

February 28, 2017

TIME WAITS FOR NO LANDLORD...

Under a typical net commercial lease, a landlord charges its tenant certain sums of additional rent based on estimates of the actual amounts, with the provisional payments being reconciled after a fiscal period ends and the actual amounts are verified. Some tenants get annoyed by landlords who seem to “never” get around to reconciling. Some landlords are vexed by delays they experience in settling, for example, an anchor tenant’s contribution before being able to finalize the amount the non-anchor tenants will be charged, or in finalizing a realty tax appeal or other financial exercise that inherently delays year-end adjustments.

Delivery of Year-End Reconciliation

It is not uncommon for a commercial lease to stipulate a deadline (e.g. 90 – 180 days after the fiscal period ends) by which the landlord must deliver a “year-end statement”, so that the appropriate refund/credit or top-up payment can be addressed in a timely manner. Some sophisticated landlords resist deadlines, whereas some sophisticated tenants insist on harsh remedies for delay. Often, the parties negotiate lease terms setting out deadline exceptions for matters beyond the landlord’s control (such as realty tax appeals that drag on for years). However, the vast majority of commercial leases are signed by parties who do not address these nuances in great detail. It is not uncommon for a lease to state that the landlord will issue year-end statements within a set period after year-end. After all, it seems only right that a landlord would agree to do what it usually does, and that a tenant would want an assurance of timely reconciliations.

Remedies for Breach of Contract

General legal principles hold that a breach of a covenant in a contract gives rise to a claim in damages. There are some

rare breaches that give rise to rescission/termination. Other remedies must be stipulated by contract (e.g. a right to terminate, a right to self-help, a right to receive a liquidated sum). On this basis, it would seem that a landlord’s breach of the covenant to reconcile additional rent by a stipulated deadline following year-end would entitle the tenant to a mere claim for damages (assuming the lease contains no other remedy). Which begs the question, what damages does a tenant suffer when it is billed late for an underpayment in a prior period, or is credited late for an overpayment in a prior period? In the former case, it enjoyed a payment holiday. In the latter, it suffered a cash flow impact but ultimately received the refund.

More than a Claim for Damages

The Ontario Superior Court of Justice recently ruled, in *1127776 Ontario Ltd. v. Deciem Inc.*, that a landlord’s breach of the covenant to reconcile additional rents by a set deadline has greater implications than mere damages.

In *Deciem*, the landlord leased the premises to the tenant in 2012 for a term of three years. The lease was to be a completely carefree net lease to the landlord. It stated that “the landlord shall provide the tenant with a statement of the additional rent for the relevant lease year within 180 days of the landlord’s financial year end”. Alas, the landlord did not adhere to this requirement. In 2015, well beyond the 180-day period, the landlord issued a demand to the tenant for outstanding additional rent. The tenant refused to pay these outstanding amounts, arguing that the landlord did not comply with the lease requirements when it requested payment after the 180-day period following the landlord’s fiscal year had elapsed. The Court held that the only additional rent the landlord was entitled to claim was the additional rent for 2015. It ruled that the lease prescribed a payment scheme and schedule, such that missing the

deadline for delivery of the additional rent reconciliations barred the landlord from demanding additional rent past the 180-day period following a year-end.

On the Other Hand...

The decision in *Deciem* stands in contrast to the Ontario Superior Court of Justice's decision in *Ayerswood Development Corp. v. Western Proresp Inc.* There, the landlord demanded payment of additional rent adjustments after the 5-year lease had expired. That lease did not specify an exact period of time in which the landlord was required to provide notice of the additional rent to the tenant. It called for adjustments to be made "as soon as practicable after the end of [a period]". The lease did not define "period" and the Court noted that if the parties had wished to define it, they could have. The landlord's first and only reconciliation for additional rent was made at the end of the lease term, yet the Court permitted this extremely late claim on the basis that the *Real Property Limitations Act* gave the landlord six years to pursue a claim for arrears of rent and the limitation period did not begin to run until the landlord demanded payment.

Commercial Realities

Neither of these cases addresses the commercial reality that a landlord may be unable to reconcile the additional rent account within a set period of time as a result of contingencies beyond its control. Although a

flow-through rent recovery regime seems easy to administer, landlords often run into snags. For example, when a receiver takes over a property, it typically serves as a mere "interim landlord" pending a new owner stepping in, and the new landlord may step into a set of inadequate records. As many parties discovered in the mid-to-late 90s, reconciling additional rent accounts in these circumstances may take years. Landlords also spend months, and in some cases years, sorting through realty tax apportionment and appeal deliberations for a multi-tenanted property. Sometimes a landlord disputes the amounts charged by suppliers and a settlement is slow to ensue. Many times an anchor tenant questions its share of a shopping centre's operating costs and, as the non-anchor tenants pay a "net-of-majors" share, their calculation cannot be completed until the anchor contribution is settled.

From a tenant's perspective, a specified period of time (such as 180 days after year-end) is desirable as it provides certainty and an opportunity for the tenant to close its books on the year in question. However, if tenants are free to not pay outstanding amounts of additional rent because the landlord billed the amounts after the deadline, landlords may eventually learn that sometimes there is no incentive to reconcile at all.

Until and unless *Deciem* is appealed, the ruling stands as a cautionary tale for landlords and tenants whose leases specify a deadline for the annual additional rent reconciliation process.



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