

THE LATEST ON TENANT'S INDUCING BREACH OF LEASE: LIABILITY OF OFFICERS AND DIRECTORS

**By Barbara L. Grossman,
Fraser Milner Casgrain LLP*
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There are often situations where the corporate tenant who has abandoned its lease or otherwise defaulted on its lease obligations has no assets, and there are no guarantees (or inadequate guarantees). The issue then becomes whether there is any claim which will allow the landlord to get around the corporate veil in order to pursue the directors and officers (and shareholders) of the corporate tenant.

One device for getting around the corporate veil of the tenant is to sue the tenant's officers and directors for the tort of "inducing breach of contract". This paper will discuss the circumstances in which this tort can be used by a landlord to recover from directors and officers (or employees) of the judgment proof corporate tenant. This paper will also briefly discuss the scope for a landlord to make use of the "oppression remedy" under the *OBCA*, *CBCA* or other provincial corporate statutes to impose liability on directors and officers (and shareholders and/or related entities) in circumstances where the corporate tenant is judgment proof.

Inducing Breach of Contract

The essential elements of the tort of inducing breach of contract are:

1. the existence of an enforceable contract;
2. knowledge on the part of the defendant of the existence of the plaintiff's contract;
3. an intentional act on the part of the defendant to cause a breach of that contract;
4. wrongful interference on the part of the defendant;

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5. resulting damage.

When the alleged inducer is a director, officer or governing mind of a corporation that has been induced to break its contract, the "rule in *Said v. Butt*" (or more properly, the exception established in the case of *Said v. Butt*, [1920] 3 K.B. 497) is relevant and creates the following additional element which must be proved by the plaintiff to establish the tort:

6. the absence of justification for the actions of the director, officer or employee that induced the corporation to break its contract, such justification being present if the director, officer or employee acted *bona fide* in the best interests of the corporation and within the scope of his/her authority.¹

The *Said v. Butt* exception prevents a claim for inducing breach of contract against a corporate director, officer or employee where a claim for breach of contract lies against the corporation. In the recent decision of the Court of Appeal for Ontario in *ADGA Systems International Ltd. v. Valcom* (1999), 168 D.L.R. (4th) 351, Carthy J. A. explained the rationale of the *Said v. Butt* exception at paragraph 15:

...First, this is not an application of Salomon and Salomon...Second, it provides an exception to the general rule that persons are responsible for their own conduct. That exception has since gained acceptance because it assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against

¹ In its most recent decisions, the Court of Appeal for Ontario has re-established the proposition (which appeared to have been significantly undermined and altered in earlier Ontario decisions) that a claim in tort may proceed against directors, officers and employees of corporations for acts performed in the course of their duties provided that (i) the allegations of their personal tortious conduct are properly pleaded, and (ii) the limited exception in *Said v. Butt* does not apply. See *ADGA Systems International Ltd. v. Valcom* (1999), 168 D.L.R. (4th) 351 (O.C.A.); *Meditrust Health Care Inc. v. Shoppers' Drug Mart, a Division of Imasco Retail Inc.*, [1999] O. J. No. 3243 (C.A.), leave to appeal denied [1999] S.C.C.A. No. 530 (S.C.C.); *1175777 Ontario Ltd. v. Magna International Inc.*, [2001] O. J. No. 1621 (C.A.). In the latter case, the Court of Appeal indicated that there was no reason why the *Said v. Butt* exception should not apply as well to an officer, director or employee of a parent corporation who, in the course of his duties acts for a subsidiary, provided the individual acts in the best interests of the subsidiary.

the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company's best interest is to pay the damages for failure to perform. By carving out the exception for these policy reasons, the court has emphasized and left in tact the general liability of the individual for personal conduct.

It is clear that the *Said v. Butt* exception is applicable and will have to be overcome in order for a landlord to successfully use the tort of inducing breach of contract to impose liability on a director or officer of a corporate tenant. The landlord will have to demonstrate that the director/officer instructed or caused the corporate tenant to breach its lease out of spite or ill will to the landlord, or for personal gain (eg. to appropriate the assets of the corporate tenant to a new entity in which the director/officer has an interest, or to another creditor of the corporate tenant whose debt has been guaranteed by the director/officer, or to get a better rent deal through a new entity s/he controls with no benefit to the corporate tenant who achieves none of the rent savings).

