



# THE GR COURT DOCKET

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## COURT REFUSES TO GIVE BUYER 13 MONTH EXTENSION TO EXERCISE ASSIGNMENT OPTION: TIME PERIOD HELD UNREASONABLE AND RIGHT SURRENDERED

By **Stephen Thiele**

Courts have often been required to determine whether a person holding an option or a right of first refusal under a lease or other contract is entitled to enforce such right. In general, enforceability of the right depends on whether or not the person holding the right has taken the proper or required steps when exercising the right.

In the recent case of *Celadon v. Hostler*<sup>1</sup>, we successfully defended the seller of business assets against an application which sought the assignment of the seller's leasing rights and option to purchase land under a commercial lease.

The right of assignment was contained in an Asset Purchase Agreement ("APA") by which the seller had sold a "significant portion" of the assets of its transportation business. Among other findings, the Court held that the right of assignment could not be exercised by the buyer as a result of significant delay. While the APA did not specify a precise time when the right of assignment was to be exercised, the buyer waited 13 months before making a written request for the assignment.

This was held to be unreasonable.

### BACKGROUND

On September 13, 2013, the seller entered into an APA which would essentially permit the buyer to take over its transportation business.

As part of the agreement, the buyer was, at its discretion, entitled to the assignment of a lease over a vacant parcel of land that was leased by the seller for the purposes of storing trucks and equipment.

The provision also required the seller to seek the consent of the landlord to assign the lease.

More specifically, the APA expressly provided as follows:

Purchaser shall also be entitled, at Purchaser's discretion, to an assignment of lease to the adjoining property that is currently under lease to the Seller with [the Landlord]... and Seller shall seek permission from Landlord to such assignment as directed by purchaser upon the execution of this Agreement.

No time was specified as to when the buyer was required to exercise its option.

Eventually, on October 24, 2014, seven days before the expiry of the lease, the buyer provided written notice to the seller to assign the lease and to give the necessary direction to the landlord.

Instead of conveying the buyer's wishes to the landlord, the seller gave the landlord notice that it wanted to exercise the right to buy the vacant land as set out in the lease.

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The buyer argued that the seller had breached its obligation under the APA by failing to assign the lease and direct the landlord to consent to the assignment.

In the alternative, the buyer argued that even if notice for the assignment had not been properly provided to the seller, the lease had been equitably assigned to it as a result of its use of the vacant land and payment of a monthly “rental” fee to the seller. The facts disclosed that the buyer had utilized the vacant land and paid a monthly fee to the seller that was equal to the monthly rent the seller remitted to the landlord.

However during a dispute that arose between the buyer and the seller in the summer of 2014, the buyer removed its trucks and equipment from the vacant property and stopped paying a monthly fee. The dispute between the parties resulted in the parties executing a broadly worded Release Agreement.

The seller also showed that the buyer had never made a commitment to wanting to be a tenant under the lease.

### **RULING OF COURT**

The application of the basic principles governing the interpretation of commercial contracts played a significant role in the ultimate determination of this case.

In general, a commercial contract is to be interpreted:

(a) as a whole, in a manner that gives meaning to all of its terms and avoids interpretation that would render one or more of its terms ineffective;

(b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the “cardinal presumption” that they have intended what they have said;

(c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),

(d) in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.<sup>2</sup>

The Court held that even though the APA required the buyer to exercise its discretion with respect to the assignment “upon the execution of this Agreement”, the fact that the buyer had been given a discretion suggested that the buyer retained its right to an assignment for some time after the execution of the APA. Yet, based on the principle that “if a contract for the sale of real estate contains all other material terms but does not fix the date for completion the law, will, as a rule, imply a term that the sale shall be completed within a reasonable time”<sup>3</sup>, the Court accepted the seller’s argument that the right did not extend for an indefinite period of time and certainly, based on the conduct of the parties, did not extend for 13 months after the date of the APA.

The evidence disclosed that prior to the buyer providing the seller with notice to seek the assignment, it had vacated the leased vacant land and stopped paying any fee for its use.

With respect to the buyer’s argument that it was entitled to an equitable assignment based on part performance, the Court found that there had been no part performance of the assignment agreement.

The Court stated that once the reasonable period had elapsed, there was no subsisting enforceable agreement for the assignment of the lease to perform.<sup>4</sup>

Lastly, the Court agreed with the seller’s argument that the language of the Release



Agreement operated to bring the buyer's right to require an assignment to an end. The context of the Release Agreement demonstrated that the parties at the time of execution desired to entirely disengage from one another. This disengagement included anything arising from the APA.<sup>5</sup>

The seller was represented by litigation partner, Howard Wolch.

Mr. Wolch was assisted in the preparation of his written legal argument by Stephen Thiele.

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1. 2015 ONSC 4089
  2. *Ibid.*, at para. 20
  3. *Ibid.*, at para. 25, citing *Shackleton v. Hayes*, [1954] D.L.R. 81 (S.C.C.)
  4. *Ibid.*, at para. 30
  5. *Ibid.*, at para. 62

