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THIS AGAIN! THE RENT RELIEF / FORCE MAJEURE SAGA CONTINUES

Recent News ReLeases have explored arguments made by tenants who failed to pay rent during the COVID-19 pandemic; more specifically, how the Courts applied *force majeure* clauses to rent obligations. In this installment, a fitness club tenant claimed that it was relieved of its obligation to pay rent during provincially-mandated closures. The Ontario Superior Court followed ample previous authority to hold that *force majeure* clauses cannot be used to avoid paying rent unless the terms of the clause expressly say so.

Now, the Ontario Court of Appeal ruling has muddied the waters.

Lower Court Favoured the Landlord

In *Niagara Falls Shopping Centre Inc v. LAF Canada Co.*, the tenant operated a fitness gym from leased premises. When the tenant was forced to close due to the Ontario government's mandated closures, the parties entered into a rent relief/deferral agreement with respect to the rent payable for April to June, 2020. After the agreement expired, the tenant paid full rent for the rest of 2020, even though the gym was only partially open.

In 2021, when the tenant was again forced to close as a result of further Ontario government mandates, it ceased paying rent. The landlord commenced an action for payment of arrears.

In defence to the landlord's action, the tenant relied on several arguments, including that the lease was frustrated and therefore no rent was owing during the closures. Although the terms of the *force majeure* clause in the lease stipulated that "lack of funds" was not an event of *force majeure*, the tenant argued that because the landlord was excused (due to *force majeure*) from providing the premises for use as a fitness gym, the tenant was correspondingly relieved from the obligation to pay rent; or, in the alternative, that the Term of the lease was extended for a period corresponding to the duration of the government-mandated closures. In that way, the tenant argued, the 'risk' of a *force majeure* event would be allocated equally between landlord and tenant.

It also argued that under the damage and destruction provisions of the lease, the tenant was entitled to rent abatement.

Further, the tenant claimed a refund of the rent paid during 2020 closures on the basis that the landlord was unjustly enriched.

The tenant was unsuccessful in the lower Court, which relied on the growing body of case law dealing with *force majeure*, including the decision of *Braebury Development Corp v. Gap (Canada) Inc.* ("*Braebury*"), covered in an earlier News ReLease. In *Braebury*, the *force majeure* clause did not excuse the tenant from the payment of rent.

The lower Court also held that it would be a commercially absurd result if the *force majeure* clause could be used to extend the Term of the lease. It found that the *force majeure* clause could only extend the time for performing time-limited tasks in the lease (such as maintenance or repair obligations).

The Court also rejected the tenant's argument that the lease had been frustrated, holding that the lease "could not be frustrated by an event that is included in a *force majeure* clause, as its inclusion in the clause shows that the event was in the parties' contemplation and they made provisions for it." Further, the Court rejected the tenant's arguments that as a result of the pandemic, the lease clauses dealing with rent abatement for damage or destruction were applicable. The Court pointed out that the premises themselves were unaffected by the COVID-19 virus; it was the government-mandated closures that prevented the tenant from operating.

The tenant was also unsuccessful in claiming that the landlord had been unjustly enriched by the government-mandated closures. Once more, the Court relied on the *force majeure* clause under the lease. While the tenant had been deprived of its ability to use the premises as a fitness gym by the government-mandated closures, the landlord was required to continue to pay

its mortgage, all property taxes, maintenance and common area expenses, and to manage the property. The Court interpreted the *force majeure* clause to entitle the landlord to receive rent despite the closures and found that the landlord was not unjustly enriched.

Appeal Court Favoured the Tenant

The tenant appealed the Superior Court's decision, based solely on the interpretation of the *force majeure* clause. It claimed that the lower Court had erred in its interpretation of the clause, arguing that the Term of the lease should be extended for a period corresponding to the government-mandated closures.

The Court of Appeal agreed with the tenant. It held that because the landlord's obligation was to provide the premises to the tenant, the *force majeure* clause, which extended the time for the performance of obligations prevented by a force majeure event, also extended the period of time for the landlord to provide the premises to the tenant. That is, the effect of the *force majeure* clause was to extend the Term of the lease for the duration of the government-mandated closures.

Although the Court of Appeal held that the tenant was not excused from the payment of rent during the government-mandated closures, it then held, without explanation, that for the period of time that the Term of the lease was to be extended, the tenant was excused from the payment of rent.

Essentially, the Court re-wrote the lease.

It is clear from the Court of Appeal's decision in *Niagara Falls*, as in *Braebury*, that the Courts will closely examine the wording of a *force majeure* clause to determine the parties' intentions as expressed by the clause itself. In *Niagara Falls*, the Court of Appeal appeared to focus on the specific wording of the lease, characterizing the Term of the lease as an "act or obligation", the performance of which could be extended by the excuse(s) contemplated by the *force majeure* clause. This is novel.

The Court of Appeal's decision introduces an element of uncertainty for landlords making plans to re-lease their premises following the expiry of a lease term. What is a landlord to do if a tenant claims that a *force majeure* clause extends the lease of premises that the landlord has already re-leased to another tenant?

In the lower Court decision, the judge refused to extend the lease Term for exactly this reason, concluding that it would lead to a commercially absurd result. Despite the Court of Appeal acknowledging this point, it nevertheless held that the Term of the lease should be extended due to the *force majeure* clause.

Now What?

It's not clear how the Court of Appeal's decision squares with promoting the goal of business certainty and commercial reasonableness. It will be interesting to see the ripple effect on commercial leases going forward, and whether the decision will be appealed. It might be that the *force majeure* clause in *Niagara Falls* can be distinguished from other *force majeure* clauses.

MARY ANN BADON
416-598-7056
mbadon@dv-law.com

FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

KRISTINA BEZPROZVANNYKH
416-597-9306
kbezp@dv-law.com

CANDACE COOPER
416-597-8578
ccooper@dv-law.com

HEATHER CROSS
416-591-3046
hcross@dv-law.com

DENNIS DAOUST
416-597-9339
ddaoust@dv-law.com

ALLISON FEHRMAN
416-304-9070
afehrman@dv-law.com

GASPER GALATI
416-598-7050
ggalati@dv-law.com

PAUL HANCOCK
41-597-6824
phancock@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MELISSA M. MCBAIN
416-598-7038
mmcbain@dv-law.com

PORTIA PANG
416-597-9384
ppang@dv-law.com

JAMIE PAQUIN
416-598-7059
jpaquin@dv-law.com

BRIAN PARKER
416-591-3036
bparker@dv-law.com

DINA PEAT
416-598-7055
dpeat@dv-law.com

MANEET SADHRA
416-479-4357
msadhra@dv-law.com

JACK SARAIVA
416-597-1536
jsaraiva@dv-law.com

CHRISTINE SHAHVERDIAN
416-598-7049
cshahverdian@dv-law.com

LUCIA TEDESCO
416-597-8668
ltedesco@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

PHILLIP WALLNER
416-597-0830
pwallner@dv-law.com

DEBORAH WATKINS
416-598-7042
dwatkins@dv-law.com