CV 06574

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ARCTIC OUTPOST CAMPS LTD.

Plaintiff

- and -

THE GOVERNMENT OF CANADA as represented by the Minister of Indian and Northern Affairs

Defendant

Application for an interlocutory injunction. Denied.

Heard at Yellowknife on August 13 & 16, 1996

Judgment filed: August 16, 1996

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Plaintiff: Gerard K. Phillips

Counsel for the Defendant: Alan R. Regel

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REASONS FOR JUDGMENT

1 The Plaintiff in these proceedings applies for an interlocutory injunction restraining the Defendant from cleaning up, disposing of or otherwise dealing with certain assets and a land lease.

2 The Defendant applies for an order striking out the Plaintiff's Statement of Claim, or, alternatively, security for costs, or, in the further alternative, should an interlocutory injunction be granted, a direction that the Plaintiff give an undertaking as to damages.

3 Some of the facts are in dispute or are simply not clear. A number of affidavits were filed on behalf of both parties. I have reviewed all of the materials.

4 It appears that the Plaintiff held a lease #2149 from Her Majesty the Queen in right of Canada on what I will call the Char Lake property. (For the sake of convenience for purposes of these Reasons for Judgment, I will refer to Her Majesty as the Defendant even though the action is not styled in that manner.) The lease commenced January 1, 1971 for a period of 20 years. The Plaintiff built a fishing lodge on the property, which it operated for about 6 years. Two other leases, #2977 (Kent Peninsula) and #2985 (Hadley Bay) were also held and used by the Plaintiff in the operation of the fishing lodge.

5 All three of the leases were assigned by the Plaintiff to 100868 Outfitters Ltd. in 1977. The Plaintiff says that it held a debenture over the assets of the fishing lodge business located on the properties covered by the leases. A receiver was appointed pursuant to the debenture on July 12, 1984. Michael Hackman, a director of the Plaintiff, states in his affidavit filed August 7, 1996 on this application that shortly after the appointment of the receiver, he was advised by an Economic Development Officer of the Government of the Northwest Territories that the leases were not in jeopardy while the lodge was in receivership and that no lease fee was required. Mr. Hackman also states that "upon request" he paid the sum of $300.00 to cover the 1985 lease renewals into a trust account with the receiver. He says he was advised that he was not to pay for the leases and that only the receiver could do that.

6 The Defendant says that it has no record of receiving this money from the receiver.

7 Mr. Hackman deposes that the Plaintiff brought foreclosure proceedings pursuant to the debenture in the Court of Queen's Bench of Alberta. A copy of an order granted June 12, 1986 in that action is attached as an exhibit to Mr. Hackman's affidavit. There is no mention in the order of the receiver. Paragraph 2 of the order reads as follows:

> 2. It is further ordered that if 100868 Outfitters Ltd. fails to make an appearance in this action on or before August 15, 1986 then the Plaintiff shall have vested in it all of the right and title of 100868 Outfitters Ltd. which exists as of this date to Lease #2149, #2146 and #2148 together with the structures and chattels of the fishing camp located upon Lease #2149.

Lease #2146 became #2977 and lease #2148 became #2985.

8 It appears that prior to the court order being made, all three leases were cancelled by the Defendant for non-payment of lease fees. Lease #2985 and #2977 were cancelled in 1984 and lease #2149 in April of 1986.

9 No copy of the debenture was provided to me and no issue was raised by counsel as to the jurisdiction of the Court of Queen's Bench of Alberta to make an order affecting leases of land located in the Northwest Territories.

10 The Plaintiff says that it was not aware that the leases would be cancelled although it accepts that the receiver was given some notice prior to cancellation. Mr. Hackman refers to discussions with the employee of Economic Development and Tourism referred to above and says that in late July 1984 he was told by that individual that there would be no problem transferring the three leases back to the Plaintiff and that there was no urgency in applying for this so long as the receiver was in place. It is not clear whether this individual had any authority to make such a representation on behalf of the Defendant.

11 From his affidavit, however, it is clear that Mr. Hackman and therefore the Plaintiff soon knew that the leases were cancelled. In paragraph 15 of his affidavit, Mr.

Hackman refers to correspondence from the Government of the Northwest Territories' Department of Economic Development and Tourism in October of 1986 to discuss "the requirements necessary prior to my *replacing* the lease on Kent Peninsula #2977". He also indicates in paragraph 18 that he wrote to that Department in January of 1987 to ask why he had not heard from it "with respect to getting my lodge *relicensed*" (emphasis mine).

12 The January, 1987 contact is the last step referred to in Mr. Hackman's affidavit. He has now learned that the Defendant plans to remove all of the assets and equipment from the fishing lodge site during the month of August, 1996 and sell or burn them. Counsel advised that the removal is in fact scheduled to commence on August 16. The site in question has been granted to the Inuit pursuant to the Tungavik Federation of Nunavut's Final Agreement with the Government of Canada.

