Date of Release: January 26, 1993 No. A901202
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	
	)	
DOLPHIN TRANSPORT LTD.	)	REASONS FOR JUDGMENT
	)	
Plaintiff	)	
	)	OF THE HONOURABLE
AND:	)	
	)	
WEATHER B TRANSPORT CO. LTD.	)	MR. JUSTICE LYSYK
345909 B.C. LTD.	)	
	)	
Defendants	)	

Counsel for the Plaintiff	H.S. MacDonald
Counsel for the Defendant Weather B Transport Co. Ltd.	S.M. Johnson
Dates and Place of Hearing	January 18-22, 1993 Vancouver, British Columbia

By the terms of a consent order made under Supreme Court Rule 39(29), the two issues to be determined now are "whether there is a valid and enforceable lease agreement and [if so] between what parties". The plaintiff contends that it entered into a valid and enforceable lease agreement with the defendant Weather B Transport Co. Ltd. (Weather B). If that contention is sustained, all issues relating to remedies claimed against the defendants will be tried at a later date.

At all material times Weather B was, and it remains, a tenant under a lease (the Head Lease) entered into with the other defendant, 345909 B.C. Ltd. (the Landlord). The Landlord was not

represented in these trial proceedings. The court was informed that by agreement reached between counsel for the plaintiff and counsel for the Landlord, the Landlord has agreed to be bound by the decision of this court on the issues now before it. If the plaintiff obtains a judgment permitting it to occupy part of the premises which are leased by the Landlord to Weather B., then the Landlord will consent to a sublease or assignment of the appropriate portion. In exchange, the plaintiff has agreed that it will not seek damages or costs against the Landlord.

The Head Lease relates to a property of which the Landlord is the registered owner and which is located at 4254 Commerce Circle, Victoria, British Columbia. Under the Head Lease, dated February 1, 1989, the Landlord leased the premises to Weather B. for a five year term commencing on that date. A term of the Head Lease provides Weather B with an option to renew for a further period of five years.

Weather B has a 49% ownership interest in the Landlord. The other 51% is divided equally between Aral Developments Ltd. and Sea Isle Management Ltd., the principals of which are, respectively, Messrs. Art Kool and Roland Beaulieu.

The plaintiff says that the essential terms of its lease agreement with Weather B are contained in a two-page letter, with attachments, dated January 8, 1990 (the January 8 letter). That

letter, over the signature of the plaintiff's President, Mr. Morris Peter, was directed to the attention of Mr. Allen Holgate, who was then President of Weather B. Mr. Holgate signed the letter on Weather B's behalf and transmitted a facsimile copy of the signed letter to the plaintiff on January 12, 1990. The attachments to the January 8 letter consisted of two pages of drawings of certain leasehold improvements and one page of details regarding those leasehold improvements.

One change to these proposed terms, requested by Weather B, was made by adding an eleventh point to the details page. This change was accepted by the plaintiff and initialled on its behalf on January 12 by Mr. James Ruse. At this time, the latter was employed as Manager of Vancouver Island operations for a group of three Dolphin companies consisting of the plaintiff, Dolphin Delivery Ltd. and Dolphin Distribution Ltd.

Several sets of drawings relating to the proposed leasehold improvements had been prepared in the course of negotiations between representatives of the plaintiff and Weather B. Due to error on the part of someone in Mr.Peter's office, the two pages of drawings attached to the January 8 letter did not represent the most recent set of drawings but, instead, were ones dated a week or so earlier than the ones intended to form part of the January 8 package. The differences between the two sets of drawings are minor and the evidence is that Mr. Holgate did not notice this

error at the time. Nothing turns on this discrepancy in the documentation.

Shortly after the January 8 letter was signed on behalf of Weather B, a deposit cheque was delivered by the plaintiff to Weather B in the amount of $3,737.50, to be applied against the first month's rent after completion of construction. This deposit cheque was cashed by Weather B on January 15, 1990.

