COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Delane Industry Co. Ltd. v. PCI Properties Corp.,*
2014 BCCA 285

Date: 20140717
Docket: CA041131

Between:

Delane Industry Co. Ltd.

Respondent
(Plaintiff)

And

PCI Properties Corp.,
PCI Waterfront Leasing Corp.

Appellants
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Groberman

On appeal from: An order of the Supreme Court of British Columbia, dated August 2, 2013 (*Delane Industry Co. Ltd. v. PCI Properties Corp.*, 2013 BCSC 1397, Vancouver Docket No. S133593).

Counsel for the Appellant:	R.J. McDonell, R.E. Morse
Counsel for the Respondent:	S. El-Khatib, P.S. Todd
Place and Date of Hearing:	Vancouver, British Columbia June 3, 2014
Place and Date of Judgment:	Vancouver, British Columbia July 17, 2014

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman

Summary:

The plaintiff ('Delane') entered into a commercial lease with defendant ('PCIW'), and withheld rent for a period following a dispute between the parties. PCIW eventually demanded payment of approximately $120,400 in past arrears. When Delane failed to pay the outstanding amount, PCIW commenced distraint proceedings and sold some of Delane's goods, but a large amount of rental arrears remained owing.

Upon completion of distraint, PCIW purported to terminate the lease, relying on a notice of default given to Delane before distraint had been completed. Delane applied in Supreme Court below for inter alia a declaration that the lease had not been effectively terminated. The summary trial judge found that by electing to distrain, the landlord had affirmed the lease and waived its right to terminate on the basis of the unpaid rent. A "cumulative remedies" clause in lease did not change this result. The judge granted the declaration sought and stated that PCIW would have to provide a new notice, complying with the terms of the lease (including a five-day notice requirement) in order to effect a forfeiture. He also implied that it would be open to PCIW in such notice to terminate based upon the rental arrears that had cumulated before or during the distraint – i.e., that a new breach would not be necessary before PCIW could terminate.

Held: *The appeal was dismissed, although the trial judge had erred in his suggestion that PCIW could terminate the lease by the giving of a new notice of default, based on the "old" rental arrears.*

Longstanding case law indicates that because distress may be exercised only during the existence of a lease, the lease may not be terminated when distraint is ongoing. The taking of distraint proceedings amounts to an irrevocable election to affirm the lease and waive past breaches which had led to the distraint. Suggestions in some cases that distraint only "suspends" the right to terminate on the basis of the past breaches are incorrect and failed to give effect to the doctrine of election. This conclusion is compatible with general contract law principles, which are now relevant to the law of commercial leases: see Highway Properties (SCC).

Once distraint was complete, the landlord was entitled to sue for the outstanding arrears; however, in order to exercise a right of forfeiture, there must be a new breach of the lease, and fresh notice given as required.

There was no merit to the landlord's argument that Delane was estopped from claiming that the termination was ineffective.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The first question raised by this appeal is whether a commercial landlord who in response to the non-payment of rent by its tenant elected to levy distress in respect of certain of the tenant's chattels, may upon completion of the distress terminate the lease on the basis of continuing arrears – without giving a 'fresh' notice of default that complies with the terms of the lease. For reasons indexed as 2013 BCSC 1397, Mr. Justice N. Smith in the court below answered this question in the negative and declared that a notice of default given by the landlord while distress was ongoing was not effective to terminate the lease immediately upon completion of the distress. A "cumulative remedies" clause in the lease did not change this result.

[2] A second and more difficult question arises out of a statement that the trial judge made but which was not reflected in the Court's formal order – whether it would be open to the landlord, in its 'fresh' notice of default, to claim rental arrears that pre-dated the distress proceedings and, if the arrears remained unpaid following the required notice period, to terminate the lease on that basis. The judge found, at least impliedly, that this course was available.

[3] For the reasons that follow, I agree with the Court's conclusion on the first point and would therefore dismiss the appeal. However, I do not agree with the suggestion that if and when the landlord issues a new notice of default, it may rely on rental arrears that accrued prior to the completion of the distress as the basis for terminating the lease. In the result, any new notice of default would have to be based on a 'new' default or breach by the tenant and would have to comply with the requirements set out in the lease for termination by the landlord.

Factual Background

[4] The premises which are the subject of the lease in this case form part of the retail space in the Vancouver Convention Centre on the downtown waterfront. The premises were leased by B.C. Pavilion Corporation to the appellant PCI Properties

Corp. ("PCI") and in turn subleased to the other appellant, PCI Waterfront Leasing Corp. ("PCIW"), a related corporation. PCIW granted two subleases to the respondent Delane Industry Co. Ltd. ("Delane"), one for a gift store and one for an ice cream parlour. It is the sublease of the gift store space with which we are concerned. Like the court below, I will refer to the sublessor (and its agents) as the "landlord", to the sublessee as the "tenant", and to their sublease as the "Lease".

[5] The rent payable by Delane under the Lease was $8,287.50 per month for the first five years of the initial ten-year term, plus an amount equal to 6% of Delane's gross sales from the gift shop. The Lease provided as follows with respect to the remedies available to the landlord on a breach by the tenant:

> **13. DEFAULT AND THE LANDLORD'S RIGHT TO CURE DEFAULT, EARLY TERMINATION**
>
> **13.1 Default**
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> The Tenant covenants with the Landlord that:
>
> (a) in the event of a breach of any covenant, agreement, stipulation, proviso, condition, rule or regulation herein contained on the part of the Tenant to be kept, performed or observed, the Tenant will promptly implement corrective action to remedy the breach, and if such breach is not cured within twenty-one (21) days after the Landlord has given Notice of the breach to the Tenant or, if such breach cannot reasonably be cured with the exercise of all due diligence within such twenty-one (21) day period given the nature of the default, within such longer period as is reasonably required to cure such breach provided the Tenant makes continuous, diligent and commercially reasonable efforts to cure such breach until so cured; or
>
> (b) notwithstanding the foregoing:
>
> (i) if any overdue Rent is not paid in full within five (5) days after written demand by the Landlord; or
>
> (ii) if the Premises or any portion thereof shall, without the prior written consent of the Landlord, be used or occupied by any person other than the Tenant or its permitted Transferees or for any purpose other than the purpose expressly permitted by this Lease or by any person whose occupancy is prohibited by this Lease;
>
> . . .
>
> then and in any such case and in addition to any other remedy now or hereafter provided under the terms hereof or at law or in equity:

(c) the Landlord may re-enter and take possession of the Premises or any part thereof in the name of the whole and have again, repossess and enjoy the Premises in the Landlord's former estate, anything herein to the contrary notwithstanding; and the Term will, at the option of the Landlord, forthwith become forfeited and this Lease terminated; and any obligations of the Tenant accruing hereunder prior to the date of such re-entry and termination will not be affected or in any way limited by such re-entry and termination but will survive and the Tenant will save harmless and indemnify the Landlord from any and all loss, costs, damages, claims and expenses which the Landlord may suffer or incur by reason of such termination of this Lease notwithstanding such termination;

. . .

