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RELIEF FROM FORFEITURE: BALANCING EQUITIES DURING A PANDEMIC

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Introduction

The COVID-19 pandemic has profoundly impacted many commercial leasing relationships. In a decision released by the Ontario Superior Court of Justice in May 2020, Myers J began by commenting on the high number of applications for relief from forfeiture of commercial tenancies received by the Court during the pandemic.[2] He stressed that such cases are always urgent and require an extraordinary amount of cooperation among parties and counsel.[3]

We surveyed reported decisions where Ontario courts have heard applications for relief from forfeiture against the backdrop of the COVID-19 pandemic. These decisions illustrate courts' willingness to consider the current challenging circumstances faced by commercial tenants when addressing defaults for non-payment of rent. As Myers J put it: "now is the time for understanding and empathy rather than strict enforcement of one's legal rights just because an opportunity has presented itself."[4]

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[2] See *Campbell v.1493951 Ontario Inc.*, 2020 ONSC 2942 at para 3 [*Campbell*].

[3] See *Campbell*, *supra* note 2 at paras 3 & 5.

[4] See *Campbell*, *supra* note 2 at para 7.

This article begins with a brief overview of relief from forfeiture before turning to a discussion of four considerations that feature prominently in the pandemic-era jurisprudence concerning such relief: (i) payment breaches and the unsuitability of relief on the basis of *force majeure*, (ii) whether the tenant's breach was wilful, (iii) any disproportion between harms suffered by either party, and (iv) whether the equities favour one party over the other. Understanding how these factors inform the exercise of judicial discretion in granting relief from forfeiture should inform real estate lawyers and their clients when faced with rent-related challenges entailed by the COVID-19 pandemic.

Overview of Relief from Forfeiture

Relief from forfeiture is an equitable remedy that allows the court to exercise its discretion to "relieve" a breaching party from "forfeiting" their benefits under a contract in order to achieve a just and equitable outcome. A clear framework for the application of this remedy has developed in Canadian jurisprudence, which guides courts in determining whether such relief should be granted. In *Saskatchewan River Bungalows Ltd. v Maritime Assurance Co*. ("***Saskatchewan River Bungalows***"), the Supreme Court of Canada confirmed that courts should consider the following factors in exercising their discretion to grant relief from forfeiture: (i) the conduct of the applicant, (ii) the gravity of the breach, and (iii) the disparity between the value of the benefit forfeited and the damage caused by the breach.[5]

Ontario courts apply this test in the commercial leasing context when a tenant in default seeks to have the court set aside the landlord's termination of the lease and reinstate the tenant to the leased

[5] *Saskatchewan River Bungalows Ltd. v Maritime Assurance Co*., [1994] 2 SCR 490 at para 10.

premises. Recently, in *2324702 Ontario Inc. v 1305 Dundas W Inc.*, the Ontario Court of Appeal affirmed the test from *Saskatchewan River Bungalows* in the leasing context and noted that the court may grant such relief as it thinks fit, having regard to all the circumstances.[6] Where the tenant's default is the non-payment of rent, courts should be guided by additional considerations, which include whether: (i) the tenant acted honestly and in good faith, (ii) the tenant outright refused to pay rent, (iii) the landlord suffered a serious loss from the tenant's delay in paying rent, and (iv) the rental arrears were significant.[7]

In Ontario, courts' equitable jurisdiction to grant relief from forfeiture for commercial tenants has been codified in section 20(1) of the *Commercial Tenancies Act*.[8] Courts are also empowered by section 98 of the *Courts of Justice Act*, which provides that a court "may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."[9]

Payment Breaches and *Force Majeure*

Against the backdrop of the COVID-19 pandemic, many a defaulting tenant has looked to *force majeure* clauses in their commercial lease agreements for relief. Where such cases have come before the court, tenants have argued that the pandemic constitutes an extraordinary circumstance, amounting to *force majeure*, which excuses a failure to perform certain obligations under the lease agreement. Generally speaking, Ontario courts have not found this argument persuasive when it relates to payment breaches.

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[6] *2324702 Ontario Inc. v 1305 Dundas W Inc*., 2020 ONCA 353 at para 22.

[7] See *Michele's Italian Ristorante Inc. v 1272259 Ontario Ltd*., 2016 ONSC 4888 at para 35–36 [*Michele's Italian Ristorante*]. See also *2324702 Ontario Inc. v 1305 Dundas*, 2019 ONSC 1885, aff'd 2020 ONCA 353 [*Ontario v Dundas*].

