Shopping Centre Leases

Second Edition

Editor-in-Chief
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Landlord's Waiver of its Right to Forfeiture – A Practical Guide

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INTRODUCTION

This chapter deals with the doctrine of waiver, an evolving minefield for landlords, property managers, and their counsel. In most leases, the landlord will have included terms which will permit it to exercise various remedies against a defaulting tenant including the ultimate remedy of termination of the lease. However, a landlord by its conduct can unwittingly waive its right to terminate in response to a specific default.

Landlord Responses to Breach

Each lease varies but, generally speaking, there are several possible courses of action available to a landlord in the event of breach by a tenant, either pursuant to the terms of its lease or at common law. The following are the most common remedies utilized:

(1) The delivery to the tenant of a Notice of Default, which declares that the tenant is in default, identifies the action or inaction which constitutes the breach, and may provide the tenant with a prescribed or reasonable period of time within which to remedy the breach.

(2) The commencement of an action against the tenant for non-payment of rent or for damages occasioned by a non-monetary default.

(3) The remedy of distress, in which the landlord seizes the goods of the tenant on the leased premises and uses the proceeds of their sale to pay the outstanding arrears of rent; the tenancy is recognized as continuing to exist.

(4) To take no steps whatsoever, and continue to accept rent from the tenant.

(5) Forfeiture, in which the landlord delivers a Notice of Termination and terminates the tenancy.

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The doctrine of waiver significantly affects the landlord's rights and any decision to proceed with forfeiture of the tenancy. The landlord's right to forfeiture can be jeopardized by certain conduct of the landlord after it becomes aware of, or arguably should have known of, a breach of lease by the tenant.

Test for Waiver

The test for waiver is succinctly set out in the key Ontario Court of Appeal decision of *Malva Enterprises Inc. v. Rosgate Holdings Ltd.*[1], as follows:

> A landlord who has the right to forfeit a lease by reason of the tenant's default may waive the exercise of this right when, after the act or omission giving rise to the right of forfeiture has come to its knowledge, it does *any act whereby it recognizes the relationship of landlord and tenant as still continuing.*

The three elements necessary for waiver are:

(1) default by tenant;
(2) landlord has knowledge of tenant's default; and,
(3) conduct of the landlord that affirms a continuing landlord and tenant relationship.

Essentially, the court found that the key to the doctrine of waiver is the obligation of the landlord to choose between mutually exclusive options for relief available to it pursuant to the lease. To permit the landlord to both affirm and repudiate the lease at the same time would be manifestly unfair. As the court set out in *Malva*:

> The lessor has an option whether he will take advantage of a forfeiture or not, and if he elects not to do so the forfeiture is waived. This waiver of the right to forfeit the lease is properly regarded as an aspect of the wider doctrine of election. This type of waiver arises where a person is entitled to alternative rights which are inconsistent with one another and, with knowledge of the facts which give rise in law to these alternative rights, he acts in a manner which is consistent with his having chosen to rely on one of them. He is held in law to his choice even though he was not aware of the legal consequences of the choice. Such election may be either express or implied and it is implied when the lessor, after the cause of forfeiture has come to his knowledge, does any act whereby he recognizes the relation of landlord and tenant as still continuing.[2]

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1 (1993), 104 D.L.R. (4th) 167, 14 O.R. (3d) 481 at p. 487 (Ont. C.A.) ("*Malva*") [emphasis added].
2 *Supra*, at p. 487.

Practical Examples of Waiver

The following recent cases illustrate the court's focus upon the conduct of the landlord that may contribute to or constitute a waiver of the right to terminate the lease.

Malva Enterprises Inc. v. Rosgate Holdings Ltd.

This is the leading case in Ontario concerning the law of waiver by a landlord. *Malva* is a decision of the Ontario Court of Appeal released in July 1993. Malva Enterprises Inc. was the tenant and Rosgate Holdings Ltd. was the landlord. In February 1991, the parties executed a lease. By May 1991, the tenant was suing the landlord for breach of that lease. The tenant alleged a failure in the construction of the leased premises, among other things. The tenant withheld rent on account of this alleged failure.