(e) the Tenant shall pay to the Landlord on demand:

(i) Rent up to the time of re-entry or termination, whichever shall be the later, (plus accelerated rent as provided in Section 13.3(j) if that Section applies);

. . .

13.2 Re-Entry

Upon the Landlord becoming entitled to enter or re-enter the Premises hereunder the Landlord may do so by force if necessary without any previous Notice of intention to re-enter and may remove all persons and property therefrom and may use such force and assistance in making such removal as the Landlord may deem advisable to recover full and exclusive possession of the Premises and such re-entry will not operate as a waiver or satisfaction in whole or in part of any right, claim or demand arising out of or in connection with any breach, non-observance or non-performance of any covenant or agreement on the part of the Tenant to be kept, observed or performed hereunder.

. . .

13.4 Termination

The Tenant further covenants and agrees that on the Landlord becoming entitled to re-enter the Premises under any of the provisions of this Lease, the Landlord in addition to all other rights, will have the right to terminate forthwith this Lease and the Term by giving Notice to the Tenant of its intention so to do, and thereupon Rent will be computed, apportioned and paid in full to the date of such termination of this Lease, and the Tenant will forthwith deliver up possession of the Premises to the Landlord and the Landlord may re-enter and take possession of the same.

13.5 Distress

. . . The Tenant waives and renounces the benefit of any present or future statute taking away or limiting the Landlord’s right of distress, and covenants and agrees that notwithstanding any such statute none of the goods and chattels of the Tenant on the Premises at any time during the

> Term will be exempt from levy by distress for rent in arrears. If the Landlord levies distress in respect of any of the Tenant's property (such as computers) which contain personal and confidential information in respect of the Tenant's customers, the Landlord will provide the Tenant with a reasonable opportunity to remove such information prior to the Landlord disposing of the Tenant's property.
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> . . .
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> **13.7 Remedies Cumulative**
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> No remedy conferred upon or reserved to the Landlord herein, or by statute or otherwise, will be considered exclusive of any other remedy, but the same will be cumulative and will be in addition to every other remedy available to the Landlord and all such remedies and powers of the Landlord may be exercised concurrently and from time to time and as often as may be deemed expedient by the Landlord. [Emphasis added.]

Obviously, the purpose of the 5-day notice requirement in Art. 13.1(b)(i) was to give the tenant time within which to remedy a default with respect to rental arrears.

[6] At some point in late 2011, a disagreement arose between the parties regarding Delane's assertion that it was entitled to an *exclusive* right to sell souvenirs of Canada at the Convention Centre and to place displays immediately outside the shop with the landlord's consent. According to Delane, the landlord was withholding its consent arbitrarily. The tenant began to withhold rent in December 2011. From then until March 2012, it withheld rent entirely, and from April 2012 to March 2013, it withheld half the rent. After March 2013, it paid no rent at all.

[7] Various letters, demands and responses passed between the parties over the period between early 2012 and April 2013. Then, on April 18, 2013, PCIW through its agent wrote to Delane stating that rent of $120,358.21 was due and owing and demanding payment no later than April 30. Failing this, the landlord said it would "pursue its rights and remedies as outlined in the Lease Agreement and at law. As per Section 13.1 (C) (D), such remedies may include early termination of lease as well as seizure and liquidation of assets to cover the outstanding account balance."

[8] Evidently, Delane did not pay the outstanding balance. On May 3, the landlord issued a distress warrant through a firm of bailiffs, which seized certain goods and chattels of the tenant. The bailiffs issued a notice of seizure confirming

that unless the sum of $101,663.09 plus costs, charges and expenses was paid within five days of the date of the notice, the bailiff would "cause the said goods to be sold as the Rent Distress Act allows and the Law permits." On May 14, (i.e., while distress was underway) PCIW gave another notice of default to the tenant, stating the amount of rent then due as $112,298.72 and demanding payment within five days. Delane immediately sought an order in the Supreme Court of British Columbia to enjoin the distress proceedings, but its application was dismissed by Pearlman J. on May 27, 2013; a second application, brought *ex parte* to enjoin PCIW's purported termination of the Lease, was dismissed on May 31 by Cohen J. on the basis that damages would be an adequate remedy.

[9] On May 29, 2013, the bailiff agreed to sell the chattels it had seized to Bossini Retail Group Corp., a company related to Delane, for the sum of $9,500 plus tax. (The bailiff's services were later invoiced at almost double this amount.) Immediately after the sale had closed, PCIW purported to terminate the Lease for non-payment of rent. The material portion of its letter to the tenant stated:

> We hereby give notice to you, Delane Industry Co. Ltd. and Mr. Karry Au-Yeung, that we hereby terminate the Lease effective immediately, pursuant to our rights as landlord under the Lease arising from the tenant's default in the payment of Rent under the Lease.
>
> Take notice that notwithstanding termination of the Lease, PCI Waterfront Leasing Corp. hereby expressly reserves all its rights and remedies under the Lease and the Indemnity Agreement between PCI Waterfront Leasing Corp. and Mr. Karry Au Yeung dated December 21, 2010 and at law and in equity, including, without limitation,
>
> (a) to apply any deposit we hold to amounts owing under the Lease,
>
> (b) to recover from you all Rent (including, without limitation, Annual Base Rent, Percentage Rent, the Tenant's Proportionate Share of Operating Expenses, the Tenant's Share of Taxes and HST/GST, together with interest) up to the date hereof, accelerated rent as provided in the Lease, and any other amounts owing under the Lease,
>
> (c) to recover from you any and all loss, costs, damages, claims and expenses suffered or incurred by us or on our behalf by reason of your default and the termination of this Lease, notwithstanding such termination, including, without limitation, all professional and legal fees on a solicitor and own client basis,

> (d) to recover from you all costs and expenses incurred by us or on our behalf in exercising our right to distrain, to re-enter the Premises and to terminate the Lease, and
>
> (e) to recover from you all prospective damages as a result of our loss of the benefit of the Lease and the income that we would have received therefrom over the balance of the term of the Lease (had it not been terminated.)