[8] *Commercial Tenancies Act*, RSO 1990, c L.7; this section of the *Commercial Tenancies Act* is reproduced in Appendix "A".

[9] *Courts of Justice Act*, RSO 1990, c C.43; this section of the *Courts of Justice Act* is reproduced in Appendix "A".

Durham Sports Barn Inc. Bankruptcy Proposal ("***Durham***") concerned an attempt by a landlord to terminate its lease with its tenant on account of non-payment of rent. The tenant, which operated an athletic performance centre on the premises, was subject to restructuring proceedings under the *Bankruptcy and Insolvency Act* at the time; the payment breach at issue in *Durham* only concerned rent payable in the post-filing period, which entitlement was not stayed by the restructuring proceeding.

In *Durham*, the tenant argued that it was entitled to relief from payment of the rent in question as it was prohibited from operating due to the pandemic shutdown.[10] In support of its position, the tenant relied on *Hengyun International Investment Commerce Inc. c. 9368-7614 Quebec Inc*. ("***Hengyun***"), a case in which Superior Court of Québec relieved a commercial tenant of its rent obligations due to pandemic lockdowns notwithstanding that the lease agreement in question specifically provided that the tenant was not entitled to rent relief on account of *force majeure*. The Québec Court arrived at its conclusion by looking to the civil law doctrine of *superior force* under the Civil Code of Québec.[11] As the doctrine of superior force has no application in Ontario, neither it nor the holding in *Hengyun* were persuasive for the tenant's purposes in *Durham*.

In *Durham*, like in *Hengyun*, the lease predictably contained a *force majeure* clause that relieved the landlord from its obligation to provide the tenant with quiet enjoyment of the premises for reasons of *force majeure*. This clause did not, however, extend to relieve the tenant from its obligation to pay rent.[12] Gilmore J reasoned that this outcome was appropriate and consistent with

[10] *Durham Sports Barn Inc. Bankruptcy* Proposal, 2020 ONSC 5938 [*Durham*].

[11] *Hengyun International Investment Commerce Inc. c 9368-7614 Quebec Inc,* 2020 QCCS 2251.

[12] See *Durham*, *supra* note 10 at para 55.

government legislation enacted during the pandemic shutdown, which focused on preventing eviction by landlords but did not suspend rent payments.[13]

When advising on payment defaults during the COVID-19 pandemic, landlords, tenants and their counsel should evaluate the express language of any *force majeure* clause in the lease agreement in question to determine its application. However, many *force majeure* clauses specifically exclude applications that would relieve the tenant of its rent obligations. In light of this ubiquitous exclusion, many tenants are unlikely to find relief from their rent obligations by relying on *force majeure*.

In cases that involve a payment breach, relief from forfeiture is likely a more appropriate and attainable remedy for commercial tenants than one founded in *force majeure.* Relief from forfeiture of a tenancy is particularly appropriate in circumstances where the landlord's rights can be fully vindicated without resort to forfeiture.[14] Consequently, relief from forfeiture for non-payment of rent is granted more readily than relief from forfeiture for other types of breaches, especially where the tenant is ready, willing and able to pay the rental arrears.

Was the tenant's conduct wilful?

One of the most common maxims of equity is that those who come into equity must come with clean hands. A court may refuse to grant equitable relief if the plaintiff has not acted in good faith or, put differently, has "unclean hands". This maxim is directly expressed in the first factor that a court considers in deciding whether to exercise its discretion to grant relief from forfeiture: the

[13] See *Durham, supra* note 10 at para 57. See also *Protecting Small Business Act, 2020,* SO 2020, c. 10, ss. 81, 82 & 84.

[14] See *2324702 Ontario v. 1305 Dundas*, 2019 ONSC 1885 at para 30.

conduct of the applicant. More specifically, the Ontario Court of Appeal in *147777 Ontario Inc. v Leon's Furniture Ltd.* noted that, in considering the tenant's conduct, the court should have regard to whether it was "wilful."[15]

Whether or not a tenant's breach is wilful remains as relevant as ever in the context of the COVID-19 pandemic. Despite the challenging circumstances resulting from the pandemic, the deliberate use of "self-help" remedies weighs heavily against a commercial tenant that seeks relief from forfeiture. Courts are more likely to grant relief to a tenant when the tenant can demonstrate that its breach was inadvertent, minor or otherwise innocent in its nature.

