Court File No. C66626

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF
CURRICULUM SERVICES CANADA/
SERVICES DES PROGRAMMES D'ÉTUDES CANADA
OF THE CITY OF TORONTO, IN THE MUNICIPALITY OF TORONTO
IN THE PROVINCE OF ONTARIO

MEDALLION CORPORATION, in its capacity as authorized agent for 280 RICHMOND STREET WEST LIMITED

Appellant

- and -

RSM CANADA LIMITED in its capacity as trustee in bankruptcy of CURRICULUM SERVICES CANADA/SERVICES DES PROGRAMMES D'ETUDES CANADA

Respondent

BRIEF OF AUTHORITIES OF THE RESPONDENT FOR ADDITIONAL WRITTEN SUBMISSIONS

November 22, 2019

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5. *Re Linens N Things Canada Corp.*, 2009 Carswellont 2849 (S.C.J.)
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TAB 1

2019 ONSC 6106
Ontario Superior Court of Justice [Commercial List]

7636156 Canada Inc. v. OMERS Realty Corporation

2019 CarswellOnt 17258, 2019 ONSC 6106

IN THE MATTER OF THE BANKRUPTCY OF 7636156 CANADA INC., OF THE CITY OF VAUGHAN, IN THE PROVINCE OF ONTARIO

Hainey J.

Heard: July 12, 2019
Judgment: October 22, 2019
Docket: BK-18-2372959-0031

Counsel: Harvey Chaiton, for Trustee in Bankruptcy, Fuller Landau Group Inc.
S. Michael Citak, for Landlord, OMERS

Subject: Estates and Trusts; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.4 Claims by landlord
X.4.g Disclaimer and surrender of lease

Headnote

Bankruptcy and insolvency --- Priorities of claims — Claims by landlord — Disclaimer and surrender of lease
Bankrupt company previously carried on business at premises owned by landlord — Bankrupt and landlord entered into lease for premises in February 2014 — On July 23, 2018, trustee in bankruptcy disclaimed lease — At that time, bankrupt's rent was up to date and there were no events of default under lease — Lease required bankrupt to provide landlord with unconditional letter of credit in favour of landlord in principal amount of $2.5 million as security for lease, which was to decline in value over time — After disclaimer of lease by trustee, landlord drew full amount of $2.5 million under letter of credit — Landlord delivered proof of claim to trustee in amount of $623,196.84 for three months' accelerated rent for months of May, June and July 2018 — Landlord reserved right to claim under letter of credit for damages for lost rent for balance of term, restoration costs, and unamortized costs of landlord allowance — Trustee did not dispute that landlord was entitled to $623,196.84 for three months' accelerated rent, but disallowed proof of claim as landlord reserved right to make claim for damages for breach of lease and did not take into account draw on letter of credit for May 2018 rent — Trustee brought motion for determination of amount landlord was entitled to draw down on letter of credit — Motion granted — Bankrupt's property included rights as tenant under lease — Trustee was entitled to disclaim lease, which it did on July 23, 2018 — There was no dispute that, under Bankruptcy and Insolvency Act, landlord had preferred claim in amount of $623,196.84 for three months' accelerated rent, which landlord was entitled to draw on letter of credit — Disclaimer of lease by trustee operated as voluntary surrender of lease by tenant with consent of landlord, which extinguished all obligations of tenant under lease — Bankrupt no longer had any obligations owing to landlord under lease, and landlord was not entitled to draw on letter of credit provided as security under lease for any amounts in excess of three months' accelerated rent — Landlord was ordered to pay to trustee amount of $1,876,803.14, which was $2.5 million less three months' accelerated rent of $623,196.84.

Table of Authorities

Cases considered by *Hainey J.*:

Crystalline Investments Ltd. v. Domgroup Ltd. (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 CarswellOnt 220, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 2004 CSC 3, 70 O.R. (3d) 254 (S.C.C.) — followed

Cummer-Yonge Investments Ltd. v. Fagot (1965), [1965] 2 O.R. 152, 8 C.B.R. (N.S.) 62, 50 D.L.R. (2d) 25, 1965 CarswellOnt 40 (Ont. H.C.) — considered

Linens 'N Things Canada Corp., Re (2009), 2009 CarswellOnt 2849, 53 C.B.R. (5th) 232 (Ont. S.C.J.) — considered

Mussens Ltd., Re (1933), 14 C.B.R. 479, [1933] O.W.N. 459, 1933 CarswellOnt 52 (Ont. S.C.) — followed

Peat Marwick Thorne Inc. v. Natco Trading Corp. (1995), 31 C.B.R. (3d) 119, 44 R.P.R. (2d) 207, 22 O.R. (3d) 727, 1995 CarswellOnt 55 (Ont. Gen. Div. [Commercial List]) — considered

Titan Warehouse Club Inc. (Trustee of) v. Glenview Corp. (1988), 67 C.B.R. (N.S.) 204, 1988 CarswellOnt 135 (Ont. H.C.) — considered

West Shore Ventures Ltd. v. K.P.N. Holding Ltd. (2001), 2001 BCCA 279, 2001 CarswellBC 725, 88 B.C.L.R. (3d) 95, 39 R.P.R. (3d) 155, [2001] 5 W.W.R. 209, 198 D.L.R. (4th) 520, 25 C.B.R. (4th) 139, 152 B.C.A.C. 55, 250 W.A.C. 55, [2001] B.C.T.C. 70 (B.C. C.A.) — considered

885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd. (1993), 17 C.B.R. (3d) 64, 12 O.R. (3d) 62, 99 D.L.R. (4th) 1, 30 R.P.R. (2d) 1, 1993 CarswellOnt 186 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 30(1)(k) — considered

s. 65.2 [en. 1992, c. 27, s. 30] — considered

s. 71 — considered

s. 136 — considered

s. 136(1)(f) — considered

s. 146 — considered

Commercial Tenancies Act, R.S.O. 1990, c. L.7
Generally — referred to

s. 38(1) — considered

MOTION by trustee in bankruptcy for determination of amount landlord was entitled to draw down on letter of credit.

***Hainey J.*:**

BACKGROUND

1 This is a motion by the Fuller Landau Group Inc., in its capacity as the trustee in bankruptcy ("Trustee") of 7636156 Canada Inc. ("Bankrupt") for a determination of the amount the Bankrupt's landlord, OMERS Realty Corporation, ("Landlord") was entitled to draw down on a letter of credit provided by the Bankrupt to the Landlord as security for the Bankrupt's obligations under a lease, and for an order for payment to the Trustee of any excess amount received by the Landlord under the letter of credit.

FACTS

2 The Landlord owns an industrial building in Vaughan, Ontario ("Premises"). The Bankrupt previously carried on business at the Premises.

3 The Bankrupt and the Landlord entered into a lease for the Premises in February 2014 ("Lease").

4 On July 23, 2018 the Trustee disclaimed the Lease. At the time the Bankrupt's rent was up to date and there had been no events of default under the Lease.

5 The Lease required the Bankrupt to provide the Landlord with an unconditional letter of credit in favour of the Landlord in the principal amount of $2.5 million for an initial term of one year, to be reviewed annually. ("LC")

6 Schedule C to the Lease provides that the LC was to be held by the Landlord for the following purpose:

> The Letter of Credit shall be held by landlord as security for indemnification of Landlord in respect of any losses, costs or damages incurred by Landlord arising out of the failure by Tenant to pay Annual Rent or any other amounts payable under this Lease or resulting from any failure by Tenant to observe or perform any obligations contained in this Lease or resulting from any default under this Lease or resulting from any termination, surrender, disclaimer or repudiation of this Lease whether by Landlord as a result of the default of Tenant or in connection with any insolvency or bankruptcy of Tenant or otherwise.

7 There are provisions in the Lease that provide for the reduction in the principal amount of the LC as follows:

> If Tenant is not then and has not been in default of its obligations under this Lease and has at all times promptly paid all Rent throughout the Term, the Letter of Credit shall decline in value as set out in subparagraph (b) below (the value of the Letter of Credit from time to time being hereinafter referred to as the "Principal Amount")
>
> Section 2(b)(i) of Schedule C provides as follows:
>
> > (i) on the thirty-seventh (37th) month of the initial Term, the Letter of Credit may be reduced by an amount equal to fifty percent (50%) of the Permitted Decline Amount (as herein defined) ...
>
> For the purposes of Paragraph 2(b) of Schedule C, "Permitted Decline Amount" means: a sum equal to (I) Two Million, Five Hundred Thousand Dollars ($2,500,000), less (II) an amount equal to the Annual Rent, the estimated Operating Costs and Taxes, and HST thereon, payable by Tenant for the last month of the initial term.

8 The Trustee and the Landlord agree that, to the extent that the above noted conditions to reduction of the LC are met, on the 37th month of the initial term of the Lease, the closing balance of the LC would have been $1,357,135.53.

9 Although the Landlord acknowledges that there were no events of default under the Lease prior to the Bankrupt's bankruptcy, it claims that rent was not paid promptly by the Bankrupt on a number of occasions. The Landlord did not, at any

time prior to May 1, 2017 inform the Bankrupt that it was not paying rent promptly.

10 In May 2014 the Bank of Nova Scotia ("BNS") issued the LC that was renewed annually thereafter. The LC was issued 'in connection with lease payments and lease defaults for' the Premises.

11 The Bankrupt deposited $2.5 Million with BNS to secure BNS' obligation under the LC. The LC does not include a covenant from BNS to perform the Bankrupt's obligations under the Lease.

12 Since the disclaimer of the Lease by the Trustee the Landlord has fully drawn the $2.5 Million under the LC. The $2.5 Million received by the Landlord is on account of the following:

(a) $207,732.28 for rent for May 2018;

(b) $1,621,160.72 for rent for the months of August 2018 through to and including April 2019;

(c) $368,479 for the unamortized cost for the Landlord Allowance (inclusive of interest); and

(d) $302,628 for restoration costs.

13 The Landlord delivered a proof of claim to the Trustee dated May 17, 2018 ("Proof of Claim") in the amount of $623,196.84 for three months' accelerated rent for the months of May, June and July 2018. The Landlord noted in the Proof of Claim that it reserved the right to claim under the LC for damages for lost rent for the balance of the term, restoration costs, and unamortized costs of the Landlord Allowance.

14 The Trustee did not dispute that the Landlord was entitled to $623,196.84 for three months' accelerated rent under the Lease and in accordance with section 136(1)(f) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("*BIA*"). However, the Trustee disallowed the Proof of Claim as the Landlord had reserved the right to make a claim for damages for breach of the Lease and had not taken into account its draw on the LC for rent for May 2018.

ISSUE

15 The sole issues that I must decide is the amount the Landlord is entitled to draw under the LC as a result of the disclaimer of the Lease by the Trustee.

POSITIONS OF THE PARTIES

16 The Trustee submits that the Landlord was only entitled to draw $623,196.84 on the LC for three months' accelerated rent pursuant to s. 136(1)(f) of the *BIA*. In the alternative, the Trustee submits that the Landlord was only entitled to draw up to a maximum of $1,357,135.53 under the LC because the terms of the Lease required the principal amount of the LC to be reduced to this amount as of May 1, 2017.

17 The Landlord submits that it was entitled to draw down on the entire amount of the LC in the amount of $2.5 Million, both pursuant to the LC and the terms of the Lease. Further, it is the Landlord's position that the Trustee "cannot obtain redress against the Landlord under the LC".

ANALYSIS

18 I have concluded that the Landlord was only entitled to draw $623,196.84 on the LC for three months' accelerated rent for the following reasons.

19 Pursuant to s. 71 of the *BIA*, upon the Bankrupt's assignment in bankruptcy, it ceased to have any capacity to dispose of or otherwise deal with its property, which, subject to the *BIA* and to the rights of its secured creditors, immediately passed

to and vested in the Trustee.

20 The Bankrupt's property included its rights as a tenant under the Lease. Pursuant to s. 30(1)(k) of the *BIA* and s. 38(1) of the *Commercial Tenancies Act*, R.S.O. 1990, c. L. 7. as amended ("*CTA*"), the Trustee was entitled to disclaim the Lease, which it did on July 23, 2018.

21 Sections 146 and 136(1)(f) of the *BIA* address the rights of the landlord of a bankrupt tenant. Section 146 provides that the rights of landlords are to be determined according to the law of the province in which the leased premises are situated, subject to, among other things, the priority claim provided in s. 136 of the *BIA*.

22 A landlord's preferred claim in a bankruptcy is set out in s. 136(1)(f) of the *BIA* as follows:

> ... for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent.

23 There is no dispute that the Landlord has a preferred claim in the amount of $623,196.84 for three months' accelerated rent which it was entitled to draw on the LC.

24 However, the law in the Province of Ontario has been well settled for over 80 years that a disclaimer of a lease by a trustee in bankruptcy operates as a voluntary surrender of the lease by the tenant with the consent of the landlord, which extinguishes all obligations of the tenant under the lease.

25 This principle was established in *Mussens Ltd., Re*, 1933 CarswellOnt 52 (Ont. S.C.). In *Mussens* the tenant was in liquidation and the liquidator surrendered possession of the leased premises to the landlord's trustee in bankruptcy. In response to the trustee's claim that it was entitled to damages for future rent Chief Justice Rose held at para. 6 as follows:

> 6. I think that by his letter of April 21, 1932, confirmed in his letter of June 21, 1932, the liquidator exercised his right to 'surrender possession or disclaim' the lease, and that when he had exercised that right the obligation of the tenant, the insolvent company, to pay rent was at an end. It did not require a statute to confer upon the liquidator power to surrender possession or disclaim the lease with the consent of the lessor; the statute means I think that whether the lessor is or is not willing the liquidator may surrender possession or disclaim the lease, and that if he does so surrender possession or disclaim the lease the tenant in liquidation shall be in the same position as if the lease had been surrendered with the consent of the lessor. Of course if the lease were surrendered with the consent of the lessor there could be no suggestion of any further liability on the part of the lessee to pay rent and no suggestion that by failing to pay rent the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages.

26 Chief Justice Rose further concluded at para. 7 that no damages can be recovered by a landlord for breach of the tenant's covenant in a lease for the following reasons:

> ... the Ontario statute contains no similar saving of the rights of the lessor, and I think that the result is that in Ontario the liquidator has been given a statutory right to commit a breach of the insolvent's covenant, and that no right of compensation for the statutory breach having been given to the covenantee no damages can be recovered.

27 The principles enunciated by Chief Justice Rose in *Mussens* have repeatedly been applied to a disclaimer of a lease by a trustee in bankruptcy. For example, in *Cummer-Yonge Investments Ltd. v. Fagot*, 1965 CarswellOnt 40 (Ont. H.C.). Chief Justice Gale adopted the reasoning in *Mussens* and held at paras. 15 and 17 as follows:

> 15. Apart entirely from this decision, however, I am not persuaded that a disclaimer of a lease by a trustee in bankruptcy has the consequence contended for by counsel for the plaintiff in this action. Assuming, for purposes of argument, that his submission that the sole effect of the trustee's disclaimer is simply to divest him of his entire interest in the lease is

> correct, it nevertheless does not follow in law that that interest thereupon reverts to the bankrupt tenant. As indicated previously, whatever interest the tenant had in the lease prior to bankruptcy was, by operation of s. 41(5) of the *Bankruptcy Act*, vested in the trustee upon the filing of the assignment. In my view, when the trustee subsequently disclaimed that interest, all the rights and obligations which he inherited from the bankrupt were wholly at an end.
>
> . . .
>
> 17. I therefore find that, upon the bankruptcy of the tenant, all of its rights and obligations under the lease, including its liability to perform the covenant to pay rent, irrevocably passed to the trustee in bankruptcy. After that date, there were no covenants in the lease which the lessee was required to perform, and the defendants' guarantee of "the due performance by the Lessee of all its covenants in this lease" thereupon became inoperative.

28 Chief Justice Gale's decision in *Cummer-Yonge Investments Ltd.* was upheld by the Court of Appeal for Ontario.

29 In *Linens 'N Things Canada Corp., Re*, 2009 CarswellOnt 2849 (Ont. S.C.J.) a landlord filed a proof of claim that included costs of building the structure, amounts provided under the lease as tenant's allowance, and the commission paid on the lease itself by the landlord. The trustee disallowed these claims, which was appealed by the landlord. The Registrar in Bankruptcy reviewed the applicable provisions of the *BIA* and *CTA* and, relying on*Mussens*, dismissed the landlord's appeal, holding as follows at para. 21:

> 21. Even more, the CTA and its predecessors, has been found for the better part of a century to have the effect of a consensual ending of the lease, and the cases recognize that this is a statutorily permitted breach for which there is no damage remedy, beyond the s. 38 CTA and s. 136 BIA preferred claim.

30 The Landlord submits that it only claimed three months' accelerated rent in the amount of $623,196.84 against the Bankrupt's estate but that it was entitled to draw on the LC to satisfy its claims of damages for the loss of rent for the balance of the term of the Lease and restoration costs to the Premises and its unamortized costs of the Landlord allowance provided to the Bankrupt.

31 The Landlord bases its position on the fact that the LC is an 'autonomous contract between the issuer and the beneficiary'. The Landlord submits that the LC in this case "is an independent third-party obligation" of BNS, "and the proceeds" of the LC "are not the debtor's property even if it is secured by the debtor's property".

32 According to the Landlord, because of the autonomy of the LC, the Trustee has no legal right to obtain redress from the Landlord under the LC.

33 I do not accept the Landlord's submissions for the following reasons.

34 In *Titan Warehouse Club Inc. (Trustee of) v. Glenview Corp.*, 1988 CarswellOnt 135 (Ont. H.C.), a trustee applied for the determination of the rights of a landlord to claim under a letter of credit following the bankruptcy of the tenant. A letter of credit had been issued to the landlord to 'guarantee to the Landlord the payment by the Tenant of Rent and Additional Rent payable pursuant to the Lease'. Montgomery, J. concluded that the landlord was only allowed to draw on the letter of credit for rent up to the date of the disclaimer of the lease. He stated as follows at para. 18:

> 18. In my view, the *Cummer-Yonge Investments Ltd*, supra, decision is dispositive of the application and the counter-application. The landlord is afforded protection by the letter of credit for any amount of rent owing up to the date of disclaimer but not thereafter.

35 An appeal by the landlord was dismissed by the Court of Appeal for Ontario for the following reasons at para. 2:

> 2. In our opinion, the letter of credit incorporated the terms of the lease by reference. Clause 22.00 thereof states that the letter of credit was intended to guarantee to the landlord payment of the rent by the tenant. In our view, the words making the letter of credit payable 'in the event of the bankruptcy of the tenant', read in the context of the clause as a

whole, must be related to the stated purpose of the letter of credit.

36 Although Blair J. (as he was) concluded in *885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd.*, 1993 CarswellOnt 186 (Ont. Gen. Div. [Commercial List]) that a landlord could draw down on a letter of credit on the basis that it was security for the tenant's obligations, the correctness of this decision has been questioned.

37 In my view, the correct approach was followed by Feldman J. (as she was) in *Peat Marwick Thorne Inc. v. Natco Trading Corp.*, 1995 CarswellOnt 55 (Ont. Gen. Div. [Commercial List]) at para. 13 as follows:

> With great respect to the decision of Blair J., in my view if security taken by the landlord secures *the obligations of the tenant* under the lease, then when those obligations end, the security can no longer be enforced in respect of obligations yet to be performed. The result is the same as with a guarantee, if it is a guarantee of the obligations of the tenant. If the obligations of the tenant are released once the lease is disclaimed, then the guarantor of those obligations is no longer guaranteeing performance by the tenant. This was the result in *Cummer-Yonge* ...

38 The British Columbia Court of Appeal came to the same conclusion in *West Shore Ventures Ltd. v. K.P.N. Holding Ltd.*, 2001 BCCA 279 (B.C. C.A.) at paras. 33 and 36 as follows:

> 33. That brings us to 'the other obligations of the Lessee in respect of the lease.' The trustee in bankruptcy surrendered possession three months after the bankruptcy. The effect of the surrender is set out in s. 29(3) of the *Commercial Tenancy Act*. It is that upon the surrender of possession 'the tenancy shall terminate'. Once the tenancy has terminated, there cannot be any further obligations of the tenant under the lease, nor do we think that any rights or obligations of the landlord could survive, except perhaps in relation to consequential delivery of real or personal property which cannot justly be retained when the tenancy comes to an end. So the tenancy terminated and all obligations between Doppler and K.P.N. came to an end three months after the bankruptcy. Up to the date K.P.N. had not had to incur any expenditures, nor had it suffered any losses. Any expenditures after that and any losses suffered after that are not losses which can be regarded as arising from a failure of Doppler to discharge 'other obligations of the Lessee in respect of the lease' within the meaning of clause 3A.1.
>
> . . .
>
> 36. In our respectful opinion, Madam Justice Feldman correctly analyzed the cases in *Peat Marwick Thorne Inc. v. Natco Trading Corp*. The feature which distinguishes the cases where the security for the tenant's obligations continues is not whether the security is a primary security, like a letter of credit, or a secondary security, like a guarantee. Rather, the key question is: 'What obligations are secured?' If the obligations secured are the obligations of the tenant under the lease then the security is no longer security for anything when the obligations of the tenant under the lease come to an end. But where the obligations secured are obligations, perhaps independent obligations, to make good the losses suffered by the landlord by reason of the tenant's bankruptcy or other default, which might well include damages for loss of rent over the duration of the tenancy, then those separate obligations might well survive the bankruptcy of the tenant.

39 For all of these reasons I have concluded that the law of the Province of Ontario remains that, upon the disclaimer of a lease by a trustee in bankruptcy, the bankrupt no longer has any obligations owing to the landlord under the lease, and the landlord is not entitled to draw on a letter of credit provided as security under the lease for any amounts in excess of the Landlord's three months' accelerated rent preferred claim under s. 136(1)(f) of the *BIA*.

40 I agree with the Trustee's submission that this conclusion is not impacted by the Supreme Court of Canada's decision in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (S.C.C.). In *Crystalline Investments Ltd.*, a tenant assigned a lease to one of its subsidiaries. The consent of the landlord was not required for the assignment. The terms of the lease provided that "[n]otwithstanding any assignment or sublease the lessee shall remain fully liable under this lease and shall not be released from performing any of its covenants, obligations or agreements in this lease and shall continue to be bound by this lease."

41 The assignee filed a notice of intention to make a proposal and gave the landlord notice of its intention to repudiate the lease pursuant to section 65.2 of the *BIA*, which was not challenged by the landlord. The lease was repudiated effective March 31, 1994. The landlord subsequently sought payment from the assignor, which declined to pay. The landlord commenced an application and obtained summary judgment against the assignor. That decision was reversed by the Court of Appeal for Ontario. The landlord appealed to the Supreme Court of Canada.

42 Major, J. writing for a unanimous Supreme Court, explained the purpose of s. 65.2 of the *BIA* as follows at para. 28:

> 28. I, thus, agree with the Court of Appeal that s. 65.2 should be read narrowly. The plain purposes of the section are to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can. Nothing in s. 65.2, or any part of the Act, protects third parties (i.e., guarantors, assignors or others) from the consequences of an insolvent's repudiation of a commercial lease. That is to say that they remain liable when the party whose behalf they acted becomes insolvent.

43 At para. 42 Major J. concluded as follows:

> 42. The House of Lords went on to overrule *Stacey v. Hill*. In my opinion, *Cummer-Yonge* should meet the same fate. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations.

44 In my view, Major J's comments do not apply to BNS' obligations as the issuer of the LC because its obligation to make payment to the Landlord under the LC was wholly dependent on the continued existence of the Bankrupt's obligations to the Landlord under the Lease. BNS had no independent obligation to make any payment to the Landlord pursuant to the LC unlike an assignor or guarantor who has its own independent contractual obligations with a landlord to perform the tenant's obligations under the Lease.

45 For these reasons the *Crystalline Investments Ltd.* decision has no impact on my conclusion that the Landlord was only entitled to draw on the LC in the amount of $623,196.84 on account of its claim for three months' accelerated rent.

46 In view of my conclusion it is not necessary to decide whether the value of the LC should be reduced to $1,357,135.53 which is the Trustee's alternative position.

47 However, if my conclusion that the Landlord is only entitled to recover three months' accelerated rent is wrong, then I would conclude, on the evidence before me, that the LC should be reduced to $1,357,135.53 for the following reasons.

48 The terms of the Lease clearly require the LC to be reduced to $1,357,135.53 as of May 1, 2017 if there have been no events of default under the Lease and the Bankrupt has paid rent promptly. I find that the language used in the Lease makes this reduction in value of the LC mandatory if these conditions are met.

49 There were no events of default under the Lease before the bankruptcy and the delays by the Bankrupt in paying rent were relatively minor. Further, the Landlord never advised the Bankrupt that it had failed to pay rent promptly under the terms of the Lease.

50 In my view, the term "promptly" means within a reasonable time and not on the actual date that the rent is due. I find that the Bankrupt paid its rent within a reasonable time.

51 For these reasons I have concluded that the value of the LC was reduced to $1,357,135.53 as of May 1, 2017.

CONCLUSION

52 For the reasons set out above, the Trustee's motion is successful. There shall be an order requiring the Landlord to pay to the Trustee $1,876,803.14 which is $2.5 Million less three months' accelerated rent of $623,196.84.

COSTS

53 The Trustee is entitled to costs of the Motion. If the parties cannot agree on costs they may schedule a 9:30 a.m. attendance with me to settle costs.

54 I thank counsel for their helpful submissions.

Motion granted.

TAB 2

2010 ONSC 6119
Ontario Superior Court of Justice [Commercial List]

TNG Acquisition Inc., Re

2010 CarswellOnt 8677, 2010 ONSC 6119, [2010] O.J. No. 4876, 73 C.B.R. (5th) 122

In bankruptcy and insolvency

IN THE MATTER OF THE BANKRUPTCY OF TNG ACQUISITION INC. (successor estate of NEXINNOVATIONS INC., a bankrupt)

C. Campbell J.

Heard: September 13, 2010
Judgment: November 5, 2010
Docket: 32-1161760

Counsel: Kenneth Kraft for Hewlett-Packard
David S. Ward, Michael W. Casey for Trustee of the Estate of TNG Acquisitions Corp.

