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"DEFAULT REMEDIES"

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INTRODUCTION

When advising a client on default remedies or any other area of landlord and tenant law, whether the client is a landlord or a tenant, you must keep in mind that the law of commercial leasing is part real property law and part contract law. As a result it takes a number of twists and turns which often defy common sense and logic. Over the years there has been a steady shift away from some of the more arcane principles as exemplified by the decision of the Supreme Court in *Kelly Douglas v. Highway Properties*[1]. However, because the commercial lease still grants an interest in land, it is unlikely that all of the unique features which arise from this will ever disappear. This presents a unique challenge to both the barrister and the solicitor when advising their clients in landlord tenant matters.

In this paper, we present an overview of the issues which often arise where is a default under a commercial lease and practical answers to the issues. Throughout this paper we have always kept in mind our overall theme, that the law of commercial leasing is a peculiar amalgam of real property law and contract law.

DEFAULT REMEDIES, SOME PRELIMINARY CONSIDERATIONS:

The Lease

In most commercial lease transactions, the lease is the document from which everything flows. It can be a one page letter to 100 page tome, with schedules A through E as amended, extended, etc. As long as the document contains the six essential elements, (1) the parties, (2) description of the premises to be leased, (3) commencement date of

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1 [1971] S.C.R. 562.

the term, (4) duration of the term, (5) rent, if any, (6) all material terms of the contract that are not matters incidental to the relationship of landlord-tenant,[2] it qualifies as a lease.

The agreement to lease must also pass the *Statute of Frauds*[3] test being; "unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or the party's agent thereunto lawfully authorized by writing or by act or operation of law as it pertains to an interest in land". In short, it must be in writing, subject to part performance and any other legal doctrines which have developed to deal with the *Statute of Frauds*.

Compelling the Other Party to Sign the Lease

An agreement to lease typically requires the parties to execute a lease in the "landlord's standard form", at some point in the future. What happens if no lease is signed? To avoid this problem, many landlords try to enforce a strict "no lease, no key" policy. Still, there are many tenants in possession on just a short letter agreement or offer to lease. This initial agreement will be binding on both the landlord and the tenant, so long as the agreement contain the six basic requirements for a lease noted above. However, where the agreement to lease also provides that the tenant will sign a lease in the landlord's standard form and the tenant has been provided with that form of lease but has not signed it, in a subsequent dispute, the tenant may be bound by the terms of the landlord's full form lease.[4]

Will a court compel a tenant to sign a lease? At least in Ontario, the answer appears to be yes.[5] However, before threatening a tenant with a "sign or else" ultimatum, landlords should be aware that the Saskatchewan Court of Appeal has ruled that such a threat can amount to an anticipatory breach of the lease by the landlord, whereby the

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2 *Ossory Canada Inc. v. Wendy's Restaurants of Canada Inc.* [1997] O.J. No. 5168

3 R.S.O. 1990 c.S. 14 s.*2*

4 *Sally Wasserman Interiors & Gifts Inc.* v. *Centre City Capital Ltd.*, [1996] O.J. No. 1295 (Gen. Div.).

5 *Ferleo Tile Inc.* v. *Nubilis Holdings Ltd.*, [1993] O.J. No. 870 (Gen. Div.).

tenant is entitled to elect to sign, or terminate the lease (much to the surprise and chagrin of the landlord in that case who only actually wanted to "scare" the tenant into compliance).[6]

However, where the landlord never provides the tenant with its standard form lease, it is difficult to see how a tenant can be bound by that lease. In this circumstance, the parties' relationship will probably be governed by the original agreement to lease, no matter how sparse.

Monetary or Non-Monetary Defaults

Once the terms of the lease are established the next issue that arises - is the default a monetary or a non-monetary default? Monetary defaults tend to offer the landlord a wider range of remedies including the right of distress. A default in the payment of rent generally has a shorter and less onerous notice requirement, when compared to those governing non-monetary defaults - no need to comply with strict notice provisions in Section 19(2) of the *Commercial Tenancies Act.*

Monetary Defaults - What is Rent?

What is the definition of "Rent" in the lease? Rent is generally defined in commercial leases to include minimum rent, additional rent and all other sums payable by the tenant to the landlord under the lease. Certain charges which the landlord may wish to collect from the tenant - such as capital tax, large corporations tax, management and administration fees which are generally found under the definition of "Operating Costs" or "Net Lease" - must be specifically addressed in the lease to be recoverable by the landlord[7].

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6 *Homer* v. *Toronto-Dominion Bank* (1990), 83 Sask. R. 300 (C.A.).

7 *Dylex Ltd. v. Premium Properties Ltd., [1996] O.J. No.2165 (Gen. Div.); Han v. 9938 Investments Ltd. (1995), 45 R.P.R. (2d) 100 (B.C.C.A.); KPMG Peat Marwick Thorne and Johnson & Higgins Ltd. v. SPE Operations Ltd., unreported, No. 4675/94, April 6, 1995*

The benefit to the landlord of an expansive definition of rent in the lease is that it allows the landlord to proceed with monetary default remedies which tend to be more effective.

Does the lease provide for "accelerated rent" upon any default by the Tenant under the Lease? If the lease does provide for acceleration of rent on default (generally 3 months), then even a non-monetary default by the tenant would give rise to a rental default which would then allow landlord to pursue remedies available on non-payment of rent (ie. Distress) and avail itself of the less onerous notice requirements.

Is there, or is there likely to be, a dispute with the tenant as to whether there is a default in the payment of Rent (look for tenant's rights of set-off in the lease)? If the tenant is subsequently found by a Court not to have been in default of its obligation to pay rent, Landlord will be liable for damages for trespass and conversion if it completed its distraint.