In April of 1992, the landlord counterclaimed for arrears of rent up to the date of judgment. In December 1992, the tenant delivered a motion for an injunction to prevent the landlord from terminating the tenancy. The landlord delivered a cross-motion for summary judgment for the rental arrears. By a decision of the court dated December 23, 1992, the landlord received summary judgment for arrears of rent payable up to and including November 1992. The December 1992 rent had already been paid as a term of an earlier Order. On January 6, 1993, the tenant paid rent for January 1993, which was accepted by the landlord. On that same day, the landlord notified the tenant that it would terminate unless all the arrears were paid forthwith, including all the arrears of rent covered by the judgment that it had just obtained.

On January 12, 1993, the tenant served an application for an order declaring that the landlord had waived its right to termination. While the application was pending (just one week before it was scheduled to be heard), on January 25, 1993, the landlord terminated the lease and took possession of the premises, thereby excluding the tenant from carrying on business. On March 12, 1993, Justice Poulin ordered that the lease was in full force and effect. The landlord appealed Justice Poulin's decision to the Court of Appeal arguing that: (a) an action for rent does not waive a right to terminate where forfeiture is for failure to pay rent; and, (b) rent payments were applied to earliest arrears by the landlord.

The appeal was dismissed on July 27, 1993. The Court of Appeal ruled that a breach of covenant to pay rent is not a continuing breach and that, when the landlord's right to forfeit is waived, it cannot be revived. The court further held that the landlord's act of counterclaiming for the arrears of rent up to December 1992 (the landlord did not seek termination in its counterclaim in the action), constituted conduct that impliedly recognized

the relationship of landlord and tenant as continuing. This had the effect of waiving the landlord's right to terminate for arrears of rent up to the end of December 1992.

In addition, the court also found that the tenant had made an appropriation of its rent cheque, by expressly directing that it was to pay the rent for the month of January 1993. The landlord accepted that January 1993 rent, thereby waiving its right to terminate for any non-payment of rent prior to January 1993.

If a landlord commences any proceeding, makes any demand, receives any rent or takes any other step after it has knowledge of a breach of lease, it will have lost its right to use that prior breach as a basis upon which to terminate the lease.

Fitkid (York) Inc. v. 1277633 Ontario Ltd.[3]

In this matter, there was on ongoing dispute between the landlord and the tenant over the condition of the roof. There was also a dispute concerning payment of taxes and utilities by the tenant. In February 2000, the tenant commenced withholding part of the rent charged by the landlord. In March 2000, the landlord delivered a Notice of Default. After delivering the Notice of Default, the landlord continued to accept partial rent payments from the tenant and continued to demand that the tenant share in the cost of roof repairs. The landlord terminated the tenancy in late April 2000, after advising the tenant that it was going to send a collection agency to recover the arrears if they were not paid.

The court determined that the landlord's conduct after delivery of the Notice of Default, by demanding that the tenant pay for half the roof repairs, accepting the April 2000, rent cheque, and advising that it was going to appoint a collection agency to collect the arrears demonstrated that the landlord had elected to affirm the continuation of the landlord-tenant relationship. This conduct constituted waiver of the right of forfeiture for the earlier breaches, thereby rendering the landlord's termination of the tenancy unlawful. The tenant was successful in obtaining judgment as against the landlord for damages for the loss of the tenant's business in the amount of $198,201.14.

Towcon Holding Inc. v. Pinnacle Millwork Inc.[4]

In this matter, the original landlord had executed a lease with the tenant that carried on business of a hardwood manufacturer with 40 employees. That lease contained an option to renew which was required to be exercised by the tenant in writing within a specific time period. The original landlord then sold the premises to Towcon. The tenant claimed that it had come to

[3] (2002), 117 A.C.W.S. (3d) 479 (Ont. S.C.J.) ("*Fitkid*").
[4] (2007), 57 R.P.R. (4th) 93, 157 A.C.W.S. (3d) 647 (Ont. S.C.J.) ("*Towncan*").

an oral agreement for the renewal of the lease prior to the sale with the original landlord, which agreement was binding on its new landlord, Towcon. The original term of the lease ended November 13, 2005. Towcon took the position that the tenant had not properly exercised its option to renew in time and that the tenant, who continued to maintain that it had properly renewed, was therefore overholding.