(It will be noted that the landlord did not in this notice give the tenant five days in which to remedy its default; nor did it state the amount of rent due and owing following the sale.) On the same day, May 29, PCIW changed the locks of the premises.

[10] On June 12, 2013, PCIW also gave notice of default to Delane in respect of the ice cream parlour lease, demanding that the rent owing thereunder up to June 1 be paid within five days. The landlord also stated the total amount due under the (gift shop) Lease:

> You are also in default under Section 13.1(b. 1) of the Ice Cream Parlour Lease by reason of your failure to pay when due amounts payable under the commercial sublease between PCI Waterfront Leasing Corp. and Delane Industry Co. Ltd. for Unit 20 (Unit 5C), Vancouver Convention Centre Expansion Project dated December 21, 2010, as amended (the "Gift Store Lease") and your failure to cure such breach within the time required. The amount owing in respect of the Gift Store Lease as of May 31, 2013 including interest to that date is $178,542.35, plus the balance of the rent distress costs in the amount of $8,743.75, for a total of $187,286.10, plus interest and costs after May 31, 2013. We hereby demand immediate payment of this amount plus interest and costs after May 31, 2013. If you fail to make such payment immediately, we shall have the right to exercise all of our rights and remedies under the Ice Cream Parlour Lease, at law and in equity including, without limitation, the rights and remedies set out in Article 13 of the Ice Cream Parlour Lease. [Emphasis added.]

[11] Having already begun the civil action against PCI and PCIW in connection with its attempt to enjoin the distress, Delane amended its pleadings. By its Amended Notice of Civil Claim filed on June 11, 2013, it sought an order, *inter alia*, enjoining the landlord from re-letting and re-entering the premises; an order allowing the tenant to pay future rent into trust pending disposition of the action; a declaration that the landlord had breached the Lease and was estopped from claiming full rent under the Lease until it had performed its obligations; specific performance;

damages; a declaration 'reinstating' the Lease; and relief from forfeiture. In connection with this final prayer, the pleading stated:

> 15. Courts will generally grant relief from forfeiture more readily when the dispute between the parties concerns only the non-payment of rent.
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> *Ostanek v. Schwartz* [1943] 1 W.W.R. 506 (B.C. Co. Ct.)
>
> *Amadon Properties Ltd. v. Pacific Apparel Ltd.* (1990), 13 R.P.R. (2d) 186
>
> In the case at bar, the Landlord had terminated the SubLease solely as a result of non-payment of rent. The Court should use its equitable discretion to grant the Plaintiff relief from forfeiture in these circumstances.
>
> 16. Where a dispute is purely monetary and there is significant prejudice to the tenant's business, courts will generally grant relief against forfeiture. [Emphasis added.]

In its Response, the landlord asserted *inter alia* that the Lease had been terminated on May 29, 2013.

[12] By a Further Amended pleading filed on June 26, Delane sought additional relief, including a declaration "that the Notice of Termination issued by [PCIW] on May 29, 2013 is illegal and of no valid force and effect" and in the alternative, relief from forfeiture. Notably, it also sought an order that the arrears of rent, which were now stated to be in the amount of $112,517.51, be paid into court or alternatively, to PCIW "without prejudice to the Plaintiff's right to claim an abatement of rent or an accounting of the funds duly owed" under the Lease.

[13] In its Response, the landlord again took the position that the Lease had been terminated by the May 29 notice. It also asserted that the tenant had admitted in its *ex parte* application filed in Supreme Court on May 31 that the Lease "had, in fact, been terminated and forfeited" – a contention clearly denied by counsel for Delane in a letter to counsel for PCIW prior to trial. Delane states in its factum that at all material times it was "willing and able to pay the arrears in rent."

[14] On June 26, 2013, Delane applied under R. 9-7 of the *Supreme Court Civil Rules* to have the matter tried by summary trial. The trial was heard by Smith J. on July 9 and he issued his reasons, indexed as 2013 BCSC 1397, on August 2, 2013.

No challenge is taken from his implicit finding that the case was suitable for summary determination.

The Summary Trial Judge's Reasons

[15] The trial judge began his analysis with the principle that, as stated in H.M. Haber, *Distress: A Commercial Landlord's Remedy* (2001):

> Termination is fundamentally inconsistent with a distress. A distress represents the landlord's clear choice to treat the lease as subsisting, despite the tenant's breach, and operates as a waiver of any default of the tenant up to the time of distress that gives rise to a right of forfeiture in the landlord. For this reason, it is said that the landlord's remedies of forfeiture (termination) and distress are mutually exclusive, meaning they cannot both be exercised with respect to any one default in payment of rent." [At 85, quoted at para. 9 by the trial judge; emphasis added.]

The fact that distress is inconsistent with termination was not disputed by PCIW. It took the position, however, that it was entitled to terminate the Lease *after* distress had been completed. Thus it did not rely on the April 18 notice, but on the May 29 letter, quoted above at para. 9, as the basis for its purported forfeiture of the Lease.

[16] Smith J. found that the May 29 letter did *not* effect the termination because the right to terminate post-distress was subject to the terms of the lease, including compliance with any notice requirements. On this point, he again cited Haber, *supra*, where it was said that:

> Only when the landlord has successfully completed a distress by selling the tenant's goods and a deficiency remains or additional arrears accrue thereafter, is the landlord free to terminate the lease *in accordance with its terms* without prejudicing the prior distress. [At 85-6.]

[17] The sole authority relied on by Haber was *Tsoukalas v. Domgroup Properties Ltd.* (1993) 33 R.P.R. (2d) 317 (Ont. Ct. (Gen. Div.)). In *Tsoukalas*, a landlord purported to terminate a lease four days after selling goods of the tenant taken in distress. The Court ruled that the termination was unlawful because the landlord had not, on completion of its distress proceedings, given the 15 days' notice of termination required by the lease and had not specified the precise amount of rent

due after crediting the sale proceeds. In the course of his reasons Rosenberg J. stated:

> A distress for rents suspends the landlord's right of action for recovery of the rent, and the suspension continues so long as the goods distrained remain in the landlord's hands as a pledge unsold no matter what proportion the value of the goods bear to the amount due ... [At para. 37.]

