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# What's Wrong with Landlords' Rights?

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**Cases Considered:**

*550 Capital Corp. v. David S. Cheetham Architect Ltd.*, 2008 ABQB 370

Is it wrong for a landlord to insist on compliance with a term of a commercial lease? The recent judgment of Mr. Justice Sandy Park in *550 Capital Corp. v. David S. Cheetham Architect Ltd.* certainly seems to indicate that it is inequitable for a landlord to require a tenant to do what it should have done, namely, to request the landlord's consent to an assignment of the lease. The unidentified type of estoppel found to prevent the landlord from terminating the lease and the unnecessary relief from forfeiture granted so that the tenant could undo its assignment both appear, with all due respect, to be unjustified both on the facts and the law.

In January 2005, ACM Project 50 Ltd., as landlord, entered into a lease of office space in a commercial office building on 11th Avenue SW in Calgary with a partnership of five corporations operating as Group 2 Architecture Engineering Interior Design, the tenant. The lease was for a term of 6 years, commencing September 1, 2005 and ending August 31, 2011. In July 2005, before the term of the lease began, ACM assigned their landlord's interest to 550 Capital Corp. Strategic Equity Corp. managed the property on behalf of 550 Capital Corp. and references to "landlord" in this comment include references to Strategic as well as 550 Capital Corp. It should be recalled, however, that the lease was drafted by ACM Project 50 Ltd., the original landlord, and that 550 Capital Corp. and Strategic Equity Corp. merely inherited its rights and obligations.

In February 2006, the five corporations in the Group 2 partnership advised the landlord that the partnership had incorporated and become Group 2 Architecture Engineering Ltd. There was nothing in this advice to indicate the partnership was transferring the lease, but the partnership did indeed transfer all of its assets, including its interest in the lease, to the Group 2 corporation.

Justice Park indicates (at para. 9) that no request was made to the landlord for its consent to the assignment of the lease to the Group 2 corporation because of some "beliefs" on the part of the architects, engineers, interior designers and the lawyer who structured the incorporation of the partnership, probably for tax or liability reasons. The five former partners apparently "did not believe they had assigned the Lease to the Corporation because there was no change in each of their control from the Partnership to the Corporation." This mistake of law, a fairly common error on the part of non-lawyers, albeit an obvious one to those with basic corporate law familiarity, appears to have been the root of the entire mess that followed. Justice Park had no difficulty, of course, in holding (at para. 38) that the partnership's conduct amounted to an "arbitrary non-consensual assignment of the Lease to the Corporation." Apparently the partnership even executed a formal assignment transferring their property, including the lease, to the Group 2 corporation, a new legal entity.

It was not until some formal legal documents were required by the landlord for its refinancing of the building that the change in the tenant came to the landlord's attention. As a result, the landlord sent each of the five corporations in the Group 2 partnership and the Group 2 partnership itself a letter dated January 3, 2007 which indicated that their review of the documents received from the tenant in 2006 indicated that the Group 2 partnership was treating the lease as having been assigned to the Group 2 corporation. The letter then referred to Article 10.02 of the lease which required the landlord's prior written consent to any assignment by the tenant. Although the relevant provisions of the lease are not set out in Justice Park's judgment, the lease is available to the public as an exhibit to an affidavit filed at the court house. Article 10.02 provided, in part:

> **10.02 Assignments and Sublettings**
> The Tenant shall not pledge or assign this lease or sublet or part with possession of the Premises or any part thereof, directly or indirectly, without the prior written consent of the Landlord which consent the Landlord agrees not to unreasonably withhold or delay. Notwithstanding anything to the contrary expressed or implied it is agreed that:
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> . . .
>
> (g) any request for such consent shall be in writing and accompanied by a true copy of a written offer, and the Tenant shall furnish to the Landlord all information available to the Tenant and requested by the Landlord as to the responsibility, reputation, financial standing and business of the proposed assignee or subtenant; . . .

The letter went on to note that no request for the landlord's consent to this assignment had been received and no consent had been provided. As a result, the landlord told the partners and partnership that the letter was the tenant's notice of default under Article 10.07 of the lease and advised that, if the tenant did not cure its default within 15 days, the landlord would be entitled to terminate the lease and re-enter the premises. Article 10.07 of the lease provided:

> **10.07 Curing Default**
> In the event that the Tenant shall pledge or assign this lease or sublet or part with possession of the Premises or any part thereof otherwise than in accordance with the provisions of the Lease, the Landlord may give the Tenant notice of such default hereunder whereupon the Tenant shall have fifteen (15) days to cure such default failing which the Landlord shall be entitled to terminate the Lease and to re-enter the Premises.

