

September 13, 2023

THE CLOCK MIGHT BE TICKING ON TRANSFER REQUESTS

Property rights are valuable. They include the right of "alienability" (i.e., someone who owns property has the right to sell it) and the right to encumber it (i.e., raise financing). For a tenant, this means there is an unrestricted right to assign its lease, or to grant an under-lease (i.e., a sublease) of the leased premises. Landlords try to restrict these rights by requiring the tenant not to assign or sublet without the landlord's prior written consent. In many Canadian provinces, legislation mandates that the consent not be "unreasonably withheld". Unfortunately, the standard of "reasonableness" can be unpredictable. The recent Ontario Court of Appeal decision of *Rabin v. 2490918 Ontario Inc.* ("*Rabin*") addresses the meaning of "reasonable" in this context.

Background

The tenant was a 70-year-old dentist who ran a dental practice in the same premises for over 44 years. In 2017, the landlord acquired the property with the intention of redeveloping it.

The tenant agreed to sell the dental practice to two younger dentists. The new dentists were to purchase the shares of the tenant's professional corporation and then incorporate a new professional corporation to operate from the premises. The tenant wanted to assign the lease to the new professional corporation, which (according to the lease) required: (i) the landlord's consent, which could not be unreasonably withheld; and (ii) a response from the landlord within 15 days of the tenant's request for consent.

The landlord emailed several days after the 15-day deadline, stating that its consent would be provided if a principal of the new professional corporation signed a guarantee agreement and the lease was amended to include a termination right if the landlord redeveloped the property. In response, the tenant threatened to sue the landlord for breach of the lease as a result of the landlord's refusal to grant its consent.

The parties exchanged further correspondence but there was no resolution on the issue of consent. Although the 15-day deadline had passed, the landlord continued to ask for information relating to the assignee and failed to either grant or deny consent. Eventually, the tenant applied to court under Section 23(2) of the *Commercial Tenancies Act* ("CTA"), seeking a determination that the landlord had unreasonably withheld its consent to the requested assignment.

The Application

The tenant's application was dismissed. While critical of both sides, the judge concluded that the parties were sending "mixed and confused messages" because they "did not trust one another and were pre-judging one another". According to the judge, the correspondence between the parties obscured the circumstances such that it appeared the landlord had neither consented nor refused to consent to the assignment and the tenant did not have a firm and consistent position on providing financial information respecting the assignee. Ultimately, the court held that the tenant had waived the 15-day deadline for a response from the landlord, and the tenant could not have relief under the CTA, as it had failed to establish that the landlord withheld consent.

The Appeal

The Court of Appeal reversed the decision on two grounds: first, the application judge erred on the matter of waiver; and, second, his analysis did not properly focus on Section 23 of the CTA.

Neither side had raised the doctrine of waiver at the initial application. As it is not open to a judge to rule on a material issue that has not been argued by the parties, the Court of Appeal found the application judge's reliance on the determination of the tenant's waiver was a sufficient ground to set the decision aside. However, the Court of Appeal also found that the doctrine of waiver had been misapplied. It

reviewed the correspondence from the tenant's lawyer and concluded that the tenant had merely insisted that the landlord perform its obligations. The Court of Appeal could not find any evidence that the tenant had waived any rights.

The Court of Appeal further stated that the application judge's analysis ought to have focused on Section 23 of the CTA, following certain well-established principles that were summarized in *1455202 Ontario Inc. v. Welbow Holdings Ltd.* ("**Welbow**"):

- (a) the tenant has the burden of proof;
- (b) it is the information available to, and the reasons given by, the landlord *at the time* of the refusal that are germane;
- (c) the provisions of the lease that define the scope and the subject matter of the assignment, including the tenant's right to assign and the landlord's right to withhold consent, must be considered;
- (d) a likelihood that the assignee will default in its obligations under the lease may be a reasonable ground to withhold consent, depending on the circumstances;
- (e) the financial position of the assignee may be a relevant consideration; and
- (f) reasonableness is a question of fact that must be determined on a case-by-case basis, including the commercial realities of the marketplace and the economic impact of an assignment on the landlord.

The Court of Appeal considered the landlord's excuses for failing to respond within the deadline: the landlord's principal had been out of town, it had not seen the purchase agreement made with the new dentists, and it wanted to negotiate a demolition right in exchange for consent. However, the landlord had not requested any financial information on the proposed assignee during the 15-day window. The evidence showed that the principal of the landlord was reachable by phone, had reviewed the lease and the assignment clause, and had sent it to his lawyer. Moreover, the tenant had previously notified the landlord that it planned to seek an assignment of the lease. The Court of Appeal found that the landlord simply could not be bothered to respond to the consent request, and that the landlord's consent had been unreasonably withheld.

The Court of Appeal also found that the request for a material amendment of the lease to include a right of termination on redevelopment of the building was unreasonable. This conclusion was reached on the basis of long-standing case law to the effect that it is unreasonable for a landlord to attempt to gain a "collateral benefit" in exchange for consent.

Takeaways

1. When a lease requires a landlord to respond to a request for consent to a transfer within a specific period, failure to do so may result in the landlord being deemed to have unreasonably withheld its consent.
2. A tenant's request for consent to an assignment cannot be used by the landlord to obtain a benefit not set out in the lease.

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.



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