Lease Renewal Options

When your wish is the law.

The rules on exercising lease renewal options are becoming more flexible. But beware, as the rules change, the limits of that flexibility are uncertain. Two recent cases show ….

An option to renew a lease is a privilege. In order to have the benefit of this privilege, the person purporting to exercise the option must clearly exercise the option, an must completely comply with the terms and conditions on which the option is to be exercised.

To properly exercise an option, several elements must be complied with, including:
1. clear and unambiguous exercise
2. unconditional exercise
3. compliance with required manner of giving notice of exercise

Clear Exercise
A letter from a tenant said this: "Re: Option to Renew Lease… We wish to exercise the option to renew our lease at Suite 202, Newton Village Square which expires January 31, 1998. We look forward to meeting with you to discuss our opportunities to continue as tenants of Newton Village Square."

The letter was signed by one of the partners of the tenant. The landlord treated the letter as an exercise of the option. The partnership had intended only to open up discussions about renewal, and had not intended to exercise the renewal option. The landlord didn't learn that until later, however.

The tenant sought a court declaration that it hadn't exercised the option. It lost. In *Lake & Associates* v. *372363 British Columbia Ltd.*, the British Columbia Supreme Court held that the only possible interpretation of the letter was that the tenant firm had exercised the option. The owner was entitled to rely upon the letter. Any mistake was unilateral in nature and as a result, the tenant could only obtain a court declaration retracting and correcting the letter if there was evidence that the owner, knowing the firm had made an error, had remained silent and taken advantage of the mistake. There was no evidence that the owner knew at the time the contract was made that the partner who sent the letter had made a mistake.

In the court's view, the letter raised no ambiguity that the option to renew was exercised and that the details were to be worked out. Given that the language was clear and unambiguous, there was no basis in law to turn to additional evidence to attempt to interpret the meaning of the lease. The court cited the 1993 Ontario Court of Appeal case of *Adelaide Leaseholds Inc.* v. *Oxford Properties Canada Ltd.* where the Court of Appeal stated that "The exercise of an option is similar to the acceptance of an offer. The law of contract required that the acceptance of an offer be communicated to the person who made the offer. In order for the acceptance to be a valid one it must be clear and

unambiguous." The court also rejected the argument that the word "wish" means "a desire at a future time to exercise the option". As a result, the court held that the exercise of the option had been clear and unambiguous, when considering the letter as a whole.

Unconditional Exercise

Non-compliance with the technical notice requirements of the lease did not negate the notice, as the requirements were not mandatory. A facsimile actually received by the other party constituted adequate notice. The delivery of the keys to the maintenance man did not constitute surrender of the premises. The maintenance man had been instructed not to accept the keys and only did so when the plaintiff continued to attempt to hand over the keys.

BENNETT J.:-- The plaintiff leased office premisesa t the Newton Village Shopping Centre in Surrey, B.C. from Adams Coscan Partners on November 4, 1992. The term was five years with a renewal option. It expired the 31st of January1998.

In April, 1996 the defendants took over ownership of the Newton Village Shopping Centre. At that time, all the tenants, including the plaintiff, were provided with a letter advising them that A.L. Sott was the new owner and provided them with a new address to send payment, numbers for enquiries for any problems with the property. The letter also indicated that any insurance certificates should be amended to reflect the new owner. The lease itself stated that the address of the landlord was the address of Adams Coscan & Partners. The lease was not amended to reflect that A.L. Sott was the new owner.

The option to renew is set out in Schedule F of the lease and states as follows: If the Tenant performs all the Tenant's covenants and is not in default under any of the terms of the Lease, the Tenant shall have the right to renew the Lease with respect to the Leased Premises and any additional space leased for an additional term of five (5) years on the same terms and conditions, save only for the Minimum Rent and that there will be no further right of renewal. The Rent during the renewal period shall be the fair market Rent for the Premises without regard to the Leasehold Improvements of the Tenant, excluding those paid for by the Landlord, agreed between the parties, and failing such agreement, as determined by arbitration pursuant to the Commercial Arbitration Act of British Columbia. However, the Minimum Rent shall not be less and the Minimum Rent payable in the last year of the Term. To exercise this right, the Tenant shall give written notice to the Landlord no earlier than seven (7) months and no later than six (6) prior to the date of expiry of the Term, otherwise this Option to Renew shall be deemed waived.
letter.