(Citing *Lehain v. Philpott* (1875) L.R. 10 Exch. 242; *Gray v. Curry* (1890) 22 N.S.R. 262; *Smith v. Haight* (1990) 4 Terr. L.R. 387; *Fawell v. Andrew* [1917] 2 W.W.R. 400; and *Hoyes v. Creery* [1918] 1 W.W.R. 873.) As noted by the trial judge in the case at bar, the notice of termination issued by PCIW on May 29, 2013 had also failed to comply with the five-day notice requirement specified in the Lease for termination. (Para. 17.)

[18] In answer to Delane's reliance on *Tsoukalas*, PCIW relied on Art. 13.7 of the Lease, the "cumulative remedies" provision quoted above. Smith J. rejected this argument, noting rulings to the contrary in *Delilah's Restaurants Ltd. v. 8-788 Holdings Ltd.* (1994) 46 B.C.A.C. 201 (C.A.) and *Rex v. Paulson* [1921] 1 A.C. 271 (J.C.P.C.). In the latter case, Lord Atkinson reasoned as follows concerning a landlord's acceptance of rent after becoming aware of a breach that would have entitled him to forfeit the lease:

> …The authorities appear to their Lordships to establish that the landlord, by the receipt of rent under such circumstances, shows a definite intention to treat the lease or contract as subsisting, has made an irrevocable election so to do, and can no longer avoid the lease or contract on account of the breach of which he had knowledge. They further think the presence in a lease or contract of a provision requiring a waiver to be expressed in writing, such as exists in the present case, does not render inapplicable the principle established, and does not enable the landlord at the same time to blow hot and cold, to approbate and reprobate the same transaction … [at 282-3, emphasis added].

[19] As well, the trial judge noted *Fitkid (York) v. 1277633 Ontario Ltd*. [2002] O.T.C. 749 (Ont. S.C.), in which a landlord who had issued a notice of default was not permitted to rely on a 'non-waiver' clause in accepting partial rent payments before terminating the lease; and *General Motors Acceptance Corp. of Canada v.*

Arthur Bell Holdings Ltd. [1990] B.C.J. No. 1725 (S.C.), in which the Court stated that "effect will not be given to a provision in a lease which tends to preserve the right to distrain for accelerated rent, notwithstanding the exercise of the right to forfeit…". (Citing *Re Lussier and Denison* (1972) 3 O.R. 652 (Ont. Co. Ct.) at 655.)

[20] Smith J. reasoned here that the converse of *General Motors* must also be true. In his words:

> It follows that the converse must also apply: effect will not be given to a provision that preserves the right of forfeiture when the right of distress has been exercised. A clause making all remedies cumulative and allowing them to [be] exercised concurrently cannot be extended to permit concurrent remedies that are, by definition, inconsistent and mutually exclusive.
> [At para. 22, emphasis added.]

In the result, he held that the notice of termination dated May 29 had not been effective to terminate the Lease. At the same time, he said, there was nothing now to prevent PCIW from issuing a *new* notice of termination that complied with the Lease and stated the exact amount then due and owing by Delane. (Para. 25.) As I understand it, the trial judge was here contemplating that it would be open to the landlord in the new notice to cite rental arrears which accrued due before or during the distress proceedings, as the basis for termination under Art. 13.1(b)(1).

[21] Smith J. also rejected the landlord's submission that Delane's default under the ice cream parlour lease had entitled PCIW to terminate the (gift shop) Lease. Again in the trial judge's words:

> The May 29 notice of termination of the gift shop lease does not purport to be based on any default under the ice cream shop lease. It could not have been, because the ice cream shop lease also requires five days' notice of termination for unpaid rent, with the tenant given the opportunity to pay the outstanding amount within that time. No such notice was given in respect of the ice cream shop until June 12, 2013 – two weeks after the termination of the gift shop lease now at issue. [At para. 24.]

[22] The Court's order declared that the notice of termination of May 29, 2013 had not been effective to terminate the Lease. The order itself did *not* declare that it was open to PCIW to terminate the Lease upon giving a fresh notice as implied by the

trial judge, but since that conclusion was challenged by the tenant in its factum and in oral argument (although not by a cross appeal), I will deal with it in these reasons.

On Appeal

[23] In its factum, the appellant PCIW asserts the following errors in judgment on the part of the trial judge:

> The Chambers Judge erred by holding that PCIW was not entitled to terminate the Gift Shop Lease on May 29, 2013, by issuing the May Notice of Termination. In reaching this conclusion, the Chambers Judge:
>
> (a) failed to properly apply the principle that distress suspends but does not permanently stay a landlord's remedies for unpaid rent;
>
> (b) erred by holding that with respect to the May Notice of Default PCIW had chosen to seek distraint and not termination; and
>
> (c) erred by holding that PCIW was required to issue another notice of default prior to terminating the Gift Shop Lease.
>
> Further and in the alternative, even if the Gift Shop Lease was not validly terminated Delane is estopped from denying the effectiveness of the May Notice of Termination. While PCIW did not raise the estoppel argument before the Chambers Judge, this Court should exercise its discretion and consider the estoppel argument.

I propose to deal with subparagraphs (a), (b) and (c) of the first ground of appeal together, given that they are all closely related.

Election/Waiver/Suspension

[24] It may be helpful to begin by reviewing some of the case law (much of it rather old) dealing with the consequences of a landlord's taking distress proceedings against a tenant. The common law is clear that distress proceedings and the termination, or forfeiture, of a lease are inconsistent remedies and that distress may be exercised only during the subsistence of a lease. Thus Crompton J. stated in *Ward v. Day* (1863) 122 E.R. 486 (Q.B.):

> The doctrine of waiver by distress and of waiver by receipt of rent depend on two different principles. Waiver by receipt of rent only applies to rent accruing subsequent to the forfeiture, and that is not the present case. There is no inconsistency in a man who is given notice to determine a tenancy receiving rent due before the supposed determination of it, and consequently there is no waiver by receiving that rent, as was expressly determined in *Green's*

> *Case* …. Waiver by distress depends upon a different principle, *viz*, that at common law a distress for rent can only be made during the existence of the tenancy; and the rent used to be made to be due before the last day of the tenancy, so that the lessor might distrain for it before the actual determination of the tenancy; and if the lessor chooses to distrain for rent after the tenancy has determined, that shews that he considers the tenancy as subsisting, as was decided in 14 Ass. pl. 10, cited in Plowden, 133. According to the doctrine of election, he treats the reversion as existing, and the rent as still accruing from time to time, instead of electing to take the land from the tenant. The doctrine of waiver rests on the inconsistency of a man saying, by his distress, that a tenancy is subsisting when by claiming a forfeiture he asserts that it has been determined. [At 492; emphasis added.]

