



Volume IX Number 2

March 2014

INTERPRETING LEASE AGREEMENTS:

Overholding Clauses – What Are They and How Are They Interpreted?

By
Paul De Francesca
Lawyer

Abstract

An overholding tenancy is one in which a tenant remains in a leased premises past the end of the lease term. For an overholding tenancy to arise, the landlord must agree that the tenant may stay in the premises. Overholding clauses are frequently inserted into lease agreements to specify terms related to the occurrence of an overholding tenancy. If an overholding clause in a lease agreement does not expressly state the requirement for the landlord's consent or state what constitutes a landlord's consent for the tenant to stay in the premises, then courts will imply these terms into the clause. The court will imply that the landlord's consent is required and that it may be evidenced by the landlord's acceptance of rent past the end of the lease term. Courts have consistently implied these terms because it is commercially reasonable to assume the landlord would intend to draft an overholding clause that creates certainty it can obtain vacant possession at the end of the lease term. Additionally, courts want to interpret clauses that are well understood to have a particular legal meaning and consequence in a consistent manner to foster certainty and predictability in the law.

Full Article

The 2012 Ontario Court of Appeal case of *AIM Health Group Inc. v. 40 Finchgate Limited Partnership*, concerned a dispute about the interpretation of a lease. In particular, whether a lease gave the tenant the right to stay in occupation on the expiration of the initial term of the lease.

The tenant, a small health clinic, notified the landlord that it would not renew its lease but that it needed to stay in the leased premises for a few weeks or months after the term expired. The tenant could not relocate until it passed an inspection by the College of Physicians and Surgeons of Ontario and it was unknown how long this inspection would take.

A week before the lease was set to end, the landlord notified the tenants that it would require vacant possession of the property by the end of the lease term. The landlord also entered into a new lease with a new tenant that was



INTERPRETING LEASE AGREEMENTS:

Overholding Clauses – What Are They and How Are They Interpreted?

Continued...

set to begin on the day after the previous lease ended. The day after the lease ended the landlord changed the locks on the leased premises and removed all property from it.

The tenant brought an emergency application to court in which it sought a declaration that it was entitled to re-enter the leased premises. It claimed to be an overholding tenant pursuant to an overholding clause written in the lease. As such, it maintained that the lease had become a month-to-month tenancy, which the landlord had not given notice to terminate.

The overholding clause in the lease stated that at the expiration of the term of the lease, the tenant may continue to occupy the leased premises without further written agreement and the tenancy of the tenant thereafter shall be from month to month only and may be terminated by either party on one month's notice.

Where the landlord accepts rent from the tenant or otherwise consents to the tenant remaining in possession following the termination of a lease, or “holds over”, a new periodic tenancy arises at common law by implication on the same terms as the expired lease, subject to any evidence that the parties reached a different arrangement or understanding. If the original lease term was less than one year, the new tenancy is deemed to be month to month, whereas if the original lease term was for more than one year, the new tenancy is deemed to be year to year. The payment and acceptance of rent is considered evidence of the parties' intent to enter into a new tenancy arrangement. Without agreeing on other terms, it would be on the same terms as the old lease.

In order to avoid the deemed creation of a yearly tenancy when the tenant holds over and the landlord accepts rent, the overholding clause is frequently inserted into leases, providing that the tenancy that is created is a month-to-month tenancy. Such clauses often provide for higher rent than was paid during the original term of the lease.

The tenant's position was that the overholding clause in the lease had a different meaning and effect than the common law meaning and effect of overholding, because it did not say that a month-to-month tenancy was created only on the payment and acceptance of rent or on the consent of the landlord. Because those words were not there, the tenant said that the meaning and effect of the clause was to give the tenant the unilateral option not to vacate the premises at the end of the lease, but to remain in possession, creating a new month-to-month tenancy without the landlord having accepted rent or otherwise given consent.

The court disagreed and provided examples of cases in which an overholding clause that does not refer to the consent of the landlord has nevertheless been interpreted and applied to mean that it is only with the consent of the landlord that a month-to-month tenancy is created when the tenant overholds by remaining in possession following the termination of the lease. For an overholding tenancy to arise, the landlord must agree that the tenant may stay in the premises, which agreement is normally evidenced by the landlord's acceptance of rent.

In this case, the landlord made it clear by notice that it required the premises at the end of the term. The tenant remained in possession without the consent of the landlord. The landlord did not create a new tenancy with the

tenant. Rather, it signed a new lease with another tenant. The tenant, having refused to deliver vacant possession at the end of the term, therefore became a trespasser. The tenant was in breach of its obligation to deliver vacant possession of the premises at the end of the term of its lease. On a proper interpretation of the overholding clause, the tenant was not entitled to unilaterally remain in the premises under that clause absent evidence that the landlord consented.