Under the terms of the January 8 letter, certain construction work to effect the leasehold improvements was to be undertaken by Weather B to meet the plaintiff's requirements. The letter provided that the occupancy date and completion date of construction was to be March 1, 1990 but, if construction was not complete by then, the plaintiff would have the option of occupying the premises prior to completion of construction at a reduced rental.

With the passage of time following signature of the January 8 letter, the plaintiff became concerned about the apparent lack of progress in readying for its occupation the portion of the Commerce Circle property which was the subject of its dealings with Weather B. At the plaintiff's initiative, a meeting was arranged in mid-February, 1990. The meeting was attended by the plaintiff's Mr. Ruse, Messrs. Allen Holgate and Brian Bevan of Weather B, and Messrs. Art Kool and Garry Gilchrist of Aral Developments Ltd., the

proposed contractor. Mr. Ruse came away from that meeting with the impression that arrangements for implementation of the terms of the January 8 letter were in hand, albeit proceeding more slowly than anticipated.

Obliged to vacate the property it had previously leased at Viewfield Road in Victoria, the plaintiff moved into the premises at Commerce Circle on or about April 1, 1990. The plaintiff agreed to allow Weather B to continue to store some of its goods in the space allocated to the plaintiff in exchange for a rent reduction or rebate. Later in the month of April, after the plaintiff had taken possession of the premises, Weather B advised the plaintiff that Weather B was unable or unwilling to go through with the deal. Mr. Ruse testified that Mr. Holgate had offered to waive the April rent because the renovations had not been carried out and Weather B did waive rent for that month. Commencing in May, 1990, the plaintiff made rental payments and it has remained in occupation. The precise amount of rent paid to date is not material to the issues presently before the court.

The plaintiff and Weather B had had prior business dealings dating from a time prior to February, 1989 when they had occupied adjoining properties on Viewfield Road. On August 11, 1989, Mr. Donald Reidie, a sales consultant employed by Weather B, wrote to Mr. Ruse proposing to lease to the plaintiff warehouse and office space at Commerce Circle. Weather B not having obtained a

response, and wishing to ascertain whether or not the plaintiff was interested in such a transaction, Mr. Holgate wrote to the plaintiff on December 14, 1989. This two-page letter, captioned "Re: Letter of Intent", proposed a ten year lease at a specified rental and, among other things, described proposed renovations to conform with the plaintiff's requirements. The letter stated that the plaintiff's signature would be required "on the following agreement subject to final legal agreements to complete the next phase of building approval" and it asked for return of signed copies of the letter.

Mr. Peter was not prepared to sign the December 14 letter. However, it formed the basis of discussions between him and Mr. Holgate which culminated in the January 8 letter.

Mr. Holgate's letter of December 14, 1989 referred to a "final presentation to Saanich Council" and it was understood that the proposed construction work to meet the plaintiff's requirements would require municipal approval. The evidence at trial indicated that obtaining such approval was not expected to present difficulty. Although evidence on the subject was scanty, it appears that documentation necessary to obtain approval was never submitted to the municipality and construction work has not proceeded. The evidence does not disclose the reason for Weather B's ultimate decision, communicated to the plaintiff in April, 1990, not to proceed along the lines contemplated earlier.

At trial, Messrs. Ruse and Peter were called to testify for the plaintiff and Messrs. Holgate and Reidie for the defendant Weather B.

I turn now to the two issues presently before the court and it will be convenient to deal first with the question of the parties to the alleged agreement. With whom was the plaintiff dealing?

The position of the plaintiff is straightforward. It says that at no time prior to signing of the January 8 letter was it told, nor did it have knowledge, of the fact that Weather B's interest in the Commerce Court premises was merely that of a lessee. It says that Weather B conducted the negotiations in its own name as if it were owner of the property and in a position to grant the plaintiff a lease as opposed to a sub-lease or an assignment of a leasehold interest. The plaintiff says it had no knowledge of the fact that Weather B was not owner of the property prior to obtaining legal advice in consequence of the "no-deal" position taken by Weather B in April, 1990.

