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AVOIDING LOSSES: A LANDLORDS DUTY TO MITIGATE

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INTRODUCTION

In 2001, Canada was faced with a failing economy and recession was knocking at its doors. Lower interest rates and tax reductions helped to stimulate spending but the lasting impact of the tragic events of September 11 remain to be seen.

Commercial real estate reports have described the past year as an active one comprised of consolidation and bankruptcy but also continued growth for the dominant retailers.¹ Conservative predictions have been made for 2002, forecasting continued growth in certain retail categories but sluggish retail conditions generally until the economy strengthens.²

The uncertain market conditions inevitably leave landlords of commercial premises increasingly vulnerable to defaulting tenants and abandoned premises. This paper will provide an overview of the current law as it relates to a landlord's obligation to mitigate losses in cases of commercial landlord-tenant relationships where the parties executed a lease and the tenant went into possession but subsequently abandoned the leased premises. The principle of mitigation and the Courts' approach to commercial leases will be reviewed first. Next, the paper will discuss the circumstances in which an obligation to mitigate has been imposed. Finally we will review what the Courts have held constitute reasonable efforts to mitigate loss.

DUTY OF MITIGATION: A PRINCIPLE IN CONTRACT LAW

The duty of mitigation is an established principle in contract law and arises in the context of assessment of damages for breach of contract. The general rule for the assessment of such damages was reviewed by the Supreme Court of Canada in *Keneric Tractor Sales Ltd. v. Langille et al.* In that decision Madame Justice Wilson for the Court stated:

The general rules for the assessment of damages for breach of contract is that the award should put the plaintiff in the position he would have been in had the defendant fully performed his contractual obligations. This principle is qualified by the doctrine of remoteness. As Baron Anderson stated in *Hadley v. Baxendale*:

¹ Colliers International, *Canadian Real Estate Review* (2001/2002) at p.11, online: <<http://www.colliers.com/pdf/canadianREreview.pdf>> (date accessed: 12 February 2002).

² *The Barnicke Report: Global Views* (2002), at p. 10, online: <[http://www.jjb.com/client/jjb/JJB_UW_MainEngine.nsf/object/Global+Views+2002+Part+1/\\$file/Global+Views+2002+doc.pdf](http://www.jjb.com/client/jjb/JJB_UW_MainEngine.nsf/object/Global+Views+2002+Part+1/$file/Global+Views+2002+doc.pdf)> (date accessed: 12 February 2002).

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The general rule is, of course, further qualified by the injured party's duty to mitigate its damages.³

This duty to mitigate was explained by the Supreme Court of Canada in *Red Deer College v. Michaels et al.* as follows:

The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.

In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.⁴

This common law duty to mitigate when a breach of contract has occurred prevents plaintiffs from simply doing nothing and thereby accumulating losses. This may require a purchaser to buy goods to replace the defective ones provided by the defendant, or for the wrongfully dismissed employee to find alternative employment. Since the duty to mitigate has been said to apply to all kinds of contracts⁵, one would necessarily presume that such duty would apply to contracts where one is given the right to use the land of another in return for consideration and other obligations, otherwise known as leases. For instance, if a shopping centre tenant abandons the leased premises contrary to the terms of the lease agreement, the initial reaction is that the landlord would have to mitigate its losses by finding an alternative tenant. This however, is not necessarily the case. Under Canadian law, landlords are not required to mitigate their losses in all circumstances. This stems from the property law versus contract law paradigm that is incumbent to a lease contract.

³ (1987), 43 D.L.R. (4th) 171 at p. 181 (S.C.C.)

⁴ (1975) 57 D.L.R. (3d) 386 at p. 390 (S.C.C.).

⁵ See G.H.L. Fridman, *The Law of Contract* (Toronto: Carswell, 1993) at p. 777.

