

**A WIN FOR LANDLORDS AT THE COURT OF APPEAL: MAPLEVIEW – VETERANS DRIVE INVESTMENTS INC. v. PAPA KEROLLUS VI INC. ET AL.**

By Ian P. Katchin, B.A. (HONS), LL.B.

On February 2, 2016 the Court of Appeal released its decision with respect to one of Fogler, Rubinoff LLP's ("FR") clients, Mapleview-Veterans Drive Investments Inc. ("Client"), which is the owner and landlord of a commercial property in Barrie on which a Mr. Sub franchise operates. The franchisee is Papa Kerollus VI Inc.

On May 28, 2015 FR brought an Application seeking a Declaration that Papa Kerollus VI Inc. ("Tenant") was in breach of the Lease, that the renewal option under the Lease was void for uncertainty and, in the alternative, a Declaration that the Tenant was in breach at the time of the renewal (due to certain defaults under the Lease) and that the Tenant's purported renewal was invalid and unenforceable.

In dismissing the Landlord's Application, Justice Mulligan stated that "there is a live issue as to the proper calculation of what the tenant owes for additional amounts. A tenant is entitled to know with some degree of accuracy what arrears exist, so that it can put itself in a position where it is not in default when exercising its right of renewal." A trial was ordered to determine the arrears.

The Landlord appealed Justice Mulligan's decision for a Judgment declaring that the Tenant was in breach of its obligations under the Lease on the date of renewal and that the term of the Lease expired on May 31, 2015. The appeal was heard on October 26, 2015. The main issue on appeal was whether the Tenant was entitled to exercise a right of renewal contained in the Lease.

The Court of Appeal held that the Application Judge erred in holding that the tenant was entitled to exercise the renewal option once the amount of rental arrears owing by it had been determined by way of a trial of that issue. The Court of Appeal found that the tenant had not satisfied its onus to show that it complied with its obligation to "[have] paid the rent and all other sums payable under [the] Lease when due" as a precondition to the exercise of the renewal option.

The Court of Appeal went on to state that the Application Judge became overly engrossed in the dispute about the proper amount of the arrears owing and focussed on how that issue could be resolved before the renewal option was exercised. That was not the issue the Application Judge was required to determine.

In allowing the appeal, the Court of Appeal ordered as follows:

1. The tenant was in breach of the Lease when it purported to exercise the renewal option;
2. The purported exercise of the renewal option is invalid and unenforceable;
3. The time for exercising the renewal option expired and the term of the Lease ended on May 31, 2015; and
4. The tenant shall have 30 days from today to vacate.

The appeal was successfully argued by the firm's litigation team, led by Milton Davis, Ian Katchin and Ron Davis. Congratulations to the team!



Milton A. Davis  
Partner

t: 416.860.6901  
mdavis@foglrs.com



Ian Katchin  
Partner

t: 416.864.7613  
ikatchin@foglrs.com



Ronald D. Davis  
Associate

t: 416.347.6765  
rdavis@foglrs.com

Fogler, Rubinoff LLP  
Lawyers  
77 King Street West  
Suite 3000, PO Box 95  
TD Centre North Tower  
Toronto, ON M5K 1G8  
t: 416.864.9700  
f: 416.941.8852  
foglrs.com