

# DRAFTING, EXERCISING AND PROTECTING LEASE RENEWAL RIGHTS

Posted on June 9, 2014

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## Introduction

The recent Ontario Superior Court of Justice decision in *Delphi Management Corporation v Dawson Properties* [1] deals with a number of the legal principles applicable to tenants drafting, protecting, and exercising renewal and extension rights in commercial leases.

## Facts

Delphi Management Corporation (the "Tenant") was a tenant in a commercial premises owned by Dawson Properties (the "Landlord"). The lease was to expire on January 31, 2014. The Tenant brought an application heard on January 6 and January 9, 2014 for a declaration that the lease had been validly renewed for another five years.

The parties and their predecessors had been landlord and tenant from February 1, 1994. It started with an initial five year term and had been renewed three times.

The current terms of the lease included a further right to renew which had preconditions as follows:

- a. the due and regular payment of the rent by the Tenant;
- b. the performance of all terms and conditions by the Tenant; and
- c. a written request being mailed or delivered by the Tenant on or before July 31, 2013.

The renewal rent was to be "determined by agreement. "

## Enforceability of the Right to Renew

The previous renewal options in the lease documents had provided for the renewal rent to be agreed by the parties and referred to binding arbitration if the parties did not agree and to be set at an amount similar to existing rents for similar premises. However, the current renewal right simply provided for a monthly rent to be determined by agreement.

The court recognized that a renewal is not void for uncertainty merely because the rent was not agreed upon in advance if the rent can be reasonably ascertained by a court or by arbitration. However in this last renewal right there was neither a test for what the rent should be (like fair market rent) or a reference to arbitration.

Relying on the general rule that the law does not recognize a contract to enter into a contract nor a contract to negotiate, the court held that the renewal right was unenforceable as simply an agreement to agree.

Even though the court found that the renewal right was not enforceable, the court looked at the other arguments made by the Tenant attempting to protect that right.

### **Compliance with Preconditions of Renewal**

The three preconditions to the option to renew are set out above. The Tenant acknowledged that none of the preconditions were complied with.

The Tenant sought relief from its non-compliance by asking the court to relieve it from the forfeiture of its option to renew.

Relief from forfeiture under the *Commercial Tenancies Act* [\[2\]](#) is available at the discretion of the court and allows a tenant to cure its default and be relieved from forfeiture of its rights. That is, the Act recognizes that consequences from a default can be extreme and gives the court discretion to grant relief.

However, the court held here that the Tenant was not asking for relief from a loss of an existing right as a result of not observing its obligations. Rather it was asking for relief from its failure to comply with conditions precedent to an exercise of an option to renew. There was no compulsion on the Tenant to exercise the renewal option and the case law is clear that if a tenant does exercise such an option, it must comply with any conditions precedent. If it fails to so comply, it does not lose an existing right for which a court will grant relief. Rather, it loses a privilege or option and the court will not grant relief in that situation.

### **Waiver, Estoppel**

As noted earlier, the Tenant did not exercise its option to renew within the required time period. The facts indicate that for the three previous renewal periods the Tenant was also late each time in delivering its notice to renew but each time the lease was renewed by the Landlord without objection to the Tenant being late.

On this basis, the Tenant asserted that the Landlord, by its conduct, waived its rights to insist on compliance and was estopped from asserting that right.

Again, the court did not agree with the Tenant. The court noted that option clauses provide certainty to the parties as to when the Tenant has the right and can exercise such right. The court relied on case law indicating

that if a course of negotiation could constitute a waiver of compliance with specific requirements, this would effectively destroy the certainty that the parties bargained for. The court found no basis for waiver or estoppel notwithstanding the past conduct.

### **Effectiveness of the Notice to Renew**

The letter where the Tenant did purport to extend the lease included:

"We would like to consider renewing our lease for a Fourth Renewal Term. Delphi Management would also like to meet to discuss the option of further leasehold improvements to be completed before the end of our third term."

The court referred to case law which indicates that a notice to renew must be "clear, explicit, unambiguous and unequivocal." The court found that the foregoing letter did not meet that test and that the letter, even if it had been given in time, would not have been effective notice.

### **Conclusion**

This case is a good reminder that careful consideration to all the terms and conditions of a renewal or extension right are required by a tenant to protect that right. It is also a useful reminder that prudent practice is usually to begin negotiations with the landlord well before the deadline for exercising the renewal right and, in the perfect world, come to full agreement before that deadline passes.

by William (Bill) Rowlands

1[ps2id id='1' target=''] [Delphi Management Corporation v Dawson Properties](#), 2014 ONSC 354.

2[ps2id id='2' target=''] [Commercial Tenancies Act](#), RSO 1990, c L.7, s 20.

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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