COMMERCIAL LEASES: PROPERTY LAW OR CONTRACT LAW

At common law, commercial leases were considered to be conveyances creating an estate in the land. The repudiation of the lease terminated the interest in the land and all the terms under the lease. This approach stemmed from the principles of property law. Where a tenant was in breach of the lease or repudiated it entirely, the landlord could take three mutually exclusive courses of action:

1. The landlord could refuse to accept the repudiation and do nothing to alter the relationship of landlord and tenant. The landlord would then insist on performance of the terms under the lease and sue for rent or damages on the basis that the lease remained in force.
2. The landlord could terminate the lease and take possession of the leased premises. The landlord would then be able to sue only for rent due or for damages for breaches of covenant committed before the date of termination.
3. The landlord could refuse to accept the repudiation or abandonment but advise that it would re-enter the premises and re-let the property “on the tenant’s behalf” and hold the tenant liable for any deficiency in rental for the balance of the lease term.⁶

These original principles of property law were reflected in the case of *Goldhar v. Universal Sections & Mouldings Ltd.*⁷ In *Goldhar* the landlord leased the premises to the tenant for an eight and a half year term but the tenant vacated the premises after four years. The landlord, in what one would consider was a reasonable action to mitigate her losses, permitted a licensee to occupy the premises for the remainder of the term at a reduced rental rate and notified the tenant that she was claiming the shortfall from the tenant.

The Court held that although the lease contained contractual provisions, the lease agreement operated to convey a possessory title.⁸ Therefore, the Court determined that in order for the landlord to preserve her rights, she had to keep the lease alive and maintain the premises vacant until the expiry of the lease and then sue for rent or keep the lease alive and notify the tenant that she intended to re-let the premises on its account. As a result of her failure to follow either of these courses of action, the Court concluded that the landlord was not entitled to any award for future losses of rent.⁹

The *Goldhar* case was subsequently overruled by the Supreme Court of Canada in *Highway Properties v. Kelly, Douglas & Co.* In *Highway Properties* the tenant leased premises in an eleven-store

⁶ *Highway Properties Ltd. v. Kelly, Douglas and Co.*, [1971] S.C.R. 562 at p. 570 [hereinafter *Highway Properties*].

⁷ [1962] O.R. 774; reversed [1963] 1 O.R. 189 (C.A.) [hereinafter *Goldhar*].

⁸ *Ibid.*, at p. 192.

⁹ *Ibid.*, at p. 201.

shopping centre to be used for a grocery store and supermarket for a term of fifteen years. The shopping centre did not prosper and two years later the tenant closed its operations and vacated the premises. Three other tenants in the shopping centre subsequently moved out. The landlord took possession of the premises with notice to the defaulting tenant that it would be liable for damages suffered as a result of the wrongful repudiation. The landlord subsequently attempted, unsuccessfully to re-let the premises for the unexpired term of the lease. The landlord claimed damages for the loss suffered up to the date of the repudiation and for future losses resulting from the tenant's failure to pay rent for the full term of the lease.

The trial judge and the Court of Appeal applied the principles in *Goldhar* and held that there had been a surrender of the lease by reasons of the repudiation of the lease contract by the teneant and the taking of possession by the landlord. The lower Courts held that landlord could only sue for breaches occurring to the date of the surrender. The Supreme Court Canada however, reversed these decisions, holding that:

It is no longer sensible to pretend that a commercial lease, such as the one before this court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land ...¹⁰

The Court did not agree that the landlord had limited the damages it was able to claim by electing to terminate the lease and remitted the case to the trial judge for an assessment of damages.

The extent of the Court's decision remains somewhat unclear. Subsequent cases and commentaries have suggested that *Highway Properties* approved an alternative fourth course of action available to the landlord (in addition to the three noted above), as argued by the landlord's counsel, namely:

The landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term.¹¹

One commentator has suggested that this fourth course of action was really a variant of the second course, the only difference being evidence of the parties' mutual intent to recognize a right of action for prospective loss upon the tenant's repudiation of the lease.¹² Meanwhile, the

¹⁰ *Highway Properties*, *supra* note 6 at p. 576.

¹¹ *Ibid.*, at (p.5); see B. T. Bernstein, *The Deal Goes Sour: Remedies for Lease Defaults* (Commercial and Retail Leases, Four Seasons Hotel, Yorkville, 22 February 1985) at pp. 55-56; *E. Parker Enterprises Ltd. v. Dud Hut Ltd.*, (1979) 8 R.P.R. 322 at p. 332 (N.S.S.C.); *North Bay T.V. & Audio Ltd. v. Nova Electronics Ltd. et al.*, (1983) 44 O.R. (2d) 342 at p. 345 (H.C.), affirmed (1984), 47 O.R. (2d) 584 (C.A.); *89804 Canada Ltd. v. Schroeder (c.o.b. Shapes Body and Tanning Salon)*, (2001) 43 R.P.R. (3d) 136 at p. 145 (Sask.Q.B.).

