The Importance of Measuring Leased Premises

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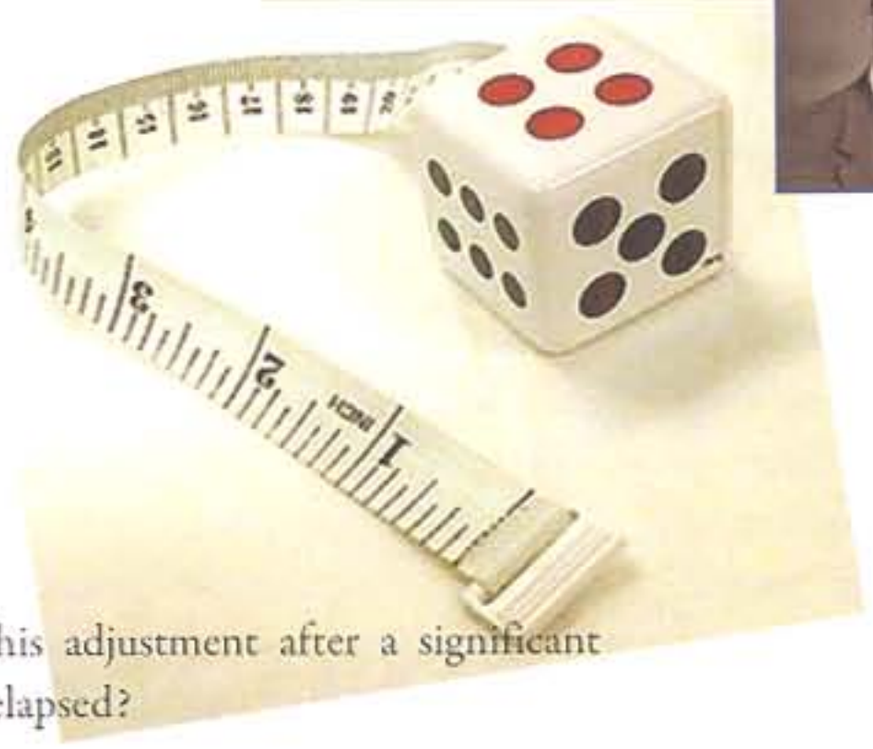

"It is not weeds that choke out the grain; it is the negligence of the farmer."

This Chinese proverb teaches us that our negligence can have serious consequences; and that, in such circumstances, it is sometimes futile to blame others, even in leasing matters.

A commercial lease contains fundamental elements, which are commonly considered to be the description of the leased premises, the duration of the lease, and the rents payable. It is understood that each of these elements must be clearly defined and clearly identifiable and that if they are not defined and identifiable the situation must be rectified immediately. Measurement of the leased premises is an important aspect of the commercial lease and must be done precisely, failing which the parties could face some very unpleasant surprises.

The Honey Fashions Ruling.

The exact area of the leased premises is an issue that is sometimes challenged or questioned. The courts have examined this matter and have provided some clarity in this regard. A recent ruling by the Court of Quebec rendered by Judge Susan Handman in the case of Honey Fashions Ltd. v. Edward Stern (December 18, 2007, 500-22-128-325-068) confirms once again how important it is for tenants to obtain a proper measurement of the premises they lease. The tenant, Honey Fashions Ltd., leased premises on the ground floor of a building for which a five-year lease had been signed on September 7, 2001. The monthly rent was set at $7,233.33 plus taxes, based on the number of square feet. Specifically, the rent was $5.00 per square foot. It was not until June 2005 that the tenant, after a request for a renewal proposal, discovered that the dimensions of the leased premises differed from those in the lease. Indeed, the lease provided for an area of 17,360 square feet and, as it was discovered upon renewal, the premises actually contained 971 fewer square feet. Accordingly, the monthly rent, according to the tenant, should have been $6,828.75 per month rather than $7,233.33. Consequently, the tenant claimed to have overpaid by $26,166.12 and requested the amount from the landlord. The question that the court had to answer was apparently quite simple: Was the tenant entitled to claim this adjustment after a significant period of time had elapsed?

The judge noted the following facts:

• the lease describes the area of the leased premises as being "approximate." In this regard, it is worth noting that unless the lease contains an established and accepted measurement certificate it is common practice in most commercial leases to consider the area of the premises to be approximate and that it may be specified by a certificate at a later time.

• a specific clause included in the lease provides that the tenant has examined the leased premises and is satisfied with them and accepts them on an "as is" basis. Again, this clause is quite standard and is found in most commercial leases.

• it is clear that there is no evidence of any fraud or false declarations on the part of the landlord. This fact is important because in case of fraud on the part of a landlord, it would be obvious and quite logical for a tenant to seek redress.

The Court concluded that an error had occurred and this fact was not in doubt, given that the question of the discrepancy in the size of the premises was not questioned by the litigants. However, the Court said that although an error had occurred, it was not the result of fraudulent declarations (fraud or lesion) on the part of the landlord. Indeed, the tenant should have measured the leased premises or required the landlord to do so. The tenant should have been more cautious in this regard and should have acted accordingly at the beginning of the term and not at its end. Consequently, the Court ruled that the tenant's error was inexcusable and ruled in favour of the landlord by dismissing the tenant's claim.

