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**** HIGHLIGHTS ****

* The British Columbia Court of Appeal has summarized the law of British Columbia regarding fixtures in a case concerning blueberry bushes which had been planted by former tenants, and which had been allegedly converted by a landlord contrary to the provisions of a lease which had been surrendered. The Court concluded the subjective intentions of the parties as expressed in the lease was not relevant. In determining whether property is a fixture, the intention of the parties must be considered objectively. The blueberry bushes were clearly affixed with the land with the objective intent that the plants could yield marketable crops. Notwithstanding the terms of the Lease, they were fixtures. The former tenants did not have a claim for breach of the lease as their lease had been surrendered and their rights had been transferred to a new tenant who entered into the new lease with the landlord. Only the new tenant could sue for damages. (Scott (c.o.b. Oldfield Orchard) v. Filipovic, CALN/2015-022, [2015] B.C.J. No. 2074, British Columbia Court of Appeal)

* A Justice of the British Columbia Court of Appeal dismissed an application for the stay of proceedings to pay a judgment for party and party legal costs on the grounds that the Farm Debt Mediation Act had not been complied with. The Justice did so on the grounds that the applicant had not pled or argued the applicability of the Act before the Court below; that the applicant had not established he was an insolvent farmer within the meaning of the Act; and that the applicant had made no attempt to initiate the process contemplated under the Act through an application to an administrator for mediation. The Justice observed that the Act could only be engaged where the creditor was a secured creditor, but did not dismiss the application on this ground because it was not fully argued before her. [Editor's note: This decision is the latest of a number of recent British Columbia decisions which have not declared void proceedings which have not complied with the Act, if farmers do not promptly raise arguments concerning non-compliance, and do not promptly take proceedings to seek mediation. It is unlikely that the Act would have applied in this case, in any event, as a claim for taxable costs is not a claim made by a secured creditor.]. (Denman Island Local Trust

Committee v. Ellis, CALN/2015-023, [2015] B.C.J. No. 2054, British Columbia Court of Appeal)

**** NEW CASE LAW ****

Scott (c.o.b. Oldfield Orchard) v. Filipovic; CALN/2015-022, Full text: [2015] B.C.J. No. 2074; 2015 BCCA 409, British Columbia Court of Appeal, E.C. Chiasson, H. Groberman and S. Stromberg-Stein JJ.A., September 29, 2015.

Fixtures -- Agricultural Fixtures -- Orchards and Trees -- Blueberry Plants.

Derek Scott and Deborah Scott, doing business as Oldfield Orchard (the "Scotts") sued Momcilo Filipovic ("Filipovic") for breach of lease and for damages as a result of Filipovic's alleged conversion of blueberry bushes which had been planted by the Scotts on Filipovic's land.

On June 1, 2007, Filipovic leased his land to the Scotts for the purpose of blueberry farming.

The lease expressly provided that at the end of the lease term, the land was to be cleared from all crop remains and planted back into timothy grass.

The lease provided that the Scotts may not "transfer this lease nor sublease the farm nor any portion thereof".

The Scotts planted blueberry bushes on the land. They farmed the leased property until July, 2010 when they sold their business to Mr. Guité ("Guité"). The sale included a purported assignment of the 2007 lease.

Filipovic and Guité entered into a new lease for the property dated July 27, 2010. Its terms were identical to those of the 2007 lease.

Guité operated the farm until 2012. He then entered into an agreement to sell the business to the Scotts, including Guité's interest as tenant in the lease. Guité and the Scotts entered into an assignment of lease "to the extent only of [Guité's] power and authority to make such assignment."

The Scotts spent the winter of 2012 in Arizona and planned to farm blueberries on their return. While in Arizona they learned that Filipovic had taken the position that the lease had been abandoned and that he was taking over the property.

Filipovic refused to allow the Scotts to remove the blueberry plants. The Scotts sued for damages for breach of the 2007 lease and the conversion.