In the event the Tenant is placed into bankruptcy, the landlord has the right to accelerate Rent for a three month period and will rank as a preferred creditor for said amounts. Accordingly, the wider the definition of Rent is the larger the Tenant's preferred claim would be.

Who is occupying the Premises?

Subtenant :

Section 21 of the *Commercial Tenancies Act*[8] (hereinafter referred to as the "Act") permits a subtenant or underlessee to apply to the court for relief from forfeiture; However, many sublease agreements specifically provide that the subtenant waives its rights under Section 21 of the Act. The rights of the subtenant on such an application will depend on many factors including whether the landlord has consented to the sublease.

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8 *Formerly the Landlord and Tenant Act (name changed by S.O. 1997, c.24, s.213(5), in force June 17, 1998 (O. Gaz. 1998 p.1006).*

Section 32(2) of the Act allows a subtenant, occupying the premises *with the consent of the landlord*, to provide a statutory declaration that the tenant has no interest in its goods and to pay any rent owing under its sublease directly to the landlord, upon which landlord will have no right to distrain against those goods upon the premises belonging to the subtenant.

Receiver:

If the receiver is court appointed, the receiver is an officer of the court and acts in its own capacity and not as the agent of the tenant. Most receiving orders provide for a stay of all proceedings against the creditor. Accordingly, the tenant would have to make an application to the court to enforce its rights under the lease (ie. distrain for rental arrears or terminate the lease);

If the receiver is privately appointed, such as by a creditor under a general security agreement, the receiver is the agent of the landlord (debtor), and the landlord retains all of its rights under the lease, including its right to distrain. The landlord may even have the right to terminate the lease where the appointment of a receiver is an event of default under the lease.

NOTICE

To whom must notice of default be provided and in what circumstances (ie. concurrent with notice to Tenant; after giving the tenant notice and an opportunity to cure the default; prior to exercising any remedy under the lease or only for certain remedies or defaults)?

Tenant - check notice provisions in the lease and property management files for any notices of change of address;

Guarantor/Indemnitor - if there are any guarantors or indemnitors of the lease, notice should be provided to them concurrent with the notice to the tenant. Failing to notify the guarantor or the indemnitor could render the guarantee or indemnity unenforceable;

Mortgagee or other lender: in many cases (especially large ground leases) where the tenant mortgages its leasehold interest to finance the development of the property, the landlord will have entered into an agreement with the lender agreeing, amongst other things, to provide the lender with notice of any defaults under the lease and the right to cure such defaults.

Franchisor:

Many leases entered into by tenants who are parties to a franchise agreement contain provisions requiring the landlord to give the franchisor notice of any default and an opportunity to cure the default or assume the lease. Alternatively, there may be a separate agreement between the landlord and the franchisor which requires that notices of default be provided to the franchisor.

Objective: Preserving or Terminating the Lease?

Where the landlord wishes to distrain once you terminate the lease. Landlord's duty to mitigate arises once the lease is terminated. Terminating the lease, written notice of your intention to claim damages for the loss of the benefit of the lease to the end of the term must be provided to the tenant either concurrent with the notice of termination or shortly thereafter[9]. Commencing an action for damages shortly after terminating the lease has been held to be sufficient notice to tenant of the landlord's intent to claim damages for loss of the benefit of the lease to the end of its term[10]. Failure to provide the tenant with such notice will result in the landlord losing its right to claim for future damages.

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9 *Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), 17 D.L.R. (3d) 710, [1971] S.C.R. 562 (S.C.C.)*

10 *North Bay T.V. & Audio Ltd. v. Nova Electronic Ltd. (1983) 4 D.L.R. (4th) 88, aff'd 12 D.L.R. (4th) 767 (C.A.)*

DISTRESS

The following is a general outline of the remedy of distress, together with a review of the impact deemed trust for unpaid Provincial Taxes claims available under section 22 of the Retail Sales Tax Act against landlord's.

Distress is a combination of a statutory (*Commercial Tenancies Act*) and common law self-help remedy whereby a landlord is entitled to seize and sell the goods of a tenant upon the leased premises (chattels not fixtures) to satisfy any *existing rental arrears*. The remedy of distress is only available when there is a landlord and tenant relationship and a default in the payment of "rent" as such term may be defined in the lease. It can only be exercised after there has been default in the payment of rent and may only be exercised between sunrise and sunset (excluding Sunday's).

The landlord or its agent, usually a bailiff, may enter the premises during daylight hours to distrain. The landlord may not use force to enter the premises to effect the distress. Note that it has been held that using a key to enter the premises when locked without the consent of the tenant for the purposes of distraining is a forcible entry and renders the distress illegal. Be aware that if using a bailiff to effect the distress, the bailiff is the agent of the landlord, and the landlord will be responsible for the actions of the bailiff during the distress.

The landlord may seize those goods in the leased premises belonging to the tenant and any other party liable to pay rent[11]. However there are numerous exceptions[12], including: the landlord can only distrain against chattels of the tenant and not fixtures. Trade fixtures are fixtures not chattels and are not subject to distress despite the fact that the lease allows the tenant to remove them at any time during, or on expiration of, the term[13]. Given the myriad of

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11 *Section 31(2) of the Commercial Tenancies Act)*

12 *See also Section 2 of the Execution Act, R.S.O. 1990, c. E.24*

13 *859587 Ontario Ltd. (c.o.b. Atalntic International equipment Sales) v. Starmark Property Management Ltd.; (1998), 81 ACWS (3d) 539; [1988] OJ No. 3022; appeal from (1997), 34 OR (3d) 43*

case law on the distinctions between fixtures and chattels, there remains constant uncertainty over what is a fixture and what is a chattel, especially when dealing with equipment. The general rule is that if it is affixed to the property it is a fixture. However the case law has distinguished on many occasion between levels of affixation to the property and found what some would have considered fixtures to be chattels.

