuaded by the fact that there was a developing trend for a supermarket to have an instore pharmacy which the tenant adopted soon after it signed the lease.

Parol Evidence Rule

The parol evidence rule is a rule against the use of parol evidence or extrinsic evidence to change the terms of a written agreement. The rule has a very long history dating back to the early English common law. In 1833 Denman C.J. stated the rule as follows:

> "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract"[15]

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[15] *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58, at pp. 64-65

The rule works well and makes sense when applied to an agreement that has been the subject of negotiation between parties of equal strength. In that case it is fair to say that the parties have reduced their entire agreement to writing and intend to be bound by the agreement as written. However, the rule can be harsh and unfair when applied to the many pre-printed, standard form agreements which we routinely sign without reading carefully and without any opportunity to negotiate or modify the terms.

When considering a standard form agreement that a party is required to sign with little opportunity to negotiate then the courts will side step the parol evidence rule and consider extrinsic evidence in order to ascertain the true agreement between the parties which may not be reflected by the standard form agreement.

Contra Proferentem

The principle of "*contra proferentem*" [16] is often helpful to tenants when dealing with the interpretation of a lease which is in the landlord's standard form. The courts will construe a document more strictly against the party who drafted it. However this does not mean that the landlord's standard form lease will always be strictly construed against the landlord. There are certain preconditions which must exist before the *contra proferentem* rule is applied.

In order to engage the *contra proferentem* principle the lease must be in one of the parties'

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16 Blacks Law Dictionary, sixth ed., defines contra proferentem as follows: "Against the party who proffers or puts forward a thing. As a rule of strict construction, "contra proferentem", requires that contact be construed against person preparing terms thereof."

standard form, most commonly the landlord's, with no opportunity to modify. The rule will not generally apply to a negotiated lease between sophisticated parties of relatively equal bargaining power. Secondly, there must be an ambiguity or imprecise term or provision. Where the lease is clear then there is no need to resort to the *contra proferentem* rule as the clear words of the lease will govern. However where there is an ambiguity such that a provision in the lease is capable of more than one equally reasonable interpretation then the meaning less favourable to the author of the document (the landlord) and more favourable to the other party (the tenant) should be adopted.[17] One must always keep in mind that the two competing meanings must both be commercially reasonable. If one of them is unreasonable or leads to an absurdity then there is no contest.

The recent decision of the Alberta Court of Queens Bench in *Depot at Riverbend Square Ltd. v. Time for Wine Ltd.*[18], is an interesting example of the court not applying the *contra proferentem* rule. In that case the tenant's use clause permitted the tenant to operate a "specialty wine store". The issue was whether the use clause permitted the tenant to sell liquor and beer in addition to wine. The court decided that in interpreting the use clause the *contra proferentem* rule did not apply as the parties were of equal bargaining power and the lease was a negotiated document. However, the analysis followed by the court very much mirrors the *contra proferentem* rule. The court decided the tenant was permitted to sell beer and liquor for the following reasons:

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17 *Hillis Oil & Sales Ltd. V. Wynns Canada Ltd.* (1986) 25 D.L.R. (4th) 649 (S.C.C.) at 657.

18 [1997]A.J. No. 660 (Q.B.) 4

> "I am of the view that the circumstances under which the lease was signed do not give rise to a change in the plain and ordinary meaning of the words "specialty wine store". Those words are ambiguous in that they could be taken to mean a store which sells wines or "specialty wines" to the exclusion of everything else, or a store which specializes in the sale of wines but carries other product lines as well. The common sense interpretation of the words is therefore not to restrict the operation of the business to that of a shop selling only wines. Such a shop would or could arguably carry products other than wines which were its specialty. The other products would or could include products such as liquor and beer which could conveniently be combined with the wine business in which the store specialized."[19]

It is interesting to compare the result in the *Depot at Riverbend Square Ltd. v. Time for Wine Ltd.* with the result in the *London Drugs Ltd. v. Truscan Realty Ltd.* case. In the Depot at Riverbend Square case the court noted that at the time the lease was signed the Alberta Liquor Control Board only permitted the tenant to sell specialty wines. The ALCB subsequently changed its rules and permitted the tenant to sell beer and liquor as well. The court interpreted the tenant's use clause in accordance with the expanded rules of the ALCB. Compare this to the decision in the London Drugs case where the court froze the interpretation of "food supermarket" to its meaning to the parties in January 1985 and did not permit the term to evolve and expand with the changing times.

