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RELIEF FROM FORFEITURE ISN'T ALWAYS A RELIEF

In the common law provinces, when its lease is terminated for a default, the tenant may apply to the court for “relief from forfeiture”. In Ontario, this remedy is available under section 20 of the *Commercial Tenancies Act* (Ontario) (the “CTA”). Other common law provinces have similar statutes.

Relief from forfeiture, as we have discussed in previous News ReLeases, is an equitable remedy: the Court *may* reinstate a terminated lease to allow the defaulting tenant back into the premises, on certain terms and conditions and depending on the conduct of the parties and the circumstances. When making an order for relief from forfeiture, the Court will set the terms and conditions for that relief; subject to compliance, the lease will come back into effect.

The most common condition for a grant of relief is the payment of arrears (because most terminations arise as a result of non-payment).

As described in our June 30, 2021 issue of *News ReLease*, some tenants withheld rent due to the economic impact of the COVID-19 pandemic, and then tried to persuade courts to expand the remedies typically granted on relief from forfeiture to include terms such as rent abatements, lower interest rates on overdue rent, and extended timelines for the repayment of arrears.

In the recent, long-awaited decision of the Ontario Court of Appeal in *Hudson’s Bay Company ULC v. Oxford Properties*, the Court confirmed that the economic impact of the COVID-19 pandemic does not justify expanding the scope of section 20 of the CTA. Simply put, as a condition of obtaining relief from forfeiture, the Tenant was required to honour the lease by paying all arrears, plus interest at the lease-stipulated rate, to the Landlord.

The Facts

The Tenant, Hudson’s Bay Company ULC, entered into a lease (the “Lease”) with the Landlord, Oxford Properties

Retail Holdings II Inc., pursuant to which it rented premises to operate its business at Hillcrest Mall in Richmond Hill, Ontario.

Prior to the pandemic, the Tenant had always paid its rent on time. However, when the Landlord, as a result of the pandemic, was forced to comply with provincially mandated capacity limits etc., the Tenant unilaterally stopped paying rent. It offered no evidence that it was unable to pay. It simply stopped paying rent from April 2020 onwards.

In September 2020, the Tenant alleged that the Landlord had failed to provide a first-class shopping centre as required by the Lease and it sued the Landlord.

Rent in arrears totalled over \$1.3 million by October 2020, when the Landlord served a Notice of Intention to terminate the Lease due to non-payment of rent and rent arrears.

The Lower Court

Following a late-October 2020 issuance of an emergency interim injunction preventing the Lease from being terminated pending a determination of the merits of each party’s position, in June 2021, the Tenant’s application for relief from forfeiture pursuant to section 20 of the CTA was ruled upon by the Ontario Superior Court of Justice. Hudson’s Bay Company had asserted that the remedy of relief from forfeiture entitled the Court to affirm the continuation of the Lease and order a rent abatement, because of the Landlord’s breach. Oxford Properties argued that for the Tenant to obtain relief from forfeiture, the Lease should be respected: all rent, plus interest on arrears at the Lease-stipulated rate, should be paid.

The motion judge found that the Landlord was complying with provincial laws during the pandemic and therefore did not breach the Lease. It found that section 20 of the CTA does not extend to permit the issuance of an order *abating* (or reducing) rent, but that an order *deferring* payment of the arrears was permissible and within the discretion of the Court when granting equitable relief. Relief from forfeiture was ordered on

the basis that some arrears would be paid immediately, and the remainder would be paid over time. The motion judge also ordered the Tenant to pay interest on arrears, at a lower rate than stipulated in the Lease – in order to mitigate the economic impact of the pandemic on the Tenant, whose sales had dropped by over 60% on a year-over-year basis.

The Court of Appeal

Both parties appealed the motion judge's order. Although the Landlord agreed that the motion judge had correctly ordered relief from forfeiture, it took the position that the motion judge had gone outside the proper scope of section 20. Conversely, the Tenant claimed that section 20 allowed the Court to order a rent abatement or reduction for an indefinite time and that the motion judge did not grant *enough* relief.

The Court of Appeal found in favour of the Landlord. It ruled that the motion judge had gone outside the scope of section 20 by modifying rent and interest terms under the Lease. It held that while the remedy of relief from forfeiture allows the Court to impose terms that will bring a tenant in compliance with the terms of its lease, “[t]o order that a tenant is not required to pay the agreed upon rent is not to grant relief from forfeiture of the lease, but is to grant relief from compliance with the terms of the lease” (emphasis added). In short, section 20 allows a tenant to escape termination of the lease, but it cannot be used to rewrite the lease: “... relief from forfeiture does not contemplate a recalibration of existing rights and obligations

under the lease on a go forward basis to reflect what the court sees as a fair arrangement in light of unforeseen developments. Nothing in s. 20 empowers the court to create what the court regards as a fair lease for the parties.”

The Court also found that although an order of relief from forfeiture cannot include an abatement or reduction in rent, it *can* include a reasonable opportunity to come into compliance with the terms of the lease. However, in this case, the rent deferral ordered by the motion judge was not intended to give the Tenant additional time to pay its rent arrears but was rather intended to mitigate the economic impact of the pandemic. The Court noted that there was no evidence that the Tenant was unable to pay rent and it was not an appropriate use of the remedy to give it more time to pay.

Finally, the Court found no justification for varying the interest rate on arrears. It held that the Tenant was a sophisticated commercial entity that knew the consequences of its decision to cease paying rent, and that varying the interest rate had not even been requested by the Tenant. It was not a proper term of granting relief from forfeiture.

Lessons Learned

A broad interpretation of the remedy of relief is not likely to prevail. The purpose of relief is to allow a tenant to escape termination, but ultimately, the lease is the lease. On a grant of relief, it is to be reinstated as written. Any other outcome would generate too much uncertainty in commercial landlord and tenant relationships.

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

FRANCINE BAKER-SIGAL
416-597-8755
francine@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