Subject: Contracts; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IX Proving claim
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X Discharge
X.5 Right to rescind after repudiation
X.5.a General principles

Headnote

Contracts --- Discharge — Right to rescind after repudiation — General principles
Bankrupt's proposal failed and bankruptcy ensued — Bankrupt notified creditor landlord that it repudiated lease, which was not acknowledged nor addressed in failed proposal — Creditors claim for rent charges was disallowed — Creditor appealed — Appeal dismissed — Creditor was required to respond to repudiation in order to advance legal remedy — Landlord accepted rent payments without objection after repudiation — Date of bankruptcy governed claim as landlord did not respond, and no election had been made — Lease was not forfeited prior to bankruptcy — Notice of repudiation allowed trustee to disallow claim under s. 30(1) of Bankruptcy and Insolvency Act.

Bankruptcy and insolvency --- Proving claim — Disallowance of claim — Appeal from disallowance — General principles
Bankrupt's proposal failed and bankruptcy ensued — Bankrupt notified creditor landlord that it repudiated lease, which was not acknowledged nor addressed in failed proposal — Creditors claim for rent charges was disallowed — Creditor appealed — Appeal dismissed — Creditor was required to respond to repudiation in order to advance legal remedy — Landlord accepted rent payments without objection after repudiation — Date of bankruptcy governed claim as landlord did not respond, and no election had been made — Lease was not forfeited prior to bankruptcy — Notice of repudiation allowed

trustee to disallow claim under s. 30(1) of Bankruptcy and Insolvency Act.

Table of Authorities

Cases considered by *C. Campbell J.*:

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), 1971 CarswellBC 274, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, [1971] S.C.R. 562 (S.C.C.) — considered

Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd. (2006), 18 B.L.R. (4th) 230, 46 R.P.R. (4th) 1, 211 O.A.C. 141, 2006 CarswellOnt 3009, 270 D.L.R. (4th) 181 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 30(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPEAL by creditor from disallowance of claim.

***C. Campbell J.*:**

Reasons for Decision

1 This motion arises from a failed restructuring under the *Companies' Creditors Arrangement Act* R.S.C. 1985 c. C-36 ("CCAA") and a subsequent bankruptcy of TNG Acquisitions Inc. ("TNG.")

2 Hewlette-Packard (Canada) Co. (successor in interest to EDS Canada Inc., hereinafter "the Landlord") appeals from the disallowance by the Trustee of an unsecured claim of the landlord for damages in lieu of rent for the remainder of the term in the amount of $3,313,500.24.

3 The issue between the parties concerns the legal effect to be given to a notice of repudiation sent by the Chief Restructuring Officer ("CRO") of Nexinnovations ("Nex"), the predecessor to TNG dated February 22, 2008, some two weeks prior to the bankruptcy of Nex.

4 The facts are not in dispute.

5 Nex obtained creditor protection under the CCAA on October 2, 2007 by Order of this Court. Pursuant to the Initial Order, Prowis Inc. was appointed as CRO to manage the business and affairs of Nex.

6 The Initial Order imposed a stay of proceedings which enjoined all creditors of Nex from commencing or continuing any legal proceedings against Nex on or after the date of the Initial Order.

7 The Premises were leased by Nex from the Landlord under a lease that was entered into on or about June 12, 2001. Paragraph 8(c) of the Initial Order provided that Nex had the right, among other things, to repudiate leases:

> 8. **THIS COURT ORDERS** that the Applicant shall have the right, but not the obligation to:

.....

> (c) vacate, abandon or quit any leased premises and/or terminate or repudiate any lease, licence and any ancillary agreements relating to any leased or licensed premises, without prior notice (or such other notice period agreed to by the relevant landlord and the Applicant) in writing... on such terms as may be agreed upon between the Applicant and such landlord or, failing such agreement, to deal with the consequences thereof in the Plan.

8 Paragraph 17 and 18 of the Initial Order contain the usual stay of proceedings except by leave of the Court and language permitting the Applicant to carry on business in the normal course.

9 By letter dated February 22, 2008, Nex through the CRO, advised EDS that it was repudiating the Lease effective as of March 21, 2008 (the "Repudiation Letter.") The Repudiation Letter stated:

> As you are aware NexInnovations filed for protection under the *Companies' Creditors Arrangement Act* (CCAA) on October 2, 2007. Pursuant to the terms of the Initial Order, NexInnovations may repudiate any real property lease with any of its landlords without prior notice. Any claim arising from such repudiation may be dealt with in the CCAA proceedings or any subsequent bankruptcy.
>
> In accordance with Initial Order, NexInnovations hereby repudiates the Lease effective as of March 21st, 2008, and will vacate the premises by such time and return all keys, pass cards or other property in the possession of NexInnovations belonging to EDS Canada Inc. at or before the termination date. As landlord, you shall have 10 days from March 21, 2008 to file a claim, as an unsecured Creditor, with the Court Appointed Monitor, Mintz and Partners, for any damages to the property. All utility service contracts will be cancelled effective the date noted above.
>
> Please acknowledge your receipt and agreement to the terms of this Notice of Repudiation, by signing and returning the attached copy of this letter in the envelope provided.

The Repudiation Letter included an acknowledgement to be signed and dated by the Landlord and returned to Nex. The Repudiation Letter was never acknowledged, accepted, or returned by the Landlord.

10 Restructuring of the business of Nex did not succeed and as a result, the majority of Nex's assets were sold pursuant to Orders granted in the CCAA proceedings. Following the sale, one of the purchasers occupied a portion of the Premises and paid occupation rent for the period from March 22, 2008 to July 22, 2008 in the amount of approximately $136,260.00.

11 As the CCAA was unsuccessful and proceedings were ultimately terminated, a plan of arrangement was never filed. The consequences of the repudiation were accordingly not dealt with in a plan of arrangement. The consequences of the repudiation of the Lease were also not dealt with by agreement of the Landlord and NEX as contemplated by paragraph 8(c) of the Initial Order.

12 Nex was declared bankrupt by Order made April 8, 2008 (the "Bankruptcy Order.")

13 On August 21, 2008 the Landlord filed its $3,313,500.24 Claim with the Trustee. The Claim is for the Landlord's "unrecoverable expenses" during the entire term of the Lease right up to January 30, 2012.

14 The Trustee issued a disclaimer of the Lease dated September 18, 2008 ("*Disclaimer*"). The Disclaimer states:

> . . . . .
>
> **AND WHEREAS** the Chief Restructuring Officer repudiated the Lease pursuant to the powers granted by the Court in the CCAA proceedings and vacated the Premises; **AND WHEREAS** the claims of landlords whose Leases were repudiated to be determined as part of the Company's Plan of Arrangement under the CCAA; **AND WHEREAS** the CCAA proceedings were terminated pursuant to an Order of the Ontario Court dated April 8, 2008 prior to the filing of a Plan of Arrangement; **AND WHEREAS** on April 8, 2008, the Ontario Court further adjudged the Company bankrupt and A. Farber & Partners Inc. (the "Trustee") was appointed as Trustee in Bankruptcy of the Company;

. . . . .

TAKE NOTICE that A. Farber & Partners Inc., as Trustee in Bankruptcy of the Estate of TNG Services Inc. formerly known as NexInnovations Inc., a bankrupt, hereby gives notice in writing, of our disclaimer for purposes of the Bankruptcy proceedings of all right, title and interest that the Trustee may have in the Lease or the Premises as of the date of bankruptcy, the 8th day of April, 2008.

15 The Trustee disallowed the claim but allowed a preferred claim for 18 days of unpaid rent from March 22 to April 8, 2008, and a preferred claim for three months accelerated rent following the date of the Bankruptcy Order, limited to the value of Nex's assets that were on the Premises as of the date of the Bankruptcy.

16 The Trustee sold the assets of Nex on the Premises as at the date of Bankruptcy for $7,775, net of costs. The Landlord's preferred claim was allowed at $7,775.

17 The Trustee also allowed an unsecured claim for rent arrears for the period of March 22 to April 8, 2008 in the amount of $24,662.89, and an unsecured claim for operating costs for the period of March 22 to April 8, 2008. The Trustee further allowed an unsecured claim for the costs of repairs to the HVAC system on the Premises in the amount of $50,000.

Law

18 The single issue before the Court is what is the effect to be given to the letter of the CRO of February 22, 2008 in the context of a CCAA proceeding.

19 The CCAA context of the landlord-tenant relationship is important. Once the Stay Order of October 2, 2007 was made, for any Plan to succeed, the Landlord and CRO had to reach agreement.][1] As long as the Stay Order was in place and the rent was continuing to be paid, the Landlord had the obligation to advise the CRO what cooperation it might expect in the attempt to restructure. In my view, once the Landlord received the letter of repudiation in the face of the Initial Order, it had an obligation to respond to advance any legal remedy.

20 In this circumstance, the Landlord accepted the continuance of rent payment without objection both before and after the letter of repudiation.

21 As nothing was received from the CRO between February 28, 2010 and the date of bankruptcy, the date of bankruptcy governs. The Landlord's claim is dependent on the determination of the rights as between the lessee and CRO under the umbrella of the CCAA.

22 The difference between the parties is narrow. The Landlord takes the position that the repudiation was complete when it received the February 28, 2010 notice. The position of the Trustee is that the CRO could not unilaterally repudiate the lease, since repudiation does not in and of itself bring an end to the contract; it merely confers on the innocent party a right of election to treat the contract at an end, thereby relieving the parties of further performance, though not relieving the party guilty of repudiatory breach from its liabilities for contractual breach.

23 Prof. Waddams in his text on the "Law of Contracts"[2] notes at p. 423:

> A variety of expressions has been used the sort of term that, if broken by one party, will excuse the other.

24 Repudiation is one of those expressions. The distinction between repudiation and recession in contract in general is well known in general terms, and well articulated in the decision of the Court of Appeal for Ontario in *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.*, [2006] O.J. No. 1964 (Ont. C.A.):

> [48] The Supreme Court of Canada explained the distinction between rescission and repudiation in *Guarantee Co. of North America v. Gordon Capital*, 1999 CanLII 664 (S.C.C.), [1999] 3 S.C.R. 423. Rescission is a remedy available to the innocent party when the other party has made a false or misleading representation. Rescission

> allows for the rescinding party to treat the contract as if it were void *ab initio*. Speaking for the court, Iacobucci and Bastarache JJ. endorsed the following definition of rescission from Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 733 at 781 (H.L.):
>
> > Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in *status quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into.
>
> Iacobucci and Bastarache JJ. went on to explain that the misrepresentation must be "substantial", "material", or "go to the root of the contract" for the remedy of rescission to be available (at para. 47).
>
> [49] In contrast, repudiation occurs by words or conduct that show an intention not to be bound by the contract. Contrary to rescission, which allows the innocent party to treat the contract as void *ab initio*, the consequences of repudiation depend on the election made by the non-repudiating or innocent party: *Gordon Capital*, *supra*, at para. 440. The non-repudiating party can elect to treat the contract as still being in full force and effect, and the contract remains for the future. In this instance, each party would have a right to sue for damages for past or future breaches. Alternatively, the innocent party can elect to accept the repudiation and the contract is terminated. Each party is then discharged from future obligations: *Gordon Capital* at para. 40.
>
> [50] Thus, a repudiatory breach does not automatically bring an end to a contract. Rather, it confers a right upon the innocent party to elect to treat the contract at an end thereby relieving the parties from further performance. As a general rule, the innocent party must make an election and communicate it to the repudiating party within a reasonable time: see *Chapman v. Ginter* 1968 CanLII 72 (S.C.C.), [1968] S.C.R. 560 at 568. However, in some cases the election to treat the contract at an end will be found to have been sufficiently communicated by the innocent party's conduct: John D. McCamus, *The Law of Contracts*, (Toronto: Irwin Law Inc., 2005) at pp. 641-42
>
> [51] Repudiation occurs in circumstances where the breach deprives the innocent party of substantially the whole benefit that it was intended he or she should have obtained from the contract: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (S.C.C.), [1989] 1 S.C.R. 426 at 499-500. A breach that allows the non-repudiating party to elect to put an end to all unperformed obligations of the parties is an exceptional remedy that is available only in circumstances where the entire foundation of the contract has been undermined, that is, where the very thing bargained for has not been provided: see *Hunter Engineering*, *supra*; see also *Gordon Capital*, *supra*, at para. 50.

25 The same principle has been applied in the context of commercial leases. *Highway Properties Ltd. v. Kelly, Douglas & Co.*[3] is the seminal Canadian case dealing with repudiations in the context of commercial leases. The Supreme Court of Canada described the landlords options upon a lease repudiation in the following terms:

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis.

26 I am of the view that it is particularly important in the context of a CCAA Application that when there is repudiation by or on behalf of a commercial tenant, the Landlord should advise promptly which of its options it intends pursuing. Written notice of an intention to seek damages for the entire unexpired term of the lease is required to clearly communicate the election of a remedy. It is only in the context that the debtor and monitor can consider the situation in the context of the possibility of an overall favourable restructuring, as opposed to a bankruptcy. That certainly is undoubtedly is one of the

goals of the 2009 CCAA amendments.

27 The argument put forward by the landlord in its most essential form is that the Trustee when it disallowed the landlord's claim following bankruptcy, could not because the lease was already forfeited prior.

28 Based on the authorities referred to above, I am satisfied that the lease was not forfeited prior to bankruptcy as asserted on behalf of the landlord.

29 Rather, the notice of repudiation on behalf of the tenant, which was not responded to prior to bankruptcy, had the effect that the Trustee was entitled as it did to disallow the claim of the landlord on the basis of disclaimer under s. 30(1) of the BIA.

30 For the foregoing reasons the appeal from disallowance is dismissed.

31 If it is necessary to deal with the issue of costs, counsel may make written submissions within 10 days.

Appeal dismissed.

Footnotes

1 It is to be noted that the problem posed by this motion is now dealt with by amendments to the CCAA as of September 2009

2 "Law of Contracts," 5th ed., Canada Law Book

3 *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.)

2011 ONCA 535
Ontario Court of Appeal

TNG Acquisition Inc., Re

2011 CarswellOnt 8039, 2011 ONCA 535, [2011] O.J. No. 3527, 107 O.R. (3d) 304, 205 A.C.W.S. (3d) 627, 283 O.A.C. 168, 340 D.L.R. (4th) 44, 81 C.B.R. (5th) 151

In the Matter of the Bankruptcy of TNG Acquisition Inc., (successor estate of NexInnovations Inc., a bankrupt) of the City of Mississauga, in the Province of Ontario

J.I. Laskin, S.T. Goudge, E.E. Gillese JJ.A.

Heard: May 31, 2011
Judgment: July 28, 2011
Docket: CA C52939

Proceedings: affirming *TNG Acquisition Inc., Re* (2010), 2010 CarswellOnt 8677, 2010 ONSC 6119, 73 C.B.R. (5th) 122 (Ont. S.C.J. [Commercial List])

Counsel: Kenneth D. Kraft for Appellant, Hewlett-Packard (Canada) Co. (formerly EDS Canada Inc.)
David S. Ward for Trustee-in-Bankruptcy, A. Farber & Partners Inc.

Subject: Contracts; Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.2 Disallowance of claim
IX.2.c Appeal from disallowance
IX.2.c.i General principles
Bankruptcy and insolvency
X Priorities of claims
X.4 Claims by landlord
X.4.g Disclaimer and surrender of lease
Contracts
X Discharge
X.5 Right to rescind after repudiation
X.5.a General principles
Real property
V Landlord and tenant
V.8 Term of lease
V.8.c Termination
V.8.c.i Rescission
V.8.c.i.A Repudiation

Headnote
Contracts --- Discharge — Right to rescind after repudiation — General principles
Bankruptcy and insolvency --- Proving claim — Disallowance of claim — Appeal from disallowance — General principles
Bankruptcy and insolvency --- Priorities of claims — Claims by landlord — Disclaimer and surrender of lease

Company (bankrupt) obtained protection of Companies' Creditors Arrangement Act (CCAA) — Initial order gave bankrupt right to repudiate leases — Bankrupt sent Repudiation Letter to landlord repudiating lease — Repudiation Letter included acknowledgment to be signed by landlord and returned to bankrupt — Landlord never acknowledged or returned Repudiation Letter — Bankrupt became bankrupt — Landlord filed proof of claim in bankruptcy — Trustee in bankruptcy issued disclaimer of lease — Bulk of landlord's claim was disallowed — Landlord brought unsuccessful motion to set aside disallowance of claim — Motion judge held that Repudiation Letter, which was not responded to prior to bankruptcy, had effect that Trustee was entitled as it did to disallow landlord's claim on basis of disclaimer under s. 30(1) of Bankruptcy and Insolvency Act — Landlord appealed — Appeal dismissed — In absence of proof of acceptance of repudiation and notification of acceptance, lease will be treated as subsisting — Due to nature of rights of landlord when tenant repudiates lease, it is important in CCAA proceedings for landlord to promptly advise tenant which option it intends to pursue — Landlord never made election after receiving Repudiation Letter — Landlord did not acknowledge or accept repudiation, and alternative mechanisms provided for in initial order for dealing with repudiation were not used — Motion judge correctly concluded that lease had not been brought to end in CCAA proceedings and was, therefore, susceptible to statutory disclaimer by Trustee following commencement of bankruptcy.

Real property --- Landlord and tenant — Term of lease — Termination — Rescission — Repudiation

Company (bankrupt) obtained protection of Companies' Creditors Arrangement Act (CCAA) — Initial order gave bankrupt right to repudiate leases — Bankrupt sent Repudiation Letter to landlord repudiating lease — Repudiation Letter included acknowledgment to be signed by landlord and returned to bankrupt — Landlord never acknowledged or returned Repudiation Letter — Bankrupt became bankrupt — Landlord filed proof of claim in bankruptcy — Trustee in bankruptcy issued disclaimer of lease — Bulk of landlord's claim was disallowed — Landlord brought unsuccessful motion to set aside disallowance of claim — Motion judge held that Repudiation Letter, which was not responded to prior to bankruptcy, had effect that Trustee was entitled as it did to disallow landlord's claim on basis of disclaimer under s. 30(1) of Bankruptcy and Insolvency Act — Landlord appealed — Appeal dismissed — In absence of proof of acceptance of repudiation and notification of acceptance, lease will be treated as subsisting — Due to nature of rights of landlord when tenant repudiates lease, it is important in CCAA proceedings for landlord to promptly advise tenant which option it intends to pursue — Landlord never made election after receiving Repudiation Letter — Landlord did not acknowledge or accept repudiation, and alternative mechanisms provided for in Initial Order for dealing with repudiation were not used — Motion judge correctly concluded that lease had not been brought to end in CCAA proceedings and was, therefore, susceptible to statutory disclaimer by Trustee following commencement of bankruptcy.

Table of Authorities

Cases considered by *E.E. Gillese J.A.*:

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), 1971 CarswellBC 274, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, [1971] S.C.R. 562 (S.C.C.) — followed

Howard v. Pickford Tool Co. (1950), [1951] 1 K.B. 417 (Eng. C.A.) — considered

Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd. (2006), 18 B.L.R. (4th) 230, 46 R.P.R. (4th) 1, 211 O.A.C. 141, 2006 CarswellOnt 3009, 270 D.L.R. (4th) 181 (Ont. C.A.) — considered

Williams v. Good Call Productions Ltd. (2003), 2003 CarswellOnt 1734, 35 B.L.R. (3d) 249, [2003] O.T.C. 406 (Ont. S.C.J.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 30(1)(k) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 32 [en. 2005, c. 47, s. 131; am. 2007, c. 29, s. 108] — referred to

Words and phrases considered:

repudiation

[T]ermination and repudiation are distinct legal concepts. To terminate a lease is to bring it to an end. Repudiation of a lease, on the other hand, does not in itself bring the lease to an end. Repudiation occurs when one party indicates, by words or conduct, that they no longer intend to honour their obligations when they fall due in the future. It confers on the innocent party a right of election to, among other things, treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach.

APPEAL by landlord from judgment reported at *TNG Acquisition Inc., Re* (2010), 2010 CarswellOnt 8677, 2010 ONSC 6119, 73 C.B.R. (5th) 122 (Ont. S.C.J. [Commercial List]), dismissing landlord's claim.

E.E. Gillese J.A.:

1 What is the legal effect of a notice of repudiation of lease given during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) proceedings? This appeal answers that question.

The Facts

2 EDS Canada Corp. (EDS or the Landlord) was the sublessor of premises located in Mississauga, Ontario. In June 2001, EDS subleased the premises to NexInnovations (Nex).

3 On October 2, 2007, Nex obtained creditor protection under the *CCAA* (the Initial Order).

4 Para. 8 of the Initial Order made in the *CCAA* proceedings gave Nex the right to repudiate leases. The relevant part of para. 8 reads as follows:

> 8. **THIS COURT ORDERS** that *the Applicant shall have the right*, but not the obligation, *to*:
>
> . . . . .
>
> (c) vacate, abandon or quit any leased premises and/or terminate or *repudiate any lease*, license and any ancillary agreements relating to any leased or licensed premises, without prior notice (or such other notice period agreed to by the relevant landlord and the Applicant) in writing, delivered by fax or courier to the last known address of the relevant landlord, *on such terms as may be agreed upon between the Applicant and such landlord or, failing such agreement, to deal with the consequences thereof in the Plan*; [emphasis added]

5 The Initial Order also appointed Prowis Inc. as Chief Restructuring Officer (CRO) for Nex.

6 The CRO sent EDS a letter dated February 22, 2008, on behalf of Nex, stating that, among other things, Nex was repudiating the lease, effective March 21, 2008 (the Repudiation Letter).

7 The Repudiation Letter included an acknowledgment to be signed and dated by EDS and returned to Nex. EDS never acknowledged, accepted or returned the Repudiation Letter to Nex.

8 Nex abandoned the premises effective March 21, 2008.

9 EDS immediately attempted to find a new tenant to re-let the premises but was unsuccessful.

10 Nex's restructuring efforts failed. It never filed a plan of arrangement.

11 The majority of Nex's assets was sold pursuant to orders made in the *CCAA* proceedings. Following the sale, one of the purchasers occupied a portion of the premises and paid occupation rent for the period from March 22, 2008, to July 22, 2008, in the approximate amount of $136,260.00.

12 On April 8, 2008, Nex was declared bankrupt (the Nex Bankruptcy Order).

13 On August 21, 2008, EDS submitted a proof of claim to A. Farber & Partners Inc. (the Trustee), in its capacity as trustee in bankruptcy of TNG Services Inc., (formerly known as Nex), for its "unrecoverable expenses" during the entire term of the lease up to January 30, 2012. The claim was for $3,313,500.24 (the Claim).

14 On September 18, 2008, the Trustee issued a disclaimer of the lease. A trustee's disclaimer of a lease brings the lease to an end and terminates all rights and obligations for the payment of rent. Thus, if the trustee disclaims the lease, the landlord has no claim for rent for the remainder of the lease.

15 On December 29, 2008, the Trustee obtained a sale approval and vesting order which, among other things, annulled the Nex Bankruptcy Order. The same order transferred all Nex assets to TNG Acquisition Inc. (TNG).

16 TNG was then adjudged a bankrupt. All claims formerly against Nex became claims against TNG and all Nex assets became available to satisfy such claims.

17 On October 13, 2009, the Trustee disallowed the bulk of the Claim. [1]

18 Hewlett-Packard (Canada) Co. (HP) is the successor to EDS. HP moved to have the disallowance set aside and the Claim declared to be valid.

19 Justice Colin Campbell heard and dismissed the motion.

20 HP appeals. For the reasons that follow, I would dismiss the appeal.

The Judgment Below

21 The motion judge found that the facts were not in dispute and that a single issue had to be decided: what effect was to be given to the Repudiation Letter in the context of a *CCAA* proceeding? He noted that the issue may now be dealt with by amendments to the *CCAA* as of September 2009. [2]

22 The Landlord took the position before the motion judge that repudiation of the lease was complete when it received the Repudiation Letter. Thus, it submitted, the Trustee could not disallow the Claim following bankruptcy because the lease had been forfeited before bankruptcy.

23 The Trustee's position was that the CRO could not unilaterally repudiate the lease, since repudiation does not in and of itself bring an end to the lease. It merely confers on the innocent party a right of election to treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach.

24 The motion judge noted that the Landlord had accepted the continuance of rent payments without objection, both before and after the Repudiation Letter.

25 He then considered this court's decision in *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.* (2006), 270 D.L.R. (4th) 181 (Ont. C.A.), in which rescission and repudiation were distinguished. Rescission is a remedy available to an innocent party when the other party has made a false or misleading representation. It allows the innocent party to treat the contract as void *ab initio*. In contrast, repudiation occurs by words or conduct that show an intention not to be bound by the contract. The consequences of repudiation depend on the election made by the innocent party. The innocent party can elect to treat the contract as remaining in full force and effect. In that case, both parties have the right to sue for damages for past or future breaches. Alternatively, the innocent party can elect to accept the repudiation and the contract is terminated. Each party is then discharged from future obligations.

26 The motion judge observed, based on *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.), that the same principle applies in the case of repudiation of commercial leases. He said it was particularly important

in *CCAA* proceedings for the landlord to promptly advise which option it intends to pursue, when it receives notice of repudiation from a commercial tenant.

27 Based on the authorities, the motion judge was satisfied that the lease had not been forfeited prior to bankruptcy. While the tenant had given notice of repudiation, the Landlord had not responded to the notice prior to bankruptcy. Accordingly, the Trustee was entitled to disallow the Claim on the basis of disclaimer under s. 30(1)(k) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

The Issues

28 HP raises two issues on appeal:

> 1. Did the Trustee have anything left to disclaim or was the Claim crystallized as an unsecured damages claim as at the date of bankruptcy?
>
> 2. Did the motion judge err in holding that more was required of the landlord in the context of the Repudiation Letter sent to EDS in the course of a *CCAA* proceeding?

Issue #1 Did the Trustee have anything left to disclaim at the date of bankruptcy?

29 HP submits that, in the *CCAA* context, the Repudiation Letter had the effect of ending the lease. Thus, as of March 21, 2008 — the date stipulated in the Repudiation Letter and prior to the bankruptcy — Nex no longer had any interest in the premises. HP says that pursuant to the terms of the Initial Order, it (as successor in interest to EDS) could not take any steps in respect of the repudiation of the lease other than to file a damages claim at the appropriate time. The fact that Nex ended up a bankrupt and did not file a plan of compromise or arrangement in respect of the *CCAA* proceedings could not undo the legal relationship that existed as at the date of bankruptcy. Accordingly, HP contends, at the date of the Nex bankruptcy, there was no longer a landlord/tenant relationship between EDS and Nex. Rather, it was simply a debtor/creditor relationship. Therefore, at the date of bankruptcy, there was no lease left for the Trustee to disclaim and it (HP) had an unsecured damages claim.

