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Collecting Overhold Rent – When is it Too Late?

An overholding tenancy is created when a tenant remains in possession of its premises past the expiry of its term without a new agreement. Under the common law, the provisions of the expired lease continue to operate with the exception of the duration of the term. Landlords often guard against an overholding tenancy by including lease provisions discouraging the tenant from overholding. The most common term states that if the tenant remains in possession past the expiry of the lease, the tenancy will be converted to a month-to-month basis at an increased rent (sometimes double!).

To be clear, no tenant has a common law right to remain in possession past the expiry of the lease term. However, tenants do stay on, so leases typically address the scenario.

When leases provide for an increase in the rent payable by overholding tenants, failing to enforce the increased rent provision from the get-go may deprive a landlord of recovering the increment. This was the case in *Kypriaki Taverna Ltd v 610428 BC Ltd*, a 2021 decision from British Columbia.

Kypriaki Taverna

The Landlord and Tenant were negotiating a lease renewal past the expiry of the term. Pursuant to the overholding provision in the Lease, the tenancy became a month-to-month tenancy once the term expired in August 2010, if the Tenant remained in occupancy. The provision entailed rent increasing to 125% of the rent payable during the last month of the term (“**Overhold Rent**”). For five years past the expiry of the term (“**Overholding Period**”), the parties attempted to negotiate the renewal, but did not come to an agreement. In March 2015, the Tenant vacated the premises.

During the entire Overholding Period, the Tenant paid rent at the same rate that it paid during the last month of the term. The Landlord did not demand the increased Overhold Rent. In

June 2015, the Landlord claimed that it was owed Overhold Rent for the entire Overholding Period (from August 2010 to March 2015). The Landlord took action to recover the difference between what the Tenant paid and the Overhold Rent (“**Increment**”). The Tenant argued that the Landlord waived its right to collect the Increment and was not entitled to claim it retroactively.

For almost two years following lease expiry, the Landlord made no mention of the rate of Overhold Rent despite the parties’ ongoing communications to negotiate a renewal. Then, in May 2012, the Landlord offered to forgo any right to the Increment, if the Tenant accepted the Landlord’s proposed renewal of the lease by August 2012 (“**May 2012 Proposal**”). The Tenant refused the May 2012 Proposal and continued to pay the lower rent. For the next two and a half years, until the Tenant vacated the premises, the Landlord accepted the lower rent without protest. The Landlord did not mention Overhold Rent again, until the Landlord filed its claim in June 2015 (at which point the Tenant had long since vacated the property).

Law of Waiver: a Refresher

A party may not be able to insist on their strict rights under a lease where their words or conduct have led another party to believe that those rights would not be enforced. Waiver may be express (written or verbal) or implied by action. An implied waiver will arise where a party has pursued a course of conduct that reveals an intention to waive a particular right under the lease. To invoke the law of waiver, a party relying on the waiver must demonstrate that the waiving party had: (1) full knowledge of its rights; and (2) an unequivocal and conscious intention to abandon them.

(a) Waiver: Knowledge of the Right

In *Kypriaki Taverna*, the Court found that the Landlord had specific knowledge of its right to the increased Overhold Rent.

In coming to this conclusion, the Court relied on the fact that: (i) the Landlord reviewed the contents of the lease (including the overholding provision) prior to signing; (ii) the Landlord referenced the terms of the overholding provision in an email to the Tenant during the course of renewal negotiations after the expiry of the lease; and (iii) in a letter to its lawyer, the Landlord calculated the Increment owed by the Tenant.

(b) Waiver: Intention to Abandon the Right

Though the Landlord did not *expressly* waive its right to the Increment in writing, the Court concluded that the Landlord's conduct and communications with the Tenant throughout the Overholding Period amounted to an implied waiver of its right to collect the Increment. As such, it would be inequitable to the party relying on this waiver (the Tenant) to enforce the Landlord's right to collect the Increment. The Tenant's financial records indicated that it did not have the funds to pay the Increment. The Tenant argued that had it known that the Landlord would rely upon the overholding provision, the Tenant's financial situation would have forced it to terminate the tenancy (which it had the right to do). The Court determined that the Tenant remained in occupation of the premises for as long as it did because it relied on the Landlord not enforcing the overholding provision.

The Court concluded that, based on the Landlord's conduct, it was reasonable for the Tenant to infer that the Landlord was not going to enforce its right to collect the Increment. As a result, the Court held that, by its conduct, the

Landlord waived its right to collect the Increment.

(c) Retracting Waiver

It is possible for a party to retract its waiver, so long as it gives clear and unequivocal notice to the party relying on that same waiver. In *Kypriaki Taverna*, the Landlord argued that by rejecting the May 2012 Proposal, the Tenant also rejected the Landlord's conditional offer to waive the Increment contained in the May 2012 Proposal. The Court did not agree. It concluded that if the Landlord intended to retract its waiver of the Increment in the May 2012 Proposal, then the Landlord should have clearly notified the Tenant that it was retracting its waiver and would be relying on the overholding provision to collect the full amount of Overhold Rent going forward. The Court found that the Landlord did not transmit a clear intention to withdraw its waiver.

Collecting on Overhold Rent

A landlord wishing to impose its right to collect an increased rent during an overholding tenancy (if permitted by the lease) should keep the *Kypriaki Taverna* decision in mind. As the case demonstrates, staying silent may be fatal. It might help to enforce an increased overhold rent, to put the tenant on notice (preferably in writing) that, if the tenant remains in possession of the premises past the expiry of the term, rent will increase in accordance with the overholding provision in the lease. This step should make it difficult for a tenant to later argue that it was under the impression the landlord would not be enforcing its rights.

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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