Consider *2487261 Ont. Corporation v 2612123 Ont. Inc*. ("***Symphony***"), where the tenant made payments covering 25% of the rent beginning in April of 2020 based on false assurances from the landlord that it had applied for the Canada Emergency Commercial Rent Assistance Program ("**CECRA**"), which would cover the remaining 75% of the rent.[16] Lemon J determined that it was entirely reasonable for the tenant to have assumed, based on email correspondence, that an agreement had been reached with respect to the rent abatement.[17] He found that the tenant had acted in good faith by continuing to make partial payments throughout the pandemic and that, despite having breached certain terms of the lease, the tenant had come to court with "clean hands."[18] Accordingly, it was entitled to relief from forfeiture.

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[15] *1497777 Ontario Inc. v. Leon's Furniture Ltd*, 2003 CanLII 50106 (ON CA) at para 72.

[16] *2487261 Ont. Corporation v 2612123 Ont. Inc.*, 2021 ONSC 336 [*Symphony*]. Note that this was a case where the Court considered section 83(1) of the *Protecting Small Businesses Act 2020*, which provides that no landlord shall exercise a right of re-entry for failure to pay rent during the COVID-19 related non-enforcement period. Although the Court determined that the landlord had acted contrary to section 82, the relief from forfeiture analysis was still necessary given that the legislation does not provide that a lease will automatically be reinstated if a landlord acts contrary to section 82.

[17] See *Symphony*, *supra* note 16 at para 38.

[18] See *Symphony*, *supra* note 16 at para 53 & 57.

Durham, discussed above, was ultimately decided in favour of the tenant because, in Gilmore J's view, the landlord's attempt to terminate the lease in question was invalid. However, Gilmore J nevertheless indicated that she would have been willing to grant the tenant relief from forfeiture given that its conduct could, at worst, be described as "inadvertent."[19] The tenant clearly communicated to the landlord that it intended to comply with the landlord's demands for the rent in question.[20] Prior to the landlord's attempt to terminate the lease, the tenant had mailed cheques covering rent for the relevant period to the landlord and attempted to confirm with the landlord's lawyer that they had been received.[21]

Courts are somewhat less willing to exercise their discretion to assist a tenant who has intentionally breached the terms of its lease, the challenges of COVID-19 notwithstanding. In *Hunt's Transport Limited v Eagle Street Industrial GP Inc.* ("***Hunt's Transport***"), the tenant withheld rent as a "self-help" remedy, asserting that the landlord had claimed an incorrect amount and refusing to pay until an arbitrator determined the amount owing.[22] However, Broad J found that nothing in the lease permitted the tenant to deliberately withhold rental amounts pending the determination of the dispute.[23]

Broad J rejected the tenant's submission that the impact of the COVID-19 pandemic on its business justified its decision to "conserve financial resources" by holding back certain disputed rental amounts.[24] He disagreed with the tenant's argument that a recently-decided case, *The Second Cup*

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[19] See *Durham, supra* note 10 at paras 39–40.
[20] See *Durham, supra* note 10 at para 40.
[21] See *Durham, supra* note 10 at para 32.
[22] *Hunt's Transport Limited v Eagle Street Industrial GP Inc.*, 2020 ONSC 5768 [*Hunt's Transport v Eagle Street*].
[23] See *Hunt's Transport v Eagle Street, supra* note 22 at para 53.
[24] *Hunt's Transport v Eagle Street, supra* note 22 at paras 79–80.

Ltd. v 2410077 Ontario Ltd. ("***Second Cup***"), supported a broad policy position that businesses that do not qualify for COVID-19-related, government-funded rent reductions should receive equitable relief from the courts.[25] Broad J stated that the effects of the pandemic *could* be a relevant consideration in granting relief, but in the case before him, the tenant offered no particulars about the specific impact of the pandemic on its business.[26] Notably, unlike the tenants in *Durham*, *Second Cup*, and *Symphony*, the tenant in *Hunt's Transport* had not been required to cease operations during the pandemic shutdown. Broad J ultimately declined to grant the tenant relief from forfeiture pending the outcome of the arbitration.[27] However, despite the strong denouncement of the tenant's conduct and wilful disregard of the terms of the lease, he granted the tenant relief from forfeiture for a period of 20 days to give the tenant an opportunity to cure its default by paying all arrears of rent, plus accrued interest.[28]