30 I do not accept this submission.

31 I begin by observing that on the facts of this case, it is hard to see how this submission could succeed, given that EDS accepted rent payments after receipt of the Repudiation Letter. But — more importantly — I reject the submission because it essentially asks the court to find that repudiation and termination are one and the same thing in a *CCAA* proceeding. They are not. Repudiation and termination are legally distinct acts that lead to significantly different legal rights and obligations for the parties. They are not to be conflated.

32 As the motion judge observed, *Highway Properties* is the seminal Canadian case on repudiation of commercial leases. In *Highway Properties*, a major tenant in a shopping centre repudiated its lease. The landlord resumed possession and notified the tenant that it would be held liable for damages it (the landlord) suffered as a result of the repudiation. The landlord sued for damages not only for the losses suffered to the date of repudiation but also for prospective losses resulting from the tenant's failure to carry on business in the shopping centre for the full term of the lease. At trial and on appeal, the courts held that the landlord could recover only for breaches that occurred to the date of surrender. On further appeal to the Supreme Court, Laskin J., writing for a unanimous court, allowed the appeal and awarded damages as the landlord had sought.

33 At p. 570 of *Highway Properties*, Laskin J. set out three courses of action that a landlord may take when a tenant has repudiated the lease entirely: 1) the landlord may insist on performance and sue for rent or damages on the footing that the lease remains in force; 2) the landlord may elect to terminate the lease, retaining the right to sue for rent accrued due or for damages to the date of termination for previous breaches of covenant; or 3) the landlord may advise the tenant that it proposes to re-let the property on the tenant's account and enter into possession on that basis.

34 Thus, as *Highway Properties* makes clear, termination and repudiation are distinct legal concepts. To terminate a lease is to bring it to an end. Repudiation of a lease, on the other hand, does not in itself bring the lease to an end. Repudiation occurs when one party indicates, by words or conduct, that they no longer intend to honour their obligations when they fall due in the future. It confers on the innocent party a right of election to, among other things, treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach.

35 One party to a lease cannot unilaterally end its obligations under the lease. In the absence of proof of both acceptance of the repudiation and notification of the acceptance, the lease will be treated as subsisting. See *Williams v. Good Call Productions Ltd.* (2003), 35 B.L.R. (3d) 249 (Ont. S.C.J.), at para. 28, quoting Asquith L.J.in *Howard v. Pickford Tool Co.* (1950), [1951] 1 K.B. 417 (Eng. C.A.), at 421:

> An unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind. Therefore a declaration that the defendants had repudiated their contract with the plaintiff would be entirely valueless to the plaintiff if it appeared at the same time, as it must appear in this case, that it was not accepted.

36 Due to the nature of the rights that a landlord has when a tenant repudiates a lease, I agree with the motion judge when he states that it is particularly important in *CCAA* proceedings for the landlord to promptly advise the tenant which option it intends to pursue.

37 In the present case, EDS never made an election after receiving the Repudiation Letter. It did not acknowledge or accept the repudiation. Moreover, neither of the two alternative mechanisms provided by para. 8(c) of the Initial Order for dealing with repudiation was used. It will be recalled that para. 8(c) gave the tenant the right to repudiate "on such terms as may be agreed upon" between it and EDS and Nex or, "failing such agreement, to deal with the consequences thereof in the Plan". There was no such agreement between the parties nor was a plan of arrangement or compromise ever filed in the *CCAA* proceeding.

38 Accordingly, notwithstanding the Repudiation Letter, the relationship between EDS and Nex remained that of landlord and tenant at the date of the bankruptcy. Thus, in my view, the motion judge correctly concluded that the lease had not been brought to an end in the *CCAA* proceedings and it was, therefore, susceptible to statutory disclaimer by the Trustee following the commencement of bankruptcy.

Issue #2 Was the landlord required to do something in order to make the repudiation notice effective?

39 HP submits that the motion judge erred in holding that the landlord was required to do something in order to make the repudiation effective. It argues that in the context of a *CCAA* proceeding, it makes no sense for a landlord to do anything other than accept the notice of repudiation, locate a new tenant and file a damages claim.

40 For the reasons given above, I would not accept this submission. The caselaw makes it clear that the landlord has an election to make when a tenant repudiates. The landlord must make the election in order for the parties to know what consequences flow from the repudiation. If the landlord does nothing, the landlord/tenant relationship remains and the lease continues in force: *Highway Properties*, at p. 570.

Disposition

41 Accordingly, I would dismiss the appeal with costs to the respondent in the agreed on sum of $2,500, all inclusive.

J.I. Laskin J.A.:

I agree.

S.T. Goudge J.A.:

I agree.

Appeal dismissed.

Footnotes

1 It allowed a preferred claim for 18 days of unpaid rent from March 22 to April 8, 2008, and a preferred claim for three months accelerated rent following the date of the Nex Bankruptcy Order, limited to the value of Nex's assets that were on the premises at the date of the bankruptcy. After the sale of the Nex assets, the preferred claim was allowed at $7,775. The Trustee also allowed an unsecured claim for a portion of the arrears, operating costs and the cost of repairs to the HVAC system on the premises.

2 Based on the factums of both parties, it appears that the motion judge was referring to s. 32 of the *CCAA*. Section 32 was originally added to the *CCAA* by S.C. 2005, c. 47, s. 131; it came into force on September 18, 2009. Prior to coming into force, s. 32 was amended by S.C. 2007, c. 29, s. 108, effective June 22, 2007, and c. 36, effective December 14, 2007.

TAB 3

1933 CarswellOnt 52
Ontario Supreme Court

Mussens Ltd., Re

1933 CarswellOnt 52, [1933] O.W.N. 459, 14 C.B.R. 479

In re Mussens Limited, in liquidation

Ex parte H. W. Petrie Limited

Rose, C.J.H.C. in Chambers

Judgment: June 9, 1933

Counsel: *J. W. Pickup*, for H. W. Petrie Limited, appellant.
R. M. Fowler, for the liquidator of Mussens Limited, respondent.

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.4 Claims by landlord
X.4.g Disclaimer and surrender of lease

Business associations
VI Changes to corporate status
VI.4 Winding-up
VI.4.b Under Dominion Act
VI.4.b.vii Claims of creditors
VI.4.b.vii.C Preferred claims
VI.4.b.vii.C.2 Claims of landlord

Real property
V Landlord and tenant
V.13 Surrender
V.13.a Express surrender
V.13.a.ii Miscellaneous

Headnote

Bankruptcy --- Priorities of claims — Claims by landlord — Disclaimer and surrender of lease

Corporations --- Winding-up — Under Dominion Act — Claims of creditors — Preferred claims — Claims of landlord

Landlord and Tenant --- Surrender — Express surrender — General

Landlord and Tenant — Winding-up — Disclaimer of Lease by Liquidator of Tenant — Landlord's Claim against Estate for Damages for Breach of Covenant to pay Future Rent — The Winding-up Act, R.S.C., 1927, Ch. 213, Sec. 71 — The Landlord and Tenant Act, R.S.O., 1927, Ch. 190, Secs. 37, 38.

By a lease dated November 11, 1930, H. W. Petrie Limited demised to Mussens Limited certain premises for a term of five years at a monthly rental of $175. On April 21, 1932, an order for the winding up of Mussens Limited under the Dominion *Winding-up Act* was made. On June 21, 1932, the liquidator notified the lessor that Mussens Limited would vacate the premises at the expiry of the period for which the lessor had "a legal claim for preference as to rent." On July 18, 1932, the liquidator wrote to the trustee in bankruptcy of the lessor (the lessor having gone into bankruptcy in the meantime) referring to the letter of June 21, 1932, and suggesting terms (which were later agreed to) upon which the liquidator would continue occupation after the time mentioned in the letter of June 21 without prejudice to the claim of the lessor that, while the liquidator was not liable for the rent reserved by the lease of November, 1930, Mussens Limited was breaking and would in each month of the original term continue to break its covenant to pay rent, and that the lessor had under sec. 71 of *The Winding-Up Act* a claim for damages for the breaches already committed and to be committed. The lessor claimed against the estate of Mussens Limited in liquidation and the claim was referred to the Master for trial. The Master disallowed the claim and an appeal was taken by the lessor from the report or judgment of the Master. For the lessor it was contended that its claim for damages for breach of the covenant to pay future rent was one of those claims for damages mentioned in sec. 73 of *The Winding-Up Act* where it is enacted that "when the business of a company is being wound up under this Act *** all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, shall be admissible to proof against the company."

Held, that under sec. 38 of *The Landlord and Tenant Act*, the liquidator is given the right at any time before electing to retain the leased premises under sec. 37 of the Act, by notice in writing to the landlord to surrender possession or disclaim the lease, and the liquidator's entry into possession of the leased premises and their occupation by him, while required for the purposes of the trust estate shall not be deemed to be evidence of an intention on his part to elect to retain possession of the premises under the provisions "of this section" — meaning sec. 37 of the Act.

Held, further, that the liquidator by his letter of June 21, 1932, confirming an earlier letter, had exercised his right, "to surrender possession or disclaim" the lease, and when he had exercised that right, the obligation of Mussens Limited, the insolvent company, to pay rent was at an end.

The appeal was dismissed with costs.

***Rose, C.J.H.C.*:**

1 This is an appeal by H. W. Petrie Limited from a report or judgment of the Master to whom the claim of the appellant against the estate of Mussens Limited in liquidation had been referred for trial.

2 By a lease dated November 11, 1930, H. W. Petrie Limited demised to Mussens Limited certain premises in Toronto for the term of five years at a monthly rental of $175. An order for the winding-up of Mussens Limited under the Dominion *Winding-up Act*, R.S.C., 1927, ch. 213, was made on April 21, 1932. On June 21, 1932, the liquidator of Mussens Limited notified H. W. Petrie Limited that Mussens Limited would vacate the premises at the expiry of the period for which H. W. Petrie Limited had "a legal claim for preference as to rent." On July 18, 1932, the liquidator wrote to the trustee in bankruptcy of H. W. Petrie Limited (that company having gone into bankruptcy in the meantime) referring to the letter of June 21, 1932, and suggesting terms (which later were agreed to) upon which the liquidator would continue occupation after the time named in the letter of June 21, without prejudice to the claim which has now been put forward and has been adjudicated upon by the Master.

3 The claim is that, while the liquidator of Mussens Limited is not liable for the rent reserved by the lease of November, 1930, Mussens Limited are breaking and will in each month of the original term continue to break their covenant to pay rent: and that the landlord has under sec. 71 of *The Winding-up Act* a claim for damages for the breaches already committed and hereafter to be committed. By sec. 71 it is enacted that "when the business of a company is being wound up under this Act ... all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, shall be admissible to proof against the company," and Mr. Pickup contends that this claim of the landlord for damages for breach of the covenant to pay future rent is one of those claims for damages.

4 In my opinion the claim of the lessor is not well founded.

5 By sec. 37 of *The Landlord and Tenant Act*, R.S.O., 1927, ch. 190, it is enacted that in case an order is made for the winding-up of an incorporated company which is a tenant the preferential lien of the landlord for rent shall be restricted to an amount stated and that the liquidator may "within three months ... and before he has given notice of intention to surrender possession or disclaim, by notice in writing elect to retain the leased premises for the whole or any portion of the unexpired term and any renewal thereof, upon the terms of the lease and subject to the payment of the rent as provided by such lease"; and by sec. 38 the liquidator is given "the further right at any time before no electing by notice in writing to the landlord, to surrender possession or disclaim any such lease, and his entry into possession of the leased premises and their occupation by him, while required for the purposes of the trust estate, shall not be deemed to be evidence of an intention on his part to elect to retain possession" — the statute says "to elect to retain possession pursuant to the provisions of *this* section" but the meaning is plain: sec. 38 of the Act as amended in 192 by 14 Geo. V., ch. 42, seq. 2, has in the revised statute been split up into secs. 37 and 38, and the expression "this section" has been left as it was in 1924, whereas really in the revised statute the expression ought to be "section 37."

6 I think that by his letter of April 21, 1932, confirmed in his letter of June 21, 1932, the liquidator exercised his right "to surrender possession or disclaim" the lease, and that when he had exercised that right the obligation of the tenant, the insolvent company, to pay rent was at an end. It did not require a statute to confer upon the liquidator power to surrender possession or disclaim the lease with the consent of the lessor; the statute means I think that whether the lessor is or is not willing the liquidator may surrender possession or disclaim the lease, and that if he does so surrender possession or disclaim the lease the tenant in liquidation shall be in the same position as if the lease had been surrendered with the consent of the lessor. Of course if the lease were surrendered with the consent of the lessor there could be no suggestion of any further liability on the part of the lessee to pay rent and no suggestion that by failing to pay rent the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages.

7 In England, as is pointed out by the Master in his judgment, the statute with which sec. 38 of *The Landlord and Tenant Act* more or less corresponds, contains the provision that any person injured by the operation of the section (i.e., by the disclaimer or surrender) shall be deemed a creditor of the bankrupt to the extent of such injury and may accordingly prove the same as a debt under the bankruptcy; but the Ontario statute contains no similar saving of the rights of the lessor, and I think that the result is that in Ontario the liquidator has been given a statutory right to commit a breach of the insolvent's covenant, and that no right of compensation for the statutory breach having been given to the covenantee no damages can be recovered.

8 The appeal will be dismissed with costs.

TAB 4

1965 CarswellOnt 40, [1965] 2 O.R. 152, 50 D.L.R. (2d) 25, 8 C.B.R. (N.S.) 62

1965 CarswellOnt 40
Ontario Supreme Court

Cummer-Yonge Investments Ltd. v. Fagot

1965 CarswellOnt 40, [1965] 2 O.R. 152, 50 D.L.R. (2d) 25, 8 C.B.R. (N.S.) 62

Cummer-Yonge Investments Limited v. Fagot et al.*

Gale C.J.H.C.

Judgment: February 17, 1965

Counsel: *J. D. Honsberger*, for plaintiff.
F. M. Catzman, Q.C., for defendants.

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
VIII Property of bankrupt
VIII.19 Miscellaneous

Headnote

Bankruptcy --- Property of Bankrupt

Landlord and tenant — Guarantee of lease — Lessee making assignment in bankruptcy — Disclaimer of lease by trustee — Liability of guarantors terminated by bankruptcy.

The lease of a limited company was personally guaranteed by W. and F. The limited company made an assignment in bankruptcy and the trustee within three months of the bankruptcy gave a disclaimer of the lease. The guarantors admitted their liability for arrears of rent but alleged that they were under no liability for the rent for the balance of the term on the grounds that the bankruptcy terminated their liability.

Held, the guarantors were not liable for the rent for the balance of the term.

By virtue of ss. 41(5) and 2(*o*) of the Bankruptcy Act, when the limited company filed its assignment in bankruptcy any beneficial interest it had enjoyed in the lease vested in the trustee in bankruptcy. The tenant's liability to pay rent was one of the obligations that passed to the trustee and as of that date, the tenant was divested of all its rights and freed from all its liabilities in respect of the lease. The guarantors had guaranteed the due performance by the lessee of all its covenants and therefore this secondary obligation was determined when the primary obligation came to an end.

The legal effect of a surrender or disclaimer given pursuant to s. 38(1) of the Landlord and Tenant Act is the same. When the

trustee gives a disclaimer, all the rights and obligations which he inherited from the bankrupt are at an end and there is no revesting of the rights and obligations in the bankrupt tenant which can impose a liability on guarantors.

Gale C.J.H.C.:

1 This is an action on a guarantee. On 29th February 1960, a lease was entered into between the plaintiff, Cummer-Yonge Investments Limited, as lessor, the defendants Wax and Feldt "as trustees, for and in behalf of a company to be incorporated", as lessee, and the defendants Wax, Feldt, and Fagot as guarantors. The lease was to run for a period of 20 years from 1st September 1960, at a rental of $742 per month for the first two years, and $779 per month for the balance of the term. Monthly charges of $44.48 were payable by way of additional rent throughout the term of the lease.

2 The lease was signed by the defendants Wax and Feldt, both in their capacity as trustees and as guarantors, but was never signed by the defendant Fagot. Accordingly, the claim against this last defendant on the guarantee must fail for want of compliance with s. 4 of The Statute of Frauds, R.S.O. 1960, c. 381.

3 On 13th July 1960, Fagot & Sons (Yonge) Hardware Limited was incorporated, it being the company contemplated at the time the lease was executed. It took possession of the leased premises in November 1960, and made payments on account of rent until it made a voluntary assignment in bankruptcy on 27th December 1962. On 6th March 1963, the trustee in bankruptcy sent to the plaintiff a document entitled "Disclaimer of Lease", by which he disclaimed the lease to the bankrupt company as of 8th March 1963. Subsequently, the trustee paid the plaintiff's preferred claim for rent under the Bankruptcy Act, as well as a dividend on the claim as an unsecured creditor for rent in arrears prior to the date of bankruptcy. Shortly thereafter, the plaintiff's solicitor sent letters to each of the three defendants in this action, advising that the plaintiff was looking to them as guarantors to make good unpaid past and future rents under the lease.

4 The premises remaining unoccupied until 26th August 1964, when they were rented by the plaintiff to a new tenant.

5 The plaintiff's claim for arrears of rent accruing prior to the bankruptcy, after giving credit for the dividend received from the trustee, is for $1,228.24. At the trial, the defendants Wax and Feldt, by their counsel, admitted liability for this amount. However, they disputed the plaintiff's claim for 16 months' rent after the bankruptcy (from 1st April 1963 to 31st July 1964) in the amount of $13,175.68. That claim is asserted in reliance upon the guarantee clause in the lease, which reads as follows:

> The Guarantors if one is a party hereto join for the first five (5) years of the term hereby granted for valuable consideration and for the purpose of guaranteeing the due performance by the Lessee of all its covenants in this lease including the covenant to pay rent on the part of the Lessee to be performed.

6 As indicated previously, the defendant Fagot cannot be held liable on this guarantee because he never executed the lease. The position taken by the defendants Feldt and Wax, who admittedly signed the lease as guarantors, is that the bankruptcy of the tenant had the effect in law of terminating the liability of the bankrupt company to pay rent under the lease for the balance of the term, and that consequently the liability of the defendants as guarantors was likewise terminated. In support of this position, the defendants rely upon the provisions of the Bankruptcy Act, R.S.C. 1952, c. 14. Section 41(5) of that Act provides:

> 41. (5) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to the provisions of this Act and subject to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

7 "Property" is defined in s. 2(*o*) in the following terms:

> (*o*) 'property' includes money, goods, things in action, land, and *every description of property*, whether real or personal, movable or immovable, legal or equitable, and whether situate in Canada or elsewhere and includes *obligations*, easements and *every description of estate, interest and profit*, present or future, vested or contingent, *in*, arising out of, or incident to *property;*

(The italics are mine.)

8 From these sections, it follows that on 27th December 1962, when the tenant company filed its assignment in bankruptcy with the official receiver, any beneficial interest it had enjoyed in the lease thereupon passed to and vested in the trustee named in the assignment. By the same token, the tenant's liability to pay rent was one of the "obligations" that passed to the trustee, and thus, as of that date, the tenant was divested of all its rights and freed from all its liabilities in respect of the lease. Since the obligation of the guarantors under the lease was "for the purpose of guaranteeing the due performance by the Lessee of all its covenants in this lease including the covenant to pay rent on the part of the Lessee to be performed", this secondary obligation was determined when the tenant's primary obligation was determined.

9 What effect on this result, if any, has the disclaimer by the trustee? Section 105 of the Bankruptcy Act makes provincial landlord and tenant law applicable to the rights of landlords upon a bankruptcy. By s. 37 of The Landlord and Tenant Act, R.S.O. 1960, c. 206, the trustee in bankruptcy acquired the right to elect within three months of the assignment to retain the leased premises for the whole or any portion of the unexpired term. Section 38(1) of that Act provides:

> 38. (1) The assignee, liquidator or trustee has the further right, at any time before so electing, by notice in writing to the landlord, to surrender possession or disclaim any such lease, and his entry into possession of the leased premises and their occupation by him, while required for the purposes of the trust estate, shall not be deemed to be evidence of an intention on his part to elect to retain possession pursuant to s. 37.

10 It was this further right which the trustee exercised on 6th March 1963, when he disclaimed the lease to the bankrupt company.

11 Counsel for the defendants referred me to two English cases, *Stacey v. Hill*, [1901] 1 Q.B. 660 and *Morris & Sons Ltd. v. Jeffreys* (1933), 148 L.T. 56. Both cases involved, as does the present case, an action by a landlord against the guarantor of a bankrupt tenant. In both, a receiving order was made against the tenant and the trustee disclaimed the lease during the currency of the guarantee. The guarantor resisted the claim against him for payment of rent following the disclaimer by the trustee, and in both cases he was successful. As Romer L.J. said in the *Stacey* case, in dismissing the landlord's appeal from a judgment in favour of the defendant guarantor (at p. 667):

> ... the defendant has only agreed to be liable as surety for the payment of rent by a lessee under a lease: and yet the appellant seeks to make him liable to pay money, though there is no rent payable, no lease, and no person in the position of lessee.

12 Mr. Honsberger, for the plaintiff, laid great stress on the fact that the action taken by the trustee in respect of the lease in the instant case was a disclaimer, rather than a surrender. It was his submission that while a surrender operates to determine a lease and to preclude any subsequent accrual of rent, the trustee's disclaimer divested only himself of the rights and obligations under the lease, and had the effect in law of revesting these rights and obligations in the bankrupt tenant, the person from whom they originally came. While conceding that these obligations would be unenforceable against the tenant because of the provisions of the Bankruptcy Act, counsel argued that since the bankrupt's theoretical liability continued, the liability of the guarantors continued as well. He sought to distinguish the English authorities cited above on the ground that, under English bankruptcy legislation, a disclaimer expressly has the effect of extinguishing all the rights and liabilities of both the bankrupt and the trustee (see the Bankruptcy Act, 1883, 46 and 47 Vict., c. 52, s. 55(2), and the Bankruptcy Act, 1914, 4 and 5 Geo. V, c. 59, s. 54(2)), whereas the Canadian Act contains no such provision.

13 In answer to this suggested distinction between a surrender and a disclaimer, counsel for the defendants relied upon the case of *In re Mussens Ltd.; Ex parte Petrie Ltd.*, [1933] O.W.N. 459, 14 C.B.R. 479, a decision of Rose C.J.H.C. Although this case involved a liquidator under the Dominion Winding-Up Act, R.S.C. 1923, c. 213, it turned on an interpretation of s.

38 of The Landlord and Tenant Act, R.S.O. 1927, c. 190, which applies equally to a trustee in bankruptcy. There, the liquidator purported "to surrender possession or disclaim" the lease, and the lessor alleged that, while the liquidator was no longer liable for rent under the lease, the tenant in liquidation was in breach of its covenant to pay rent and was liable in damages for this breach. In rejecting this contention, the learned Chief Justice stated (at pp. 460-461):

> By his letter of 21st June 1932, confirming an earlier letter, the liquidator exercised his right 'to surrender possession or disclaim' the lease, and when he had exercised that right the obligation of the tenant, the insolvent company, to pay rent was at an end. It did not require a statute to confer upon the liquidator power to surrender possession or disclaim the lease with the consent of the lessor; the statute means that, whether the lessor is or is not willing, the liquidator may surrender possession or disclaim the lease, and that, if he does so surrender or disclaim the lease, the tenant in liquidation shall be in the same position as if the lease had been surrendered with the consent of the lessor. Of course, if the lease were surrendered with the consent of the lessor, there could be no suggestion of any further liability on the part of the lessee to pay rent and no suggestion that, by failing to pay rent, the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages.

14 It will be noted that, in this passage, Rose C.J.H.C. makes no distinction between surrender and disclaimer and the clear inference is that, in the opinion of the learned Chief Justice, the legal effect of each is the same.

15 Apart entirely from this decision, however, I am not persuaded that a disclaimer of a lease by a trustee in bankruptcy has the consequence contended for by counsel for the plaintiff in this action. Assuming, for purposes of argument, that his submission that the sole effect of the trustee's disclaimer is simply to divest him of his entire interest in the lease is correct, it nevertheless does not follow in law that that interest thereupon reverts to the bankrupt tenant. As indicated previously, whatever interest the tenant had in the lease prior to bankruptcy was, by the operation of s. 41(5) of the Bankruptcy Act, vested in the trustee upon the filing of the assignment. In my view, when the trustee subsequently disclaimed that interest, all the rights and obligations which he inherited from the bankrupt were wholly at an end.

16 This conclusion may be tested by reference to the provisions of the Bankruptcy Act itself. Mr. Honsberger's theory suggests that after bankruptcy a tenant may be revested with the rights and obligations of a lease which the trustee elects to disclaim. Such a contingency must, however, from the tenant's point of view, be an "interest ... present or future, vested or contingent, in ... property." Since this is embraced by the statutory definition of "property" in s. 2(*o*), the notional bounce-back interest for which counsel contends must itself be an incident of property that passes to the trustee immediately upon bankruptcy, and therefore cannot remain with the bankrupt tenant so as to revive in the event of disclaimer by the trustee. The contrary suggestion presupposes that there is an aspect of the tenant's property that does not pass to the trustee on the bankruptcy. An examination of the Act yields no authority for such a proposition.

17 I therefore find that, upon the bankruptcy of the tenant, all of its rights and obligations under the lease, including its liability to perform the covenant to pay rent, irrevocably passed to the trustee in bankruptcy. After that date, there were no covenants in the lease which the lessee was required to perform, and the defendants' guarantee of "the due performance by the Lessee of all its covenants in this lease" thereupon became inoperative.

18 The action is dismissed as against the defendant Fagot. The plaintiff will have judgment against the defendants Wax and Feldt for $1228.24, the amount of unpaid arrears of rent accruing before the bankruptcy. For the reasons indicated above, its claim against these defendants for rent accruing after the bankruptcy will be dismissed. In accordance with counsel's request at the conclusion of the argument, I may be spoken to on the question of costs.

Footnotes

* Affirmed on 14th May 1965 without written reasons by the Court of Appeal for Ontario.

