

RENT IN ARREARS & RENEWAL OPTIONS

In our June 30 News ReLease titled “Withholding Rent: Gutsy or Risky?”, we considered whether a commercial tenant who was withholding rent during the pandemic was simply being strategic. Now we are frequently asked if tenants who accumulated arrears during the pandemic might have thereby lost the right to exercise their renewal options.

Preconditions to Renewal: What Does the Lease Say About Default?

A lease will often set out specific preconditions that a tenant must satisfy to exercise its renewal option.

A common precondition is that the tenant not be in default when exercising its renewal option. Some renewal options require that a tenant not be in default at *the time of exercising* its option, while others may require the tenant not to have been in default at *any time* during the lease. The Courts have consistently stated that a tenant must strictly comply with any prerequisites expressed in its lease in order to exercise its renewal option.

When are Tenants Given a Second Chance?

In rare cases, the Court has granted equitable relief where there has been a failure to comply with a no-default precondition to renewal. In British Columbia, for example, relief from forfeiture is not available as a remedy for a tenant’s failure to meet a renewal option precondition. In Ontario, the Court of Appeal has been forgiving if a tenant made diligent efforts to comply with

the terms of the lease, but the efforts were only unsuccessful due to no fault of their own.

In general, it is hard to predict whether the strict compliance requirement may be relaxed by a Court. It is fair to say that a tenant who purposefully withheld rent payments during the pandemic is unlikely to be granted equitable relief to be entitled to their option.

Curing the Default Before Exercising the Option

In *HAS Novelties Ltd v 1508269 Ontario Ltd*, the parties entered into a rent relief agreement during the pandemic. The tenant also asked the landlord to participate in the Canada Emergency Commercial Rent Assistance program (CECRA). A couple of months later, the tenant failed to pay the full amount of abated rent because it thought the landlord was applying for CECRA, which would have reduced the rent to the amount actually paid by the tenant. As a result of the tenant’s non-payment of what would have been subsidized by CECRA, the landlord sought a declaration from the Court that the tenant was in breach of its obligations under the lease and was therefore not entitled to exercise its option to renew. The renewal clause stated that in order to exercise its renewal option, the tenant could not be in default of any covenants under the lease *at any time*.

Despite the wording in the lease, the Court ruled that when a tenant remedies a past default *prior* to exercising its renewal right, it is entitled to renew its lease, whereas when the default is subsisting *at the time of the exercise of the renewal*, the tenant is

precluded from exercising the option. As of the date of the hearing, the rent arrears had been paid, except for October 2020, and the Court creatively held that under the circumstances, so long as the tenant paid the October 2020 rent arrears *prior* to the date when it had to exercise its option, the tenant would be entitled to renew the lease. In coming to this conclusion, the Court noted that “absolute and precise compliance” by a tenant is “virtually impossible” and if this were required, then the option to renew would be “worthless” or “merely at the mercy of the landlord.”

In *HAS Novelties Ltd*, the Court did not significantly dissect or analyze the wording of the option clause. Instead, it concluded that although there were defaults, they were due to misunderstandings with regards to CECRA and rent abatement amounts, allowing the tenant to catch up on arrears prior to the renewal date – essentially re-writing the no-default precondition in the renewal option.

Conclusion: Anyone’s Guess?

The outcome in *HAS Novelties Ltd* suggests that if a tenant can pay the rent arrears it accumulated during the pandemic prior to the time it must exercise its option, then perhaps the exact wording of the no-default precondition in the lease will not be determinative. It is difficult to predict with any certainty whether the Courts will generally offer leniency towards defaulting tenants who wish to preserve their renewal rights despite having accumulated rent arrears during the pandemic.

It is always important to review the specific wording of the lease, yet it is sometimes the case that the interpretation or application of the wording may be tailored to achieve what the Court considers to be a just result. We simply do not know if non-payment of rent as a failed renewal pre-condition is fatal in every renewal scenario. In one instance, the tenant lost out on its renewal option for admitted arrears of only \$251.92 at the time of renewal! Notably, that case was decided pre-pandemic.

LATEST CERS EXTENSION

The federal government recently announced the further extension of the Canada Emergency Rent Subsidy, to October 23, 2021. As with the previous extension, during this latest extension, applicants must experience at least a 10% decline in revenue to receive the base rent subsidy. The program still requires, as a condition of eligibility, that tenants pay the entire monthly rent within 60 days of receiving the funding.

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

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
afchrman@dv-law.com

GASPER GALATI
416-598-7050
ggalati@dv-law.com

MICHAEL HOCHBERG
416-597-9306
mhochberg@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MIMI LIN
416-597-8493
mimil@dv-law.com

MELISSA M. MCBAIN
416-598-7038
mmcbain@dv-law.com

ROBBIE MOSES
416-479-4354
rmoses@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

LUCIA TEDESCO
416-597-8668
ltesesco@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

PHILIP WALLNER
416-597-0830
pwallner@dv-law.com

DEBORAH WATKINS
416-598-7042
dwatkins@dv-law.com