*Perry Building* v. *Commissioner of the NWT*, 2009 NWTSC 54

Date: 2009 08 06
Docket: S-0001-CV-2007000147

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PERRY BUILDING LTD.

Plaintiff

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

Defendant

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Application for an interlocutory mandatory injunction.

Heard at Yellowknife, NT on July 7, 2009.

Reasons filed: August 6, 2009

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

Counsel for the Plaintiff: Steven Cooper and Patricia Tiffen
Counsel for the Defendant: Martin Goldney

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REASONS FOR JUDGMENT

[1] In this application, the Plaintiff seeks an interlocutory mandatory injunction compelling the Defendant to pay rental arrears and ongoing rent under a lease between the parties.

Background

[2] Although much of the background is straightforward, there are significant disputes of fact that I will acknowledge. For approximately 30 years, the Defendant has leased a three-storey office building in Inuvik from the Plaintiff. In 1998 the lease they were then operating under was extended to April 30, 2005. When that lease expired, the parties entered into negotiations for a new lease. The negotiations proceeded to the extent that the Plaintiff signed a lease (the "2005 proposed lease') with terms the parties had verbally agreed on. However, the Defendant refused to sign because of complaints from its employees about the safety of the building.

[3] As a result of the complaints, the Defendant obtained a technical report on the building (the "NEAL report"). The report identifies various structural problems with the building and says that in a number of areas it fails to meet National Building

Code requirements. It concludes that there could be structural failure over time or catastrophic in nature and recommends the immediate relocation of personnel. The report identifies excessive weight of equipment and other materials on the upper floors, but says that the main floor can be re-occupied once the upper two floors are empty of equipment and personnel. It also says that an entirely new structure might be required but that a costly rehabilitation of the existing structure might be possible.

[4] The Defendant evacuated the building on February 7, 2006, the day after receiving the NEAL report.

[5] In response to the NEAL report, the Plaintiff obtained its own technical report (the "Williams report"). The Williams report disagrees with the NEAL report in several key respects. While it finds that the NEAL report's concerns about the piles and columns supporting the floors are not well-founded, the Williams report does agree that the building does not meet National Building Code standards and the upper floors have to be strengthened.

[6] The Williams report states, "Apparently, changes were made in two areas of the building by the tenant and without competent structural advice. We understand that the tenant did not request permission from the owner". The report says that it is difficult to assess the percentage cost of the work to repair due to the tenant's changes in the context of all the repair work needed but suggests the cost would be "around" 20 to 30 percent of the overall project cost.

[7] At the end of February 2006 the Defendant went back into occupation of the first floor of the building. Subsequently, the Plaintiff and the Defendant entered into a "without prejudice" agreement which is a major issue of dispute on this application. The agreement provides for payment by the Defendant of a reduced monthly rent plus all operating and maintenance costs as under the previous leases.

[8] Since the evacuation, the Defendant has also paid for alternate office space for 53 of its employees who worked in the Plaintiff's building prior to the evacuation.

[9] Recently, the Defendant has set off against the ongoing amounts for operating and maintenance costs amounts by which it says it has overpaid those costs in advance and amounts that were wrongly claimed as part of those costs by the Plaintiff. The Plaintiff, on the other hand, says that it is unable to begin repairs to

the building because of the reduced rent and the reduced payments for operating and maintenance costs.

[10] In July 2007, the Plaintiff filed a statement of claim alleging that the Defendant has breached covenants in the lease by not paying the full amount of rent and by making changes to the building which caused structural weaknesses or damage. The statement of claim seeks damages and an injunction compelling the Defendant to pay full rent, both arrears and ongoing. A notice of motion for an interlocutory injunction was filed at the same time as the statement of claim. That notice of motion was adjourned and cross-examinations took place on some of the affidavits filed. The motion was brought back on recently and was heard on July 7, 2009, at which time I reserved decision on it.

*The legal test*

[11] Counsel agree that the legal test for an interlocutory mandatory injunction is as set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 and *Commission scolaire francophone, Territoires du Nord-Ouest et al v. Northwest Territories (Attorney General)*, [2008] N.W.T.J. No. 54, 2008 NWTSC 53 :

> 1. the Applicant must demonstrate a strong prima facie case;
>
> 2. the Applicant must demonstrate that irreparable harm will result if the injunction is not granted; and
>
> 3. the Applicant must show that the balance of convenience favours it.