Who owns the goods?

Goods on consignment: as they are not owned by the tenant they are not subject to distress.

Conditional Sales: the right of the Landlord to distrain is limited to the tenant's interest in the goods subject to the conditional sale[14].

Are the goods subject to any security interests?

The current status of the law is that if the landlord commences its distraint prior to the any seizure by a secured party under its security, the landlord will have priority over the secured creditor[15]. Essentially it is a race to the swiftest. However, the Ontario Court of Appeal has recently held that a landlord's distress completed within 3 months of a tenant's bankruptcy, amounts to a "fraudulent preference" and that the proceeds of the distress belong to the trustee in bankruptcy leaving the landlord with its preferred claim under the *Bankruptcy and Insolvency Act*[16].

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14 *J.R. Autobrokers ltd. v. Hillcreast Auto Lease Ltd., [1968] 2 O.R. 532 (H.C.)*

15 *Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd. (1980), 29 O.R. (2d) 106, affd 32 O.R. (2d) 703 (C.A.)*

16 *Canadian Imperial Bank of Commerce v. Canotek Development Corporation (1997), 35 O.R. (3d) 247 (C.A.)*

Due to the numerous cases concerning priorities before the courts, it is open for the courts to reverse the current state of the law or provide for additional exceptions to the rule, thus leaving a level of uncertainty as to priority when rendering a distress.

TO DISTRAIN OR NOT TO DISTRAIN?:

Pros: (i) does not terminate Lease;

(ii) costs of distress chargeable to Tenant;

(iii) fast and gets Tenant's quick attention;

Cons: (i) Uncertainty over whether goods are chattels or fixtures;

(ii) Detailed and onerous procedures which if not strictly followed could lead to the landlord being liable for trespass and/or even termination of the lease which would then preclude the landlord from claiming damages for the loss of the benefit of the lease to the end of its term.

Example: changing the locks and denying tenant access to the property while distraining could result in the termination of the lease which then results in the landlord losing its right to distrain (as the right only exists so long as there is a landlord and tenant relationship) as well as losing its right to sue the tenant for damages for loss of benefit of the lease to the end of its term.

- uncertainty as to the title of the goods being sold - superior lien claimants: Revenue Canada for unremitted G.S.T. and Employee remittances. These "super liens" have priority over the landlord's right to distrain and attach to and follow the goods.

- can be defeated if tenant becomes bankrupt before the distress is complete (ie. before the goods are sold and proceeds distributed to satisfy the arrears) or if tenant becomes bankrupt within 3 months of the completion of the distress.

PRACTICAL CONSIDERATIONS:

Has the Landlord contracted out of the right to distrain in the Lease? It is common in ground leases where the tenant is making a substantial investment in the development of the property, for the tenant to insist that the landlord waive its rights to distrain against the goods of the tenants. Why? Because if the tenant defaults, the landlord has the benefit of the improvements made to the property which were done at the expense of the tenant with no cost to the landlord.

Is there, or is there likely to be, a dispute with the tenant as to whether there is a default in the payment of "Rent" (look for tenant's rights of set-off in the lease)? If the tenant is subsequently found by a Court not to have been in default of its obligation to pay rent, Landlord may be liable for damages for trespass and conversion if it completed its distraint.

Value of goods: goods may have a greater value on the premises (ie. restaurant equipment) than if sold under a distress;

Financial Position of Tenant: Is tenant on verge of bankruptcy? If tenant becomes bankrupt before landlord completes its distraint (ie. sale of goods seized and the receipt and application of the proceeds of the sale to arrears of rent), landlord's claim for distress will be defeated and the goods or proceeds from the sale of the chattels will vest in the trustee.

If tenant has substantial assets and values the premises, landlord may prefer to sue tenant for arrears of rent and reduce the potential risk of having the lease terminated or being found liable to the tenant for damages in the event of an illegal distress.

Distraining may interfere with the tenant's business being conducted from the premises and further impair tenant's ability to pay arrears of rent or future rent.

RE-ENTRY

The landlord's right to re-enter and take possession of the premises thereby terminating the lease, exists for both monetary and non-monetary defaults of the tenant. Most commercial leases set out a list of events of default which would permit the landlord, amongst other things, to re-enter the premises and terminate the lease. What distinguishes monetary defaults from non-monetary defaults is the notice requirements in the Commercial Tenancies Act (the "Act") as well as the lease itself.

Where the lease is silent as to notice for non-payment of rent, Section 18(1) of the Act provides that where the rent remains unpaid for fifteen (15) days the landlord is entitled to re-enter the premises without any formal notice to the tenant (although formal notice is generally recommended in any event unless the tenant has been in habitual default in payment of rent). Most commercial leases contain provisions requiring notice to the tenant on rental defaults with a brief opportunity to cure the default. The fifteen day statutory period is often reduced to three to seven days as landlord's are not prepared to allow tenants a fifteen day grace period for payment of rent.

For non-monetary defaults, Section 19(2) of the Act requires that a specific form of notice be provided to the tenant before the landlord has the right to re-enter and terminate the lease. Failure to strictly comply with the requirements of the 19(2) notice may render the termination invalid and result in a claim against the landlord for trespass. The 19(2) notice is not a notice of termination however the tenant's failure to comply with the notice within the time periods specified therein will permit the landlord to re-enter the premises and terminate the lease. Although many commercial leases attempt to contract out of the provisions of Section 19(2) of the Act by providing that the landlord may terminate without notice to the tenant in certain circumstances, the courts have been reluctant to give

effect to such provisions and have maintained that the landlord must comply with the provisions of 19(2) even if the breach is not capable of remedy[17].