1965 CarswellOnt 40, [1965] 2 O.R. 152, 50 D.L.R. (2d) 25, 8 C.B.R. (N.S.) 62

TAB 5

2009 CarswellOnt 2849
Ontario Superior Court of Justice

Linens N Things Canada Corp., Re

2009 CarswellOnt 2849, 177 A.C.W.S. (3d) 493, 53 C.B.R. (5th) 232

In the Matter of the Bankruptcy of Linens 'N Things Canada Corp., of the City of Toronto, in the Province of Ontario

Reg. S.W. Nettie

Heard: May 7, 2009
Judgment: May 22, 2009
Docket: Estate No. 31-1121528

Counsel: James Klein for Appellant
Aubrey Kauffman, Graham Phoenix for Respondent / Trustee

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
IX Proving claim
IX.2 Disallowance of claim
IX.2.c Appeal from disallowance
IX.2.c.i General principles
Real property
V Landlord and tenant
V.13 Surrender
V.13.a Express surrender
V.13.a.ii Miscellaneous

Headnote

Bankruptcy and insolvency --- Proving claim — Disallowance of claim — Appeal from disallowance — General principles

Bankrupt was big box retailer of household linens and other items — Bankrupt made assignment into bankruptcy — At time of assignment, creditor was landlord of one of bankrupt's locations — Trustee occupied demised premises for approximately two months — Trustee disclaimed lease of premises — Creditor, in its proof of claim, claimed to be due from bankrupt amount, in aggregate, of $3,886,933.15 — Trustee disallowed amount of $3,693,984 claimed on account of costs of building structure, amounts provided under lease as tenant's allowance, and leasing commission — Creditor appealed — Appeal dismissed — Trustee properly disallowed those portions of creditor's proof of claim — Creditor characterized its disallowed claim as one for damages for breach of contract contained in lease — Only breach complained of by creditor was of covenant to pay rent — Effect of s. 39 of Commercial Tenancies Act ("CTA") was that effect of surrender or disclaimer by trustee was as if there was consensual surrender of lease — In other words, it was at end, and no claim for damages could possibly be founded from such cessation of obligations under lease — Neither CTA nor Bankruptcy and Insolvency Act provided for type of claim advanced.

Real property --- Landlord and tenant — Surrender — Express surrender — Miscellaneous

Bankrupt was big box retailer of household linens and other items — Bankrupt made assignment into bankruptcy — At time of assignment, creditor was landlord of one of bankrupt's locations — Trustee occupied demised premises for approximately two months — Trustee disclaimed lease of premises — Creditor, in its proof of claim, claimed to be due from bankrupt amount, in aggregate, of $3,886,933.15 — Trustee disallowed amount of $3,693,984 claimed on account

of costs of building structure, amounts provided under lease as tenant's allowance, and leasing commission — Creditor appealed — Appeal dismissed — Trustee properly disallowed those portions of creditor's proof of claim — Creditor characterized its disallowed claim as one for damages for breach of contract contained in lease — Only breach complained of by creditor was of covenant to pay rent — Effect of s. 39 of Commercial Tenancies Act ("CTA") was that effect of surrender or disclaimer by trustee was as if there was consensual surrender of lease — In other words, it was at end, and no claim for damages could possibly be founded from such cessation of obligations under lease — Neither CTA nor Bankruptcy and Insolvency Act provided for type of claim advanced.

Table of Authorities

Cases considered by *Reg. S.W. Nettie*:

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), 1971 CarswellBC 274, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, [1971] S.C.R. 562 (S.C.C.) — distinguished

Mussens Ltd., Re (1933), 1933 CarswellOnt 52, 14 C.B.R. 479, [1933] O.W.N. 459 (Ont. S.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 73(4) — referred to

s. 135 — pursuant to

s. 136 — considered

s. 146 — referred to

Commercial Tenancies Act, R.S.O. 1990, c. L.7

s. 38 — considered

s. 39 — considered

APPEAL by creditor from partial disallowance of its proof of claim by trustee of bankrupt's estate.

***Reg. S.W. Nettie*:**

1 This was the appeal by Roundhouse Centre Windsor Inc. (the "Appellant") of the partial disallowance of its December 29, 2008, proof of claim by RSM Richter Inc., trustee of the Estate of Linens' N Things Canada Corp. (the "Trustee"), on or about February 20, 2009.

2 The appeal is pursuant to the provisions of s. 135 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

Facts

3 Linens' N Things Canada Corp. (the "Bankrupt") was a big box retailer of household linens and other items. On October 31, 2008, it made an assignment into bankruptcy, pursuant to the provisions of the BIA. At the time of the assignment, the Appellant was the landlord of the Bankrupt's location at the Round House Centre, in Windsor, Ontario.

4 The Trustee occupied the demised premises until December 29, 2008. The Trustee disclaimed the lease of the premises, by way of notice dated January 16, 2009, effective that date.

5 The demised premises included a standalone structure, various landlord improvements to it, and a significant tenant's allowance. The Appellant also incurred in letting the premises certain leasing costs. All of these were as provided for in the lease.

6 The Appellant, in its proof of claim, claimed to be due from the Bankrupt the amount, in the aggregate, of $3,886,933.15. This included a claim in the amount of $3,693,984.00 for build cost of the structure, tenant allowance and

leasing commission. The proof of claim also included certain other amounts which were disallowed by the Trustee, but which amounts have now been agreed to as properly disallowed.

7 What remains in dispute is the propriety of the Trustee's disallowance of the $3,693,984.00 on account of the costs of building the structure; amounts provided under the lease as tenant's allowance; and the commission paid on the lease itself by the Appellant.

Analysis

8 Section 146 BIA provides that, subject to the priority of claims set out in s. 136 BIA, and the provisions of s. 73(4) BIA, the rights of landlords shall be determined according to the laws of the Province in which the demised premises are situated. In the case at bar, that is Ontario.

9 The law in Ontario as to the rights of a landlord is codified, and has been for many, many, years, in what are now sections 38 and 39 of the *Commercial Tenancies Act*, R.S.O. 1990, chapter L.7 (the "CTA"). While s. 38 CTA provides for a preferential claim which mirrors s. 136 BIA, it is s. 39 CTA which is of most concern on this appeal. That section provides as follows:

> The person who is assignee, liquidator or trustee has the further right, at any time before so electing, by notice in writing to the landlord, to surrender possession or disclaim any such lease...

10 The Trustee's position, in partially disallowing the proof of claim, is that it has allowed the claims provided for in s. 38 CTA and s. 136 BIA, being that of three months arrears of rent, and three months of accelerated rent (the lease having contained an acceleration clause), together with certain other entitlements by way of charge backs, outstanding at the time of the bankruptcy, as being rent under the lease, or, alternatively, as being actually due and quantified under the lease at the time of bankruptcy. The Trustee's position is that it is not required to allow the claim for damages which the Appellant alleges it is suffering as a result of the disclaimer of the lease.

11 What is the claim of the Appellant? Put succinctly, it is that it built an expensive purpose built building for the Bankrupt, in what to others is seen as a less than valuable location at its Round House Centre, and bargained to recover its costs of so doing, together with some element of profit, over a 10 year and 6 month period of demise under the lease. It advances the same argument with respect to the tenant allowance and the leasing commissions which it paid in letting the building to the Bankrupt. The Appellant claims that it cannot lease this building to anyone else -for a variety of reasons. Even if I accept this to be true, and that the costs of erecting, improving and leasing this building are a complete loss, the question is whether or not that is a claim provable in bankruptcy.

12 The Appellant has gone to great lengths at the hearing to characterize its disallowed claim as one for damages for breach of the contract contained in the lease. It has taken great pains not to claim that any part of the disputed amount is rent, as it accepts that it can only claim rent in accordance with s. 136 BIA and s. 38 CTA.

13 The Appellant relies upon the decision of the Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.) for the proposition that a lease of real property is both a lease and a contract. Flowing from this is the finding in that decision that a landlord may have recourse not only to its rights as a landlord, but for contractual damages for breach of the contract which is the lease.

14 While I take no issue with the decision in *Highway Properties*, and it is clearly binding, it is also entirely distinguishable on the facts. The circumstances of the breach of the lease in *Highway Properties* were that the tenant therein repudiated the lease. There was no insolvency, and no applicability of s. 146 BIA or anything like sections 38 and 39 CTA.

15 Counsel spent considerable time on argument about whether the lease, which provides in its language a reservation to the Appellant of all of the Appellant's rights at law and equity for breach of the lease, was sufficient to contract out

of the provisions of sections 38 and 39 CTA, and whether or not a lease could provide for payback to a landlord, as damages, of an amount representing the unrealized costs of erecting a building for a tenant, or the like.

16 While such an argument is appealing, both the Dominion and Provincial Parliaments have spoken in determining that a trustee in bankruptcy may surrender or disclaim a lease. The effect of such is as if the parties had consensually ended the lease.

17 As pointed out in *Mussens Ltd., Re*, 1933 CarswellOnt 52 (Ont. S.C.), at paragraph 6, the language used in the predecessor of s. 39 CTA, which is for our purposes identical to the present day language in s. 39 CTA, means "that whether the lessor is or is not willing the [trustee] may surrender possession or disclaim the lease, and that if he does so surrender possession or disclaim the lease the tenant...shall be in the same position as if the lease had been surrendered with the consent of the lessor. Of course if the lease were surrendered with the consent of the lessor there could be no suggestion of any further liability on the part of the lessee to pay rent and no suggestion that by failing to pay rent the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages."

18 As in *Mussens* the only breach complained of by the Appellant is of the covenant to pay rent. I concur with the learned Chief Justice in *Mussens* that the effect of what is now s. 39 CTA is, whether in liquidation, as in *Mussens*, or in bankruptcy, the effect of a surrender or disclaimer by a trustee in this Province is as if there was a consensual surrender of the lease. In other words, it is at an end, and no claim for damages can possibly be founded from such a cessation of obligations under the lease. As Chief Justice Rose said in paragraph 7 of *Mussens*, a trustee under this section is given a statutory right to commit a breach of the insolvent's obligations under the lease.

19 According to the Chief Justice, the then corresponding provisions of the similar United Kingdom statute provided that any person injured by the exercise of the surrender or disclaimer of a lease under that statute shall be deemed a creditor to the extent of such injury. If s. 39 CTA contained such deeming language, then it seems to me that the Appellant would have the claim which it seeks to advance.

20 The Ontario statute did not provide for such a damage claim and deemed creditor status 76 years ago, and it does not do so today. The Dominion Parliament, in exercising its jurisdiction over bankruptcy law in the Dominion, has wholly left it up to the Provinces to determine the rights of lessors in these circumstances, and the Provincial Parliament has not seen fit to provide for the type of damage claim advanced by the Appellant. One can imagine that this is so because the vast majority of landlords are either amply compensated by a reduced but preferred claim for unpaid rent and future loss of rent, capped at three months worth, or there is generally no issue as the estates of commercial tenants in bankruptcies most often have no funds to pay claims of any type, so it matters little as to the quantum of a landlord's claim. In this case, I am advised that there may be sufficient funds in the Estate to provide a dividend to ordinary unsecured creditors - making the outcome of the appeal significant to the Appellant.

21 Be that as it may, neither of the statutes which govern rights in these matters provides for the type of claim advanced. Even more, the CTA and its predecessors, has been found for the better part of a century to have the effect of a consensual ending of the lease, and the cases recognize that this is a statutorily permitted breach for which there is no damage remedy, beyond the s. 38 CTA and s. 136 BIA preferred claim.

22 Accordingly, I find that the Trustee has properly disallowed the portions of the Appellant's proof of claim which it did, and the within appeal is dismissed.

23 Counsel are to be thanked for their very helpful briefs.

24 As to costs, counsel have suggested brief written submissions following the release of these Reasons, not to exceed one page. I find this appropriate. Counsel should contact the Bankruptcy Office at Toronto to arrange for their submissions to be forwarded to me, within 45 days hereof.

Appeal dismissed.

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TAB 6

2019 ONSC 1114
Ontario Superior Court of Justice

In the Matter of the Bankruptcy of Curriculum Services Canada

2019 CarswellOnt 2545, 2019 ONSC 1114, 302 A.C.W.S. (3d) 466, 68 C.B.R. (6th) 278

IN THE MATTER OF THE BANKRUPTCY OF Curriculum Services Canada/Services Des Programmes D'Etudes Canada of the City of Toronto in the Province of Ontario

V.R. Chiappetta J.

Heard: January 21, 2019
Judgment: February 15, 2019
Docket: 13-2360759

Counsel: Catherine Francis, for Appellant, Medallion Corporation as authorized agents for 280 Richmond Street West Limited
Alex Ilchenko, for Trustee, RSM Canada Limited

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.4 Claims by landlord
X.4.e Accelerated rent
X.4.e.i Entitlement to claim

Headnote

Bankruptcy and insolvency --- Priorities of claims — Claims by landlord — Accelerated rent — Entitlement to claim
Landlord filed Proof of Claim with Trustee claiming: preferred claim for three months' accelerated rent in amount of $100,558.59 under s. 136(1)(f) of Bankruptcy and Insolvency Act — Landlord appealed Notice of Disallowance — Appeal dismissed — Registrar in caselaw concluded that law in Ontario was as Trustee advocated on appeal: that after disclaimer there was no right in Ontario for landlord to claim damages on unexpired portion of lease.

Table of Authorities

Cases considered by *V.R. Chiappetta J.*:

Crystalline Investments Ltd. v. Domgroup Ltd. (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 CarswellOnt 220, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 2004 CSC 3, 70 O.R. (3d) 254 (S.C.C.) — considered

Cummer-Yonge Investments Ltd. v. Fagot (1965), [1965] 2 O.R. 152, 8 C.B.R. (N.S.) 62, 50 D.L.R. (2d) 25, 1965 CarswellOnt 40 (Ont. H.C.) — considered

Cummer-Yonge Investments Ltd. v. Fagot (1965), 8 C.B.R. (N.S.) 62 (note), 50 D.L.R. (2d) 30 (note), [1965] 2 O.R. 157

(note) (Ont. C.A.) — referred to

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), [1971] S.C.R. 562, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, 1971 CarswellBC 274 (S.C.C.) — considered

Hindcastle Ltd. v. Barbara Attenborough Associates Ltd. (1996), [1997] A.C. 70, [1996] 2 W.L.R. 262, [1996] 1 All E.R. 737 (U.K. H.L.) — considered

Linens 'N Things Canada Corp., Re (2009), 2009 CarswellOnt 2849, 53 C.B.R. (5th) 232 (Ont. S.C.J.) — considered

Mussens Ltd., Re (1933), 14 C.B.R. 479, [1933] O.W.N. 459, 1933 CarswellOnt 52 (Ont. S.C.) — considered

Stacey v. Hill (1901), [1901] 1 Q.B. 660 (Eng. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 30(1)(k) — considered

s. 65.2 [en. 1992, c. 27, s. 30] — considered

s. 65.2(3) [en. 1992, c. 27, s. 30] — considered

s. 135(3) — considered

s. 136 — considered

s. 136(1)(f) — considered

s. 136(3) — considered

s. 146 — considered

Commercial Tenancies Act, R.S.O. 1990, c. L.7
Generally — referred to

s. 38 — considered

s. 39 — considered

Landlord's Rights on Bankruptcy Act, R.S.A. 2000, c. L-5
s. 4 — referred to

APPEAL by landlord from Notice of Disallowance.

***V.R. Chiappetta J.*:**

Background

1 Pursuant to a Lease dated May 26, 2017 (the "Lease"), Curriculum Services Canada/Services Des Programmes D'Etudes Canada (the "Tenant" or "Curriculum") rented the sixth floor of 150 John Street West, Toronto, Ontario (the "Premises") from Medallion Corporation. Medallion Corporation is the authorized agent for 280 Richmond Street West

Limited (the "Landlord"). Curriculum went bankrupt in March 2018. The Landlord brought this claim in April 2018 under s. 136 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") for three months' accelerated rent and the unexpired portion of the term of the Lease.

2 The Lease was for 8,322 square feet of space at the Premises for a term of ten years and six months, commencing on July 1, 2017 and expiring on December 31, 2027, with basic rent payable as follows:

(i) Months 1-42: $21.50 per square foot per annum;

(ii) Months 43-78: $23.50 per square foot per annum; and

(iii) Months 79-126: $25.50 per square foot per annum.

3 In addition to basic rent, the Tenant was required to pay additional rent as defined in the Lease. Section 16 of the Lease deals with defaults and remedies. Section 16.1 reads in relevant part:

If any of the following shall occur:

. . .

(f) Tenant, any assignee or a subtenant of all or substantially all of the Premises makes an assignment for the benefit of creditors or becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment, arrangement or compromise with its creditors or Tenant sells all or substantially all of its personal property at the Premises other than in the ordinary course of business (and other than in connection with a Transfer requiring Landlord's consent and approved in writing by Landlord), or steps are taken or action or proceedings commenced by any person for the dissolution, winding up or other termination of Tenant's existence or liquidation of its assets (collectively called a "*Bankruptcy*");

(g) a trustee, receiver, receiver-manager, manager, agent or other like person shall be appointed in respect of the assets or business of Tenant or any other occupant of the Premises;

. . .

then, without prejudice to and in addition to any other rights or remedies to which Landlord is entitled hereunder or at law, the then current and the next three (3) months' Rent shall be forthwith due and payable and Landlord shall have the following rights and remedies, all of which are cumulative and not alternative, namely:

(i) to terminate this Lease in respect of the whole or any part of the Premises by written notice to Tenant (it being understood that actual possession shall not be required to effect a termination of this Lease and that written notice, alone shall be sufficient); if this Lease is terminated in respect of part of the Premises, this Lease shall be deemed to be amended by the appropriate amendments, and proportionate adjustments in respect of Rent and any other appropriate adjustments shall be made;

. . .

(v) to obtain damages from Tenant including, without limitation, if this Lease is terminated by Landlord, all deficiencies between all amounts which would have been payable by Tenant for what would have been the balance of the Term, but for such termination, and all net amounts actually received by Landlord for such period of time;

(vi) to suspend or cease to supply any utilities, services, heating, ventilating, air conditioning and humidity control to the Premises, all without liability of Landlord for any damages, including indirect or consequential damages, caused thereby;

(vii) to obtain the Termination Payment from Tenant;

(viii) if this Lease is terminated due to the default of Tenant, or if it is disclaimed, repudiated or terminated in any insolvency proceedings related to Tenant (collectively "Termination"), to obtain payment from Tenant of the value of all tenant inducements which were received by Tenant pursuant to the terms of this Lease, the agreement to enter into this Lease or otherwise, including, without limitation, the amount equal to the value of any leasehold improvement allowance, tenant inducement payment, rent free periods, lease takeover, Leasehold Improvements or any other work for Tenant's benefit completed at Landlord's cost or any moving allowance, which value shall be multiplied by a fraction, the numerator of which shall be the number of months from the date of Termination to the date which would have been the natural expiry of this Lease but for such Termination, and the denominator of which shall be the total number of months of the Term as originally agreed upon.

4 On March 28, 2018, Curriculum filed an Assignment for the General Benefit of Creditors (the "Assignment"). Amy Coupal, an officer and director of Curriculum, swore a Statement of Affairs dated March 28, 2018 in which she swore that Curriculum had assets totaling $1,903,563.87 and liabilities totaling $5,605,253.28, resulting in a deficiency of $3,701,689.41. The single largest liability shown on the Statement of Affairs was Curriculum's liability to the Landlord, which was reflected as follows:

(i) Unsecured claim: $3,986,725.25; and

(ii) Preferred claim: $100,558.59.

5 On March 29, 2018, pursuant to the Assignment, Curriculum became bankrupt. RSM Canada Inc. was appointed as Trustee.

6 On April 20, 2018, the Landlord filed a Proof of Claim with the Trustee claiming:

(i) A preferred claim for three months' accelerated rent in the amount of $100,558.59 under s. 136(1)(f) of the BIA, which reads as follows:

136(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . .

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

and;

(iii) An unsecured claim in the amount of $4,028,11.23 for the unexpired portion of the term of the Lease under s. 136(3) of the BIA, which reads as follows:

136(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

7 On April 23, 2018, the Trustee issued a Notice of Disclaimer of the Lease pursuant to s. 30(1)(k) of the *BIA*, effective that date.

8 On September 19, 2018, pursuant to s. 135(3) of the *BIA*, the Trustee disallowed part of the Landlord's preferred claim for $100,558.59, on the basis that the Trustee had realized only $24,571 from the assets on the leased premises (i.e. the office equipment). The Trustee therefore admitted the Landlord's preferred claim for $24,571 under s. 136(1)(f) of the *BIA*, in addition to the occupation rent that the Trustee paid to the Landlord.

9 The Trustee disallowed the entirety of the Landlord's claim for the unexpired portion of the term of the Lease in the amount of $4,028,111.23. The Trustee reasoned then, and now argues on appeal, that s. 146 of the *BIA* and ss. 38 and 39 of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 (the "*CTA*") operate to deem the disclaimer of a lease in Ontario by a trustee in bankruptcy as a consensual surrender of the lease by the tenant to the landlord, and consequently no claim for damages can be founded on the cessation of obligations under the lease.

10 Following the Disclaimer, the Landlord successfully mitigated its damages for the unexpired portion of the term of the Lease by obtaining another tenant. The Landlord has therefore amended its claim for the unexpired portion of the term to seek recovery of the tenant inducements provided to Curriculum under the terms of the Lease. These inducements were leasehold improvements provided by the Landlord under the Lease, costing $45,280 and free rent for a six-month period, worth a total of $175,225.28. The Landlord also seeks the balance of its claim for accelerated rent.

11 The Landlord appeals the Notice of Disallowance. It argues that there is no legal principle under which the Landlord should be disentitled from filing a proof of claim for its damages for the unexpired term of the Lease. It argues that these are contractual damages, and should be treated equally with any contractual damages potentially suffered by any of Curriculum's other creditors.

12 For reasons that follow, I disagree. There is long-established legal precedent that bars the claims made by the Landlord. The appeal is therefore dismissed.

Analysis

13 The Landlord's appeal requires the court to consider whether it remains the law in Ontario that the disclaimer of a lease by a trustee in bankruptcy prevents a landlord from claiming unsecured damages.

14 Pursuant to s. 136(3) of the *BIA*, a creditor whose rights are restricted by s. 136 is entitled to rank as an unsecured creditor for the balance of any claim due to him. Pursuant to s. 146 of the *BIA*, subject to priority for arrears of rent and accelerated rent, the rights of lessors are to be determined according to the law of the province in which the leased premises are situated. In Ontario, unlike in other provinces like Alberta, the statute that governs a landlord's rights on the bankruptcy of a tenant (the *CTA*) is silent as to whether a landlord can pursue an unsecured claim for its damages over and above its preferred claim (ss. 38 and 39 of the *CTA*; *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5, s. 4).

15 The issue of whether there is a damage remedy for landlords in Ontario beyond s. 38 of the *CTA* and s. 136 of the *BIA* was most recently considered by a Registrar in *Linens N Things Canada Corp., Re* (2009), 53 C.B.R. (5th) 232 (Ont. S.C.J.). Relying on *Mussens Ltd., Re*, [1933] O.W.N. 459, 14 C.B.R. 479 (Ont. S.C.), the Registrar concluded that the law in Ontario is as the Trustee advocates on this appeal: that after a disclaimer there is no right in Ontario for a landlord to claim damages on the unexpired portion of the lease.

16 In *Linens 'N Things*, the Landlord of the bankrupt *Linens 'N Things* appealed the bankruptcy trustee's disallowance of amounts it claimed under the lease, including the costs of building the structure expressly for the *Linens 'N Things*, tenant allowance and leasing commission. The Landlord went "to great lengths at the hearing to characterize its disallowed claim as one for damages for breach of the contract contained in the lease." It relied on the Supreme Court of Canada's decision in *Highway Properties Ltd. v. Kelly, Douglas & Co.* [1971] S.C.R. 562 (S.C.C.) for the proposition that a lease of real property is both a lease and a contract. Based on this, it argued that it should have recourse not only to its rights as a landlord, but to contractual damages for breach of the lease contract: *Linens 'N Things* at paras. 12-13.

17 The Registrar distinguished *Highway Properties* on one very important fact: that case did not involve any insolvency. In the context of an insolvency, s.146 of the *BIA* and ss. 38 and 39 of the *CTA* apply. The Registrar stated that through these enactments "both the Dominion and Provincial Parliaments have spoken in determining that a trustee in bankruptcy may surrender or disclaim a lease. The effect of such is as if the parties had consensually ended the lease . . . In other words, it is at an end, and no claim for damages can possibly be founded from such a cessation of obligations under a lease": *Linens 'N Things* at paras. 16-18.

18 In coming to this conclusion, the Registrar relied on *Mussens Ltd.*. In this 1933 case, Rose C.J.H.C. dismissed a landlord's claim for damages for breach of covenant to pay future rent in its tenant's bankruptcy proceedings. His Honour interpreted the predecessor to s. 39 of the *CTA* as giving the bankrupt tenant a statutory right to breach the lease without liability:

> [T]he statute means I think that whether the lessor is or is not willing the liquidator may surrender possession or disclaim the lease, and that if he does . . . the tenant in liquidation shall be in the same position as if the lease had been surrendered with the consent of the lessor. Of course if the lease were surrendered with the consent of the lessor there could be no suggestion of any further liability on the part of the lessee to pay rent and no suggestion that by failing to pay rent the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages.

19 Based on this decision, the Registrar in *Linens 'N Things* stated that "the *CTA* and its predecessors has been found for the better part of a century to have the effect of a consensual ending of the lease, and the cases recognize that this is a statutorily permitted breach for which there is no damage remedy, beyond the s. 38 *CTA* and s. 136 *BIA* preferred claim": para. 21.

20 The Landlord submits that the decision in *Linens 'N Things* is flawed as the Registrar failed to consider the Supreme Court's decision in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.). It argues as follows. In finding against the landlord in *Linen 'N Things*, the Registrar relied heavily on *Mussens*. *Mussens* was adopted and applied in *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152 (Ont. H.C.) , aff'd [1965] 2 O.R. 157 (note) (Ont. C.A.). *Cummer-Yonge* was overruled by the Supreme Court in *Crystalline Investments Ltd.*. It follows then that *Mussens* was also overturned such that the rights of landlords survive the issuance of a disclaimer.

21 I disagree.

22 In *Cummer-Yonge*, a landlord sought unpaid past and future rents from the guarantors of a lease after the trustee of the bankrupt tenant had disclaimed it. The guarantee clause in the lease stated that the defendants guaranteed "the due performance by the Lessee of all its covenants in this lease . . . " The plaintiff landlord argued that a disclaimer did not have the legal effect of a surrender, such that the guarantor's liability survived the bankrupt tenant's disclaimer (p. 155):

> It was his submission that while a surrender operates to determine a lease and to preclude any subsequent accrual of rent, the trustee's disclaimer divested only himself of the rights and obligations under the lease, and had the effect in law of revesting these rights and obligations in the bankrupt tenant, the person from whom they originally came. While conceding that these obligations would be unenforceable against the tenant because of the provisions of the Bankruptcy Act, counsel argued that since the bankrupt's theoretical liability continued, the liability of the guarantors continued as well. [Emphasis added.]