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[19] Ibid at 8

Words Crossed Out in the Lease

What use can a court make of words or even paragraphs in a lease that have been crossed out but are still legible. In the English case of *Inglis v. John Buttery & Co.,*[20] the House of Lords was unanimous in their conclusion that excised words could not ordinarily be referred to in construing an agreement:

> "With reference to the deleted words, it is of great importance to have it understood that there is no doubt on that point in the mind of any one of your Lordships. When those words were removed from the paper which had presented the full contract between the parties, they ceased to exist to all intents and purposes; and whether it was possible, as in point of fact it was, still to read them, in consequence of their simply having a line drawn through them, or whether they had been absolutely obliterated, appears to me not to make the smallest difference. The contract was complete after the deletion."[21]

This position was accepted by the majority of Supreme Court of Canada in *Knight Sugar Co. v. Webster*[22]. However an exception to this rule has been carved out which is based on Chief Justice Anglin's dissent in that case. In his view the ruling in *Inglis* was too broadly stated:

> "While, no doubt, under ordinary circumstances, it is not proper to look at deleted words in an instrument as an aid to its construction...that rule, I venture to think,

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20 (1878), App. Cas. 552 (H.L.)

21 Ibid at 571

22 [1930] S.C.R. 518.

> is sometimes too broadly stated and *does not apply where, as a result of the deletion, there is an ambiguity such as that now before us.*"[emphasis added]

Chief Justice Anglin's approach has been supported by several cases since and now appears to be a valid exception to the rule. For example, in *Louis Dreyfus & Cie. v. Parnaso Cia. Naviera S.A.*,[23] Diplock J. commented, in obiter, that "while I think that I must look first at the clause in its actual form without the deleted words, if I find the clause ambiguous, I think I am entitled to look at the deleted words to see if any assistance can be derived from them in solving the ambiguity".

Just last year, the Alberta Court of Appeal also seems to have acknowledged that a deletion may be used in order to clarify an ambiguity[24]:

> *" Where, as here, there is no ambiguity justifying the admission of extrinsic evidence in aid of interpretation,* it is not proper to refer to the deleted words in construing the meaning of the words actually used by the parties to express their agreement."[25][emphasis added]

The foregoing is only an outline of some of the issues relating to the interpretation of a lease which is intended to give some practical guidance on the subject. A full examination of the area

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23 [1959] 1 Q.B. 498 (C.A.) at 513

24 *Paddon Huges Development Co. v. Pancontinental Oil Ltd. et al.* (1998), 223 A.R. 180.

25 Ibid at 520.

is beyond the scope of this paper.

C.

MEDIATION, ARBITRATION AND COURT PROCEEDINGS

Mediation

Mediation is designed to be a non-binding, without pre-judice attempt to negotiate a resolution of a dispute with the assistance of a person trained and skilled in the art of dispute resolution. Non-binding, means a resolution cannot be imposed but must be agreed to by all participants. Without prejudice, means that a party is not bound by any positions taken or concessions made during the mediation process. All of this is intended to encourage the parties to negotiate freely and frankly without being concerned that their case may be weakened by participating in mediation.

Generally, I have found that where the two parties agree to mediate their dispute, there is a high likelihood that the case will be resolved during the mediation. Voluntarily agreeing to mediation, is always a significant step towards settlement.

Selecting the Mediator

Retired judges and senior practitioners offer themselves as mediators. Private mediators are paid by the hour and the rates charged generally reflect their experience and stature in the profession. While retired judges, senior practitioners and experienced mediators tend to charge an hourly rate that is in keeping with their experience, if they are able to resolve the dispute then it is certainly good value.

With the introduction of Mandatory Mediation (discussed below) we have seen an explosion in the number of mediators and with it some price competition (read undercutting of fees) in order to attract business. It is too early to say what impact this explosion in mediators will have on the litigation process. It has certainly increased the profile of mediation and one would expect it will lead to more disputes being resolved without going to court.

From a landlord-tenant perspective, mediation may be most useful where there is an ongoing tenancy and a genuine dispute has developed which needs to resolved without destroying the business relationship between the landlord and tenant.

Mandatory Mediation

Mandatory mediation seems a contradiction in terms. However, it is a very successful project in the Ontario Superior Court of Justice which requires that all case managed cases in Toronto and Ottawa have a 4 hour mediation session within 90 days of the filing of the statement of defence [26].

