Date:

20000322
Docket: CA 159641

NOVA SCOTIA COURT OF APPEAL

[Cite as: Hargrove v. Swim, 2000 NSCA 40]

Freeman, Roscoe and Cromwell, JJ.A.

BETWEEN:

MALCOLM S. SWIM	)	Michael J. O'Hara
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
LACHLAN J. HARGROVE AND	)	
RONALD A. FRANCIS	)	Joseph M. J. Cooper, Q.C.
	)	for the respondent
Respondents	)	
	)	
	)	
	)	Appeal Heard:
	)	February 17, 2000
	)	
	)	Judgment Delivered:
	)	March 22, 2000
	)	
	)	

THE COURT: Appeal allowed as per reasons for judgment of Freeman, J.A.; Roscoe, J.A., concurring; Cromwell, J.A., concurring by separate reasons.

Freeman, J.A.:

[1] The respondents sold a building at 1043-1047 Barrington Street, Halifax, on land owned by Canadian National Railways, to the appellant in June, 1987. CN leased 8,925 square feet of land under the building at that civic number to the appellant by lease No. 40024 dated July 15, 1987. While Mr. Swim also carried on business through a company, Evan A. Swim Limited, the lease was in his individual name After some negotiations, a purchase price of $100,000 was agreed to for the building. The respondents took back a first mortgage of $80,000 at 11 per cent interest payable over twenty years by blended payments of $812.52 per month.

[2] Lease No. 40024 from CN for the land under the building was for a term of five years, to June 29, 1992, "and continues until terminated at any time thereafter by either party giving the other six (6) months' notice in writing, or by re-entry. . ." While the appellant was habitually behind in his rent, the re-entry provision was not invoked. The appellant had also bought a building at 1037-39 Barrington Street from other vendors under a similar lease, No. 40023. While this figured in his negotiations with CN, it is not the subject of this appeal.

[3] A letter dated April 14, 1987, to Mr. Swim from CN confirming terms of a lease to be submitted to CN management stated:

> Stress is being placed on the termination provision of the lease as it is contemplated the Lessor will require the leased land for redevelopment or Railway purposes following the five- year term of the lease.

[4] This appeal arises from a term or the agreement between the parties that if

CN terminated the land lease to nos. 1043-1047 Barrington Street through no fault of the appellant, or refused to renew it, all the appellant's outstanding indebtedness to the respondents would be forgiven. As part of a federal government policy involving some $400-500,000,000 worth of lands across the country, CN notified the appellant by letter dated August 12, 1996, that the subject property had been vested in The Canadian Lands Company (CLC) to be disposed of.

[5] The appellant treated this as notice that the lease could not be renewed, triggering forgiveness of the balance of the monies owed. The respondents denied this effect and claimed that if the lease was canceled, the appellant was to blame because he was demanding concessions from CN and had gone behind in his rent. This is an appeal from the judgment of Justice Gruchy in the Supreme Court of Nova Scotia, who found for the respondents.

The Factual Background

[6] The appellant's obligation to the respondents was documented by a promissory note, a chattel mortgage and a collateral mortgage, all dated June 25, 1987. The forgiveness provision first appeared in a counter offer as follows:

> Mortgage shall be opened for repayment in part or in full at any time without penalty, interest for [sic] bonus. The mortgage balance shall be forgivable if from no fault of the purchaser (Swim) CN terminates the land lease or exercises it's [sic] (CN) rights not to renew. If the purchaser (Swim) defaults on the land obligations so that CN cancells [sic] the land lease; then the mortgage balance shall be due and payable.

[7] The promissory note reads as follows:

> I promise to pay Ronald A. Francis and Lachlin J.Hargrove, the full sum of Eighty Thousand Dollars ($80,000.00) together with interest calculated semi-annually not in advance, in manner following, that is to say by monthly payments of principal and interest in the amount of Eight Hundred Twelve Dollars and Fifty-Two cents ($812.52), first of such payments to be made on the 26th day of July, A.D. 1987 and to continue thereafter until the 26th day of June, A.D. 2007 when the balance of principal and interest, if any, then outstanding shall be paid. In default of any of the payments the full amount principal then outstanding together with any interest thereon shall at the option and on the demand of Ronald A. Francis and Lachlin J. Hargrove shall immediately become due and payable.