Courts have looked favourably upon tenants who have attempted to negotiate a reasonable rent abatement, requested that the landlord apply for CECRA, or admitted that they were in arrears, indicating that such conduct is inconsistent with a wilful refusal to pay rent.[29] Although a wilful breach may weigh against granting relief, the 20 days of clemency granted by Broad J to the tenant in *Hunt's Transport* suggests that the pre-COVID-19 tendency of courts to take a relatively generous, pro-tenant approach to relief from forfeiture remains unchanged.

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[25] See *Hunt's Transport v Eagle Street*, *supra* note 22 at paras 76 & 78, citing *The Second Cup Ltd. v 2410077 Ontario Ltd.*, 2020 ONSC 3684 at para 58 [*Second Cup*].

[26] See *Hunt's Transport v Eagle Street*, *supra* note 22 at paras 78 & 80.

[27] See *Hunt's Transport v Eagle Street*, *supra* note 22 at para 81.

[28] See *Hunt's Transport v Eagle Street*, *supra* note 22 at para 82.

[29] See e.g. *The Second Cup Ltd. v 2410077 Ontario Ltd.*, 2020 ONSC 3684 at para 62; *Symphony*, *supra* note 16 at paras 57–58.

Where does the balance of proportionality fall?

Proportionality is built into the third of the three factors to be considered by the court in deciding whether to exercise its discretion to grant relief from forfeiture. Determining the disparity between the value of the property forfeited and the damage caused by the breach is a balancing exercise, which, in effect, focuses on which party suffers more in the circumstances. Proportionality favoured the tenant in the majority of relief from forfeiture cases that we surveyed from the COVID-19 era.

In *Second Cup*, for example, the balance weighed heavily in favour of the tenant. The tenant had recently filed applications with the Alcohol and Gaming Commission of Ontario to open cannabis shops at the leased premises and elsewhere. The termination of its lease would have jeopardized not only the licence for the leased premises, but also the likelihood of being granted licences for other proposed locations. The value of the leased premises to the tenant was well in excess of the rent arrears at issue.[30] In contrast, the landlord claimed it had a significant mortgage carrying costs but offered no evidence of any actual prejudice suffered as a result of not having been paid the one-and-half month's rent outstanding under the lease.[31]

In *Symphony*, Lemon J compared the damage that would be suffered by each party if the tenant were granted relief from forfeiture. He noted the tenant's allegation that it had considerable goodwill in the premises and that its losses would be substantial if the landlord were permitted to proceed with forfeiture.[32] In addition, he noted that, if the tenant paid the substantial outstanding rental amounts, the landlord would not suffer. He concluded that the balance fell in favour of

[30] See *Second Cup*, *supra* note 25 at para 58.
[31] See *Second Cup*, *supra* note 25 at para 60.
[32] See *Symphony*, *supra* note 16 at para 56.

granting relief to the tenant and that, even if the tenant failed to pay the rent arrears, such failure would "not make things any worse" since the term of the current lease was set to expire shortly.[33]

In *Durham*, the value in the forfeited premises extended beyond the value to the tenant. As described above, the tenant sought relief from forfeiture in the context of restructuring proceedings under the *Bankruptcy and Insolvency Act*. In considering whether to grant the relief sought by the tenant, Gilmore J considered the impact that the forfeiture could have on the tenant's business and its ability to make a reasonable proposal to its creditors.[34]

In contrast to *Second Cup, Symphony*, and *Durham*, in *Hunt's Transport*, Broad J determined that the scales of proportionality tipped slightly in the landlord's favour. On the one hand, the landlord suggested that the tenant's precarious financial situation raised the potential for substantial financial loss to the landlord if the tenant were permitted to withhold rental amounts while "maintaining sovereignty" over the leased premises, especially given that the landlord held no security for the collection of those amounts if it was successful in arbitration.[35] On the other hand, the tenant made no specific submissions regarding the value it placed in its leasehold interest of the premises. Broad J suggested that evidence regarding the availability of comparable premises and their lease rates would have been relevant, but none was offered.[36]

These cases illustrate that courts remain alert to the issue of proportionality. For a tenant to persuasively demonstrate that the value it places in the property outweighs the damage the landlord has suffered as a result of the breach, or vice versa, specific and supportive evidence must be

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[33] *Symphony*, *supra* note 16 at para 56.