[12] As Charbonneau J. said in *Commission scolaire francophone*, an interlocutory injunction is a discretionary, exceptional measure, because its purpose is to grant a remedy to a party before a case has been heard on its merits.

*Has the Plaintiff demonstrated a strong prima facie case?*

[13] The first issue in dispute is the cause of the damage to the building. The Plaintiff says that the evidence points to the Defendant having caused the problems that resulted in structural damage to the building by making structural alterations without the Plaintiff's consent. Therefore, the Plaintiff says, it is the Defendant's own fault that it had to move employees out of the building and it should be paying

rent pursuant to the lease that was about to be signed or the lease that had just expired when the Defendant evacuated the building. The Plaintiff's position is that so long as the Court can say that the Plaintiff is likely to succeed to some extent at trial, the injunction should be granted.

[14] The Defendant, on the other hand, denies responsibility for the damage to the building and points out that there is no allegation that it is responsible for inadequate design of the floors which do not comply with the National Building Code. The Defendant says that it acted prudently on receipt of the NEAL report and its warning about structural failure of the building and that it cannot fully re-occupy the building because the structural problems have not been addressed. It relies on the without prejudice agreement and says that it has paid the rent required under that agreement for partial occupation of the building.

[15] The Plaintiff relies on statements in the Williams report, to which I have referred above, to the effect that the cost to repair changes made to the building by the Defendant will amount to 20 to 30 percent of the total repair cost. The Plaintiff says that because the previous leases restricted the Defendant to making alterations to the building "without causing any structural weakness or damage" (clause 6.6), there is a strong *prima facie* case that the Defendant is in breach of the lease.

[16] At trial, the issue will be whether the Defendant made alterations to the building and if so, whether those alterations caused structural weakness or damage. Even if those facts are established, the question will be the extent to which the structural weakness or damage caused by the Defendant's alterations contributed to the conclusion in the NEAL report that there could be catastrophic structural failure and therefore immediate relocation of employees was recommended. The Williams report says "apparently" changes were made in the building by the Defendant without competent structural advice and without permission of the Plaintiff. The report does not say where that information came from, but since the Plaintiff commissioned the report, it is not unreasonable to think that the information came from the Plaintiff. But the word "apparently" is somewhat curious in that it suggests a lack of first-hand information about what, if anything, the Defendant did.

[17] The Plaintiff points out that both the NEAL and the Williams reports talk about the upper floors of the building being overloaded with equipment. To the extent that this was the cause of the Defendant having to evacuate the building, this is likely the strongest aspect of the Plaintiff's case. However, even if it can be said

on the basis of the Williams report that 20 to 30 percent of the cost of repairs needed is likely attributable to the actions of the Defendant, that simply means that the Plaintiff is likely to be partially successful in its claim. To justify the drastic relief of an interlocutory injunction the Plaintiff must show more than simply a likelihood of partial success. A strong *prima facie* case means that the applicant for an interlocutory injunction is likely to prevail at trial. Although the Plaintiff presents a serious issue to be tried, the more stringent requirement for an interlocutory mandatory injunction, that the Plaintiff show it has a strong *prima facie* case, has not been satisfied.

[18] Another issue in dispute is whether the parties are operating under a lease or the without prejudice agreement. The Plaintiff takes the position that the parties are bound by the 2005 proposed lease or, alternatively, the lease that expired not long before the evacuation took place. The Defendant says that although it intended to sign the 2005 lease, when it found out about the serious structural problems, it declined to do so and the parties are operating under the without prejudice agreement. That agreement provides that the Defendant pays what amounts to 45 percent of the rent that would have been payable under the 2005 proposed lease plus actual operating and maintenance costs. The reduced rent was agreed upon because at the time the Defendant was occupying only the main floor of the building and making incidental use of the top floors.

[19] The Plaintiff argued that the Court should not consider the agreement at all since it was entered into on a without prejudice basis. However, it is still an agreement reached by the parties and may be relied on as such: *Barker v. Newfoundland (Minister of Works, Services and Transportation)*, [1997] N.J. No. 319 (S.C.).