23 To reject this suggested distinction between a surrender and a disclaimer, the defendants cited *Mussens* (p. 155):

> In answer to this suggested distinction between a surrender and a disclaimer, counsel for the defendants relied upon the case of *Re Mussens Ltd., Petrie Ltd.'s Claim*, [1933] O.W.N. 459, 14 C.B.R. 479, a decision of Rose, C.J.H.C. Although this case involved a liquidator under the Dominion Winding-Up Act, it turned on an interpretation of s. 38 of the Landlord and Tenant Act, which applies equally to a trustee in bankruptcy. There, the liquidator purported "to surrender possession or disclaim" the lease, and the lessor alleged that, while the liquidator was no longer liable for rent under the

lease, the tenant in liquidation was in breach of its covenant to pay rent and was liable in damages for this breach. In rejecting this contention, the learned Chief Justice stated (at pp. 460-1):

> By his letter of June 21st, 1932, confirming an earlier letter, the liquidator exercised his right "to surrender possession or disclaim" the lease, and when he had exercised that right the obligation of the tenant, the insolvent company, to pay rent was at an end. It did not require a statute to confer upon the liquidator power to surrender possession or disclaim the lease with the consent of the lessor; the statute means that, whether the lessor is or is not willing, the liquidator may surrender possession or disclaim the lease, and that, if he does so surrender possession or disclaim the lease, the tenant in liquidation shall be in the same position as if the lease had been surrendered with the consent of the lessor. Of course, if the lease were surrendered with the consent of the lessor, there could be no suggestion of any further liability on the part of the lessee to pay rent and no suggestion that, by failing to pay rent, the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages.

24 The Registrar noted that Rose C.J.H.C. did not distinguish between a surrender and a disclaimer in *Mussens*, and "the clear inference is that, in the opinion of the learned Chief Justice, the legal effect of each is the same": p. 156.

25 After considering the defendants' submissions on *Mussens*, the Registrar made his conclusions on a different basis (p. 156):

> Apart entirely from this decision, however, I am not persuaded that a disclaimer of a lease by a trustee in bankruptcy has the consequence contended for by counsel for the plaintiff in this action. Assuming, for purposes of argument, that his submission that the sole effect of the trustee's disclaimer is simply to divest him of his entire interest in the lease is correct, it nevertheless does not follow in law that that interest thereupon reverts to the bankrupt tenant. As indicated previously, whatever interest the tenant had in the lease prior to bankruptcy was, by the operation of s. 41(5) of the Bankruptcy Act, vested in the trustee upon the filing of the assignment. In my view, when the trustee subsequently disclaimed that interest, all the rights and obligations which he inherited from the bankrupt were wholly at an end.

26 The Registrar supported this analysis by examining the *BIA*, finding that "an examination of the Act yields no authority for [the plaintiff landlord's position]: p. 157. Ultimately, the Registrar found that upon the bankruptcy of the tenant, all of its rights and obligations passed to the trustee, such that there were no covenants in the lease which the tenant was required to perform, and the guarantee of the "due performance by the Lessee of all its covenants in this lease" therefore became inoperative.

27 *Cummer-Yonge*, therefore, stood for the proposition that the disclaimer of a lease in bankruptcy extinguishes the lease obligations of any guarantor. *Mussens* was referenced to the extent of the suggested distinction between a surrender and a disclaimer as advanced by the plaintiff. Apart from *Mussens* and accepting a difference for the purposes of argument, the Court remained unconvinced of the plaintiff landlord's position, relying on the *BIA*. Furthermore, the proposition that a bankruptcy trustee's disclaimer ended the obligations of the bankrupt tenant was not at issue in *Cummer-Yonge*. It was not disputed by the parties or considered by the Registrar.

28 *Crystalline Investments Ltd.* overturned *Cummer-Yonge*. The case considered the effect of a bankruptcy trustee's disclaimer of a lease from the perspective of an assignor of a lease, not a guarantor. The plaintiff landlords had leased premises to the defendant, who had assigned the leases to a wholly owned subsidiary which it subsequently sold, and which subsequently became insolvent. Under the leases, the landlords' consent was not required for the assignments. The insolvent assignee's trustee repudiated the leases under s. 65.2 of the *BIA* as part of a court-approved proposal. The landlords received payments equivalent to six months' rent under the leases pursuant to s. 65.2(3) of the *BIA*.

29 The question before the Supreme Court was whether the insolvent assignee's repudiation of the lease ended the obligations of the assignor. The Supreme Court held that s. 65.2 should be read narrowly. It held that the plain purposes of the section were to free the insolvent from its obligations under a commercial lease, to compensate the landlord, and to allow the insolvent to resume viable operations as best it could. Nothing in s. 65.2, or any part of the Act, protects third parties from

the consequences of an insolvent's repudiation of a commercial lease.

30 The Court noted that this result is consistent with the concept of assignments in general. When a lease is assigned, the original tenant remains liable should the assignee not pay the rent. The bankruptcy of the assignee destroys the original tenant's right to require the assignee to discharge the obligations of the lease, and impairs the original tenant's right of indemnity against the assignee if the original tenant must discharge the obligations itself, but the assignee's bankruptcy has no effect on the original tenant's liability towards the lessor, which continues unaffected.

31 The Court dismissed the suggestion that the original tenant's right of indemnity against the insolvent assignee would frustrate the scheme of the *BIA*. The Court reasoned that the original tenant's claim would be dealt with according to the scheme of the Act, joining other unsecured creditors.

32 A unanimous Supreme Court therefore held that the disclaimer of the lease alone did not affect the obligations of the assignor.

33 Having decided the issue before it (the post-disclaimer obligations of an assignor), the Court went on to provide guidance on the post-disclaimer liability of a guarantor.

34 The Court questioned the correctness of the decision in *Cummer-Yonge* (para. 39):

> *Cummer-Yonge* has created uncertainty in leasing and bankruptcy. Not only have drafters of leases attempted to circumvent the holding in *Cummer-Yonge* by playing upon the primary and secondary obligation distinction, but courts have also performed what has been called "tortuous distinctions" in order to reimpose liability on guarantors. See J. W. Lem and S. T. Proniuk, "Goodbye *'Cummer-Yonge'*: A Review of Modern Developments in the Law Relating to the Liability of Guarantors of Bankrupt Tenants" (1993), 1 D.R.P.L. 419, at p. 436.

35 The Court further noted that the English case *Stacey v. Hill*, [1901] 1 Q.B. 660 (Eng. C.A.), which had come to the same conclusion as and was applied in *Cummer-Yonge*, had been overruled by the House of Lords in *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.*, [1996] 1 All E.R. 737 (U.K. H.L.). In overruling it, Lord Nicholls stated that treating the guarantor and the assignor of a lease differently in the case of the current tenant's insolvency "would make no sort of legal or commercial sense": p. 754.

36 Ultimately, the Court in *Crystalline Investments Ltd.* held that, like *Stacey v. Hill*, *Cummer-Yonge* should be overruled. It concluded that "Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations": para. 42.

37 The Court stated, therefore, that there should be no distinction in the post-disclaimer liability of assignors and guarantors. Consistent with its holding on the liability of assignors, and contrary to the holding in *Cummer-Yonge*, the Court held that a disclaimer alone should not relieve a guarantor from its obligations. The comments of the Court were *obiter dicta* but, in my view, carry significant weight with respect to the issue of whether a guarantor's assurances survive a tenant's bankruptcy. They are not relevant, however, to the issue presented by this appeal.

38 Neither the *ratio decidendi* nor the *obiter dicta* of *Crystalline Investments Ltd.* address whether a landlord can claim unsecured damages in the bankruptcy proceedings of its tenant upon the disclaimer of a lease by the trustee in bankruptcy. The principle in *Mussens* remains the law on this issue in Ontario as correctly applied in *Linen 'N Things*.

Conclusion

39 The Appeal is therefore dismissed.

Appeal dismissed.

End of Document

TAB 7

Most Negative Treatment: Check subsequent history and related treatments.

2017 BCCA 165
British Columbia Court of Appeal

Stearman v. Powers

2017 CarswellBC 1066, 2017 BCCA 165, [2017] B.C.W.L.D. 2803, [2017] B.C.W.L.D. 2899, [2017] B.C.W.L.D. 2900, 278 A.C.W.S. (3d) 179, 80 R.P.R. (5th) 219, 98 B.C.L.R. (5th) 86

Randall Charles Stearman (Appellant / Plaintiff) and Penny Faith Powers d.b.a. Walkabout Casual Wear (Respondent / Defendant)

Lowry, Willcock, Fenlon JJ.A.

Heard: March 29, 2017
Judgment: April 26, 2017
Docket: Vancouver CA43525

Proceedings: reversing in part *Stearman v. Powers* (2016), 2016 CarswellBC 410, 2016 BCSC 263, 67 R.P.R. (5th) 283, Pearlman J. (B.C. S.C.)

Counsel: P.K. McMurchy, G. Clark, for Appellant
G.R. Phillips, for Respondent

Subject: Civil Practice and Procedure; Contracts; Property

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.c Divided success
XXIV.6.c.iii Miscellaneous

Real property
V Landlord and tenant
V.8 Term of lease
V.8.c Termination
V.8.c.i Rescission
V.8.c.i.A Repudiation

Real property
V Landlord and tenant
V.13 Surrender
V.13.b Implied surrender
V.13.b.ii Tenant yielding up possession

Headnote

Real property --- Landlord and tenant — Term of lease — Termination — Rescission — Repudiation
Tenant signed five-year lease for commercial premises in November 2008, but ceased paying rent in October 2009 and vacated premises in November 2009, having complained to landlord about strong odour — Landlord argued that lease

remained in effect for two-year period after tenant stopped paying rent and vacated premises until he sold building — Landlord brought action for damages for breach of lease — Trial judge found that landlord failed to provide clear and unequivocal notice of his intention to insist on continuation of tenant's obligation to pay rent, and that his conduct was consistent with intention to repudiate lease — Landlord was awarded "minimal" damages in amount of $3,553.09 for rent accrued due to date of termination of lease which, when set off against deposit, came to $62.28 — Landlord appealed — Appeal with respect to damages dismissed — Trial judge clearly found landlord's conduct to be unequivocally inconsistent with continuation of lease, and did not rely solely on his request for tenant's keys to show premises to prospective tenant in coming to that conclusion — Any other reading of judgment did not accurately reflect manner in which trial judge dealt with evidence — Taking all of factors into account, trial judge found landlord's conduct from time tenant vacated premises until sale of building to be consistent with intention to treat lease as ended — Evidence supported conclusion that landlord terminated lease by re-taking possession without reservation — Trial judge's finding that landlord's conduct was inconsistent with continuing lease could reasonably be supported and there was no basis on which to set it aside.

Real property --- Landlord and tenant — Surrender — Implied surrender — Tenant yielding up possession
Tenant signed five-year lease for commercial premises in November 2008, but ceased paying rent in October 2009 and vacated premises in November 2009, having complained to landlord about strong odour — Landlord argued that lease remained in effect for two-year period after tenant stopped paying rent and vacated premises until he sold building — Landlord brought action for damages for breach of lease — Trial judge found that landlord failed to provide clear and unequivocal notice of his intention to insist on continuation of tenant's obligation to pay rent, and that his conduct was consistent with intention to repudiate lease — Landlord was awarded "minimal" damages in amount of $3,553.09 for rent accrued due to date of termination of lease which, when set off against deposit, came to $62.28 — Landlord appealed — Appeal with respect to damages dismissed — Trial judge clearly found landlord's conduct to be unequivocally inconsistent with continuation of lease, and did not rely solely on his request for tenant's keys to show premises to prospective tenant in coming to that conclusion — Any other reading of judgment did not accurately reflect manner in which trial judge dealt with evidence — Taking all of factors into account, trial judge found landlord's conduct from time tenant vacated premises until sale of building to be consistent with intention to treat lease as ended — Evidence supported conclusion that landlord terminated lease by re-taking possession without reservation — Trial judge's finding that landlord's conduct was inconsistent with continuing lease could reasonably be supported and there was no basis on which to set it aside.

Civil practice and procedure --- Costs — Effect of success of proceedings — Divided success — Miscellaneous
Tenant signed five-year lease for commercial premises in November 2008, but ceased paying rent in October 2009 and vacated premises in November 2009, having complained to landlord about strong odour — Landlord argued that lease remained in effect for two-year period after tenant stopped paying rent and vacated premises until he sold building — Landlord brought action for damages for breach of lease — First trial judge dismissed action and awarded tenant damages of $18,861.60 on her counterclaim — Judgment was set aside on appeal — On retrial, trial judge found that landlord's conduct was consistent with intention to repudiate lease and awarded him "minimal" damages for rent in amount of $3,553.09 which, when set off against deposit, came to $62.28 — Tenant was awarded costs at Scale B, together with her reasonable disbursements — Landlord appealed costs award, submitting that trial judge erred in finding that tenant was successful party — Appeal with respect to costs allowed — Rule 14-1(9) of Supreme Court Civil Rules has been held to require trial judge to consider which party was substantially successful — There was clearly mixed success in this case — While tenant was clearly unsuccessful when judgment at first trial was set aside, she clearly succeeded on issues as defined by judge at second trial — It was unclear whether, in making impugned costs order, trial judge had in mind costs of first trial — Since there was no explicit reference made to effect of dismissal of counterclaim, trial judge appeared to have failed to consider relevant fact in exercising his discretion — Court was therefore justified in intervening — Given what amounted in broad terms to divided success, each party was ordered to bear their own costs.

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Walls v. Atcheson (1826), 130 E.R. 591, 3 Bing. 462 (Eng. C.P.) — referred to

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009
R. 14-1(9) — considered

APPEAL by landlord from judgment reported at *Stearman v. Powers* (2016), 2016 BCSC 263, 2016 CarswellBC 410, 67 R.P.R. (5th) 283 (B.C. S.C.), allowing his action for damages for breach of commercial lease.

***Willcock J.A.*:**

Introduction

1 This is the second time this case has come to the Court of Appeal.

2 On November 1, 2008, the appellant and the respondent signed a five-year lease of premises at 87 Commercial Street in Nanaimo. The respondent ceased paying rent as of October 1, 2009 and vacated the premises on November 16, 2009. Before doing so, she had complained to the appellant that a strong odour interfered with her ability to operate her retail clothing business on the premises.

3 The appellant commenced a number of small claims actions for arrears in rent, ultimately consolidating them in a Supreme Court action; the respondent initiated a counterclaim for damages for breach of the landlord's covenant of quiet enjoyment.

4 The first trial judge, for reasons indexed at 2013 BCSC 1160 (B.C. S.C.), found the presence of an odour substantially deprived the respondent of the whole benefit of the contract, entitling her to terminate the lease. The appellant's claim was dismissed; the respondent's counterclaim was allowed in part and she was awarded damages of $18,861.60.

5 On the first appeal, this Court, for reasons indexed at 2014 BCCA 206 (B.C. C.A.), found the first trial judge to have erred in finding that the landlord's failure to eliminate the odour constituted a fundamental breach of the lease. The judgment was set aside and the appellant's claim was remitted to the Supreme Court for retrial of the claim for damages. By agreement, that trial was on the original record.

6 The appellant sought judgment for the base rent and additional rent due under the lease from October 2009 to December 2011 (when he sold the building) in the amount of $50,261.77.

Judgment Appealed From

7 The issue at the retrial was whether the lease had been surrendered at a date earlier than December 2011. The trial judge noted that in *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.) at 570, the Supreme Court of Canada identified four mutually exclusive courses of action open to a landlord where a tenant repudiates a lease:

> a) do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force;
>
> b) elect to terminate the lease, retaining the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant;
>
> c) advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis;
>
> d) elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term.

8 The judge considered the case to give rise to two questions:

> a) Did the plaintiff provide the defendant with clear and unequivocal notice of his intention to insist on the continuation of the tenant's obligation to pay rent?
>
> b) Was the lease terminated, and if so, when and how was it terminated?

9 The first question was answered in the negative. The judge held, at para. 62, the appellant had failed to give clear notice of his intention to re-let the premises and to hold the respondent accountable for any loss over the remaining term of the lease.

10 The second question was answered in the affirmative. The appellant's conduct after the respondent had repudiated the lease and abandoned the premises on November 24, 2009 was found, at para. 73, to be "consistent with the landlord's intention to treat the lease as at an end, and is inconsistent with the continued existence of the lease, and in particular, the tenant's continuing obligation to pay rent." The appellant had requested the keys on November 24, 2009 to show the premises to a prospective tenant and had repeatedly entered the premises to show them to prospective tenants or purchasers thereafter.

11 At paras. 90-91 the judge held:

> The plaintiff re-entered the premises without providing clear notice of his intention to re-let the property as agent for the tenant, or that he intended to insist upon the tenant continuing to pay rent for the unexpired term of the lease. By failing to qualify his re-entry by providing that notice, the plaintiff is taken to have exercised the second option in *Highway Properties Ltd.* Accordingly, I find the landlord elected to terminate the lease while retaining the right to claim for rent accrued due to the date of termination of the lease.
>
> I find the plaintiff had unequivocally elected to terminate the lease by no later than November 24, 2009 when he sought the keys from the defendant's solicitor for the purpose of showing the premises to a potential tenant.

12 The appellant was entitled to "minimal" damages: the total rent outstanding as of November 24, 2009: $3,553.09. Setting off that claim against the deposit he still held, the appellant was owed $62.28 and obtained judgment in that amount.

Grounds of Appeal

13 The appellant says the judge erred in law by:

> 1. . . . not applying the correct standard to consider whether there had been surrender by operation of law. The correct standard is to consider whether [the] acts were unequivocal act[s] inconsistent with the continuation of the lease, whereas the learned trial judge applied the standard as being acts that were inconsistent with the continued existence of the lease.
>
> 2. . . . finding that the landlord requesting keys from the tenant, after the tenant had abandoned the premises, to be returned [to] the tenant, was an unequivocal act that constituted surrender by operation of law.
>
> 3. . . . [categorizing] the landlord's actions as falling to be considered under the second of the fourth course available as set forth in *Highway*, whereas the landlord's actions were consistent with following the first course.
>
> 4. . . . failing to apply the principle of estoppel in the circumstances of this case to estop the tenant from relying on the landlord's attempts to mitigate as a bar to his claim.

14 And, in relation to the costs order:

> 5. . . . finding that the tenant was the successful party in the action, when the award was made to the landlord.
>
> 6. . . . failing to consider that the landlord had commenced his actions in Provincial Court and the transfer to the Supreme Court was made on the application of the tenant.

Argument

The Appellant

15 The appellant says "[i]n the absence of proof of both acceptance of the repudiation, and notification of the acceptance, the lease will be treated as subsisting." *TNG Acquisition Inc., Re*, 2011 ONCA 535 (Ont. C.A.), para. 35.

16 He notes that in *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2005 BCCA 583 (B.C. C.A.), Prowse J.A. observed, at para. 28, that the law had developed after *Highway Properties* " . . . on a case-by-case basis, but with a view to expanding remedies, [available to the landlord] rather than restricting them."

17 The appellant seeks access to the "full armoury of remedies" described by Laskin J. at 576 of *Highway Properties*;

> . . . 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.

18 He says he kept the lease open and sought to enforce the covenant to pay rent. He did nothing that altered the relationship of landlord and tenant, such as would have occurred had he re-let the premises, until he sold the building in January 2012. He emphasizes that he did not deny the tenant's right of entry, he did not demand the tenant's keys or change the locks and he never told the tenant she would be unwelcome if she returned. Characterizing a request for use of the keys to gain temporary access as an unequivocal act taking possession of the premises is said to have stretched the doctrine "beyond any previous standard". He submits there is "no case, either in the developed case law cited in *Highway Properties*, or in any of the subsequent decisions, where a request to provide the tenant's keys to a realtor was found to constitute an unequivocal act".

19 He says other acts the judge considered to be inconsistent with the continuation of the lease were equivocal:

a) entering the premises to take photographs sometime in October 2009;

b) listing the building for lease or sale;

c) entering the premises to make repairs after the tenants had abandoned it.

20 He submits that one repair, in particular, was wrongly considered to be relevant. The December 9, 2009 repairs to the sewer were the responsibility of the landlord and were undertaken at the earlier request of the tenant and cannot be said to be inconsistent with recognition of the continuing obligations under the lease. To the contrary, he says, those repairs were undertaken to fulfil his covenants.

21 The appellant says his intention to treat the lease as continuing is reflected in the manner in which the small claims actions were prosecuted. After the respondent abandoned the premises, the appellant filed 13 successive and identical notices of claim, for rent past due, in the Provincial Court. All were consolidated and transferred to the Supreme Court in October 2011. In her pleadings in response, the respondent did not allege surrender by operation of law by virtue of the landlord's repeated re-entry after the premises were vacated.

22 He argues he did not re-enter the premises in the proper, technical sense in which that term is used in *Walls v. Atcheson* (1826), 3 Bing. 462, 130 E.R. 591 (Eng. C.P.), by *taking possession* of the premises. That being the case, he says he did not take the third course described in *Highway Properties* and was not obliged to qualify his re-entry by giving notice to the respondent that he was not foregoing his right to insist on continuation of the tenant's obligation to pay rent.

23 Relying upon *Oastler v. Henderson* (1877), 2 Q.B.D. 575 (Eng. Q.B.), and *Buchanan v. Byrnes* (1906), 3 C.L.R. 704 (Australia H.C.), the appellant says nothing in his conduct gives rise to an estoppel that stands as a bar to an action for accrued rent: "The mere attempting to let does not amount to an estoppel": *Oastler*, at 578.

24 Last, he says that regarding his conduct as acceptance of the tenant's repudiation risks creating a disincentive to mitigate. He says there are strong policy reasons to encourage mitigation:

> "The principle of mitigation maximizes the utility of resources by directing the innocent party back to the market place, there is an inherent fairness or justice in the principle of mitigation. It is simply fair that the innocent party not receive compensation for losses that he or she could have avoided by acting reasonably." *Shapiro v. 1086891 Ontario Inc.*, 2006 ONSC 2050 at para. 130.

The Respondent

25 The respondent says the evidence supports the judge's conclusion that the appellant terminated the lease by re-taking possession without reservation. Requesting keys from the tenant was properly regarded as one of many acts consistent with acceptance of repudiation.

26 She says the judge did not err when he found the landlord's actions fell under the second of the four courses of action described in *Highway Properties* and correctly found the appellant's unqualified re-entry to re-let constituted termination of the lease.

27 She cites the following passage from the judgment of Leggatt J. in *Marathon Realty Co. v. Pogon Professional Services Corp.* [1994 CarswellBC 798 (B.C. S.C.)] (27 January 1994), Vancouver C933836:

> It is the giving up of possession of the premises by the tenant and the acceptance of possession by the landlord that is inconsistent with the lease, and therefore result in surrender. It is important to note that while the returning of keys is cogent evidence of surrender, it is insufficient in itself. For example, if a landlord accepts keys for security reasons and informs the tenant that the landlord was not accepting surrender of the lease, there would be no surrender: see *Commercial Credit Corp. v. Harry D. Shields Ltd.* (1980), 112 D.L.R. (3d) 153 (Ont. H.C.J.). But this did not occur in

the case at bar.

28 She argues the appellant had no right of re-entry at common law (*Morche v. British Columbia* (1982), 40 B.C.L.R. 249 (B.C. S.C.)), by statute, or under the lease and acted in a manner inconsistent with the continuation of the lease by entering the premises without notice and without regard to the rights of the tenant. In particular, the respondent says the following acts were inconsistent with a continuing lease:

a) the appellant attempted to sell or lease the premises; he entered into an "authority to lease" agreement with his agent; and he listed 83, 85 and 87 Commercial Street for sale or lease;

b) he had keys to the premises and personally entered without notice to the tenant after the tenant vacated;

c) his agent entered the premises without notice or permission on several occasions shortly after the respondent vacated to show the premises to potential clients; in October or November to take photographs; and in at least a dozen cases in the two years following to "fill the space" or sell the building;

d) he or his agent used keys to allow a contractor to do plumbing repairs on December 9, 2009, without notice to or permission of the respondent; and permitted access for extensive plumbing and sewer repairs to be done in the premises in 2011;

e) he did not advise the respondent of his intention to either re-let the property or claim prospective losses;

f) he did not return or apply the respondent's deposit, as required by the lease; and

g) his agent specifically advised the January 2012 purchasers that the tenant had no further obligations under the existing lease.

29 Further, the respondent says at the second trial the appellant argued the landlord had adopted the *third* course available to him — that is, he re-entered the property to re-let it on the tenant's account. The landlord now says his actions were consistent with the *first* course — to do nothing to alter the relationship of landlord or tenant, but simply to insist on performance of the terms. The respondent says the appellant should not be permitted to resile from that position in this Court: *Sahlin v. Nature Trust of British Columbia Inc.*, 2011 BCCA 157 (B.C. C.A.) at para. 38.

30 Similarly, the respondent says the argument she is estopped by her conduct from pleading surrender is new and was not raised at either of the prior trials. She reminds us that this Court will only permit a new issue to be entertained where the interests of justice require it and, then, only on a sufficient evidentiary record and findings of fact: *Pinto v. Revelstoke Mountain Resort Ltd. Partnership*, 2011 BCCA 210 (B.C. C.A.) at para. 26.

Discussion

Standard of Review

31 In *Il Caminetto di Umberto Restaurant (1982) Ltd. v. Watson* (1997), 47 B.C.L.R. (3d) 120, 100 B.C.A.C. 201 (B.C. C.A.) [*Umberto*], a case arising out of the breach of a commercial lease where the issue was whether the landlord had terminated the lease, this Court described the standard of review as follows:

[20] . . . in order to succeed on the appeal, the appellant must show that the cancellation and repudiation conclusions reached by the trial judge "cannot reasonably be supported": *Orangeville Raceway Limited v. Wood Gundy Inc.* (1995), 6 B.C.L.R. (3d) 391 at 400 (B.C.C.A.).