METHODS

Physical Re-entry - physically re-enter and take control of the premises (ie. change the locks). Landlord is permitted to use force to re-enter the property but force must not be excessive. Use of excessive will not render the termination and re-entry invalid but will expose the landlord to a claim for damages for use of excessive force.

Make an application for an order that the lease is terminated and for possession pursuant to Part III of the Act - this is a summary procedure which may not include any claims for damages or other remedies other than possession. Generally used where lease has expired or been terminated and tenant refuses to vacate the premises and where there is no claim for damages such as rental arrears. May also be used where it is very unlikely that the tenant would be able to satisfy any monetary judgement obtained against the tenant.

Commence an action by way of statement of claim for an order that the lease has been terminated and for possession (can be coupled with a claim for damages). If the landlord has a very strong case, it may be successful on a motion for summary judgment, which would expedite the process.

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17 *Kawartha Consumers Co-operative v. Cashway Building Centres Ltd., [1997] O.J. No. 32309 (Ont. Gen. Div.)*

SEARCH TITLE TO THE PROPERTY FOR CONSTRUCTION LIENS:

If there are any registered liens, serve the lien claimant with the default notice[18] or the termination may not be effective as against the lien claimant, who under Part IX of the Construction Lien Act could appoint a trustee who could then sell the leasehold interest.

CONTRACTUAL REMEDIES

Right to Cure Tenant Defaults:

Most commercial leases contain provisions allowing the landlord to cure the defaults of the tenant without effecting a termination of the lease. The provisions further provide that any costs incurred by the landlord in curing such defaults are the responsibility of the tenant and may be recovered by the landlord as additional rent under the lease. For example, where the tenant, after proper notice from the landlord, has failed to carry out the necessary repairs required of it under the lease, the landlord may elect to enter the premises and make the necessary repairs. The costs of the repairs would be chargeable to the tenant as additional rent under the lease and if not paid the tenant would then be in default of its rental obligations under the lease which provide the landlord with a wider scope of remedies and simpler notice requirements if it then elects to terminate the lease.

Right to Re-Let on Tenant's Behalf:

Most commercial leases provide that upon default, the landlord may re-enter the premises without terminating the lease and re-let the premises on behalf of the tenant. Despite having this right, this remedy is rarely used as a court may find that the lease was terminated on the re-letting as the new lease was on terms and conditions inconsistent with, or altered the original tenant's obligations under, the original lease (such as extending beyond the term of the

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[18] *See Section 19(3) and Part IX of the Construction Lien Act (Ontario).*

original lease). The result would be the landlord's loss if its right to claim damages for loss of the benefit of the lease for its term.

Coupled with the Landlord's right to re-enter and re-let is the landlord's right to "make such alterations to the premises as are necessary in order for tenant to re-let the premises", the costs of which are then chargeable to the tenant. This is not a blanket right for the landlord to effect any alterations it wishes as the courts will impose some reasonableness on the landlord and look to see if the alterations could have been reasonably foreseen or contemplated by the tenant as necessary for the landlord to re-let the premises.

Right to Appoint a Receiver:

Occasionally, commercial leases will provide that on an event of default, such as non-payment of rent, the landlord will have the right to appoint a receiver . This is rarely done due to the exposure of the landlord to liability for the acts of the receiver and the fact that landlord's are not in the business of running tenant's businesses.

Right to Act as Attorney of Tenant:

On the sale or re-financing of leased property, the landlord will generally require estoppel certificates from its tenants as a condition of the closing of the transaction. Most leases provide that the tenant must deliver to the landlord estoppel certificates within a certain number of days from the date requested by the landlord. To ensure that they are delivered in time and do not delay the landlord's closing of its transaction, many leases provide that if the tenant fails to execute and deliver the estoppel certificate to the landlord as required under the lease, the landlord may execute the estoppel certificate as attorney for the tenant.

Landlord as a Secured Creditor :

It is common these days for landlords to take a security interest in the property of the tenant to secure the tenants obligations under the lease. The benefit of taking a security interest in the property of the tenant is that if properly

drafted and registered in accordance with the provisions of the *Personal Property Securities Act*, upon bankruptcy of the tenant, the landlord will be a secured creditor for the full amount of the tenant's debt under the lease as opposed to being a preferred creditor for 3 months accelerated rent and an unsecured creditor for the balance of the debt the tenant as provided for under the *Bankruptcy and Insolvency Act*.

STRATEGIES WHERE THE TENANT HAS NO ASSETS

EQUITABLE ASSIGNMENT OF LEASE

Distinction between a sub lease and an assignment: under a sub lease the lessee parts with less then the whole of the term of its lease i.e. the sub lease excludes the last day of the term of the head lease. Under a sub lease there is no privity of contract or privity of estate between the landlord and the sub lessee.

Legal Assignment of a lease: under an assignment of a lease the lessee parts with the whole term, or more then the term, of the lease so that the lessee has no reversion. In this instance there is still no privity of contract between the landlord and the assignee, but now there may be privity of estate between them. Where there is privity of estate the landlord may be able to sue the assignee for the rent owing over the unexpired term of the lease[19]. The landlord may still sue the assignor under its covenant to pay rent found in the lease.[20]

Equitable Assignment of the lease: where the lease is in default and the lessee under the lease is a shell corporation without assets the landlord will want to take a look around for another entity that may be liable to the

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19 *Selby v. Robinson* (1865) 15 U.C.C.P. 370 (C.A.).

20 *Barmond Builders LTD. v Mark 3 Investment Corp. (1993) 32 R.P.R. (2d) (Ont. Gen. Div.) In this case Rapson J. found there had been a permitted assignment to a related corporation as contemplated by the lease and found both the lessee named in the lease and the equitable assignee liable. Although the lessee had assigned the term it remained liable on its covenant to pay rent.*

landlord for the rent. If, as is often the case, the entity actually occupying and carrying on business on the premises is not the lessee but a related or affiliated business then the landlord will want to consider whether equity will find that there has been an assignment of the lease. If there has been an "equitable assignment" of the lease, thereby creating privity of estate between the landlord and the equitable assignee, the equitable assignee may not only be liable for unpaid rent but also for future rent due over the unexpired term of the lease.