It may be noted at this point that the plaintiff and Weather B had elected, as an economy measure, to dispense with the involvement of lawyers in the negotiations which culminated in signing of the January 8 letter. More specifically, this was agreed upon by Messrs. Peter and Holgate, the persons who carried authority to bind their respective companies contractually.

What evidence does Weather B rely upon to establish knowledge on the part of the plaintiff that Weather B was merely a lessee, not the owner, of the Commerce Circle premises? With a single exception, all of the documentation up to and including the January 8 letter speaks in terms of Weather B granting the plaintiff a lease or leasehold interest. The exception is found in a sentence contained in the December 14, 1989 letter which reads as follows:

> "2. Ten year lease with option to review in the 5th year and option to sublet where agreeable by both parties."

Neither Mr. Peter nor Mr. Holgate could say precisely what the reference to "option to sublet" was to mean. Mr. Reidie, who had prepared the December 13 letter for Mr. Holgate's signature, testified that he thought it referred to the plaintiff obtaining additional space in the Commerce Court premises. Another possible interpretation of that clause would be that the plaintiff would have the option to sublet to another party if Weather B agreed to this. In any event, the term "sublet" does not reappear in the January 8 letter. Clause 9 of that letter reads:

> "9. Dolphin Transport Ltd. has the option at any time during this lease, or option period, to lease the other half of the building upon thirty days written notice."

The documentary evidence, therefore, provides scant support for Weather B's position on this issue.

The only other evidence that the plaintiff knew, or might have known, prior to the January 8 letter that someone other than Weather B owned the Commerce Circle premises came from Mr. Holgate. Messrs. Peter and Ruse denied having any such knowledge prior to the January 8 letter and Mr. Reidie testified that he was not present at any discussions bearing on the ownership of Commerce Circle. Mr. Holgate's own evidence on this subject was vague. He acknowledged that discussions with the plaintiff's representatives were in terms of a lease, not a sub-lease. While he felt he had told Mr. Ruse that someone other than Weather B was the owner of Commerce Circle, he could not recall the specifics of any such conversation or say when it had taken place. Under cross-examination, he adopted his affidavit evidence at an earlier stage of these proceedings to the effect that his best recollection is that he told Ruse about this before the end of January, 1990. But what might have happened after Mr. Holgate's signature of the January 8 letter on January 12 is of secondary interest, as is the evidence, which I will not stop to review, suggesting that some persons in the plaintiff's employ had acquired information by February, 1990 that Weather B was not the proprietor, or not the sole proprietor, of Commerce Circle.

On the whole of the evidence, I have no hesitation in finding that if a legally enforceable lease agreement was entered into when Mr. Holgate signed the January 8 letter, the parties to that agreement were the plaintiff and the defendant Weather B.

I turn now to the question of whether Mr. Holgate's signature signifying acceptance of the plaintiff's offer as set out in Mr. Peter's January 8 letter created a valid and enforceable lease agreement. Weather B says that it did not because essential terms were not agreed upon, or because certain terms of the agreement were so uncertain as to render the agreement void or because agreement upon the terms of the January 8 letter (as modified by the January 12 amendment to the list of building renovations) was to be conditional upon a subsequent formal lease agreement. In my view, none of these defence submissions can be sustained.

First, as counsel for Weather B rightly concedes, it is not necessary that the parties agree upon, and record in writing, each and every detail relating to their proposed relationship of landlord and tenant in order to create a valid and legally binding lease agreement. What is necessary is that there be a meeting of minds as to the essential terms: **Horse & Carriage Inn Ltd. v. Baron** (1975), 53 D.L.R. (3d) 426, at 436 (B.C.S.C.); **First City Investments Ltd. v. Fraser Arms Hotel Ltd.** (1979), 104 D.L.R. (3d) 617, at 624-625 (B.C.C.A.). The January 8 letter, with attachments, identifies the parties, describes the premises,

specifies the date of occupation and sets out the amount of rent payable after occupation in the event that construction has not been completed and the amount of rent payable after completion of construction. The document deals with temporary and permanent office space and it deals with the nature of the renovations in considerable detail. It specifies a five-year term with an option to renew for a further five years and it also provides for an option to lease additional space.

