



COMMERCIAL LEASES:

LANDLORDS BE CAREFUL NOT TO WAIVE YOUR LEGAL RIGHTS!

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North Elgin Centre Inc. v. McDonald's Restaurants of Canada Limited, 2017 ONSC 3306 involves a lease dispute between McDonald's Restaurants of Canada Ltd. ("McDonalds"), as tenant, and North Elgin Centre Inc. ("Elgin"), as landlord. McDonalds and Elgin had entered into a lease beginning on March 11, 1997 and ending on March 10, 2017. The terms of the lease provided that it could be renewed for two further terms of ten years, with the tenant required to notify the Landlord of its intention to renew one year before the end of the term. The lease is renewed on the same terms and conditions as in the original lease as follows:

...provided that the rental to be paid during such renewal terms shall be mutually agreed upon between the parties hereto and failing such agreement, at least nine (9) months prior to the expiration of the original Term or any renewal term or terms, the Tenant at its option may either revoke its notice of intention to renew, in which case this Lease shall expire at the end of the current term, or the Tenant may elect to proceed to arbitration. If the Tenant elects to proceed to arbitration the rental shall be determined by arbitration within the next three (3) months... and shall be based upon the fair market rent of the land only as at the date of the exercise of the option to renew contained herein.

McDonalds gave notice to the Landlord that it wanted to renew the lease in February 2016 and



began negotiations with the Landlord as to the rental rate for the renewal term. The Landlord responded by collecting information about market rates so that it could deliver an initial rent proposal, and as late as July 2016, after the nine-month deadline on June 10, 2016 to proceed to arbitration has passed, Elgin sought information from McDonalds to determine the market rental rate for the renewal term. Elgin finally received an appraisal in August 2016 and the parties met shortly after to discuss. In an email after that

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meeting the landlord wrote to McDonalds referring to the tenant having “confirmed” that it did not wish to go to arbitration and that since it had not elected to proceed to arbitration it “assumed that McDonald’s intends to let this lease expire”, finishing with an inquiry as to whether McDonalds wanted to now proceed to arbitration.

The landlord argues that this email made it clear that it was insisting on strict compliance with the renewal provision such that McDonalds must either revoke its intention to renew or elect to arbitration, and since McDonalds failed to take either course the lease was at an end. In other words, the landlord argued that it had waived the renewal provision until this email sent in August 2016, but in this email revoked its waiver of the renewal provision, and further that this email provided McDonalds with sufficient notice of its revocation for McDonalds to protect its rights under the lease. The landlord accordingly sought a declaration that the lease was at an end and must be renegotiated, which would put the landlord in a strong bargaining position since the renewal provision limits the rent for the renewal term to the fair market rent. McDonalds disagreed, arguing that this email did not revoke the landlord’s waiver of the renewal provision, and sought a declaration that the lease be renewed.

The doctrine of waiver prevents a party from enforcing its strict rights where by its words or conduct, it has demonstrated an intention to affect legal relations which leads a counter-party to believe the party’s strict rights will not be enforced. A party who has waived its rights can revert to its original position on giving reasonable notice by making it plain that he will thereafter insist upon them unless it cannot be done without an injustice to the other party. The Superior Court of Justice found that the landlord had waived strict compliance with the renewal provisions while it was developing a rental rate proposal since McDonalds expected that the parties would first try to agree on the rental rate before deciding to either revoke the lease or proceed to arbitration. However, the Superior Court of Justice also found that the landlord in its August 2016 email revoked its waiver of the renewal provision with sufficient notice, and as such found that the lease came to an end.

On Appeal, the Court found that the August 2016 email did not provide a clear revocation of the waiver. Furthermore, the Court of Appeal determined that this email and subsequent communications did not provide McDonalds with sufficient time to elect to proceed to

arbitration to avoid the lease coming to an end, and as such McDonalds would suffer an injustice if the Landlord was allowed to return to its original position. As a result, the Court of Appeal ordered for the lease to be renewed for an additional term of ten years and for the parties to proceed to arbitration to determine the fair market rental rate. This case clarifies when a waiver can be revoked. The revocation must provide the other party with an opportunity to act to protect its own interests, and also highlights that lease terms involving renewals and arbitrations must be drafted carefully to avoid any confusion.