Is the tenant a shell corporation owned and controlled by entity whose business is carried on from the leased premises then the court may find an equitable assignment of the lease particularly where there is no sub lease and there is no clear distinction between lessee and the occupant of the premises[21].

TORT REMEDIES

Intentional Interference with Contractual Relations: Where the lessee is a shell corporation without assets the landlord may in the right circumstances be able to sue the principals of the corporate lessee for intentional interference with contractual relations. See most recently *Torgan Enterprises Ltd. v. Contact Arts Management Inc.* [1997] O.J. No. 2759 (QL) (Gen. Div.) where a fellow member of the bar was ordered to pay damages in excess of $400,000, ouch.

Elements of the tort are set out in *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989) 70 O.R. (2d) 42 (H.C.)

1. an enforceable contract
   (a) in our case a lease

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21 *For example see Bengro Holdings Inc. v. Tax To Go Inc. [1996] O.J. NO. 2242 QL) (Gen. Div.).*

2. knowledge of the plaintiffs contract

   (a) typically the officers and directors have signed the lease on behalf of the lessee corporation

3. an intentional act on the part of the defendant to cause a breach of the contract

   (a) the principals of the corporation may;

   (b) cause the lessee to stop paying rent;

   (c) cause the lessee to abandon the leased premises;

   (d) cause the lessee to not pursue its sub tenants for the rent so that the lessee has no income or assets to satisfy its liability under the lease

4. wrongful interference on the part of the defendant

   (a) the intentional act becomes a "wrongful interference" when it lacks *bona fides* because it is not done in the best interests of the corporate lessee, but advances the personal interests of the principals or a related entity, typically the principals move to new premises because of a better rent deal. The better rent deal does not benefit the lessee as none of the savings flow through to the lessee, the principals keep all the benefit to themselves.

5. resulting damage

   (a) the damage to the landlord is the loss of rent , including rent over the unexpired term of the lease plus its cost of finding a new tenant. As this is an action in tort the landlord must mitigate its loss by making reasonable efforts to re let the premises.

Where the principal of the corporate tenant causes the tenant to abandon the premises for a better deal elsewhere consider: *Torgan Enterprises Ltd. v. Contact Arts Management Inc.* in which case a lawyer, was found liable to the landlord for inducing the corporate tenant to breach its lease. The defendants claimed they stopped paying rent and vacated the leased premises because of a large number of unremedied problems they had with the building. The court found that the defendants never told the landlord they would leave if their complaints were not dealt with and found the real reason they moved was a better financial deal for the lawyer. The annual rent at the new premises was $57,166.69, instead of $84,000.00 per year, with 60 months free rent, a leasehold improvement allowance of $175,000 and a moving allowance of $2.00 per foot. The court found the lawyer caused the corporate tenant to breach its lease so that he could get a better rent deal which was of no benefit to the corporate tenant.

The court assessed damages as the rent due over the balance of the term plus costs incurred to re-rent the premises less rent received in mitigation for a total of over $400,000.

"IN TRUST FOR A CORPORATION TO BE INCORPORATED"

"Ms X in trust for a company to be incorporated" what to do when you see these words:

The *Business Corporations Act* R.S.O. 1990, c. B.16, s. 21.deals specifically with pre incorporation contracts.

Was a company ever incorporated which became the tenant and paid the rent: if no company was incorporated then Ms X may be personally liable:

> 21. (1) Except as provided in this section, a person who enters into an oral or written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof.

Where a company was incorporated which adopted the lease by its action or conduct such as paying the rent: then Ms X may no longer be personally liable:

> 21 (2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption,
>
> (a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and
>
> (b) the person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.

Where it is unclear whether or not the lease was adopted by the corporation the landlord may apply to the court to determine liability:

> 21 (3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit.

Ms X intrust for a company to be incorporated and without personal liability: where these words describe the tenant on the lease and no company was ever incorporated which adopted the lease, then you may have an unenforceable lease as it is not enforceable against Ms X

> 21 (4) If expressly so provided in the oral or written contract referred to in subsection (1), a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof.

The consequences of naming a non-entity as tenant in a lease: the occupant of the premises will be liable for occupation rent for the premises however the other terms of the lease will be unenforceable and the landlord will have no claim for loss of future rent should the "occupant/tenant" quit the premises.

LANDLORD'S INJUNCTION

From a landlord's perspective injunctions are not generally the remedy of choice. They are expensive, as is all litigation, and the landlord's default remedies under the lease or at law, are in most cases adequate. However, there is a fairly narrow band of circumstances where an injunction may be an option to consider.

Injunctions are only available for non-monetary breaches of a lease: For the most part, where the there has been a none monetary breach of a lease the landlord serves a notice of default on the tenant and if the tenant doesn't remedy the default the landlord either terminates the lease or remedies the default itself and charges the cost back to the tenant. However there are circumstances where the landlord does not want to terminate the tenancy, for

instance where the tenant is an anchor tenant without whom the shopping center will no longer be financially viable. While suing the anchor tenant will put a strain on the landlord/tenant relationship, it may preserve it and be the landlord's best option.

Injunction available where there will be irreparable harm that cannot be compensated by an award of damages: In *Lackner Center Developments Inc. v. Toronto Dominion Bank* (1993), 17 C.P.C. (3d) 60 (Ont. Gen. Div.) the court refused the landlord's application for an injunction to prevent the bank from breaching its lease by shutting down branches as damages would be an adequate remedy for the landlord. For most breaches of a contract or lease damages are an adequate remedy[22].