There were a few details of construction which continued to be the subject of discussion after the January 8 letter was signed. However, there was no suggestion in the evidence that either party considered these items, individually or collectively, to be of major importance or to be ones which could not readily be resolved in their ongoing dealings. None of these details can reasonably be characterized as essential terms of the agreement to lease.

One matter which was not dealt with in the January 8 letter, and which the parties apparently did not specifically address in their discussions, relates to the amount of rent payable upon exercise of the option to renew or the option to lease additional space. In their testimony, Messrs. Peter and Holgate expressed their thoughts concerning these eventualities: either the rentals set out in the January letter would extend to the additional term or additional space or, alternatively, the parties would negotiate the rental and, failing agreement, would arbitrate. In my view,

the lack of specific provision relating to rental payable upon exercise of an option ought not, in all the circumstances, to be regarded as fatal to formation of a binding contract.

I conclude that the gaps in the contractual framework are relatively minor. Taken cumulatively, they fail to warrant a conclusion of the type reached by the Court of Appeal in **Papageorgiu v. Seyl** (1990), 45 B.C.L.R. (2d) 319, at 326, namely, that "too many essential terms are missing". As previously stated, I am of the view that in the present case no term essential to the formation of a binding contract is missing.

Nor is the agreement evidenced by the January 8 letter too vague or uncertain to be enforceable. Having regard to the fact that it was negotiated between and concluded by businessmen, not lawyers, the agreement is reasonably comprehensive and, as far as it goes, quite precise. Should differences arise in the future concerning, for example, the terms upon which an option is exercisable, the parties may be obliged to have recourse to arbitration or litigation. But the mere fact that there may be gaps or ambiguities in the matters agreed upon does not, in itself, require a conclusion that no legally enforceable contract was formed.

Weather B contends, as well, that the parties contemplated that the January 8 letter agreement would be followed by a formal

lease agreement and that only the latter would be legally binding. Mr. Holgate testified that he understood that a formal and comprehensive lease agreement would be signed in due course. Mr. Peter, on the other hand, was emphatic in his testimony to the effect that Weather B's acceptance of the January 8 letter was all that was considered necessary to document the lease arrangements.

Whether or not there was any discussion concerning the execution of a subsequent formal lease document, the evidence simply does not support Weather B's contention that the parties intended the execution of such a document to be a condition precedent to the creation of a legally binding relationship. Counsel for Weather B places considerable emphasis on the fact that the January 8 letter is captioned: "Re: Letter of Intent". However, in their testimony neither Mr. Peter nor Mr. Holgate placed any special significance on the use of that terminology and the former noted that the January 8 letter simply repeated the caption that had appeared on the December 14, 1989 letter over Mr. Holgate's signature.

The words "letter of intent" appear to have received little attention in Anglo-Canadian case law. A document carrying that description was considered in **British Steel Corp. v. Cleveland Bridge and Engineering Co. Ltd.,** [1984] 1 All E.R. 504 (Q.B.), but no particular importance appears to have been attached to use of

this terminology. The pertinent question was whether the parties had reached final agreement on essential terms.

Reference has been made to the fact that the December 14 letter referred to agreement upon its terms being "subject to final legal agreements". The January 8 letter, it may be noted, does not contain this or any other "subject to" clause.

In sum, I am satisfied that Weather B's position cannot be sustained either by the text of the January 8 letter or by the evidence concerning the course of negotiations leading up to the signing of that letter.

I conclude that the plaintiff is entitled to a declaration to the effect that the execution of the January 8 letter resulted in a valid and enforceable lease agreement between the plaintiff and Weather B.

Counsel may, if necessary, speak to the form of the Order.

"Lysyk, J."

Lysyk,J.

Vancouver, B.C.

January 26, 1993