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Court Sets Out 'Reasonableness' Test for Landlord Consent to Lease Assignment

In a recent case, the court concluded that a commercial landlord had unreasonably refused to consent to the tenant's assignment of its lease. The case is noteworthy in highlighting the proper factors for a landlord to consider, when deciding whether to give such consent.

The leased property was a gas station, car wash and convenience store. The lease's wording precluded the tenant from assigning it without the landlord's written consent.

The tenant approached the landlord with a proposal to assign the lease to a corporation. The landlord refused, citing among other reasons that the tenant was in default of certain lease terms, such as neglecting to make repairs and failing to pay taxes and insurance premiums. The tenant then applied to the court under the *Commercial Tenancies Act*, for a ruling on whether the landlord had unreasonably withheld its consent to that proposed assignment.

The court began by noting the *Act* stipulates that if a commercial lease requires the landlord's consent to an assignment, then the lease is deemed to also provide that the consent is not to be unreasonably withheld. Although the older case law tended to favour the tenant, modern rulings are pro-landlord, and apply a liberal test assessed from the landlord's own perspective.

In deciding whether to consent, the landlord may consider a variety of factors. They are not limited to any particular criteria, but can include all the surrounding circumstances including: (1) the commercial realities of the marketplace; (2) the economic impact of the assignment; and (3) the financial position of the assignee. The landlord may also consider its own position, as well as the positions and interests of other tenants.

Similarly, when asked to review the reasonableness of the landlord's refusal to consent, the court must look at the lease covenant against the contextual matrix of the entire lease, as well as the factual circumstances. As viewed in the context of the "reasonable person" standard, these include the commercial realties, and the economic impact on the landlord of any change in use. These evaluations must be made from the landlord's own perspective, considered as of the time it made the refusal. Finally, each case is determined on its own facts, with the tenant bearing the onus to prove unreasonableness.

Applying those tests to the proposed assignment in this case, the court concluded the landlord had indeed withheld its consent unreasonably. Admittedly, the evidence showed the landlord had longstanding concerns about the tenant's failure to comply fully with the lease provisions. However, these concerns were independent, quickly remediable and raised only after-the-fact in some cases. None of them were the real reason for the landlord's refusal to consent, the court found.

Instead, the landlord's predominant concern was about the financial viability of any proposed new tenant. Yet in this case, the landlord had met with a representative of the corporation being considered and had orally agreed to consent after vetting its financial information and expressing satisfaction with the experience and qualifications of its principals.

The landlord's subsequent reversal, conveyed in a letter, was simply based on the belief the corporation might want to re-negotiate the lease, which the landlord was unwilling to do. This was the real reason for the landlord's refusal to consent, and in the court's view, it was an insufficient since the corporation later confirmed it would abide by the lease terms. This stripped the landlord of genuine reason for its refusal. The tenant having met its onus, the court granted the application. See *6791971 Canada Inc. v. Messica*, 2020 ONSC 1642.

Occupancy by Buyers' Friend During Interim Occupancy of New Condo Was Not a Breach of APS

Is a non-paying occupant considered a "tenant"? This was the issue in a recent case involving buyers who agreed to purchase a newly constructed residential condominium unit. They paid the seller the required deposits, together with almost a year's worth of monthly occupancy fees, all totaling about $93,500. They took pre-closing possession under an interim occupancy agreement, which included provisions to accommodate the seller's access to the unit to address deficiencies.

The buyers did not occupy the unit right away; instead, they allowed a struggling friend to live in the unit for a few months, rent-free. There was no lease. The seller was aware that someone was living in the unit and knew it was not the buyers.

Over the next several months, friction increased between the seller and buyers over various deficiencies and repairs to be remedied by the seller. Then, just weeks before closing, the seller alleged for the first time that the buyers had breached the agreement, by allowing their friend to stay in the unit without the seller's consent. At that point, the buyers' friend had vacated the unit over four months earlier and the seller had known about him for about nine months in total.

The seller nonetheless purported to terminate the agreement on this basis and unilaterally retained the buyers' $93,500 as liquidated damages. The seller then took steps to re-sell the unit to family members. The buyers applied to the court for relief from forfeiture of their money, and for specific performance compelling completion of the original deal.