Error in Principle: Looking for Unequivocal Conduct

32 The first two grounds of appeal advanced by the appellant are difficult to reconcile. On one hand, the appellant submits the judge erred in law by failing to consider whether the appellant's conduct was *unequivocally* inconsistent with the continued existence of the lease. On the other, he says it was an error to find the landlord's request for the keys to be unequivocally inconsistent with a continuing lease. He simultaneously argues the judge failed to apply the unequivocal conduct standard while also implying the judge did in fact apply that standard with respect to the evidence of the keys.

33 In my view, the trial judge clearly found the conduct of the appellant to be unequivocally inconsistent with the continuation of the lease and did not rely solely upon the landlord's request for the keys in coming to that conclusion.

34 Any other reading of the judgment does not accurately reflect the manner in which the judge dealt with the evidence. He clearly placed some weight upon the request for keys, possession of the keys and the manner in which the keys were actually used by the appellant's agent, Mr. Loeppky. He was entitled to do so; the appellant does not dispute that requesting or obtaining the keys to the leased premises is cogent evidence. That is reflected in *Highway Properties*, where at 696, the Court noted: "There is a delivery of possession sufficient to effect a surrender when the tenant returns the keys of the premises, and the landlord accepts them with the intention of changing the possession." See also the judgment of Dickson J. in *Levesque v. J. Clark & Son Ltd.* (1972), 7 N.B.R. (2d) 478 (N.B. Q.B.) at 482.

35 The judge's conclusion the appellant acted in a manner inconsistent wit h continuation of the lease was not, however, founded solely or even principally upon the request for keys or possession of keys. At para. 82, he expressly held:

> [82] While not a determinative factor, it is noteworthy that the plaintiff had possession of the keys to the premises.

36 The judge held:

> [87] I have found that on November 24, 2009 the tenant, through her lawyer, returned the keys to the premises to the landlord. Although Mr. Stearman sent the keys back to the defendant's lawyer, the plaintiff and Mr. Loeppky were aware that the keys were available and that the tenant had no intention of using them to re-enter the property. Indeed, the plaintiff had requested the keys on November 24, 2009 to show the premises to a prospective tenant. The landlord or his agent used the keys to show the premises to prospective tenants or purchasers, and used them repeatedly after November 24, 2009 to re-enter the premises for that purpose. In addition, in December 2009, the landlord's agent had the keys and used them to re-enter the premises to repair the plumbing.
>
> [Emphasis added.]

37 "Taking all of these factors into account" at para. 88, the judge found the landlord's conduct from the time the tenant vacated the premises until the sale of the building in January 2012 to be "consistent with an intention to treat the lease as at an end".

Characterization of the Course Taken

38 The key issue on this appeal is not whether the trial judge erred in failing to consider whether the landlord's conduct was *unequivocally* inconsistent with continuation of the lease (he expressly considered precisely that test) but, rather, whether the evidence supported the conclusion the appellant terminated the lease by re-taking possession without reservation. The appellant's challenge to this conclusion invokes the standard of review described in *Umberto*.

39 The appellant does not dispute the fundamental proposition stated in *Halsbury's Laws of England* (3d ed.) Vol. 23, at p. 685:

> Delivery of possession by the tenant to the landlord and his acceptance of possession effect a surrender by operation of law.

40 He argues that nothing he or his agent did before November 24, 2009, or thereafter until the property was sold,

amounted to acceptance of possession. He points to numerous examples in the jurisprudence of cases where conduct by a landlord in the nature of mitigation has been held *not* to amount to taking possession, including*Walls v. Atcheson*, and *Oastler v. Henderson*. He says the conduct of the landlord should be seen in its most favourable light and he points to specific acts on his part, such as returning keys to the tenant and regularly initiating claims for arrears in rent, as evidence of his intention not to terminate the lease.

41 He places some reliance upon the decision of the High Court of Australia in *Buchanan v. Byrnes*. In that case the landlord, having re-entered, attempted to re-let and, in the meantime, operated a hotel for a period, was found by a jury not to have done so with the intention of terminating the lease. Notwithstanding that fact, the trial judge entered judgment for the tenant, holding that the lease had been surrendered by operation of law. The landlord succeeded on appeal, for reasons that turned on the particular facts of the case. After noting, at 712, that the trial judge had correctly held that the case was not determined by the landlord's intentions and that "in every such case it is a question of fact whether there was an agreement, express or to be implied from the facts, to put an end to the term", Griffith C.J. described the general principles (as they then stood) as follows at 713:

> I apprehend that it is quite clear that mere abandonment by the lessee does not operate as a surrender of the term of a lease, because the concurrence of both parties is required in order to put an end to a contract; but if, after the lessee has abandoned the premises, the lessor re-enters, it will generally be presumed that he has by that act shown his intention to accept the proposal which is implied in the abandonment by the lessee. Where this re-entry is accompanied by an express protest that he is doing nothing of the kind, but is only going in to do the best that he can to prevent the destruction of the subject matter of the contract for the benefit of both parties, it is a question, I think, of considerable difficulty.

42 The exceptional circumstances in the case were set out as follows, at 714:

> In the present case the plaintiff did not formally give notice to the defendant, when he took possession, that he was doing so for the joint benefit of both parties: but he had been invited by the defendant to do so to protect his own interests, and it is not contested that he did any more than was absolutely necessary to keep the goodwill of the premises intact.

43 In a concurring opinion, O'Connor J. noted, at 721-722:

> Now, there is no doubt that the acceptance of possession in such a way as to bring about a surrender by operation of law may be evidenced by the mere relinquishment of possession on the part of the tenant and the acceptance of possession on the part of the landlord. Whether the inference can be drawn in any particular case is entirely a question of fact. There are cases, no doubt, in which it would be a very reasonable inference, from the acceptance of possession by the landlord after an abandonment by the tenant, that there was an acceptance of possession in such a way as to put an end to the contract . . . But where you are dealing with a property of this kind . . . where in short it is essential, when the house has been abandoned, that the landlord should take some action to preserve his property in its existing condition, it does not at all follow that a resumption of possession amounts to an acceptance such as would establish a surrender by operation of law.

44 The appellant submits that courts have properly become increasingly less inclined to draw the inference that a landlord has accepted possession. Among the Canadian cases upon which he relies is *Goldhar v. Universal Sections & Mouldings Ltd.* (1962), [1963] 1 O.R. 189, 36 D.L.R. (2d) 450 (Ont. C.A.). In that case, the Ontario Court of Appeal found the landlord had not effected a surrender by entering the premises for the purpose of re-letting, but had done so when the premises were actually re-let. McGillivray J.A. held:

> A surrender by operation of law occurs when the parties to a lease participate in a course of action inconsistent with the continued existence of the lease. In such circumstances both parties are held to be estopped from denying that a surrender has occurred. The estoppel by operation of law, as distinct from the acts of the parties, may in some circumstances arise independently of their intention and will occur when there has been acceptance of a new interest by

> the lessee or by acceptance of possession by the landlord. A situation of the latter type such as we are called upon to consider here has received the attention of the Court in numerous cases. These cases may be considered as in two classes: one in which the landlord, upon the lessee abandoning the premises, has resumed some control over them; and the other in which the landlord has made a new lease to a third party prior to the expiry of the existing term. In the first class, there being no agreement between the parties, the Court seeks to ascertain if there has been an implied agreement, the burden of establishing such lying upon he who asserts it. For this purpose the Court looks to the acts and words of the parties as well as to the surrounding circumstances to ascertain if a surrender has in fact occurred.

45 It is of note, however, that in *Goldhar* the landlord's solicitor wrote to the tenant's solicitor before the premises were abandoned in the following terms: "Our client considers the lease to be in full force and effect and any attempt on the part of your client to abandon the lease will be considered as a breach of covenant thereunder". The court expressed the view that it should be slow to attach to the acts of the landlord the character of an acceptance of a surrender of a lease unless they were acts unequivocally of that character; and held that the landlord's actions in the interim before re-letting were not unequivocally inconsistent with the lease's continuation. In doing so McGillivray J.A. expressly noted that conclusion was consistent with the correspondence that made it clear that the landlord was not intending to resume possession in the interim before re-letting.

46 In the absence of such express, or any, qualification, the trial judge is left to draw inferences from conduct and an inference may be drawn, for example, from the unqualified acceptance of keys. So, in *Marathon Realty*, the tenant had returned the keys for the premises, and the landlord simply accepted them. This was found to be sufficient delivery of possession to effect a surrender because the acceptance was unqualified.

47 The appellant refers us to the review of the authorities by L. Smith J. in *Irie Enterprises Ltd. v. Shortee's Canadjun Rastaurant Ltd.*, 2001 BCSC 1192 (B.C. S.C.), where a landlord sought arrears in rent and damages from a tenant and a guarantor. The guarantor in that case sought to establish that by changing the locks and failing to give the tenant keys to the new locks, the landlord had acted in a manner inconsistent with the continued existence of the lease, had terminated it and retained only the right to sue for arrears to that date. L. Smith J. considered a number of cases where locks had been changed without terminating leases, including *Langley Crossing Shopping Centre Inc. v. North-West Produce Ltd.* [1998 CarswellBC 2245 (B.C. S.C. [In Chambers])] (20 October 1998), Victoria 96 0457; *Commercial Credit Corp. v. Harry D. Shields Ltd.* (1980), 112 D.L.R. (3d) 153 (Ont. H.C.); and *Country Kitchen Ltd. v. Wabush Enterprises Ltd.* (1981), 120 D.L.R. (3d) 358 (Nfld. C.A.); and others where such conduct was found to be inconsistent with a continuing lease, including *Heppleston Holdings Ltd. v. Presdex Jewellery Ltd.*, [1986] O.J. No. 1802 (Ont. Dist. Ct.); *Clarkson Co. v. Consortium Group Ltd.* (1983), 40 O.R. (2d) 771 (Ont. H.C.); and *North Bay T.V. & Audio Ltd. v. Nova Electronics Ltd.* (1983), 44 O.R. (2d) 342 (Ont. H.C.), aff'd (1984), 47 O.R. (2d) 588 (Ont. C.A.). The cases where changing the locks terminated the lease were described, at para. 38, as follows:

> They involve landlords who have unwittingly terminated a lease: (1) by changing the locks on the leased premises in an effort to keep the tenants out and to secure the tenants' goods for the purpose of distress; or (2) by accepting the tenants' abandonment and not indicating that they considered the lease to be still in effect. Those situations are distinguishable from one in which the landlord gives notice that it does not accept the tenant's repudiation yet the tenant leaves the premises and allows the landlord to take the keys to the premises or change the locks.

48 In *Irie Enterprises*, the landlord was held not to have terminated the lease because the locks had been changed with the tenant's permission and the landlord had given notice in writing that it considered the lease still to be in effect.

49 The authorities relied upon by the appellant in the case at bar support the proposition that when a lessor re-enters after the lessee has abandoned the premises, without clarifying his intentions, it will generally be presumed that he has accepted the proposal implied in the tenant's abandonment. The question whether unqualified re-entry amounts to such retaking of possession as to be inconsistent with a continuing lease in any particular case is, however, entirely a question of fact.

50 In the case at bar, the trial judge weighed the conduct of the landlord in light of the terms of the lease. He noted that the landlord did not rely upon the only provision in the lease that gave him a right to re-enter the premises. That provision, clause 5.14, only permits re-entry upon termination of the lease. It reads, in part, as follows:

> 5.14 In . . . case of the non-payment of rent . . . or in case the Premises . . . become vacant and unoccupied . . . without the written consent of the landlord, this lease shall, at the option of the Landlord cease and be void, and the term hereby be created expire and be at an end . . . and the then current month's rent and THREE (3) months additional rent shall thereupon immediately become due and payable, and the Landlord may re-enter and take possession of the Premises.

51 In that context, it was appropriate to place some weight upon the evidence of Mr. Loeppky that he would not have entered the leased property without notice if the tenant had remained in occupation and paid rent, but did so in this case because the tenant had surrendered the key and all her possessions before his entry.

52 The appellant says his conduct should have been seen in the light of his periodic claims for arrears in the Provincial Court. I would not accede to the appellant's arguments that those claims were sufficient notice of his intention to regard the lease as continuing.

53 In *Langley Crossing Shopping Centre Inc. v. North-West Produce Ltd.*, 2000 BCCA 107 (B.C. C.A.), a claim for loss of the present value of future rents was allowed at trial but set aside on appeal. Esson J.A., for this Court, held there had been inadequate notice to the tenant of the landlord's intentions on re-entering the premises. After reviewing the correspondence between the parties both before and after re-entry he concluded, at para. 11: "Whether read separately or together, they do not convey notice of an election to claim the present value of future rents". The same can be said in this case in stronger terms, as there was no notice other than periodic suits for arrears. The Court in that case noted:

> [13] . . . There is sound reason for requiring the landlord to make clear which of the four mutually exclusive courses it proposes to follow. If it intends to follow the first course of doing nothing other than insisting on performance of the terms, or if it intends to follow the fourth course of terminating and suing for prospective damages, it behooves those liable on the lease to take steps to rectify the situation, perhaps by securing a new tenant or applying for relief against forfeiture. The second and third courses do not create the same threat to a solvent tenant or indemnitor. For the very reason that the landlord's remedies are mutually exclusive, it is not sufficient to simply give notice of its intention to exercise its "rights" under the lease.

54 In my view, the judge's finding that the appellant's conduct was inconsistent with a continuing lease can reasonably be supported and there is no basis upon which we should set it aside. That being the case, it is unnecessary, in my view, to deal with the respondent's argument that because the appellant took the position below that he had entered into possession to re-let the property on the tenant's account, it is no longer open to him to say that he did nothing to alter the relationship of landlord and tenant and sue for rent on the footing that the lease remained in force after November 24, 2009.

Estoppel and Mitigation

55 Last, in relation to the appeal on the merits, the appellant says the judge failed to apply the principle of estoppel to preclude the tenant from relying on the landlord's attempts to mitigate as a bar to his claim. This, in effect, is an argument that the court should encourage mitigation by being slow to find the landlord to have terminated a lease.

56 In considering that argument we must bear in mind that it was open to the appellant to avoid any misapprehension with respect to his intentions. He regularly sued for arrears in rent but otherwise was silent as to his intentions. The argument that the judgment in this case is a disincentive to mitigation ignores the fact that since *Highway Properties* it has been open to landlords to take steps in mitigation of damages without the risk they will be estopped from claiming ongoing or prospective damages, by giving appropriate notice to tenants of their intentions. The question in *Highway Properties* was whether, in addition to exercising the third option: *advising the tenant* that he proposed to re-let the property on the tenant's account and to enter into possession on that basis; the landlord might exercise a fourth option: terminating the lease "*with notice to the defaulting tenant* that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term" (emphasis added).

Costs

57 In relation to the costs order, the appellant says the judge erred in finding that the tenant was the successful party in the action, despite the fact an award was made to the landlord.

58 Supreme Court Rule 14-1 provides:

> (9) . . . costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

59 This Rule, and its predecessor, have been held to require the trial judge to consider which party can be said to have been *substantially successful*. In *Aschenbrenner v. Yahemech*, 2010 BCSC 1541 (B.C. S.C.), Mr. Justice Metzger, at para. 13, said:

> While the Rule itself does not include the term "substantial success" under the former Rule 57(9), it was held to be a necessary and sufficient condition for an award of costs under Rule 57(9) that success in the outcome of the trial be "substantial": see *Gold v. Gold*, 82 B.C.L.R. (2d) 180, 32 B.C.A.C. 287.

60 The rule calls for the exercise of a trial judge's discretion and that discretion should be deferred to in the absence of an error in principle. In *Fraser v. Desmond* (1996), 24 R.F.L. (4th) 365, 71 B.C.A.C. 14 (B.C. C.A.), Newbury J.A. held, at para. 7:

> I think it must be acknowledged that a person appealing an order for costs made at the close of detailed Reasons for Judgment faces an uphill battle in attempting to persuade an appellate court that a trial judge failed properly to assess the relative success or failure of each party. The trial court has before it not only the pleadings and final result of the case, but is able to assess as well how the evidence went in, who was responsible for any prolongation or shortening of the trial, the reasonableness of the positions taken by the parties, and what the "real issues" turned out to be. In my opinion, we should accord a good degree of respect to such an assessment and should not require a trial judge to list in detail the many factors behind it.

61 In *Loft v. Nat*, 2014 BCCA 108 (B.C. C.A.), this Court held that it was an error in principle to find that a plaintiff who had recovered damages from a defendant in a personal injury action, albeit less substantial damages than he sought, to have been unsuccessful. Goepel J.A., for the Court held:

> [47] In this proceeding Mr. Loft was awarded damages for injuries he had suffered in the motor vehicle accident. The respondents had denied liability until shortly before trial. Although the damage award was far less than sought, Mr. Loft was the successful party. The fact that he obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving him of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328, 320 D.L.R. (4th) 637.
>
> [48] The trial judge's stated reason for awarding costs to the respondents was that the respondents had been largely successful in all areas of the claim. With respect, that decision is wrong in principle and cannot stand. I note that on the hearing of the appeal the respondents did not suggest otherwise.

62 In the case at bar, the issues were poorly defined by the pleadings but there was clearly mixed success. At the first trial, the judge considered both the landlord's claim for arrears in rent and the tenant's counterclaim for damages said to arise from the breach of the landlord's obligation to afford quiet enjoyment to the tenant. As noted at the outset of these reasons, the claim was dismissed, the counterclaim was allowed in part and the tenant was awarded damages of $18,861.60. That judgment was set aside on appeal, the counterclaim was dismissed and the respondent was clearly unsuccessful on that count.

63 The respondent clearly succeeded, however, on the issues as defined by the trial judge on the second trial: the lease was held to have been terminated and the appellant was held not to have provided the respondent with clear notice of his intention to insist on the continuation of the tenant's obligation to pay rent.

64 It is unclear whether, in making the impugned costs order, the trial judge had in mind the costs of the first trial. There is no explicit reference made to the effect of the dismissal of the counterclaim. In that respect, in my view, the trial judge

appears to have failed to consider a relevant fact in exercising his discretion, and we are therefore justified in intervening and making the order that ought to have been made.

65 In considering the meaning of "substantial success", this Court has held that success is measured in broad terms and the Court should not finely parse issues: *Harder v. Poettcker*, 2017 BCCA 107 (B.C. C.A.).

66 Given what amounts in broad terms to divided success I would order each party to bear their own costs.

Conclusion

67 I would otherwise dismiss the appeal.

***Lowry J.A.*:**
I agree

***Fenlon J.A.*:**
I agree

Appeal allowed in part.

TAB 8

2012 ONSC 7248
Ontario Superior Court of Justice

OPB Realty Inc. v. Transport North American Express Inc.

2012 CarswellOnt 16466, 2012 ONSC 7248, 224 A.C.W.S. (3d) 70

OPB Realty Inc. v. Transport North American Express Inc. et al.

Master Benjamin Glustein

Heard: December 17, 2012
Judgment: December 19, 2012
Docket: 06-CV-312337PD1

Counsel: Roger B. Campbell, for Plaintiff
Ivan V. Lavrence, for Defendants except Marie Monique Julienne DeGuire
S.J. MacDonald, for Defendant, Marie Monique Julienne DeGuire

Subject: Civil Practice and Procedure; Property

Related Abridgment Classifications

Civil practice and procedure
XVIII Summary judgment
XVIII.5 Requirement to show no triable issue

Real property
V Landlord and tenant
V.8 Term of lease
V.8.c Termination
V.8.c.v Miscellaneous

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue
Defendants brought motion for partial summary judgment dismissing plaintiff's claim against defendant for damages during balance of term of lease in respect of loss of prospective rent and other charges, totaling $183,795 — Motion adjourned — There was genuine question of law to be determined — Whether notice requirement for claim for prospective damages under commercial lease was satisfied by issue of statement of claim was genuine issue.

Real property --- Landlord and tenant — Term of lease — Termination — Miscellaneous
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Table of Authorities

Cases considered by *Master Benjamin Glustein*:

Falwyn Investors Group Ltd. v. GPM Real Property (6) Ltd. (1998), 22 R.P.R. (3d) 1, 1998 CarswellOnt 4848 (Ont. Gen. Div.) — considered

Harlon Canada Inc. v. Lang Investment Corp. (2010), 270 O.A.C. 64, 2010 ONSC 5264, 2010 CarswellOnt 7423 (Ont. Div. Ct.) — considered

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), 1971 CarswellBC 274, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, [1971] S.C.R. 562 (S.C.C.) — considered

Malva Enterprises Inc. v. Rosgate Holdings Ltd. (1993), 14 O.R. (3d) 481, 104 D.L.R. (4th) 167, 64 O.A.C. 363, 34 R.P.R. (2d) 161, 1993 CarswellOnt 636 (Ont. C.A.) — considered

Neighbourhoods of Cornell Inc. v. 1440106 Ontario Inc. (2006), 2006 CarswellOnt 6871, 51 R.P.R. (4th) 176, 40 C.P.C. (6th) 117 (Ont. Master) — followed

North Bay T.V. & Audio Ltd. v. Nova Electronics Ltd. (1983), 44 O.R. (2d) 342, 30 R.P.R. 169, 4 D.L.R. (4th) 88, 1983 CarswellOnt 658 (Ont. H.C.) — considered

North Bay T.V. & Audio Ltd. v. Nova Electronics Ltd. (1984), 47 O.R. (2d) 588, 12 D.L.R. (4th) 767, 1984 CarswellOnt 1202 (Ont. C.A.) — referred to

TNG Acquisition Inc., Re (2011), 2011 ONCA 535, 2011 CarswellOnt 8039, 81 C.B.R. (5th) 151, 107 O.R. (3d) 304, (sub nom. *TNG Acquisition Inc. (Bankrupt), Re)* 283 O.A.C. 168, 340 D.L.R. (4th) 44 (Ont. C.A.) — considered

722924 Alberta Ltd. v. Sinn (2002), 2002 CarswellAlta 9, 2002 ABPC 2, 309 A.R. 342 (Alta. Prov. Ct.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — considered

R. 20.04(4) — referred to

MOTION for partial summary judgment by defendant to dismiss plaintiff's claim for damages for loss of prospective rent.

***Master Benjamin Glustein*:**

Nature of motion and overview

1 The defendants Transport North American Express Inc., TNA Logistics Inc., TNA Express Inc., Steel Matrix Inc. and David Bazar (collectively, "the TNA Defendants") bring this motion for partial summary judgment dismissing the claim by the plaintiff OPB Realty Inc. ("OPB") against the defendant Transport North American Express Inc. ("Transport") under paragraph 1(b) of the statement of claim for "damages during the balance of the term of the Lease in respect of loss of prospective Rent and other charges due by the Lease in the sum of $183,795.94" (the "Prospective Rent Claim").

2 For the reasons I discuss below, I find that there is a genuine issue as to a question of law with respect to whether OPB can succeed with its Prospective Rent Claim against Transport. Consequently, under Rule 20.04(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), I adjourn the motion to a judge since the genuine legal issue could be determined by way of summary judgment.

Applicable law under Rule 20.04(4)

3 In *Neighbourhoods of Cornell Inc. v. 1440106 Ontario Inc.* [2006 CarswellOnt 6871 (Ont. Master)], 2006 CanLII 37402 ("*Cornell*"), Master MacLeod set out the governing principle that if a genuine issue of law arises on a motion for summary judgment before a master, a master can either adjourn the motion to a motions judge (if the master concludes that the issue can be determined on a motion for summary judgment) or to a trial judge (if the master concludes that the genuine legal issue can only be determined at trial). Master MacLeod held (*Cornell*, at para. 14):

> It is important to understand what that means. Obviously the rule was not intended to preclude a master from deciding any legal issue or applying the law to the facts. A master is empowered to decide that there is no genuine issue of law in the same way as he or she may determine there is no genuine issue of fact. The rule only reserves a "genuine issue" of law to a judge.[1] **To put this in simplest terms, if a point of law is unclear and it seems possible to determine it on a motion then the issue will be adjourned to a judge.** In all other cases in which the law is clear and there is no genuine factual or legal issue, a master may grant summary judgment.
>
> [Emphasis added.]

4 The above statement of the law was followed by the Divisional Court in *Harlon Canada Inc. v. Lang Investment Corp.*, [2010] O.J. No. 4237 (Ont. Div. Ct.) at para. 13.

Analysis

5 In the present case, OPB raises two issues of law which it submits are "unclear" and as such requires the court to adjourn the motion to a judge. I address each of these issues below.

(a) Issue 1: Is the notice requirement under North Bay satisfied by issuing a statement of claim or does there need to be a distinct notice of termination and a distinct notice of claim?

6 OPB submits that the law is unclear as to whether the "notice" requirement under the fourth course of action as set out in *North Bay T.V. & Audio Ltd. v. Nova Electronics Ltd.*, [1983] O.J. No. 2527 (Ont. H.C.) ("*North Bay — HCJ*"), affirmed [1984] O.J. No. 3053 (Ont. C.A.) ("*North Bay — CA*") can be satisfied by issuing a statement of claim or whether there needs to be a distinct notice of termination and a distinct notice of claim. I agree that the law on this issue is unclear.

7 In *North Bay - HCJ*, Rutherford J. reviewed the decision of Laskin J. (as he then was) in the Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.) ("*Highway Properties*"). Rutherford J. held that in *Highway Properties*, Laskin J. set out four courses which a landlord may take when a tenant has repudiated a lease. Rutherford J. held (*North Bay - HCJ*, at para. 10):

> When a tenant abandons premises rented under a commercial lease, the landlord has available a number of remedies. In *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*, [1971] S.C.R. 562 at p. 570, 17 D.L.R. (3d) 710 at p. 716, [1972] 2 W.W.R. 28, Laskin J. (as he then was), identified four courses of action that a landlord might follow:
>
> > 1. The landlord may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force.
> >
> > 2. The landlord may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant.
> >
> > 3. The landlord may advise the tenant that he proposes to relet the property on the tenant's account and enter into possession on that basis.
> >
> > 4. The landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term.

8 Even if the court accepts that there is no genuine issue of law that "option 4" above requiring notice before a claim for prospective damages under a commercial lease is a proper reading of *Highway Properties Ltd.* (an issue I discuss below), there remains a genuine issue as to whether the "notice" requirement under option 4 is satisfied by the issuance of a statement of claim.

9 In *North Bay - CA*, Blair J. in a one paragraph endorsement agreed with the "disposition" of Rutherford J., and "more particularly with his conclusion that notice of intention to claim damages for prospective loss of rent need not be given contemporaneously with the termination of the tenancy and that the *notice given by the commencement of proceedings was sufficient to found the claim for damages in this case.*" [Emphasis added.] Consequently, Blair J.A.'s endorsement leaves open the possibility that commencing proceedings may constitute sufficient notice.

