



Volume XVIII Number 3

March 2023

COMMERCIAL LEASING

Should a Landlord Rely on an Entire Agreement Clause? A Cautionary Tale for Landlords

By

Andrew Kirk, Lawyer

andrew@defranlaw.com

Spot Coffee Park Place Inc. ("Spot Coffee") v. Concord Adex Investments Limited ("Concord") highlights the importance of clear and unambiguous language contained in a commercial lease, especially as it pertains to the effectiveness of an entire agreement clause. Simply stated, the entire agreement clause is a mechanism to prevent the party relying on it from being liable for any statements or representations, including pre-contractual representations, except as specifically set out in the agreement. The above-mentioned case exemplifies a situation where the entire agreement clause was ineffective in protecting the Landlord from a claim based on a pre-contractual misrepresentation.

Concord leased the premises to Spot Coffee after executing of an offer to lease in September 2010, followed by the formal lease a month later, in October. In the offer to lease, there was an entire agreement clause that stated the following:

"... This Offer to Lease contains all of the terms and conditions of the agreement between the parties relating to the lease of the Premises and supersedes all previous agreements or representations of any kind, written or verbal. There are no covenants, representations, agreements, warranties or conditions in any way relating to the subject matter of this Offer to Lease, expressed or implied, collateral or otherwise, except as expressly set out herein."

This Entire Agreement Clause was also stated in the formal lease. Spot Coffee subsequently experienced issues over parking that resulted in losses to the company and it abandoned the premises in May 2013. The lease was terminated by the landlord in June of that year.

By ruling of the Ontario Superior Court of Justice, Justice Susan Vella awarded \$1,027,051.34 in damages to Spot Coffee in spite of their abandonment of the premises. The court's reasoning can be summarized as (i) Concord and Spot Coffee had a sophisticated landlord-tenant relationship in which a duty of care was owed, (ii) Concord negligently misrepresented the prospective parking situation concerning convenient access to free retail customer parking without restrictions, (iii) Concord had an obligation to address the misrepresentation, (iv) Spot



Coffee relied on the misrepresentation, and (v) the entire agreement provision did not prevent Spot Coffee from bringing a claim based on negligent pre-contractual misrepresentation. On appeal, it was concluded that the trial judge considered the lease as a whole and was correct in determining the language of the entire agreement clause did not preclude the tenant's claim.

In summary, there was no provision in the lease to justify the prevention of a negligent misrepresentation claim. The appellant had attempted to invoke protection of the Entire Agreement Clause by singling out two articles of the lease that had not been considered properly by the trial judge but was unsuccessful. The two articles in question that addressed the topic of parking were struck down by the Court of Appeal as the language was deemed insufficiently clear to justify such an interpretation. For example, article 3.2 of the lease used ambiguous language that did not specify what was included in the common elements, common facilities, and what the landlord had designated.

At De Francesca Law, we have extensive experience in acting on behalf of commercial landlords. As a landlord, it is paramount that you use clear and concise language throughout your commercial leasing documentation. Furthermore, this language should be finalized during negotiations of the Letter of Intent/Offer to Lease phase. Lastly, once drafted, the final lease should be carefully reviewed by the parties to ensure everyone is completely satisfied with all of the terms and conditions. It is crucial to recognize that these types of issues may be prevented through effective negotiation at De Francesca Law and the use of clear and unambiguous language within all leasing documents.