The mandatory mediation project was started in Ottawa on January 1, 1997. It expended to Toronto on January 1, 1999. All case managed cases in Toronto and Ottawa after January 1, 1999, will be subject to a four hour mandatory mediation session. The mediators are selected from a roster of court-connected mediators who are paid $125.00 per hour for a four hour mediation session consisting of one hour for preparation, and three hours for the mediation

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[26] See Rule 24.1 Mandatory Mediation, *Rules of Civil Procedure*, R.R.O.....

session. The fee is split by the parties. Mandatory Mediation is now an added cost of litigation, however, if the mediation is instrumental in resolving the dispute then it is certainly good value.

Arbitration

Most leases include an arbitration clause. An arbitration clause can be a simple statement that any disputes under the lease will be resolved by arbitration in accordance with the *Arbitration Act*. Or, it can be several paragraphs long detailing how the arbitrator or arbitrators will be selected, what issues may be arbitrated, who will pay the cost of the arbitration and other procedural matters. No matter the length of the provision it is considered an arbitration agreement within the meaning of the *Arbitration Act*.

Unless the parties specify otherwise the arbitration will be governed by the *Arbitration Act* 1991[27] (the "Act"). The Act applies to all arbitrations which were commenced after 1991. The Act, replaced the old *Arbitration Act* which had been around since the late 1800s. The Act was intended to remedy some of the major shortcomings of the original *Arbitration Act* including that it permitted too much court interference and provided very little procedural guidance. The Act follows the United Nations Commission on International Trade Law model arbitration act (the "UNCITRAL model").

The Act does restrict court interference more than the old Act did and offers more procedural guidance for arbitrations as well as restricting the right of appeal. The Act provides that the

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[27] S.O. 1991, c 17

courts will not intervene in arbitrations except:

1. To assist in conducting arbitrations;
2. To ensure that arbitrations are conducted in accordance with the arbitration agreements;
3. To prevent unequal or unfair treatment of parties to arbitration agreements;
4. To enforce the arbitration awards.[28]

The court may also intervene to determine whether a dispute should be the subject of an arbitration or a court proceeding. Where the parties agree that the issue shall be arbitrated then the court may stay the court proceeding and require that the parties proceed by arbitration. Conversely, where one of the parties seeks to arbitrate the court may intervene and stop the arbitration if it decides the matter which the party seeks to arbitrate is not within the scope of the issues which the parties agreed would be arbitrated.[29]

Pros and Cons of Arbitration

Proceeding by way of arbitration can have the following advantages:

1. it may take less time as the parties are not subject to the scheduling difficulties experienced by the courts;
2. it may be less costly because the parties have the ability to streamline the process and set their own procedures;

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[28] Ibid s.6

[29] Ibid s.7

3. the parties can agree on an arbitrator who has knowledge and expertise in the area of the dispute;
4. an arbitration can be private and the result of the arbitration does not create a binding judicial precedent which may affect the rights of third parties or be relied on by third parties;
5. an arbitrator's award only binds the parties to the arbitration;
6. preservation of valued relationships. This may in fact be the most important feature of arbitration. Where the parties, in particular a landlord and a tenant wish to preserve their business relationship but there has arisen a genuine dispute between them and they have not otherwise been able to resolve the issue then arbitration is probably the best route to resolve the dispute.

On the other hand, an arbitration can be as drawn out and expensive as any court proceeding. Although the Act seeks to limit court intervention, there are still numerous issues which can be the subject of a court application including:

a. the selection of the arbitrator;
b. the definition of the issues to be arbitrated; and
c. are the issues within the four corners of the arbitration agreement.

Procedurally the arbitration can be as complex as any court proceeding as the arbitrator may order examinations for discovery and production of all documents in the party's possession and

control [30]similar to the provisions of the *Rules of Civil Procedure*.