Mareva Injunction to freeze a tenant's assets before they disappear: The courts are reluctant to grant a Mareva Injunction as it has the same effect as execution before judgement. There must be a strong *prima facia* case on the merits and a real risk that the defendant will put its assets out of the reach of its creditors[23]. This form of injunction is available, in principle, to a landlord to prevent a tenant from removing its assets from the leased premises to defeat the landlord's claim. See *Young Street Shopping Center General Partner Ltd. v. Nimo's Lighting World Inc.*(1992), 9 C.P.C. (3d) 350 (Ont. Gen. Div.) in which case the landlord applied for a Mareva Injunction to prevent the tenant, who was in arrears of rent, from holding a liquidation sale. The court did not grant the injunction as it found that the sale was in the ordinary course of business and not intended to defeat the landlord's claim. However reading between the lines of the reported decision it appears that during interim proceedings sufficient money had been paid to the landlord to cover the arrears and the landlord was pursuing a claim for accelerated rent

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22 *Similarly see Duarte v. Lens Crafters International Inc. (1994), 31 C.P.C. (3d) 321 (Ont. Gen. Div.) where the landlord was unable to restrain the tenant from terminating its lease as the plaintiff would not suffer irreparable harm.*

23 *See Chitel v. Rothbart (1982), 39 O.R. (2d) 513 (C.A.) outlines the general principles for a Mareva Injunction.*

over the unexpired term of the lease which it claimed was also due. The court refused to tie up the tenant's assets to pay this claim.

An order to preserve a tenants records (Rule 45) or an "Anton Pillar" Order: Where there is a risk that a tenant may destroy its records, for example its sales records where the landlord claims percentage rent, then the landlord may need to consider an interim order for preservation of documents. The landlord may in an extreme case seek such an order without notice to the defendant, this is an "Anton Pillar" Order however the test for such an *ex parte* order is rigorous[24].

Enforcing a Use Clause by injunction: The most common use of the injunction remedy by landlords, if the decided cases are a guide, is to seek to enforce, or restrain the breach, of the tenant's use clause.

Injunctions to Enforce Use Clauses: have been granted in a number of cases. In *Denison v. Carrousel Farms Ltd.*, (1982) 38 O.R. (2d) 52 (C.A.), the landlord obtained permanent injunction, after trial, restraining the tenant from selling certain products not included in its use clause. The landlord was also awarded $25,000.00 in damages to compensate the landlord for the loss suffered because of its inability to find a tenant for another space until the space of the tenant's lease was settled[25].

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24 *See Bardeau Ltd. v. Crown Food Service Equipment (1982), 38 O.R. (2d) 411 (H.C.) for a discussion of an Anton Pillar Order.*

25 *Other cases where landlord have obtained injunctions to enforce use clauses: 806042 Ontario Ltd. v. Gasrite International Corp. (1992) 21 R.P.R. (2d) 33, (Ont. Gen. Div.), a gas station was not entitled to sell cigarettes. Lawrence Plaza Equities Ltd. v. A & P Properties Ltd. [1997] O.J. No. 5004 (Q.L.) (Ont. Gen. Div.) an interim injunction was granted preventing A & P from opening within its store a Tim Horton's and a Spotless Cleaners which conflicted with long established businesses in the plaza. Corporate Properties Ltd. v. 358654 Ontario Ltd. [1979] O.J. No. 1173 (Q.L.) (Ont. H.C.J.) The defendant was enjoined from operating a "Games Room".*

Interim or interlocutory injunctions: when you need an injunction you generally need it right away and the motion for an interim or interlocutory injunction is the critical point in most injunction cases. When considering a party's chance of success on an interim injunction you must consider the three stage test set out by The House of Lords in *American Cyanamid*[26] and adopted by the Supreme Court of Canada in *R.J.R. Macdonald Inc.* v. *Canada (Attorney General)* (1994), 54 C.P.R. (3d) 114 at 130 (S.C.C.):

- First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried.
- Second, it must be determined whether the applicant would suffer irreparable harm if the application were refused.
- Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits.

Balance of Convenience: the three point American Cyanamid test is not rigorously applied by the court in all cases. Particularly in cases where there are difficult issues of fact which can only be resolved at a trial. In these cases the courts will focus on the second and third aspects of the test, provided the plaintiff has established a *prima facia* case then the court will look to the balance of convenience[27].

Tenant's injunctions: Tenants are far greater consumers of injunctions than landlord's. When it appears that the landlord is about to do something which may cause a tenant to seek an injunction the landlord should give its litigation counsel forewarning of the possible claim by the tenant as injunctions tend to come up quickly and the ability to respond quickly to the interim injunction motion is critical.

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26 *American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 (H.L.)*

27 *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. (1977) 17 O.R. (2d) 505 (C.A.)*

LITIGATION OVERVIEW IN LANDLORD TENANT MATTERS

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, pretrials, and delays, not to mention expense, with a trial three to five 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 defense 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 damages for breach of lease or a claim for non-payment of rent the parties proceed by statement of claim.

In rent collection matters, landlord's counsel will usually issue a statement of claim. This will allow them to obtain default judgment where the claim is not defended.

Default Judgement - rule 19

Where no statement of defense 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, and the registrar needs to be convinced that it should be granted.

Summary Judgment - rule 20

Where a statement of defense is filed, counsel will assess the quality of the defense, and if it appears that the tenant does not have a defense 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 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. 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 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[28].

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28 *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.)

Injunctions

Injunctions are a powerful tool for bringing an issue to a head, and are sought frequently by both landlords and tenants. The claim for an injunction must be made in the originating process (the statement of claim or notice of application), however, in most cases quick action is required and a motion of an interlocutory injunction is brought.