On January 30, 2006, the landlord commenced an application pursuant to s. 74 of the *Commercial Tenancies Act*[5] for an order declaring that the lease had expired, the tenant was overholding, and for a writ of possession.

From December 15, 2005 to June 15, 2006, the landlord, while stating that it would not accept the rent payments from the tenant, directed that the rent tendered by the tenant was to be held by the landlord's solicitor. In July 2006, counsel paid these funds out to the landlord without notice to the tenant or the court. From July 2006 forward, the landlord accepted rent and insurance premiums at the rates contemplated in the renewal.

The court found that there had been an oral agreement between the former landlord and the tenant to renew the lease which was binding on Towcon and that it was the duty of Towcon to have inquired into the equities between the former landlord and its tenants prior to its purchase. Relying in part upon the reasoning in *Malva* and *Fitkid*, the court ruled that Towcon's acceptance of rent and insurance premiums on the same terms as the proposed renewal lease pending the hearing of the application and during the period that the application had been adjourned, effectively affirmed the relationship of landlord and tenant as still continuing. The landlord's application was dismissed.

Towcon had claimed that it had required the rent from the occupying tenant in order to pay expenses. The court noted that there was nothing preventing the landlord from bringing a motion for a declaration that it could receive the tenant's rent, on a without prejudice basis, while the proceeding was pending. The landlord's decision to arrange for the payment of rent to its solicitor or accepting rent from the tenant pending the hearing of the application without having first obtained a court order permitting it to accept the rent without prejudice to its right to terminate, constituted a waiver of the right to terminate the landlord-tenant relationship. This was held to be the case whether the landlord intended to affirm the relationship or not. The court found an implied waiver.

Buck or Two Properties Inc. v. 1281632 Ontario Ltd.[6]

This case demonstrates how *Malva* might even be used by tenants against landlords as a result of, believe it or not, a court order! In this case the landlord had delivered a letter notifying the tenant of its intention to

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5 R.S.O. 1990, c. L.7.

6 (2007), 162 A.C.W.S. (3d) 482 (Ont. S.C.J.) ("*Buck or Two*").

terminate a tenancy for monetary and non-monetary defaults. Pursuant to the lease, the landlord was required to give 10 days' notice in respect of any monetary defaults. On August 2, 2006, the landlord delivered the letter purporting to be a Notice of Termination in relation to the alleged defaults. Four days later on August 6, 2006, the landlord re-entered the premises and changed the locks before the start of business. The tenant immediately brought on an application for, among other things, possession of the premises and moved immediately for interim relief. On August 11, 2006, Campbell J. permitted the tenant to go back into possession of the premises provided that the tenant pay any rent due, provide the landlord with post-dated cheques for two months future rent and arrange for the hearing of the main application, all without prejudice to the landlord.

Apparently, the Order was complied with and the tenant paid the arrears and provided the post-dated cheques to the landlord which were negotiated by the landlord pending the hearing of the main application which occurred in October, 2007 (approximately 14 months after the landlord originally re-took possession of the premises). The court held on the application that the termination of the lease by the landlord was unlawful because of the fact that the landlord had re-entered prior to the 10-day notice period for monetary default, as provided for in the lease. In addition, the court went on to hold further that the fact that the landlord had received the arrears of rent and was being paid rent (pending the hearing of the application pursuant to the interim Order of Campbell J.) effectively amounted to a waiver of the landlord's right to terminate under *Malva*. This is notwithstanding Justice Campbell's Order was made on a without prejudice basis!

As far as the landlord is concerned, the old cliché "be careful what you wish for" or in this case, "be careful what you ask for" comes to mind. The effect of the case is that *Malva* might even be applied against a landlord who accepts rent from a tenant under an interim court order that is expressly made on a without prejudice basis to the landlord's rights.