[8] The chattel mortgage charging the property with the debt was similar, but contained the following "confirmation" of the provision in the counter-offer:

> Confirmation
>
> We, the undersigned hereby confirm to Malcolm S. Swim his heirs, executors, administrators and assigns, that in the event that the lease between Malcolm S. Swim or his designated leasee [sic] with CN for the property known as 1043-1047 Barrington Street, in the City of Halifax, be terminated at the expiration of the original five (5) year term, through no fault of the leasee [sic] or should CN exercise its rights not to renew the said lease, then all outstanding indebtedness at the time of such termination owing by Malcolm S. Swim to the undersigned shall be forgiven and the undersigned shall provide any further assurances, releases or acknowledgments which may be reasonably requested and required should this take place. Notwithstanding the foregoing however, if such lease is terminated due to a default by the leasee [sic] then any and all amounts due and owing by virtue of the aforesaid documentation shall become due and payable.
>
> This is also to confirm that the Promissory Note and mortgages given pursuant hereto are repayable in advance at any time before maturity without any penalty or bonus of interest.

[9] The subject building, and the one next door, were accessible only from the front, from Barrington Street, but CN owned land at the back suitable for access and parking. Mr. Swim appears to have used some of the space in the buildings for his own purposes and sought to rent the rest to tenants, but found many potential tenants often required rear access. He appears to have entered into negotiations with CN even before

the lease was signed seeking access to the back of the buildings. He was advised in the April 14, 1987, letter of confirmation from CN that:

> We would be prepared to consider leasing an additional parcel of land at the rear of the building.

[10] While inconclusive efforts to negotiate rear access to the buildings continued to figure prominently in all of Mr. Swim's dealings with CN, I would agree with the trial judge that this was not an issue between Mr. Swim and the respondents.

[11] The negotiations became protracted. Other issues, including the amount of the rent and the length of a new fixed term, were introduced. Meetings were held. Correspondence ballooned, particularly in 1987 and 1992. In 1989 Mr. Swim began withholding rent, presumably to bring pressure for a conclusion. He brought his rent up to date in 1992, then ceased further payments. CN did not invoke sanctions such as re-entry to which it appeared entitled under the lease, and treated the arrears with remarkable tolerance as part of the negotiating agenda. A requirement of the lease that Mr. Swim have CN's approval for subletting appears to have been honoured in the breach with the knowledge of both sides. CN was negotiating to make nearby lands available for a new supermarket, but did not appear unsympathetic to Mr. Swim's position with respect to lease no. 40024.

[12] Mr. Swim described his difficulties in a letter faxed to the solicitor acting for CN on February 18, 1997, repeating a refrain CN never denied and which had

appeared many times previously in his correspondence:

> ... in the last three years I met no less than six times with CN officials, each time an agreement was reached, satisfactory to all parties. On every occasion CN left the meeting agreeable to prepare necessary documents to allow me the ability to lease my properties. Never did CN finalize one agreement. As a result I have maintained +60% vacancy.

[13] Mr. Swim blamed his high vacancy rate on CN because tenants required access to the back of the buildings and leases for longer terms than he was able to offer.

[14] Mr. Swim's complaints of frustration at CN's failure to follow up on negotiations received corroboration from a memorandum from CN's in-house counsel, Mr. M. Rabin, to Harold Kenny, lands manager for CN, dated September 8, 1994:

