

Negotiated Rental Increase



By Brian Madigan LL.B.

It is not uncommon for a Landlord and Tenant to agree to a future rent increase at a rate “to be negotiated between the Landlord and Tenant, both parties acting reasonably”

But, what does this mean? Is it enforceable? If the parties cannot agree, what will a Court do?

A recent case before the Superior Court of Ontario comes to mind. Briefly, A&P entered into a long term lease with a Landlord concerning certain premises to be used a grocery supermarket. The rent was clear and there were several renewal terms. A&P exercised its rights to renew. However, the shopping centre was sold and the new owner looked at the lease quite carefully.

A&P had the right to expand its premises, and the rent for the new expanded portion was subject to determination in accordance with the proper interpretation of the following clause:

Article 16.B, under the heading “Alterations” and “Enlargement and Additions” provides that the Tenant may enlarge and extend the Demised Premises to incorporate all or part of that portion of the Extended Premises, and

Upon the Tenant completing any such addition to the Demised Premises, the Tenant shall be liable for any increase in real property taxes arising therefrom with respect to the Demised Premises and any increase in insurance premiums resulting therefrom. Rent for the addition or extension shall be negotiated by the Landlord and Tenant acting reasonably.

The key words here are “...rent... shall be negotiated...”. The Court reviewed the provisions and made the following comments:

- The insertion of such a clause makes an enlargement and extension a distinct act from a renewal.
- This is not a situation where a blue-pencil or a reading out or reading down is appropriate.
- We are not trying to make a legal act out of an illegal act.
- We are not dealing with a contract in restraint of trade.

- What would otherwise be an extension of “Demised Premises” to include “Extended Premises” is nullified by the additional sentence.
- The “Extended Premises” language must be read on its own.
- We must interpret the intent of the parties on the basis of the language used in the lease.
- We cannot make a new agreement for the parties.
- The words are general words.
- They provide no agreed formula, let alone any objective standard such as “market” rent or other certainty.
- They do not provide for arbitration if rent cannot be agreed.
- They are merely an agreement to negotiate which is no agreement at all.
- This is nothing more than an agreement to agree which is no agreement at all.
- There being no formula for reaching an agreement and no other method, such as an arbitration clause, for determining the agreement in the event a negotiation fails, it is not enforceable.

A&P wanted to pay about \$12.00 per square foot. That was based upon what they would pay elsewhere for new space. The Landlord said the space in that particular shopping centre was \$40.00 per square foot, and that was what other tenants were paying.

So, you can see that the exact wording of the lease would be particularly important. In this case, the Court simply concluded that no deal was reached. An agreement to negotiate in the future does not result in an agreement today (or later, for that matter).

If you want to include a provision for expansion and have it enforceable then:

- Provide a formula
- Provide that it is the same as the rent for the original (or 2 times that amount)
- Provide any objective standard for calculation
- Provide that it will be market rent
- Provide for arbitration

All of these methods will work, but an agreement to “agree” will not.

If you need further information, you may wish to review: *Great Atlantic & Pacific Company of Canada v. Topostar (Aurora) Inc., 2006 March 10, 2006 (ON S.C.)*

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