



Summer 2018

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PROPERTY LEASING **Recent Developments of Importance**

PART 1

Principle of Immunity and Implied Releases – Trilogy Scope Widens Further

Since the 1970s, a series of three Supreme Court of Canada cases – commonly referred to as the “Trilogy” – has established a common law principle to assist landlords and tenants in allocating risk in the absence of express provisions. This principle provides that the risk of loss or damage caused by peril rests on the party who has



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covenanted to obtain insurance to cover such peril or who has had their cost of insurance partially reimbursed by the other party, subject to express language to the contrary. The intent is that the party should look to the insurance to fund the loss, even if the other party is negligent. In *Youn v. 1427062 Alberta Ltd. (Red's Pub)*, the Courts further developed this principle by finding that the insurance obtained by the Landlord was for the benefit of the Tenant, even where there was no express covenant on the Landlord to obtain such insurance and even where the Tenant was not specifically paying its share of occupancy costs.

This case involved a subrogated claim by the Youns' ("Landlord") insurer against Red's Pub ("Tenant"), which arose after the premises leased to the Tenant was destroyed by patrons who started a fire in the washroom. The Tenant carried liability insurance but did not carry fire insurance, while the Landlord did carry fire insurance. The Landlord's insurer brought an action against the Tenant for damages due to negligence. The Tenant, in turn, applied for summary judgment dismissing the Landlord's action and claiming that it was entitled to benefit from the Landlord's fire insurance.

The lease agreement was a "gross" lease where the Tenant paid a base rental with no obligation to pay property taxes or a share of common area costs. The Tenant's insurance obligations did not include fire insurance and the Tenant's repair covenant expressly excluded damage by fire. There was no express covenant requiring the Landlord to obtain fire insurance but the Lease made the Tenant responsible for any increased costs if the Tenant did something to increase the Landlord's fire insurance premiums.

Based on a reading of the agreement as a whole, the Court found that there was an inferential covenant on the Landlord to obtain fire insurance, which, even in the absence of an express covenant to obtain such insurance, was for the benefit of the Tenant. In addition, although the Lease contained an indemnity that required the Tenant to indemnify the Landlord for its negligence, the Court found that it was generic in nature and could not override the specific provisions in the Lease, such as the express exclusion of damage by fire from the Tenant's repair covenant. The Tenant's application to dismiss the Landlord's claim was granted.

The authors previously reported on *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, (“Deslaurier”) in our 2016 article, which was an update on our 2015 article.¹ As a reminder, the Court of Appeal found that the Superior Court failed to properly apply the principles of contractual interpretation and relevant case law and erred in finding that the Landlord’s indemnity took priority over the Tenant’s obligation to insure. The Tenant’s obligation to insure against all risk of loss or damage to its own property caused by fire relieved the Landlord from liability. In addition,

the Tenant should not have been able to bring a subrogated claim against the Landlord because the Tenant would not have been able to bring such a claim if it had complied with its obligation to add the Landlord as an “additional insured”.

The Tenant sought leave to appeal this decision to the Supreme Court of Canada. While the application for leave was pending, the Supreme Court released its decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* (“Ledcor”), and thus the Supreme Court directed the Court of Appeal to recon-



sider its previous decision on *Deslaurier* in light of the Supreme Court's ruling in *Ledcor*.

Ledcor was a contractual interpretation case involving an exclusion clause in an all-risk property insurance policy; a standard form contract. The ultimate issue for the Court of Appeal was whether *Ledcor* mandated the application of a different standard of review (the palpable and overriding standard) and whether application of that standard, if necessary, required an alteration of the Court of Appeal's decision. The Court of Appeal noted that the lease in question was a negotiated contract and

therefore the *Ledcor* principles regarding standard form contracts had no application in this case. The Court of Appeal confirmed that they did apply the correct standard of review and affirmed their original decision. Once again the Tenant sought leave to appeal this decision to the Supreme Court of Canada and, on October 9, 2017, the Supreme Court provided finality to this case by dismissing the Tenant's application for leave.

1. These articles can be found at www.mindengross.com



Does a Landlord's failure to demand additional rent and deliver statements relieve the Tenant from paying additional rent?

The principles of promissory estoppel are well settled and require the party relying on the doctrine to establish that the other party has, by words or conduct, made a promise or assurance that was intended to affect their legal relationship and which the party, in reliance on the representation, has acted on or in some way changed their position because of it. Closely tied to the doctrine of promissory estoppel is the doctrine of waiver, which is only found when the evidence demonstrates that the party waiving it had (1) full knowledge of rights and (2) an unequivocal and conscious intention to abandon them.