> In reference to A.E.Robichaud's letter of 6 Sept., a revue of your file indicates that the handling of this matter has been less than satisfactory, to say the least. The correspondence on file (mainly from Mr. Swim) indicates that there were negotiations between the parties covering new lease terms, although not brought to a successful conclusion. Accordingly, I do not think we can successfully argue that Mr. Swim is no(w) in an overholding position, even though he has not been paying his rent. A number of questions must be answered before I can give a conclusive opinion on our position on Mr. Swim.
>
> 1. Why have we not replied to Mr. Swim's letters, and in particular his letter of 24 Dec. 1993.
>
> 2. It appears from Mr. Swim's letter of 24 Dec. 1993 that the ball is in CN's court to do something about providing a new lease to Mr. Swim. What have you done in reference to progressing such a new lease with CN Management.
>
> 3. Why the gap between Swim's letter of 24 Jan. 1993 and his letter of 24 Dec. 1993. What did CN do in the interim.
>
> 4. What action was taken by CN in reference to the matters set out in the Memo dated 18 Aug. 1993. If action was taken, why was no correspondence sent to Mr. Swim.
>
> 5. What action was taken by CN following the meeting with Mr. Swim on 8 Feb. 1993. See Armond's Memo of 11 Feb. 1993.
>
> 6. If CN was intent on progressing a new lease with Mr. Swim, as it appears to

> have undertaken to do in the correspondence (see Cox Downie's letter of 29 July 1992 and Swim's letter of 5 Feb. 1993), why is there no evidence of this on the file. In particular, there appears to be a distinct lack of any correspondence indicating discussions with Management covering new lease terms for Mr. Swim. There may be an issue of good faith in this regard.
>
> 7. Why was no formal letter sent to Mr. Swim terminating the overholding arrangement and requesting payment of arrears, if that was CN's intent.
>
> May we please discuss the above at your convenience, in order that an appropriate action plan can be developed. At a minimum, Mr. Swim should be formally advised of our position in reference to his continued occupation and payment of arrears before we take any action to recover possession of the property by judicial or extra-judicial means.

[15] For its part, CN claimed to be frustrated by Mr. Swim's habit of changing his demands whenever agreement seemed possible.

[16] The letter that thrust the controversy into its current phase was sent by Lawrence A. Freeman, counsel for Canada Lands Company Limited, to Evan A. Swim Limited August 12, 1996. It stated in part:

> This is to inform you that the South Barrington Street, Halifax, N.S., property, therefore the land leased by Evan A. Swim Limited, under Lease Nos. 40023 and 40024, are part of the Federal Government's commercialization of select CN properties transferred to Canada Lands Company CLC Limited (CLC), a Federal Crown Corporation, which manages and/or disposes of certain surplus federal lands on behalf of the Government of Canada.
>
> CLCs mandate is to manage the disposal of various federal real properties and to ensure that the government receives fair value from timely sales, appropriate value creation and development. All disposals undertaken by CLC are subject to compliance with Government of Canada policies relating to environment, heritage and First Nations claims.
>
> Considering the CLC mandate, the property on South Barrington Street has been designated for disposal. In your instance, CLC has two possible disposal options. Firstly, subdivide the property for sale directly to the tenants subject to approval of the appropriate regulatory agencies, i.e. City Planning and Development, etc. Secondly, negotiating eviction of tenants and sale of one vacant land block, as was done with the northern portion of this property.

[17] This was followed by a letter from Mr. Kenny, now general manager of CLC, to Mr. Swim reminding him that lease no. 40023 through which he had been leasing lands under buildings at civic nos. 1037-1039 Barrington Street had been canceled November 29, 1994, for non-payment of rent. Pursuant to the lease, CN had demanded that the buildings be removed or pass into its ownership without compensation. On September 24, 1994, Mr. Swim had offered to "gift CN clear title to building and contents in consideration CN forgive any rent which may be owing or deemed owing on this property." The cancellation of lease referred to by Mr. Kenny would have occurred within three months of his receipt of Mr. Rabin's memorandum. There was little if any follow up and the 1037-1039 Barrington Street property remained in Mr. Swim's possession. CN and CLC continued to claim for municipal taxes, which formed part of the rent for that lot.

[18] Respecting the subject property, Mr. Swim complained continually that "meeting after meeting concludes in what we believed, an agreement, only to have the officials leave and never again to be heard from." He repeated three alternative proposals:

i) please sell us the lands;

ii) please buy our buildings;

iii) provide us with sufficient land to allow lease of buildings thereafter and we will pay our reasonable lease rates.

[19] When CN notified him it had turned the property over to CLC to be sold, he

focused his negotiating effort on buying the property.