(i) Was the letter a conditional notice?
(ii) Was the letter ambiguous and uncertain?
(iii) Was the letter sent in error and therefore rectifiable in equity?
(iv) Is the option void to due a unilateral mistake of Steven Lake?

(v) Is the option to renew void because of "non est factum" in that Steven Lake was over worked and not in good health at the time the document was prepared and signed?
(vi) Was the option to renew devoid for failure to comply with the specific renewal terms of the lease, i.e. sent by registered mail and sent to the address for the notice contained in the lease?
(vii) Did the defendants actually or constructively terminate the lease by permitting the plaintiff to return the keys and requiring an inspection of the premises?

The plaintiff seeks a declaration that the lease was not renewed and that the lease expired on January 31,1998. If it was renewed then it submits the defendants have re-taken possession and terminated the lease.

I heard two days of submissions and have been referred to many authorities on the issues raised before me

The plaintiff argues that the letter sent to the defendants was a conditional acceptance. He argues that the word "wish" is ambiguous, and the words "to meet with you" and" to discuss", "opportunities to continue as tenants" and" please ... arrange a meeting time" all suggest that the letter was a conditional expression of a desire to exercise the option at a future time if the terms were agreeable .Further, the plaintiff submits that the letter should be viewed as a whole.

Reading the letter of July 2, 1997, I am satisfied that the only possible interpretation and the interpretation a reasonable person reading the letter would arrive at is that Lake & Associates have indicated that they want to exercise the option to renew the lease. In the original lease agreement the terms were to be set by an arbitrator if the terms could not be agreed upon. Whether Mr. Lake acted carelessly or without authority of his other partners is irrelevant. Mr. Silber was entitled to read that as the exercise of the option to renew and to rely on it.

RECTIFICATION

The plaintiff argues that if the document was a notice to exercise the option to renew then because the notice was given in error equity should intervene to cancel it.[para24] In order to succeed in rectification of a contract, the plaintiff must meet a high onus of proof. The law is clear that the remedy of rectification is to be used with great caution and only in the face of "clear and convincing proof" or "beyond a fair and reasonable doubt".(See Norman Estate v. Norman (1990), 43 B.C.L.R. (2d) 193 at204 (B.C.S.C.) and the cases cited therein). Rectification is normally invoked to correct a mistake in a contract where the evidence is "clear and unambiguous" that a mistake has been made and that the contract does not represent the parties' common intention. However, the plaintiff in this case seeks rectification based on a unilateral mistake. The remedy of rectification in these circumstances must rely on a finding of" fraud, constructive fraud, or of some degree of unconscionability" on the part of the defendant when the contract was entered

into. (See Farmer Construction Ltd. v. The Corporation of the District of Surrey (5 June 1997)Victoria Registry [1997] BCJ No. 1332 B.C.S.C.) where Spence rJ. referred to a number of authorities including Windjamme rHomes Inc. v. Generation Enterprises [1989] BCJ No. 278B.C.S.C., and said at paragraph 19:In the Windjammer case, the equitable fraud was found to consist of the fact that the defendants unilateral mistake was of such a character as to be obvious to a reasonable person and that taking advantage of it would amount to equitable fraud: see page 7. At page 5 of that decision, the learned judge had already stated that: To be characterized as "equivalent to fraud" then, constructive knowledge of the mistake is required. Implicit in finding constructive knowledge, where possibly as a second element of equitable fraud, is that the parties seeking to enforce the contract acted in such a way as to gain an advantage unfairly or in bad faith.

Spencer J. also referred to the decision of McLachlin C.J.S.C. (as she then was) in First Capital City Ltd. v. British Columbia Building Corp. [1989] BCJ No. 130,where she held that: equitable jurisdiction to relieve against a mistake comprehends situations where one party knows or ought to know of another's mistake, remains silent and snaps at an offer, seeking to take advantage of the other's mistake

Thus, an equitable remedy is available to correct a unilateral mistake wherein one party, knowing the other has erred, remains silent and takes advantage of the mistake.

The plaintiff argues that Mr. Silber was aware or had constructive knowledge that the mistake was made. H epoints to the fact that Silber knew sometime before July of1997 that the plaintiff was looking at other premises. He states that a clarification was given before the expiry of th eperiod for given notice on July 31st. He says there was ample opportunity for the defendant to find a new tenant and that there was no evidence that the defendants relied on the July2nd letter to their detriment or prejudice in any way. He points out s. 44 of the Law and Equity Act that states where the equity and common law conflict, equity prevails.

