

August 18, 2020

## **BANKRUPTCY TRUSTEE SUCCESSFULLY ASSERTS EXTENSION OF SUBSECTION 38(2) *COMMERCIAL TENANCIES ACT* RIGHTS AFTER LANDLORD ARGUES LEASE WAS SURRENDERED**

The Ontario Superior Court recently granted a bankruptcy trustee access to a premises and the right to assign a lease, despite the landlord's claim that the same trustee, acting as receiver, had previously surrendered the lease to the landlord. Further, the Court extended the trustee's time period within which to exercise those rights.

In *Cerberus Business Financial, LLC v. B & W Heat Treating Canada, ULC*, 2020 ONSC 3781, A. Farber & Partners Inc. ("**Farber**") acted as both receiver and trustee in bankruptcy. As receiver, it advised the landlord that it would no longer occupy the premises and delivered the keys to the landlord. As trustee, it then attempted to access the premises and assign the lease. The landlord refused to grant Farber access to the premises. It denied Farber, as trustee, its rights under Subsection 38(2) of the *Commercial Tenancies Act* (the "**CTA**") (which sets out a 90 day period within which a trustee must elect to disclaim, retain or assign a lease), on the basis that Farber's prior acts as receiver worked as a surrender.

Farber brought a motion that asked the Court to confirm that Farber had the right to access the premises and assign the lease, and furthermore, to extend the time period it had as trustee to exercise its rights under Subsection 38(2) of the CTA. The trustee also attempted to rely on O. Reg 73/20, promulgated under the Emergency Management and Civil Protection Act (the "**Suspension Order**"), which was passed by the Ontario legislature in response to the COVID-19 pandemic to extend the time period granted pursuant to Subsection 38(2) of the CTA.

### **The Facts**

In September 2019, Farber was appointed as receiver over all of the assets, undertakings and properties of B&W Heat Treating Canada, ULC ("**B&W**").

On March 31, 2020, Farber, as receiver, filed an assignment in bankruptcy on behalf of B&W and appointed Farber as the trustee. On the same day, Farber's lawyer, as receiver, wrote to the landlord stating that Farber, as receiver, would no longer occupy the premises or pay rent. The keys to the premises were delivered to the landlord. Concurrently, Farber, as trustee, sent, on April 21, 2020, a separate letter to the landlord informing the landlord of the first meeting of creditors.

Farber, as trustee, took the position that (pursuant to Subsection 38(2) of the CTA) it was entitled to retain, disclaim or assign the lease at any time within 90 days of the assignment in bankruptcy.

Through its real estate agent, Farber subsequently sought to assign the lease to a new tenant and to access the premises. The landlord refused access, arguing that Farber, as receiver, surrendered the lease on March 31, 2020.

Farber brought a motion, asking the Court to: (1) confirm that Farber had the right to access the premises and assign the lease; and (2) grant an extension of the 90 day period under Subsection 38(2) of the CTA.

### **Access and Assignment**

The landlord argued that Farber did not have the right to access the premises and/or assign the lease. The landlord noted that Farber, as receiver, could have surrendered the keys to the premises to Farber, as trustee, instead of surrendering them to the landlord. Since it did not, the landlord argued that the trustee had knowledge of the receiver's purported surrender and "at least" tacitly acquiesced to the surrender of possession of the premises.

The Court did not accept the landlord's position. It held that Farber, as receiver, and Farber, as trustee, were two distinct entities.

It further noted that Subsection 38(2) of the CTA provides the trustee with specific rights to assign the lease. The Court held that Farber, as receiver, could not prejudice the rights of Farber, as trustee, under the CTA.

### **Extension**

The motion was heard on June 18, 2020. The 90 day time period granted pursuant to Subsection 38(2) of the CTA from March 31, 2020, had less than 2 weeks remaining. Farber argued that the Court had inherent jurisdiction to extend such 90 day time period. Farber reasoned that there was "a gap in the legislation that ought to be filled to allow trustees relief when dealing with the landlord that wrongfully denies access".

The Court rejected Farber's position. It concluded that there was no functional gap in Subsection 38(2) of the CTA and that the 90 day time period was clearly set out.

Nonetheless, the Court granted the extension, explaining that the Suspension Order (responding to the COVID-19 pandemic) gave the Court the jurisdiction to extend the time period set out in Subsection 38(2) of the CTA. The Court held that it was within its reasonable discretion under the Suspension Order to

provide Farber with a 90 day extension. The Court noted that it was ***not*** prepared to grant the alternative relief sought by Farber (which was to declare that the 90 day period under Subsection 38(2) of the CTA would be suspended ***indefinitely*** for the duration of the COVID-19 emergency), as it would be unfair to the landlord to leave it in an unduly vulnerable position for an indeterminate, extended time period.