[20] By a subsequent letter dated November 1, 1996, on behalf of CLC to Evan S. Swim Limited c/o Malcolm Swim, Mr. Freeman advised that “CLC has made a decision to sell the property, on an “en bloc” basis only, to all of the existing tenants” for a price of $1,700,000. The appellant joined the other tenants in engaging a realtor to assist in negotiations. It appears to have been agreed by CLC that while the property would be sold en bloc to the tenants, it could be divided among them by agreement which CLC would recognize by separate conveyances.

[21] Negotiations reached the point that a draft agreement of purchase and sale came into existence by which Mr. Swims would acquire the property he wanted, as established by survey, for $217, 741.50. CLC agreed to accept 25 months of arrears totalling $17,232 which accrued in 1995, 1996 and 1997 under lease 40024. Outstanding rent on 1037-39 Barrington Street under lease 40023 was to be waived. If the closing did not take place as scheduled on September 30, 1997, Mr. Freeman was instructed to proceed with legal action to collect all rents unpaid since 1992, including municipal taxes of $25,5231.99 under lease no 40023 and $24,903.88 under lease no. 40024.

[22] Three of the five CN tenants in the Barrington Street properties agreed to buy and closings were held in September, 1997. Mr. Swim and one other tenant did not purchase the lands they occupied.

[23] By letter dated September 29, 1997, Mr. Kenny instructed Mr. Freeman:

> Mr. Swim should be put on notice through his solicitor that if the closing does not take place on September 30, 1997, you are instructed to proceed with whatever legal action that may be required to have Mr. Swim remove the buildings from Canada Lands' property in accordance with the requirements under the leases. In addition, Canada Lands will sue for all outstanding property taxes and rents since 1992. All concessions made to date are on the basis of showing good will so that we could conclude a Purchase Agreement with Mr. Swim.

[24] Mr. Freeman notified Mr. Swim of the termination of lease no. 40024 on October 10, 1997.

[25] As of January 1, 1997, Mr. Swim had ceased making mortgage payments to the plaintiffs. It is not clear what notice was provided to them at that time, but by the end of June, 1997, he had made it known to them that he considered the August 12, 1996, letter from CLC to have triggered his right to forgiveness of the balance owed on the purchase of the building as contemplated by the confirmation clause.

[26] On October 1, 1997, ten days before the tenancy under lease no. 40024 was terminated by Mr. Freeman's notice to Mr. Swim, the respondents' solicitor wrote Mr. Swim invoking the acceleration clause in the indebtedness documentation and demanding payment in full of the outstanding balance and interest totalling $65,468.94. In my view this notice, coming after CN had exercised its right not to renew the lease and after Mr. Swim had given notice of claiming forgiveness of the loan, would "accelerate" only the amounts owed at the time the notice was given. It would not make him liable to pay amounts he was then entitled to have forgiven.

The Issues at Trial

[27] These facts appear to resolve themselves into two issues for the trial judge: (1) was the letter of August 12, 1996, notice of the termination of the lease or the exercise by CN of its rights not to renew the lease as contemplated by the confirmation clause? (2) If so, was the notice the result of fault on the part of Mr. Swim?

Findings of the Trial Judge

[28] Justice Gruchy reviewed the background, summarized the positions of both sides, and set out his conclusions, which I quote at length:

> I have reviewed in detail the history, both of a documentary and oral nature, of the relationship between the defendant and CN (CLC). It was clearly a difficult relationship. The defendant consistently and constantly complained about the lack of access to the rear of the building. I fail to understand how that question has any relevance to the renewal of the lease of the land in question herein.
>
> The defendant has taken the position that CN (CLC) treated the defendant unfairly. My review of the evidence does not reveal any unfairness of a nature which would have any effect on the terms of the "confirmation" attached to the collateral mortgage. There is certainly evidence that some officials of CN (CLC) had a considerable amount of sympathy for the defendant and the position in which he found himself as a result of lack of rear access. Nonetheless, as I have noted, such rear access was never a condition of the CN lease to the defendant. My review has led me to the conclusion that any termination of the lease by CN (CLC) (or a failure to renew same) can only be attributed to the defendant's failure to respond reasonably to CN's various requests. The lease for the premises in question could and should have been renewed by the defendant.
>
> I have reached certain general conclusions with respect to the relationship between the defendant and CN (CLC).
>
> 1. The defendant's persistence that the renewal of the lease be tied to the question of rear access was unreasonable.
>
> 2. The defendant's persistent refusal to pay arrears accumulating on the lease and tying the payment of arrears to the rear access was unreasonable.
>
> 3. The defendant's persistent comparison of the rental rate charged or requested of him to the rates charged to other tenants was unreasonable and evidence concerning that matter was irrelevant.

