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Commercial Leasing Bulletin

Navigating the Hazards of Waivers and Estoppels in Commercial Leasing – Part 2

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Waivers and estoppels are complex and can have harsh repercussions. This paper is Part 2 in a two-part series we hope helps landlords and tenants avoid unintended results. Part 1, published in November 2023, introduced the doctrines of waiver and estoppel and examined waiver of relief from forfeiture and continuing breach. This edition will cover more examples of waiver and estoppel and discuss the effect of non-waiver clauses.

Waiver and Estoppel in Commercial Leasing

The doctrine of waiver and estoppel are often relied upon where a landlord has understated actual charges, failed to request payment of occupancy costs, or accepted rent at a lower rate than what is provided in the lease, over an extended period. Whether a tenant is able to successfully raise an estoppel defence is fact-specific.

In *Long v. Inter-Habitation Inc.*,[1] the tenant, a bakery business, had a triple net lease. Months after signing the lease, the landlord shaved operating costs from the monthly rent because the landlord allowed another tenant in the plaza to sell bakery products. Although the tenant had not been paying operating costs for seven years, the lease had not been formally amended. After the plaza was sold, the new owner discovered that operating costs were not paid. The new owner demanded operating costs. The tenant refused and the landlord terminated the lease. The Court found that the rent had been accepted without operating costs being paid for such a long time as to preclude the new owner from doing something about it. This was a simple buyer-beware situation where the new owner could have gotten confirmation of the status of the lease prior to purchase but failed to do so. As a result, the right of the landlord to forfeit the lease was not available

In contrast, the tenant was not able to successfully raise an estoppel defence, despite the landlord having failed to demand operating expenses and property taxes for three years, in the case of *Bulley v. Weatherford Canada Partnership*.[2] The parties had entered into a triple net lease. The

[1] [1999] O.J. No. 3305 (Ont. S.C.J.)

[2] 2016 BCSC 1955 (B.C. S.C.)

landlord failed to send invoices to the tenant for operating expenses and property taxes for the first three years. When the landlord finally realized its mistake and sent the invoices, the tenant refused to pay them. The tenant made three arguments. First, it argued that it was a precondition for payment of the additional rent that the landlord deliver budget statements, tax assessments, and reconciliation statements to the tenant annually and the landlord's failure to do so barred the landlord from collecting the additional rent. Second, it argued that the landlord's non-delivery of the budget statements, tax assessments, and reconciliation statements amounted to a representation by the landlord that it would not require the tenant to pay the additional rent and the landlord was therefore estopped from collecting additional rent because the tenant detrimentally relied on this representation. Lastly, the tenant argued that some of the amounts claimed were barred as the limitation period had expired. For this paper, we will only focus on the second argument.

The Court restated the test for estoppel, which requires that the landlord has, by words or conduct, clearly indicated that they would not take advantage of their legal rights under the lease to claim additional rent and that the tenant has relied upon this representation to their detriment. The Court applied this test and found that there was no promise or assurance made by the landlord to the tenant to never collect additional rent or that the landlord would not strictly enforce its rights under the lease.

The landlord's failure to request additional rent was the result of an unintentional mistake and this mistake could not be relied upon to ground promissory estoppel. Moreover, the tenant did not change its legal position due to the alleged representation. As a result, the landlord was entitled to collect the operating expenses and property tax arrears.

In *1198816 Alberta Ltd. v. Bourbon Lounge Inc.*,[3] a dispute arose over the applicable rent after a new landlord and a new tenant took over the lease of certain commercial premises. The written lease provided for rent of $11,000 per month plus GST, with annual increases. The old landlord had, however, accepted reduced rent of $10,000 per month for a year because the tenant had completed extensive renovations and was cash-strapped. When the building was sold, the tenant continued to pay the reduced rent, which was initially accepted by the new landlord with the stipulation that the actual rent was higher and with a request for the shortfall. As the relationship deteriorated, the new landlord refused the lower rent and brought an application for termination of the lease.

At issue was whether accepting the reduced rent was intended to operate as a permanent contractual modification to the written lease or as a temporary indulgence extended to a cash-strapped tenant. There was much conflicting evidence but ultimately, the court found that there was no contractually binding variation of rent agreed to by the parties. The reduction in rent was a temporary indulgence and there was no manifest intention to alter the parties' underlying legal relations. As a result, there was no conduct on the part of the landlord that amounted to estoppel or

[3] 2008 ABQB 600 (Alta. Q. B.).

waiver. The Court went on to say that even if there was estoppel or waiver by the original landlord, the new landlord was entitled to insist on the reinstatement of the strict terms of the written lease.

While a landlord is entitled to give reasonable notice to revive the original obligations of the lease,[4] a landlord must be careful that its subsequent conduct does not nullify the effect of that notice. In *Chan v. Lorman Developments Ltd.*,[5] the new landlord's continued acceptance of rent based on the lower rate, without complaint (notwithstanding that it had previously issued a notice of default demanding rent at the full rate), acted to nullify the effect of the notice. The Court found that the new landlord waived the provisions of the lease that provided for rent based on the higher rate. Its conduct in accepting rent based on the lower rate, without complaint after issuing a notice of default, led the tenant to believe that the landlord was accepting that rent in fulfilment of the contractual obligations under the lease.

Effect of Non-Waiver Clauses

Most leases contain a standard non-waiver clause similar to the following:

> "The waiver by the Landlord or the Tenant of a default under this Lease is not a waiver of any subsequent default. The Landlord's acceptance of Rent after a default is not a waiver of any preceding default under this Lease even if the Landlord knows of the preceding default at the time of acceptance of the Rent. No term, covenant or condition of this Lease will be considered to have been waived by the Landlord or the Tenant unless the waiver is in writing."

Although these types of clauses provide that any waiver must be expressed in writing, the Courts have shown time and time again that they will consider the course of conduct of the party. In *Hreit Holdings 452 Corp. v. R.A.S. Food Services (Kenora) Inc.*,[6] the Court relied on *Med-Chem Health Care Inc. (Re)*,[7] for the proposition that a clause requiring that all waivers be in writing was not effective because "a course of conduct can be viewed to determine whether there is any intention by the landlord not to rely on the strict terms of the lease with respect to the amount of the rent." Similarly, in *Sledz v. Edmonton Home Fair Ltd.*,[8] the Court found that the acceptance of post-dated cheques after the termination was a waiver, even though there was a clause in the lease that stated that a waiver must be in writing. As a result, it is important that landlords, tenants, and anyone

[4] *1198816 Alberta Ltd. v. Bourbon Lounge Inc.*, *supra, note 21,* at para 205.

[5] *Chan v. Lorman*, *supra*, note 2.

[6] [2009] O.J. No. 506 (Ont. S.C.J.).

[7] [2000] O.J. No. 4009 (Ont. S.C.J.)

[8] (1997), 28 R.P.R. (3d) 132 (Alta. Q.B.).

acting on behalf a landlord or tenant are aware of the doctrine of waiver and estoppel and how certain actions can jeopardize the landlord's or tenant's rights under the lease.

Conclusion

The doctrine of waiver and estoppel have created a minefield where certain actions can have unintended results. Although most leases contain a provision stipulating that any waiver must be expressed in writing, this provision does not always provide adequate protection. It is therefore critical for not only those who are negotiating the lease, but also those who interact with the tenant on a regular basis, to be aware of the doctrine of waiver and estoppel and to conduct themselves in a manner consistent with the intent of the party.

We provide regular updates on commercial leasing issues in Canada. If you have any questions or would like to obtain legal advice on any leasing issues or commercial leasing litigation, please contact any lawyer in our **Commercial Leasing Group**.

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