NEWS Release

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Damages v. Injunctions: Prelude to a Potential Answer from the Supreme Court of Canada

You may have previously noticed that our News Releases aim to provide practical advice on, and insight into, the law of commercial leasing. We like to avoid esoteric, lawyerish musings. That is, except for this issue. There is an issue brewing in the Supreme Court of Canada that could have a profound impact on the world of commercial leasing. We just have to tell you about this, so please bear with us as we explain our excitement over an esoteric, lawyerish matter.

Estate in Land? Commercial Contract? Or Both?

The issue before the Supreme Court boils down to this: Is a commercial lease: an estate in land? a commercial contract? or both? The last time the Supreme Court dealt with this issue was in 1971 in *Highway Properties Ltd. v. Kelly, Douglas and Co. ("Highway Properties").* Prior to *Highway Properties,* a commercial lease was treated as an estate in land despite the contractual provisions included in commercial leases; the landlord-tenant relationship was primarily viewed as a conveyance of an interest in land. When a tenant defaulted, prior to *Highway Properties,* the remedies available to the landlord were limited to collecting rent as it came due or re-renting the leased premises on behalf of the defaulting tenant after it left. Claiming for loss of future rent was problematic.

In *Highway Properties,* the Supreme Court held that a lease was as much a commercial contract as it was a conveyance of land. As a result, in addition to the usual lease remedies, the full range of contract remedies was also available to landlords and tenants. This meant that when a tenant defaulted, the landlord could terminate and then sue for loss of future rent. The landlord's ability to claim for the loss of future rent is subject to the contractual duty to mitigate (i.e. limit the loss by finding a new tenant for the premises).

Why All the Excitement?

Over 35 years later, another case is on its way to the Supreme Court of Canada and it might complete the process started by *Highway Properties.* The case is known as *Evergreen Building Ltd. v. IBI Leaseholds Ltd. ("Evergreen").* It is borne out of the overheated Vancouver real estate market. The tenant had a lease for five (5) years, with a right of renewal, for an entire floor in an older ten (10) storey building. One year into the term, the landlord informed the tenant that it planned to demolish the building and replace it with a residential condominium. The lease did not contain a termination right and the tenant refused to move, claiming security of tenure under its lease. The landlord commenced proceedings for re-entry and a declaration that damages were the appropriate remedy. The tenant applied for an injunction to prevent the landlord from breaching the covenant of quiet enjoyment.

The Trial Court Decisions

The landlord argued that the lease should be viewed as a commercial contract. The landlord should be allowed to terminate the contract and pay damages to the tenant. It referred to the contract-based, common law doctrine of "efficient breach of contract". Under this doctrine, provided the innocent party is fully compensated for the breach, both parties can be released from their contractual obligations where the benefits of the breach would be so great that even with the innocent party being made whole, the breaching party would still turn a profit. In *Evergreen,* the tenant argued that its lease gave it an interest in land; such interests have always been protected by the courts by way of an injunction preventing the landlord from

interfering with the tenancy. The tenant maintained that the building had many unique architectural features that it could not find in other buildings. The tenant refused to leave and asked the Court to grant an interim injunction. In deciding whether it should be granted, the Court applied the classic test: (i) is there a "serious issue to be tried," (ii) will the party seeking the injunction suffer irreparable harm (harm which cannot be adequately compensated by damages), and (iii) is the balance of convenience in the favour of the party seeking the injunction (i.e. the inconvenience of not granting the injunction outweighs the inconvenience to the other party of granting the injunction). The Court considered these 3 factors and granted the injunction.

The injunction expired shortly thereafter and the parties went back to Court, with both parties re-iterating their arguments. The judge emphasized that the lease conveyed an interest in land; the landlord had no right to re-enter and re-take possession; and the theory of efficient breach was better suited to a contract breach and did not enable the landlord to take back the leasehold interest. It declared the injunction to be *permanent.*

The Court of Appeal's Decision

The landlord appealed to the British Columbia Court of Appeal. The Court of Appeal found that the lower Court did not appropriately exercise its discretion in deciding to grant an injunction. The Court of Appeal held that the court must not automatically grant an injunction on the basis of protecting an interest in land. Although, it must be said that contract remedies do not preclude injunctions, awards of damage are far more common for breach of contract. The Court ruled that it was necessary to consider all of the equities between the parties, particularly that it would be unfair to the landlord to allow one tenant to prevent the landlord from re-developing the building. The permanent injunction was revoked, an interim injunction was re-instated and the case was sent back to the lower court to be reconsidered (on the basis that the lower court would apply the law as stated by the Court of Appeal).

The tenant obtained leave to appeal to the Supreme Court of Canada. The lower court's mandate to review its decision is therefore sidelined, pending the appeal. In the meantime, the building went into foreclosure and the tenant was effectively forced to leave, adding yet another twist. Nevertheless, the Supreme Court of Canada is slated to hear the appeal; it has not been abandoned. The Supreme Court of Canada generally grants leave to appeal where the issue is of national importance. Arguably, the reason this matter is proceeding is to analyze the issue of whether a commercial lease should be treated as an interest in land *and* a commercial contract, or purely a commercial contract.

Where Does this Leave the Commercial Lease?

If the Supreme Court moves the commercial lease further toward being a pure commercial contract, life as a commercial leasing lawyer could get interesting. Landlords would have a much freer hand in dealing with their tenants if they were willing to pay the freight. Tenants might walk away from operating covenants in leases without agonizing over exposure. Termination rights, relocation rights and quiet enjoyment rights, to name a few, will be hugely affected. For now, we can only wait and speculate. Is it an interest in land, is it a contract, is it both? What do you think?

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