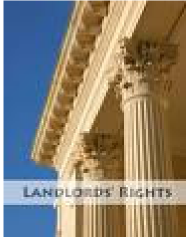
Ignore the Landlord at your Own Risk



By Brian Madigan LL.B.

From time to time, tenants will wish to take advantage of the favourable lease rates under a long term lease.

For one reason or another, the property is no longer suitable for them to continue to occupy the premises. So, they decide to sublet. Only one little problem: they forget to notify the landlord. And, the reason is quite simple, the landlord would probably say “no”.

After a 15 year initial term, and a 5 year renewal, the landlord is anxious to see the lease come to an end so that he can raise the rates to market levels.

At one time, the courts would come to the tenant’s assistance and relieve the tenant from the forfeiture provisions contained in the Lease. This was relatively commonplace. There appeared to be a predisposition on the part of the judicial system to err on the side of the tenant. (*Barrow vs. Isaacs*, England, Court of Appeal, 1891). That proposition was commented upon with approval recently by the English House of Lords in *Shiloh vs. Harding*.

However, as time went by, tenants became larger and in many cases far more sophisticated than the landlords. So, there was no longer a compelling reason to assist tenants to the ultimate disadvantage of the landlords.

Today, both sides are on equal footing. Basically, this means that the courts, notwithstanding a long line of cases to the contrary are likely to prefer the interests of the tenant. Accordingly, tenants who fail to seek the approval of the landlord to the new sub-tenant, do so at their own peril. No longer can a tenant simply come to court and confess that he forgot to obtain the landlord’s consent.

There are provisions for relief from forfeiture contained in the *Commercial Tenancies Act*:

"Relief against re-entry or forfeiture

20. (1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor’s action, if any, or if there is no such action pending, then

in an action or application in the Superior Court of Justice brought by the lessee, apply to the court for relief, and the court may grant such relief as, having regard to the proceeding and conduct of the parties under section 19 and to all the other circumstances, the court thinks fit, and on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court considers just.

Exceptions

(7) This section does not extend,
(a) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the lessee making an assignment for the benefit of creditors under the Assignments and Preferences Act, or on the taking in execution of the lessee's interest; or

(b) in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof."

The Ontario Court of Appeal in *Leon's Furniture v. 1497777 Ontario Inc.* (2003) that:

• The prohibition under s. 20(7) does not oust the general equitable jurisdiction of the courts

• s. 98 of the Courts of Justice Act provides that a court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

• Section 98 supercedes s20(7)

One issue is now quite clear the Court will examine both the conduct of the landlord and the conduct of the tenant in determining the result of a relief from forfeiture application.

The Court also quoted with approval the following decision of Justice Donnelly of the Supreme Court of Ontario (now the Superior Court of Justice and upheld by the Court of Appeal) in *Federal Business Development Bank vs. Starr* (1988):

"These cases illustrate that the test of a landlord's reasonableness extends beyond and is moving away from the restrictive two-part test based on the personality of the proposed assignee or the intended use of the premises as established in the early English authorities.

The more liberal approach, close to the "reasonable man" standard, is to consider the surrounding circumstances, the commercial realities of the market-place and the economic impact of an assignment on the landlord."

This means that courts will view the conduct of a landlord who wishes to bring to an end a long term lease with options as being reasonable in the circumstances. Tenants no longer should ignore their landlord's right to approve their su-tenants. Or, they do so at their own peril!

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