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CARE MUST BE TAKEN TO ENSURE ALL CONDITIONS ARE MET WHEN EXERCISING A RIGHT TO RENEW

A recent decision of the Ontario Court of Appeal, *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. c.o.b. Mr. Sub c.o.b. Mr. Submarine-Mapleview and Mr. Submarine Limited*, once again brings home the importance of all conditions precedent to a renewal clause being complied with for the renewal clause to be enforceable.

Under the lease in question, Papa Kerollus was granted a 15-year term which expired on May 31, 2015 with an option to renew for one further period of 5 years. Clause 2 of the renewal clause reads as follows:

"Provided that the Tenant has paid the rent and all other sums payable under this Lease when due and, provided the Tenant has performed all other covenants under the Lease as and when the same are required to be performed, the tenant shall have the option to renew for one further term of five (5) years each provided that written notice is given to the Landlord at least six (6) months prior to the expiry of the term or any previous renewal thereof, on the same terms and conditions as herein contained, save as to the rental rate which shall be the then current rate."

Under the lease, Papa Kerollus was obligated to pay both the base rent and additional rent, which comprised a stated share of taxes and operating costs. Base rent was paid. With respect to the tenant's proportionate share of taxes and operating costs, the landlord had the right to estimate the cost on an annual basis and request that the tenant pay monthly 1/12th of its stated share. A statement of actual expenses was to be provided following the year for which the estimate was provided.

A dispute arose between Papa Kerollus and Mapleview in 2003 through 2004 pertaining to certain alleged defaults by Papa Kerollus. In May 2014, Mapleview reconciled its cost recovery claims for 2012 and 2013, and delivered a revised monthly summary statement for 2014 to Papa Kerollus calling for a monthly payment of base rent plus revised operating costs and taxes, which represented an increase of approximately \$1,000 per month over the amount that Papa Kerollus had been previously paying. Further discussions ensued between the parties. Papa Kerollus did admit that it was in arrears in the amount of \$251.92 for amounts arising in 2013.

Papa Kerollus objected to the increased monthly amount in question. It continued to pay the amount it had been previously paying. In November 2014, Papa Kerollus purported to exercise the option to renew.



The issues which arose were:

1. Was the renewal option clause void for uncertainty?
2. Was Papa Kerollus entitled to exercise the renewal option once the rental arrears had been determined by way of a trial of the issue?

Mapleview disputed the right to renew on the basis that the renewal option was void for uncertainty because there were no guidelines for the calculation of the renewal term rent and no arbitration provision to settle the matter if an agreement was not reached. It took the position that the renewal term rent could not be ascertained. The Court of Appeal held that the renewal term rent was to be the “then current rate”. The determination that the renewal clause was not void for uncertainty was based on the Court finding that the “parties intended to make a binding agreement as to the renewal rate; they simply declined to specify that rate in a dollar amount”. The Court held that this wording was sufficient to “overcome a void-for-uncertainty argument”. It held that the rate could be readily ascertained by resorting to expert evidence as to rental rates for comparable spaces. If the parties were unable to agree, the matter could be resolved through judicial means. The Court of Appeal did state that if the phrase “as mutually agreed between the landlord and the tenant” had been added, the clause would have been void for uncertainty. The Court did not address the specific mechanics by which the current rates could be determined. That leaves the matter open to future discussion. I would be cautious in drafting a lease that did not provide for a specific method of determining the rate, such as a referral to arbitration.

As to the ability of Papa Kerollus to exercise the option to renew, the Court held that a condition precedent was that all rent and other sums payable when due had been paid, and as it was acknowledged that there was a small sum owing, and that as Papa Kerollus had failed to pay the increase in the estimated operating costs and taxes, it had failed to pay monies payable when due. These breaches rendered Papa Kerollus not in compliance of the conditions necessary to exercise the renewal. Papa Kerollus should have paid the \$251.92, and paid the new estimated additional rent. As to any issues it had with respect to the new estimated additional rent, any adjustment would have been made following the landlord’s delivery of the statement of actual expenses. Its stubbornness led to its downfall.

Tenants need to carefully review any renewal clause to educate themselves as to the conditions that must be met for such a clause to be exercised and ensure that they are followed. The case indicates that a breach, no matter how small, renders the renewal right unenforceable.