

## A Lease Estoppel Certificate Constituting The Exercise Of A Renewal Right

### Introduction

Almost all commercial leases contain a provision that the landlord can call for the tenant to sign a document or certificate detailing and confirming various lease related particulars. These are commonly required by purchasers and lenders. They are often referred to as estoppel certificates.

An estoppel certificate is founded on the principle of promissory estoppel, the theory being that a party that executes an estoppel certificate is thereafter "estopped" from being able to assert a fact inconsistent with what is set out in the certificate. The case law around estoppel certificates generally deals with whether or not the signing of an estoppel certificate by a tenant has achieved the intended result for the purchaser or lender.

The recent case in the Supreme Court of British Columbia of *419219 Alberta Ltd v 238709 BC Ltd*<sup>1</sup> dealt with a situation where the tenant who signed the estoppel certificate was relying on the execution and delivery of this estoppel certificate to have achieved the exercise of a renewal right.

### Facts

The tenant (in fact a subtenant) operated a motel on the subleased property. The sublease commenced January 1, 1978,

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<sup>1</sup> *419219 Alberta Ltd v 238709 BC Ltd*, 2013 BCSC 1667.

and the tenant received an assignment of the sublease on July 3, 2004. In or about June 2010, the landlord acquired the head lease interest and became the landlord of the tenant.

In connection with the landlord's purchase and perhaps the financing of the purchase, the tenant delivered an estoppel certificate to the landlord. The court notes the purpose of this estoppel certificate was to show the prospective purchaser, and perhaps those who are providing the funding, that the lease is in good standing and that there are no significant disputes. The estoppel certificate was prepared by the landlord.

At the time of the delivery of the estoppel certificate in 2010, the sublease had a current term that ended December 31, 2012. There were rights to extend, the next one for a period from January 1, 2013, to December 31, 2017, which required notice to be given at least 6 months in advance (that is, on or before June 30, 2012) in order to exercise that right.

### Issue

The tenant did not give notice of the exercise of its renewal by the required time. However, in the estoppel certificate delivered in 2010 (well before the 6 month notice period) there was a statement that the term of the sublease was amended to a period commencing January 1, 1981, and ending December 31, 2037 (reflecting all of the potential, renewal periods).

The issue was whether or not the estoppel certificate effectively extended the sublease such that a further and separate notice within the time period provided was not required.

### Decision

The court held that the estoppel certificate replaced the need to give a separate notice at least 6 months prior to December 31, 2012, as the certificate confirmed the desire to extend the sublease for the next 5 year term.

The court noted that the estoppel certificate was delivered within the required timeframe, was in writing and contained the correct information as to the premises and the parties.

However, the key considerations in finding for the tenant here seem to be the following two points:

1. the landlord had prepared the estoppel certificate and delivered it to the tenant for signing. The court found this as evidence of a clear intention on the part of the landlord that the tenant would be bound by the statements in the estoppel certificate, including the renewal of the lease; and
2. it was recognized by the court that to hold that the renewal right had not been validly exercised would be an "amazing windfall" for the landlord. The renewal terms were at the same rent. The tenant had invested a lot of money in the hotel on the property when it acquired it. It would be a "multi million dollar loss" to the tenant and a similar gain to the landlord. This seemed to be a key factor for the court.

In fact, the court held that if that analysis was not accepted, it would rely on the ability to grant relief against penalties and forfeitures to find for the tenant.

## Conclusion

Tenants of commercial properties have always been cautioned to thoroughly review and undertake due diligence to ensure that the statements in any estoppel certificate are accurate. Failure to do so can result in a landlord arguing that legal rights have changed.

This case shows that landlords must be equally careful in preparing and providing estoppel certificates to tenants. A landlord might, by what it includes in the estoppel certificate it prepares and has a tenant execute, also be changing or effecting legal rights.

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[a cautionary note](#)

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