These principles were applied in *2373322 Ontario Inc. v. Nolis*, (“*Nolis*”), where the Landlord demanded additional rent from the Tenant after almost 2.5 years. The applicant Tenant purchased a previous tenant's business on October 1, 2013. The Tenant did not pay any additional rent between October 1, 2013, and February 23, 2016, and argued that the Landlord never advised it of the amounts required to be paid, never provided any supporting documentation, and never demanded payment until February 23, 2016, when the Landlord demanded arrears of additional rent and additional rent going forward.

The Tenant brought an application arguing, among other things, that the Landlord was not entitled to arrears of additional rent on the basis of (1) promissory estoppel, (2) waiver, (3) Landlord's failure to fulfill a condition precedent to entitlement to additional rent, and (4) the claim being statute-barred.

In examining whether the doctrine of promissory estoppel applied, the Court stated that the onus was on the Tenant to establish that the Landlord had made an unambiguous representation, by words or conduct, that its strict rights under the Lease would not be enforced. The Court pointed to the fact that the Tenant failed to provide any evidence that it acted in reliance on a representation by the Landlord that it would not insist on payment of additional rent or that it changed its position. The Court found there was no evidence that showed the Landlord would not rely on the strict

terms of the Lease, coupled with the Tenant's reliance on it, and dismissed the Tenant's waiver argument on similar grounds.

The Tenant also argued that the Lease imposed an obligation on the Landlord to provide a statement at least once a year with information to calculate the amounts payable as additional rent and a further obligation to provide an adjusting statement within 120 days, which were pre-conditions to entitlement to additional rent. The Court pointed out that there was no reference to consequences to the Landlord in the Lease for failing to provide a statement and that any such failure by the Landlord did not relieve the Tenant of its obligation to pay additional rent once the statement was provided. Any such failure by the Landlord, as with the breach of any covenant, only gave rise to a claim for damages by the Tenant.

The lower Court in British Columbia similarly found in *Bulley v. Weatherford Canada Partnership*, (“*Bulley*”), that the Landlord's failure to provide budget statements, as required by the Lease, was a breach of the “time of the essence” clause, which did not exempt the party who is not in breach from performance of the contract, but rather provided it with an election as to whether to keep the contract in force. Since the Tenant continued to operate under the Lease, it could not rely on this clause to avoid payment of the additional rent and was responsible for it.

How does one reconcile *Nolis* and *Bulley* with *1127776 Ontario Ltd. v. Deciem Inc.*, where the Court found that the Tenant was not liable for adjustments in additional rent where the Landlord failed to comply with the schedule for providing reconciliation statements? In each of the cases, there was a positive obligation on the Landlord to provide a statement or budget of the additional rent to the Tenant and the Landlord's only conduct was a failure to provide it based on the time period provided in the lease. Aside from the Court's holding, there appears to be little difference between these cases in terms of the conduct of the Landlord and reliance by the Tenant. On appeal, the Divisional Court of Ontario upheld *Deciem*, placing reliance on the six-month limitation imposed on the Tenant with respect to its ability to seek a readjustment of additional rent. Since the six-month limitation was tied to the end of each lease year (rather than upon receipt of a year-end





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statement), the Tenant was clearly prejudiced by the Landlord's delay in providing a reconciliation statement. This appears to be a key distinguishing factor between these cases.

Turning back to *Nolis*, the fourth argument raised by the Tenant was that the Landlord's claim for additional rent did not constitute "rent" under the *Real Property Limitations Act* ("RPLA") as the definition of "rent" in the original lease stated "Rent means the amounts payable by the Tenant to the Landlord pursuant to this Section" and struck out the words "and includes additional rent". The Tenant took the position that the general two-year limitation period applied instead of the six-year limitation period under the RPLA because the Landlord's claim did not constitute one for "rent". Referring to the leading case of *Ayerswood Development Corporation v. Western Proresp Inc.*, the Court held that the Landlord's claim for common area maintenance (CAM) charges fell under the six-year limitation under the RPLA. Notably, the Court also held that even if it was wrong and the parties intended to exclude "additional rent" from "rent", the Landlord's claim for additional rent would still constitute "rent" for the purposes of the RPLA.

Fundamental Breach by Landlord

A fundamental breach is a breach that substantially deprives the innocent party of the benefit of the agreement and frees the innocent party from any future obligations. The following five factors must be considered in determining whether there is a fundamental breach: (1) the ratio of the party's obligations not performed to that party's obligations as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of such breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation performed to the whole obligation.

