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## Director's Liability and the "Oppression Remedy" for Landlords

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Typically, using the vehicle of a corporation insulates directors from personal liability to the corporation's creditors for defaults, but that is not always true. A recent Ontario case highlights that risk for those who are the "directing minds" of the corporation.

In *Pitney Bowes v. Belmonte*, Pitney leased equipment to Company A in January 2007. Company A later defaulted on its lease payments. Pitney was awarded default judgement against Company A but Company A had no assets. Pitney then brought an application pursuant to s.248 of the Ontario Business Corporations Act for recovery against Mr. and Mrs. B. as directors of Company A and related companies. Section 248 of the Ontario Business Corporations Act offers protection to creditors (which can include landlords) from acts or omissions of a corporation that are "oppressive or unfairly prejudicial to or unfairly disregards the interests of" a creditor.

During the lease term with Pitney and due to a dispute with Company A's landlord, Mr. B incorporated Company B, registered in its favour the trade name being used by Company A for the same business and Company B became the registered owner of a website using that same registered trade-name. Company B then paid lease payments to Pitney. Sales revenues from Company B went directly into the account of Mr. and Mrs. B.

Based on the evidence (including admissions from Mr. B. that the transfer of the business from Company A was done to escape obligations to its landlord and Pitney) the Court found that the sole purpose for Company B was to enable the transfer of the business to it to avoid liabilities or potential liabilities of Company A.

So, on the application of Pitney for liability of Mr. and Mrs. B under s.248 of the Ontario Business Corporations Act, the Court applied the following guidelines to the determination of their personal liability:

- the protection of the underlying expectations of the creditor;
- whether the acts of the debtor were unforeseeable;
- whether the creditor could have protected itself from the acts;
- the detriment to the interests of the creditor;

and found that the principals acted in an "oppressive or unfairly prejudicial manner" to Pitney and directly benefitted by their actions including taking revenues directly into their joint account, abandoning Company A and moving the business to Company B which, - given the fact that Mr. B was also the director, he was in a position to know that Pitney was a creditor and would have nothing to look to in Company A.

**Lesson:** The "oppression remedy" should not be overlooked as a possible remedy for landlords, even where the actions of the directing minds of a corporation are not technically illegal or fraudulent. Landlords have had success using it in the past (in cases where it was shown that the directors' transfer of assets was intended to defeat the landlord's right to rent) However, to "pierce the corporate veil" and find a director personally liable, it's usually vital that there is no evidence of any genuine underlying business rationale for the directors taking the actions they did. If one is demonstrated, then a Court will be reluctant to utilize s.248 for a creditor – especially where the creditor is sophisticated and could have obtained other security from the debtor or its principals prior to becoming a creditor.

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