Interlocutory Injunctions

The three point test that a party seeking an interlocutory injunction must meet is well established.

1. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried.

2. Second, it must be determined whether the applicant would suffer irreparable harm if the application were refused.

3. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits[29]. (ie. the "balance of convenience" test.)

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[29] *Abbott Laboratories Ltd. v. Apotex Inc., [1998] O.J. No. 2159 (QL)(Gen. Div.), R.J.R. Macdonald Inc. v. Canada (Attorney General) (1994), 54 C.P.R. (3d), (S.C.C.)*

The granting of an interlocutory injunction is an extraordinary remedy, that if granted, gives the moving party a remedy until trial for a right that has yet to be proven. This requires the court to be particularly vigilant in the exercise of its discretion to grant or withhold such relief until the merits of the case have been determined.

The majority of interlocutory injunction cases come down to the balance of convenience test. In the landlord tenant context, we find that the balance of convenience often favors the tenant because the consequences of granting the interim injunction (or not granting the interim injunction) as the case may be, will often have a far greater impact on a single tenant than on the landlord.

Permanent Injunctions

As a result, the landlord may be better off to bringing an application, or a motion for summary judgment for a permanent injunction, because the granting or withholding of a permanent injunction does not depend on the balance of convenience. However, the party seeking the permanent injunction must prove,

a. on an application that it is entitled to a permanent injunction, or

b. on a motion for summary judgment

that there is no genuine issue for trial with respect to the granting of the permanent injunction. If there are serious factual issues that require a trial then in either case a trial of an issue may be ordered by the judge hearing the application or motion.

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.

However, you may succeed in obtaining an early trial date on a application or a motion for judgment where the court orders a trial of an issue.

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 you don't succeed on your application or motion for summary judgment for a permanent injunction, or whatever other relief you are after, you may succeed in having a judge order a trial of only the issues that are truly in dispute, and the judge could also order an expedited or early trial date.

A word of caution, there are cost consequences to losing a motion for summary judgment[30] or an application.

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30 *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."*

Finally the respondents on an application will invariably claim that the case is not appropriate for an application, there are factual issues in dispute and your application should be converted into an action[31].

Commercial List

The Commercial List is a special court designed to provide timely resolution of disputes in commercial matters. Cases on the commercial list move quickly, from notice of application to trial in six to eight months and faster if you want. Disputes under the *Commercial Tenancies Act* are not specifically listed as matters which will be dealt with by the Commercial List[32], however, there is a provision for applying to a judge of the Commercial List to have your matter heard by that court. This would certainly be an option for a commercial leasing matter that requires fast action.

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31 *Rule 14.05.*

32 *The Commercial List practice direction provides as follows:*
"Matters Eligible for the Commercial List
1. Matters which may be listed on the Commercial List are applications, motions and actions which in essence involve the following:

(a) Bankruptcy and Insolvency Act;
(b) Bank Act, relating to realizations and priority disputes;
(c) Business Corporations Act (Ontario) and Canada Business Corporations Act;
(d) Companies' Creditors Arrangements Act;
(e) Limited Partnerships Act;
(f) Pension Benefits Act;
(g) Personal Property Security Act;
(h) receivership applications and all interlocutory motions to appoint, or give directions to, receivers and receiver/managers;
(i) Securities Act;
(j) Winding-Up Act; and
(k) such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List (see 771225 Ontario Inc. v. Bramco Holdings Co. Ltd. [1993] O.J. No. 1772).

In considering whether to make a direction under sub-paragraph 1(k), the judge may take into account the current and expected caseload of matters listed on the Commercial List."

Summary Application for Possession

Part III of the *Commercial Tenancies Act* 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 overholding rent. It is an application, which is commenced by a notice of application. 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 simplified procedure is available 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 its action under the simplified procedures

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*[33] 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.

Mandatory Mediation

A mandatory mediation pilot project was started in Ottawa on January 1, 1997. It moved to the rest of the province as on January 1, 1999. All case managed cases in Toronto 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 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.

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33 *[1971] S.C.R. 562.*

Private Mediation

Retired judges and senior practitioners are now offering ADR services. 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 more then the $125.00 per hour charge for mandatory mediation, again, if they are able to resolve the dispute then it is certainly good value.

With the introduction of Mandatory Mediation 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.

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. Mediation is probably well advised as opposed to no holds barred litigation.

SPECIFIC COMMERCIAL LEASING TIPS AND TACTICS

Specific Performance of a Lease

After an agreement to lease or lease is signed, can either party apply for specific performance of the lease agreement to either:

(a) compel the tenant to take possession, or

(b) compel the landlord to allow the tenant into possession?

Specific performance is a discretionary remedy which will only be granted where the common law remedy of damages would not be an adequate one in the circumstances. In *1110049 Ontario Ltd. v. Exclusive Diamonds Inc.*[34], the Court of Appeal noted that in cases involving the sale of land it is presumed that real property is unique. However in the *Exclusive Diamonds* case the Court of Appeal did not find that leased premises in a regional shopping mall were sufficiently unique to support an order for specific performance. Instead the court found that damages were an adequate remedy.

There are cases where residential leases are subject to specific performance[35], however, granting specific performance of a commercial lease before the tenant goes into possession is rare. This being said there is the decision in *Applewood BMW Inc.* v. *S. Ligouri Investments Inc.*[36] where a tenant was successful in obtaining an order for specific performance.

As for a landlord obtaining specific performance, it is hard to imagine a case where damages would not be an adequate remedy for a landlord. One scenario for specific performance would be where a major anchor tenant refuses to enter into possession thereby jeopardizing the entire development. The landlord could fashion a compelling argument for specific performance, particularly if the entire project depends on the presence of the anchor. On the other hand, the landlord's damages, while potentially large, could be readily quantified.