The Group 2 Corporation's response to this January 3, 2007 notice of default was basically to assert that control of "the firm" had not changed because the partnership retained the ownership of "the firm." Just what "the firm" was and how it differed from the partners, partnership or Group 2 corporation was not specified. The position of the tenant was clearly, if erroneously, put in the response: there was no assignment of the lease because the shareholders of the corporation were the same as the parties of the Group 2 partnership who had signed the lease. One has to think that the lawyer for the Group 2 corporation who drafted this letter had to be a different lawyer than the one who advised the architectural and engineering firm to incorporate, presumably for tax or liability advantages. If the legal fiction of a separate legal existence for a

corporate entity was so easily ignored, why would the partnership have gone to the trouble and expense of incorporating the partnership?

More letters followed quickly, with the landlord insisting the partnership had assigned the lease and Group 2 corporation insisting there had been no assignment because there was no change in control. Of the many letters written by the landlord, one dated January 8 named January 19 as the date on which the landlord would be entitled to exercise its remedies if the tenant had not cured its default. January 19 was 15 days after the January 3 notice of default, not counting the date the notice was given. Finally, on January 12, after a telephone call between the lawyers for the parties, the landlord's lawyer sent a letter asking the partnership to ask for the landlord's consent to the assignment in accordance with the lease. The lawyer for both the partnership and Group 2 corporation replied on January 17, reiterating their usual position. That letter concluded, however, in what Justice Parks characterizes (at para. 28) as "an effort to resolve the Landlord's concerns", with the partnership requesting the landlord's consent to an assignment of the lease from the partnership to the corporation. Finally, more than one year after the assignment, the tenant requested the landlord's consent as required by Article 10.02.

The next day, January 18, the landlord's lawyer advised the lawyer for the partnership and the Group 2 corporation that the landlord's position had not changed. The letter then advised that the landlord was giving notice of termination of the lease under Article 10.03, effective March 31, 2007. Article 10.03 provides:

> **10.03 Cancellation and Termination**
> (a) Notwithstanding section 10.02, within 30 (30) days after the receipt by the Landlord of such request for consent and all of the information which the Landlord shall have requested hereunder (and if no such information has been requested, within ten (10) days after receipt of such request for consent) the Landlord shall have the right upon written notice to the Tenant, if the request is to assign this lease or sublet the whole of the Premises, to cancel and terminate this Lease . . . on a termination date to be stipulated in the notice of termination which shall not be less than sixty (60) days or more than ninety (90) days following the giving of such notice. . . . If the Landlord shall not exercise the foregoing right of cancellation then the Landlord's consent to the Tenant's request for consent to assign or sublet shall not be unreasonably withheld . . . .

Justice Park makes much of the fact that the landlord purported to terminate the lease under Article 10.03 on January 18, one day before the expiry of the 15 day period to cure the default that was given in the landlord's January 3 letter. The termination under Article 10.03 did not, Justice Park found (at para. 30), deprive the tenant of their right to cure the default under Article 10.07.

The Group 2 corporation did not vacate the leased premises. The landlord applied to Master Alberstat in Chamber in July 2007 for an order for possession. This application was dismissed by the Master on the basis that Article 10.03 of the lease was inconsistent with Article 10.02 and that Article 10.03 should be struck. Without it, there was no basis for the landlord's termination. The landlord appealed to the Court of Queen's Bench and the result of that appeal was this judgment by Justice Park.

Justice Park found that Articles 10.02 and 10.03 were not inconsistent with each other. Combining clauses such as Article 10.02 and Article 10.03 is not uncommon in commercial

leases, even if they do seem rather draconian in conjunction. For example, something very similar was considered by the Alberta Court of Appeal in *Zurich Canadian Holdings Ltd. v. Questar Exploration Inc.*, 1999 ABCA 75. As the Court of Appeal noted in that case (at para. 22), in a passage quoted by Justice Park (at para. 45), the combination of these lease provisions gives the landlord three options if the landlord receives a request for their consent to a transfer of the lease. The landlord may:

- consent to the transfer, or
- refuse to consent to the transfer, or
- cancel the lease.

Note, however, that the landlord only has these three options if the tenant requests their consent. If the tenant does not request the landlord's consent - as they are required to do under Article 10.02 - then the landlord can only act under Article 10.07 and give the tenant notice that they have 15 days to cure their default and, if they do not, then the landlord may terminate the lease. A tenant who requests the landlord's consent to an assignment, as required by their lease, therefore runs the risk that the landlord will, instead of consenting or refusing to consent, simply terminate the lease. It is for this reason that it was suggested the descriptor "draconian" might be appropriate. Of course, a tenant who fails to ask for the landlord consents merely delays the same fate, termination of their lease if their failure to ask for the landlord's consent is not cured within 15 days. Either way, the tenant either stays in the leased premises themselves for the entire term of the lease or they run the risk of losing the lease when they want to transfer it - sell it - to someone else.

