1997 S.H. No. 142151

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

LACHLAN J. HARGROVE and RONALD A. FRANCIS

Plaintiffs

- and -

MALCOLM S. SWIM

Defendant

DECISION

HEARD BEFORE:	The Honourable Justice David W. Gruchy at Halifax, Nova Scotia
DATE(S) HEARD:	August 16, 17 and 18, 1999
DECISION DATE:	October 6, 1999
COUNSEL:	Joseph M. J. Cooper, Q.C. for the Plaintiff
	Michael J. O'Hara for the Defendant

GRUCHY, J.:

The plaintiffs had leased certain lands at civic number 1043-1047 Barrington Street, Halifax, Nova Scotia from Canadian National Railways (CN) and were the owners of the building thereon. They had purchased this building and had taken an assignment of lease from the previous owner in June 1984. They had done certain work on the property, consisting of renovations and updating and then had occupied it by renting to tenants and for their own purposes.

In June 1987 the plaintiff's decided to sell the building and accordingly listed the property for sale with a real estate agent. The building was to be sold and the purchaser was to be assigned their rights under the CN lease. By virtue of that lease CN had retained to itself certain rights of termination.

On June 17, 1987 the defendant through the real estate agent presented two offers to the plaintiffs. One was for a purchase price of $90,0000.00 with a $15,000.00 down payment and the requirement that the plaintiff would agree "to take back a collateral first mortgage in the amount of $75,000.00 for a term of 20 years amortized over the term of the mortgage at 11% per annum payable in blendid [sic] monthly payment of $761.73 per month". The clause continued: "the mortgage shall be cancelled without penalty of interest, bonus or oblidigation [sic] in any manner whatsoever to the purchaser (Swim) should CNR fail to maintain and continue the land lease".

The other offer presented at the same time was for a purchase price of $55,000.00, with $5,000.00 cash down and a balance of $50,000.00 to be paid on closing. There was no forgiveness clause in that offer as there was in the other.

The plaintiffs counter-offered on the first offer only for the purchase price of $100,000.00 with an agreement to "take back a first mortgage of $80,000.00 for a term of

20 years, amoritized [sic] over the term of the mortgage at 11% per annum in blendid [sic] monthly payments of $812.52 per month". The counter-offer continued:

> Mortgage shall be opened for repayment in part or in full at anytime 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 lease obligations so that CN cancells [sic] the land lease; then the mortgage balance shall be due and payable.

That counter-offer was accepted by the defendant and the transaction duly closed and the defendant executed to the plaintiffs a promissory note, a chattel mortgage and a collateral mortgage, all dated June 26, 1987.

The promissory note reads as follows:

> AMOUNT: $80,000.00 DATED: June 26, 1987
>
> I PROMISE to pay to 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 of 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.
>
> VALUE RECEIVED.
>
> MALCOLM S. SWIM

The chattel mortgage charged the building for $80,000.00 and the terms of repayment are essentially identical to those contained in the promissory note with the

interest rate specified. The mortgage was executed as collateral security to the promissory note and charged the defendant's interest in the property in question. The collateral mortgage also contained a "confirmation" executed for and on behalf of the plaintiffs as follows:

> 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 5 - 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 be come due and payable.
>
> This is also to confirm that the promissory note and mortgages given pursuant hereto are repayable in advance at anytime before maturity without any penalty or bonus of interest.

The defendant then entered into possession of the property and occupied same either by subleasing to tenants or for his own purposes.

Each of the plaintiffs testified that their lease from CN was for the building only, with no rear access. The only access the plaintiffs had to the building was through its front directly from Barrington Street. I accept that evidence as factual. There was never any undertaking by the plaintiffs to the defendant concerning rear access to the building. Such rear access was never negotiated or discussed by the parties prior to or after the sale. There was never an undertaking by CN prior to the defendant's purchase of the building

or his receiving a lease from CN that rear access to the building was a condition of the transactions.

The defendant adduced evidence from the plaintiffs that from time to time during their occupancy of the building their rent to CN fell into arrears. Similarly, the defendant adduced evidence through the plaintiffs that from time to time the municipal taxes on the building had been in arrears while they were in occupancy. That evidence is irrelevant to the questions now before me. At the time of the sale of the property to the defendant all arrears to CN and municipal taxes were brought up to date. The past relationship between CN and the plaintiffs has no relevance to this action.

The parties gave conflicting evidence as to difficulties allegedly experienced by the plaintiffs in collecting mortgage payments. Nothing turns on this point or this evidence and it is irrelevant.

From the time the defendant took possession of the property the plaintiffs had no knowledge of his continuing relationship with CN. They had no knowledge of whether the defendant was in default under its land lease or otherwise. They had no knowledge of the defendant's leases to his tenants or of his negotiations with CN. They had no knowledge of any undertakings given by the defendant to his various tenants concerning the matter of rear access to the building.