10 In *Malva Enterprises Inc. v. Rosgate Holdings Ltd.*, [1993] O.J. No. 1724 (Ont. C.A.) ("*Malva*"), Morden A.C.J.O adopted the language of the author Ewart that "*the institution of an action* for the recovery of such rent furnishes similarly satisfactory evidence" of the landlord's intention (*Malva*, at para. 29) [Emphasis added.]. *Malva* supports an argument that the issuance of a claim can constitute notice under option 4 of *Highway Properties*.

11 There are other cases which appear to support an argument that notice is satisfied by issuing a statement of claim. In *Falwyn Investors Group Ltd. v. GPM Real Property (6) Ltd.*, [1998] O.J. No. 5258 (Ont. Gen. Div.) ("*Falwyn*"), Lederman J. held (*Falwyn Investors Group Ltd.*, at para. 45):

> On the fourth option, there are two requirements, namely, termination of the lease and notice of a claim for damages by the landlord. **The remedy is available even if termination and notice do not occur contemporaneously. (See *North Bay T.V.*, *supra*, at 346.) Additionally, notice may be given by the commencement of court proceedings. (See Court of Appeal endorsement of *North Bay T.V.*, *supra*, at 584.)**
>
> [Emphasis added.]

12 Similarly, In *722924 Alberta Ltd. v. Sinn*, [2002] A.J. No. 3 (Alta. Prov. Ct.) ("*Sinn*"), Hess J. held that "I am also satisfied *the plaintiff put the defendant on notice by commencing these proceedings that the plaintiff would be seeking damages equal to the rent reserved by the terms of the Agreement*" (*Sinn*, at para. 14) [Emphasis added.].

13 The TNA Defendants submit that the above cases are "incongruous", since they submit that other cases support a requirement of notice of termination as well as a notice of claim. The TNA Defendants rely on cases in which the court refers to "service" or "delivery" of the claim as constituting notice, and to the decision of the Court of Appeal in *TNG Acquisition Inc., Re*, [2011] O.J. No. 3527 (Ont. C.A.) ("*TNG*") in which the court held that "In the absence of proof of both the acceptance of the repudiation and notification of the acceptance, the lease will be treated as subsisting" (*TNG*, at para. 35).[2]

14 The TNA Defendants also rely on what they submit are admissions of fact by OPB's counsel at an examination for discovery that "the lease was not terminated"; "there was no notice of termination provided"; "the lease eventually ran its course" and that the pleaded fact that the lease was terminated "is not substantiated".

15 However, the above statements by OPB's counsel must be read in the context of his prior positions on the issue of termination, in which he was discussing whether a "notice of termination" had been sent, and stated that if no such notice had been sent, then the issuance of the statement of claim was the act by which the landlord accepted the repudiation and terminated the lease. Those statements are positions taken which are entirely consistent with the statement of claim.

16 As OPB counsel acknowledged, it may be that OPB cannot seek a remedy based on the principle that the lease continued, given the statement of claim and positions taken before the court to obtain interim relief. However, counsel's position as to a party's available remedies in law have no bearing on the court's determination of a legal issue and ought not be considered admissions of "fact" which then preclude a legal argument that the landlord elected to treat the lease as terminated.

17 On the basis of the above law, I conclude that this issue of law is unclear and that a motions judge can determine the

issue on summary judgment. Consequently, I adjourn the motion to a judge as required under Rule 20.04(4).

(b) Issue 2: Is there a notice requirement under Highway Properties?

18 OPB submitted that "option 4" as set out by Rutherford J. in *North Bay - HCJ* was not a proper reading of the law set out in *Highway Properties*. In particular, counsel for OPB took the court to the reasons in *Highway Properties* to submit that Laskin J. never imposed a notice requirement to claim prospective rent. OPB submitted that Laskin J. only overruled earlier common law that the lease and its covenants ceased to exist with the surrender such that the landlord could only recover for damages up to the date of surrender. In other words, OPB reads *Highway Properties* as standing for the proposition that a landlord may claim prospective rent upon termination, and does not set out a notice requirement.

19 The TNA Defendants submit that "option 4" requiring notice has been part of the settled law of Ontario ever since *North Bay - HCJ* and is binding on this court or before any judge who might hear the adjourned motion or address the issue at trial.

20 Given my findings on "Issue 1" above, I do not address whether it is unclear that there is a notice requirement under *Highway Properties*, or whether OPB can challenge the existing law on the basis that it was derived from an alleged misreading of *Highway Properties* by Rutherford J. in *North Bay - HCJ*. That will remain an issue for the judge hearing the adjourned summary motion or addressing the issue at trial. As this is a legal issue that can also be determined on a motion for summary judgment, I adjourn the motion to be head by a judge under Rule 20.04(4).

Order and costs

21 For the reasons I discuss above, I adjourn the partial summary judgment motion to be heard by a judge under Rule 20.04(4). Both parties incurred significant costs in reviewing all of the relevant case law, and preparing factums and motion records. Those costs are properly determined either at the adjourned motion for summary judgment or at trial, when the substantive issues are decided. I award costs only for preparation and attendance to argue the issue of adjournment under Rule 20.04(4) as I ruled in favour of OPB on that issue. I fix only those costs in the amount of $1,250 inclusive of taxes and disbursements payable by the TNA Defendants to OPB within 30 days of this order.

22 I thank counsel for their thorough submissions which were of great assistance to the court.

Order accordingly.

Footnotes

1 In his footnote at this point, Master MacLeod states "Adjournment to a motions judge will be necessary if the court decides it is appropriate to determine the point of law on the Rule 20 motion. If the court is of the view a trial is necessary then the motion should be dismissed."

2 OPB submits that *TNG* can be distinguished because different notice requirements arise in insolvency proceedings which OPB submits is the genesis in *TNG* of any notice requirement to protect other creditors.

TAB 9

2016 ONCA 179
Ontario Court of Appeal

Pickering Square Inc. v. Trillium College Inc.

2016 CarswellOnt 2929, 2016 ONCA 179, [2016] O.J. No. 1118, 263 A.C.W.S. (3d) 217, 347 O.A.C. 124, 395 D.L.R. (4th) 679, 64 R.P.R. (5th) 175, 84 C.P.C. (7th) 12

Pickering Square Inc., Plaintiff (Respondent by way of cross-appeal) and Trillium College Inc., Defendant (Appellant by way of cross-appeal)

G.R. Strathy C.J.O., H.S. LaForme, Grant Huscroft JJ.A.

Heard: November 24, 2015
Judgment: March 3, 2016
Docket: CA C58900

Proceedings: affirming *Pickering Square Inc. v. Trillium College Inc.* (2014), 44 R.P.R. (5th) 251, 2014 CarswellOnt 5557, 2014 ONSC 2629, Mew J. (Ont. S.C.J.); additional reasons at *Pickering Square Inc. v. Trillium College Inc.* (2014), 2014 CarswellOnt 6894, 2014 ONSC 3163, Graeme Mew J. (Ont. S.C.J.)

Counsel: Courtney Raphael, for Appellant, Trillium College Inc.
Alan B. Dryer, Orly Kahane-Rapport, for Respondent, Pickering Square Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Property

Related Abridgment Classifications

Civil practice and procedure
VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.a Statutory limitation periods
VII.4.a.iii When statute commences to run
VII.4.a.iii.C Miscellaneous

Headnote

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous
Continuing breach — Plaintiff landlord P Inc. brought claim for damages for defendant tenant college's breaches of covenants in lease on ground that tenant did not operate business continuously and failed to restore premises when lease ended — Motion judge partially granted tenant's motion for summary judgment on basis that landlord's claim was statute-barred — Landlord appealed but abandoned appeal — Tenant cross-appealed — Cross-appeal dismissed — Tenant's obligation to operate its business was ongoing, so its breach was of continuing obligation under lease — Motion judge properly concluded that fresh cause of action accrued every day that breach continued, and that each fresh cause of action set clock running for new two-year limitation period — Landlord's election to affirm lease did not postpone date for discovery of breach until expiry of lease — Landlord was entitled to claim damages for breach of covenant to operate business continuously for period going back two years from when action was commenced until lease expired — Motion judge was entitled to find that landlord made claim for breach of covenant to repair and restore at end of lease and that limitation period began to run when lease expired — Action was commenced within two years of discovery of claim.

Table of Authorities

Cases considered by *Grant Huscroft J.A.*:

Bridgesoft Systems Corp. v. British Columbia (2000), 2000 BCCA 313, 2000 CarswellBC 996, 74 B.C.L.R. (3d) 212, [2000] 5 W.W.R. 518, 137 B.C.A.C. 277, 223 W.A.C. 277 (B.C. C.A.) — referred to

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — followed

Goorbarry v. Bank of Nova Scotia (2011), 2011 ONCA 793, 2011 CarswellOnt 15062, 286 O.A.C. 282, 109 O.R. (3d) 92, 345 D.L.R. (4th) 624, 109 D.L.R. (4th) 92 (Ont. C.A.) — considered

Guarantee Co. of North America v. Gordon Capital Corp. (1999), 1999 CarswellOnt 3171, 1999 CarswellOnt 3172, 178 D.L.R. (4th) 1, 247 N.R. 97, [2000] I.L.R. I-3741, 126 O.A.C. 1, 49 B.L.R. (2d) 68, 15 C.C.L.I. (3d) 1, [1999] 3 S.C.R. 423, 39 C.P.C. (4th) 100 (S.C.C.) — considered

Hamilton (City) v. Metcalfe & Mansfield Capital Corp. (2012), 2012 ONCA 156, 2012 CarswellOnt 2578, 290 O.A.C. 42, 347 D.L.R. (4th) 657 (Ont. C.A.) — followed

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), [1971] S.C.R. 562, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, 1971 CarswellBC 274 (S.C.C.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Peixeiro v. Haberman (1997), 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 30 M.V.R. (3d) 41, [1997] 3 S.C.R. 549, 12 C.P.C. (4th) 255, 46 C.C.L.I. (2d) 147, 217 N.R. 371 (S.C.C.) — followed

Smith v. Empire Life Insurance Co. (1996), 19 C.C.E.L. (2d) 171, [1996] I.L.R. I-3312, 1996 CarswellOnt 1182 (Ont. Gen. Div.) — considered

Smith v. Empire Life Insurance Co. (1996), 1996 CarswellOnt 3671 (Ont. C.A.) — considered

TNG Acquisition Inc., Re (2011), 2011 ONCA 535, 2011 CarswellOnt 8039, 81 C.B.R. (5th) 151, 107 O.R. (3d) 304, 340 D.L.R. (4th) 44, (sub nom. *TNG Acquisition Inc. (Bankrupt), Re)* 283 O.A.C. 168 (Ont. C.A.) — referred to

Wilson's Truck Lines Ltd. v. Pilot Insurance Co. (1996), 140 D.L.R. (4th) 530, 22 M.V.R. (3d) 216, 38 C.C.L.I. (2d) 159, [1997] I.L.R. I-3402, 31 O.R. (3d) 127, 94 O.A.C. 321, 24 M.V.R. (3d) 216, 1996 CarswellOnt 4282 (Ont. C.A.) — considered

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

s. 4 — considered

s. 5(1) — considered

s. 5(2) — considered

Real Property Limitations Act, R.S.O. 1990, c. L.15

Generally — referred to

CROSS-APPEAL by defendant tenant from judgment reported at *Pickering Square Inc. v. Trillium College Inc.* (2014), 2014 ONSC 2629, 2014 CarswellOnt 5557, 44 R.P.R. (5th) 251 (Ont. S.C.J.), partially granting tenant's motion for summary judgment to dismiss plaintiff landlord's action.

***Grant Huscroft J.A.*:**

Overview

1 The main question posed by this case is: When is a claim discovered for limitations purposes in the context of a continuing breach of contract?

2 Trillium College Inc. (Trillium) and Pickering Square Inc. (Pickering) were parties to a long-term lease of space in a shopping centre. Trillium covenanted not only to pay rent but also to occupy the premises and to operate its business as a vocational college continuously, and to restore the premises at the expiry of the lease.

3 Trillium paid rent for the duration of the lease but did not operate its business continuously and failed to restore the premises when the lease ended. Pickering brought a claim for damages for Trillium's breaches of its covenants following expiry of the lease.

4 Trillium brought a motion for summary judgment, arguing that Pickering's claim was brought outside the two-year limitation period under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The motion judge held that Trillium's breach of the covenant to occupy the premises and operate its business continuously was of a continuing nature, such that each day of the breach gave rise to a fresh cause of action. As a result, only a portion of Pickering's claim against Trillium for breach of its covenant — the portion concerning the breach that occurred more than two years prior to commencement of the action — was barred by the *Limitations Act*. The motion judge also held that Pickering's claim for damages for breach of the covenant to restore the premises was not time barred. (A claim for arrears of rent was resolved prior to the summary judgment motion and was dismissed by the motion judge.)

5 Pickering appealed against the judgment but did not pursue its appeal. At the hearing, Trillium abandoned its cross-appeal of an award of costs in favour of Pickering arising out of the dismissal of its claim for arrears of rent. As a result, this case is concerned solely with Trillium's cross-appeal of the partial summary judgment.

6 Trillium raises two issues on appeal:

1. Did the motion judge err by finding a continuing breach of the agreement giving rise to a new cause of action and a new limitation period each day that Trillium failed to carry on business at the leased premises?

2. Did the motion judge err by finding that the repair claim was not statute-barred because it concerned repairs at the end of the lease rather than during its term?

7 I would dismiss Trillium's cross-appeal for the reasons that follow.

Facts

8 Pickering entered into an agreement with Trillium to lease commercial space at a shopping centre for a five-year term, from June 1, 2006 to May 31, 2011. The agreement required Trillium to pay monthly rent and included covenants requiring Trillium to operate its vocational college business continuously, to maintain the premises throughout the term of the lease, and to restore the premises following the expiry of the lease. The relevant covenants are set out in Appendix A.

9 Trillium gave notice to Pickering and vacated the leased premises in December 2007. In June 2008, Pickering sued the appellant for rent arrears and payment under s. 16.08 of the lease for failing to occupy the premises and to conduct its business continuously. The suit was settled in August 2008 with Trillium agreeing to resume occupation of the leased premises by October 1, 2008 in accordance with the terms of the lease.

10 Although Trillium paid the rent for the remainder of the lease (with two deficiencies not relevant here), it failed to conduct its business continuously at the leased premises as required by the covenant.

11 The lease expired on May 31, 2011 and Pickering brought an action against Trillium on February 16, 2012 for arrears of rent; for failure to occupy the premises and conduct its business continuously from October 1, 2008 to May 31, 2011; and for breach of the covenant to restore the premises.

12 As noted earlier, Trillium brought a motion for summary judgment, arguing that Pickering's claims were time-barred. The parties agreed that this was an appropriate case for summary judgment under the principles enunciated in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.).

The motion judge's decision

13 The motion judge concluded that the two-year limitation period under the *Limitations Act* applied to Pickering's claim against Trillium for breach of the covenant to operate its business continuously. He rejected Pickering's argument that the longer limitation periods under the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, applied. The motion judge found that Pickering discovered its claim once Trillium did not resume occupation of the leased premises on October 1, 2008. Thus, well before the lease expired, Pickering knew that it had suffered damage and knew that it could pursue a remedy in a legal proceeding (as it had done in 2008).

14 However, the motion judge also found that Trillium's failure to resume occupation of the premises and to carry on its business continuously from October 1, 2008 gave rise to a series of breaches rather than a single breach. Accordingly, Pickering acquired a new cause of action every day Trillium failed to operate its business in accordance with the covenant until expiration of the lease on May 31, 2011.

15 Pickering brought its action on February 16, 2012. The motion judge found that Pickering's claim for the period from October 1, 2008 to February 16, 2010 was statute-barred, but its claim for the period from February 16, 2010 to the expiry of the lease on May 31, 2011 was not.

16 The motion judge found, further, that Pickering sought to recover only for breach of the covenant to repair and restore the premises at the end of the lease (and not during its term). Accordingly, it was not necessary to determine whether the limitation period under the *Real Property Limitations Act* or the *Limitations Act* applied because the obligation to restore arose when the lease expired on May 31, 2011, and Pickering's February 16, 2012 action was brought within the two-year period under the *Limitations Act* — the shortest of the possible limitation periods under the two statutes.

Analysis

(1) The standard of review

17 The interpretation of the lease and application of the principles of contract law involve issues of mixed law and fact and the motion judge's decision is to be reviewed on a deferential basis: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.). In the absence of an extricable question of law, which attracts the correctness standard, the decision of the motion judge is reviewable on the standard of palpable and overriding error.

(2) When does the limitation period run in the context of a continuing breach?

18 Trillium argues that its breach of the covenant to operate its business continuously was complete on October 1, 2008, the first day it failed to resume occupation of the leased premises and operate its business, and that each subsequent day that it failed to operate its business was not a separate breach but, instead, an instance of additional damages.

19 Trillium submits that a continuing breach of contract requires a succession or repetition of separate acts, whereas this is a case of a single act with continuing consequences. Although s. 16.08 of the lease quantifies the damages payable for every day Trillium failed to carry on business, it does not give rise to a separate cause of action each and every day the failure continued. Consequently, Pickering's claim is statute-barred because it should have been brought within two years of the October 1, 2008 breach — on or before October 1, 2010.

20 I would reject this submission.

21 For purposes of s. 5(1) of the *Limitations Act*, a claim is discovered once a plaintiff knew or ought to have known of sufficient facts on which to base the claim. Under s. 5(2), a claimant is presumed to discover his or her claim on the day the act or omission giving rise to the claim occurs, unless the contrary is proven.

22 In order to determine the discovery date for the claim, the nature of the breach must first be determined.

23 Breaches of contract commonly involve a failure to perform a single obligation due at a specific time. This sort of breach is sometimes called a "once- and-for-all" breach: it occurs once and ordinarily gives rise to a claim from the date of the breach — the date performance of the obligation was due. Trillium's breach of s. 16.08 does not fall into this category because its obligation to operate its business was ongoing rather than single and time-specific.

24 A second form of breach of contract involves a failure to perform an obligation scheduled to be performed periodically — for example, a requirement to make quarterly deliveries or payments. A failure to perform any such obligation ordinarily gives rise to a breach and a claim as from the date of each individual breach: see e.g. *Smith v. Empire Life Insurance Co.* (1996), 19 C.C.E.L. (2d) 171 (Ont. Gen. Div.), leave to appeal refused, [1996] O.J. No. 3113 (Ont. C.A.). That is not this case.

25 As the motion judge found, this case falls into a third category of breach: breach of a continuing obligation under a contract. Trillium breached its covenant to operate its business continuously — "at all times" — for the duration of the lease.

26 The concept of a continuing breach is not novel. It was outlined by Dixon J. (as he then was) in *Larking v. Great Western (Nepean) Gravel Ltd. (in Liquidation)* 64 C.L.R. 221, at p. 236:

> If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.
>
> The distinction may be difficult of application in a given case, but it must be regarded as one depending upon the meaning of the covenant. It is well illustrated by the construction given to the ordinary covenant that premises will be insured and kept insured against fire. Such a covenant is interpreted as imposing a continuing obligation to see that the premises are insured, so that the covenant cannot be broken once for all, but, on the contrary, failure to insure involves a continuing breach until the omission is made good.

See the discussion in J.W. Carter, *Carter's Breach of Contract* (Lexis Nexis-Butterworths 2011), at ch. 11-64. See also *Bridgesoft Systems Corp. v. British Columbia*, 2000 BCCA 313, 74 B.C.L.R. (3d) 212 (B.C. C.A.).

27 Trillium's argument that breach of its covenant to operate its business continuously established a complete cause of action as of October 1, 2008 overlooks the consequences of its breach. In the face of Trillium's action — a serious breach or

repudiation of the lease — Pickering had an option. It could either cancel the lease or affirm it and require performance: see *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.), at p. 570; *TNG Acquisition Inc., Re*, 2011 ONCA 535, 107 O.R. (3d) 304 (Ont. C.A.), at para. 33.

28 The election to cancel a contract as a result of a serious breach or repudiation brings a contract to an end and relieves the parties of any further obligations under it. The contract is not void *ab initio*: the innocent party may sue for damages for breach of the contract.

29 By contrast, if the innocent party elects to affirm the contract despite the serious breach or repudiation, the contract remains in effect and the parties are required to perform their obligations under it. The innocent party retains the right to sue for past and future breaches: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at para. 40.

30 Pickering elected not to cancel the lease following Trillium's October 1, 2008 breach. It affirmed the lease and, as a result, the parties were required to perform their obligations under it as they fell due.

31 Trillium could have resumed performance of its obligations at any time prior to the end of the term of the lease by carrying on its business at the leased premises in accordance with the terms of the covenant. Had it done so, Pickering would have been required to accept Trillium's performance and would have been unable to terminate the lease in the absence of a further serious breach or repudiation. Trillium would have been liable for damages from the date of its October 1, 2008 breach until the date it resumed the performance of its covenant obligations, but would not have incurred liability for breach of the lease beyond that date.

32 Trillium chose not to resume its obligations at any point prior to the expiry of the lease. In these circumstances, when did the two-year limitation period begin to run?

33 It is clear that a cause of action accrues once damage has been incurred, even if the nature or the extent of the damages is not known: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), at para. 18; *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156, 347 D.L.R. (4th) 657 (Ont. C.A.), at para. 61.

34 But accrual of a cause of action is not determinative for limitation purposes in the context of a continuing breach of contract and an election by the innocent party to affirm the contract. The motion judge properly concluded that a fresh cause of action accrued every day that breach continued — every day that Trillium failed to carry on its business in accordance with the covenant.

35 Nothing in *Highway Properties* precludes this approach. Laskin J.'s statement, at p. 576, that "the election to insist on the lease or to refuse further performance (and thus bring it to an end) goes simply to the measure and range of damages" does not speak to a situation of continuing breach or the application of the *Limitations Act*.

36 I agree with the motion judge that the proper approach to the calculation of the limitation period in the context of a continuing breach is set out in H.G. Beale, ed., *Chitty on Contracts*, 29th edn. (London, UK: Sweet & Maxwell, 2004), at para. 28-035 (the position is unchanged in the 32nd edition):

> [T]he breach may be a continuing one, e.g. of a covenant to keep in repair. In such a case the claimant will succeed in respect of so much of the series of breaches or the continuing breach as occurred within the [relevant limitation period] before action brought. If the breach consists in a failure to act, it may be held to continue *die in diem* until the obligation is performed or becomes impossible of performance or until the innocent part elects to treat the continued non-performance as a repudiation of the contract. ... [Footnotes omitted.]

37 The accrual of fresh causes of action has consequences for the innocent party as well as the party in breach of the contract. It sets the clock running for a new two-year limitation period. Pickering's election to affirm rather than cancel the lease does not have the effect of postponing the date for discovery of the breach until expiry of the lease.

38 The limitation period in this case applied on a "rolling" basis, a concept discussed in *Goorbarry v. Bank of Nova*

Scotia, 2011 ONCA 793 (Ont. C.A.) at paras. 11-13 and *Wilson's Truck Lines Ltd. v. Pilot Insurance Co.* (1996), 31 O.R. (3d) 127 (Ont. C.A.) at para 58. The two-year limitation period commenced each day a fresh cause of action accrued and ran two years from that date. Thus, Pickering was entitled to claim damages for breach of the covenant for the period going back two years from the commencement of its action on February 16, 2012 — the period that ran from February 16, 2010 until the lease expired on May 31, 2011.

(3) Was the repair claim statute barred?

39 Trillium submits that Pickering's restoration claim was related to obligations during the lease rather than at its expiry. This claim was therefore discoverable as of October 1, 2008 and, as a result, is barred by the two-year limitation period under s. 4 of the *Limitations Act.* Trillium submits, further, that if Pickering's claim related to obligations at expiry of the lease, it failed to give notice under the lease that repairs were required.

40 This argument must also be rejected.

41 The motion judge was entitled to find that the respondent was claiming only for the breach of the covenant to repair and restore at the end of the lease. From this finding it followed that the limitation period for the claim began to run on May 31, 2011, and as a result the action was commenced within two years of discovery of the claim. Whether notice was provided was irrelevant to the nature of the claim and the *Limitations Act* issue.

Disposition

42 Accordingly, I would dismiss the cross-appeal.

43 I would order the appellant to pay the respondent costs fixed by agreement at $20,000, inclusive of disbursements and all applicable taxes.

G.R. Strathy C.J.O.:
I agree

H.S. LaForme J.A.:
I agree

Cross-appeal dismissed.

Appendix A

Section 16.08 Failure of the Tenant to Carry on Business

(a) The Tenant shall take possession of the Leased Premises upon the Commencement Date, and shall open the whole of the Leased Premises for business, fully fixtured, stocked and staffed upon the Commencement Date (but in no event prior to the Opening Date), and thereafter throughout the Term conduct its business operations continuously, diligently and actively on the whole of the Leased Premises at all times, duly and strictly in accordance with the terms, covenants and conditions of this Lease.

(b) If the Tenant fails to take possession of and to open or to reopen the Leased Premises for business, fully fixtured, stocked and staffed within the times and in the manner required pursuant to this Lease or to carry on business at all times during the Term duly and strictly in accordance with the terms, covenants and conditions contained in this Lease, the Landlord shall be entitled (i) to collect (in addition to the Minimum Rent, Additional Rent and all other charges payable hereunder), an additional charge at a daily rate of Ten Cents ($0.10) per square foot ($1.08 per square metre) of the Rentable Area of the Leased Premises or One Hundred Dollars ($100.00), whichever is the greater, for each and every day that the Tenant fails to commence to do or to carry on business as herein provided, the additional charge being a liquidated sum representing the minimum damages which the Landlord is deemed to have suffered as a result of the Tenant's default, and is without prejudice to the Landlord's right to claim a greater sum of damages; and (ii) to avail

itself of any other remedies for the Tenant's breach hereunder, including obtaining an injunction or an order for specific performance in a court of competent jurisdiction to restrain the Tenant from breaching any of the provisions of this Section 16.08 and to compel the Tenant to comply with its obligations under this Section 16.08...

