



NEWS Release

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Mitigation Update: A Deal is a Deal

The Ontario Court of Appeal handed down its long-awaited decision in the case of *Unisys Canada Inc. v. York Three Associates Inc.* on September 25, 2001. The case was the subject of vigorous debate among the commercial real estate bar in Ontario, as it caused confusion relating to the law of mitigation.

The situation before the Court involved a commercial sub-lease of office space in a declining market. The subtenant, a law firm, had leased more space than it needed for itself, intending to sub-sublease the remainder to other law firms. A limited personal guarantee was provided by the principal lawyer of the law firm.

The Plot Thickened

The first sub-sublease ended when the sub-subtenant went bankrupt. As the rental rate under the sublease was higher than market, the subtenant couldn't replace the sub-subtenant. It approached the sublandlord for a reduction in rent terms but the sublandlord declined the request. The subtenant's failure to attract replacement sub-subtenants rendered it impossible to pay the sublease rent as the subtenant company was itself only a conduit and had no assets. Eventually, the subtenant walked away from the space and the sublandlord sought to recover damages for the loss of the subtenancy from the individual lawyer behind the corporate subtenant. The personal guarantee amount was paid. The sublandlord sought to pierce the corporate veil on the basis that as the controlling mind of the subtenant corporation, the lawyer had intentionally caused the subtenant to breach its

contractual obligations. However, the trial judge awarded only partial damages to the sublandlord, holding that the sublandlord should have mitigated its losses by accepting the subtenant's request for reduced rent. The trial judge also denied any further personal liability on the lawyer's part, finding that the degree of personal liability had been contemplated and fixed by the parties when they agreed to the limited personal guarantee.

The personal liability issue was not affected by the appeal decision. However, the trial level ruling on the mitigation issue was overturned on appeal. The Court of Appeal confirmed that the sublandlord was under no obligation to renegotiate the sublease rent in order to mitigate its damages.

And The Point Is...

The outcome of the case is very satisfactory from the perspective of landlords holding covenants of tenants whose businesses may struggle during economic downturns. From that perspective, it is a relief to know that a deal is a deal and there is no obligation to renegotiate when the going gets tough.

What's New

It is with great pleasure that we announce Joanna Board as the newest member of Daoust Vukovich Baker-Sigal Banka LLP.

Joanna is a welcome addition to our litigation team. Her strong focus on resolving disputes in a timely, efficient and effective manner will serve all of our clients well.

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Daoust Vukovich Baker-Sigal Banka LLP
BARRISTERS & SOLICITORS

The Electronic Commerce Act, 2000:

Conducting Commercial Lease Transactions In Cyber-Space

The *Electronic Commerce Act, 2000* recently came into force in Ontario and similar legislation has been enacted or is being considered in most of the other Canadian provinces. This new Act legitimizes electronic documents and signatures so that they are as legally binding as their paper counterparts.

What Does This Mean to You

Landlords and tenants should take particular note of the legislation because it affects commercial lease transactions in many significant ways. For example, the Act makes it possible for a party to sign a lease through the use of an electronic signature. A person's electronic signature need not resemble his or her handwritten signature and may consist of simply typing the person's name or clicking on an icon. The Act also stipulates that where there is a requirement to provide a document or notice to another person in writing, the use of electronic information or documents is equally acceptable. Therefore, where a lease provides for the delivery of written notice (as is typically required for notices exercising options to renew, termination notices, and default notices), the notice may now be delivered by e-mail or by way of any other electronic communication. The Act

also makes it possible for landlords and tenants to do away with their vast lease libraries by permitting existing documentation to be stored in an electronic form such as on a CD-ROM.

What to Watch Out For

Since it is possible to contract out of the legislation, parties who have not implemented vigorous internal/corporate safeguards should think carefully before conducting their transactions electronically. Of particular concern is the fact that, to date, the e-mail approach to business communication has been informal and, oftentimes, downright sloppy. Electronic transmissions are also subject to unauthorized altering and unless a party insists on the use of a "secured digital signature", there is no way to determine if a signature is authentic.

Protect Yourself

Landlords and tenants who wish to sidestep the Act should expressly state in their lease agreements that they will not be bound by agreements entered into electronically. Leases and agreements to lease should also state that notices may not be delivered by electronic means.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward. The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

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