The court granted the buyers' application. In reviewing the wording of contract, the court agreed it prohibited the lease of the unit without the seller's written consent. But on proper interpretation, the clause was mainly aimed at two things: (1) ensuring the seller could address deficiencies during the occupancy period, without difficulties in gaining access to the unit; and (2) avoiding disputes over damage caused by third parties.

The seller chose to use the word "lease" in the agreement, which by common definition involves a written contract for a fixed period. There was no "lease" here, nor any "tenant" as that legal term is understood. The buyers had merely allowed their friend to stay in the unit, without receiving rent or other benefit from him. This was not a breach of the agreement, since the agreement contained nothing to prevent buyers with occupancy rights from allowing friends or guests to stay for free.

The court observed that – despite being immediately aware of the friend's occupancy – the seller had waited nine months to assert its putative right to terminate, meanwhile continuing to accept the buyers' monthly occupancy fees. This delay alone amounted to a waiver of the seller's right to end the agreement.

The seller's attempt to terminate was a thin excuse to seize the buyers' payments, and to achieve its sole aim of securing an economic advantage by avoiding the costs of repairing the disputed deficiencies. It was a grossly disproportionate response to an alleged breach – one the buyers had cured months earlier by asking their friend to leave.

The court ordered relief from forfeiture and granted specific performance after concluding that damages would be an inadequate remedy. Admittedly, the unit could not be considered "unique" in terms of its layout and amenities since there were many similar units not only in the building itself, but also in the city. However, the court reasoned that when the buyers had agreed to purchase the unit nearly five years earlier, they did so on very advantageous terms. The unit had also increased significantly in value since then.

In this respect – and as measured against the test of whether damages were an adequate alternative – the unit could be considered "unique" because a substitute was not readily available. Plus, the buyers' money had been tied up with the seller for the years leading to trial, so it was not available to them for buying a different unit while the real estate market continued to rise.

An order for specific performance would better achieve timely and fulsome justice in the case. It was the only remedy that would put the buyers in the position they would have been in, had the contract been performed.

The court nullified the seller's re-sale to family members and ordered the original sale to the buyers to go through, with their deposit funds to be credited toward the purchase price. See *Lucas et al. v. 1858793 Ontario Inc. o/a Howard Park et al.*, 2020 ONSC 964.

"Sellers' Remorse" No Justification for Reneging on House Deal – Specific Performance Granted

The sellers owned a 4300 sq ft home on a large lot. Wanting to consolidate and pay off their debts, they decided to sell and accepted the buyers' offer of $835,000. For the buyers, the home was ideal since it had the requirements they needed to accommodate their four-generation extended family. These included two master bedrooms, each with ensuite bath, and a main-floor bedroom suitable for their grandparents.

But just before closing, the sellers had "sellers' remorse". They reneged on the deal, believing that they could have obtained a higher price. The deal did not close. The buyers mitigated by finding a somewhat comparable home, but it cost more, had a smaller square-footage and lacked some of the crucial features they were looking for.

The buyers sued for a court declaration that the agreement was valid and binding. They claimed for specific performance or damages in the alternative.

The court ruled in the buyers' favour, and declared the agreement valid. On the evidence, the sellers had fully understood the terms of the agreement they had signed, including the $835,000 price and the binding nature of the contract.

However, an award of damages would be inadequate and uncollectable, given sellers' existing debt load. As the court put it: "Awarding damages would leave the [buyers] with a meaningless remedy."

Instead, the court ordered specific performance. It explained that when crafting a remedy for breach of contract, it strives to place the injured parties in the position they would have been in, had the contract been performed. From the buyers' perspective, the house had particular significance to them, with its ideal features to accommodate their extended family's needs. This made it "unique" in the legal sense, when viewed in the context of their specific requirements.

The court ordered the sellers to vacate within 120 days, and imposed hefty legal costs amounting to $200,000, to be deducted from the home's purchase price. The sellers' later appeal, requesting a stay of the proceedings, was dismissed in the interests of justice by the Court of Appeal. See *Dhatt v. Beer*, 2020 ONSC 2729; aff'd 2020 ONCA 545.