4. The defendant's request for long term leases was unreasonable in the circumstances.

5. The defendant's persistent requests for access to the rear lands--possibly to the detriment of a CN customer--were unreasonable and had no relevance to the renewal of the lease in question.

6. The defendant's various requests to CN (CLC) for cost sharing of improvements to the rear lands were unreasonable and were irrelevant to the question of the renewal of the lease in question.

7. The defendant's comparison of his treatment by CN(CLC) for arrears to the treatment of other tenants was unreasonable and irrelevant.

I have concluded that at all relevant times it was within the grasp of the defendant to have achieved a reasonable renewal of the lease in question. He failed to take advantage of such opportunities.

I will address each of the various positions taken by the defendant.

The defendant has taken the position that the lease terminated by its own terms and the term of the lease expired automatically at the expiration of the five year term. I cannot accept those positions. By virtue of clause VI of the lease a month to month tenancy was continued. The defendant says that the evidence is clear that CN exercised its rights not to renew the lease. While it is correct that CN did not renew the lease, the provisions of the lease are clear that it was for the defendant to give CN notice of his desire to continue in possession of the lands. The lease then provides for a mechanism for the determination of the continued occupancy.

The ultimate termination of the lease by CN(CLC) occurred only after the defendant had abandoned the property and was clearly in default under many of the terms of the lease. It is my conclusion that the defendant was consistently at fault under the terms of the lease. In addition, CN did not terminate the lease "at the expiration of the original five (5) year term", and CN did not exercise its rights not to renew the said lease. It is my conclusion that the final termination of the lease was ultimately due to defaults by the defendant.

The plaintiffs have taken the position that the terms of the confirmation together with the provisions of the defendant's lease from CN [placed?] a duty upon him to use best efforts to renew the lease. That is, the words "through no fault of the leasee" in the confirmation meant that the defendant should have attempted to renew the CN lease in accordance with its terms. He made no such attempt. The plaintiffs reason that this clause is tantamount to an imposition of the duty of good faith or best efforts. They cite **Norfolk Motor Hotel v. Graves** (1988) NSJ No. 298 and the authorities therein referred to as authority for that proposition. The defendant takes issue with the proposition and says that although there is a duty of good faith, I should not imply a duty of best efforts. He has referred to various authorities to support his argument. With respect, I agree with the plaintiffs. It was within the power of the defendant at least to comply with the provisions of the CN lease to attempt to address its renewal and he did not do that in a straight forward fashion. Any attempts he did make were tied to other demands unrelated to the transaction he had with the plaintiffs.

> Accordingly, I conclude firstly that the lease did not terminate, but even if it did, the defendant must bear responsibility for it. Whether one examines the terms of the defendant's offer to purchase the building, the terms of the plaintiff's counteroffer, the terms of the security documents or the confirmation, the inescapable conclusion on the facts before me is that there was fault on the part of the defendant--he did not attempt to renew pursuant to the lease--and CN only exercised its right not to renew after the defendant had effectively abandoned the building.
>
> The defendant has also taken the position that the contract was frustrated by the decision of CLC to sell the lands in question. The defendant was informed by CLC on August 12, 1996, that it had designated the property in a question for disposal. CLC was willing to negotiate the sale of the property to the defendant and in fact embarked on a serious (sic) of efforts in an attempt to do so. Notwithstanding those efforts, however, it is clear that in the period between June 29, 1992, the originally scheduled termination date of the CN lease and August 12, 1996, the defendant had repeated opportunities to renew the lease at favourable terms. The renewal of the lease was not in fact frustrated by the decision of CN (CLC) to sell the lands. Had the defendant renewed the lease as he had been able to do the renewed term could have been extended to June 29, 1997.
>
> While CLC might have purported to have sold the property in August, 1996 if the defendant had renewed the lease, any such sale would have of necessity been subject to that lease.
>
> Finally, it is clear on the evidence that on October 1, 1997, the plaintiffs made formal demand upon the defendant pursuant to the provisions of the security documents. I find as a fact that this letter was delivered directly to the defendant's residence on that date and that the defendant duly received same. It was delivered to the defendant prior to termination of the lease by CLC which was effected on October 10, 1997. I further find at the time the defendant had effectively abandoned the property and had informed the plaintiffs accordingly.