[25] This principle has been reaffirmed in many cases to present times (see, e.g., this court's decision in *Baywest Properties Ltd. v. Stratheden Properties Ltd.* (1992) 83 B.C.L.R. (2d) 21 (C.A.), where it was said that having distrained, a landlord had "waived any right of forfeiture existing up to the time of distress, and while the distress continued" (at para. 48); and *Black v. Stebnicki* [1930] 4 D.L.R. 715 (Man. C.A.)). As with many applications of the doctrine of election, the underlying rationale is normally said to be that it would be unfair to the tenant to permit the landlord "at the same time to blow hot and cold, to approbate and reprobate the same transaction." (See *Rex v. Paulson*, *supra*, at 283.)

[26] The older authorities seem to have used the terms "election" and "waiver" almost interchangeably in this context. Today, it may be said that "the fact that a person has elected one option results in the waiver of the other .... Waiver is the result of the process of election." (B. MacDougall, *Estoppel* (2012) at §7.14.) On the other hand, it will be seen below that not all the authorities equate a landlord's 'election' to exercise distress by reason of non-payment of rent or other breach of the lease as a 'waiver', or at least a 'permanent waiver', of the right to terminate a lease *by reason of the same breach*.

[27] This brings us to the question of the effect of an election to distrain a tenant's goods. What exactly does the landlord "waive" by electing to distrain? In *Ward v. Day* Blackburn J., as he then was, described the landlord's choice to distrain as an election "once for all". (At 493.) His Lordship continued:

> … Most of the cases in which the doctrine of election has been discussed have been cases of landlord and tenant, under a regular lease, in which has been reserved a right of re-entry for a forfeiture, that is, an option to determine the lease for a forfeiture; but this doctrine is not, as Mr. Russell seems to think, confined to such cases. So far from that being so, the doctrine is but a branch of the general law, that, where a man has an election or option to enter into an estate vested in another, or to deprive another of some existing right, before he acts he must elect, once for all, whether he will do the act or not. He is allowed time to make up his mind, but when once he has determined that he will not consider the estate or lease, whichever it may be, void, he has not any further option to change his mind. [At 493.]

[28] The principle of election was applied by Master Funduk in *A & M Enterprises Ltd. v. B.J. Millwork Ltd.* (1985) 61 A.R. 283, who observed that having distrained, a landlord could not later purport to terminate "for the same breach". In his analysis:

> Any discussion about mutually exclusive remedies invariably brings into the discussion the question of election, if the innocent party has done any positive act. Has the innocent party, by his actions, exercised one of the remedies? If he has he cannot then purport to exercise the remaining remedy. An election between two mutually exclusive remedies, once made, is irrevocable. There is no turning back once a remedy has been exercised.
>
> In the context of the problem there are three possible fact situations. First, the landlord forfeits the balance of the tenant's term and *later* purports to levy distress for the rent arrears. That is the *Swenson* situation [see *Swenson v. McIlmoyle* [1930] 3 W.W.R. 364 (Alta. C.A.)]. The legal result is clear in that situation. Having elected to exercise the right of forfeiture, the later distress by the landlord is illegal. He had no right in law to levy distress.
>
> Swenson was followed in *Coopers and Lybrand v. Royal Bank of Canada*, [1982] 5 W.W.R. 156 (Sask. Q.B.), where a forfeiture took place on August 13 and a distress for rent was made on October 1st.
>
> The second situation is where the landlord distrains and forfeits (or forfeits and distrains) at the same time. That is the *Country Kitchen* situation [See *Country Kitchen Ltd. v. Wabush Enterprises Ltd.* (1981) 35 Nfld. & P.E.I.R. 391 (Nfld. C.A.)]. In this kind of situation the cases do not entertain niceties about time factors or consider philosophical concepts about whether one act preceded the other. What it comes down to is that if both the distress and the forfeiture were done as part of one continuing course of action the law will not allow the landlord to then choose between the distress and the forfeiture.
>
> In my view, the rationale for these one continuing course of action situations is to prevent the landlord from playing games. If an election is involved and the landlord does both mutually exclusive acts contemporaneously (which is legally impossible), the law conclusively deems the landlord to have elected to forfeit the balance of the term. It is a pragmatic approach to a situation where the landlord is attempting to have the best of both worlds. The landlord cannot distrain and forfeit, simultaneously or separately. If he has done both separately he has unequivocally elected the first, so the second is illegal. If

> he does both simultaneously he is not allowed to then choose between the two acts. The law makes the choice by declaring that he has elected to forfeit, with the result that the distress is illegal.
>
> *Country Kitchen* was followed in *Beaver Steel v. Skylark Ventures*, 47 B.C.L.R. 99 (S.C.), where the distress and forfeiture took place simultaneously.
>
> The third situation is where the landlord distrains for rent arrears and some time later (as a separate act) forfeits for the same breach that gave rise to the distress for rent. That too is a straight forward application of the election principle found in *Swenson*, except the facts are reversed. However, the concept of election still remains and dictates the result. The distress is an unequivocal election to continue the landlord and tenant relationship and any subsequent forfeiture *for the same breach* is illegal. [At paras. 25-31; emphasis by underlining added.]

[29] A similar view was taken in *Malva Enterprises Inc. v. Rosgate Holdings Ltd.* (1993) 104 D.L.R. (4th) 167 (Ont. C.A.), where Morden A.C.J.O. observed:

> A breach of the covenant to pay rent is not a continuing breach. This means that Rosgate did not have "an ever-recurring new right of election" (Ewart, *Waiver Distributed* (1917) at p. 182) to forfeit the lease for the past breaches after seeking to recover the rent to December. Once a right to forfeit for a breach has been waived it cannot be revived. It follows that Rosgate waived its rights to forfeit for each of the breaches resulting from non-payment of rent up to December. In the result, in so far as Rosgate sought to rely on the non-payment of all of the arrears to December of 1992, in asserting its right to forfeit on January 25, 1993, I think, with respect, that it was not entitled to do so. [At 177; emphasis added.]