Finally, once the arbitrator's award is made the right of appeal is limited to a question of law which will significantly affect the rights of the parties.[31] The arbitration agreement may provide for more extensive rights of appeal. A party may however, apply to the court for an order setting aside the arbitrator's award on any one of the following grounds:

a. a party entered into an arbitration agreement while under legal incapacity;

b. the arbitration agreement is invalid or has ceased to exist;

c. the award deals with a dispute the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement;

d. the composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with the *Arbitration Act*;

e. the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law (this applies to child custody matters and criminal matters - commercial leasing issues can be arbitrated).

f. the applicant was not treated equally and fairly, was not given an opportunity to present the case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;

g. the procedures follows in the arbitration did not comply with the *Arbitration Act*;

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30 Ibid s. 25(6)

31 Ibid s. 45

h. the arbitrator has committed a corrupt or fraudulent act and there is a reasonable apprehension of bias;

i. the award was obtained by fraud. [32]

Court Proceedings

When mediation and arbitration fail, then one can always turn to the courts. Even though one has engaged the court process it is always open to the parties to resolve their dispute through mediation, in fact it is encouraged. We have already discussed mandatory mediation of all case managed cases started in Toronto and Ottawa. In addition to the mandatory mediation project there are pre-trail conferences which are heard by judges before the actual trail of a case. The pre-trial may be held months, weeks, days or even hours before a trial. While mandatory mediation attempts to resolve disputes early in the process, a pre-trial attempts to assist the parties in resolving their dispute before they actually go to trial.

If the case is not resolved either by mediation or pre-trial then at the trial neither party is permitted to refer to anything said during mediation or pre-trial. The judge who heard the pretrial is not permitted to preside over the trial. Similarly, the mediator cannot be called at trial as a witness. At trial both parties are permitted to pursue their case to the fullest without regard to any admissions or concessions they may have made in order to attempt to settle the case before trial

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[32] Ibid s. 46

Getting started: The Originating Process: Application or Statement of Claim

Whenever an issue arises which may lead to litigation, one of the parties, if not both, wants a quick resolution of the issue. Unfortunately we all know that litigation often means a life sentence of discoveries, motions, and waiting for dates, not to mention expense, with a trial three years down the road. As a result, litigators are faced with the challenge of getting a quick, cost effective result. This challenge becomes even greater in the face of one of the most common defence tactics, which is to delay and to obfuscate matters in the hopes that litigation fatigue will set in and the suit will go nowhere.

Notice of Application - rule 14.05

The hearing of an application can be brought on much faster than a trial, often in a matter of months. An application may be brought for a wide variety of relief where it is unlikely that there will be any material facts in dispute. An application proceeds on affidavit evidence and cross examination, no *viva voce* evidence. However, if there are factual issues in dispute that cannot be resolved on the basis of the written record, then the court may order a trial of those issues.

In order to proceed by way of application, either the landlord or the tenant should attempt to cast the issue as an application to interpret a lease (rule 14.05 (d)). To this can be joined a claim for an injunction or a declaration or payment in accordance with the interpretation. For example where there is a dispute over a use clause, the landlord may bring an application to interpret the clause and an injunction to enforce the tenant's compliance with the clause.

For the tenant, one of the most common applications is for relief from forfeiture. This application may be brought either under the *Courts of Justice Act* ("CJA") section 98, or the *Commercial Tenancies Act* ("CTA") section 20 (1), or to be safe, under both acts.

For the most part, the requirements for relief from forfeiture whether under the CJA or the CTA are the same with one notable difference. Under the CTA it is a requirement that a forfeiture has in fact occurred, i.e., not just a notice of future termination and demand for possession. Under the CJA there is no such requirement. Accordingly relief under the CJA may be available in a wider variety of circumstances than under the CTA. However, keep in mind that it is unsettled whether the *Commercial Tenancies Act* is intended to be a complete code, thereby precluding the applicability of *CJA*, or whether the court may proceed under the *CJA*, despite the provisions of the *Commercial Tenancies Act*.

Statement of Claim

Generally where there is a claim for non-payment of rent the landlord will proceed by statement of claim. This allows the landlord to obtain default judgment where the claim is not defended. Where the claim is defended then the landlord may bring a motion for summary judgment (see below).

Default Judgement - rule 19

Where no statement of defence is filed within the time prescribed by the rules the landlord may obtain default judgment signed by the registrar "for a debt or liquidated demand in money, including interest if claimed in the statement of claim" (rule 19.04 (1) (a)). A claim for rent

owing under a lease is a liquidated demand for money for which default judgment is available. Default judgment is also available for the rent due over the unexpired term of the lease, although this is not always granted automatically, as it raises issues of mitigation and the registrar needs to be convinced that it should be granted. Practically speaking, where the tenant has not defended the landlord will have difficulty in collecting its judgment wether it includes the loss of future rent or not.