The difficulty with the argument is that there is no evidence that at the time that the contract was made on July 2nd, Mr. Silber knew that Mr. Lake had made a mistake. The fact that Lake & Associates were looking at other premise is irrelevant. The parties did not tell Mr. Silber they were looking at other premises. The word may have gotten to Mr. Silber by way of a real estate agent. The evidence is equivocal on this point. Even if the real estate agent was firm in his evidence that he told Mr. Silber, that is wholly irrelevant given that on July 2, 1997 Steven Lake clearly exercised the option to renew. Silber was entitled to assume that they had decided to stay with his premises.

The argument that there was a unilateral mistake of which the defendants had constructive knowledge of and took advantage of fails.

NON EST FACTUM
There was some evidence from Steven Lake that he was very busy, not feeling well and his secretary drafted the letter at his instruction, which he signed. There is no medical

evidence tendered that suggests that Steven Lake did not have an operating mind when he signed the letter. The plaintiff simply cannot rely on the defence of non est factum. Steven Lake was the author of the document, he read it and he signed it. Whether he signed it through carelessness or negligence is neither here nor there. The plaintiff cannot rely on this defence.

NON-COMPLIANCE WITH THE TECHNICAL REQUIREMENTS OF THE LEASE

The plaintiff argues that the fact that they did not send their notice by registered mail and they sent it to the address of A.L. Sott instead of the address of the former owner in the lease negates the notice. The notice was sent by facsimile to Arnold Silber.

This issue was dealt with by Campbell J. in Masters Realty Inc. v. Bellevue Properties Ltd. supra. He referred to the decision of Ross v. T.E. & Company (1992), 96DLR (4th) 631 (at 638) Ont. C.A. as follows:.... if an offeree wishes to depart from the method of acceptance prescribed by the offeror (which is not insisted on as the sole method of acceptance), he or she can only do so effectively if the communication is by a method which is not less advantageous to the offeror and the acceptance is actually communicated to the offeror.

Campbell J. also refers to a similar case of Canada Safeway Ltd. v. A. Schiel Construction Ltd. (1993), 34R.P.R. (2d) 320 B.C.S.C. at 323 where Macdonald J. said: The only issue here is whether actual notice is effective in light of the notice provision in the lease which states that any notice thereunder shall be given by registered mail. I have concluded that actual notice is good notice under this lease. I reach that conclusion because the notice provisions therein is not exclusionary in the sense of prohibiting service other than by registered mail.

Campbell J. came to the same conclusion in Masters Realty. Therefore a facsimile that is in fact received by the other party is adequate notice and the technical requirement of sending by registered mail is not mandatory. Further the argument that the notice should have been sent to the former address of Adams Coscan Partners when the plaintiff had been dealing with the defendants for over a year is not sound. The plaintiff cannot rely on their so-called failure to comply with the strict requirements of the lease to avoid the option to renew the lease.

SURRENDER OF THE LEASE

The plaintiff's office assistant wrote to the Newton Village maintenance man to ask for his assistance during the move. The maintenance man had no notice of any dispute between the plaintiff and the defendants. He attended at the office several days in advance as he normally would and did a check of the premises. This check, although standard procedure when a tenant is vacating the premises, is also permitted within the terms of the lease. Further, the maintenance man asked to make arrangements for the keys to be delivered.

Prior to the delivery of the keys, the maintenance man was advised by his employer, the defendants, not to accept the keys. He advised the plaintiff that he would not accept the keys. Rather than accepting this, the plaintiff continued to attempt to hand the man the keys until he finally took them. I find as a fact that the defendants have not surrendered the lease and taken occupation of the premises by virtue of the maintenance man accepting the keys and checking the premises.

The plaintiff's application is dismissed. The option to renew the lease was a valid option to renew

The further issues of the appointment of an arbitrator to set the amount of the lease and the issues of costs I am advised require additional argument. Counsel are invited to contact the Court Registry to arrange a suitable date for further argument.