[30] Other courts have characterized the landlord's right to forfeit and re-enter as being "suspended" during the distress process – a term that might suggest only a temporary "freezing" of the right to terminate a lease *while distress is ongoing*. *Lehain v. Philpott*, *supra*, has been cited for this proposition, although it did not deal with termination. It was concerned with the right of a landlord who had distrained for rent but had not sold the seized goods, to *sue for rent* once the distress had proven insufficient to satisfy the arrears. The Court ruled that *as long as the distress continued*, the landlord could not sue in debt and that "if the distress [i.e., the distrained goods] was held, it was immaterial what was its value, and could not properly be decided, and therefore enough of the plea was proved to make a defence". (At 250.) In the course of giving his reasons for the Court, Cleasby B. stated:

> Upon the question whether levying distress for rent took away or suspended the right to maintain a personal action to recover it while the distress continued, we were referred to many authorities.
>
> In the case of cattle taken damage *feasant*, and impounded and detained as a distress, the authorities clearly established that no action of trespass is maintainable so long as the distress is detained or not accounted for. This was determined after full argument, in very clear judgments from Holt, C.J., and other judges in *Vaspor v. Edwards*. [12 Mod. 658.]
>
> This has never been dissented from, and the reason of the conclusion is that when the law gives a man two remedies, one by a sort of execution by levying a distress, and the other by a personal action, he cannot, if he choses to resort to the former, have his action as long as the distress is in force. It seems to have been considered in early times that when a man adopted his remedy by distress which the law gave him, he made an election, and could not afterwards have his personal action at all; and Turton, J., in the beginning of his judgment in the case referred to, says, "The plaintiff had his election of two remedies, trespass or distress, and using of one is an utter waiver of the other", and Littleton (2), ss. 219, agrees with this. But this doctrine of election, founded originally upon some distinction between a real remedy and a personal one is, I should say, obsolete, and all the late authorities take no notice of it, though it would have been conclusive if effectual. …
>
> There are certainly good reasons for holding that a man who is distrained for rent shall not have his action until the result of the distress is ascertained; for by taking the distress he compels the tenant either to lose his goods (or before the statute 2 Wm. & M., sess. 1, c. 5, the use of them), or replevy …. It is therefore reasonable to say that the landlord who has compelled the tenant to bring his action to try the right to the rent shall not have his own action until the former is disposed of. And the authorities … are clear upon the subject. [At 245-6; emphasis by underlining added.]

[31] Referring still to *Vaspor v. Edwards*, Cleasby B. agreed with the comment of Holroyd J. that "if debt [i.e., an action in debt] were brought for the arrears while the goods were under distress, the tenant might plead the distress in answer, which shews that the debt was for the time suspended." (My emphasis.) In summary, Cleasby B. continued:

> The above reasons and authorities seem to establish clearly that the existence of the distress is an answer to an action for the rent. In the case last referred to it appeared, no doubt, that the distress was of sufficient value to satisfy the rent, but all the authorities proceed upon the general principle that the taking and holding of the pledge takes away the right to bring the action, without reference to the value .... As long as the distress remains, the tenant cannot tell what amount to pay into Court to satisfy the uncertain balance. It certainly seems more reasonable to say, in accordance with the precedents and current of authorities, that the levying the distress for the whole rent suspends the remedy for the whole rent as long as the distress

> continues a pledge. If the goods were insufficient to meet the whole arrears, the landlord might have distrained in respect of one month's rent, and have proceeded by action for the residue. [At 248; emphasis added.]

[32] Many of the authorities were considered by the Manitoba Court of Appeal in *Black v. Stebnicki, supra*. Unlike *Lehain*, it did deal with the landlord's right of re-entry on a purported termination. The facts of *Black* were complicated: the rent was $100 per month payable in advance and the lease contained a proviso for re-entry if it was unpaid for 15 days. A dispute arose between the parties and the landlord refused to accept a cheque for the May rent on May 1. He had commenced an action against the tenant on April 2 for possession of the premises. On June 11, while the tenant was out of town, the landlord distrained for $200 (rent for May and June) and placed a padlock on the door. On June 17, he changed the lock on the door and advertised the premises for rent. On the same day, he cashed the cheque given to him for the May rent. On June 20, the tenant paid the bailiff $110 for the June rent and the costs of distress and thereupon demanded possession of the premises. The trial judge held that the landlord's re-entry had been unlawful, but that his occupation from June 16 on had been lawful, and gave the tenant judgment for the return of certain chattels and $441.

[33] On appeal, the tenant sought greater damages, submitting that the eviction had been wrongful throughout and that "the defendant had no right, while holding a distraint for the June rent to re-enter for non-payment of that very rent." (At 716; my emphasis.) The landlord argued in response that although his distraint had "waived any right of re-entry existing at the time of the distraint", he did not waive any such right arising *after* the distraint and that since the right to re-enter for non-payment of the June rent did not arise until after June 15, his re-entry had been lawful. The Court rejected this submission. Fullerton J.A. observed:

> In *Williams on Landlord and Tenant* [presumably the 1st ed., 1922], the law is thus stated:
>
> > The levying of a distress for the whole rent suspends the remedy by action for the whole rent, as long as the distress continues a pledge — that is, until sale, no matter what proportion the value of the goods bears to the amount due.

> It would seem strange indeed if while distress deprived the landlord of his remedy by action for the rent it left him the right to re-enter for default in payment. [At paras. 6-7; emphasis added.]

Trueman J.A. referred to several authorities affirming that a distress "waives any forfeiture not only up to the day on which the rent distrained for was due, but up to the day of the distress itself." (At 721.) In the result, the tenant was granted judgment for $1,200 in damages for conversion and eviction.

[34] The "suspension" terminology was, as the trial judge observed, adopted in *Jorgenson v. Englestad* [1924] 2 D.L.R. 635 by the Saskatchewan Court of Appeal at 644 and in *Tsoukalas* at para. 37. It has also been adopted by the 6th edition of *Williams and Rhodes Canadian Law of Landlord and Tenant*. A passage from this text was cited by the trial judge para. 11 of his reasons:

> A distress for rent suspends the landlord's right of action for recovery of rent, and the suspension continues so long as the goods distrained remain in his hands as a pledge unsold, no matter what proportion the value of the goods bears to the amount due. [At §72; emphasis added.]

Again, as in *Lehain*, this reasoning refers to an action for rent, rather than a right of termination.

[35] As noted above, Haber writes that a distress "operates as a waiver of any default of the tenant up to the time of distress that gives rise to the right of forfeiture in the landlord", citing *inter alia Ward v. Day*, *Black v. Stebnicki*, and *A & M Enterprises*, all *supra*. However, the author goes on to observe:

> Only when the landlord has successfully completed a distress by selling the tenant's goods and a deficiency remains or additional arrears accrue thereafter, is the landlord free to terminate the lease *in accordance with its terms* without prejudicing the prior distress. [At 85-6; emphasis by underlining added.]