Justice Park held (at para. 37) that the landlord could not use Article 10.03 to terminate the lease until the tenant's 15 days to cure the default under Article 10.07 had expired and the default had not been cured. (Not mentioned was the fact the lease provided that, if the 15 days expired and the default was not cured, then the landlord could terminate the lease in any event under Article 10.07 - it would not need to go to Article 10.03 to terminate.) Having elected to proceed under Article 10.07, the landlord was held to its original election until the tenant's 15 days of grace had expired. "Election" is an odd characterization because, if the tenant does not ask for the landlord's consent, the landlord has no choice but to proceed under Article 10.07. It is only when a tenant asks for the landlord's consent that the landlord has an election to make.

The core of Justice Park's judgment is paragraph 40, where he sets out what he found to be the factual basis for the application of an estoppel. Recall that, on January 12, after a telephone call between the lawyers for the parties, the landlord's lawyer sent a letter asking the partnership to ask for the landlord's consent to the assignment in accordance with the lease. Justice Park held that this January 12 letter allowed the tenant to invoke "the doctrine of estoppel" and that this doctrine of estoppel prevented the landlord from acting under Article 10.03. Just what representation of existing facts or promise of future conduct formed the basis for this estoppel? According to Justice Park:

> Its conduct in inviting the Tenants to request an assignment of the Lease, caused the Tenants to reasonably believe that such a request would cure the default and the Landlord would not terminate the Lease. The representation in the letter fax of January 12, 2007 induced the Tenants to ask for the consent of the Landlord for the assignment of the Lease. Without this representation the Tenants, on the evidence, would not have asked the Landlord for its consent for an assignment of the Lease. . . . In making the request to the Landlord for the assignment of the

> Lease as a result of the Landlord's representation the Tenants committed an act to their detriment. This detriment is seen by the Landlord now seeking a declaration in this Court that the Lease is terminated under the Landlord's attempted invocation of Article 10.03. If the Lease is terminated, the Tenants will lose the benefit of the Lease and its attendant current economic benefits. Further if the Landlord is allowed to terminate the Lease under Article 10.03, the Tenants will be precluded from asking this Court for relief from forfeiture because of their positive act in asking for an assignment of the Lease and thereby allowing the Landlord to terminate the Lease under Article 10.03. . . . To allow the Landlord to rely on Article 10.03 in these circumstances would be inequitable. (emphasis added)

There is so much that is problematic with this passage that it is difficult to know where to begin. Let us start, however, with the law. The first point is that, although Justice Park refers only to "the doctrine of estoppel," there are several types of estoppel. Spencer Bower, *Estoppel by Representation*, 4th edition (LexisNexis, 2004) discusses seven types: estoppel by representation of fact, proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by deed, estoppel by negligence and election. The two main types are estoppel by representation of fact and promissory estoppel. In the former, one party makes a representation regarding an existing fact or existing state of affairs which the other party relies on to its detriment, with the result that the first is precluded from denying the fact or state of affairs that they represented to exist. Promissory estoppel was first established in *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 439 (H.L.) but not developed until the decision of Lord Denning in *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130. This type of estoppel applies when one party make a promise about their future conduct, a promise that is relied upon by the other party to their detriment. The promisor is precluded from retracting their promise to the extent it would be inequitable for them to do so. A promise is not a representation of an existing fact and so estoppel by representation of fact is not available when promissory estoppel is, and vice versa.

Justice Park appears to conflate estoppel by representation of fact and promissory estoppel. In paragraph 41, the paragraph that follows the passage quoted at length above, he states that the essential factors that give rise to estoppel are set out in *Morgan v. Boles*, [1945] A.J. No. 26 (Alta. S.C.A.D.) at para. 19:

1. A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
2. An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
3. Detriment to such person as a consequence of the act or omission.

*Morgan v. Boles* is about estoppel by representation of fact, as are the cases it cites. Justice Park follows his citation of *Morgan v. Boles* with a quote from *Owen Sound Public Library Board v. Mial Developments Ltd.*, 1979 Carswell Ont 643 (Ont CA) at paragraph 16, which deals with the question of the sort of promise that can give rise to promissory estoppel. *Owen Sound* has nothing to say on the topic of estoppel by representation of fact.

