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Careful What You *DON'T* Say

Negotiating a contract (including a lease) is done against the backdrop of the common law and applicable legislation. Parties to a negotiation expect that, unless they explicitly contract-out of a right, all their underlying common law and statutory rights will be available. But a recent leasing case from the Ontario Court of Appeal introduces some uncertainty into that common expectation.

LA Fitness was a tenant under a commercial lease. Rent went into arrears and the landlord issued a notice of default. When the arrears were not paid by the end of the cure period, the landlord terminated the lease and sued LA Fitness for the arrears, plus damages in the form of lost rent over the unexpired balance of the term.

The landlord sought summary judgment from the court. LA Fitness conceded that it owed the arrears, but contested the landlord's right to lost rent over the unexpired balance of the term. The issue before the court was the correct interpretation of the lease. The lease stated that, if the tenant failed to pay rental arrears following the applicable notice and cure period, then "in addition to any other remedies available to the landlord at law", the landlord may: (a) terminate the lease; or (b) keep the lease alive and insist on the payment of rent as it falls due.

According to LA Fitness, because the lease did not mention the landlord's right to claim lost rent for the period following termination, the landlord had contracted-out of that right. The landlord resisted LA Fitness's interpretation by pointing to the proviso in the default clause, which said that the landlord's stated remedies were "in addition to any other remedies available to the landlord at law".

The landlord argued that pursuant to the seminal 1971 Supreme Court of Canada decision in *Highway Properties v Kelly Douglas* ("**Highway Properties**"), when a tenant is in fundamental breach of its lease (or has repudiated it entirely), a landlord may: (1) keep the lease alive and insist on performance (including the ongoing payment of rent) on the footing that the lease remains in force; (2) terminate the lease (retaining the right to sue for arrears or damages to the date of termination); (3) sublease the premises on the tenant's account; or (4) terminate the lease and claim damages against the tenant for lost rent over its unexpired term.

According to the landlord, option (4) from *Highway Properties* remained open to the landlord as one of the "other remedies available to the landlord at law".

The judge disagreed, holding that the phrase "in addition to any other remedies" could not be interpreted to preserve the right to sue for future lost rent after termination because of "the specific words to the contrary used later in that very paragraph". Ostensibly, the judge was referring to the fact that: (a) the reference to the landlord's termination right did not include express mention of the landlord's right to sue for lost rent over the unexpired balance of the term; and (b) the tenant's liability for rent over the balance of the term was only mentioned in the portion of the clause setting out the landlord's right to keep the lease in force. It is hard to understand how the judge arrived at the conclusion that these were "specific words to the contrary" - as they are not words to the contrary. Rather, the court's decision was based on the absence of words. The court drew an inference that, by omitting the landlord's right to recover lost future rent, the landlord had contracted-out of such right entirely.

The landlord appealed. The three judge panel at the Ontario Court of Appeal unanimously upheld the motion judge's decision. Paying deference to the motion judge's reasoning, the Court of Appeal held that the motion judge "reasonably found...the reference to 'any other remedies'...could not have reasonably intended to preserve a right that was explicitly precluded later in that same section". This is a curious holding, since (as described above) the landlord's right to claim lost future rent is not "explicitly precluded". It is just not mentioned.

Despite the landlord's argument that such an interpretation was inconsistent with Highway Properties, as far as the Court of Appeal was concerned, the failure to mention the landlord's right to lost rent over the unexpired term of the lease (and only mentioning rent over the balance of the term in connection with keeping the lease alive) was an "explicit preclusion" that overrode the landlord's right to lost future rent.

The Court of Appeal stated that "Highway Properties does not establish that a claim for prospective rent can be made in every case" and reminded the parties that in Highway Properties, the Supreme Court of Canada noted that the lease in question did not preclude a claim for prospective damages. It appears therefore that the courts will not

require a lease to expressly provide a landlord with the right to lost future rent for the landlord to be entitled thereto. However, if a lease precludes such a remedy, the landlord will be prevented from pursuing it. The difficulty with this case is that the lease did not "explicitly preclude" recovery of lost rent over the unexpired term. It just didn't mention it.

In fact, the lease stated that, if the landlord terminated the lease, it was required to mitigate its damages. This is generally understood to be a reference to a landlord's obligation to seek a replacement tenant to mitigate the landlord's claim for lost future rent. Why would mitigation be required if the landlord had waived its right to future rent?

Going forward, landlords ought to ensure that their default provisions either: (a) don't mention a landlord's right to terminate for tenant default; or (b) explicitly give the landlord a right to claim lost future rent following termination. If a lease mentions only termination, and not the landlord's claim to lost future rent arising from such termination, the landlord risks losing its right to lost future rent on the basis that it has been contracted-out by omission.

Sometimes, it's not what is said, but what is unsaid, that matters.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



We are pleased to announce that **Kenneth Pimentel** has joined Daoust Vukovich as a Partner in the Commercial Leasing department.

Ken brings exceptional expertise and a wealth of experience that will strengthen our team and enhance the value we deliver to our clients. His leadership and vision align with our commitment to excellence and innovation in the legal industry.

Please join us in welcoming Ken to the firm!

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