New developments in the law of options

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The Court of Appeal for Ontario has re-stated the general test for relief from forfeiture where a lease option requires the tenant to be in compliance with the terms of the lease.

Recent decisions from the Court of Appeal for Ontario have shed some light on two issues that frequently arise in connection with real estate options to purchase or to renew. As a result of those decisions, the criteria for when a court will find that an option to renew a lease is sufficiently certain as to the renewal rent to be an enforceable agreement (as opposed to an unenforceable "agreement to agree") appear to have been relaxed.

Secondly, the general test for relief from forfeiture has been re-stated. The Court of Appeal has clarified that where a lease option requires the tenant to be in compliance with the terms of the lease, the prerequisite for relief from forfeiture is that

> the tenant has made diligent efforts to comply with the terms of the lease which are unavailing through no default of his or her own.

Enforceability of a renewal option

Prior to the Ontario Court of Appeal's recent decision in *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc.* ("*Mapleview*"), courts had almost consistently held that for an option to renew a lease to be enforceable, the option must contain two elements regarding the renewal rent:

(1) a formula or reference standard to fix the renewal rent if a dollar amount is not set out, e.g. "market rent" or "fair market rent"; and
(2) procedural machinery to determine the renewal rent in the event that the parties do not agree, typically a form of ADR such as arbitration.

"Then current rate" is sufficient

In *Mapleview*, the Court of Appeal affirmed the lower court's holding that the "then current rate" was a sufficiently certain reference standard for the renewal rent and did not constitute an "agreement to agree" because it was the functional equivalent of saying the rental rate would be at the "then market value" or the "then prevailing market rate" — expressions that have been found to be sufficient to overcome a void for uncertainty argument.

Although the option did not provide for arbitration or specify procedural machinery to determine the "then current rate," the Court of Appeal held that there was nothing which prevented the parties from submitting the matter to arbitration or the courts if negotiations proved unsuccessful.

There is limited authority for the point that the court can supply the mechanism to determine the new rent, although none was cited. (See, for instance, *Dagny Development Corp. v. Ocean Fisheries Ltd.*) *Mapleview* is now clear authority for this point.

Relief from forfeiture

Options are generally interpreted by the courts to be unilateral contracts, separate from the underlying contract in which they are embedded. The option is an irrevocable offer, and it is only open for acceptance in the exact manner — and on the exact conditions — specified.

Any conditions precedent to exercising the option, such as the common precondition in a lease that the tenant not be in default under the lease, must be complied with strictly or the option cannot be exercised.

When a tenant's purported exercise of an option is challenged on the basis that the tenant was not in strict compliance with the option terms (in addition to any other arguments that can be advanced, such as interpretation arguments, the doctrine of spent breach, waiver, and estoppels), the tenant will typically claim relief from forfeiture.

Test for relief

Relief from forfeiture is available pursuant to the court's inherent equitable jurisdiction, as codified in s. 98 of the *Courts of Justice Act* ("CJA"). In *Kozel v. Personal Insurance Co.* ("*Kozel*"), a 2014 case involving forfeiture of an automobile insurance policy, the Court of Appeal held that the test under s. 98 of the CJA to grant relief from forfeiture requires the court to consider the following three factors:

(i) the conduct of the applicant,
(ii) the gravity of the breach, and
(iii) the disparity between the value of the property forfeited and the damage caused by the breach.

Previous case law

Prior to *Kozel*, the test for relief from forfeiture required the court to ask whether the object of the right of forfeiture was essentially to secure the payment of money, which some Ontario courts had held meant that relief from forfeiture was not available in the case of lease options to purchase and renew. (See, for instance, *Annett v. Robert Breadner Children's Trust (Trustee of)*.)

This approach was contrary to earlier case law that permitted such relief. (See, for instance, *Sheikh v. Sheffield Homes Ltd.*; *Ross v. T. Eaton Co.;* 120 *Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*; and *1383421 Ontario Inc. v. Ole Miss Place Inc.*)

Additionally, some courts, adopting the unilateral contract theory of options, reasoned that while relief from forfeiture could cure loss of the lease following defaults, it is not available to cure non-compliance in exercising a lease option, as there is a difference

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between the loss of a right and a failure to acquire a right. (See, for instance, *Sparkhall v. Watson*; *Re Pacella and Giuliana*; and *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*)

Application of test

This approach was rejected and the reformulated three-part *Kozel* test was applied by the Court of Appeal in *PDM Entertainment Inc. v. Three Pines Creations Inc.* ("*Three Pines*"). Here, the court upheld the lower court's decision to grant relief from forfeiture where an optionee made a mistake in exercising its right to extend its movie option.