The Court extended the period for election by Farber to disclaim, retain or assign the lease by 90 days (to September 29, 2020) and granted Farber access to the premises. The Court also held that, given the landlord's past refusal to provide access, Farber was not obligated to pay occupation rent for the first 30 days of the extension, but was required to do so for the balance of the extension.

### **The Takeaway**

In this case, the landlord lost control of the premises in September 2019 and became impatient after the receivership became a bankruptcy. It was unsuccessful in asserting that the lease had been surrendered by Farber, as receiver. The Court used a nuanced approach to problem solving by relying on a temporary tool (the Suspension Order passed by the Ontario government in response to COVID-19). This case illustrates that the courts may be willing to be somewhat creative in light of the COVID-19 pandemic, but are not willing to extend time periods indefinitely, nor are they willing to rewrite the law.

## **ANNOUNCEMENT**

*Daoust Vukovich LLP is pleased to announce that **Ike Omoruna and Jack Saraiva** have joined the firm as Associate Lawyers. Ike is now a member of the firm's litigation and real estate teams, and Jack is a member of the commercial leasing team. Both Ike and Jack were called to the Ontario bar in 2020, after completing their articles at Daoust Vukovich LLP. Ike can be reached at 416-597-9225 ([iomoruna@dv-law.com](mailto:iomoruna@dv-law.com)). Jack can be reached at 416-597-1536 ([jsaraiva@dv-law.com](mailto:jsaraiva@dv-law.com)).*

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MARY ANN BADON  
416-598-7056

[mbadon@dv-law.com](mailto:mbadon@dv-law.com)

FRANCINE BAKER-SIGAL

416-597-8755

[francine@dv-law.com](mailto:francine@dv-law.com)

CANDACE COOPER

416-597-8578

[ccooper@dv-law.com](mailto:ccooper@dv-law.com)

DENNIS DAoust

416-597-9339

[ddaoust@dv-law.com](mailto:ddaoust@dv-law.com)

ALLISON FEHRMAN

416-304-9070

[afehrman@dv-law.com](mailto:afehrman@dv-law.com)

SAHISTA FITTER

416-597-5742

[sfitter@dv-law.com](mailto:sfitter@dv-law.com)

GASPER GALATI

416-598-7050

[ggalati@dv-law.com](mailto:ggalati@dv-law.com)

MEGHAN GREENFIELD

416-597-0830

[mgreenfield@dv-law.com](mailto:mgreenfield@dv-law.com)

S. RONALD HABER

416-597-6824

[rhaber@dv-law.com](mailto:rhaber@dv-law.com)

MICHAEL HOCHBERG

416-597-9306

[mhochberg@dv-law.com](mailto:mhochberg@dv-law.com)

WOLFGANG KAUFMANN

416-597-3952

[wolfgang@dv-law.com](mailto:wolfgang@dv-law.com)

LYNN LARMAN

416-598-7058

[llarman@dv-law.com](mailto:llarman@dv-law.com)

MIMI LIN

416-597-8493

[mimil@dv-law.com](mailto:mimil@dv-law.com)

MELISSA M. MCBAIN

416-598-7038

[mmcbain@dv-law.com](mailto:mmcbain@dv-law.com)

IKE OMORUNA

416-597-9225

[iomoruna@dv-law.com](mailto:iomoruna@dv-law.com)

PORTIA PANG

416-597-9384

[ppang@dv-law.com](mailto:ppang@dv-law.com)

JAMIE PAQUIN

416-598-7059

[jpaquin@dv-law.com](mailto:jpaquin@dv-law.com)

BRIAN PARKER

416-591-3036

[bparker@dv-law.com](mailto:bparker@dv-law.com)

DINA PEAT

416-598-7055

[dpeat@dv-law.com](mailto:dpeat@dv-law.com)

CLAIRE RENNEY-DODDS

416-488-3568

[crenney-dodds@dv-law.com](mailto:crenney-dodds@dv-law.com)

JACK SARAIVA

416-597-1536

[jsaraiva@dv-law.com](mailto:jsaraiva@dv-law.com)

LUCIA TEDESCO

416-597-8668

[ltedesco@dv-law.com](mailto:ltedesco@dv-law.com)

NATALIE VUKOVICH

416-597-8911

[nvukovich@dv-law.com](mailto:nvukovich@dv-law.com)

DEBORAH WATKINS

416-598-7042

[dwatkins@dv-law.com](mailto:dwatkins@dv-law.com)