Alberta landlord entitled to damages despite tenant not taking possession as a result of COVID-19 restrictions

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The COVID-19 pandemic led to significant stress on commercial tenancy relationships throughout Canada. Recently, the Alberta Court of King's Bench released a decision in 1218807 *Alberta v Muslim Association of Canada*, 2023 ABKB 300, related to the default of a commercial lease because of the pandemic. In the case, the Court held that the commercial landlord was entitled to damages despite the tenant never taking possession of the leased premises because of the pandemic.

Background

The Muslim Association of Canada Ltd. (MAC) entered a commercial lease (the Lease) with 1218807 Alberta Ltd. (the Landlord). MAC intended to use the vacant building (the Premises) and surrounding lands and other buildings (the Property) to establish a private Islamic school and future religious assembly (the Permitted Use) in southeast Edmonton.

The Lease for the Premises included a defined fixturing period with a specific commencement date. Section 2.6 of the Lease also contained two conditions precedent, being (i) the approval of a development permit application and (ii) approval of the Permitted Use by the City of Edmonton (the City) (collectively, the Conditions Precedent).

In March 2020, the pandemic led to restrictions on services provided by the City. As a result, MAC was unable to obtain a building safety and fire inspection, which MAC alleged could not be completed as a result of the pandemic. MAC elected to not take possession of the Premises and it took the position that the Conditions Precedent had not been met and the Lease had been frustrated.

Trial decision

Conditions Precedent

On the issue of the Conditions Precedent, the Landlord argued that any approvals required from the Government of Alberta (GOA) for MAC to operate a private school were **not** part of the Conditions Precedent. The Landlord argued that the Conditions Precedent had been met as a Development Permit by MAC had been obtained. Further, the Landlord argued that this interpretation was supported by MAC's conduct as MAC had entered a Lease Amendment which changed the condition removal date to the end of the appeal period for the Development Permit and MAC had paid a security deposit after the development permit was obtained.

MAC argued that the second Conditions Precedent of the Lease, namely the approval of the Permitted Use by the City, required actual approval or accreditation from GOA to operate the school, despite the Conditions Precedent not mentioning GOA approval specifically. MAC also argued that GOA approval for the school required a building safety and fire inspection by the City, which the City allegedly refused to complete until June 2020 due to the pandemic.

The Court held that the Conditions Precedent in the Lease were satisfied so that the Lease remained valid and enforceable. The Court found that the wording of the Lease and the context surrounding the agreement between the parties did not support MAC's position that the Conditions Precedent were tied to approvals required by the GOA; the Lease only included language specific to approvals by the City and did not mention the GOA. The Court also noted that section 2.6 did not mention building, fire or other inspections by the City, nor City building permits; rather, it spoke exclusively to development matters and the Development Permit application. The Court also noted that MAC provided evidence that the GOA approval was essential to opening a school on the Premises; however, for reasons unknown, MAC agreed to the Lease without including GOA approval in the Conditions Precedent.

Judicial notice of impact of COVID-19

The Court also considered whether judicial notice should be taken with respect to the pandemic. MAC argued that the Court should take judicial notice that the City would not engage in inspections due to the pandemic. The Landlord argued that MAC bore the onus to prove that the pandemic impacted its ability to meet its obligations under the Lease and had failed to do so.

The Court reviewed the test for judicial notice and held that it could take judicial notice of the fact of the pandemic, its impact on Canadians generally, and that in general, many entities were restricted or changed the provision of services in response to the Pandemic. However, the Court would not take judicial notice of the impact of the pandemic on the provision of services by the City.

Force majeure and frustration

MAC also argued that the pandemic prevented the triggering of rent becoming payable under the Lease and so the *force majeure* clause relieved MAC of its obligations and that the Lease had been frustrated.

The Court noted that three questions need to be addressed when consider a *force majeure* clause: (i) what are the triggering events under the clause; (ii) what is the

required impact on the party invoking the clause, and (iii) what are the consequences of that impact on the invoking party's contractual obligation.

In this case, the required impact for *force majeure* did not occur and the *force majeure* clause did not excuse MAC's obligation to pay rent. In particular, the Court noted that the Conditions Precedent were met and they were not impacted by the pandemic. MAC's failure to take possession of the Premises was not due to the pandemic. The Court also noted that MAC did not establish the third part of the test, either – the *force majeure* clause did not, directly or indirectly, permit MAC to be excused from its obligation to pay rent.

As far as frustration, the Court held that the jurisprudence is clear that frustration of a contract involves the permament, not temporary, impact of a supervening event. The Court found that any government restrictions that may have prevented MAC from getting the inspections necessary for it to move forward were temporary, not permanent. Because the Lease's 10-year term commenced on May 1, 2020, the governent restrictions did not permanently impact MAC's ability to meet its obligations under the Lease.

Key takeaways

This decision makes it clear that any conditions precedent in a lease should be clear. The failure to do may result in in a Court finding that the contract remains valid and enforceable despite said approvals not being obtained. The decision also affirms that a properly drafted *force majeure* clause will not relieve a tenant from paying rent, even if the obligations under a lease are impacted. Finally, this case again confirms that the Courts will only find that a contract is frustrated in rare situations where there is a permanent impact.

BLG acted as legal counsel to the Landlord in this action. For more information, please reach out to one of the key contacts below.

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