[20] The issue that cannot be resolved on affidavit evidence is how long the without prejudice arrangement was to be in place. The agreement itself recites that a dispute has arisen between the parties and "in order to reach a resolution on an interim basis and without admission by either party, an Agreement has been reached between the parties". The parties do not agree on the meaning of "on an interim basis". The Plaintiff says it was intended to mean until a Court on application decides otherwise. The Defendant says it was intended to mean until trial.

[21] Since the parties do not agree on whether the without prejudice agreement was meant to govern until trial, it cannot operate to preclude the Plaintiff from

bringing this application. On the other hand, in my view the existence of the agreement is a complete answer to the Plaintiff's argument that the Defendant has wrongfully reduced the rent payable to the Plaintiff. It cannot be said that the Defendant has acted wrongfully in paying reduced rent when the Plaintiff agreed to accept reduced rent, albeit without prejudice to her claim that the Defendant should have been paying full rent in accordance with the proposed 2005 lease all along. In submissions, the Plaintiff attempted to use this "wrongful" reduction of rent to paint the Defendant as acting in bad faith, thus necessitating an injunction to stop such behaviour. I find no merit in that argument.

[22] The third main issue is the effect of the Defendant having re-occupied the building. The Plaintiff says that notwithstanding what was contemplated when the without prejudice agreement was entered into, the Defendant is and has been occupying the entire building since shortly after the evacuation and so should be paying the full rent contemplated under the 2005 proposed lease. The Defendant says it is and has been occupying only the main floor of the building and making incidental use of the parts of the building it does not occupy and that this was contemplated by the reduced rent in the without prejudice arrangement. The without prejudice agreement itself does not specify which part or parts of the building the Plaintiff will occupy or use. This is a factual dispute that cannot be resolved on the affidavit evidence before the Court. Similarly, the deductions made by the Defendant from its payments for operating and maintenance costs so as to compensate for advance amounts that were overpaid, are matters which will have to be addressed at trial. I am unable to say based on what is before me that the Plaintiff has a strong *prima facie* case on these issues.

[23] Ultimately, the legal consequences will depend on how the factual disputes are resolved. On the whole, however, as I have indicated above, although the Plaintiff has shown that there is a serious issue to be tried, it has not shown that it has a strong *prima facie* case.

*Has the Applicant demonstrated that irreparable harm will result if an injunction is not granted?*

[24] The Plaintiff alleges that it cannot keep up maintenance on the building or make the repairs required unless the Defendant pays the full amount of rent it was to have paid under the lease. The building, which is the Plaintiff's only asset, will deteriorate, as will the financial situation of the principal of the Plaintiff. This will also result in delay and have an impact on the Plaintiff's financial ability to pursue this litigation. The Plaintiff says that this also detrimentally affects the financial reputation of the Plaintiff, which the Plaintiff says is not compensable by damages.

[25] The Defendant says that the harm claimed by the Plaintiff is compensable by damages and thus is not "irreparable". The Defendant also points to evidence that the Plaintiff does have financial resources and is not in dire straits. Finally, the Defendant points out that it is paying the actual operating and maintenance costs for the whole of the building as was agreed in the without prejudice agreement, although it acknowledges making deductions from those payments for the reasons I have referred to above.

[26] Irreparable harm was defined by the Supreme Court of Canada in *R.J.R. MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311 as follows:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[27] Irreparable harm arises if the refusal by the Court to grant relief would so adversely affect the applicant's interests that the harm could not be remedied if the decision at trial is in the applicant's favour: *Aram Systems Ltd. v. NovAtel Inc.*, [2006] A.J. No. 1216 (Q.B.).

[28] There is no issue as to the Defendant's ability to pay damages if ordered to do so.

[29] The Plaintiff's claim by its very nature is one that is compensable by damages. It is a monetary claim.

[30] There is no evidence of damage to reputation, only a concern voiced by the Plaintiff that its financial reputation and that of its principal may be damaged.

[31] No authority was offered for the proposition that an injunction should issue to address the Plaintiff's difficulty in funding this litigation and counsel for the Plaintiff did not press that argument.

[32] The Plaintiff's principal alleges that both she and the Plaintiff will be bankrupt soon. I will not review the evidence about the Plaintiff's financial situation in detail but I note that the building itself in its present state appears to have some value. The appraisal attached to the Plaintiff's affidavit indicates a value "as is" of $700,000.00 in 2006 after the structural issues came to light and there is no evidence suggesting that the building has deteriorated significantly since then. The material indicates that the Plaintiff's principal has made certain financial decisions over the past few years affecting her asset and income position. Perhaps more importantly, the evidence indicates that the Plaintiff never established a reserve fund to pay for repairs to the building. It would not be appropriate to issue an injunction to address these financial issues.