When a tenant doesn't take possession, the calculation of landlord's damages is straight forward, it is the lost rent. The more interesting question is does the landlord have a duty to mitigate? Could the landlord not simply sit back

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34 *1110049 Ontario Ltd. V. Exclusive Diamonds Inc.* (1995) 25 O.R. (3d) 417 (C.A.)

35 *See Williams & Rhodes, Canadian Law of Landlord and Tenant, Sixth edition; section2:6:2*

36 *[1996] O.J. No. 1579 (Gen. Div.) and related cases.*

and take the position that its premises are leased to the tenant and sue for its rents as it came due. Theoretically this is correct, as the landlord would be suing for rent under its lease. However a judge would probably frown on a landlord who makes no effort to re-rent its property. The more prudent course may be to make reasonable efforts to mitigate[37].

Interesse Termini

The question of a tenant's ability to succeed on a claim for specific performance of a lease before it has possession of the leased premises is further complicated by the old English doctrine of *interesse termini*. "At common law, whether the term is to commence at once or in the future, the lessee has no more than an *interesse termini* [an interest in a term], until he actually takes possession of the demised premises."[38] This doctrine has been abolished for residential tenancies and in some jurisdictions, but it is alive and well in Ontario.

Black's Law Dictionary, sixth edition, defines *interesse termini* as follows: "An interest in a term. That species of interest or property which a lessee for years acquires in the lands demised to him, before he has actually become possessed of those lands; as distinguished from that property or interest vested in him by the demise, and also reduced into possession by an actual entry upon the lands and the assumption of ownership therein, and which is then termed an 'estate for years'".

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37 *On mitigation, Professor Waddams writes as follows: "The plaintiff is barred from recovering in respect of loss that could have been avoided by acting reasonably. What is reasonable has been called a question of fact depending on the particular circumstances of the case. However, as with remoteness, a finding that the plaintiff ought to have mitigated is not a simple question of fact because it involves a legal conclusion. In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be over-critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendant's wrong."The Law of Damages (Looseleaf Edition) S.M. Waddams, Canada Law Book, page 15-7.*

38 *Williams & Rhodes, Canadian Law of Landlord and Tenant, Sixth edition; page 3-56*

Where the tenant has not entered into possession its remedy is in damages, which are limited to the difference in rent between the demised premises it was denied and any replacement premises it may rent for the same business. The tenant cannot recover prospective loss of profits for the business it would have carried on upon the premises it was denied.[39]

It is interesting to note that in the case of *Applewood BMW Inc.* v. *S. Ligouri Investments Inc.* where specific performance of a lease was granted, the doctrine of *interesse termini* was not raised by either party.

Rectification of a Lease to conform with the Agreement to Lease

What happens when you discover that the lease, which weighs in at over 2 pounds, does not say what you thought it would say at article 13.03 (h) (iii) (C) (1.1) which deals with property taxes.

Mistake and Rectification

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,*[40] Justice Brooks JA, in an often quoted passage, sets out the equitable principle of rectification:

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39 *Williams & Rhodes, Canadian Law of Landlord and Tenant, Sixth edition; page 3-57*

40 *[1973] 33 DLR 3d 13 (Ont. C.A.)*

> "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 defence which would otherwise unfairly succeed to the end that business may be fairly and ethically done."

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. Where the agreement to lease differs from the lease signed by the parties, this would generally be good evidence of what the parties agreed to at the time.

The decision in *Strategeas v. Lloyd Parish Holdings Limited*[41] 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

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41 *(1991), 17 R.P.R. (2d) 293 (Ont. Ct. (Gen. Div.))*

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.

Waiver and Estoppel

The most common example of a waiver in landlord-tenant matters occurs when the landlord accepts rent that comes due after it has learned of a default under the lease entitling it to terminate. The majority of cases find that the acceptance of rent that comes due after the landlord becomes aware of a default acts as a waiver of the landlord's right to forfeiture in respect of that default.[42] However, there are cases where the acceptance of rent did not constitute a waiver of the default[43].

When there has been a alleged breach of the lease, other issues surrounding the application and interpretation of the terms of a lease may arise years after the lease is signed. Often, the parties have been doing things one way for

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42 *R.* v. *Paulson* (1920), 54 D.L.R. 331 (P.C.); *Lippman* v. *Lee Yick* [1953], O.R. 514 (H.C.),

43 *1012765 Ontario Inc.* v. *Regional Shopping Centres Limited*, Ont. Ct. (Gen. Div), June 15, 1993, Rosenberg J.

years, and then someone, for some reason decides to read the lease closely and discovers that the parties have not been conducting themselves in accordance with the express terms found in the lease. What then?

It is generally acknowledged that the doctrine of equitable estoppel has its origin in *Hughes* v. *Metropolitan R. Co.* (1877), 2 App. Cas. 439.

> In that case ... the parties entered into negotiations for several months which ultimately failed. Then tenant proceeded to repair but was unable to do so within the original six-month period. 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. In dismissing the landlord's appeal, Lord Cairns said at p. 448:
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> > ... 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.

The legal elements supporting an estoppel were outlined by Martland J. in the *Canadian Superior Oil* case at p. 939 S.C.R. [quoting from *Greenwood* v. *Martins Bank Ltd.*, [1933] A.C. 51 at 57], and are as follows:

The essential factors giving rise to an estoppel are I think:

(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.[44]

It is also important to note that questions of estoppel, waiver and amendments to a lease may not matter if the current landlord obtained its title to the property through a mortgagee.

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44 *As cited in M.L. Baxter Equipment Ltd. et al. v. Geac Canada Ltd. et al. (1982), 36 O.R. (2d) 150 at 157 and 158-59 (H.C.J.)*