The lease between CN Real Estate and the defendant was dated July 15, 1987. It provided, *inter alia*, as follows:

IV. TERM

The term commences on 30 June, 1987, and ends on 29 June, 1992, and continues until terminated at anytime thereafter by either party giving the other 6 (six) months notice in writing, or by reentry pursuant to the provisions of clause 13 of schedule A.

V. RENTAL

...

IT IS AGREED, subject to the following procedures being observed:

(a) that four (4) months prior to the expiration of the five (5) year Term or before 29 June 1992, the Lessee shall give to CN notice in writing of the Lessee's desire to continue in possession of the Leased Lands and shall request CN to provide a rental quotation:

(b) that within two (2) months of receiving the Lessee's notice, CN will notify the Lessee in writing of the new rental that will apply during such continuation:

(c) that within one (1) month of receiving CN's rental quotation, the Lessee shall notify CN, in writing, whether or not the Lessee wishes to continue with the Lease at the new quoted rental:

(d) that if the Lessee elects to so continue in possession (and failure of the Lessee to do notify CN shall be deemed to be a positive response), this Lease shall be continued at the quoted rental, subject to termination at any time thereafter by either party giving the other six (6) months' notice in writing, or by re-entry pursuant to the provisions of Clause 13 of Schedule "A".

VI. OTHER CONDITIONS

If the Lessee, without the written consent of CN. continues to occupy the leased lands after the termination of this lease. The tenancy thereby created shall be a tenancy from month to month at a monthly rental equal to the yearly rental in existence prior to the termination of the lease, plus taxes of lawful money of Canada, subject to the right of either party, CN or the lessee, to terminate at any time by giving to the other party not less than sever (7) days' notice in writing of its intention to terminate. Except as

aforesaid, all of the terms and conditions of this lease shall be applicable to such tenancy.

In addition, the "General Conditions" of the lease provided:

11. ASSIGNMENT AND SUB-LEASE

The Lessee shall not assign, transfer or sub-let these presents or the Leased Lands, or any part thereof, or interest therein, without the prior consent in writing of CN, and the Lessee shall file a duplicate original of such assignment, transfer or sub-lease with CN.

12. EFFECTS OF EXPIRY OR TERMINATION

Upon the termination of this Lease, either by lapse of the time or by notice or otherwise, as herein provided, the lessee shall, at the lessee's own risk and expense, by the date of termination remove from the leased lands all buildings, erections and materials and things thereon not belonging to CN, and restore the leased lands to the satisfaction of CN, leaving the leased lands in a clean and neat condition. If the Lessee shall not so remove such buildings, erections, materials and things, the same shall without prejudice to CN's right to enforce such removal as hereinbefore provided, become the sole property of CN without any right to the lessee to have compensation therefor.

13. RE-ENTRY UPON DEFAULT

It is hereby agreed that if and whenever the rent, or any part thereof, shall be in arrears for thirty (30) days, although no format demand shall have been made therefor, or in case of the default, breach, or non-performance of any of the covenants, conditions, or reservations herein contained on the part of the Lessee, or in case the Term shall be seized or taken in execution, or on attachment, or if the Lessee shall make an assignment for the benefit of creditors, or becoming bankrupt, or insolvent, shall take the benefit of any act that may be enforced for bankrupt or insolvent debtors, then in any such event, the Term shall, at the option of CN, immediately become forfeited and void, and in every such case, CN may at any time thereafter enter into and upon the Leased Lands, or any part thereof, in the name of the whole, and again have, repossess and enjoy the Leased Lands as if this Lease had not been made, together with all buildings and

> structures, with ownership therein, at any time placed by the Lessee upon the Leased Lands, without any right, claim or demand, by or on behalf of the Lessee, upon CN for compensation in any manner based thereon: and no acceptance of rent subsequent to any breach or default, other than non-payment of rent, nor any condoning, excusing or overlooking by CN, on previous occasions of breaches or defaults, similar to that for which such forfeiture arises, shall be taken to operate as a waiver of this condition, nor in any way to defeat or affect the rights of CN hereunder.

This lease was assigned by the defendant Swim to a company incorporated by him, Evan S. Swim Limited which assignment was consented to by CN.

There is no evidence of any formal consent by CN to the various subleases granted by the defendant to tenants.

The defendant never took the formal steps required by Article V to renew the lease. It is to be noted, however, that clause VI, the overholding clause of the lease, was such that the terms of the lease would continue during the continued occupancy of the premises pursuant to that clause.

