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## Renewal Clauses: Non-Compliance = Out of Luck? Yes, but.....

One of the questions we are most frequently asked about renewal rights is just how important is it for tenants to comply strictly with the notice and delivery terms of those renewal clauses. That is, if a tenant sends the notice to the wrong person or misses a date, will it be fatal?

The short answer is that courts will not assist tenants who do not observe and carry out the precise terms of an option to renew or extend. Landlords can expect to have the timing, notice periods and other requirements in the renewal clauses strictly enforced. However, a few court decisions have added a gloss on this general rule. For example, where a landlord makes representations to a tenant and the tenant is thereby induced into a detrimental course of conduct as a result of the representations, a court may not allow the landlord to rely on the strict terms of the renewal clause. Representations of this sort may include the landlord entering into negotiations with the tenant without requiring compliance with the renewal provision. Also, where a landlord's conduct causes the tenant to believe that the landlord will not insist on strict compliance with the renewal terms, a court may find that it would be inequitable to strictly enforce the precise terms of the option to renew. However, it goes without saying that each decision turns on its facts. A review of a few key Ontario decisions illustrates the exceptions to the general rule and the factors that have influenced the courts.

### *Conduct Amounts to Waiver*

In *Director's Film Co. v. Vinifera Wine Services Inc.*, the tenant had an option to renew upon giving nine months' written notice. The tenant claimed

it exercised the option while at a meeting with the landlord. The Court found that the relationship between the landlord and tenant had been casual and informal. More importantly, after the time for the exercise of the option had lapsed, the parties engaged in discussions and negotiations regarding rent for the renewal period. The Court concluded that the lease was renewed and, through its conduct, the landlord waived its right to demand strict compliance with the lease terms.

### *Delivery of the Notice to Renew*

The tenant in *DW Squared Limited Partnership v. Oxford Properties Canada Ltd.* delivered its notice to renew the lease to a security guard at the building. Under the lease, notices were to be delivered "to a responsible employee of the party being served"; the security guard was not an employee of the landlord. The cheque was received and cashed by the landlord, but it claimed it did not receive the tenant's notice of renewal. The Court found that the tenant delivered previous notices to the security guard for relaying to the landlord. In the Court's view, what really mattered was that notice was given to a responsible person connected with the landlord. The Court ruled that the tenant validly renewed the lease and the landlord's conduct precluded it from insisting on strict compliance with the terms of the lease.

### *Conduct of the Landlord's Predecessor*

A recent example is the 2007 case of *Towcon Holdings Inc. v. Pinnacle Millwork Inc.* ["*Towcon*"]. The tenant had an option to renew its lease upon six months' written notice, provided it

was not in default. The tenant lost a major customer and could not pay its rent. The landlord's predecessor agreed to treat the arrears of rent as a mere receivable in the ordinary course, thereby putting the tenant in good standing. The tenant claimed that it orally exercised its option with the landlord's predecessor prior to the sale of the building. The successor landlord claimed that the option had not been validly exercised and denied waiving the requirement of written notice.

The Court held that when the building was sold and the rent was four months in arrears, the tenant could pay its arrears only if it continued to operate in the premises. Furthermore, the Court found that the only way the tenant could continue to operate was by renewing the lease. The Court also found that relations between the tenant and the former landlord had been informal. On account of these facts, the tenant was not required to exercise the renewal option in writing. In the Court's view, it was the successor landlord's duty to inquire into the common practices between its predecessor and the tenant before taking an assignment of the lease. When the lease was assigned to the new

landlord, oral agreements, such as the agreement to renew the lease were made part of the deal. The conduct of the parties served to alter the express terms of the lease – in this case, the conduct of prior parties was relevant!

The Court concluded that the tenant had exercised its option to renew for five years without the necessity of written notice. The landlord's acceptance of rent amounted to a validation of the tenancy and a confirmation that the lease had been renewed.

Although *Directors Film*, *DW Squared* and *Towcon* illustrate a departure from the general rule of strict adherence to the terms in renewal clauses, the principle remains intact. These cases are exceptions to the general rule because of their specific facts. In all three decisions, the Court emphasized the importance of common practices between the parties as well as the landlords' conduct, which led the tenant to reasonably believe that strict compliance was not required. While courts continue to insist on strict adherence, they may be inclined to relax the requirements where the conduct of the parties suggests it would be appropriate to do so.

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