[33] The Plaintiff complains that the Defendant is wrongfully reducing the amounts it pays for operating and maintenance costs. The Defendant says it has made the reductions from ongoing payments because the advance payments were based on figures from the Plaintiff which were subsequently found to include amounts that were improperly included. If the effect of this is that the Defendant has refused to pay for costs that it should have paid, that is compensable by damages. The Plaintiff did not, on this application, provide a detailed or satisfactory response to the Defendant's claim that it has been overcharged for the costs.

[34] The Plaintiff also argues that unless the Defendant pays the full rent under the 2005 proposed lease and the amount calculated by the Plaintiff for operating and maintenance costs, it cannot afford to begin repairs to the building. Again, that is a financial issue that can be addressed by damages. Save for an estimate that the Plaintiff concedes is not substantiated, there is no evidence as to the expected cost of repairs or how long they would take or whether they could be accomplished within a reasonable time or even before a trial could take place.

*[35]* For the foregoing reasons, the Plaintiff has not satisfied me that it will suffer irreparable harm if the injunction is not granted.

*Has the Applicant shown that the balance of convenience favours it?*

[36] The Plaintiff says that it is unable to repair the building and will continue to deteriorate financially without an injunction compelling the Defendant to pay full rent along with operating and maintenance costs. The Defendant points out that if compelled to pay, it will be spending public funds on full rent on the Plaintiff's building despite not being able to occupy the entire building and having to pay rent elsewhere for space for the 53 employees who cannot be moved back into the Plaintiff's building.

[37] Both sides stand to suffer financially. It is for the Plaintiff to satisfy the Court that it will suffer greater harm if the injunction is refused than the Defendant will suffer if it is granted. While there may be a basis upon which to say that the Plaintiff will suffer more financially, this is only one of the factors to be considered.

[38] The Defendant asks the Court to consider that there has been significant delay on the part of the Plaintiff in bringing on this application, which was initially filed in July 2007 arising out of circumstances that occurred in February 2006, more than three years ago. The Defendant points out that this case might have come to trial, or close to trial, in that time had the Plaintiff been diligent. As at the date of argument, no statements as to documents had been filed and no examinations for discovery held, although it is not clear whether counsel anticipate any examinations beyond those that took place on the affidavits filed for this application. Although counsel for the Plaintiff advised that there were some difficulties in obtaining answers to undertakings given by the Defendant's representative, that cannot account for the delay in pursuing the injunction.

[39] I view the delay as a significant weakness in the Plaintiff's application. In *923087 N.W.T. Ltd.* v. *Anderson Mills Ltd.*, [1996] N.W.T.J. No. 19 (S.C.) at paragraph 10, Richard J. observed that an interlocutory injunction is by nature an immediate, and drastic, remedy, one that should not be used in practice either as a bargaining or negotiating tool or as a device to obtain a quick inexpensive resolution of the merits of the litigation. Here, the Plaintiff wants the injunction so as to preserve a status quo that has not existed for three years, without in the meantime having taking significant steps to move the matter to trial.

[40] Despite the Plaintiff's argument that the Defendant caused the damage that resulted in the recommendation to move employees out of the building, it appears clear from the NEAL and Williams reports that many of the problems cannot be

attributed solely to the Defendant. To grant the injunction would impose all of the responsibility on the Defendant without a trial on the merits.

[41] The above considerations lead me to the conclusion that the balance of convenience does not favour the Plaintiff.

[42] For the foregoing reasons, I find that the Plaintiff has not satisfied the three criteria necessary to obtain an interlocutory mandatory injunction and the application is dismissed. Costs usually follow the event but if counsel wish to make submissions they may do so by contacting the Registry within 30 days to obtain a date for that purpose. Alternatively, they may within that same time frame jointly propose a schedule for the filing of written submissions on costs.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
6th day of August 2009

Counsel for the Plaintiff: Steven Cooper and Patricia Tiffen
Counsel for the Defendant: Martin Goldney

S-1-CV 2007000147

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REASONS FOR JUDGMENT OF
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