The cases summarized below in which landlords have succeeded or failed in their efforts to utilize the tort of inducing breach of contract to impose liability on directors/officers/principals of corporate tenants, demonstrate the way in which the courts have applied the requisite elements of the tort and the *Said v. Butt* exception in the commercial leasing context. The cases are not entirely consistent.

First, the success stories:

1. *United Cooler (Niagara 1980) Ltd. v. Zafir*, [1992] O.J. No. 1258 (Gen. Div.)

The President and directing mind of a corporate tenant was found personally liable for inducing the corporation to breach a covenant in its lease not to remove certain chattels from the rented premises. The corporate tenant purchased the plaintiff's assets and entered into a lease with the plaintiff for the premises formerly occupied by the plaintiff, one of the terms of the lease being that the tenant would not remove chattels from the premises without the permission of the plaintiff landlord. Subsequently, the corporate tenant vacated the premises in order to cut its losses and the President personally directed and supervised the removal of certain chattels from the premises. The Court made a finding of fact that the demise of the corporate tenant's business was due to the economic recession and that the President "endeavoured for a year and a half to keep the business afloat." For this reason, the Court concluded that the president could not be held personally liable for the corporate tenant's breach of its lease by failing to make the necessary monthly rent payments. The Court found that the breach of the covenant not to remove the chattels was a different matter. Here, the President interfered wrongfully with the contractual relations between the landlord and the corporate tenant in order to advance his personal financial interests. More particularly, the President was concerned about his personal guarantees to the bank. The Court stated at page 5:

In anticipation of paying off that indebtedness to C.I.B.C. and taking an assignment of C.I.B.C.'s interest in the chattel mortgage from [the corporate tenant], he moved unilaterally, and in disregard of both the landlord's rights and [the corporate tenant's] obligations under the lease, to take possession of and remove the chattels in question. In my view this was not a justifiable interference...

2. *Bengro Holdings Inc. v. Tax To Go Inc.*, [1996] O.J. No. 2242 (Gen. Div.)

A corporate tenant, controlled by T, leased space in the plaintiff landlords' shopping centre. The tenant sublet 2/3 of the premises to another corporation, also controlled by T. T

negotiated a new lease with another landlord for other premises and was able to get a rent credit from the new landlord equivalent to the base rent due to the plaintiff landlords for the balance of the shopping centre lease term. T then advised the plaintiffs that the new landlord would assume a portion of the corporate tenant's obligations under the shopping centre lease. The corporate tenant and sub-tenant subsequently abandoned the shopping centre premises and ceased paying rent. At issue was whether T was personally liable to the plaintiff landlords. The Court held that T was personally liable to the plaintiffs for the tort of inducing breach of contract. Dyson J. was not impressed with the conduct of T, describing it as follows at paragraphs 12 to 15:

I would define the machinations that Mr. [T] practices the corporate shell game. He has several companies which he manipulates in a manner which benefits himself to the detriment of those he does business with. He could give no satisfactory answer to the question of why he set up the so-called sub-lease between [the corporate tenant] and [the corporate sub-tenant]. One can only infer that one reason for such an arrangement would be to officially transfer money from one company to another without any consideration for such transfer.

[T] secured a benefit for both his companies and himself by getting a credit in the premises at 3080 Yonge Street and refused to pass along such benefit to the plaintiffs to which the plaintiffs were legitimately entitled.

...

Clearly, this was an intentional act on the part of Mr. [T] causing a breach of the contract and wrongful interference on his part, resulting in the loss to the plaintiffs.

3. *Harry Winton Investments Ltd. v. 962247 Ontario Limited et al.*, unreported June 16, 1997, Court File No. 93-CQ-35536 (Ont. Gen. Div.)

