

Renewal Requirements Revisited*

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Less than three months after the decision of the Ontario Superior Court in *DW Square* (upheld on appeal), which was the subject matter of an earlier article in *Shopping Centre News*, a similar fact situation was developing in British Columbia.

A tenant purported to have sent a letter on January 30, 2002 by regular mail to its landlord, stating simply "Please be informed that we will be renewing the lease for 2459A Bellevue when it comes do [sic] in August."

Similar to the *DW Square* fact situation, the tenant claimed to have placed the rent cheque for the upcoming month in the same envelope. The tenant took the position that if the rent cheque was cashed, the notice of renewal was received ... yet just as in *DW Square*, although receipt of the rent cheque was admitted, the landlord denied receiving the notice of renewal.

It is relevant to note that both leases in issue did not specify a sole method for service of the notice of renewal. Instead, the leases had general notice provisions setting out how and when notice would be deemed to have been given.

That's the end of the similarities. In *DW Square*, upon reviewing affidavit evidence at the hearing of an application by the tenant, the court made a finding of fact that the notice of renewal was received by security personnel and that this previously accepted method of service allowed matters to go astray. What happened to the notice thereafter is unknown.

The B.C. Supreme Court held after the trial of an issue that either the tenant was "mistaken about having the notice letter in the same envelope as the rent cheque, or he was untruthful about it".

The principle relating to the service of notices of renewal was established in *Re Ross v. Eaton Co. Ltd.*: "... if an offeree wishes to depart from the method of acceptance prescribed by the offeror (which is not insisted on as the sole method of acceptance), he or she can only do so effectively if the communication is by a method which is not less advantageous to the offeror and the acceptance is actually communicated to the offeror".

Both the Ontario court and the B.C. court applied this principle. In the Ontario case, the court found that by hand-delivering the notice to the security guard at the reception area on the ground floor of the office building as opposed to sending it by registered mail to the head office of the landlord, the tenant had not used a method which was less advantageous to the landlord. The B.C. court found that a notice sent by regular mail as opposed to sending it by registered mail was less advantageous.

Needless to say, each case was determined on its specific facts. But the reoccurring themes - (1) the method of communication is to be not less advantageous to the landlord than that set out in the lease and (2) the notice must be actually communicated - are factually troublesome. The tenant says "I sent it" and the landlord says "I didn't get it".

To avoid the necessity of a court weighing the evidence at a hearing, landlords should ensure that their standard form of lease states that notice of renewal shall be given in a specified manner and that no other manner of service will be acceptable.

The issue is still brewing. An Ontario commercial tenant has brought an application returnable this December for a declaration that proper notice of renewal was given and received although not in the manner required by the lease.

The landlord says "I didn't get it". For those of you wondering ... the tenant says he sent the notice along with the rent cheque which was cashed.