13 On behalf of the Defendant was filed the affidavit of Annette McRobert, the Manager of Land Administration, of the federal Department of Indian Affairs and Northern Development ("DIAND"). Her affidavit points out, first of all, that there is no record of the Plaintiff's debenture having been registered with DIAND. She indicates that after leases #2977 and #2985 were cancelled, DIAND was advised that 100868 was in receivership. She provides documentation indicating that the receiver was advised in 1985 that lease #2149 might be cancelled as a result of non-payment of rent. No rent was received and by letter dated April 17, 1986, lease #2149 was cancelled. The April letter was sent to 100868 Outfitters Ltd. but returned as undeliverable. A copy of the letter was sent to the receiver.

14 Subsequently, DIAND received a letter from the receiver advising of the order of the Alberta Court of Queen's Bench.

15 Ms. McRobert indicates that over the next few years Mr. Hackman expressed an interest in reviving an interest in the three leases. Attached to her affidavit is documentation indicating that in March of 1987, the Plaintiff applied for a lease of what had been the Char Lake location. In his covering letter of March 10, 1987, Mr. Hackman wrote, "We also had 2 other leases, and we will be applying for the Kent Peninsula lease when we complete the application and receive the Lease for Char lake first *(sic)*".

16 Ms. McRobert swears that the application for a lease for the Char Lake location was processed but denied and the Plaintiff was advised of what was needed, for example, that it obtain a licence to operate the lodge. She also refers to meetings with then counsel for the Plaintiff in 1987 and correspondence to the Plaintiff in 1989, regarding the requirements in order to obtain a lease.

17 The Plaintiff, through its solicitors, filed an appeal of the denial of its application for a lease in 1987. That appeal was denied, although precisely when the denial was communicated to the Plaintiff and/or its solicitors is not clear. There is no evidence before me that the Plaintiff did anything after 1989 to pursue the obtaining of new leases.

18 The only document in the material filed on this application which reflects events after 1989 was a copy of a letter dated June 25, 1992 to the Plaintiff from Jim

Umpherson of DIAND, in which he says the following:

> As you may know, the Tungavik Federation of Nunavut (TFN) has reached a Final Agreement with the Government of Canada on the Inuit land claim in the Eastern Arctic. This office has been advised that during the land selection negotiations, Inuit and government agreed that those lands which you presently hold under Federal lease No. 67C12002 will be granted to the Inuit at the expiry date of your lease. Once the said lease has expired you will have to negotiate a new lease with the Designated Inuit Organization (DIO), your new landlord, and resolve the ownership status of buildings and structures on the lands at that time.

Mr. Umpherson then provides telephone and facsimile numbers and an address for contact should the Plaintiff wish to discuss the matter.

19 In his affidavit filed August 16, 1996, Mr. Umpherson says that this was a standard form letter intended to go only to those with leases in good standing and that it was sent to the Plaintiff by mistake. He says that the file number referred to was the file number used for the Plaintiff's application file and indeed that appears from correspondence attached to Ms. McRobert's affidavit to be the case.

20 The letter raises a number of questions. It was not referred to at all in Mr. Hackman's affidavit filed on August 7. In his affidavit filed August 15 he does refer to the letter but does not say that he did anything at all in consequence of it.

21 At the very least, one would expect that the Plaintiff would, on receiving the June 25, 1992 letter, ascertain the expiry date of its supposed lease. But, based on correspondence in the materials, it had been told back in 1988 and 1989 that the original leases it had were cancelled. Even if it had thought that they were still in effect, they

would have expired in 1991. It is not at all clear to me what lease it is that the Plaintiff thinks it has.

22 Counsel for the Plaintiff asks me to take judicial notice that such leases are commonly renewed. I do not think that that is a matter of such notoriety that I can take judicial notice.

23 As I have indicated, the site in question has been selected by the Tungavik Federation of Nunavut and is to become part of Nunavut at the end of 1998. Pursuant to the governing agreement for that purpose, DIAND is required to clean up the site. A Land Lease Inspection Report for an inspection dated June 28, 1995 indicates that the equipment and improvements on the site are in disrepair and that there are environmental concerns. The Plaintiff does not dispute this in any of its material.

24 DIAND (and for purposes of these reasons DIAND is also considered the Defendant) indicates that in cleaning up the site it will proceed pursuant to section 13 of the Territorial Lands Regulations under the *Territorial Lands Act*. Section 13 reads as follows:

> 13. (1) When a lease is cancelled or expires and there are no arrears of rent or taxes, the lessee may, within three months thereof, remove any buildings or other structures owned by him that may be on the lands or the portion thereof withdrawn from the lease.
>
> (2) Where a lessee described in subsection (1) does not remove his buildings or other structures within three months of the expiration or cancellation of a lease, a land agent for the area in which the lands leased are located shall make an appraisal of the buildings or other structures that have been left on the lands by the

> lessee and the Superintendent may direct the sale of the same by public auction.
>
> (3) Where the buildings or other structures described in subsection (2) have been offered for sale by public auction and have not been sold, the Superintendent may authorize the disposal thereof by private sale.
>
> (4) From the proceeds realized from the sale of a building or any other structure under this section, the land agent shall, after deducting any expenses of sale and any arrears of rent and taxes, pay to the former lessee the balance remaining from that sale.