The main claim in this action was against the corporate tenant for rent in respect of the period following the corporate tenant's abandonment of the leased premises. The corporate tenant resisted the claim on the ground that, by leasing another part of the same building to a

controversial abortion clinic, the plaintiff landlord breached the covenant for quiet enjoyment, thereby entitling the corporate tenant to abandon. Two months prior to abandoning the leased premises, the principal of the corporate tenant arranged for a new company to be incorporated to carry on an altered version of his business from new premises which were ultimately furnished and equipped with items taken from the abandoned leased premises. As there was no clandestine activity involved in the removal and the principal's position was that he genuinely believed that he was entitled to take all of his possessions when he left, the Court declined to find the principal personally liable under section 50 of the *Landlord and Tenant Act* (Ontario) (now the *Commercial Tenancies Act*) for assisting in the fraudulent removal of the corporate tenant's goods and chattels. However, the Court did find the principal personally liable for the rent due under the abandoned lease on the basis of inducing breach of contract. In holding that the *Said v. Butt* exception did not apply on the facts, Somers J. stated as follows at pages 31-32:

...In this case Mr. Blondell owned both companies. He was the sole shareholder, the sole director, and the sole officer of both companies. In my view, he caused the Toronto company to abandon its lease for his own personal gain. Had this intentions been otherwise, he would simply have moved the company elsewhere and changed its name.

While I have said earlier in these reasons that I concluded that it has not been proven that his conduct constituted fraud, I find that he was intent on starting up his new company in a new location and furnished with sufficient equipment and furnishings to get it going. As the sole owner of the new company, he was, in effect, reaping the benefit of these acts personally. I find that these acts were to his benefit and not to that of the defendant corporation...

4. *Torgan Enterprises Ltd. v. Contact Arts Management Ltd.*, [1997] O.J. No. 2759 (Gen. Div.)

This case involved an action by the plaintiff landlord against a corporate tenant that had abandoned, and a solicitor who was an officer, director, shareholder and the directing mind of the

corporate tenant. The solicitor occupied the leased premises for his law practice. The sub-lease between the corporate tenant and the solicitor was the only asset the corporate tenant had. The solicitor got a better rent deal at new premises and relocated his law practice, signing a lease with the new landlord through a new management company. In communications with the plaintiff landlord about the fact that the solicitor was moving his practice, the corporate tenant expressly represented that it had no intentions of not fulfilling its obligations under the lease. However, one month later the corporate tenant asserted that it was relieved from further obligations under the lease because of a number of unremedied problems with the building. The Court rejected this position and found the corporate tenant and the solicitor jointly and severally liable to the plaintiff landlord for the damages which ensued as a result of the abandonment. In finding the solicitor personally liable for inducing breach of contract, Greer J. found that he gave no thought to the best interests of the corporate tenant and that he failed to keep himself a distinct entity from the corporate tenant. In his evidence, the solicitor admitted that he was the alter ego of the corporate tenant. Therefore, it was in his best interest to cause the corporate tenant to commit the breach without notice to the landlord when he obtained a better rent deal for his law practice at new space.

5. *Colonia Life Holdings Ltd. v. Fargreen Enterprises Ltd.* (1990), 1 O.R. (3d) 703 (Gen. Div.)

Unlike the above cases, this is a pleadings decision, as opposed to a decision on the merits. Like the *Torgan* case, it involved a law firm that leased space in a building through a management company. The law firm leased space in another building through a new management company and advised the plaintiff landlord that its old management company would not honour its lease obligations for certain floors in the plaintiff landlord's building. The landlord brought an action for damages against the partners of the law firm who were directors of

the management company for inducing breach of the lease. The defendants moved for an order striking out that part of the statement of claim and dismissing it on the basis that no reasonable cause of action was disclosed. The Court rejected the motion and allowed the claim for inducing breach of contract to proceed, on the basis that the pleading contained the necessary requisites (a plea of lack of *bona fides* and a plea as to the "sole purpose" of the impugned scheme).

