The Case of the Vanishing Tenant

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In the middle of the night, a commercial tenant removes all its goods and chattels of value and, without prior warning, ceases operating its business from its leased premises prior to the end of the term of its lease.

In many cases the tenant's business has been failing and the principals of the tenant (a corporation) may be well aware that the tenant's "midnight run" is in breach of its lease. In considering the pros and cons of a surreptitious exit from the leased premises, the principals of the tenant may believe that the worst that can happen is that if a judgment is obtained against the corporate tenant, it will be unenforceable as the corporation will no longer have any assets from which the landlord will be able to seek recovery.

Conversely, in the face of this economic reality, the landlord may be resigned to suffering the loss without seeking legal recourse and may instead focus solely on finding a replacement tenant as soon as possible rather than incur costs to obtain a "paper judgment".

In considering their options, however, both landlords and tenants should be mindful of section 50 of the *Commercial Tenancies Act* (the "Act").

Pursuant to the Act, a landlord has the right to distrain (i.e. seize and sell) goods or chattels (i.e. equipment, machinery, displays, tenant's fixtures etc.) owned by a tenant in order to recover arrears of rent owing under a lease, *prior to the termination of the lease*.

However, where a tenant fraudulently or clandestinely removes goods and chattels from the leased premises, thus preventing the landlord from exercising its right of distraint, s. 50 of the Act allows the landlord to seek damages *for double the value* of all goods and chattels removed.

The real key to this provision however is from whom this remedy may be sought. It is not limited to the tenant, which is often a shell corporation with limited or no assets, but rather to "any person" who "willfully and knowingly aids or assists the tenant" in the removal.

In other words, this section enables a landlord to pursue a claim as against the *principals* of the tenant (or any others who assisted in the surreptitious removal of goods and chattels from leased premises) for double the value of all such goods and chattels removed.

For example, in *1268227 Ontario Ltd. (c.o.b. Seamus O'Brien's) v. 1178605 Ontario Inc.*, the Court of Appeal upheld a trial decision in which the principals of a numbered corporation/tenant (which itself no longer had assets) were found to have conducted themselves with the intent to defeat the rights of the landlord to the rent then in arrears in breach of s. 50 of the Act. The Court of Appeal upheld the trial judge's award of double the value of the goods and chattels the landlord was able to prove had been removed from the leased premises against the principals of the company *personally*.

Of note, in *1268227 Ontario Ltd.* there was in fact little direct evidence linking the principals of the tenant to the actual removal of goods, but the trial judge found that there was *circumstantial evidence* pointing to their responsibility for the removal and to their intent to defeat the landlord's entitlement to rent. Based upon these factual findings, the Court of Appeal saw no basis upon which to interfere with those conclusions.

From the perspective of a landlord, a claim under s. 50 of the Act may result in at least some viable financial recovery arising from a tenancy gone bad, even if the tenant's assets are long gone.

Landlords may wish to consider photographing all its tenants' businesses at regular intervals during the course of their tenancies to create a documentary record of what the premises looked like when in full operation. Should one of its tenants later attempt to abandon the leased premises and remove goods and chattels, such evidence will assist in proving what was removed and its value.

Conversely, the principals of a corporate tenant should be aware that if the goods and chattels removed from the leased premises do in fact have some value, they may find themselves exposed to personal liability for actions they (erroneously) believe can only result in a "paper judgment" as against their shell corporation. Even if the value of the goods and chattels is relatively modest, the principals of a tenant should be mindful that they may still find themselves embroiled in litigation which could adversely impact upon their credit rating.

Given this, tenants will want to carefully weigh the risk/reward of such conduct and may wish to instead pursue negotiations with the landlord for the early surrender of their tenancy, which agreement (while likely being more costly) would ensure that the principals of the tenant will not face any personal exposure to liability, rather than risk the potential consequences of a "midnight run".

Where a tenant is considering ceasing operations prior to the end of its lease term, in addition to s. 50 of the Act, there are many other strategic considerations and options that could impact upon both landlords and tenants. It would be advisable for both parties to seek legal advice in considering an appropriate course of action in these circumstances.