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WHAT HAPPENS WHEN AN OPTION TO TERMINATE IS NOT EXERCISED IN ACCORDANCE WITH ITS TERMS?

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An option for the renewal or termination of a lease generally provides for the mechanism that is necessary to exercise the option. Is the failure to comply with this mechanism fatal to the exercise of the right? If the clause does not state that the fulfillment of the conditions is necessary to validly exercise the option, the clause will be construed in favour of the party exercising the option, even where it has not scrupulously complied with those conditions.

In the case of *World Color Press Inc.* v. *Édifice 800 Industriel Inc.* 2012 QCCS 1774, the court had to determine whether the lessee had validly exercised an option to terminate the lease which provided that the lessee's right had to be exercised by no later than March 31, 2011, for purposes of terminating the lease on March 31, 2012, together with the payment of a penalty of $1 million by no later than March 31, 2011 in "full and final payment of all the lessee's obligations under the Lease". The lessee sent the notice on March 30, 2011 indicating that a cheque in the amount of $1 million was attached to the notice; however, no cheque was attached. On discovering the omission, the lessee sent the cheque on April 8, 2011, but the lessor returned it, claiming that the option had not been validly exercised and that the lease would continue until March 31, 2017, the expiry date of the initial term.

In fact, the termination clause was reproduced upon each renewal. Only the dates and amount of the penalty were changed. However, according to the lessor, at the time of the last renewal, the parties had wanted to make the payment of the penalty concomitant with the notice of exercise of the option. On the other hand, the lessee pleaded the whole agreement clause in order to exclude the discussions surrounding the changes made to the last version of the option to terminate.

Two issues were raised in court: was the non-payment of the penalty by the specified date fatal to the exercise of the option to terminate and, if the answer was no, did the penalty serve as the payment of the rent until the end of the term in 2012, since this penalty represented a "full and final payment of all the lessee's obligations under the Lease".

The court held that the lessee had validly exercised the option to terminate but that it still had to pay the rent until the end of the term in 2012.

The court found that the entire agreement clause was inoperative in the circumstances and that it did not prevent the court from endeavouring to determine the parties' true intention since, on the one hand, the option to terminate clause was incomplete and, on the other hand, the literal application of the clause would have had an absurd result from a commercial point of view.

CONTENT

NEW RULES RESPECTING SAFETY, HEALTH AND THE PROTECTION OF BUILDINGS

In the December 2012 edition of this bulletin, we discussed the draft *Regulation to improve building safety* (the **"Regulation"**) which will amend the Quebec *Safety Code*, adopted under the *Building Act*.

In general, the Regulation specifies, for the territory of Quebec, the standards to be complied with by owners to improve building safety. It contains standards applicable at the time of construction and imposes maintenance requirements for building façades and parking lots.

The Regulation has been adopted by the government and the first provisions of the Regulation, i.e. those relating to the maintenance of building façades and parking lots, came into force on March 18, 2013.

We will discuss the new obligations imposed on owners under the Regulation in a special bulletin to be published shortly.

The option to terminate clause was incomplete because it did not specify the nature of the time limits, i.e. whether or not they were mandatory. The court found that the parties never discussed this point and, therefore, that the time limits were not mandatory and that the lessee had validly exercised the option to terminate. As for the penalty, the court held that it should not be considered as rent paid in advance, otherwise, the concept of penalty would lose all its meaning. Consequently, the lessee had to pay the rent until the end of the term in 2012 despite the words "in full and final payment of all the lessee's obligations under the Lease," which could be given their full meaning under the previous versions of the option to terminate when the penalty was payable at the end of the term, but which would have yielded an absurd result where the penalty was payable one year prior to the end of the term, as in the present case.

THE LANDLORD'S OBLIGATION TO PROVIDE PEACEFUL ENJOYMENT

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Although non-residential real estate leases provide for a variety of obligations, which are often more onerous for the tenant than the landlord, it is the very essence of the lease that the landlord must provide the tenant with the peaceful enjoyment of the leased premises. This means unimpeded possession that enables the tenant to fully use the premises for the purposes for which they were rented. The tenant is entitled to conduct its activities in the premises with peace of mind and without fear of the risk of accidents.

The obligation to provide peaceful enjoyment extends both to the leased space, to the areas used jointly by the tenants of the property, and to the appurtenances necessary for its use. It is a continuous obligation that is binding on the landlord until the end of the lease.

Peaceful enjoyment is a concept which is assessed, firstly, according to the authorized use of the leased space, but also in light of all the circumstances surrounding the lease and the property. The nature of the tenant's activities, the main reasons for the tenant's lease of this space in the building, the location of the property in the city or chosen sector of the city, the type of construction of the building and neighbouring area, are some of the factors to be considered in assessing the peacefulness of the occupancy and the use of the leased premises by the tenant. This is because, for some tenants, the same event may prevent or interfere with the normal exercise of their activities, while it would have little impact on others. For example, one can imagine the consequences of opening a bar in a building housing a law firm as compared to opening a bar in proximity to a billiard hall.

The criterion used for assessing the peaceful enjoyment afforded to the tenant is the average person. Moreover, the landlord's duty to provide peaceful enjoyment does not require it to provide exceptional services in order to take a specific situation into account.

Interference with peaceful enjoyment may be due either to the conduct or omissions of the landlord and its employees, or to disturbances from circumstances under the total or partial control of the landlord, such as those caused by other tenants in the building. Thus, the landlord may not transform the physical space of the building with the effect of restricting access to the leased space or preventing the free use of the amenities and services available to the tenant without the risk of infringing on peaceful enjoyment. It cannot turn a blind eye to a water leak, an invasion of cockroaches, constant loud noise or a persistent toxic odour without incurring its liability. Nor may it make excessive use of its right to visit the premises for an inspection or to re-lease or sell them without exposing itself to damages, an abatement of rent, or even termination of the lease.

As important as it may be, the landlord's obligation to provide peaceful enjoyment is sometimes limited by the consent of the parties through the insertion of a clause in the lease exonerating the landlord of any liability in this regard. The effect of such a clause has been reviewed on several occasions and recognized as valid by the courts, although they found it to be inoperative in cases where the tenant was totally deprived of the enjoyment of its space, or where the peaceful enjoyment was disturbed by the deliberate acts of the landlord. And justifiably so, since the peaceful enjoyment of the premises chosen by a tenant to carry on its activities is the primary benefit sought by it and for which it pays a price. It is a benefit which should not be nullified. The use of such a clause requires both care and advice.