6. *Camden Nominees Limited v. Forcey and Another*, [1940] 1 Ch. 352

This older English case involved a successful inducing breach of contract claim against the President and Secretary of a tenants' association, for spearheading a rent strike to force the tenants' landlords to address the tenants' complaints that the landlords were not fulfilling their obligations of providing heating and cleaning. The Court concluded that the Chairman and Secretary had induced the tenants to breach their leases. It then looked at whether there was justification in law for such inducement and concluded that there was not, stating at page 365:

The defendants owed no duty to their fellow tenant; they sought their co-operation for their own ends, though no doubt a successful campaign would have been for the benefit of all alike. The end which they sought, namely, the performance by the landlords of their obligations, was one which could be reached by process of law. There is neither reason nor authority for the suggestion that in such circumstances a common interest can justify the interference with contractual rights.²

In the following group of cases, claims by landlords against corporate officers and directors for inducing breach of contract did not succeed:

7. *Lehndorff Canadian Pension Properties Ltd. v. Davis & Co.* (1987), 10 B.C.L.R. (2d) 342, [1987] B.C.J. No. 85 (S.C.)

² This passage was cited with approval in *Posluns v. Toronto Stock Exchange and Gardiner*, [1964] 2 O.R. 547, (H.C.), aff'd [1966] 1 O.R. 285 (C.A.), aff'd [1968] S.C.R. 330

In this case, the defendant law firm incorporated a management company called DML, which leased space from the plaintiff. DML decided to abandon the premises and alleged that the landlord had agreed to a surrender of the lease. The landlord sued its corporate tenant, DML, along with the law partnership for inducing DML to breach the lease. While the claim alleged both the tort of inducing breach of contract and a civil conspiracy to cause DML to breach its lease, the decision focuses primarily on the tort of civil conspiracy. The law firm's motion to have both claims against it summarily dismissed succeeded. The plaintiff alleged, and the Court found, that the partners of the law firm were the directing minds of the tenant management company and that their acts, when they were acting *bona fide* and within the scope of their authority, were the acts of the management company, and therefore attracted no personal liability. The British Columbia Supreme Court reasoned as follows at page 7:

It is clear that when a director of a company engages in discussions and makes decisions relating to the company's business, he is acting within the scope of his authority as the human agent which makes the company capable of doing business. And he can only attract personal liability if he is acting outside the scope of his authority in being motivated by advancing a personal interest contrary to the interests of the company, or by fraud, or with malice.

The purpose of Davis & Company may differ somewhat from that of DML in that Davis & Company's purpose is to carry on the practice of law and DML's purpose is to provide the accommodation to do so. But, there is a strong community of interest between the two; in essence, the interest of one is the interest of the other. There is no suggestion that any member of Davis & Company acted individually or with other members of the firm to advance any interest apart from that of DML. Nor is there any allegation that they acted *mala fide*.

8. *Jim Pattison Developments Ltd. v. Fudex International Inc.* (1996), 45 Alta. L.R. (3d) 345, [1996] A.J. No. 1181 (Q.B (Master Funduk))

This pleadings decision involved an application to strike out a statement of claim on the basis that it did not disclose a cause of action. The plaintiff landlord alleged that the corporate tenant defaulted in paying rent, removed its chattels from the leased premises, and abandoned the leased premises. The landlord also alleged that the directors of the corporate tenant induced the breach of lease and were personally liable. The claim for inducing breach of contract was struck out, on the basis of pleading deficiencies. By pleading that the individuals (who were alleged to be shareholders and/or directors and/or officers of the corporate tenant), as the "directing minds and will" of the corporation caused the corporation to repudiate its lease, the plaintiff identified the individuals' acts as the corporation's acts. That did not give the plaintiff a cause of action against the individuals for inducing breach of contract, as the plaintiff failed to plead facts which would take the case outside the exception in *Said v. Butt*.

9. *Jade Agencies Ltd. v. Meadow's Management Limited et al.*, [1999] B.C.J. 214 (S.C.)