On this point, Haber cites only *Tsoukalas*.

Application to this Case

[36] On its appeal, the landlord agrees with the (implicit) finding of the trial judge that its distress proceedings "suspended" its right to terminate the Lease; and acknowledges that on the authorities, the "cumulative remedies" clause in the Lease does not alter this fact. It also asserts that, as the trial judge suggested, it was entitled to terminate the Lease "once the distress process was complete, providing that Delane still owed PCIW outstanding rent." Where the landlord parts company from the court below is with respect to the conclusion that PCIW could not rely on either the notice of default given on April 18, 2013 (prior to the distress) or the notice given on May 14 (during the distress procedure), but had to make a new demand for the rental arrears and give the tenant five days in which to pay in accordance with Art. 13.1(b)(1) before it could terminate the Lease. Thus the landlord states in its factum:

> Respectfully, [the trial judge's] conclusion is inconsistent with the nature of distress, which does not permanently stay other remedies but merely suspends them. Delane was in breach of the Gift Shop Lease before PCIW distrained the goods. That breach continued after the Goods were sold and distraint came to an end, since Delane remained in arrears for rent. Since the breach continued after completion of the distress, PCIW was entitled to sue for the unpaid rent (less the amount recovered in distress) or terminate the Gift Shop Lease. No further breach or further notice of default was required before PCIW could exercise its right to terminate. [Emphasis added.]

[37] As a related argument – and still relying on the notion that the commencement of distress proceedings does not preclude a termination on the basis of previous rental arrears once distress is completed – PCIW submits that even if it could exercise only "a single remedy" under any particular notice of default, the distress "flowed from" the notice of default given in *April* and it was open to PCIW, after distress had concluded, to exercise its rights, including the right of termination, by means of the *May 14* notice (referred to as the "May Notice of Default") followed by the May 29 letter (referred to as the "May Notice of Termination".) Thus the landlord argues in its factum:

> Contrary to the findings of the Chambers Judge, PCIW did not choose to exercise distress as a remedy under the May Notice of Default: distress was

> already ongoing at the time PCIW issued the May Notice of Default. PCIW did not exercise *any* of its remedial rights under the May Notice of Default until May 29, 2013, after the Goods were sold and distress had concluded. It was only then that PCIW exercised a remedy under the May Notice of Default: the right to terminate the contract by delivering the May Notice of Termination.
>
> Thus to the extent that the Chambers Judge held that PCIW had chosen distress as its remedy under the May Notice of Default, the Chambers Judge was simply mistaken. PCIW chose only one remedy with respect to the May Notice of Default: termination of the Gift Shop Lease. [Emphasis by underlining added.]

[38] Delane on the other hand contends not only that a new notice of default was required before PCIW could terminate the Lease, but that any such notice must be based on a *new act of default* rather than the non-payment of the rental arrears that have been in existence for many months. In its analysis, by taking distress, PCIW waived those arrears and therefore cannot revive them *as a basis for forfeiture* of the Lease. In support, counsel cites many of the comments in the old cases, some of which I have referred to above, that emphasize that election is irrevocable, that distress operates as a waiver of forfeiture and that, as observed by Blackburn J. in *Ward v. Day*, "if a man once determines his election, it shall be determined for ever." His Lordship added that the "fact of making the distress is an assertion by the landlord that the estate continues, stronger than a mere assertion by words; and to make a subsequent entry would be treating his election as void." (At 493; my emphasis.)

[39] I must confess to some uncertainty arising out of many of the older cases, which employ dense and arcane terminology and which, at least to modern eyes, are tantalizingly obscure concerning the practical consequences of the courts' reasoning. It seems clear, however, that there are two lines of authority. The first, typified by *Malva* (decided at roughly the same time as *Tsoukalas*) and *A & M Enterprises*, takes a strict view of election or waiver and would prohibit a landlord who has distrained for arrears, from then terminating the lease on the basis of arrears that remain outstanding. The second, essentially represented by *Tsoukalas* (which made no reference to *Ward v. Day*, *A & M* or to election or waiver), adopts the "suspension" approach and relies on those cases that permitted landlords who

had taken distress proceedings to sue later for arrears – a course that, unlike termination, is perfectly consistent with the subsistence of the lease. *Tsoukalas* goes further, however, and suggests that a landlord may *terminate* the lease on the basis of continuing rental arrears.

[40] The first line of cases appears to represent the weight of longstanding judicial authority that was apparently not before the Court in *Tsoukalas.* This fact alone might lead one to prefer that first line. But there is also another reason to do so, and that is the objective of consistency between the law of commercial tenancy and the general law of contract on this point.

[41] Since the Supreme Court of Canada's decision in *Highway Properties Ltd. v. Kelly, Douglas & Co.* [1971] S.C.R. 562, Canadian courts have been encouraged to look at commercial leases not only as grants of interest in land but also as contracts. The issue in *Highway Properties* was whether the doctrine of surrender applied to preclude a landlord from recovering damages accruing *after* its tenant had repudiated the lease and the landlord had taken possession of the premises. Such an outcome was dictated by longstanding authority applicable to leases. The Court ruled however that since a lease was also a contract, the landlord should not be 'estopped' from claiming damages over the unexpired term of the lease. Laskin J., as he then was, speaking for the Court, was critical of the "persistent ascendancy of a concept that antedated the development of the law of contracts in English law and has been transformed in its social and economic aspects by urban living conditions and by commercial practice". (At 569.) He added:

> ... It is no longer sensible to pretend that a commercial lease, such as the one before this court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land. Finally, there is merit here as in other situations in avoiding multiplicity of actions that may otherwise be a concomitant of insistence that a landlord engage in instalment litigation against a repudiating tenant. [At 576.]

[42] This 'harmonizing' approach was also adopted in *Keneric Tractor Sales Ltd. v. Langille* [1987] 2 S.C.R. 440, where Wilson J. observed with respect to *chattel* leases and contracts:

> In addition to these two considerations the need for consistency within the law militates in favour of a change in the rules relating to breach of chattel leases. As was noted in both *Baldock* and *Regent Park* there is no essential difference between a lease of land and a lease of chattels that is material to the ascertainment of damages on breach. They are both contracts. Thus, the spirit of *Regent Park* – the harmonizing of the law relating to the leasing of chattels with the law relating to the leasing of land – is best given effect today by a different result in a chattel lease case. The damages flowing from the breach of a chattel lease, like the damages flowing from the breach of a land lease, should be calculated in accordance with general contract principles. To the extent that *Regent Park* reflects a different approach it should not be followed. [At 453.]