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In this The exercise of an option is similar to the acceptance of an offer. The law of contract requires that the acceptance of an offer be communicated to the person who made the offer. In order for the acceptance to be a valid one it must be clear and unambiguous. The renewal of an option requires explicit certainty and direct, unequivocable communication to the person who granted option. Notice in law means explicit, express and unequivocable notice

Barber Greene Business Park Inc. v. *L. & R. Fitness Enterprises Ltd.* (Ontario Court of Justice), this was an application by the landlord for a summary determination that it had the right to refuse to renew the lease on commercial premises. The 10-year lease provided for two renewal periods of five years each. The renewal option could only be exercised if the tenant had not defaulted in payment of rent or performance of the lease. The tenant was to provide written notice to the landlord of an intention to exercise the renewal option. The tenant sent a letter on September 17, 1996, which it relied on as purported exercise of the option to renew. The landlord's position was that the letter was insufficient to constitute notice. The tenant argued that the landlord waived its right to claim strict compliance with the renewal clause, since it actively engaged in negotiations with the tenant without advising it of its intention to insist on its strict legal rights. The landlord further asserted that the tenant was in breach of a section of the lease, so the renewal clause was not exercisable.

HELD: Application allowed. The case was summarily decided in the landlord's favour as there was no genuine issue for trial. The actions of the landlord in meeting with the tenant within the renewal period to discuss the lease provisions could not invoke the equitable doctrine of waiver. The tenant had failed to comply with one section of the lease. The land lordcould refuse to allow it to exercise the renewal option.

CHAPNIK J. (endorsement):-- The respondent/tenant operates a health club and fitness centre of approximately24,000 square feet, located on two floors at premises municipally

known as 900 Don Mills Road, North York (the premises). This matter was brought by application under Rule14.05(3)(d) for the determination of rights under the lease contract.

The initial lease had been assigned to the tenant on January 2, 1989. The lease stipulated a term of 10 years, commencing April 1, 1987 and expiring on March 30, 1997. It also provided two successive but independent renewal periods of five years each on the same terms and covenants as contained in the lease "except for any further right of renewal or extension beyond the second renewal period and except for the minimum rent payable by the Tenant." The option to renew contained the proviso that the tenant not be in default in the payment of rent and other sums to be paid under the lease or in the performance of the terms, covenants and conditions contained therein. Pursuant to paragraph 3(b)of the lease, the tenant was to provide written notice to the landlord of an intention to exercise the renewal option between April 1, 1996 and October 1, 1996.

On September 17, 1996, R.E. Barrett, president of Windward Realty Inc. (Windward) wrote to the landlord to express the tenant's interest "in entering into a new 10 year commitment" with the landlord effective April 1, 1997, in space reduced from 24,000 to 20,000 square feet. The letter ends by stating that Windward was given a mandate to represent the tenant "in all negotiations pertaining to a new lease with you and all other landlords who may wish to present lease proposals for our consideration"; and a request for real estate commission "upon occupancy of the new or existing premises on April 1, 1997". That letter represents the only written correspondence between the parties within the stipulated time frame.

The tenant relies upon the letter as a purported exercise of the option to renew provided in the lease. It is in the landlord's position that the letter of September 17,1996 was insufficient to constitute notice pursuant to the renewal option within the meaning of section 3(b) of the lease.

An option to renew is a privilege, a right which has always been treated by the law as requiring complete compliance with the terms and conditions on which the option is to be exercised. Dragon City Developments Inc. v. Wong(1996), 3 R.P.R. (3d) 157 (Ont. Gen. Div.).

The renewal of an option requires explicit certainty and direct, unequivocable communication to the optionor. Notice in law means explicit, express and unequivocable notice. 120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd., [1993] O.J. No. 2801 (C.A.).

The letter from Mr. Barrett is equivocal in several respects: first, it refers to a 10 year rather than a 5 year commitment; second, it contemplates less rental space than previously; third, it indicates that the respondent was open to receiving lease proposals from other landlords; forth ,it makes mention of "a new lease"; and fifth, it makes no mention of exercising the option.

In a subsequent letter dated November 16, 1996 to the landlord, the tenant made a proposal for a "new lease" incorporating different terms and conditions than the origin alone including altered square footage, rent free periods, reconfigurations of space and landlord's covenants, and an extended term. Again, nowhere does the term "option to renew" appear. On the contrary, the tenant appears to be negotiatingt erms for a "new lease". It is apparent that the purported exercise of the renewal clause was not certain, direct or unequivocal. A landlord is not required to renew a lease on terms other than those provided for in the renewal clause of the lease. Zacharopoulos v. Sykiotis Enterprises Ltd. (1992),22 R.P.R. (2d) 137 (Man. C.A.). In all of the circumstances ,I find that the tenant never properly exercised its right of renewal under the lease agreement

Nevertheless, the tenant contends that the landlord is estopped from relying upon the strict wording in the renewal provisions in the lease; or in the alternative, the landlord waived its right to insist upon strict compliance with those terms, as a result of its ongoing negotiations with the tenant commencing in early September 1996.