The trial Judge ruled that the 2007 lease had been surrendered and dismissed and dismissed the Scotts' claim for damages based on a breach of the lease. However the trial Judge also held that the blueberry bushes were chattels, not fixtures and awarded the

Scotts $90,000.00 in damages for conversion (Scott v. Filipovic, 2014 BCSC 939 (CanLII)). Filipovic appealed this decision in the British Columbia Court of Appeal.

Decision: Chiasson, J.A. (Groberman and Stromberg-Stein, J.J.A. concurring) allowed Filipovic's appeal and set aside the judgment for damages [at para. 33 and 34].

Chiasson, J.A. agreed with the trial Judge's conclusion that the 2007 lease established the intention of the parties to the lease that they Scotts were entitled to reclaim the blueberry plants on termination of the lease, but did not agree that this statement of intention made the blueberry plants chattels, not fixtures [at para. 17].

Chiasson, J.A. observed that the trial Judge had based her decision on the subjective intention of the parties as set out in clause 8 of the lease, but that the subjective intention of the parties was not relevant, because the intention of the parties for determining whether or not an object is a fixture is to be determined objectively. Chiasson, J.A. set out the law regarding whether or not property is a fixture as follows, at para. 18 to 21:

> [18] The trial judge based her conclusion that the blueberry plants were chattels primarily on clause 8 of the lease and the subjective intention of the parties. Insofar as the intention of parties to a contract is relevant, it is considered objectively. This is clear from the decisions of this Court in La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd. (1969), 4 D.L.R. (3d) 549 (B.C.C.A.), and Zellstoff Celgar Ltd. v. British Columbia, 2014 BCCA 279 (CanLII), in which this Court adopted the five principles for determining whether property is a fixture or chattel stated in Stack v. T. Eaton Co. (1902), 4 O.L.R. 335 (Div. Ct.):
>
> (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
>
> (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
>
> (3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
>
> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.
>
> (5) That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however,

> to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

[19] In Bruce Ziff, Principles of Property Law, 6th ed. (Toronto: Carswell, 2014) at 118, the author observes that "[t]he determination of whether a chattel has been transformed into a fixture is a matter of intention, objectively determined". The intention is ascertained by examining the degree and object or purpose of annexation. At p. 120, he states that "[w]hether or not a chattel becomes a fixture cannot be conclusively controlled by contract," and continues:

The objective test of intention found in the law of fixtures is mainly aimed at protecting third parties who may be dealing with the land at some future point. In theory, by relying on external factors, third parties, who may be unaware of some existing contractual arrangements, can, in theory, know whether a given item is a chattel or fixture.

[Emphasis in original]

[20] As explained in Anne Waraner La Forest, Anger & Honsberger: Law of Real Property, 3d ed. (Toronto: Canada Law Book, 2006) (loose-leaf updated December 2014, release 13) vol. 2 at para.20:20, whether an object is a chattel or a fixture is determined by operation of law:

> A chattel becomes a fixture by implication of law. Thus, whether or not an object has become a fixture is determined by the application of established rules to the facts of the case rather than by agreement or conveyance. Parties may determine by contract their rights as between themselves, but this does not affect the rights of third parties.

Chiasson, J.A. held that the decision of Long v. Van Burgsteden, 2014 SKCA 115 (CanLII), in which the issue was whether trees which had been placed in wire baskets to facilitate their removal retained their status as chattels, did not assist the Scotts, stating [at para. 22]:

> [22] .Objectively, the trees were stored on the land for resale. In the present case, the blueberry plants were planted to grow berries. They developed root systems, grew and matured to facilitate the commercial production of blueberries.