This case involved a claim by the plaintiff landlord for inducing breach of contract against a solicitor, who was a director of the corporate tenant and himself occupied the leased premises for his law practice. After the lease was extended for a further five years and the landlord had paid the corporate tenant an inducement to sign the extension, the lawyer/director informed the landlord that the corporate tenant would be vacating the premises and terminating rent payments due to ongoing problems with the premises. The lawyer/director alleged that the extension agreement had been induced by the landlord's misrepresentations concerning the remedying of ongoing complaints, but the misrepresentations themselves were not specifically identified. In addition to claims for past and future rent, the landlord sought the return of the inducement. The action against the corporate tenant was allowed in part but the action against

the solicitor/director was dismissed. The Court found that the corporate tenant was not justified in ceasing to pay rent, so it was liable for the unpaid rent as well as damages for future loss to the end of the term, but the landlord was not entitled to recover the inducement. The British Columbia Supreme Court reviewed the earlier Ontario decision in *Torgan*, and on very similar facts expressly declined to follow it. The British Columbia Supreme Court held that a person who acts as a director of a company has the right to act only in his personal best interest as shareholder without incurring personal liability so long as the action was not obviously detrimental to the corporation. Errico J. of the British Columbia Supreme Court reasoned as follows at paragraphs 25 to 29:

I think in assessing the duties of a director to his company, it is important to keep in mind the basic principle that an individual who is a shareholder director of a corporation acts in two different capacities. He can act on his own behalf and he can act as a director of the corporation...

Accordingly when Mr. Sprague made the decision to move his law office, he did so as an individual law practitioner. He was entitled to terminate his tenancy agreement. That being done, and Mr. Becker having terminated his tenancy agreement, Meadow's Management was left with no tenants and a long term obligation under the lease. Meadow's Management through its director could have attempted to sublet the property to other tenants. The decision was made not to do so but rather to attempt to return the premises to the landlord. The letter of October 7 sets out purported grounds for ceasing to pay rent. Mr. Sprague as director may have thought them sufficient. He may as well have thought that the landlord would exercise its option to retake the premises and attempt to relet them. In any event, the actions he took as director of the company, after the company was left with no tenants, could not be said to be in breach of his duty as a director to the company.

In *McFadden*, the Court found the directors to be liable on the basis that what they did was in breach of their duty as directors of the company. What they had done was to remove money from the company to themselves without any consideration or justification.

In conclusion, on the principles enunciated in the *Imperial Oil* case Mr. Sprague would not be liable as it was clearly not his dominating concern to deprive Jade Agencies of its contractual benefit. However, on the facts of this case, it is not necessary for me to decide if that is the appropriate test. I find that in the circumstances, Mr. Sprague was not acting contrary to the best interest of Meadow's Management and is not liable to Jade Agencies for inducing breach of contract.

The result of my analysis is contrary to the conclusions found by the court in *Torgan Enterprises*. However, with respect, I have difficulty following the analysis in that case, and I respectfully decline to follow it."

10. *Unisys Canada Inc. v. York Three Associates Inc.*, [1999] O.J. No. 4859 (Gen. Div.), aff'd Court of Appeal for Ontario September 25, 2001

This action concerned a sub-sublease of excess office premises to a shell company for the purpose of being further sublet by the shell company to a number of month to month tenants. A solicitor, who was the governing mind of the corporate sub-subtenant, gave a very limited rental guarantee. His own law practice and his related business occupied some of the space as month to month tenants of the corporate sub-subtenant. The majority of the space was occupied by another lawyer who subsequently became bankrupt and vacated. After the sub-sublease was entered into, the rental market in downtown Toronto declined dramatically. The solicitor/director attempted to renegotiate the sub-sublease to obtain lower rents that could be passed on to month to month subtenants, but the sub-sublandlord refused to consider any downward adjustment. After his renegotiation efforts failed, the solicitor/director relocated his law practice and related business elsewhere at lower rent. Lacking any cash flow, the corporate sub-subtenant defaulted in its rental payments, thus breaching its sub-sublease. The sub-sublandlord claimed against the corporate sub-subtenant and against the solicitor/director in his personal capacity. The claim against the solicitor was both under his personal limited guarantee and for a larger amount for inducing breach of contract. A consent summary judgment was

obtained on the limited guarantee. Following a trial, the inducing breach of contract claim was dismissed on two grounds, either of which the trial judge considered to be sufficient to defeat the landlord's claim:

1. In the sub-sublease and in the personal guarantee from the solicitor/director, the parties addressed their mind to what would happen if the corporate sub-subtenant failed to carry out its payment obligations under the sub-sublease and had limited the remedies as against the solicitor/director. Tort law should not be used in these circumstances to defeat the allocation of risk in contractual obligations.
2. Certain of the required elements of the tort of inducing breach of contract, namely wrongful interference and causation of damages, were not established.