¹² Bernstein, *supra* note 11 at p. 55.

Court in *Globe Convestra Ltd. v. Vucetic*¹³ considered the argument that *Highway Properties* had effectively rejected the property law approach and the three alternatives developed at common law to be replaced with the principles of contract law.¹⁴

Canadian Courts have not yet clarified whether *Highway Properties* stands for the proposition that commercial leases have a dual nature as a conveyance and a contract, or alternatively that the principles of contract law have effectively replaced the traditional principles of property law when it comes to mitigation. As a result, a landlord's obligation to mitigate has been assumed to apply in circumstances where the landlord relies on contract law remedies and less so when recourse is made to in property law remedies.

DUTY TO MITIGATE LOSSES

Under the principles of property law, the only recourse to the innocent landlord was to sue for rent in arrears. If the landlord's intention was to seek prospective damages following the tenant's abandonment of the premises, it was obliged to act in a manner consistent with the preservation of the lease. The principle of mitigation was never an issue. However, the decision in *Highway Properties* and the application of contractual principles to commercial leases changed that. Does the duty to mitigate remain in the realm of contract law or does it extend to remedies arising under property law?

When a landlord terminates the lease and claims for damages under the law of contract, Courts have generally assumed an obligation on the landlord to mitigate its damages by finding a new tenant and offsetting the amount owing by the tenant by the amount it receives from the new tenant.¹⁵ In contrast, when a landlord relies upon the principles of property law, the Courts have generally held that there is no duty to mitigate, except where there was a re-letting on the tenant's account.¹⁶

In *607190 Ontario Inc. v. First Consolidated Holdings Corp.*¹⁷ the landlord and the tenant were parties to a commercial lease. When the tenant stopped making payments under the lease, the landlord did not terminate the lease nor take action by way of distress. The Court held that the landlord

¹³ (1991) 15 R.P.R. (2d) 220 (Ont.Gen.Div.) [hereinafter *Globe Convestra Ltd.*].

¹⁴ *Ibid.*, at p. 243.

¹⁵ See *Hay (c.o.b. Willow Plaza Developments) v. Ollerenshaw*, [1993] O.J. No. 1045 at para. 14 (Gen.Div.), online: QL (SCJ); *Barmond Builders Ltd. v. Mark 3 Investments Corp.*, (1993) 32 R.P.R. (2d) 149 (Ont.Gen.Div.); *Kosiadis v. First Pioneer Petroleums (Quinte) Ltd.*, [1993] O.J. No. 1583 (Gen.Div.), online: QL (O.J.); *Adanac Realty, Ltd. v. Humpty's Egg Place Ltd.*, (1991), 15 R.P.R. (2d) 77 at p. 86 (Alta.Q.B.) [hereinafter *Adanac Realty*]; H.M. Haber, Q.C., *Landlord's Rights and Remedies in a Commercial Lease: A Practical Guide* (Aurora: Canada Law Book Inc., 1996) at pp. 12, 83.

¹⁶ *Highway Properties*, *supra* note 6 at p. 572; *Royal Trust Corp. of Canada v. Grandma Lee's Properties Inc.*, [1998] O.J. No. 2558 (C.A.), online: QL (O.J.).

¹⁷ (1992) 26 R.P.R. (2d) 298 (Ont.Gen.Div.).

had exercised the first remedy available to him upon the tenant's repudiation of the lease as set out in *Highway Properties*.

He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force.¹⁸

As a result, there was no duty upon the landlord to mitigate. This position was taken in *Transco Mills Ltd. v. Percan Enterprises Ltd.*:¹⁹

There is no basis on which a landlord of commercial premises can be required to mitigate its loss where it maintains the lease in existence and claims for rent due.