The Standard of Review

[29] Cromwell J.A. concisely stated the standard of appellate review followed by this court in civil matters in **Dartmouth (City) v. Dartmouth Police Association** (1998), 172 N.S.R. (2d) 352, as follows:

> The scope of appellate intervention with respect to findings of fact at trial is well-known and has often been repeated. To justify appellate intervention, there must be a "palpable or overriding error": **Toneguzzo-Norvell et al v. Savein and Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121. It is not every error that leads to appellate intervention. As Lamer C.J.C. said in **Delgamuukw et al v. British Columbia et al**, [1997] 3 S.C.R. 10110 at para 88:
>
> > The error must be sufficiently serious that it was overriding and

> determinative in the assessment of the balance of probabilities with respect to that factual issue.

[30] In my view, such error occurred.

The Basis for Reversal

[31] The trial judge misconstrued the evidence in finding a duty on the appellant to negotiate a renewal of the lease, which was not the simple five-year lease the players seemed to assume it to be. Such a duty would be inconsistent with the provisions of the particular lease in question, and is inconsistent as well with CN's advice to the appellant before the lease was signed that "it is contemplated the lessor will require the leased land for redevelopment or railway purposes following the five-year term of the lease." After the expiry of the five-year term the lease ran indefinitely, entitling the appellant to possession of the property until CN gave six months notice under Clause IV that the lease was terminated. It was because CN had made it clear that there was no reasonable prospect of renewing the five-year term of the lease that the parties entered into the confirmation clause. It was an error for the trial judge to find that "the provisions of the lease are clear that it was for the defendant to give CN notice of his desire to continue in possession of the lands." The lease does not provide for such notice of desire, and it would have served no useful purpose.

[32] The trial judge found:

> …My review has led me to the conclusion that any termination of the lease by CN (CLC) (or a failure to renew same) can only be attributed to the defendant's failure to respond reasonably to CN's various requests. The lease for the premises in question could and should have been renewed by the defendant.

[33] After reviewing the evidence, I remain unclear as to what requests were made by CN that the appellant failed to respond to, apart from the rental arrears which had become one of the subjects of the interminable negotiations. In my view, it was the federal policy to dispose of the CN land, a contingency contemplated by the parties in negotiating the confirmation clause, and not the rental arrears, that caused the lease to be terminated.

[34] The trial judge found that the lease could have been extended to June 29, 1997, but the appellant in fact remained lawfully entitled to possession of the property until October 20, 1997.

[35] In my view, the trial judge did not make an unequivocal finding whether the notice of August 12, 1996, terminated the lease within the meaning of Clause IV. I disagree with his conclusion, and consider it erroneous, that "firstly that the lease did not terminate, but even if it did, the defendant must bear the responsibility for it."

[36] In my view, for reasons which I will expand upon below, the notice of August 12, 1996, triggered the forgiveness provision in the confirmation clause, and no default by the appellant was a causative factor.

Analysis

[37] The first ground of appeal stated by the appellant addresses the central

question:

> Did the Learned Trial Judge err in not finding that the 1996 policy decision of the landowner to refuse to grant future renewals of land leases to lessees, including the Appellant, was an event which relieved the Appellant of the obligation to make payments under the relieving “loan confirmation” provision.

