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OVERHOLDING TENANCIES

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Two important legal issues, arising at the end of a commercial tenancy, were recently addressed by the BC Supreme Court in *Van-Air Holdings Ltd. v. Delta Charters (1982) Inc.*, 2013 BCSC 1322. The first issue dealt with the period of notice required to terminate an overholding commercial tenancy. The second issue dealt with ownership and rights of removal of docks and pilings which had been installed in a marina by a subtenant at the commencement of a long-term sublease.

Background

Scott MacDonald acted as legal counsel for a subtenant who operated a marina business under a long term sublease which commenced in 2001 and expired January 30, 2009. The marina was located on the Fraser River which deposited about a foot of silt annually, in the marina. When the sublease was being negotiated in 2001, the pre-existing marina was in a state of disrepair, the docks and pilings needed to be removed, the water lot needed to be dredged and the entire marina then had to be reconstructed. The subtenant agreed to assume responsibility for dredging and reconstruction of the marina under the sublease. The pre-existing wood piles all had to be pulled to allow for access by dredging equipment. The old wood docks were removed. The entire layout of the marina was changed. New wood docks were constructed with some salvaged material from the old docks, old wood piles were reused, and new steel piles and steel dock extensions were added. The design of the reconstructed marina was chosen to allow for future removal of docks and pilings to permit dredging to be carried out when needed.

Under the terms of the marina sublease, Basic Rent and property taxes (part of Additional Rent) were payable in annual instalments. Other charges (for electricity and garbage pickup) were invoiced and paid monthly. When the sublease expired January 30, 2009, the subtenant overheld with the sublandlord's consent, and continued to pay Basic Rent in annual instalments until August 2010 when it began paying Basic Rent in monthly instalments. The pattern of paying the property tax component of Additional Rent, in annual instalments, never changed and was typically invoiced to, and paid by, the subtenant in June of each



year.

More than two years after the sublease term expired, the sublandlord gave one month's notice in July 2011 requiring the subtenant to vacate the marina by the end of August 2011. At the time the one month's notice of termination was given, the subtenant had already prepaid property taxes for the 2011 calendar year. The subtenant objected to the short notice and also claimed the right to remove the docks and pilings which it had rebuilt and expanded at significant expense in 2001.

The Issues

There were two key issues which had to be resolved by the court. The first issue was whether the overholding tenancy created after the initial sublease term expired, was month-to-month or year-to-year. The difference was significant in terms of the period of notice required to terminate. Generally speaking, one clear month's notice is required to terminate a month-to-month tenancy but six months' notice, effective at the end of a tenancy year, is required to terminate a year-to-year tenancy. In this case, by giving one month's notice in July 2011 to terminate a month-to-month tenancy effective at the end of August 2011, the sublandlord missed the opportunity to give the six months' notice that would have been required to terminate a year-to-year tenancy effective January 30, 2012. By the time the sublandlord considered whether the subtenant was overholding on a year-to-year tenancy, the sublandlord was unable to give six months' notice of termination of a year-to-year tenancy effective any sooner than January 30, 2013. That date fell during the middle of trial when the subtenant did in fact vacate the marina, more than 18 months after the initial termination notice had been delivered.

The Decision

The court found in favour of the subtenant on the two key issues:

1. A tenant's overholding upon expiry of a lease of a term for years, and a landlord's acceptance of rent, creates a year-to-year tenancy. This common law rule can be modified by the terms of the original lease or by subsequent agreement of the parties. The common law requires six months' notice of termination of a year-to-year tenancy, effective at the end of a tenancy year.
2. The docks and pilings were trade fixtures because they were installed in the marina by the subtenant to use for the purpose of operating its marina business. The pilings were driven into the river bed but the marina improvements had been designed, constructed and attached in a manner which allowed them to be removed for dredging purposes, and then reinstalled once the dredging was completed. There is a presumption in law that articles attached to the land even slightly are to be considered part of the land. Although these docks and pilings became fixtures and could not be



removed during the term of the sublease, the subtenant had a right under the sublease to convert them back into chattels and to remove them upon termination of the sublease.

Lessons Learned

The uncertainty and confusion which arose in this case could have been avoided by clear lease provisions. Many commercial leases for a term of years contain an express overholding provision which creates a month-to-month tenancy in the event the tenant overholds with the landlord's consent, and continues to pay rent after the initial lease term expires. By including an overholding provision on these terms, a landlord can avoid the creation of a year-to-year overholding tenancy. In this case, the sublease did not contain an overholding provision. There was a monthly overholding provision in the head lease which the sublandlord tried, unsuccessfully, to incorporate into the sublease, but the court concluded it was not applicable. This problem could have been avoided by the insertion of a monthly overholding clause directly into the sublease itself.

The subtenant's right to remove the docks and pilings from the marina at the end of sublease term, was also resolved in the subtenant's favour based on the interpretation of a clause in the sublease. Although the docks and pilings had become fixtures attached to the property during the sublease term, the sublease gave the subtenant the express right, at the end of the sublease, to remove docks, pilings and other improvements placed upon the water lot by the subtenant during the sublease term. The sublandlord tried to claim ownership of the docks and pilings by arguing they were fixtures and by relying upon a clause in the head lease which limited the sublandlord's right to remove improvements without the head landlord's consent. The court, however, found the head lease was not determinative of ownership issues as between the sublandlord and subtenant.