some weight on the fact that the landlord knew for some time that the tenant could not relocate by December 31, 2011.

Significance

Tenants do not have a unilateral right to overhold despite contractual language that may suggest to the contrary. An overholding provision merely provides the terms of an overholding tenancy, rather than establishing a right to an extension.

The result of this application may be harsh, especially in circumstances in which the tenant has no control over the situation requiring the extension and where the tenant's business may be seriously prejudiced if the tenant is not permitted to overhold.

Tenants should make firm arrangements with their landlords as early as possible before the end of the term of their lease if there is a risk that they may need to remain in the premises beyond the term of the lease. Conversely, if landlords expect to receive vacant possession at the end of the term, they must not lend tacit approval to overholding tenants by accepting further rent after the expiration of the lease.

REFERENCES: *AIM Health Group Inc. v. 40 Finchgate Limited Partnership,* 2012 ONCA 795, 2012 CarswellOnt 14463 (Ont. C.A.); *Re Imperial Oil Ltd. & Robertson,* [1959] OR 655, 1959 CarswellOnt 156 (Ont. C.A.); and *Rafael v. Crystal,* [1966] 2 OR 733, 58 DLR (2d) 325, 1966 CarswellOnt 135 (Ont. H.C.).

DIRECTORS' AND OFFICERS' LIABILITY

Advancement of directors' legal fees denied

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Directors and officers should be aware of the circumstances in which they may be denied advancement of legal fees when sued by the corporation.

In *Cytrynbaum et al. v. Look Communications Inc. et al. ("Look Communications")*, the court held that in appropriate circumstances, s. 124 of the *Canada Business Corporations Act* (the "CBCA") permits a company to refuse to advance legal fees to former directors where the company has sued those former directors.

The court found this to be the case even where the interim advancement of legal fees is required by the corporation's by-laws and /or pursuant to an indemnification agreement between the corporation and the former directors.

To successfully resist the payment of interim advancement of a former director's legal fees, the court held that the corporation must establish that a strong *prima facie* case exists that the former director acted in bad faith. However, the decision in this case has been appealed to the Court of Appeal for Ontario so the decision may not be the last word on the matter.

Facts

Look Communications Inc. ("Look") was listed on the TSXV and distributed wireless, internet and cable services to subscribers under a spectrum license. In 2009, Look's business was in decline and its board of directors determined that Look would seek to sell its assets under the supervision of a court-appointed monitor pursuant to a plan of arrangement.

Look received an $80 million offer for its spectrum and license agreement. The board approved the offer and set aside $11 million from the proceeds of the transaction for a severance and bonus pool for the benefit of Look's employees, consultants and management (which included members of the board).

Authorized payments

At the time of the transaction, Look's share price was in the range of $0.20. The board also authorized payments for the cancellation of the equity held by the directors at above market rates of $0.40.

These payments generated shareholder criticism, causing Look's directors to retain three law firms. Look paid the law firm's retainers which totalled $1.5 million.

Lawsuit

Following a successful proxy contest and the replacement of the incumbent members of Look's board of directors with new members of the board, Look sued the former directors for the alleged self-dealing related to the bonus and share cancellation payments.

The directors brought an application for a declaration that Look was required to advance their legal fees under s. 124 of the CBCA and pursuant to their indemnity agreements with the company.

Bad faith

Subsections 124(3) and (4) of the CBCA provide that a corporation may indemnify directors for any legal proceeding in which the individual is involved because of their association with the corporation, if the individual director acted honestly and in good faith with a view to the best interests of the corporation.

In *Look Communications*, the court noted that pursuant to the decision of the Supreme Court of Canada in *Blair v. Consolidated Enfield Corp.*, all persons are presumed to have acted in good faith unless proven otherwise.

The court nonetheless held that a corporation may refuse to advance monies under subs. 124(4) if the court is satisfied that the corporation has established

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a strong *prima facie* case that the former director acted in bad faith.

Definition

The court described bad faith as including

> fraud or misappropriation against a corporation…[;]conduct coloured by opportunistic or self-seeking behaviour which exhibits a type of dishonesty that should not be countenanced by an award of indemnity…[; and] conduct that is so inexplicable that it leads to the inference of an absence of good faith.