Summary Judgment - rule 20

Where a statement of defence is filed, counsel will assess the quality of the defence and if it appears that the tenant does not have a defence to the action then a motion for summary judgment under Rule 20 is the next step. The rule provides; "where the court is satisfied that there is no genuine issue for trial .... the court shall grant summary judgment accordingly."

The Ontario Court of Appeal has made it clear that when dealing with a motion for summary judgment the court is not to assess credibility or find facts. However, it is not sufficient for the defendant to merely raise a number of issues. The defendant must present evidence of specific facts to establish that there is a genuine issue for trial. The court must critically examine that evidence to see if it is reasonably capable of raising a genuine issue for trial. Where the court is satisfied that the evidence does not support the conclusion that there is a genuine issue for trial, then the Court shall grant summary judgment[33].

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33 *Irving Ungerman Ltd. v. Galanis* (1991) 4 O.R. (3d) 545, [1991] O.J. No. 1478 (C.A.), *Bossè v. Mastercraft Group* [1995] O.J. No. 884 (C.A.), *Aguonie v. Galion solid Waste Material Inc.* (1998) 38 O.R. (3d) 161 (C.A.)

Trials

Where the claim is proceeding by way of a statement of claim, the trial will happen in due course, after discoveries, a few motions, a pretrial and a few years. But remember the trial will happen, justice is slow but it is sure.

Trial of an Issue

Application, rule 38.10(1): At the hearing of an application the judge may order that the whole application or any issue proceed to trial.

Summary Judgment, rule 20.05 (1): Similarly, on a motion for summary judgment, one of the options open to the court is to order a trial of some or all of the issues.

If one does not succeed on an application or motion for summary judgment, you may succeed in having a judge order a trial of only those issues that are truly in dispute, thus streamlining and focusing the trial. Also counsel may convince a judge to order an expedited or early trial date.

A word of caution, there are cost consequences to losing a motion for summary judgment[34] or an application.

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[34] rule 20.06 (1) reads as follows: "Where, on a motion for summary judgment, the moving party obtains no relief, the court shall fix the opposite party's costs of the motion on solicitor and client basis and order the moving party to pay them forthwith unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable."

Summary Application for Possession

Part III of the *Commercial Tenancies Act* [35] offers a summary procedure for a landlord to obtain possession of its premises. This is a little used remedy as it only allows a claim for possession at the end of the lease, and no claim for damages or rent, except for over-holding rent. It is an application so it is commenced by a notice of application under Rule 14. The relief sought is a declaration that the tenancy is terminated and the landlord is entitled to possession of its premises and that a writ of possession issue, directed to the appropriate Sheriff and directing the Sheriff to forthwith take possession of the premises and return them to the landlord. A action for possession is most useful where you want to get rid of a pain-in-the-neck tenant, and nothing more.

Simplified Procedure - Rule 76

The rules of the Ontario Superior Court of Justice now provide for a simplified procedure for claims under $25,000. Under this rule, procedures have been simplified to encourage the quick and economical adjudication of claims where smaller amounts are at stake. Some highlights are:

- no examination for discovery or cross-examination on affidavits filed on motions;
- the parties may agree to a summary trial in which the evidence in chief is introduced by affidavit;
- at a summary trial there are time limits set on examinations and cross-examinations;
- the test for granting summary judgment is lower;
- there are cost consequences to a party who recovers less then $25,000 and did not bring

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35 R.S.O., 1990 c.L7

its action under the simplified procedures

The experience with the simplified rules to date has been very good. Cases are getting on for trial in under a year.

Small Claims Court - Provincial Court (Civil Division)

The monetary limit of the Small Claims Court is $6,000, plus interest and costs. A plaintiff cannot unreasonably split its cause of action to bring it within jurisdiction of the Small Claims Court. For example if the tenant is in arrears for 6 months rent at $3,000 per month for a total of $18,000, the landlord cannot bring three actions each for two months rent in order to bring it within the jurisdiction of the court. However, the Supreme Court stated in *Kelly Douglas v. Highway Properties*[36] the landlord may sue for each month's rent as it comes due. The landlord may take advantage of this and bring separate actions for each month's (or two months') rent provided that: (a) the lease has not been terminated, and (b) the landlord issues its claim in the Small Claims Court immediately after the rent has accrued, for the full amount owing on that date. Small Claims Court judges don't like this, but it does work.

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36 [1971] S.C.R. 562.