The Court of Appeal very recently affirmed the decision of the trial judge, without commenting on the first ground of the trial judge's decision. The Court of Appeal expressly agreed with the second ground of the trial judge's decision, stating at paragraphs 12 and 14:

However, in the case in appeal the trial judge found that Cancilla neither induced a breach of contract by York Three nor interfered with the commercial relationship between York Three, as sub subtenant and Unisys, as sub-sublandlord. The trial judge also found that Cancilla "did no wrongful act" and that at all times he acted in good faith. He was fully justified on the evidence in so finding.

...

The trial judge correctly held that Cancilla's conduct did not amount to interference with Unisys' contractual relations or to an inducement of breach of contract because the requisite elements of the tort were not provided. In particular, the trial judge correctly found that Cancilla had

not performed any intentional act to cause York Three to breach the sublease. York Three simply lost the revenue it needed to pay rent to Unisys when one of its subtenants went bankrupt and another abandoned the premises in anticipation of the termination of the rent free period. Without subtenants, York Three had no revenue. It could not, therefore, honour the sublease. No intentional act was required and none was performed.

11. *Novacrete Construction Limited v. Profile Building Supplies (2000)*, 35 R.P.R. (3d) 21 (Ont. S.C.J.), [2000] O.J. No. 3179

In this recent case the corporate tenant vacated the leased premises and new corporate entities controlled by the same principal conducted a similar business from a new location. The landlord sued the corporate tenant, a principal of the corporate tenant, and other entities incorporated by the principal, for monies owing under the lease and damages to the premises caused during the removal of fixtures, stock, inventory and equipment. The landlord asserted a variety of claims against the tenant, the principal of the tenant, and the other corporate entities he controlled, including breach of lease, inducing breach of contract, piercing the corporate veil, the oppression remedy under the *OBCA*, fraudulent removal of goods and chattels from the premises under section 48 and 50 of the *Landlord and Tenant Act* (now the *Commercial Tenancies Act*), and liability for non-compliance with the *Bulk Sales Act*. The defendants' main position was that the corporate tenant did not abandon, but rather the landlord terminated the lease wrongfully, locked the tenant out of the premises and withheld its goods. The defendants' position in this regard was ultimately accepted by the Court. Madam Justice Himel dismissed the claim against the principal for inducing breach of contract on the basis of the following reasoning at paragraphs 85 to 86:

It was clear that the liabilities of the company exceeded its assets. In my view, Mr. Valente was doing what he deemed necessary to minimize exposure for the Profile Building and himself personally by reducing expenses in a time of economic recession.

I find that he was acting in a bona fide manner and in the interests of the corporation when he took the steps he did. He attempted to sublet the premises and demonstrated a willingness to honour the lease by using the premises for storage, if necessary. These actions do not constitute wrongful interference, that is a deliberate interference in the contract between the landlord and Profile Building such that the company was prevented from performing its contractual obligations. The evidence pointed out by the plaintiff as demonstrating that Mr. Valente was acting in his own interests and not in the interests of Profile Building fell far short of the test. In my view, the elements of the tort of inducing breach of contractual relations are not made out in these circumstances.

Interestingly, although the Court rejected the claim for inducing breach of contract and rejected the claim to "pierce the corporate veil" on the basis that the principal's conduct was such as to cause him to "shed his identity with the corporation and expose himself to personal liability for the corporation's alleged wrongdoing", the Court found that the landlord was entitled to compensation from the principal and his other corporations under the oppression remedy. They were found to be jointly and severally liable for the cost of repairs and rent arrears up to the date the landlord re-entered. Madam Justice Himel reasoned as follows at paragraphs 95 to 99:

In my view, the actions of Mr. Valente in establishing a new corporation and transferring assets to that corporation were not sudden acts done in suspicious circumstances. Rather, I find that Mr. Valente pursued that course to create a viable business, obtain financing and survive in a time of economic recession. The assets transferred to the new corporation were of a nominal value. This is not the type of case which can be considered a fraudulent conveyance. There was no judgment against Profile Building at the time. However, while I do not find that there was fraudulent intent proven, the court may intervene in appropriate circumstances nonetheless.