What was the representation of an existing fact or the promise about future conduct that triggered the application of the unidentified type of estoppel? Justice Park does not quote the landlord's letter of January 12, 2007 anywhere in his judgment, so it is difficult to critique his

characterization of what he summarizes (at para. 40) as "conduct . . . inviting the Tenants to request an assignment of the Lease, [that] caused the Tenants to reasonably believe that such a request would cure the default and the Landlord would not terminate the Lease" (emphasis added). In order to understand what the landlord's representation was, we need to figure out what the ambiguous "cure the default" means." What is the tenant's default, according to Justice Park? One might think that the default was the tenant's failure to request the landlord's consent to the assignment, a default on the tenant's obligations under Article 10.02. Then - paraphrasing Justice Park's summary - the landlord's invitation to the tenant to request its consent to the assignment would have caused the tenant to reasonably believe that their request would cure their failure to request the landlord's consent and the landlord would not terminate the lease. However, the landlord did not purport to terminate the lease for the failure to request their consent. If this was the landlord's promise, the promise was kept. There would be nothing to estop.

What else might "cure the default" mean? Article 10.07 is the "curing default" provision and it seems likely, from what follows in the judgment, that Justice Parks meant to refer to that article. Under Article 10.07, the tenant's default is not a failure to request the landlord's consent to the assignment. Under Article 10.07, the default is described as the tenant actually assigning the lease without abiding by the provisions in the lease. In this context," "curing the default" would be a reference to the tenant curing their assignment of the lease, and not to their curing their failure to ask for the landlord's consent. Then - paraphrasing Justice Park's summary in paragraph 40 again - the landlord's invitation to the tenant to request its consent to the assignment would have caused the tenant to reasonably believe that their request would cure their assignment and the landlord would not terminate the assignee's lease. In other words, the representation was that the landlord would consent to the assignment. That the assignment was likely the default to be cured and the landlord's consent to the assignment the representation Justice Park was referring to is supported by his decision to allow the tenant to cure the default by re-assigning the lease from the Group 2 corporation back to the partnership. It is the assignment itself, not the failure to request the landlord's consent to the assignment, which is the default the landlord promised the tenant could cure.

The latter interpretation of what Justice Park thought the landlord promised the tenant is suspect however. If Justice Park thought the landlord promised that, if the tenant applied for its consent to the assignment, the landlord would consent to the assignment, then why would he not order the landlord to do so? Instead, he gives the Group 2 corporation an opportunity to undo the assignment by transferring the lease back to the partnership. Moreover, how on earth could the landlord's invitation to the tenant to request consent for an assignment constitute a promise to grant consent?

Based on the facts set out in the judgment itself, we are unable to know what representation of an existing fact or what promise about future conduct triggered the application of what type of estoppel. As the entire case turns on this point, the lack of clarity and precision is disappointing. Without the facts, there is nothing more we can say about the application of the law to the facts. More can be said about the law.

Neither of the cases Justice Park relies upon - *Morgan v. Boles* or *Owen Sound* - are classic promissory estoppel cases from the landlord and tenant context. In such a context, most equitable estoppel cases would begin with a brief mention of *Hughes v. Metropolitan Railway* and follow that up with *High Trees*. According to Lord Denning in the latter case, the following elements are required to found a promissory estoppel:

1. a clear and unequivocal promise or representation as to future conduct which indicates that the promisor will not enforce all its rights under the existing contract with the promisee
2. which the promisee relies on
3. and which it would be unconscionable or inequitable for the promisor to retract and insist upon its full contractual rights.

Was whatever was in the letter "a clear and unequivocal promise or representation as to future conduct which indicates that the promisor will not enforce all its rights under the existing contract with the promise"? As we already indicated, we cannot assess how clear or unequivocal it was, but the proper test for assessing whatever was written was not used.
What about the third element? The party to whom the promise is made must act on that promise to their detriment in order for it to be inequitable for the promisor to insist on their full contractual rights. Where is the detriment to the tenant in this case? Justice Park found detriment in two places (in para. 40). First, he held that in requesting the landlord's consent to the assignment to Group 2 corporation, the partnership committed an act to their detriment. Once they made the request, they triggered Article 10.03 of the lease, which gave the landlord the option to terminate the lease. And, as the second detriment, once they triggered Article 10.03, they could not ask a court to relieve their forfeiture of the rest of the term of the lease; relief from forfeiture is only available if a tenant is in breach of a lease.

