

Clear Lease Provisions Trump the Sharing of COVID Economic Burdens, but BCSC Hesitant to Give Tenant the Boot

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Throughout the past 17 months, courts have been grappling with how to allocate the economic consequences of the COVID-19 pandemic. An area where this challenge has been particularly notable is in shopping malls, which have been significantly impacted by the pandemic. During the pandemic, public health orders and restrictions reduced capacity in shopping centres or even shuttered them completely, which resulted in many commercial tenants being left with rent obligations but limited or no revenue to meet such obligations. On June 17, 2021, the Supreme Court of British Columbia (BCSC) released a decision grappling with some of these issues. Justice Giaschi, in *Cherry Lane Shopping Centre Holdings Ltd. v. Hudson's Bay Company ULC Compagnie De La Baie D'Hudson Sri*, considered a commercial landlord and tenant dispute and who should bear the economic fallout between them caused by the pandemic. Justice Giaschi held that, notwithstanding the pandemic, the terms of the lease agreement between the parties required the tenant to pay rent without abatement or set-off. However, Justice Giaschi granted the tenant relief from forfeiture despite holding the landlord was justified in terminating the lease due to non-payment of rent.

Background

The landlord, Cherry Lane Shopping Centre Holdings Ltd., operates the Cherry Land Shopping Centre in Penticton, BC. The tenant, Hudson's Bay Company ULC, has leased retail space in the shopping centre since 1996. The lease required the Bay to pay monthly instalments of annual rent to Cherry Lane "without any abatement, set-off or deduction whatsoever except as specifically provided for in this lease." Cherry Lane had the right to terminate the lease for non-payment of rent if the Bay failed to remedy the default within 30 days. The lease also contained an "Unavoidable Delay" provision (which was essentially a *force majeure* clause) which excused a party for non-performance of certain obligations under the lease as a result of an Unavoidable Delay (as defined in the lease). Of particular note, the lease also imposed certain non-monetary obligations upon Cherry Lane concerning the operations of the Shopping Centre, including maintaining a standard of "high quality."

In March 2020, due to the pandemic, the Bay closed its store at the Shopping Centre and did not re-open it until mid-May 2020. Cherry Lane put various procedures and restrictions in place and closed certain parts of

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the Shopping Centre. Starting in April 2020, the Bay failed to pay its monthly rent under the lease and on April 15, 2020, Cherry Lane delivered a notice of default and demanded payment of the outstanding rent. The Bay wrote to Cherry Lane advising it would not be paying rent due to the pandemic and continued to not pay rent in the following months. The Bay eventually wrote to Cherry Lane alleging that Cherry Lane was in default of the lease for, among other things, failing to maintain the Shopping Centre in accordance with “first class regional shopping centre” standards and requested an abatement of rent. On November 9, 2020, Cherry Lane issued a notice to quit and notice to terminate the lease.

On November 13, 2020, Cherry Lane commenced a petition seeking a declaration the lease had been terminated, a declaration that the Bay wrongfully held possession of the premises, and the issuance of a writ of possession. On the same day, the Bay commenced a separate action against Cherry Lane and the landlord of a shopping centre in Victoria, BC alleging the two breached the terms of their respective lease agreements with the Bay. The Bay also claimed relief from forfeiture, a declaration that it was not required to pay rent until the alleged breaches by the landlords were cured, and orders abating the rent and prohibiting the landlords from interfering with the Bays use of the leased premises. On January 5, 2021, the parties entered into a consent order providing, among other things, for the Bay to pay 50% of the ongoing rental amounts for 2021 to Cherry Lane.

Decision

On the issue of whether Cherry Lane was entitled to terminate the lease and to a writ of possession, the Bay contested Cherry Lane’s position by relying upon two arguments to justify its non-payment of rent; (1) that Cherry Lane was itself in breach of the lease as a result of its failure to maintain the Shopping Centre to the standard required pursuant to the lease and (2) that the “Unavoidable Delay” clause applied to suspend its obligations to pay rent.

Justice Giaschi held it was unnecessary for him to determine if Cherry Lane was indeed in breach of its obligations to operate a “high quality” shopping centre as a breach by a landlord does not give rise to abatement nor suspension of rent.

On the matter of “Unavoidable Delay,” Justice Giaschi held the meaning of Clause 4.02 (which sets out the obligation for the Bay to pay rent), was “clear, unequivocal and unambiguous” in stipulating that rent is payable “without any abatement, set-off or deduction whatsoever except as specifically provided for in this lease.” None of the clauses in the lease providing for abatement, set-off or deduction of rent were on the basis of “Unavoidable Delay.” Further, Justice Giaschi held the application of the “Unavoidable Delay” clause was limited by its wording to only the parts of the lease that expressly stated they were subject to it. Thus, regardless of whether the pandemic constituted an “Unavoidable Delay,” the Bay’s obligation to pay rent was not suspended. To deviate from the plain language of the lease would “effectively be making a new agreement between the parties.” To this end, Justice Giaschi held Cherry Lane was entitled to

declarations that the lease had been terminated and that the Bay wrongfully held possession of the premises and was further entitled to the issuance of a writ of possession.

Despite finding Cherry Lane was entitled to a writ of possession, Justice Giaschi nevertheless granted the Bay relief from forfeiture on the basis that the sum to be forfeited was out of proportion to the loss suffered. Justice Giaschi made this finding due to the Bay's leasing of the premises since 1996, the potential reputational damage to the Bay, and the lack of alternative locations in the area for the Bay to relocate to. The pandemic also played a role in Justice Giaschi's decision in attempting to ameliorate its consequences with equity and fairness. However, given that the Bay deliberately failed to pay rent contrary to its obligations under the lease, Justice Giaschi granted the Bay relief from forfeiture on terms that all outstanding and ongoing rent be paid to Cherry Lane.

Implications of the Decision

The BCSC decision demonstrates that even in the unprecedented and economically devastating context of the pandemic for many retailers, courts are unwilling to change the terms of a contract when they are clear, unequivocal and unambiguous. Thus, it is important when drafting lease agreements, particularly with respect to *force majeure* terms, that tenants and landlords alike pay particular attention to the plain language interpretation of the text and how the terms interact with one another. This decision makes clear that even a pandemic cannot be grounds to deviate from the express terms of an agreement between two sophisticated parties.

The BCSC decision also demonstrates that, to the extent possible, courts will attempt to protect tenants from eviction, provided they pay rent, as a means of buffering the economic consequences of the pandemic with equity and fairness. Tenants should not expect a "free pass" with regards to rent even if landlords breach their obligations, but landlords should also not expect to easily evict tenants for failure to pay rent during the pandemic, nor to be relieved of their obligations altogether. In other words, landlords and tenants alike are expected to act reasonably and not use the pandemic as a means to circumvent obligations pursuant to a lease. However, as to the question of shopping centre landlords' obligations to maintain a standard of "high quality" and how the pandemic influences this standard, this remains a live issue and court determination is yet to be seen.