Section 11.05 Surrender of the Leased Premises

At the expiration or earlier termination of the Term, the Tenant shall peaceably surrender and yield up the Leased Premises to the Landlord in as good condition and repair as the Tenant is required to maintain the Leased Premises throughout the Term... The Tenant shall, however, remove all its trade fixtures and any alterations or improvements if requested by the Landlord as provided in Section 11.09 before surrendering the Leased Premises, and shall forthwith repair any damages to the Leased Premises caused by their installation or removal. The Tenant's obligation to observe and perform this covenant shall survive the expiration of the Term or earlier termination of this Lease.

Section 11.09 Removal and Restoration by the Tenant

[T]he Tenant shall, at the expiration of the Term, at its own cost, remove all its trade fixtures and such of its leasehold improvements and fixtures installed in the Leased Premises as the Landlord requires to be removed.

End of Document

TAB 10

HMANALY N§187
Houlden & Morawetz Analysis N§187

Bankruptcy and Insolvency Law of Canada, 4th Edition

COMPANIES' CREDITORS ARRANGEMENT ACT

Section 34
L.W. Houlden and Geoffrey B. Morawetz

N§187 — Application to Leases

N§187 — Application to Leases

See s. 34

Section 34(2) specifies that in a lease, the lessor may not terminate or amend the lease by reason only that *CCAA* proceedings commenced, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings. The debtor company that is attempting to reorganize will not be unreasonably evicted, denied basic and essential services, or denied other benefits to which it would otherwise be entitled solely on the basis that it commenced proceedings under the *CCAA*.

The party to the agreement with the debtor company may, however, require payments to be made in cash for goods, services, use of leased property, or other valuable consideration after the commencement of proceedings: s. 34(4).

The Ontario Court of Appeal addressed the issue of the legal effect of a notice of repudiation of lease given during *CCAA* proceedings. The debtor had obtained creditor protection under the *CCAA* and the initial order gave it the right to repudiate leases. The CRO of the debtor sent a letter repudiating a lease; however, the letter was never acknowledged, accepted or returned. The debtor abandoned the premises and the landlord attempted to find a new tenant but was unsuccessful. The restructuring efforts failed and the debtor was declared bankrupt. The landlord submitted a proof of claim to the trustee for its "unrecoverable expenses" during the entire term of the lease. The trustee issued a disclaimer of the lease; a trustee's disclaimer brings the lease to an end and terminates all rights and obligations for the payment of rent. The trustee subsequently obtained a sale approval and vesting order that annulled the bankruptcy order; and the same order transferred all the debtor's assets to another debtor company, which was then adjudged bankrupt. All claims formerly against the initial debtor became claims against the second company, and all the initial debtor's assets became available to satisfy such claims. Justice Campbell found that the facts were not in dispute and that the sole issue before the court was what effect was to be given to the repudiation letter in the context of a *CCAA* proceeding? Justice Campbell referenced the Ontario Court of Appeal in *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.* (2006), 2006 CarswellOnt 3009, 270 D.L.R. (4th) 181 (Ont. C.A.), to find that rescission is a remedy available to an innocent party when the other party has made a false or misleading representation. It allows the innocent party to treat the contract as void *ab initio*. In contrast, repudiation occurs by words or conduct that show an intention not to be bound by the contract. The consequences of repudiation depend on the election made by the innocent party. The innocent party can elect to treat the contract as remaining in full force and effect. In that case, both parties have the right to sue for damages for past and future breaches. Alternatively, the innocent party can elect to accept the repudiation and the contract is terminated. Each party is then discharged from future obligations. Campbell J. held that it was particularly important in *CCAA* proceedings for the landlord to promptly advise which option it intends to pursue, when it receives notice of repudiation from a commercial tenant. Campbell J. was satisfied that the lease had not been forfeited prior to bankruptcy. While the tenant had given notice of repudiation, the landlord had not responded to the notice prior to bankruptcy; accordingly, the trustee was entitled to disallow the claim on the basis of disclaimer under section 30(1)(k) of the *BIA*. At the appellate court, the court held that repudiation and termination are legally distinct acts that lead to significantly different legal rights and obligations for the parties and they are not

to be conflated. The Court of Appeal observed that there are three courses of action that a landlord may take when a tenant has repudiated the lease entirely: 1) the landlord may insist on performance and sue for rent or damages on the footing that the lease remains in force; 2) the landlord may elect to terminate the lease, retaining the right to sue for rent accrued due or for damages to the date of termination for previous breaches of covenant; or 3) the landlord may advise the tenant that it proposes to re-let the property on the tenant's account and enter into possession on that basis. Repudiation of the lease does not in itself bring the lease to an end. Repudiation occurs when one party indicates, by words or conduct, that they no longer intend to honour their obligations when they fall due in the future. It confers on the innocent party a right of election to, among other things, treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach. The Court of Appeal was in agreement that Campbell J. had correctly concluded that the lease had not been brought to an end in the *CCAA* proceedings and it was, therefore, susceptible to statutory disclaimer following bankruptcy.

During *CCAA* proceedings, a lessor and lessee brought applications for payment of leased vehicles. The Alberta Court of Queen's Bench held that while some aspects of the arrangement suggested a financing arrangement, the lease was a true lease when the transaction was viewed as a whole. The agreement did not place the entire loss of risk on the lessee. In a true lease, the debtor is paying for the use of the lessor's property: *Re Connacher Oil and Gas Limited*, 2017 CarswellAlta 2728, 55 C.B.R. (6th) 191, 2017 ABQB 769 (Alta. Q.B.).

End of Document

TAB 11

INSOLVNWS 2011-32
Bankruptcy & Insolvency Law Newsletters
August 8, 2011

— Houlden & Morawetz On-Line Newsletter

L.W. Houlden and Geoffrey B. Morawetz

Headlines

• The Court of Appeal for Ontario considered and gave direction on the legal effect of a notice of repudiation of lease given during a CCAA proceeding. The court emphasized the distinction between a lease termination and a repudiation. See *Case Updates* [Re TNG Acquisition Inc.].

• The Ontario Superior Court of Justice reviewed the process involved in an application for recognition of a foreign representative and whether the proceeding is a "foreign main proceeding" for the purposes of the CCAA. See *Case Updates* [Re Massachusetts Elephant & Castle Group Inc.].

• The British Columbia Court of Appeal addressed the issue of whether leave to appeal was required in respect of an appeal brought in a CCAA proceeding that also involved the BIA. See *Case Updates* [Re Ted LeRoy Trucking Ltd.].

Case Updates

[Re TNG Acquisition Inc.]

Re TNG Acquisition Inc. (July 28, 2011) (Ont. C.A.)

The Court of Appeal for Ontario addressed the issue of the legal effect of a notice of repudiation of lease given during *Companies' Creditors Arrangement Act* ("CCAA") proceedings.

EDS Canada Corp. ("EDS", or the "Landlord") was the sublessor of premises located in Ontario. In June 2001, EDS subleased the premises to NexInnovations ("Nex").

On October 2, 2007, Nex obtained creditor protection under the CCAA (the "Initial Order"). The Initial Order gave Nex the right to repudiate leases. On February 22, 2008, the Chief Restructuring Officer ("CRO") for Nex sent EDS a letter repudiating the lease, effective March 21, 2008 (the "Repudiation Letter"). The Repudiation Letter was never acknowledged, accepted or returned by EDS to Nex. Nex abandoned the premises effective March 21, 2008. EDS attempted to find a new tenant but was unsuccessful. The restructuring efforts failed. Nex never filed a plan of arrangement. The majority of Nex's assets were sold in the CCAA proceedings. One of the purchasers occupied a portion of the premises and paid occupation rent from March 22, 2008 to July 22, 2008 in the amount of approximately $136,000. On April 8, 2008, Nex was declared bankrupt.

On August 21, 2008, EDS submitted a proof of claim to the Trustee for its "unrecoverable expenses" during the entire term of the lease up to January 30, 2012. The claim was for $3.3 million (the "Claim").

On September 18, 2008, the Trustee issued a disclaimer of the lease. A trustee's disclaimer brings the lease to an end and terminates all rights and obligations for the payment of rent.

On December 29, 2008, the Trustee obtained a sale approval and vesting order which, among other things, annulled the Nex Bankruptcy Order. The same order transferred all Nex assets to TNG Acquisition Inc. ("TNG"). TNG was then adjudged a

bankrupt. All claims formerly against Nex became claims against TNG and all Nex assets became available to satisfy such claims.

On October 13, 2009, the Trustee disallowed the bulk of the Claim. Hewlett-Packard (Canada) Co. ("HP"), as successor to EDS, moved to have the disallowance set aside and the Claim declared to be valid. Campbell J. heard and dismissed the motion.

Justice Campbell found that the facts were not in dispute and that a single issue had to be decided: what effect was to be given to the Repudiation Letter in the context of a CCAA proceeding? He noted that the issue may now be dealt with by amendments to the CCAA as of September 2009.

The Landlord took the position that the repudiation was complete when it received the Repudiation Letter. Thus, the Trustee could not disallow the Claim following bankruptcy because the lease had been forfeited before bankruptcy.

The Trustee's position was that the CRO could not unilaterally repudiate, since repudiation does not in and of itself bring an end to the lease. It merely confers on the innocent party a right of election to treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach.

Justice Campbell had noted that the Landlord had accepted the continuance of rent payments without objection, both before and after the Repudiation Letter.

Justice Campbell also referenced the decision of the Ontario Court of Appeal in *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.* (2006), 18 B.L.R. (4th) 230, 46 R.P.R. (4th) 1, 211 O.A.C. 141, 2006 CarswellOnt 3009, 270 D.L.R. (4th) 181 (Ont. C.A.), in which rescission and repudiation were distinguished. Rescission is a remedy available to an innocent party when the other party has made a false or misleading representation. It allows the innocent party to treat the contract as void *ab initio*. In contrast, repudiation occurs by words or conduct that show an intention not to be bound by the contract. The consequences of repudiation depend on the election made by the innocent party. The innocent party can elect to treat the contract as remaining in full force and effect. In that case, both parties have the right to sue for damages for past and future breaches. Alternatively, the innocent party can elect to accept the repudiation and the contract is terminated. Each party is then discharged from future obligations.

Based on *Highway Properties Ltd. v. Kelly, Douglas & Co.* (1971), 1971 CarswellBC 274, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, [1971] S.C.R. 562 (S.C.C.), Campbell J. observed that the same principle applied in the case of repudiation of commercial leases. Campbell J. said it was particularly important in CCAA proceedings for the landlord to promptly advise which option it intends to pursue, when it receives notice of repudiation from a commercial tenant. Campbell J. was satisfied that the lease had not been forfeited prior to bankruptcy. While the tenant had given notice of repudiation, the Landlord had not responded to the notice prior to bankruptcy. Accordingly, the Trustee was entitled to disallow the Claim on the basis of disclaimer under section 30(1)(k) of the *Bankruptcy and Insolvency Act* ("BIA").

HP raised two issues on appeal:

1. Did the Trustee have anything left to disclaim or was the Claim crystallized as an unsecured damages claim as at the date of bankruptcy?

2. Did the motion judge err in holding that more was required of the landlord in the context of the Repudiation Letter sent to EDS in the course of the CCAA proceeding?

On the first issue, HP took the position that, in the CCAA context, the Repudiation Letter had the effect of ending the lease and thus, as of March 21, 2008, Nex no longer had any interest in the premises. The fact that Nex subsequently declared bankruptcy and did not file a plan of arrangement in respect of the CCAA proceedings, did not undo the legal relationship that existed as at the date of bankruptcy. HP contended that there was no longer a landlord/tenant relationship, rather it was simply a debtor/creditor relationship. Therefore, at the date of bankruptcy, there was no lease left for the Trustee to disclaim and HP had an unsecured damages claim.

Justice Gillese did not accept this submission. She rejected the submission because it essentially asked the court to find that repudiation and termination are one and the same in a CCAA. They are not. Repudiation and termination are legally distinct acts that lead to significantly different legal rights and obligations for the parties and they are not to be conflated.

In the seminal Canadian case on repudiation of commercial leases, *Highway Properties*, *supra*, Laskin J. set out three courses of action that a landlord may take when a tenant has repudiated the lease entirely: 1) the landlord may insist on performance and sue for rent or damages on the footing that the lease remains in force; 2) the landlord may elect to terminate the lease, retaining the right to sue for rent accrued due or for damages to the date of termination for previous breaches of covenant; or 3) the landlord may advise the tenant that it proposes to re-let the property on the tenant's account and enter into possession on that basis.

As *Highway Properties* makes clear, termination and repudiation are distinct legal concepts. To terminate a lease is to bring it to an end. Repudiation of the lease, on the other hand, does not in itself bring the lease to an end. Repudiation occurs when one party indicates, by words or conduct, that they no longer intend to honour their obligations when they fall due in the future. It confers on the innocent party a right of election to, among other things, treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach.

Justice Gillese went on to state that one party to a lease cannot unilaterally end its obligations under the lease. In the absence of proof of both acceptance of the repudiation and notification of the acceptance, the lease will be treated as subsisting. See *Williams v. Good Call Productions Ltd.* (2003), 2003 CarswellOnt 1734, 35 B.L.R. (3d) 249 (Ont. S.C.J.).

Due to the nature of the rights the landlord has when a tenant repudiates a lease, Gillese J.A. agreed with Campbell J. when he stated that it is particularly important in CCAA proceedings for the landlord to promptly advise the tenant which option it intends to pursue.

In this case, EDS never made an election after receiving the Repudiation Letter. Moreover, neither of the two alternative mechanisms provided for in the Initial Order for dealing with repudiation was used. Paragraph 8(c) of the Initial Order gave the tenant the right to repudiate "on such terms as may be agreed upon" between it and EDS and Nex or, "failing such agreement, to deal with the consequences thereof in the Plan". There was no such agreement between the parties, nor was there a plan.

Accordingly, notwithstanding the Repudiation Letter, the relationship between EDS and Nex remained that of landlord and tenant at the date of bankruptcy. Gillese J.A. was in agreement that Campbell J. had correctly concluded that the lease had not been brought to an end in the CCAA proceedings and it was, therefore, susceptible to statutory disclaimer following bankruptcy.

Justice Gillese also rejected the second argument put forth by HP, namely that the motion judge had erred in holding that the landlord was required to do something in order to make the repudiation effective. The case law makes it clear that the landlord has an election to make when a tenant repudiates. If the landlord does nothing, the landlord/tenant relationship remains and the lease continues in force.

In the result, the appeal was dismissed.

See Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*:

C§65 — Retaining and Surrendering Leases

G§128 — Forfeiture of Term Before Bankruptcy

G§140 — Disclaimer and Surrender of Lease by the Trustee

N§178 — Debtor Cannot Disclaim Specified Contracts

N§187 — Application to Leases

[Re Massachusetts Elephant & Castle Group Inc.]

Re Massachusetts Elephant & Castle Group Inc. (2011), 2011 CarswellOnt 6610, 2011 ONSC 4201 (Ont. S.C.J.)

Massachusetts Elephant & Castle Group, Inc. ("MECG" or the "Applicant") brought an application under Part IV of the *Companies' Creditors Arrangement Act* ("CCAA"). MECG sought orders pursuant to sections 46-49 of the CCAA providing for

(a) an Initial Recognition Order declaring that:

(i) MECG was a foreign representative and was entitled to bring the application;

(ii) the Chapter 11 Proceeding in respect of a number of Chapter 11 Debtors was a "foreign main proceeding" for the purposes of the CCAA; and

(iii) any claims against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors' property were stayed; and

(b) a Supplemental Order

(i) recognizing in Canada and enforcing certain orders of the U.S. Court made in the Chapter 11 Proceeding;

(ii) creating a super-priority over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and

(iii) appointing an Information Officer in respect of these proceedings.

On June 28, 2011, the Chapter 11 Debtors commenced proceedings in the United States Bankruptcy Court in Massachusetts, pursuant to Chapter 11 of the *United States Bankruptcy Code* ("*U.S. Bankruptcy Code*"). On June 30, 2011, the U.S. Court made certain first-day orders, including an order appointing the Applicant as foreign representative in respect of the Chapter 11 Proceeding.

The Chapter 11 Debtors operate and franchise full-service British-style restaurant pubs in the United States and Canada.

MECG is the lead debtor in the Chapter 11 Proceedings and is incorporated in Massachusetts. All of the Chapter 11 Debtors with the exception of Repechage Investments Limited ("Repechage"), Elephant & Castle Group Inc. ("E&C Group Ltd.") and Elephant & Castle Canada Inc. ("E&C Canada") (collectively, the "Canadian Debtors") are incorporated in various jurisdictions in the United States.

Repechage was incorporated under the CBCA with its registered office in Toronto. E&C Group Ltd. was also incorporated under the CBCA with a registered head office in Halifax and E&C Canada was incorporated under the *Business Corporations Act* (Ontario) with its registered office in Toronto. The mailing office for E&C Canada is in Boston at the location of the corporate head offices for all of the debtors, including Repechage and E&C Group Ltd.

The issues for consideration were whether the Ontario Court should grant the application for orders pursuant to sections 46-49 of the CCAA and recognize the Chapter 11 Proceeding as a foreign main proceeding.

Justice Morawetz set out the purpose of Part IV of the CCAA and also referenced sections 45, 46 and 47. Section 47(1) of the CCAA provides that there are two requirements for an order recognizing a foreign proceeding:

(a) the proceeding is a foreign proceeding, and

(b) the applicant is a foreign representative in respect of that proceeding.

Canadian courts have consistently recognized proceedings under Chapter 11 of the *U.S. Bankruptcy Code* to be foreign proceedings for the purposes of the CCAA. See *Re Babcock & Wilcox Canada Ltd.* (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]); *Re Magna Entertainment Corp.* (2009), 2009 CarswellOnt 1267, 51

C.B.R. (5th) 82 (Ont. S.C.J.); and *Re Lear Canada* (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

Justice Morawetz also commented that by order of the U.S. Court, the Applicant had been appointed as a foreign representative of the Chapter 11 Debtors.

Justice Morawetz was of the view that the Applicant had satisfied the requirements of section 47(1) of the CCAA and that it was appropriate to recognize the foreign proceeding.

Section 47(2) of the CCAA requires a court to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. A "foreign main proceeding" is defined in section 45(1) of the CCAA as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest" ("COMI").

Justice Morawetz noted that Part IV of the CCAA came into force in September 2009. Therefore, the experience of Canadian courts in determining the COMI has been limited.

Section 45(2) of the CCAA provides that, in the absence of proof to the contrary, the debtor company's registered office is deemed to be the COMI. As such, the determination of COMI is made on an entity basis, as opposed to a corporate group basis.

In this case, the registered offices of Repechage and E&C Canada are in Ontario and the registered office of E&C Group Ltd. is in Nova Scotia. The Applicant, however, submitted that the COMI of the Chapter 11 Debtors, including the Canadian Debtors, was in the United States and the recognition order should be granted on that basis.

The issue before the court was whether there was sufficient evidence to rebut the section 45(2) presumption that the COMI is the registered office of the debtor company.

The Applicant submitted that the Chapter 11 Debtors have their COMI in the United States for a number of reasons, including the following:

(a) the location of all corporate head offices are in Boston;

(b) the Chapter 11 Debtors function as an integrated North American business unit;

(c) management is located in Boston;

(d) accounting /finance and administrative functions are located in Boston.

On the other hand, it was noted that nearly one-half of the operating locations are in Canada and 43% of employees work in Canada.

GE Canada Equipment Financing G.P. ("GE Canada"), a substantial lender to MECG, did not oppose the application.

Counsel to the Applicant referenced *Re Angiotech Pharmaceuticals Ltd.* (2011), 2011 BCSC 115, 2011 CarswellBC 124, 76 C.B.R. (5th) 317 (B.C. S.C. [In Chambers]), where the court listed a number of factors to consider in determining the COMI. Morawetz J. considered the factors listed in *Angiotech*, and commented that the intention is not to provide multiple criteria, but rather to provide guidance on how the single criteria, i.e. the centre of main interest, is to be interpreted.

In interpreting COMI, Morawetz J. noted that the following factors are usually significant:

(a) the location of the debtor's headquarters or head office functions or nerve centre;

(b) the location of the debtor's management; and

(c) the location which significant creditors recognize as being the centre of the company's operations.

While other factors may be relevant in specific cases, it could very well be that they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors.

In this case, Morawetz J. noted that the location of the debtors' headquarters or head office functions or nerve centre is in Boston and the location of the debtors' management is in Boston. Further, a significant creditor, GE Canada, did not oppose the relief sought. All this led him to conclude that for the purposes of this application, each entity making up Chapter 11 Debtors, including the Canadian Debtors, had its COMI in the United States.

Having reached the conclusion that the foreign proceeding in this case is a foreign main proceeding, certain mandatory relief in the form of a stay of proceedings followed, as set out in section 48(1) of the CCAA. This relief was contained in the Initial Recognition Order.

In addition to the mandatory relief provided for in section 48, pursuant to section 49 of the CCAA, further discretionary relief can be granted if the court is satisfied that it is necessary for the protection of the debtor company's property or in the interests of a creditor or creditors.

In this case, Morawetz J. was satisfied that it was appropriate to grant the supplementary relief which related to, among other things, the recognition of Chapter 11 Orders, the appointment of the Information Officer, and the quantum of the administrative charge.

The Initial Recognition Order and the Supplemental Order were granted.

See Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*:

N§207 — Cross-Border Insolvencies Generally

N§213 — Application for Recognition of Foreign Proceeding

N§215 — Recognition of Foreign Proceeding

N§216 — Effect of Recognition Order

[Re Ted LeRoy Trucking Ltd.]

Re Ted LeRoy Trucking Ltd. (2011), 2011 BCCA 319, 2011 CarswellBC 1851 (B.C. C.A. [In Chambers])

The applicants, the Attorney General of Canada, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Union Applicants"), sought directions on whether leave was required to appeal the order of the Supreme Court chambers judge pronounced May 12, 2011. They took the position that leave to appeal was not required.

The respondent, Century Services Inc. ("Century"), opposed and contended that leave to appeal was required.

The applicants advised that in the event leave was required, they would pursue their applications for leave at a later date.

The reasons for judgment of the chambers judge are unreported, but the events that gave rise to the decision of the chambers judge are set out in the decision of the Supreme Court of Canada in *Re Ted Leroy Trucking Ltd.* (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Re Leroy (Ted) Trucking Ltd.)* 503 W.A.C. 1, (sub nom. *Re Leroy (Ted) Trucking Ltd.)* 296 B.C.A.C. 1, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Re Ted LeRoy Trucking Ltd.)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.), which is referred to by the chambers judge in her own reasons. The decision of the Supreme Court of Canada was the subject of commentary in Houlden & Morawetz On-Line Newsletter 2011-2 (January 10, 2011).

After the decision by the Supreme Court of Canada, the Union Applicants and Human Resources Skills Development Canada ("HRSDC") applied for a declaration that the GST fund was a current asset of the estate of Ted Leroy Trucking and formed part of the current assets available to pay the secured portion of the employees' wage claims. The application was brought in the CCAA proceedings as opposed to the companion bankruptcy proceedings.

The chambers judge referenced the order of Chief Justice Brenner and commented that "... one of the purposes of the CCAA is to maintain the status quo between the creditors while the company intends to reorganize. The court facilitates this process, supervising and making orders necessary to maintain the status quo between the creditors. The order made in this case is simply one of those types of orders. If the status quo is not maintained, creditors will be encouraged to pursue their own interests, interfering with and ultimately thwarting the company's attempts to reorganize. Ted Leroy was selling redundant assets and realizing on other capital assets as part of its effort to reorganize. This led to the issue between CRA and Century Services ... "

The chambers judge found that the fund in the amount of approximately $305,000, that Chief Justice Brenner ordered held by the Monitor in its trust account, was for the pre-filing liability of Ted Leroy for unremitted GST, and was not a current asset of Ted Leroy as of the date of bankruptcy. As such, it was not subject to secured wage claims of the union member employees of Ted Leroy pursuant to the BIA.

Section 193(c) of the BIA provides:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (c) if the property involved in the appeal exceeds in value $10,000;

Section 13 of the CCAA provides that:

> Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Counsel for the applicants argued that the order of the chambers judge was made in relation to issues in the bankruptcy proceeding, and that, in the result, leave to appeal the order was not required.

Ted Leroy was assigned into bankruptcy on September 3, 2008. The order also provided that the proceedings under the CCAA would continue, and that the bankruptcy proceedings would be stayed.

In addition to submitting that the issue on appeal exceeded in value $10,000, the applicants also contended that although the so-called GST fund was originally set aside by the court during the CCAA proceedings, the part of the order that they wished to appeal concerned the assets of the bankrupt estate and necessarily considered the priorities and definition set out in the BIA.

Justice Hinkson made specific reference to the following passage from *Re Ted Leroy Trucking (Century Services)*, *supra*, where Madam Justice Deschamps found:

> Tysoe J.A. therefore erred in my view by treating the CCAA and the BIA as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the BIA and the CCAA, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in

> bankruptcy (*Re Ivaco Inc.* (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 26 B.L.R. (4th) 43 (Ont. C.A.), at paragraph 62-63).

Justice Hinkson concluded that although the order of the chambers judge was made in the CCAA proceedings, the relief sought included an order approving the fees of the Trustee and an order for his discharge. That relief was not dealt with by the chambers judge, but it was apparent that the applicants attempted to seek but did not obtain relief from the chambers judge in the CCAA action that could only be granted in the bankruptcy proceedings if the two were to be considered to be separate mechanisms within an overall statutory regime:

> The term "current asset" is defined in the BIA not the CCA and therefore the order could not have been made solely pursuant to the CCAA. However, the respondent's claim to the funds was pursuant to the previous CCAA proceedings and not the BIA proceedings. Therefore while the order with respect to the funds engaged the applicants' rights under the BIA, it also engaged the respondent's right to the funds resulting from the CCAA proceedings culminating in the decision from the Supreme Court of Canada referred to above. The applicant's choice to proceed under the CCAA was an available method of proceeding and did not treat the CCAA and the BIA as separate regimes. Instead, the choice of within which proceeding to bring the application recognized the different legal mechanisms pursuant to which their applications might be brought. While the applicants may now be of the view that this was not the preferable method of proceeding, having made that choice, it cannot now resile from that decision to seek the benefit of the provisions under the BIA.

Accordingly, Hinkson J.A. concluded that the applicants required leave to appeal the order of the chambers judge relating to the so-called GST fund.

> See Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*:
>
> > I§57 — Appeals Generally
> >
> > N§130 — Appeals — Leave to Appeal

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BRIEF OF AUTHORITIES OF THE RESPONDENT FOR ADDITIONAL WRITTEN SUBMISSIONS

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