[38] The relevant portion of the confirmation clause provides:

> ...in the event that the lease between Malcolm S. Swim or his designated leasee [sic] with C.N. for the property known as 1043-1047 Barrington Street, in the City of Halifax, be terminated at the expiration of the original five (5) year term, through no fault of the leasee [sic] or should C.N. exercise its rights not to renew the said lease, then all outstanding indebtedness at the time of such termination owing by Malcolm S. Swim to the undersigned shall be forgiven. ...

[39] I would interpret this to express the intention contained in the counter offer, which stated:

> The mortgage balance shall be forgivable if from no fault of the purchaser (Swim) CN terminates the land lease or exercises it’s (sic) (CN) rights not to renew.

[40] The appellant and the respondents are experienced businessmen who worked out an agreement for the purchase and sale of a building on CN land for which a long-term lease was not available. The issues are in contract; the objective expectations of reasonable people must govern. The law of landlord and tenant is incidentally involved, but it does not govern their contract.

[41] The respondents wanted to get the best price they could for their building despite the short term of the lease. They had rejected Mr. Swim’s offer of $55,000 cash. The appellant wanted the building, but he did not want to pay $100,000 for it and be faced with removing it or losing it after five years. They hit upon an equitable

scheme for sharing the risk. They began with the assurance of the five-year term of years that CN provided in the lease. After that the buildings could remain on the land pursuant to the lease until the landlord or the tenant gave six months' notice of termination of the lease. This provision in the lease was to accommodate CN's foreseen concern that the land could be required for redevelopment or Railway purposes. If CN did not require the land the lease would remain in effect indefinitely and the entire purchase price sought by the respondents for the building would be paid. But if the land ceased to be available, Mr. Swim would be faced with removing the building or abandoning it. The parties agreed that in that event, he would be relieved of paying the balance owed on the mortgage; it would be forgiven.

[42] At the time the parties agreed to this solution it would have been clear to them that after the first five years, the fate of the contract depended on whether CN would require the land for its own purposes. As businessmen, they would have recognized the sale of the land as among CN's options, as well as, or as part of, redevelopment or other railway purposes. They would have recognized as well that there could be no reasonable expectation that CN would deal with the property in a manner contrary to its own best interests; therefore there would be no purpose to be served by imposing on Mr. Swim an obligation to seek a term of years beyond the flexible notice arrangement in the lease that was consistent with CN's plans for the future. They made a contract that reflected reality as they saw it at that time.

[43] The strong but somewhat imprecise alternative language in which they

expressed this provision in their contract may reflect the clarity with which they understood its broad intent at the time. If CN terminated the lease after the first five years, through no fault of the lessee, or "exercises its rights not to renew", the balance was to be forgiven. The words "exercises its rights" could hardly be broader and the intention is clear and non-technical. If CN reclaimed the land, the confirmation provision would be triggered. If the words "not to renew" require clarification, I would consider them to mean that CN would not continue the lease beyond the six months' notice period current at the time notice was given to reclaim the land.

[44] Forgiveness would not apply if CN reclaimed the land because of the fault of Mr. Swim. If he had been the party giving notice under Clause IV, for example, or if CN had reclaimed the land because he was not paying his rent, the debt would not have been forgivable. CN could have re-entered the land without notice under Condition 13 of the lease but did not do so; given the tolerance shown for the arrears during the negotiations, re-entry without notice would hardly have been conscionable. While CN might have been out of patience with Mr. Swim after the endless negotiations, there is no evidence that CN reclaimed the land because of fault on his part.

[45] It reclaimed the land by the letter of August 12, 1996. This made it clear that the decision resulted from national policy, and not from any fault on the part of Mr. Swim. It advised that the land had been vested in CLC for disposal; neither of the two disposal options included further leasing. This was precisely the kind of event the parties had addressed in 1987 when they agreed to the confirmation clause. It would

have been preferable from a procedural viewpoint if the August 12th letter had formally given six months' notice of termination of the lease under Clause IV, but that is of little importance in determining the effect on the contract. CN had exercised its rights not to renew and the lease was effectively at an end, although CN could not have claimed vacant possession within six months. In fact it allowed Mr. Swim more time than that, and he took less. He effectively vacated the premises in January, 1997, but he did not formally relinquish them and remained legally in possession.