Certainly a key factor in any situation in which counsel is taking steps to terminate a tenancy where an ongoing business is operating, is to understand what the landlord's real objective is. Is the object to get rid of an undesirable tenant, or to require compliance with the terms of the lease by a defaulting tenant? If the object is to rid the landlord of the tenancy, then on an application by the tenant to re-take possession, it may be prudent for counsel to consider requesting that any rent to be paid by the tenant, be paid into court or the solicitor for the tenant's trust account, to the credit of the proceeding while the application before the court is pending. Further, counsel should also consider requesting that any such order is not only without prejudice to the landlord's rights, but specifically and expressly does not constitute a waiver of the landlord's rights to claim

forfeiture. If acting for a tenant, the opposite tactic may be employed. Counsel might request the court order payment of some of the arrears to be paid to the landlord and then argue that the landlord waived its rights to terminate and reference this case as authority for that proposition.

Effect of a "Non-Waiver" Clause in the Lease

Many leases include a standard non-waiver clause providing that virtually nothing the landlord does or omits to do will constitute a waiver of any of its rights. The lease in *Fitkid* had such a clause. However, even in those cases where there is a term in the lease governing waiver, the courts have suggested that they will look to the conduct of the landlord to determine whether it has expressly or impliedly elected not to terminate and thereby waived its right of forfeiture.

Acceptance of Rent After Termination

In the matter of *ARC Sports Ltd. v. Delia Catering Inc.*,[7] the landlord, in response to persistent non-monetary defaults on the part of the tenant, delivered a Notice of Termination and brought an application for possession of the premises. While the hearing before the Ontario Court (General Division) was pending, the tenant continued in occupation of the premises and paid rent. At the initial hearing before Trafford J., the court found that the tenant had breached the lease and granted relief to the landlord. However, the Divisional Court, on appeal, granted relief from forfeiture on the basis that the acceptance of rent after termination constituted a waiver. The Court of Appeal overturned the Divisional Court, finding that the landlord's Notice of Termination was clearly a termination of the lease effective immediately and that any subsequent payment of rent accepted by the landlord did not constitute waiver. The Court of Appeal considered that the landlord had made a clear election to terminate the tenancy and, by doing so, avoided waiver, despite the subsequent payment of rent.

It is worth noting that the landlord's delivery of a Notice of Termination combined with an application to the court for vacant possession may be a wise strategy when dealing with the termination of an ongoing business. In particular, should the tenant be successful in arguing that the termination was wrongful or, is granted relief from forfeiture, the landlord utilizing this strategy may well have greatly reduced the risk of an award of damages against it. A prudent use of this strategy will include obtaining an interim order requiring that any "occupation rent" coming due while the application is pending may be received by the landlord without prejudice to its termination rights or, alternatively, paid into court to the credit of the application.

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[7] (1997), 14 R.P.R. (3d) 275, 75 A.C.W.S. (3d) 739 (Ont. C.A.) ("*ARC Sports*").

Effect of Type of Breach Upon Waiver

Non-payment of rent is not a continuing breach. If the landlord accepts rent after the original failure to pay, the right to forfeiture for that original failure has been waived. Once waived, the right to forfeit cannot be revived.

As determined by the court in the matter of *Peel Non-Profit Housing Corp. v. Myers*,[8] non-monetary default can also be waived through the landlord accepting rent with knowledge of the outstanding non-monetary default.

Avoiding a Potential Waiver

Many commercial landlords or property management firms have a system wherein a number of people including building property managers, superintendents, and accounting personnel actually deal with tenants directly concerning the tenancy or process cheques or other documentation concerning the administration of the lease. Those individuals, however, through their conduct, may unwittingly take some step that may waive the landlord's forfeiture rights. It is important to ensure that everyone in the chain of command who may interact with the tenant is aware of the doctrine of waiver and knows what to do, or, more appropriately, what not to do. When the decision has been made to proceed with a default remedy, all persons in contact with the tenant must be aware that they cannot accept cheques from the tenant without first reviewing the matter with counsel. A shrewd tenant, when confronted with a demand for rent or Notice of Default, may deliver a rent cheque covering the most recent month's rent, and specifically appropriate the cheque for that purpose. If the landlord accepts and/or processes the cheque, then it will, in all likelihood, be deemed to have waived its right to terminate for any arrears of rent or other breach of lease predating that cheque. While the landlord will still have a right to proceed by way of distress, or by action on the debt, any termination utilizing these earlier defaults will be unlawful.