With all due respect, it should be impossible to characterize a tenant doing what it promised to do as a detriment. The tenant promised to ask for the landlord's consent to an assignment in Article 10.02. It only did what it should have done in the first place; how can it be said to be worse off? Why should it be better being in breach of the lease than being in compliance? The effect of Justice Park's finding the tenant's request for consent to the assignment to be a detriment is to reward its breach of the lease.
Nevertheless, having found (at para. 41) that "the facts of this case allow the doctrine of estoppel to be invoked", Justice Park returned to the fact that the landlord refused the request for its consent and gave notice of termination of the lease under Article 10.03 one day too early, on January 18. The landlord acted prematurely. He reiterated that having "elected" to proceed under Article 10.07, the landlord could not proceed under a different article unless and until the 15 days expired without the default being cured. He found (at para. 43) that "[t]he Landlord by its conduct never gave the Tenants an opportunity to cure the default." "Never" is, of course, an exaggeration given that 14 days had gone by, but it is what Justice Park does next with the notion that the tenant had one more day to cure its default that is rather remarkable.

Note that the one more day the tenant should have had to cure its default under Article 10.07 was January 18, 2007 and this judgment was handed down on June 23, 2008. However, that one more day seems to have stretched out to almost a year and half because Justice Park held (at para. 50) that the partnership could still cure the defect! How? Considering the default was the failure to request the landlord's consent, one might think the cure would be to ask the landlord for its consent, exactly the act found to be a "detriment" to the tenant. Instead, the default was to be cured not immediate re-assignment of the lease held by Group 2 corporation to the partnership! (If any tax lawyers are reading this post, please, lower your eyebrows.) Justice Parks gave the partnership a further grace period of ten business days after his judgment was entered to cure the default and re-assign the lease to the partnership.

That is not the end of the judgment though. Rather inexplicably, Justice Parks then goes on to say (at para. 52) "in the circumstances of this case I, alternatively, would be prepared to grant the

tenant relief from forfeiture." Reading this, what would one conclude? If relief from forfeiture of the remaining term of the lease is an "alternate" remedy, alternate to curing the default, then the tenant seems to be home free. They wouldn't have to ask for consent; they wouldn't have to try to undo the assignment by re-assigning back to the partnership. But no, this is not what relief from forfeiture, as an alternative, turns out to be in this judgment. Instead, Justice Parks concludes the judgment (at para. 55) by stating "[relief from forfeiture is granted again on the basis the tenants must cure the default within ten (10) business days by re-assigning the Lease from the Corporation to the Partnership. . . . If the default is not cured as directed, the Landlord can proceed with its remedies under the lease where the Tenants have not cured the default." With all due respect, if the tenant cures the default, it does not need relief form forfeiture. It is only when the tenant does not cure the default and the landlord can therefore terminate the lease - "its remedies under the lease where the Tenants have not cured the default" - that the tenant needs, but is denied, relief from forfeiture.

Something further must be said about Justice Park's idea that the tenant's default in not requesting the landlord's consent to the assignment of the lease can be "cured." His judgment specifies the method (at paras. 50 and 55), namely, re-assigning the Lease from the Corporation to the partnership. Even assuming the rent is so low that any tax problems caused by such a re-assignment would still result in savings to the tenant, could it really be done without breaching the lease? Let us suppose that Group 2 corporation re-assigns the lease back to the partnership, which is resurrected for the sole purpose of holding this one asset. Article 10.02 provided that not only could the tenant not assign without the landlord's prior written consent, but also that the tenant "shall not . . . part with possession of the Premises or any part thereof, directly or indirectly, without the prior written consent of the Landlord. In addition, Article 10.01 of the lease provides as follows:

> **10.01 Licenses, etc.**
> The Tenant shall not suffer or permit any part of the Premises to be used or occupied by any persons other than the Tenant, and subtenants permitted under section 10.02 and the employees of the Tenant . . ."

If the only asset of the resurrected partnership was the lease, then who is in possession of the premises? Who is occupying them? It must be Group 2 corporation, which is not the tenant. The result would be another default under the lease, triggering Article 10.07 and the start of a further 15 day grace period to cure this new default. How could it be cured or prevented? Undoing the entire partnership conversion into a corporation would do it. But just how low is the rent?

If the tenant was some sort of charitable organization one might have some sympathy for the court's invocation of some ill-defined and inapplicable doctrine of estoppel to ride roughshod over a commercial landlord. Part of the background to this case is that the rent the tenant is paying appears to be substantially less than the amount the premises could command in today's market in Calgary (para. 54). Surely an architectural and engineering business is the sort of entity that could cope with the prevailing market rates, as those sectors of the economy are some of the main beneficiaries of the huge increases in property values in Calgary. They are not the sort of tenant to excite the sympathies of a court in normal circumstances. What was really going on in this case?