In *Cadillac Fairview Corp. v. Parkway Village Fruit Market Ltd.*²⁰, the action involved a claim by the landlord against the tenant for arrears of rent and accelerated rent for space in a shopping centre. The tenant failed to pay three months of rent in arrears and the lease provided the landlord with a right to re-enter the premises, such re-entry constituting a termination of the lease agreement. The lease further provided that three months accelerated rent would be payable to the landlord upon re-entry. The Court cast doubt on whether the principle of mitigation was applicable in an action for rent which became due under the terms of the lease.²¹ The Court concluded that if mitigation was required by the landlord, it was only with respect to the accelerated rent claimed and in the circumstances the landlord had acted reasonably in its efforts to re-let the premises.²²

It is interesting to note that Courts have by-passed this stage of analysis in situations where it was found that mitigation had in fact taken place. For instance, the Court in *Toronto Housing Co. Ltd. et al. v. Postal Promotions* did not decide whether the landlord was under an obligation to mitigate because mitigation had taken place when the premises were re-let.²³ Similarly, *Parkway Village*²⁴ did not clarify whether the landlord had a duty to mitigate its losses because it found that the landlord had met its obligation.

Whatever confusion exists, it appears that we are not alone. This lack of consensus among the Courts is not unique to Canada. In a recent article, Celeste M. Hammond of the John Marshall

¹⁸ *Ibid.*, at p. 301.

¹⁹ (1993) 100 D.L.R. (4th) 359 at p. 370 (B.C.C.A.)

²⁰ [1983] O.J. No. 569 (H.C.), online: QL (O.J.) [hereinafter *Parkway Village*].

²¹ *Ibid.*, at para. 22.

²² *Ibid.*, at para. 15.

²³ (1982), 39 O.R. (2d) 627 (C.A.)

²⁴ *Parkway Village* *supra* note 20.

Law School in Chicago, Illinois reviewed recent case law in several jurisdictions to determine the extent of the shift from the property law to the contract law paradigm.²⁵

The author noted that New York's respect for property law principles was reflected in *Holy Properties Limited, L.P. v. Kenneth Cole Prods.*²⁶ The landlord brought a summary eviction proceeding, seeking rent arrears and damages after the tenant stopped paying rent and vacated the premises three years before the end of a ten-year lease. In response to the tenant's defense that the landlord had failed to mitigate damages, the Court of Appeals affirmed the long-standing rules based on property law and held that the landlord had no duty to mitigate.

In contrast, the Pennsylvania Supreme Court in *Stonehedge Square Limited Partnership v. Movie Merchants Inc.*²⁷ concluded that leases have a dual nature both as conveyances and contracts. However, the Court did not give guidance as to when contract rules applied. In this case the tenant was an assignee of a five-year shopping centre lease who abandoned the premises and stopped paying rent nine months prior to the end of the term. The Court simply held that a non-breaching landlord had no duty to mitigate damages even though the damages sought was unclear.

The Texas Supreme Court in *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*²⁸ provided the most guidance in this area. It held that a duty to mitigate arises when the landlord seeks a contract remedy. For instance, if the landlord re-entered the premises without terminating the lease, there is a duty to mitigate but if the landlord maintains the lease and sues for rent as it comes due, there is no duty. The Texas Supreme Court's guidance sounds remarkably similar to the common law options numbered one and three described above (at page 3) and discussed in *Highway Properties*.

REASONABLE EFFORTS TO MITIGATE LOSS

If the duty to mitigate has been established, the landlord is held to a standard of reasonableness. The onus falls on the defendant to establish those efforts were not reasonable:

With the benefit of hindsight, it might be possible to say that if the plaintiff had held out longer, it might have been able to find another tenant to take a longer term lease at a higher rate. However, the plaintiff is not to be held to a standard

²⁵ C.M. Hammond, "Landlord Remedies in Commercial Leasing – A surprising Lack of Uniformity", (Spring 2001) 21:1 Shopping Centre Legal Update (Spring 2001) 8.

²⁶ (1995) 87 N.Y. 2d 130 (N.Y.C.A) as discussed in Hammond, *supra* note 14 at p. 8.

²⁷ (1998), 552 Pa. 412, 715 A. 2d 1082 as discussed in Hammond, *supra* note 14 at p. 8.

²⁸ (1997), 40 Tex.Sup.J. 924 948 S.W. 2d 293 as discussed in Hammond, *supra* note 14 at pp. 8-9.

of perfection, only one of reasonableness, with the burden on the defendant to prove it has not been met.²⁹

What constitutes reasonable mitigation is a question of fact, taking into account factors such as efforts to list the property, advertise and contact potential tenants.³⁰ What follows are illustrations of what Courts have held to be reasonable or unreasonable efforts to mitigate.