In *Mapleview*, the Court of Appeal held it was unnecessary to resolve the conflicting lines of authority on whether relief from forfeiture is available for non-compliance with conditions precedent in a lease option. The court cited its own decision in *Ross v. T. Eaton Co.* ("*Ross*") in noting that one of the prerequisites for relief from forfeiture for a tenant who has not complied with a "not in default" precondition is that

> the tenant has made diligent efforts to comply with the terms of the lease which are unavailing through no default of his or her own.

Rental arrears and dispute

In *Mapleview*, the tenant had failed to satisfy this requirement. The tenant had admitted rent arrears of $251.92 and was paying its monthly additional rent in the old amount, rather than the increased amount requested by the landlord whose calculations the tenant disputed.

The Court of Appeal held that if the tenant had wished to preserve its right to exercise the option, it could have paid the small amount of admitted arrears and the disputed higher, additional rent amount, and then sought a correcting adjustment in the year-end reconciliation.

Significance

As the Court of Appeal in *Mapleview* did not refer to the test it had articulated and applied in *Kozel* and *Three Pines*, it did not indicate where the *Ross* requirement fits in, but, it seems to be part of the first factor — the conduct of the applicant. The strict application of this requirement in *Mapleview* illustrates that even if the court has the ability to grant relief from forfeiture in relation to the exercise of a tenant's option, it will do so sparingly. (There remain unresolved conflicting lines of authority on this issue.)

REFERENCES: *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc.*, 2016 ONCA 93, 2016 CarswellOnt 1485 (Ont. C.A.); *Dagny Development Corp. v. Ocean Fisheries Ltd.*, 1991 CarswellBC 675, 1991 CANLII 528 (B.C. S.C); *Courts of Justice Act*, R.S.O. 1990, c. C.43. *Kozel v. Personal Insurance Co.*, 2014 ONCA 130, 2014 CarswellOnt 1790 (Ont. C.A.); *Annett v. Robert Breadner Children's Trust (Trustee of)*, 2008 CarswellOnt 83 (Ont. S.C.J.) at para. 35, affirmed 2008 ONCA 787, 2008 CarswellOnt 6892 (Ont. C.A.); *Sheikh v. Sheffield Homes Ltd.*, 1989 CarswellOnt 553 (Ont. H.C.) at para. 23; *Ross v. T. Eaton Co.*, 1992 CarswellOnt 615, 11 O.R. (3d) 115 (Ont. C.A.) at para. 27; *120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*, 1993 CarswellOnt 5327, [1993] O.J. No. 2801 (Ont. C.A.) at para. 3; *1383421 Ontario Inc. v. Ole Miss Place Inc.*, 2003 CarswellOnt 3681, 67 O.R. (3d) 161 (Ont. C.A.) at para. 80; *Sparkhall v. Watson*, 1953 CarswellOnt 434, [1954] 2 D.L.R. 22 (Ont. H.C.) at para. 8; *Pacella v. Giuliana*, 1977 CarswellOnt 411, 16 O.R. (2d) 6 (Ont. C.A.) at p. 8 [O.R.]; *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*, 2007 BCCA 24, 2007 CarswellBC 63, 277 D.L.R. (4th) 201 (B.C. C.A.) at para. 30; *PDM Entertainment Inc. v. Three Pines Creations Inc.*, 2015 ONCA 488, 2015 CarswellOnt 9648 (Ont. C.A.); *Ross v. T. Eaton Co.*, 1992 CarswellOnt 615, 11 O.R. (3d) 115 (Ont. C.A.) at p.125 [O.R.], referred to with approval in the Court of Appeal's 2004 decision in *1383421 Ontario Inc. v. Ole Miss Place Inc.*, 2003 CarswellOnt 3681, 67 O.R. (3d) 161 (Ont. C.A.) at para. 80.

MUNICIPAL LAW

Will proposals make the Golden Horseshoe great?

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Proposed amendments under the Greater Golden Horseshoe will require municipalities in the outer ring to identify and eliminate excess lands from the development pool.

The Growth Plan for the Greater Golden Horseshoe (the "Growth Plan") is a provincial-level, land-use planning document that, through a rigid set of rules, establishes how and where communities within the Greater Golden Horseshoe Growth Plan Area (the "GGH") can and should develop. After a decade of planning under the Growth Plan, the government has decided to refresh the plan.

Anticipated growth

The refresh is being done in an attempt to keep up with anticipated growth in the GGH, which is expected to be nearly 50 percent in terms of population — from the current population of about nine million people to about 13.5 million people by 2041; and 40 percent in terms of jobs — from 4.5 million jobs to 6.3 million jobs by 2041.

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