[46] While he stopped making mortgage payments at that time, the trial judge did not find he had fully informed the respondents that he was invoking the forgiveness clause until June of 1997. Upon giving that notification he had, in my view, completed the requirements for claiming forgiveness of the balance owned for the purchase price of the building.

Other Grounds of Appeal

[47] The contract was not frustrated, as the appellant argues in an alternative ground of appeal, because the contingency for which the parties provided was foreseen. Justice Chipman stated in **Teleflex v. I.M.P.Group Ltd.** (1996), 149 N.S.R. (2d) 355 at paragraph 59:

> As was said by Lord Simon in the House of Lords in **National Carriers Ltd., v. Panalpina (Northern) Ltd.,** [1981] A.C. 675, at p. 700:
>
> > Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance. (emphasis in case cited.)

[48] Given these conclusions, it is not necessary to deal with the further grounds of appeal except for the issue of interest. The trial judge ordered interest at eleven per cent, the rate provided for in the debt documentation. I would consider this rate to be within the proper exercise of the discretion of the trial judge.

Conclusion

[49] The language of the confirmation clause is not helpful as to the time when forgiveness of the balance owing becomes effective. While relations between landlord and tenant altered fundamentally with the giving of the notice on August 12, 1996, the effect on the relationship between the parties was less immediate. The respondents were entitled to rely on Mr. Swim being in possession of the lands until both the lease

and the ensuing tenancy were terminated as of October 20, 1997.

[50] I would allow the appeal and order that Mr. Swim be relieved of the liability of paying the balance owing on the promissory note, chattel mortgage and collateral mortgage as of October 20, 1997. That is, I would vary the order to make him liable to the respondents only for payments which should have been made between January, 1997 and October 20, 1997, together with interest on the same at the rate of eleven per cent per annum, and I would order that all amounts which would have fallen due after October 10, 1997, be forgiven pursuant to the confirmation clause. The appellant shall have his costs at trial and on appeal. The latter are hereby fixed at $1500 plus disbursements.

Freeman, J.A.

Concurred in:

Roscoe, J.A.

CROMWELL, J.A.: (Concurring)

[51] I agree that the appeal should be allowed, but I reach that conclusion for different reasons than those persuasive to my colleague Justice Freeman.

[52] In my opinion, the trial judge's conclusion that the lease was terminated because of Swim's fault is clearly wrong. It has no support that I can find in the record. The lease was terminated because the property was to be sold. The forgiveness clause operates unless the termination is due to the default of Swim. While there were many defaults by Swim, the termination did not come about because of them.

[53] I am not ready to say that Swim had no obligation to seek in good faith to have the lease renewed. Assuming he did, the record at trial does not, in my opinion, support a finding that his occupancy of the premises would have been for a longer period than it actually turned out to be. To succeed on this basis, the respondents would have to show that Swim's failure to seek a renewal led to the termination of the tenancy before it would have been terminated had he done so. The trial judge made no such finding. He held only that a renewal of the lease to June of 1997 had been within Swim's grasp. In the event, Swim's tenancy was not terminated until October of that year. If he had an obligation to seek a renewal and breached it, it still has not been shown that this breach led to an earlier termination of the lease than would have occurred had he not breached this obligation.

[54] As for the acceleration clause, it must, in my view, be read together with the

forgiveness clause as both were part of the same overall agreement between the parties. While the acceleration clause and the demand pursuant to it made the balance of principal and interest then outstanding immediately due and payable, the forgiveness clause provides that, if it applies as I find it does, all the outstanding indebtedness [at the time of termination of the lease] owing by Swim to the respondents shall be forgiven. In other words, the forgiveness clause read with the acceleration clause operates to forgive accelerated amounts relating to the period after termination.

[55] In my view, the lease was terminated pursuant to the notice given in October, that termination was not as a result of the fault of Swim and the forgiveness clause operates to forgive indebtedness relating to the period following termination.

[56] I agree with the result and the order proposed by Justice Freeman.

Cromwell, J.A.