In the event that there are any ongoing negotiations between the parties regarding an extension or a renewal of the lease or even future repairs or replacements based on the assumption that the tenant will remain in the leased premises for the foreseeable future, they must cease when the decision is made by the landlord to pursue a termination remedy. When termination is the objective, the tenant should be advised that on account of the default, or defaults, all negotiations or other discussions are at an end.

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[8] (1995), 58 A.C.W.S. (3d) 867 (Ont. Ct. (Gen. Div.)), leave to appeal to Ont. C.A. refused 74 A.C.W.S. (3d) 488 ("*Myers*").

A waiver of forfeiture issue may arise when the tenant alleges that the former landlord granted privileges or made allowances not set out in the lease. Landlords, purchasing a tenanted commercial property, should require the former landlord to warrant that there are no amendments, variations, or other oral agreements concerning the tenancy, and that it has not waived any of the landlord's rights under the lease. Similarly, it might further consider obtaining an acknowledgement by the tenant that the original landlord has not by its conduct or otherwise done anything, or omitted to do anything, which might constitute a waiver of any of the landlord's rights.

Tenant Strategies and Landlord Exposure

If the tenant wants out of the lease or wants to position its guarantors or indemnifiers such that they may be able to reduce their exposure on any guarantee or indemnity, the tenant may try to set up a situation where it baits the landlord into a wrongful termination. This is especially relevant where the tenant's business is doing poorly and the guarantors and indemnifiers are looking to avoid liability.

If the landlord wrongfully terminates the tenancy, it opens up a number of options for the tenant:

(1) As in *Fitkid*, the tenant may claim damages for the loss of its business;

(2) the tenant may take the position that the landlord has effectively breached the lease and it is no longer liable for the present value of the remainder of the term of the lease. The tenant would effectively be accepting the landlord's anticipatory breach;

(3) if the tenant wants to continue to operate the business, it may seize this moment of landlord vulnerability to try to negotiate better terms for continuation of the lease in return for not commencing a wrongful termination lawsuit;

(4) where the landlord terminates the tenancy, the tenant has a remedy under the *Commercial Tenancies Act*.[9] Pursuant to s. 20(1) of the *Commercial Tenancies Act*, the tenant may apply to the court for relief from forfeiture and the court may grant such relief as it thinks fit, on such terms as the court considers just. This is discretionary equitable relief. However, if the tenant can concurrently demonstrate on the application that the termination was unlawful because the landlord has through its conduct, expressly or impliedly, waived its right of forfeiture, the court will set aside the termination. A tenant that successfully sets aside the termination in this manner can arguably avoid the

[9] *Supra*, footnote 5.

necessity of demonstrating that it is entitled to a discretionary order of relief from forfeiture. This may benefit a tenant that might not otherwise have been able to persuade a court to exercise its discretion in the tenant's favour because of its past history of breaches of lease, or improper conduct.

CONCLUSION

When terminating a lease, the landlord must be very careful to ensure that it does not provide the tenant with grounds to argue that it has waived the right to forfeiture. The conduct of the landlord that may amount to a waiver may be as obvious as the acceptance of rent or as innocuous as continuing some discussions concerning repair obligations. *Malva* and subsequent cases have left the door wide open as to what conduct of the landlord will constitute "any act" that recognizes the relationship of landlord and tenant as still continuing. Given that the courts seem to disregard the non-waiver clause in the lease, this creates uncertainty for the landlord and conversely an opportunity for the tenant to attempt to limit its liability or the liability of its guarantor and indemnifiers. Careful co-ordination with your client and its representatives, and ensuring that each member of the landlord's team knows their duties, will go a long way towards protecting against a landlord "waving goodbye" to its right to forfeiture.