25 In its Statement of Claim, the Plaintiff refers to the leases as having various renewal provisions. The Defendant denies this and the copies of the leases attached to Ms. McRobert's affidavit include no renewal provisions.

26 The Plaintiff claims wrongful termination of the leases and that removal or disposal of the assets from the site will constitute a conversion of those assets. It claims damages for both breach of contract and conversion. It also claims an order requiring the Defendant to reinstate or renew the leases.

Interlocutory Injunction

27 The Plaintiff asks for an interlocutory injunction so as to prevent the Defendant from disposing of the assets at the fishing lodge site. In paragraph 3 of his affidavit, Mr. Hackman deposes that the cost of the improvements the Plaintiff put on the property for the fishing lodge operation was $325,000.00. He does not say how much, if any, of that was recovered when the leases were assigned to 100868 Outfitters Ltd..

28 In *923087 N.W.T. Ltd. v. Anderson Mills Ltd. et al*., (unreported), March 5, 1996, CV 06226, Richard J. of this Court stated that an interlocutory injunction is a drastic remedy, and that in making its determination whether to grant same, the Court will consider the following factors:

(1) a preliminary assessment of the merits of the case to ensure that there is a serious question to be tried,

(2) whether the applicant litigant will suffer irreparable harm if the injunction is refused, and

(3) an assessment of the balance of convenience between the parties, i.e. which of the parties will suffer the greater harm from the granting or refusal of the injunction.

29 With respect to the merits of the case, all of the evidence before me points to the Plaintiff knowing, at least as early as 1987, that the leases had been cancelled. The Plaintiff tried to get new leases on the properties, or some of them, but was unsuccessful. It appears that no steps were taken by the Plaintiff after 1989, so that some seven years have passed. The Plaintiff may believe that it does or that it should have a lease or leases, but in my view the lack of any real action in pursuing that casts doubt on that assertion.

30 I do not view the letter of June 25, 1992 as assisting the Plaintiff in light of the information presented. Therefore, it seems to me that at best the Plaintiff's claim

can be only that the leases it did have were wrongfully terminated. Those leases, as I have said above were assigned prior to termination and the Alberta Court of Queen's Bench order was made only after termination. The case for the Plaintiff would appear to be a weak one. The claim for conversion no doubt depends on the outcome of the claim for wrongful termination.

31 On the issue of irreparable harm, Mr. Hackman swears in his affidavit (paragraph 22) "that if the materials and chattels are removed by the Defendant from the Char Lake Lodge and Kent Peninsula sites there will be irreparable damage to Arctic Outpost Camps Ltd. future potential for operation as a tourist fishing camp". No explanation of this statement is given in his affidavit. I have to question how the removal and even disposal of the materials and chattels which have apparently been sitting on the site for at approximately 7 to 10 years while the lodge has not operated could cause irreparable damage to the future potential of the Plaintiff to operate as a tourist fishing camp. There is no evidence that the Plaintiff has operated a tourist fishing camp since the leases were assigned in 1977 and no evidence that it is in a position to do so now. In his affidavit filed August 7, 1996, Mr. Hackman refers to having made considerable efforts over the past 13 years to obtain a new licence to operate a tourist fishing camp on the site but there is no evidence of anything done in the last 7 years.

The Defendant being the federal government, clearly this is not a situation where the Defendant may be unable to pay damages if same are awarded. In this case, damages would appear to be an adequate remedy: see *923087 N.W.T. Ltd. v. Anderson Mills et al.*,

supra.

32 I find that the Plaintiff has not established irreparable harm in this case.

33 The balance of convenience does not assist the Plaintiff either. Considering the delay by the Plaintiff in pursuing his claims to date, and the arrangements which the Defendant has in place for cleaning up and dealing with the site, the Plaintiff has not met the onus of showing that it will suffer greater harm should an injunction be refused than the Defendant will suffer should one be granted.

34 The Plaintiff's application for an interlocutory injunction is accordingly dismissed.

35 The Defendant's application will be dealt with in separate Reasons for Judgment as the relief sought by the Defendant involves no urgency.

V.A. Schuler
J.S.C.

Yellowknife, Northwest Territories
August 16, 1996

Counsel for the Plaintiff: Gerard K. Phillips

Counsel for the Defendant: Alan R. Regel