The court reached this conclusion notwithstanding the terms of the former directors' indemnification agreements with the company which obligated the company to advance the funds. The court reasoned that companies and their directors cannot contract out of the court's supervisory role in respect of the advancement of legal expenses.

Best interests

The court ultimately concluded that the former directors and certain former officers were not entitled to the advancement of their legal fees because the corporation had a strong *prima facie* case that those directors had acted in bad faith.

In particular, the court found that the cancellation of equity payments was not in the best interests of the corporation as the payments were based on share values significantly above the market value of Look's shares and were made contrary to the terms of the company's compensation agreements.

The court further concluded that the directors' decision to ignore legal advice recommending against the payment by the corporation of legal retainers to law firms retained by the directors for the purpose of defending claims against the directors also established a strong *prima facie* case of bad faith.

The court emphasized, however, that its findings were not binding on the trial judge, who would be left to make the final determination as to whether the directors were entitled to full indemnification.

Significance

The decision in *Look Communications* is currently under appeal which is unsurprising given that it is one of the few decisions wherein a court has refused to approve the interim advancement of legal fees to former directors in the face of indemnity agreements with the corporation.

However, as it presently stands, the decision confirms the courts' supervisory role in circumstances where advances by the corporation to former directors who are being sued by the corporation are challenged.

This decision also provides companies with a benchmark for determining the circumstances in which a director will not be entitled to the advancement of legal fees despite the presence of an indemnification agreement between the director and the corporation.

Irrespective of the outcome of the appeal, the Court of Appeal's decision will likely provide further guidance on this important issue for companies and their directors and officers.

REFERENCES: *Cytrynbaum et al. v. Look Communications et al.*, 2012 ONSC 4578, 2012 CarswellOnt 12008 (Ont. S.C.J. [Commercial List]); *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, 1995 CarswellOnt 1393, 1995 CarswellOnt 1179 (S.C.C.) and *Canada Business Corporations Act*, RSC 1985, c. C-44.

BRIEFLY SPEAKING

COMPETITION: The **Canadian Competition Bureau** has obtained **record-setting fines** against **Furukawa Electric Co., Ltd** and **Yazaki Corporation** — two Japanese auto parts suppliers. Both companies had pleaded guilty in **Superior Court** (under a **plea agreement**) to **bid-rigging charges** under **s. 47** of the ***Competition Act*** in relation to the **supply** of certain **electrical components** and related products.

Both **penalties** were obtained under the Bureau's **leniency program** — the companies were the first two **applicants** under the program — and both defendants had **attorned** to **Canadian jurisdiction** for purposes of their respective pleas. Note, however, that there were **no assertions** in either case that any of the **activities** related to the **bid-rigging offences** occurred ***in* Canada**. Section 47 of the Act does **not** contain any **language** asserting that the bid-rigging offence can be committed in a place **outside Canada**, or that persons may commit the offence regardless of whether they are in Canada.

ENVIRONMENT: In its **May 10, 2013** decision in ***Kawartha Lakes (City) v. Ontario (Environment)***, the **Ontario Court of Appeal** unanimously **dismissed** the City's **appeal** of the Divisional Court's decision. The **Environmental Review Tribunal** and the **Divisional Court** had each **upheld** an **Ontario Ministry of the Environment order** issued under **s. 157.1** of the ***Environmental Protection Act***.

That **order** required the **City** to **clean up pollution** that was migrating onto the City's property from adjacent residential property. **Fuel oil** had been **spilled** on the residential property and the residential owners had run out of money while in the course of **remediating** their property. The pollution had also **migrated** into Sturgeon Lake from the City's property.

The Appeal Court noted that the City's lack of **fault** for the pollution was **irrelevant**: the Tribunal had found that the protection of the environment (the primary **objective** of the **Act**) took **precedence** over the **polluter-pays principle**, and the **order** under the Act was a **no-fault order**. 2013 ONCA 310, 2013 CarswellOnt 5503 (Ont. C.A.)

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