In *772067 Ontario Ltd. v. Victoria Strong Manufacturing Corp.*, the Landlord terminated the Tenant's lease for outstanding arrears of rent. The Landlord offered to allow the Tenant to reoccupy the premises once the rent arrears were paid. The Tenant paid the arrears but the Landlord continued to refuse the Tenant re-entry as a result of other non-rent defaults (for which no notice and cure period was provided). The Court found that the Tenant's payment of rent arrears in satisfaction of the Landlord's offer was a reinstatement of the lease. The Landlord's subsequent refusal to allow the Tenant to re-enter due to other non-rent defaults

amounted to a fundamental breach as it deprived the Tenant of the benefit of the contract and forced the Tenant to relocate.

Although mice, spiders, and garbage were not found to be a fundamental breach in *Kenny Alwyn Whent Inc. v. J. Mao Dentistry Professional Corp.*, this case is instructive on the importance of the conduct of the Tenant in determining whether a fundamental breach will be found. Although the Tenant complained of mice, spiders, and garbage throughout the term of the Lease, the Tenant continued to operate his dental practice from the premises, renewing the Lease twice. The Court concluded that since the Tenant continued

to occupy the premises and had renewed the Lease after making complaints, the presence of mice, spiders, and garbage only constituted a mere annoyance, but did not go to the heart of the agreement such that it constituted a fundamental breach. The case seems to suggest that had the Tenant conducted itself differently, the Court may very well have come to a different result.

Stay tuned for Part 2 in our
Fall 2018 issue in November

Special acknowledgement and thanks to Melodie Eng, Steven Birken, and Hayley Larkin (student-at-law) for their valuable assistance in preparing this article.



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Firm News

New Financial Services Group

Minden Gross LLP brought together its innovative thought leaders who advise financial institutions to create its new Financial Services Group. Legal professionals from the Commercial Real Estate, Bankruptcy and Insolvency, Business Law, and Litigation Groups will now fall under the banner of the Financial Services Group to better serve financial institutions, financial service providers, and their clients.

Top 10 Regional Law Firm

Minden Gross LLP is again ranked in the Top 10 Ontario Regional Law Firms by *InHouse* magazine. Thank you to all of our clients, friends, and colleagues who voted for us.

Canadian Legal Lexpert Directory

The *2018 Canadian Legal Lexpert Directory* acknowledged our lawyers as leaders in their fields. The firm received leading ranking in Property Leasing and Property Development and congratulates **Joan Jung** (Estate & Personal Tax Planning); **Howard Black** (Estate & Personal Tax Planning – Estate Litigation); **Reuben Rosenblatt, LLD, QC, LSM** (Property Development); and **Michael Horowitz, Christina Kobi, Stephen Messenger, Adam Perzow, and Stephen Posen** (Property Leasing).

Congratulations Reuben!

Minden Gross LLP congratulates **Reuben M. Rosenblatt, LLD, QC, LSM**, who was honoured at the June 27, 2018, Call to the Bar ceremony and presented with the degree of Doctor of Laws, *honoris causa* (LLD) from the Law Society of Ontario.

Professional Notes

Melissa Muskat posted “Property Taxes: What’s new and exciting?” on May 1 and published “The new and the exciting in this year’s Ontario property taxes” in *The Lawyer’s Daily* on May 22. She was awarded the 2018 UJA Phil Granovsky Award for Campaign Excellence on Jun. 6.

Howard Black acted as a mediator in a mock mediation program on May 30 on “Estate Tax Planning Gone Awry” at the 17th Annual B’nai Brith Canada CLE for Lawyers & Accountants.

Minden Gross LLP lawyers attended the 2018 CCCA National Conference from Apr. 29-May 1 in Toronto. **Ryan Gelbart, Samantha Prasad, Irvin Schein, Brian Temins, Ken Kallish, Ethan Eisen, and Whitney Abrams** were in attendance.

Whitney Abrams published five articles on *Canada Cannabis Legal* including “AGLC Announces First 13 Licensed Producers to Supply to Alberta” on Jul. 5. She spoke at a law seminar hosted by the Jewish Lawyers Network on cannabis legalization in Canada on May 23. *CannaInvestor* published her article “Cannabis Retail Across Canada - Coveted Licenses up for Grabs” in their Apr. 2018 edition.

Members of the Tax and Estates Groups attended the 2018 STEP National Conference on May 28-29 in Toronto. **Joan Jung, Michael Goldberg, and Samantha Prasad** attended.

Joan Jung moderated the seminar “Tax Update and Related Issues” at a STEP Toronto event on Apr. 11. Joan’s paper “The Taxable Preferred Share Rules and the Private Corporation” was published in *TaxFind*. *STEP Inside* published her article “US Tax Reform - Increased Gift and Estate Tax Exemption and Withholding Tax on the Sale of a US Partnership Interest” in May. Joan is a member of the Planning Committee for the 2018 Ontario Tax Conference of the Canadian Tax Foundation.

