

Court Permits Trustee to Access Bankrupt's Premises and Assign a Lease Over Landlord's Objection That the Premises Were Previously Surrendered by Receiver

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On June 18, 2020, the Ontario Superior Court of Justice (the “**Court**”) released an endorsement in *Cerberus Business Financial, LLC v. B & W Heat Treating Canada, ULC*,¹ holding that the *Commercial Tenancies Act* (the “**CTA**”)² grants a trustee in bankruptcy the right to assign a lease to premises that a receiver previously surrendered to the landlord (the “**Landlord**”), and to access those premises for the purpose of showing the premises to potential assignees of the lease.

Originally, A. Farber & Partners Inc. (“**Farber**”) was appointed as receiver (the “**Receiver**” or “**Farber as Receiver**”) of the respondent, B & W Heat Treating Canada, ULC (“**B&W**”). The Receivership Order authorized the Receiver to file an assignment in bankruptcy on behalf of B&W. The Receiver subsequently filed that assignment in bankruptcy and appointed Farber as the trustee (the “**Trustee**” or “**Farber as Trustee**”). After its appointment as Trustee, Farber as Receiver wrote to the Landlord of B&W's premises, advising that the Receiver would no longer occupy the premises or pay rent, and later delivered the keys to the premises to the Landlord. On the same day, Farber as Trustee wrote to the Landlord advising of the First Meeting of Creditors.

At the First Meeting of Creditors, the Trustee was instructed not to occupy the premises and that, at the Trustee's discretion, it was to retain or disclaim the lease within 90 days of the assignment in bankruptcy. Subsequently, the Trustee sought to assign the lease to a new tenant and requested access to the premises for showings. The Landlord refused to grant access to the premises, asserting that Farber had surrendered possession of the premises when it turned over the keys and that, as Farber acted both as Receiver and Trustee, the Trustee had knowledge of, and tacitly acquiesced to, the Receiver's surrender of possession to the Landlord.

Subsection 38(2) of the CTA sets out a three-month period within which a trustee must elect to disclaim, retain or assign a lease. The Trustee brought a motion seeking an extension of the time period in subsection 38(2) of the CTA and access to the premises to conduct tours for potential assignees of the lease during that period. Alternatively, the Trustee sought a declaration that the three-month period during which the Trustee must make an election is suspended for the duration of the emergency by virtue of the provisions of Ontario Regulation 73/20, ordered under subsection 7.1(2) of the *Emergency Management and Civil Protection Act* (the “**Suspension Order**”),³ which was passed by the Ontario legislature in response to the COVID-19 pandemic.

The Court granted the Trustee's motion, holding as follows:

- **The Trustee had the right to access the premises** - Farber as Receiver and Farber as Trustee provided two distinct letters to the Landlord, clearly distinguishing the Trustee's role from the Receiver's role. Given the specific rights to assign the lease afforded to the Trustee pursuant to subsection 38(2) of the CTA, which are not afforded to a Receiver, Farber as Receiver could not prejudice the rights of Farber as Trustee under the CTA.
- **It was reasonable for the Court to grant the extension in light of the Suspension Order** - While the Court did not agree that the time period in subsection 38(2) of the CTA constitutes a “limitation period” pursuant to section 1 of the Suspension Order, the Court held that section 2 of the Suspension Order, which suspends “any period of time within which any step must be taken in any proceeding in Ontario”,

provided the Court with jurisdiction to extend the time period in subsection 38(2), and that it would be reasonable in the circumstances for the Court to exercise its discretion and provide the Trustee with the 90-day extension sought so that the Trustee could attempt to market the lease for a further 90 days.

The Court declined to grant the alternative relief sought by the Trustee, which was to declare that the three-month period during which the Trustee must make an election under subsection 38(2) of the CTA is suspended for the duration of the emergency. The Court reasoned that it would be unfair to the Landlord to do so, as it would leave the Landlord in an unduly vulnerable position for an unknown, extended period of time.

The Court also rejected the Trustee's argument that the Court, independent of the Suspension Order, had the inherent jurisdiction to extend the three-month time period in subsection 38(2) of the CTA. The Court held that its inherent jurisdiction could not be used to contradict a statute.

¹*Cerberus Business Financial, LLC v. B & W Heat Treating Canada, ULC*, 2020 ONSC 3781.

²*Commercial Tenancies Act*, R.S.O. 1990, c. L.7.

³*Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9.

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