Chiasson, J.A. concluded [at para. 26 and 27]:

> [26] Removal of the plants at the end of the lease may return them to their status as chattels. It does not mean that they were not fixtures prior to that

> time. In my view, the plants clearly were affixed to the land. The purpose or object of the annexation was to grow the plants so they could yield marketable crops of blueberries.
>
> [27] I agree with the appellant that the fact the plants were to be removed at the end of the lease does not inform their characterization as fixtures or chattels during the term of the lease.

With respect to whether there had been a breach of the lease, Chiasson, J.A. observed that if Filipovic had converted any property by preventing the removal of the blueberry plants, it was the property of Guité not the Scotts [at para. 32] and that the result in the case was unfortunate, but that the remedy was not an action by the Scotts for conversion.

Denman Island Local Trust Committee v. Ellis; CALN/2015-023, Full text: [2015] B.C.J. No. 2054; 2015 BCCA 401, British Columbia Court of Appeal, N.J. Garson J.A. (In Chambers), September 25, 2015.

Farm Debt Mediation Act -- Failure of Farmer to Promptly Raise Non-Compliance -- Failure of Farmer to Apply for Mediation.

Self-represented appellants, Francis Dean Ellis, Daniel John Stoneman and Debra Monica Stoneman (collectively "Ellis") applied to the Court of Appeal for British Columbia for a stay of the execution of an Order for Sale granted to the Denman Island Local Trust Committee (the "Trust") on a number of grounds, including the ground that the proceedings were statutorily stayed by virtue of the Farm Debt Mediation Act, S.C. 1997, c. 21 (the "FDMA"). The Order for Sale arose from proceedings to enforce a debt for legal costs of $85,000.00 awarded to the Trust against Ellis in a dispute concerning Ellis' unauthorized cutting of trees on his property on Denman Island.

Ellis argued that the proceedings must be statutorily stayed pursuant to the provisions of the FDMA and that the Trust must first submit to the mediation provisions under the FDMA before obtaining an Order for Sale.

Decision: Garson, J.A. rejected Ellis' arguments under the FDMA for three reasons:

1. He had not pled or argued the applicability of the Act in the Court below.
2. He had not established he was an insolvent farmer within the meaning of the Act.
3. He had made no attempt to initiate the process contemplated under the Act through an application to an administrator.

In this regard, Garson, J.A. stated, at para. 16 to 19:

> [16] There are several reasons why I would not accede to Mr. Ellis's

argument that the enforcement proceedings should be stayed in order to permit him to seek relief under the Farm Debt Mediation Act.

[17] First, Mr. Ellis neither pled nor argued the applicability of that Act in the court below.

[18] Second, the Act is engaged where the creditor is a secured creditor. It was submitted that DILTC is not a "secured creditor" for the purposes of the federal Bankruptcy Act. DILTC argues that the Farm Debt Mediation Act applies only to "secured creditors" as defined in the Bankruptcy Act, executing upon their rights in the property itself: T.L. Cleary Drilling Co v. Beaver Trucking Ltd., 1959 CANLII 58 (SCC), [1959] S.C.R. 311; Re Mackay, 2003 BCSC 413 (CanLII); Arran Savings and Credit Union Ltd. v. Melnyk, 1987 CanLII 4468 (SK QB), [1987] S.J. No. 565, 42 D.L.R. (4d) 370 (Q.B.); Canadian Imperial Bank of Commerce v. Verbugghe, [2006] O.J. No. 2306 (S.C.J.), aff'd 2007 ONCA 98 (CanLII); Rai v. Can-Pacific Farms and Packers Ltd., 2013 BCSC 545 (CanLII) at paras. 22-23. Because this issues was not canvassed fully before me, I prefer to rest my judgment on other grounds.

[19] As a third reason, it can be said that Mr. Ellis has not established that he is insolvent or a farmer within the meaning of the Farm Debt Mediation Act: see ss. 2, 5, 6. In addition to having not established that he is an insolvent farmer within the meaning of the Act, Mr. Ellis has made no attempt to initiate the process contemplated under the Act through an application to an administrator.

** CREDITS **

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