The Basili ruling.

The ruling in the Honey Fashions case is consistent with the judgement of the Court of Appeal of Quebec in Basili v. Québit, (Court of Appeal of Quebec, November 26, 2001). In this case, the tenant and the landlord had signed a lease in 1987. In 1994, a dispute arose between the parties and the tenant responded to the landlord by claiming he was misled

and that the leased premises contained 666 fewer square feet than what was determined in the lease. The tenant asked to be reimbursed for the amount overpaid. The Court of Appeal ruled as follows:

"In this case, no fraud was proved. The measurements contained in the lease were carried over from a previous lease. The respondents did not prove that the owner knew that these measurements were incorrect. Davis can hardly claim to have been misled about the purpose of the lease. She was familiar with the premises because Québit had been a tenant of the same building before 1987, and no misrepresentation was made.

An error indeed occurred. However, the error here cannot lead to a reduction in the obligations as asked for by the respondents. Article 1407 of the C.c.Q. does not apply here because even if there were an error it was not a result of fraud, fear, or injury.

... The respondent Davis acted as representative of the respondent. She is a businessperson and this was her third lease with the appellant. Each party negotiating a commercial lease must show a minimum amount of lucidity and vigilance. Here, nothing was hidden; neither the rent nor the dimensions were challenged before the claim by the appellant some 7 years after the signing of the lease in 1987. If there was an error, I would not hesitate to describe it as inexcusable in that it results from an omission on the part of Davis to ascertain the meaning of the description of the premises that she claims not to have understood." [Our translation]

"A minimum amount of lucidity and vigilance" are the straightforward words, to say the least, used by the Court of Appeal and they have weighty consequences for the tenant. The principle to remember is the following: not asking for a measurement at the beginning of the term of a lease and attempting to demonstrate several years later that the leased premises do not conform to the terms of the lease can be considered an inexcusable mistake. This lack of diligence on the part of the tenant—coupled with the absence of fraud, fear, or injury on the part of the property owner—allows the Court to consider such a mistake on the part of the tenant as inexcusable. In the Basili case, the fact that the claim was made seven years after the lease was signed is beyond a doubt the critical element in the ruling of the Court.

Measure without delay.

There is no doubt that the tenant and the landlord have an interest in ensuring the exact size of the leased premises at the outset of their contractual relationship. All fundamental aspects of the lease must be clearly established. And if this is not done at the outset, it must be done without delay. Accordingly, it may be important for the →61

lease to contain appropriate mechanisms in this regard (for example, the obligation of the landlord to measure within a specified time or an opportunity for the tenant to re-measure if he/she is not satisfied).

Contractual relationships in the world of commercial leases bring the parties to commit themselves for long periods of time. Maintaining the stability of a contract is a fundamental legal principle that is frequently reiterated by jurisprudence and doctrine. In matters of commercial leases, a tenant should obtain an accurate measurement of the leased premises at the beginning of the commitment to avoid being considered to have accepted the approximate size of the leased premises.

In fact, it is common in matters of commercial leases to determine the exact area of the leased premises after the lease has been signed. The reason for this is very simple. In many cases, the leased premises have not yet been built or set up and measurements cannot be made. It is therefore important for the tenant to ensure that a mechanism exists that requires the landlord to quickly establish the exact size of the leased premises at the beginning of the term of the lease. Any failure or omission in this regard will have consequences for the tenant (or even for the landlord), and rightly so. The parties entering into a lease agreement (contract of successive performance) are entitled to expect that the financial terms on which they agree remain unchanged for the duration of the agreement and even after the expiry of the term of the agreement.

In contract law, this principle is based on the notion of contract stability. Indeed, parties who are committed contractually are entitled to expect some stability in their commercial dealings. On this topic, Jean-Louis Baudoin (now a judge at the Court of Appeals of Quebec) stated, "The Civil Code of Quebec adopted the view of French law on this issue by ruling out cancellation when the error is inexcusable. We find in this new rule a regard for the stability of contracts and for the idea, already accepted in a related context, that all concerned parties should inform themselves before entering into a contract (Les Obligations, Jean-Louis Baudouin, p.205). A parallel could be drawn with the theory of unpredictability (a theory according to which contracts can be revised or cancelled in exceptional circumstances). Opposition to this theory, a theory that is not accepted in Quebec law, is based in particular on the following arguments. "As a further step, the authors point to the merits of economic liberalism and to its legal manifestation: free will and the binding power of contracts. Contract stability is essential to relationships between people, especially long-term business relationships. Accepting the unforeseeable would obviously reduce or even undermine this stability. The review of a single contract, moreover, would lead to a cascade of reviews, given the complex structure of modern industrial society." (Les Obligations, Jean-Louis Baudouin, p.363).

Therefore, regarding the measurement of leased premises, it is imperative to act quickly or the tenant could inescapably be placed before a fait accompli without any possibility of remedying the situation. Acting quickly and diligently is the key to success! •