In *Parkway Village*³¹, the landlord, upon the tenant's failure to pay rental arrears, re-entered the premises and eventually re-let them. The landlord claimed against the tenant for arrears of rent and accelerated rent. The tenant alleged that the landlord was under a duty to mitigate its damages. While the presiding judge expressed doubt as to whether the principle of mitigation was applicable in an action for rent owing, he went on to express the view that even if the landlord did have an obligation to mitigate its damages, the defendants had failed to prove the landlord's failure to do so.

The Court found that the landlord took immediate attempts to re-let the premises and acted reasonably by requesting financial statements of potential tenants. It was also reasonable for the landlord to reject an offer which included a non-competition clause. Furthermore, it was not unreasonable for the landlord to not retain a real estate agent due to the size and scope of the landlord's (Cadillac Fairview's) own resources in that regard.

In *5000 Kingsway Ltd. v. Baros Holdings Inc. (c.o.b. Physician's Weight Loss Clinic)*,³² Baros Holdings leased the premises to be used as a Physician's Weight Loss Clinic. In September 1990 the tenant defaulted on its rental payments and vacated the premises the following month. The parties agreed on the amount of rent arrears and interest payable up to and including October 1, 1992. However, the tenant alleged that the landlord failed to mitigate its damages by failing to diligently seek replacement tenants once there was a default in the lease. The Court found that the landlord engaged a real estate agent who took adequate steps to find another tenant. It was also reasonable for the landlord to narrow the market for the premises to the medical profession since other space on the floor was occupied by other physicians, making the premises more attractive to the medical community.

The tenant argued that the defendant failed to mitigate its losses by leasing other empty space in the building in preference to the premises in question. The Court found that the landlord had made the subject premises available to the new tenants and as a result, the landlord could not be faulted for the decisions of the new tenant. Also, it was argued that even though the landlord lowered the rental rate below the rate agreed in the lease, it was not low enough to attract a new

²⁹ *1039198 Ontario Inc. v. Ash Pharmacies Inc.*, [1998] O.J. No. 4397 at para. 109 (Gen.Div.), online: QL (O.J.); affirmed [2000] O.J. No. 2523 (C.A.), online: QL (O.J.).

³⁰ Haber, *supra* note 14 at p. 83.

³¹ *Parkway Village*, *supra* note 20.

³² [1993] B.C.J. No. 1196 (B.C.S.C.), online: QL (B.C.J.).

tenant. The Court held that this was a reasonable effort to mitigate and the duty did not require one to act in a commercially unsound fashion.³³

The Alberta Court of Queen's Bench in *Deer Valley Shopping Centre Ltd. v. Sniderman Radio Sales and Services Ltd.*³⁴ also found that it was not unreasonable to expect the landlord to accept a replacement tenancy at a monthly rate below the market rate. In this case, the leased premises were occupied by a franchisee of the defendant. The franchisee vacated the premises and the landlord re-let the premises a number of times. However, the premises remained vacant during a period of time which the defendant submitted should have been rented to Bon Marche at \$10.00 per square foot on a month-to-month basis. The Court accepted the Landlord's evidence that the market rate at the time was \$15.00 per square foot. There was also concern about the tenancy being on a monthly basis. On that issue, Justice McBain wrote:

I believe that it was quite unreasonable to expect the shopping centre to accept a month-to-month tenancy at \$10.00 per month. Surely it was better to leave the premises vacant for a further period of time, and continue to attempt to secure a tenant on a lease with a term of reasonable duration, which if obtained would, of course, lessen the liability of Sniderman [the defendant].³⁵

On the other hand, the Court in *Pacific Centre Ltd. v. Geoff Hobbs & Associates Ltd.*³⁶ found that it was reasonable to rent the premises at a decreased rate as there was no evidence that it was below market rental. The tenant was late with its rent payment and subsequently vacated the leased premises. The landlord, after notifying the tenant, re-entered the premises and re-let the office space at a decreased rent, resulting in a monthly shortfall of \$650.00. The Court held that the landlord took reasonable steps to mitigate its losses. The landlord re-let the premises and the liability was greatly reduced from what it would have been had the premises remained vacant. Requiring the landlord to obtain the consent of the tenant exceeded what was reasonable. Furthermore, the tenant did not convince the Court that the new lease was below market rental.