...

The oppression remedy is a broader remedy than what is available for fraudulent conveyances. The courts have also taken an expansive view of whether a person with a claim for damages should be considered a creditor for the purposes of the Act...

...

Similarly, I find that Mr. Valente as the sole shareholder and director of Profile Building, Profile Woodworking and Profile Tile, exercised his powers in an unfair manner which disregarded the interests of the plaintiff and that under the statute, the court is empowered to make an order it thinks fit including compensating an aggrieved person. By transferring all the assets of Profile Building to Profile Tile, he has caused prejudice or oppression to the landlord who is entitled to recover compensation for damages.

The Oppression Remedy

As can be seen from the *Novacrete* case discussed above, the oppression remedy under the *OBCA* and other corporation statutes, is another device which can be utilized by a landlord to get around the corporate veil and impose liability on the directors/officers/shareholders of a corporate tenant if the affairs of the corporation have been conducted in a manner "that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of " the landlord as a creditor of the corporation. In cases involving non-fraudulent conduct, the courts must balance the rights of directors and officers of the company to carry on the business as they see fit, and the rights of the company's creditors to fair treatment. While a creditor who is dealt with by a corporate debtor in the ordinary course of business will rarely be entitled to an oppression remedy, courts are more likely to find that the interests of a creditor have been unfairly prejudiced or unfairly disregarded when the affairs of a corporation have been managed in a way that depletes its assets to the detriment of a creditor if there is a corresponding benefit to the directors/shareholders. In the creditor oppression remedy cases, the courts have indicated that the oppression remedy is designed to protect reasonable expectations, and one of the most reasonable of all expectations of those dealing with corporations is that directors will manage the

company in accordance with their legal obligations to act honestly and in good faith in the best interests of the corporation.

The leading case in Ontario concerning creditors' rights under the oppression remedy is *Sidaplex - Plastic Suppliers, Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div.), varied (1998), 40 O.R. (3d) 563 (C.A.). In that case, Blair J. considered an oppression application brought by a judgment creditor against the corporation and its sole shareholder and director. Pending the disposition of other outstanding litigation between the parties, the amount of a consent judgment was secured by a letter of credit. Both parties failed to appreciate that the letter of credit was for a fixed term and did not automatically renew. Through inadvertence, the corporation failed to renew the letter of credit, causing the security for the judgment to lapse once the fixed term was over. In the meantime, the corporation sold the bulk of its assets and used the proceeds to eliminate a debt to its bank and pay other creditors. In doing so, it had also eliminated a liability of its sole shareholder and director who had personally guaranteed the corporation's bank debt. Once the bank debt and other debts of the corporation had been paid, there were insufficient assets to pay the judgement creditor, Sidaplex. Blair J., at first instance, concluded that despite the absence of any bad faith or lack of probity on the part of the corporate debtor, Elta, or its director, the acts or omissions of Elta effected a result that was unfairly prejudicial to or unfairly disregarded the interests of its creditor, Sidaplex. To remedy the oppression, Blair J. granted judgment against Elta's sole officer, director and shareholder personally for the amount of the judgment debt, as the corporate conduct had inured to his personal benefit. Blair J.'s decision on this point was affirmed by the Court of Appeal for Ontario. Blair J. noted that in small, closely held corporations, the director(s) is the source of the

oppressive conduct, and therefore liability properly lies with the director, and stated at pages 405 to 406:

Courts have made orders against directors personally, in oppression remedy cases... These cases, in particular, have involved small, closely held corporations, where the director whose conduct was attacked has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question has redounded directly to the benefit of that person.

Such is the case here....

The Court of Appeal for Ontario dismissed an appeal from the oppression remedy aspect of Blair J.'s decision, indicating that Blair J. made no error in principle and his discretionary decision was not otherwise unjust.

