

May 3, 2022

Who “Wins” When Relief From Forfeiture is Granted?

It is common, after parties duke it out in court, for the winner to be “awarded costs” - the loser must pay all or a portion of the winner’s legal fees. However, in an application for relief from forfeiture, who wins and who loses is a more nuanced matter.

As a refresher, an application for relief from forfeiture is brought by a tenant when a landlord has terminated its lease and the tenant seeks to have it reinstated. Relief from forfeiture is the right of the Court to set aside the termination of a lease and reinstate possession to an evicted tenant. It is a discretionary remedy that a Court may grant if, given the conduct of the parties and the surrounding circumstances, the Court considers reinstatement to be just and reasonable. Courts tend to take a generous view of what is just and reasonable; as a result, relief from forfeiture is more or less generally granted on certain usual conditions (such as payment of rent arrears).

In a recent decision of the British Columbia Supreme Court in *Hudson’s Bay Company v. Cherry Lane*, the Court decided that even though relief from forfeiture is granted in favour of a tenant, such that the tenant “wins”, the landlord may nevertheless be entitled to recover its legal costs from the tenant.

In the *Cherry Lane* case, Hudson’s Bay Company withheld payment of rent and the landlord terminated the lease. In the application for relief from forfeiture,

the Court held that the tenant was in default of its rental obligations under the lease, the landlord was entitled to terminate the lease, and the tenant was entitled to relief from forfeiture (so long as all rent was paid).

The only outstanding matter was the question of costs. This issue was brought before the British Columbia Supreme Court subsequent to the main hearing of the application for relief from forfeiture. Each of the landlord and the tenant asserted that they were the successful party in the application and therefore claimed that they were entitled to have their legal fees covered by the other.

After surveying case law, the Court concluded that there is no common practice regarding cost awards when relief from forfeiture is granted. It approvingly cited *Jungle Lion Management Inc. v. London Life Insurance Co.*, where the Court had granted the tenant relief from forfeiture and awarded the landlord its costs, explaining that “[r]elief from forfeiture is a remedy which invokes equity in order to override the [l]andlord’s legal rights. The [tenant] may appear to be successful if it salvages its tenancy, but that does not mean that the [l]andlord was not actually ‘right’”. This statement summarizes the conflict that arises in determining which party has won when relief from forfeiture is granted:

although the landlord may have lawfully terminated the lease, the Court may give the tenant another chance, and under these circumstances, it is not clear who was the successful party.

In *Hudson's Bay Company v. Cherry Lane*, to determine who was the successful party, the Court focused on whether the tenant was entitled to withhold payment of rent. It found that the very act of withholding rent initiated the sequence of events that led to the application for relief. It concluded that since the tenant had a continuing obligation to pay rent to the landlord without abatement, set-off or deduction and had failed to do so, the landlord's termination of the lease was proper, even if relief from forfeiture was available. Relief was granted, subject to the tenant paying the

outstanding (and ongoing) rent, but the Court found that the **landlord** was the successful party. Essentially, its position (that the tenant was not entitled to withhold rent) was vindicated. Consequently, the Court found that the landlord was entitled to have its costs of the legal proceeding paid by the tenant.

This is an important ruling. It holds that even where the tenant wins relief from forfeiture, the landlord wins its costs. The case serves as a cautionary tale to tenants who choose to not pay rent, suffer lease termination and then bring an application for relief from forfeiture. It also provides comfort to landlords defending such applications at significant legal cost.

ANNOUNCEMENT

Daoust Vukovich LLP is pleased to welcome **PAUL HANCOCK** to the firm as an Associate Lawyer. Paul represents owners, general contractors/subcontractors, construction managers and engineers in construction law matters. He was selected by his peers as one of the Best Construction Lawyers in 2022. He is a graduate of Osgoode Hall Law School and was called to the Ontario Bar in 2009. Paul is joining the firm's litigation team and can be reached at 416-597-6824 (phancock@dv-law.com).

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
afehrman@dv-law.com

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

PAUL HANCOCK
416-597-6824
phancock@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

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

LUCIA TEDESCO
416-597-8668
ltesesco@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