In *West Edmonton Mall Ltd. v. McDonald's Restaurants of Canada Ltd.*³⁷ the tenant leased space in the shopping mall for a term ending in September 2005. The tenant vacated the premises in January 1988. The tenant did not deny the breach but contended that the landlord failed to meet its duty to mitigate.

The Court of Appeal upheld the trial judge's conclusion that the landlord had taken all reasonable steps to mitigate its losses. The landlord made significant efforts to re-lease the premises but

³³ *Ibid.*, at para.7.

³⁴ [1989] A.J. No. 305 (Alta.Q.B.), online: QL (A.J.).

³⁵ *Ibid.*, at p. 16.

³⁶ [1988] B.C.J. No. 40. (B.C.Co.Ct.), online: QL (B.C.J.).

³⁷ (1995) 50 R.P.R. (2d) 1 (Alta.C.A.)

they were unsuccessful due to the unique shape of the premises and the depressed state of the rental market. The space was difficult to lease because it had an “L” shape with little frontage on the public part of the Mall. The tenant argued that the landlord should have reconfigured the space but the Court held that it would have been a risky decision at the time and that it was not reasonable on the particular facts as it may have impacted on the lease of another tenant.

In *Globe Convestra Ltd.*³⁸, a commercial landlord claimed for arrears of rent and repossession costs claiming that the defendant tenant had abandoned the premises. The landlord eventually sold the building and claimed for the shortfall in rent between the abandonment and sale. The tenant testified that he had gone to Germany to reconcile with his wife, following which he intended to resume his jewellery business.

The Court held that it was reasonable for the landlord to conclude that the tenant had abandoned his business and the landlord was entitled under the lease to re-enter and take possession of the leased premises. However, the landlord’s actions amounted to a termination of the tenancy and she was under a duty to mitigate her loss.

The Court found that the premises could have been sub-divided as the space was too large for rental to one tenant but this option was not considered because the landlord did not want to jeopardize her primary objective of selling the land. Furthermore, there was little evidence to suggest that genuine efforts were made to rent the property, such as advertising and following-up leads by the rental agent. The Court concluded that that the landlord was more interested in selling the property than re-renting it.³⁹ As a result, the plaintiff’s claim for prospective rent was only successful in part.

Similarly, in *Adanac Realty, Ltd.*⁴⁰, the landlord leased a restaurant and gas bar to the tenant for a term of five years. Two years later, the tenant stopped paying rent and informed the landlord that it would not continue with the lease. The landlord accepted the repudiation of the lease and demanded arrears of rent and future rents on the unexpired term of the five-year lease. The tenant paid the arrears in rent but refused to pay for the unexpired term. The landlord did not put the premises up for rent, and eventually sold it with no part of it ever being re-let.

The Court found that the lease document contemplated damages for future loss and held that the landlord was entitled to damages as the law of contracts would allow. However, it was unreasonable for the landlord to fail to rent the premises and as a result, the damages recoverable were adjusted to take into account the landlord’s failure to mitigate the losses.⁴¹

³⁸ *Globe Convestra Ltd.*, *supra* note 13.

³⁹ *Ibid.*, at p. 245.

⁴⁰ *Adanac Realty, Ltd.*, *supra* note 15.

⁴¹ *Ibid.*, at p. 92.

CONCLUSION

The application of contractual principles to commercial leases has given landlords a wider range of options when faced with abandoned premises. Recent case law has confirmed that there is no duty on a landlord to mitigate its losses when the landlord takes the position that the lease remains in full force and effect. However, it may be prudent for a landlord to attempt to re-let the premises as it is possible that the Courts will impose the contract law duty to mitigate on property law remedies. As the Court in *Globe Convestra* reasoned:

... it is difficult to accept, in this day and age, the continuing accuracy of a proposition that permits a landlord to sit back and do nothing to mitigate a loss occasioned by a forfeiting tenant.⁴²

Furthermore, when taking steps to mitigate its loss the landlord is held to a standard of reasonableness. What constitutes reasonable mitigation is a question of fact but it appears from the case law that the Courts have given landlords the benefit of the doubt where some attempts have been made to re-lease the premises, even if those attempts have proven unsuccessful.

⁴² *Globe Convestra*, *supra* note 13 at p. 242.