[34] See *Durham*, *supra* note 10 at para 41.

[35] See *Hunt's Transport v Eagle Street*, *supra* note 22 at para 74.

[36] See *Hunt's Transport v Eagle Street*, *supra* note 22 at paras 74–75.

submitted. The burden may currently be higher for landlords given that, in the absence of regular market forces resulting from the pandemic, it less clear how a landlord would be harmed if it collects the tenant's rent as a legal entitlement, when the alternative is an empty unit.[37]

When do the equities favour granting relief?

Relief from forfeiture is a remedy that is equitable in nature and, consequently, requires the existence of circumstances in which enforcing a contractual right of forfeiture would result in an inequitable consequence for the party in breach.[38] In determining what might constitute the most equitable result, courts have great latitude to survey a number of factors, including the length of the tenancy, the history of defaults, the tenant's ability to bring the lease into good standing, and other special circumstances.[39] In recent decisions, the circumstances of the COVID-19 pandemic have fallen into this latter category.

Consider *Second Cup*, where Kimmel J indicated that he would have granted relief from forfeiture had he not found that the termination of the lease in question was unlawful.[40] He acknowledged the "extenuating circumstances" caused by the pandemic, noting sympathetically that it had shut down most of the tenant's operations and left its management "scrambling" to negotiate with multiple landlords over a short period of time.[41] Kimmel J reasoned that, when the tenant sought to negotiate a rent deferral with the landlord, it was not unreasonable for the tenant to ask for, and expect, an "indulgence."[42]

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[37] See *Campbell*, *supra* note 2 at para 5.
[38] See *Ontario (Attorney General*) *v 8477 Darlington Crescent*, 2011 ONCA 36 at para 87.
[39] See *Michele's Italian Ristorante*, *supra* note 7 at para 35.
[40] See *Second Cup*, *supra* note 25.
[41] *Second Cup*, *supra* note 25 at paras 37 & 58.
[42] *Second Cup*, *supra* note 25 at para 62.

In addition to the challenges posed by the pandemic, various other factors weighed exclusively in the tenant's favour. The tenant had immediately offered to bring the lease into good standing upon receiving notice of termination from the landlord. It was a long-standing tenant with no prior history of defaults and had just singed a lease extension for a further ten years. In contrast, the landlord had sought to terminate the lease for a failure to pay 25.5% of April's rent on the first business day after May rent was due. The landlord also appeared to have been taking advantage of the situation by terminating the lease in order to keep a non-refundable exclusivity payment that the tenant had recently paid, and then immediately signed a new lease with another cannabis retail store. Taken together, these factors led to the conclusion that the equities favoured granting relief from forfeiture.[43]

The COVID-19-era cases affirm that relief from forfeiture is extremely discretionary. Courts take notice of a broad range of factors, which currently include the state of the world as a result of the COVID-19 pandemic.

Conclusion

The decisions released to date illustrate that Ontario courts, in exercising their discretion to grant relief from forfeiture, are quite willing to take into consideration the challenging circumstances facing many landlords and tenants as a result of the COVID-19 pandemic. As we look hopefully toward the future, real estate lawyers should bear in mind the following:

[43] See *Second Cup*, *supra* note 25 at paras 57–58 & 62.

- courts look favourably upon parties who seek to negotiate commercially reasonable compromises, including rent abatement agreements or flexible payment schedules, when they encounter difficulties in paying rent;

- courts are more likely to grant relief in the face of minor or inadvertent breaches, and look less favourably on deliberate acts of self-help;

- landlords and tenants should each maintain detailed records of any losses suffered as a result of the COVID-19 pandemic; and

- courts continue to take a liberal and typically pro-tenant approach to granting relief from forfeiture.

APPENDIX "A"

KEY LEGISLATIVE PROVISIONS

Commercial Tenancies Act, R.S.O. 1990, c. L.7

Relief against re-entry or forfeiture

20(1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action or application in the Ontario Court (General Division) brought by the lessee, apply to the court for relief, and the court may grant such relief as, having regard to the proceeding and conduct of the parties under section 19 and to all the other circumstances, 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.

Courts of Justice Act, RSO 1990, c C.43

Relief against penalties

(98) A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.