Michael Goldberg hosted the fourth session of Tax Talk: Season 5 on May 16 and the summer social on Jul. 18. He presented “What To Do When Your Trust Comes of Age” to private wealth advisors on Apr. 12 and to Our Family Office on May 14. His articles “21-Year Tax Issues and the Non-Specialist Advisor” (part 1 & 2) appeared in the Jun. & Jul. editions of *Tax Notes*.

Samantha Prasad published four articles in *The Fund Library* including “Family trusts not just for the rich and famous” on Jul. 19. *The TaxLetter* published two articles including “Discretionary Trusts - Proper Administration” in June. She was quoted on the 2018 Federal Budget in *Securities Lending Times* on Apr. 18.

Hartley R. Nathan, QC, and Jessica Thrower published “Removal of Directors of Business Corporations Revisited” in *The Directors Briefing* for May 2018.

Sasha Toten hosted a Young Women in Law event on mindfulness on Jul. 12.

Irvin Schein published “A Commercial Tenant Fails to Pay Rent and Gets Locked Out: Will the court let them back in?” on *irvinschein.com* on Jul. 12 and “The Uber Powerful Impact of Arbitration Clauses” on *Slaw* on Apr. 10. He also presented “Some Thoughts on Commercial Arbitration Clauses” to the ACC on Jul. 12.

Reuben M. Rosenblatt, LLD, QC, LSM, was profiled in *The Gazette* in anticipation of being honoured with a Doctor of Laws. Reuben spoke at the LSO’s 15th Annual Real Estate Law Summit on “Does Good Faith Trump Certainty?” on Apr. 19.

Steven Pearlstein was cited in a recent Superior Court decision on mortgage interest, which was included in the Jun. 29 edition of *Ontario Reports*. He spoke at OBA’s professional development event on troubleshooting problem closings on May 17.

The Employment and Labour Group hosted two seminars including “Don’t jump to conclusions: Conducting proper workplace investigations” on Apr. 11 with **Tracy Kay**, **Andrew Zinman**, and **Carrington Hickey**. They also posted two articles including “Out with the New: Important Changes to Public Holiday Pay” on Jun. 26.

Rachel Moses spoke at an LSO event on enforcing judgments on May 22.

Minden Gross LLP attended the ICSC Canadian Law Conference on Apr. 30-May 1 including **Stephen Messinger**, **Stephen Posen**, **Christina Kobi**, **Benjamin Radcliffe**, **Michael Horowitz**, **Adam Perzow**, **Steven Birken**, **Enzo Sallese**, and **Melissa Muskat**. **Christina** was on the program planning committee and moderated a workshop on “Leasing in the Franchise Triangle: Who’s Who When Negotiating Leases Involving Franchisors, Franchisees, and Landlords.” **Stephen Messinger** was a panelist on “The Art of Negotiation.” **Michael** was a panelist on “Today’s Special: Specialty Leasing in the Current Retail Environment.” **Stephen Posen** and **Benjamin** led a roundtable discussion on “Tenant Remedies for Violation of Co-Tenancy, Kiosk Protection, No-Builds, and Other Special Tenant Rights.” **Melissa** led the roundtable discussion “Property Taxes Update: What’s New and Exciting in 2018.”

Stephen Messinger and **Stephen Posen** were listed in the *2018 Lexpert Guide to US/Canada: Cross-Border Lawyers in Canada*. **Stephen Messinger** was quoted in “Why a licence agreement is better than a lease for landlords of pop-up shops” in *Financial Post* on Jun. 20.

Christina Kobi spoke at a CCIM network meeting on the best practices for drafting an LOI on Apr. 18.

Brian Temins was mentioned as an example of great personal branding in an article in *S/law* on May 31 for his Twitter @btemins. **Brian** and **Jessica Thrower** acted for FirePower Equity Inc. on its acquisition of Interwork Technologies Inc. and on behalf of Lynx Equity Limited for multiple acquisitions including Flooring Solutions Inc., Safe-Tech Training Inc., and Blind Bay Village Grocers.

Yosef Adler, Andrian Lozinski, Jessica Thrower, Michael Goldberg, and Tracy Kay acted for the majority shareholder as part of Debco Bag Distributors' merger with HUB Promotional Group.

Andrew Elbaz and **Sasha Toten** acted for Enthusiast Gaming Inc. as they completed an \$8.4 million offering. They acted for GreenTec Holdings Ltd. as they completed a private placement offering of \$8,888,880 subscription receipts as well as a private placement offering of 8% senior secured convertible debentures units. **Andrew** and **Sasha** also acted for GreenTec Holdings Ltd. as GTEC Holdings completed a reverse take-over transaction.

Andrew Elbaz and **Alexander Katznelson** (student) posted "TSX Venture Exchange publishes 'Bulletin, Blockchain, and Cryptocurrency'" on Apr. 6.

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