The court has jurisdiction to grant equitable relief to a tenant notwithstanding the tenant's failure to deliver a timely notice of renewal. Ross v. T. Eaton Co.(1992), 11 O.R. (3d) 115 (C.A.); Dragon City Developments Inc. v. Wong, supra.[para11] In Becker Milk Co. v. Goldy (1977), 18 O.R. (2d)417 (H.C.J.); affd. (1978), 20 O.R. (2d) 400n (C.A.), the tenant sent a letter to the landlord advising of its exercise of a 5 year option to renew whereas the lease specified a renewal term of 10 years; and the court found the landlord was aware of the mistake yet remained silent. The landlord was estopped in the circumstances, from relying upon the clause.

According to the landlord herein, at no time during the course of meetings in September, October 1996 and January 1997, did the tenant state that he intended to renew the lease on the stipulated terms but rather, he consistently attempted to negotiate a new and revised lease containing different terms and conditions. In Becker, the only error pertained to the recitation of the term of the lease. Clear unequivocal written notice was given by the tenant of the exercise of its option to renew. In this case, the letter sent on the tenant's behalf contained no such notice. The law cannot impose upon the landlord an obligation to do the tenant's work for it. The circumstances here do not create an estoppel as against the landlord.

The tenant also relies upon the equitable doctrine of waiver described by Lord Denning in W.J. Alan &Co. v. El Nasr Export & Import Co., [1972] 2 All E.R. 127 at140 as follows:... if one party, by his conduct, leads another to believe that strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so. See also Hughes v. Metropolitan Railway Co. (1877), 2 App.Cas. 439 at 448; 6781427 Holdings Ltd. v. Alma Mater Society of University of British Columbia (1987), 36 D.L.R. (4th) 753(B.C.S.C.); affd. (1987), 44 D.L.R. (4th) 257 (B.C.C.A.).

It is the tenant's contention that the landlord waived its right to claim strict compliance with the terms of the option clause since it actively engaged in negotiations with the tenant without advising of its intention to insist upon its strict legal rights.[para15] In Petridis v. Shabinsky (1982), 35 O.R. (2d) 215(H.C.J.), the tenant failed to exercise a renewal option in accordance with the terms of the lease and the landlord sought vacant possession. As the tenant had entered negotiations with the landlord with respect to the renewal option within the relevant period, the principle of waiver was held to be applicable. In that case, the landlord had sent a letter to the tenant offering the tenant a new lease agreement after the expiry of the renewal period and the tenant had accepted the offer. By its actions, therefore, the landlord waived its right to insist upon strict compliance with the terms of the lease document. Its "peremptory immediate termination" was enforced with an extended time limit.

In my opinion, the actions of the landlord herein in meeting with the tenant within the renewal period to discuss the lease provisions cannot invoke the equitable doctrine. The strict rights of the landlord were neither waived nor suspended in any way.

The final issue raised by the landlord concerns t he matter of default in rental payments. Under the terms of the lease, the renewal option was only exercisable provided here was no default in payment of rent or performance of the terms, covenants and conditions contained in the lease. According to the landlord, at the time of the purported renewal on September 17, 1996 the tenant was in arrears of rent in the sum of $39, 221.09. Moreover, since January 1,1994, the tenant had consistently failed to make rental payments in a timely fashion.

The tenant contends that it gave an assignment of monies to the landlord under a real property tax appeal in consideration of amounts owing. That is certainly so. However, I am satisfied on the evidence that the assignment took effect prior to January 1, 1994. The tenant also attested to an agreement to pay monthly rent of $15,000 to$20,000, as it was able. The landlord's documentation tells a different story, including invoices of arrears which I find were sent on a yearly basis rather than cumulatively.

In my view, there is no issue of fact or credibility which requires a trial for its resolution. The tenant did not comply with section 3(b) of the lease. The landlord did not by its actions waive its rights nor is ite stopped from demanding strict compliance with the renewal provisions. Upon taking a good hard look at the facts, I find that there is no genuine issue for trial.

Accordingly, the application is allowed and the cross-application is dismissed. If the parties are unable to agree on costs, they may arrange a conference call or meeting through my office.