

## Relief from Forfeiture of a Commercial Lease: How Much is Too Much?

The Ontario Court of Appeal, in *Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*<sup>1</sup> recently added to the growing list of pandemic cases in the commercial leasing area.

The main issue was the scope of relief a court may grant under section 20 of the Commercial Tenancies Act<sup>2</sup>, which section provides that where a landlord seeks to enforce a right of re-entry or forfeiture, the tenant may apply to the court for relief, and the court “may grant such relief as ... the court thinks fit, and on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court considers just.”

To summarize the events that led to the appeal:

- Hudson's Bay Company (“HBC”) was an anchor tenant at the Hillcrest Mall, in Richmond Hill, Ontario;
- HBC stopped paying rent in April 2020 and attempted to negotiate concessions with the Landlord to take into account the effects of the pandemic, which attempts failed;
- in September 2020, HBC notified the Landlord that it was in breach of its lease obligations to operate the mall in accordance with “first-class shopping centre standards” due, in part, to its alleged failure to make health and safety upgrades in response to the pandemic;
- in October 2020, HBC commenced an action seeking a declaration that, among other things, the Landlord was in breach of the lease by failing to meet “first-class shopping centre standards” and a further declaration that it was not required to pay rent unless and until the Landlord remedied its alleged breaches of the lease;
- the Landlord responded by, among other things, serving HBC with a Notice of Intention to forfeit the HBC's lease for 7 months arrears of rent totalling over \$1.3 million;

- in deciding the motion for relief from forfeiture, the judge:
  - o found that the Landlord was not in breach of the Lease;
  - o rejected the Tenant's argument that the Landlord's compliance with government-imposed COVID-19 restrictions in the mall could be relied upon to establish that the Landlord had breached the terms of the lease; and
  - o granted relief from forfeiture and ordered HBC to pay the arrears but gave it several months to do so and allowed rent to be paid on an increasing percentage over the following months with all arrears arising from the partial payments, to be paid several months after that;
- both HBC and the Landlord appealed, although HBC did not appeal the finding that the Landlord did not breach the Lease.

The main issue in the appeal was not the decision to grant relief from forfeiture (which neither party disputed), but the scope of that order. HBC argued that section 20 gives the court broad discretion in granting relief, that the court did not go far enough and should have abated or reduced the rent owing by 50 percent for some indefinite period while the economic effects of the pandemic continued.

Conversely, the Landlord argued that the court went too far, especially since HBC was able to pay the arrears, including interest, and that HBC should have been ordered to pay the arrears, plus interest, within 10 days.

The Court held that the discretion granted by section 20 must be exercised in light of the narrow remedy contemplated by the section (namely, granting relief from

forfeiture) and that any terms imposed in connection with such relief are to make the relief an effective remedy, not to change the terms of a lease to make it a fair arrangement in light of unforeseen developments. Nothing in section 20 empowers a court to amend a lease to make it a fair lease for the parties.

In rejecting HBC's appeal, the Court noted that certainty is important in commercial relations and that HBC's broad interpretation of section 20 could potentially create uncertainty for landlords and tenants as it "would inevitably encourage litigation as a means of redefining a tenant's obligations under a lease in response to unforeseen changed economic circumstances."<sup>3</sup> The Court held that the motion judge erred in granting HBC the payment terms for the arrears and rent. The Court acknowledged that in making an order for relief under section 20 that includes a requirement that the tenant rectify the underlying default, a judge must include a reasonable period, otherwise the relief would be illusory. The time needed depends on the circumstances and if a judge concludes that the tenant cannot rectify the default within a reasonable period, then relief from forfeiture is not an appropriate remedy.

The Court found that the motion judge's payment schedule had nothing to do with HBC's ability to pay but rather

with the finding that "the circumstances surrounding the pandemic made it unfair, in the motion judge's view, to require HBC to carry that burden without the help of the landlord."<sup>4</sup> Instead, the Court held that the length of the deferral should have reflected the time needed for HBC to pay the arrears.

The Landlord had also appealed the interest rate on the arrears awarded by the motion judge. While the lease set interest at prime plus 4%, the motion judge awarded interest at prime plus 2%, even though HBC had not requested such a reduction. Consistent with its finding that section 20 is to be interpreted narrowly and that the terms of the relief are not to change the terms of a lease to make it a fairer arrangement, the Court held that there was no reason to diverge from the terms of the lease as to the rate of interest.

The Court's decision makes clear that the discretion provided by section 20 is a narrow one which does not afford a court the latitude to amend a lease even in the face of an unexpected global pandemic.

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<sup>1</sup> 2022 ONCA 585

<sup>2</sup> R.S.O. 1990, c. L.7

<sup>3</sup> Ibid, at para. 54.

<sup>4</sup> Ibid, at para. 59.



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