Daoust Vukovich LLP
BARRISTERS & SOLICITORS

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Breakfast Roundtables

LEASE RENEWAL CLAUSES

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LEASE RENEWAL CLAUSES: OVERVIEW

Lease extension of renewal provisions often contain broad and strict language stating that the Tenant has the option to renew or extend a lease for a further term provided the Tenant is not in default of the Lease and has not regularly been in default during the lease term.

A tenant is typically allowed to renew or extend a lease even if it has committed a breach over the course of the lease term if the breach is no longer subsisting and the tenant has clean hands. However, if the tenant has not taken steps to address and remedy a subsisting breach, it will typically lose its renewal or extension right.

If a landlord is disputing the tenant's right to renew or extend a lease, the following questions should be considered:

(a) Has the breach been spent or is it subsisting when the tenant exercises its right to renew?

(b) Is the breach significant or would it cause the landlord minimal harm?

(c) Was the landlord aware of the breach before the lease was renewed or extended? If so, did the Landlord object to the breach or ignore it?

(d) If the tenant is deemed to be in breach of the lease, do the circumstances entitle it to relief from forfeiture?

(e) Does the tenant dispute the breach? If so, has the tenant taken steps to protect itself?

POINTS TO CONSIDER

1. Has the breach been spent?

In order to be permitted to renew its lease, a tenant is not expected to perform all of the lease terms flawlessly throughout its tenancy. In other words, if breaches have been committed over the course of a lease term, the tenant may still be able to renew its lease, despite the rigid wording of the renewal clause.

In *1290079 Ontario Inc. v. Beltsos*, the Ontario Court of Appeal held that a breach "will not preclude a tenant from exercising an option to renew so long as the Lease is 'effectively clear' on the renewal date. If a landlord has a subsisting cause of action against the tenant that is rooted in the breach, the Lease is not effectively clear". It was also stated that "a historical breach of a lease covenant, once remedied, will not entitle a landlord to refuse an otherwise valid option to renew the lease".

In *Sail Labrador Ltd. v. Challenge One (The)*, the Supreme Court of Canada held that a breach is deemed to be "spent" when it no longer gives rise "to a subsisting cause of action" at the time the Tenant exercises its right to renew the lease.

2. Is the breach insignificant?

There is not much case law on this point, but the Supreme Court of Canada in *Sail Labrador* held that a tenant may still have the right to renew a lease where there has been "no fundamental breach permitting rescission" of the lease.

If the tenant raises an argument that its breach is insignificant, the tenant will bear the burden of proving that this is true.

3. Has the landlord waived its right to rely on the breach?

If a landlord is aware of a breach and does not oppose it (either through words or conduct), the landlord may waive its right to deny the tenant a renewal right based on the breach.

The Ontario Court of Appeal in *Technicore Underground Inc. v. Toronto (City)*, held that waiver "will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated."

The mere fact that a breach has been in existence for a long period is not enough to establish waiver. The Tenant must prove that the landlord was aware of the breach and either allowed it or consciously ignored it. If this can be proven, the Tenant may be able to renew the lease, despite the ongoing breach.

4. Is the tenant entitled to relief from forfeiture?

A tenant can be granted relief from forfeiture for an option to renew when it is in breach of a lease, depending on the conduct of the landlord and the tenant.

In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, the Supreme Court of Canada held that the following factors should be considered when determining whether relief from forfeiture should be granted:

(a) whether the breach of the lease was wilful and intentional and whether or not the tenant has come to court with clean hands;

(b) whether the breach has caused the landlord to suffer "serious financial loss or prejudice."; and

(c) whether the tenant's potential loss from forfeiture would be disproportionately large compared to the landlord's loss.

These factors will all be considered when determining to grant the tenant relief from forfeiture and none of the factors is determinative on its own.

5. Is the breach disputed?

When a tenant exercises its right to renew, it should take steps to protect itself if it is disputing a breach of the lease.

In the case of a monetary breach, the Ontario Court of Appeal in *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (c.o.b. Mr. Sub)* held that a tenant cannot pay nothing until the dispute is resolved. Rather it should at least make partial payment or pay the disputed amount into its lawyer's trust account pending the resolution of the dispute.

Also, if the landlord and tenant end up in court over the dispute, the tenant should agree beforehand to take steps beforehand to remedy its conduct if it is deemed to be in breach of the lease.