By August 1987 the defendant had sublet a portion or portions of the building to a tenant who required rear access for loading and unloading large trucks. He accordingly negotiated with CN for the access which, in effect, responded positively on August 14, 1987, and offered to lease the rear lands at a rental based on a calculation using potential parking income as a yard stick to determine value. The defendant refused that offer and instructed CN to "...cancel our interest in parking area".

It is clear, however, that the defendant had knowingly sublet portions of the premises to a tenant or tenants who required rear access and which the defendant was unable to deliver.

The defendant's interest in the potential rear access to the building, accordingly, did not wane. He continued to attempt to deal with CN Real Estate, a division of CN, but that division was subservient to CN Rail with respect to any lands adjacent to the railway. While the officials of CN Real Estate were sympathetic to the defendant's predicament, it was clear to all, including the defendant, that they could only recommend an arrangement which might interfere with the railway's interest in the lands adjacent to the rail line. On the evidence before me it does not appear that CN ever committed to the defendant to supply rear access. CN and the defendant ultimately were unable to conclude an agreement whereby the defendant could have access to the rear lands.

In January 1997, the defendant stopped making payments to the plaintiffs. In 1996 the CN lands became vested in a federal corporation, Canada Lands Company Limited and that company assumed management of all relevant CN lands. I will refer to CN and that company as CN (CLC).

In June 1997 the defendant informed the plaintiffs through Mr. Francis that he was through with the property, that he was in negotiations with CN (or its successor) and he would be in contact with them in due course. The plaintiffs say, and I accept, that the tenor of Mr. Swim's notification to the plaintiffs was clear: he would not be making any further payments until further notice and there was no point in pursuing him for regular monthly payments. This conclusion is somewhat at variance with the evidence given by the defendant, but I accept that version of the facts as testified to by Mr. Francis.

In due course the plaintiffs took steps to demand payment of the promissory note and eventually commenced this action.

Plaintiffs' Position

The plaintiffs have taken the following position:

1. The defendant is in default on the various security documents and the plaintiff is accordingly entitled to recover thereunder.

2. After commencing the action the plaintiffs learned of matters of controversy between the defendant and CN (CLC), but say that these controversies have no effect on the continued validity of their security;

3. CN (CLC) never terminated the lease;

4. The defendant was constantly in default under its lease with CN (CLC);

5. That CN (CLC) at no time frustrated the renewal of the lease;

6. Alternatively, if CN (CLC) ever did terminate the lease, such termination was the result of the defendant's defaults;

7. Accordingly, the plaintiff's are entitled to the full recovery of all sums due under the terms of their security documents, without any forgiveness pursuant to the documents themselves or the confirmation attached to the collateral mortgage.

Defendant's Position

The defendant says:

1. The loan forgiveness clause was triggered as:
   (a) the lease was terminated by CN (CLC), or
   (b) the lease was not renewed.

2. The contract between the parties was frustrated by CN (CLC) firstly by their refusal or failure to supply rear access to the property, and secondly by their ultimate decision to sell the property.

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 to 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 questions.

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 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 be 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 the responsibility for it. Whether one examines the terms of the defendant's offer to purchase the building, the terms of the plaintiffs' 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 the sell the lands in question. The defendant was informed by CLC on August 12, 1996 that it had designated the property in question for disposal. CLC was willing to negotiate the sale of the property to the defendant and in fact embarked on a serious 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.

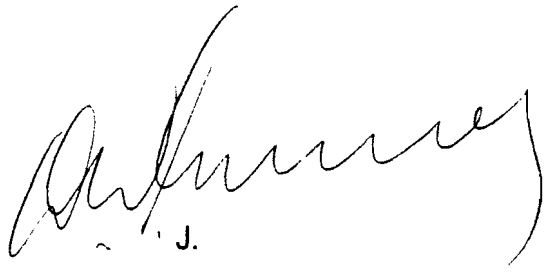
Finally, it is clear on the evidence that on October 1, 1997 the plaintiffs made formal demand upon the defendant pursuant to the provisions of the security documents. I find as a fact that this letter was delivered directly to the defendant's residence on that date and that the defendant duly received 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

that time the defendant had effectively abandoned the property and had informed the plaintiffs accordingly.

Conclusion

I find the defendant liable to the plaintiffs for the full balance of the debt evidenced by the promissory note. As of September 30, 1997 that balance amounted to $60,933.17 and interest to that date in the amount of $4,535.77. Interest on the outstanding principal accrues pursuant to the terms of the security documents. The promissory note is silent as to the rate of interest to be charged, but the terms of the chattel mortgage and the collateral mortgage specify the interest to be charged is at the rate of 11% per annum calculated half yearly, not in advance.

The plaintiffs will have judgment for the amount to be calculated on the basis of the above, together with their costs to be taxed, if necessary.



J.