[43] How, then, would the issue of termination in this case be resolved under ordinary principles of contract? In my opinion, it is a clear principle of the law of contract that where one contracting party has breached a term, entitling the innocent party to discharge the agreement, but the innocent party elects to affirm it (as here, by taking distress proceedings), the latter's election is irrevocable. It is not open to that innocent party then to rely on the same breach to justify terminating the contract (here, forfeiting the lease). Thus the authors of *Chitty on Contracts* (30th ed., 2008) observe at §24-004:

> Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable. There is no need to establish reliance or detriment by the party in default. Thus the innocent party, having affirmed, cannot subsequently change his mind and rely on the breach to justify treating himself as discharged. Nevertheless, in the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude him at a later stage from treating himself as discharged. In such a case the innocent party is not terminating on account of the original repudiation and going back on his election to affirm but rather is "treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour after the affirmation" [citing *Safehaven Investments Inc. v. Springbok Ltd.* (1996) 71 P. & C.R. 59 at 68].

(As stated in *Malva*, *supra*, a failure to pay past arrears is not regarded as giving rise to a new breach that can give rise to a new right of termination.) See also

G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 572; M.P. Furmston, ed., *Cheshire, Fifoot & Furmston's Law of Contract* (14th ed, 2001) at 601; *Spencer Bower*, *supra*, at 359, 404; *Ashmore v. Bank of British North America* (1913) 4 W.W.R. 1014 (B.C.C.A.); *MacDougall*, *supra*, at 561.

[44] There is in my view no good reason not to adopt similar reasoning in this case. This does not mean, of course, that PCIW is without a remedy for the recovery of the 'old' rental arrears: the landlord may still, as we have seen, sue for rental arrears after the distress is completed, since that course is not inconsistent with the subsistence of the Lease, which was affirmed by the distress. What the landlord who has elected distress may *not* do is terminate the lease *on the basis of the same breach on which the distress was founded*. The landlord's "election" is thus preserved in that the landlord is bound by its choice; but it is not without a remedy for existing rental arrears. It may also, of course, give a new notice of default based on any new default.

[45] It should go without saying that the new notice, based on a new default, would have to comply with the five-day notice requirement in the Lease and state clearly the amount of rent (post-distress) said to be due and owing to PCIW; otherwise the tenant is unlikely to be aware of the precise amount necessary to cure its breach. It is true that in this case, Delane was aware of the sale price received by PCIW for the goods, but there is no indication it was aware of the amount of the bailiff's costs and charges and any other attendant expenses that would have been properly chargeable by the landlord. In any event, the Lease still being in effect, I can see no reason why the 5-day notice requirement in the Lease should be regarded as somehow spent or inapplicable.

[46] In the result, I would not accede to PCIW's first ground of appeal, but I would with respect disagree with the trial judge that it was open to PCIW to give the tenant "another" notice of default specifying an outstanding balance of rental arrears based on breaches prior to or during the distress process. Notwithstanding *Tsoukalas* and the comment of Haber relied upon by the trial judge, such a course would amount to

a nullification of PCIW's *election* of distress – and hence its irrevocable *waiver* of the past breaches – up to the completion of distress on April 29, 2013.

Estoppel

[47] The landlord's second ground of appeal was that even if the Lease had not been validly terminated, Delane was estopped from denying the effectiveness of the notice given on May 29 which purported to terminate the Lease immediately – i.e., without the giving of five days' notice. The landlord's factum states that PCI (presumably meaning PCIW) relied on the "assumption" that the Lease had been terminated, and did so to its detriment. It says Delane's conduct gives rise to an estoppel by representation of fact, estoppel by convention, and proprietary estoppel.

[48] This argument was not advanced before the trial judge and in my opinion, cannot succeed in this court. As seen above, the question of whether the Lease had been terminated was raised in Delane's Further Amended Statement of Claim filed on June 26, 2013. One of the terms of relief it sought by that pleading was a declaration that the notice of termination was "illegal and of no valid force and effect". PCIW in response asserted that the Lease *had* been terminated and forfeited. Ms. El-Khatib reaffirmed her position in a letter dated July 4. Thus the issue was squarely raised to the knowledge of the landlord and its counsel.

[49] All the forms of estoppel relied on by PCIW are somewhat similar, but also somewhat different. All require that the person asserting estoppel have relied on the statement or assumption in question; and that he or she suffered detriment as a result or that it would be otherwise unfair for the other party to resile from what was said or assumed. They differ in that estoppel by representation of fact obviously requires a representation or statement of *fact*, whereas estoppel by convention is founded on an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as a basis of their relationship. (See *Ryan v. Moore* 2005 SCC 38 at paras. 53-59.) Proprietary estoppel is a term used to describe estoppel relating to an interest in land and requires that it would be unconscionable for the person having the right sought to be enforced, to continue to

seek to enforce it. (See *Trethewey-Edge Diking District v. Coniagas Ranches Ltd.* 2003 BCCA 197 at paras. 63-69; *Erickson v. Jones* 2008 BCCA 379 at para. 56.)

[50] In my opinion, none of these forms of estoppel could be made out in this case, given the fact that Delane and its counsel made it clear to the landlord that they intended to take the position in this proceeding that the Lease had not been validly terminated. It is true that the tenant also sought other relief in the alternative, but this does not mean it would have been reasonable for PCIW to assume that the tenant had in some way resiled from its clearly stated position. For the same reason, I do not see how a "shared assumption" could have arisen to the effect that the tenant was admitting that the Lease had been validly terminated. Nor do I see how it would be unjust or unfair to allow the tenant to take a position it had pleaded. The landlord has not shown that it changed its position based on the strength of pleadings, nor has it pointed to any evidence or sought to adduce new evidence for this purpose. Finally, with respect to proprietary estoppel, even if one assumed that the "representation" in this case related to an interest in land, it again cannot be said to have been unconscionable for Delane to question whether the Lease was validly terminated.

[51] I would therefore dismiss the second ground of appeal.

Disposition

[52] With thanks to all counsel for their able arguments, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

"The Honourable Madam Justice Kirkpatrick"

"The Honourable Mr. Justice Groberman"