

February 26, 2018

## ESTOPPEL CERTIFICATES: BROAD SHIELDS & LEGAL MINEFIELDS

It is commonplace that commercial tenants are expected to deliver signed estoppel certificates in connection with any sale or financing transaction involving property they lease. Sometimes referred to as status statements, or tenant acknowledgements, estoppel certificates are intended to be statements of fact about the key terms of a lease, upon which the party requesting that information may rely.

The legal utility of estoppel certificates is based on the doctrine of promissory estoppel. This equitable doctrine prevents “party 1” to a contract from enforcing its rights under that contract against “party 2” to the contract, where it would be inequitable to do so, because “party 1” gave “party 2” reason to believe that they would not enforce those rights, and “party 2” detrimentally relied on that understanding.

More simply put, when a tenant signs an estoppel certificate, it is deemed to acknowledge that the addressee will rely on the statements contained in that certificate. The tenant is therefore prevented from making a claim asserting facts contrary to those statements.

Estoppel certificates (most often) contain statements regarding the status of the landlord and tenant relationship. They do not amend or alter the terms of the lease. That is not to say that estoppel certificates are innocuous. In fact, a signed estoppel certificate may seriously and adversely impact the enforcement of legal rights under a lease. For this reason, these statements must be carefully reviewed and considered when they are prepared and executed. A recent

decision of the Ontario Superior Court of Justice serves as a cautionary tale.

### THE CASE OF THE ROFR THAT GOT AWAY

In *1960529 Ontario Inc. v. 2077570 Ontario Inc.*, the lease contained a demolition/termination clause in favour of the landlord and right of first refusal (ROFR) in favour of the tenant. The ROFR clause required the landlord to provide the tenant with any offer to buy the property that the landlord was willing to accept, and the tenant could jump the queue and purchase the property if it could match the offer in 24 hours.

In October of 2016, the original landlord agreed to sell the property to a third party and did not give the tenant an opportunity to exercise its ROFR. In February of 2017, the original landlord advised the tenant of the sale and presented it with an estoppel certificate, which it said it needed, to complete an assignment of the lease to the purchaser. The tenant signed the certificate, which was addressed only to the new owner’s lender. The certificate stated, among other things, that (1) there was no material default under the lease by either the landlord or the tenant; and (2) the tenant had no claim against the landlord in respect of any matters.

A few days later, the property was transferred and within days of owning the property, the new owner sent a notice of termination to the tenant pursuant to the demolition clause in the lease. The tenant sought an injunction, claiming that

the original landlord breached the lease by not giving the tenant the opportunity to match the offer to purchase the property.

The tenant claimed there was a serious issue to be tried as to whether the new owner and the original landlord were entitled to rely on the estoppel certificate, because it was addressed solely to the new owner's lender.

The Court disagreed with the tenant and held that the lender, the original landlord and the new owner were all entitled to rely on the estoppel certificate. The Court held that the tenant was not allowed to take the contrary position, against any of them, that its ROFR had been breached. In arriving at this decision, the Court made the following statements about reliance:

*Estoppel certificates are commonly used in commercial transactions involving the sale of land where there are tenancies. The parties to a commercial real estate transaction are entitled to rely upon an estoppel certificate to prevent the party signing the certificate from taking a position that is contrary to the statements made therein ... When [the tenant] signed the Estoppel Certificate and gave it to [the original landlord] for the purpose for which it was requested, he must be taken to have known that the parties affected by the sale of the Property to [the tenant's] knowledge, specifically, [the original landlord, the new owner, and the lender] would rely upon the Estoppel Certificate.*

The Court was satisfied that the estoppel certificate prevented the tenant from denying that (1) there was no material default under the lease by the original landlord; and (2) the tenant had no claim against any party in respect of any matters under the lease, including the ROFR.

The Court was not satisfied that there was a serious question to be tried regarding whether the original landlord was entitled to transfer the property to the new owner without affording the tenant an opportunity to match the offer under the ROFR.

The Court explained that its conclusions were based entirely on the legal effect of the estoppel certificate. If there had been no estoppel certificate and the original landlord had simply sold the property to the new owner, without regard to the ROFR, the tenant would have succeeded.

The decision also contains a thorough and informative discussion about awards of injunctive relief versus awards of damages - which some readers may find of interest.

### **FOREWARNED IS FOREARMED**

This decision illustrates the significance of the terse statements that are made (or omitted) in estoppel certificates, the broad power and utility of estoppel certificates, as well as the doctrine of promissory estoppel that underlies these certificates. These seemingly routine documents are not without risk and should be given serious consideration.

*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.*



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward. The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

MARY ANN BADON  
416-598-7056  
[mbadon@dv-law.com](mailto:mbadon@dv-law.com)

FRANCINE BAKER-SIGAL  
416-597-8755  
[francine@dv-law.com](mailto:francine@dv-law.com)

JEANNE BANKA  
416-597-0830  
[jbanka@dv-law.com](mailto:jbanka@dv-law.com)

CANDACE COOPER  
416-597-8578  
[ccooper@dv-law.com](mailto:ccooper@dv-law.com)

DENNIS DAOUST  
416-597-9339  
[ddaoust@dv-law.com](mailto:ddaoust@dv-law.com)

BITALI FU  
416-598-7053  
[bitalif@dv-law.com](mailto:bitalif@dv-law.com)

GASPER GALATI  
416-598-7050  
[ggalati@dv-law.com](mailto:ggalati@dv-law.com)

S. RONALD HABER  
416-597-6824  
[rh Haber@dv-law.com](mailto:rh Haber@dv-law.com)

PAETRA KAUFMANN  
416-479-4357  
[pkaufmann@dv-law.com](mailto:pkaufmann@dv-law.com)

WOLFGANG KAUFMANN  
416-597-3952  
[wolfgang@dv-law.com](mailto:wolfgang@dv-law.com)

LYNN LARMAN  
416-598-7058  
[llarman@dv-law.com](mailto:llarman@dv-law.com)

MIMI LIN  
416-597-8493  
[mimil@dv-law.com](mailto:mimil@dv-law.com)

MELISSA M. MCBAIN  
416-598-7038  
[mmcbain@dv-law.com](mailto:mmcbain@dv-law.com)

JENNA MORLEY  
416-597-9225  
[jmorley@dv-law.com](mailto:jmorley@dv-law.com)

PORTIA PANG  
416-597-9384  
[ppang@dv-law.com](mailto:ppang@dv-law.com)

JAMIE PAQUIN  
416-598-7059  
[jpaquin@dv-law.com](mailto:jpaquin@dv-law.com)

BRIAN PARKER  
416-591-3036  
[bparker@dv-law.com](mailto:bparker@dv-law.com)

DINA PEAT  
416-598-7055  
[dpeat@dv-law.com](mailto:dpeat@dv-law.com)

ALICE PERALTA  
416-597-1536  
[aperalta@dv-law.com](mailto:aperalta@dv-law.com)

KEN PIMENTEL  
416-598-7049  
[kpimentel@dv-law.com](mailto:kpimentel@dv-law.com)

LUCIA TEDESCO  
416-597-8668  
[ltesesco@dv-law.com](mailto:ltesesco@dv-law.com)

NATALIE VUKOVICH  
416-597-8911  
[nvukovich@dv-law.com](mailto:nvukovich@dv-law.com)

DANIEL WALDMAN  
416-597-9306  
[dwaldman@dv-law.com](mailto:dwaldman@dv-law.com)

DEBORAH WATKINS  
416-598-7042  
[dwatkins@dv-law.com](mailto:dwatkins@dv-law.com)