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## TENANT'S FAILURE TO SATISFY PRECONDITIONS TO A RENEWAL OPTION IS FATAL

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In the recent decision of *The Zone Bowling Centre (2002) Ltd. v. 14100 Entertainment Blvd. Investments Ltd.*, 2015 BCSC 524, a tenant sought to avoid the loss of its right to renew the lease when it failed to satisfy the preconditions to the renewal option. The tenant argued that the landlord should not be permitted to rely upon the tenant's failure to satisfy those preconditions, as a basis to deny the tenant's right to renew, because the landlord had waived its rights. On behalf of the landlord, Scott MacDonald took the position that the tenant had lost the benefit of the renewal option by failing to satisfy the preconditions and, once the initial term of the lease expired, the tenant became an overholding tenant. The overholding provision in the lease stipulated that any overholding was on a month-to-month basis. Ultimately, when negotiations for a lease renewal or a new lease broke down, the landlord gave one clear month's notice terminating the overholding tenancy and sought to recover possession of the premises. The tenant tried to resist by seeking a court declaration that it had validly exercised its renewal option.

The case is significant for its discussion of the importance of preconditions to a renewal option, and the circumstances in which a landlord may be prevented from relying upon the tenant's failure to satisfy those preconditions as a basis for refusing to renew the lease.

### The Preconditions to the Renewal Option

We acted for the landlord under a long-term lease of premises used by a tenant to operate a bowling facility, sports bar and grill. The lease was for an initial term of 10 years and contained three options to renew for additional terms of five years each. The renewal options were subject to three preconditions: (1) the tenant had to give written notice of renewal no earlier than 12 months and no later than nine months before the expiry of the initial term; (2) at the time of giving its notice the tenant could not be in breach of any covenant under the lease; and (3) the tenant had to "duly and regularly" perform its obligations throughout the initial term of the lease. The tenant failed to satisfy any of the three preconditions. It did not give any written notice of renewal and the verbal notice it claimed to have given was after the renewal option deadline had expired. The tenant was in default of its covenant to pay rent and rent was in arrears at the time the renewal option deadline expired. The tenant had a history of late rent payments and had failed to



“duly and regularly” perform its obligations throughout the initial term of the lease.

The tenant argued that the landlord was estopped from relying upon the preconditions to the renewal option and, alternatively, that the landlord had waived its right to require strict compliance with those preconditions. The court rejected both of the tenant’s arguments.

**Landlord Was Not Prevented from Relying on Preconditions When It Did Nothing to Mislead Tenant; Defence of Promissory Estoppel Was Not Established**

The estoppel argument was rejected because there was no evidence that the landlord had made any promise to the tenant, during the period of time within which the tenant had to exercise the renewal option, which would have caused the tenant to believe that it did not need to give written notice to exercise the option. The court distinguished our case from other cases where a landlord, before the option deadline had expired, had lulled its tenant into believing that written notice to renew was not required.

**Landlord Did Not Waive Its Right to Require Strict Compliance with Preconditions to Renewal by Accepting Late Rent Payments or Negotiating for a Lease Renewal After Expiry of Option Deadline**

The court also rejected the tenant’s waiver argument. By accepting late rent payments from the tenant and engaging in negotiations of renewal terms with the tenant after the option deadline had expired, the landlord did not waive its right to require strict compliance with the preconditions to renewal. The court relied upon the express “non-waiver” provision in the lease which stipulated that no acceptance of rent or other act or omission by the landlord shall operate as a waiver of the landlord’s rights unless such rights are expressly waived in writing. To establish waiver by the landlord of its rights the tenant must prove that the landlord had full knowledge of its rights and unequivocally and consciously intended to abandon those rights. While the landlord’s acceptance of late rent payments could prevent the landlord from seeking to terminate the lease by reason of a breach of the tenant’s covenant to pay rent, that late acceptance of rent did not preclude the landlord from relying upon the preconditions to the exercise of the renewal option. Similarly, negotiating renewal terms with the tenant after the deadline for the tenant to exercise its renewal option, did not amount to conduct that could lead a tenant to believe the landlord had waived compliance with the preconditions to the renewal option.

**The Business Rationale for Preconditions to Renewal Option is to Provide Certainty of Rights and Obligations**

The case law is clear that a tenant who wishes to exercise a renewal option must do so in a manner which is





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clear, explicit, unambiguous and unequivocal. The business rationale for preconditions to a renewal option is to provide both the landlord and tenant with certainty as to their future rights and obligations. If the preconditions aren't satisfied, then the landlord is free to market the premises to another prospective tenant or even to the existing tenant. If the tenant exercises the renewal option in compliance with the preconditions under the lease, then the landlord is bound to grant the tenant the renewal term. If the tenant does not exercise the renewal option in the manner required by the lease, then the tenant is free to try to negotiate a new lease with the landlord knowing that the tenant has no obligation if those lease negotiations do not result in a concluded agreement. Once the time for giving notice of renewal has passed without being exercised, it is a new ballgame. The mere expression of interest on the part of either or both of the parties to continue in a landlord-tenant relationship, and the negotiation of lease terms, does not revive the right of renewal if it has lapsed.

**Relief from Forfeiture Is Not Available to a Tenant Who Fails to Satisfy Preconditions**

The court also found that relief from forfeiture was not available to a tenant who fails to comply with the conditions precedent to the exercise of a renewal option. If a tenant fails to comply with those preconditions, then it does not suffer the forfeiture of an existing tenancy but simply loses its option to renew the tenancy.