In a more recent decision of the Court of Appeal for Ontario in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161, [2001] O.J. No. 1879, the Court of Appeal again confirmed (at paras. 55 et seq.) that a judgment creditor of a corporation can seek an oppression remedy in the form of a personal judgment against the directors, officers and shareholders of the corporation, in the absence of bad faith or want of probity on the part of those individuals who were the directors and shareholders, in order to rescue itself from the inability of the corporate debtor to pay the debt which resulted from their decision to terminate the company's operations and to render it without assets capable of responding to a possible judgment. The "oppressive" conduct that causes harm to a creditor need not be undertaken with the intention of harming the creditor provided it is established that a creditor has a reasonable expectation that the company's affairs will be conducted with a view to protecting its interests.

In an earlier Albert case, *First Edmonton Place Ltd. v. 315888 Alta Ltd.* (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Q.B.), appeal adjourned (1989), 71 Alta. L.R. (2d) 61, 45 B.L.R. 110 (C.A.), a landlord brought an oppression application under the Alberta corporate statute in order to secure the future rent payments due under a lease from a corporate tenant. The landlord had paid a large cash inducement to the corporate tenant, which was distributed to its director/shareholders who were three lawyers who occupied the premises during the rent free period and abandoned shortly thereafter. The oppressive act was the stripping of the corporate tenant's assets by its director/shareholders, leaving it unable to pay the future rent. The Alberta Queen's Bench decided that future rent payments were unliquidated debts, and it stated that it did not agree with the majority decision of the Court of Appeal for Ontario in *G.T. Campbell Ltd. v. Hugh Carson Co.* (1979), 24 O.R. (2d) 758 at 765, allowing an unliquidated debt holder to be considered a creditor under the *OBCA*. Subsequent Ontario oppression cases have cast doubt on the position of the Alberta Queen's Bench that there must be a liquidated debt before a creditor has standing to seek an oppression remedy.³ In *First Edmonton*, the Alberta Queen's Bench also held that for a creditor to have standing to seek an oppression remedy, it must establish that it was a creditor at the time the oppressive acts took place. Consequently, because the oppressive act took place before the future rent payments were due and had become liquidated debts, the landlord did not have status to seek an oppression remedy. The reasoning on this timing point has been adopted by some Ontario courts and rejected by other Ontario courts.

In summary, where the corporate tenant is a small closely held company and the directors/officers/shareholders have personally benefited from corporate transactions that fall outside the ordinary course of business, without properly taking into consideration the interests

³ See *Gignac, Sutts v. Harris* (1997), 36 B.L.R. (2d) 210 (Ont. Gen. Div.); see also *AE Realisations (1985) Ltd. v. Time Air Inc.*, [1994] S.J. No. 684 (Q.B.), aff'd. [1995] S.J. No. 273 (C.A.) The issue was also discussed and left open in *Levy-Russell Ltd. v. Shieldings Inc.* (1998), 41 O.R. (3d) 54 (Gen. Div.) at 60-61.

and expectations of the corporation's landlord, it may be possible for the landlord to use the oppression remedy to obtain a personal judgment against the directors/officers/shareholders (and/or other corporate entities they control) for rent arrears owing prior to the oppressive conduct, and possibly also for future rent and/or unliquidated damages flowing from a breach of lease.

Conclusion

The case law suggests that in appropriate circumstances landlords can make use of the tort of inducing breach of contract and the oppression remedy under the *OBCA* and similar corporation statutes, in order to recover personally against a director, officer and/or shareholder of a corporate tenant who abandons or otherwise defaults under its lease. Appropriate circumstances will include situations where the corporate tenant is a small closely held company, whose affairs are directed by one or a few directing minds, and those individuals have benefited personally from the conduct in question. However, courts will not be inclined to impose personal liability in the absence of a personal benefit gained by the director/officer/shareholder, particularly if s/he is seen to have been acting in a good faith attempt to minimize the corporate tenant's losses or maximize its revenues in difficult economic circumstances.

As the same circumstances which increase the likelihood of success in an inducing breach of contract claim, also tend to support a creditor's oppression application, it will usually be appropriate for a landlord to advance both claims in an effort to impose personal liability on a director, officer or shareholder of the corporation. Such claims should be pleaded with care and attention to their requisite elements, so as to avoid missing the mark and being struck out or dismissed because of pleading deficiencies.