ENDORSEMENT OF MR. JUSTICE NEWBOULD

June 15, 2012

David Preger, counsel for the A. Farber & Partners Inc.

Craig Mills, counsel for CIT Financial ltd.

Catherin Patterson, counsel for Albion Kipling Medical Building Corp.

The receiver, supported by CIT Financial, moves for relief regarding the tenancy of the debtor of a drugstore premises at Albion Road in Toronto.

The original lease was renewed for five years. The issue is whether a second extension for five years took place, or whether if not, relief from forfeiture should be granted.

Schedule B to the original lease required that the tenant deliver notice of intent to renew at least 90 days prior to the expiry of the term to the landlord. The landlord says that the word "deliver" suggests that notice must be in writing. I disagree. One delivers a speech, or delivers a message orally. The renewal clause as originally drafted contained a sentence that referred to notice in writing. It was removed by an amendment understandably because it was a non sequiter. However, it indicated that the parties understood what notice in writing was, and it was removed. Also, Section 41 of the Lease contained a general notice provision. It provided notice may be given in writing. It did not provide that any notice must be in writing.

In this case, in issue is whether effective notice to renew was given by the delivery of cheques by the tenant to the landlord. In the circumstances, I find that it was.

On December 15, 2010 Mr. Lorruso, the principle of the landlord faxed a memo to the tenant stating that the rental payments for 2011 would be as follows. Separate calculations were made for the period January to July 2011 and for August to December 2011. The first extension of the lease expired July 31, 2011. The calculations for August to December 2011 reflected increases as provided for in the lease agreement for the next renewal period commencing August 1, 2011. Mr. Lorruso then requested the cheques for the upcoming year, and shortly afterwards had them picked up.

In my view, the deliver of the cheques by the tenant was a clear indication, or notice by the tenant that it intended to renew the lease starting August 1, 2011. This is hardly surprising, as Mr. Ghattas, the principal of the tenant, and Mr. Lorruso are shareholders in a medical clinic in the same building and Mr. Lorruso had to know that it would make no sense for Mr. Ghattas to invest in such clinic, which would provide prescriptions to be filled by the pharmacy, if Mr. Ghattas intended to leave the building and not renew the pharmacy lease.

The cheques were not equivocal. They were for the first five months of the renewal term of the lease in the amounts provided for in the lease for the renewal term. On July 20, 2011, Mr. Lorruso and the treasurer of the landlord delivered a letter to Mr. Ghattas saying that there was no notice given of an intent to renew the lease and they assumed that the tenant would be moving out at the end of July. This is a disingenuous statement. Mr. Lorruso could not have thought Mr. Ghattas intended to leave at the end of the month. There clearly would have been discussions between them if that were the case. On cross-examination, Mr. Lorruso acknowledged he had no such expectation. Notably, the post-dated cheques for August to December, 2011 were not returned to Mr. Ghattas.

I find that notice of intention to renew the lease was given by the request by the landlord for the cheques for part of the renewal period and by the delivery of those cheques by the tenant to the landlord.

Even if that were not the case, I would hold that by its conduct, the landlord should be estopped from insisting on the strict terms of the lease requiring notice of renewal to be given. Ms. Patterson acknowledges that it is open to me to find such estoppel, but asserts that the facts of this case do not support such a finding.

The grounds for estoppel are well known. See *Greenwood v. Martin Bank Ltd.* [1933] 1K.B. 371(h.l.). Here, the conduct of the landlord amounted to a representation that induced the tenant to think that the landlord wanted or was agreeable to the lease being renewed. That is the objective view that I take of the request for cheques for at least part of the renewal term. The tenant acted on that conduct by sending in those cheques and suffered a detriment by the landlord taking the position that the lease was terminated.

Ms. Patterson makes much of the evidence of Mr. Stobie, the lawyer for the tenant, who wrote on the tenant's behalf on July 20, 2011, the same date that Mr. Ghattas had been given the letter from Mr. Lorruso. In his letter, Mr. Stobie said that due to an oversight on the part of his client, the requisite notice was not provided under the lease, but that his client's intention had always been to exercise the option to renew. Mr. Stobie said on cross-examination that he imagined that he had an opportunity to review to the lease. He said that Mr. Ghattas had indicated to him that he had failed to provide the landlord with written notice. Mr. Ghattas is not a lawyer, and if he thought on July 20, 2011 when he received the letter from Mr. Lorruso that he had to send his notice in writing, he was mistaken. It is also important to consider Mr. Ghattas' evidence, which is that due to the urgency and stress, he did not discuss the matter in meaningful way with Mr. Stobie and that he never told him of the events in December 2010 and January 2011, i.e., that the request for and delivery of the cheques.

The fact that Mr. Ghattas in the stress of the moment failed to recall, let alone appreciate the significance of those events cannot be taken to be some admission that at the time he did not place any importance on those events. It is normal that he would, back at this time be lulled into thinking that the landlord was agreeable to renewing the lease without more.

The tenant also contends that the landlord has waived the right to notice by reason of its conduct in requesting the cheques for part of the renewal term and receiving them. There is authority such as *Petridis v. Shabinksy* 25 O.R. (2d) 215 per Grange J. (as he then was) that where a party by its conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that behalf and he does act on it, then the first party will not afterwards be allowed to insist on its strict legal rights when it would be inequitable for him to do so. See also *Duarte v. 792786 Ontario Ltd*. 1995 CarswellOnt. 3033 at para. 14 per Flinn J.

In my view, the facts support a waiver by the landlord and it would inequitable for the landlord to insist on its strict legal rights. It lulled the tenant by the request for cheques and receiving them into a "false sense of security" in the words of Chadwich J. in *Chateau Holdings Ltd. v. National Capital Commission* in his October 11, 1989 judgement.

I find that there was waiver of the requirement for any further notice of renewal to be required after the request for, and receipt of, the cheques for part of the renewal period.

In the event, the motion of the receiver is granted, it is declared that the lease has been effectively renewed for a second term of five years effective August 1, 2011 and that the landlord is estopped from taking a contrary position. It is not necessary to deal with relief from forfeiture.

The receiver and CIT are entitled to their costs. If costs cannot be agreed, the receiver and CIT may make brief written submission, along with proper costs, outlines, in ten days and the landlord shall have 10 days to provide with brief written submissions.

Newbould J.