WeirFoulds LLP

CASE LAW UPDATE

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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

2011 ONCA 535 (Released July 28, 2007)

Landlord and tenant – Repudiation of Lease – Companies' Creditors Arrangement Act Proceedings

In June 2011, EDS Canada Corp. ("EDS") subleased 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 "vacate, abandon or quit any leased premises and/or terminate or repudiate any lease…"

The chief restructuring officer for Nex sent EDS a letter on February 22, 2009 on behalf of Nex repudiating the lease, effective March 21, 2008. The letter included an acknowledgement to be signed and dated by EDS. EDS never acknowledged, accepted or returned the repudiation letter.

Nex abandoned the premises effective March 21, 2008. EDS immediately attempted to find a new tenant to re-let, but was unsuccessful.

On April 8, 2008, Nex was declared bankrupt. On August 21, 2008, EDS submitted a proof of claim to the trustee in bankruptcy of Nex (now known as TNG Services Inc.) (the "Trustee") for its "unrecoverable expenses" during the entire term of the lease up to January 30, 2012.

On September 18, 2008, the Trustee issued a disclaimer of the lease.

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 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 EDS's claim for unrecoverable expenses.

Hewlett-Packard (Canada) Co. ("HP"), as successor to EDS, moved to have the disallowance set aside and the claim declared to be valid. Justice Campbell dismissed the motion. This is an appeal from that motion.

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

Both the motions judge and appellate court agreed with the Trustee that the lease had not been forfeited prior to bankruptcy because the tenant could not unilaterally repudiate the lease, since repudiation does not in and of itself bring an end to the lease. While the tenant had given notice of repudiation, the landlord had not responded to the notice prior to bankruptcy. Additionally, it continued to accept rent payments after receipt of the repudiation letter. Therefore, the Trustee was entitled to disallow the claim.

The Court of Appeal held that the landlord's submission essentially was asking the court to find that repudiation and termination are one and the same thing in a CCAA proceeding. They are not. The court explained:

> 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. It 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.

One party cannot unilaterally end its obligations of the lease. In absence of proof of both acceptance of repudiation and notification of acceptance, the lease continued.

In this case, the landlord did not acknowledge or accept the repudiation. Accordingly, notwithstanding the repudiation letter, the relationship between EDS and Nex remained that of landlord and tenant, and the lease had not been brought to an end. Therefore, it was susceptible to statutory disclaimer by the Trustee following commencement of bankruptcy.

The Court of Appeal commented that the issue of a repudiation letter in the context of CCAA proceedings may now be dealt with by the amendments to the CCAA as of September 2009. Specifically, section 32 of the Act provides for disclaimer of an agreement. Counsel should be mindful of this amendment and should advise tenant clients to explicitly state that they are disclaiming or terminating a lease, not repudiating it.

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