Court of Appeal for British Columbia
International Knitwear Architects Inc. v. Kabob Investments Ltd.
Date: 1995-12-14

H.S. MacDonald, for appellant.

G.F.T. Gregory, for respondents.

(Doc. Vancouver CA018929)

December 14, 1995. The judgment of the court was delivered by

[1] SOUTHIN J.A.:– The appellant, a defendant below, appeals from the judgment of the Honourable Mr. Justice Tyrwhitt-Drake, pronounced the 5th May, 1994, consequent upon a five day trial held in February 1994. The material terms of the judgment are:

> THIS COURT ORDERS that the Plaintiff recover damages against the Defendant, Kabob Investments Ltd., for $2,000.00, plus court order interest from and after December 13th, 1991 until today's date in the amount of $231.14, and costs at Scale 1.
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> *** * ***
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> THIS COURT FURTHER ORDERS that Richards, Buell, Sutton, solicitors for the Defendant, Kabob Investments Ltd., return to The International Knitwear Architects Inc. the sum of $48,386.44, together with interest on that sum from and after June 2nd, 1994.
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> THIS COURT FURTHER ORDERS that the counterclaim of Kabob Investments Ltd. be dismissed with costs on Scale 3, and set off.

[2] The appellant seeks to set aside both the award of damages against it for trespass, which is founded on an allegedly illegal distress, and the dismissal of its counterclaim under which it sought to recover the sum of $183,763.99, for rent and other moneys allegedly owing under a lease both from the respondent, The International Knitwear Architects Inc., its tenant, to whom I shall hereafter refer as the "tenant", and from the respondents, Mr. and Mrs. Tsuruda, who were parties to the lease – the appellant says as covenantors, while they say merely as guarantors.

[3] That claim is made up as follows:

(a) basic and additional rent	$ 86,958.89
(b) interest on rent at 18% per annum	58,929.64
(c) expenses incurred to enforce lease	
– solicitors	33,175.59
– bailiff	4,636.49
(d) NSF cheques	20.50
	$183,763.99

[4] The premises in issue are a shop on West 4th in Vancouver.

[5] Although the executed lease has been lost, the learned judge was able to conclude that, indeed, the parties had executed an instrument and to determine its relevant terms. No issue is taken with those findings.

[6] For the purposes of this appeal, the relevant terms are these:

> 2.00 TERM
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> To have and to hold the Premises unto the Lessee for the term (the "Term"), commencing on the 1st day of May, 1987 and ending on the last day of April, 1992, subject to the payment of Basic Rent and Additional Rent as herein defined and the fulfillment by the Lessee of the covenants, agreements and conditions herein set forth and unless sooner terminated as herein provided.
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> [By other terms, "Additional Rent" included taxes, rates and assessments.]
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> 3.00 RENT
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> YIELDING AND PAYING therefor unto the Lessor during the Term hereof, rent for the Premises, without deduction, set off or abatement whatsoever, in lawful money of Canada as follows:
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> (a) basic rent (the "Basic Rent") payable in advance in equal monthly instalments of:
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> (i) $2,290.93 on the 1st day of May, 1987, and on the 1st day of every month thereafter to and including the 1st day of April, 1988;
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> (ii) $2,577.30 on the 1st day of May, 1988 and on the 1st day of every month thereafter to and including the 1st day of April, 1989;
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> (iii) $2,720.48 on the 1st day of May, 1989 and on the 1st day of every month thereafter to and including the 1st day of April, 1990;
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> (iv) $2,863.67 on the 1st day of May, 1990 and on the 1st day of every month thereafter to and including the 1st day of April, 1991; and
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> (v) $3,150.03 on the 1st day of May, 1991 and on the 1st day of every month thereafter to and including the 1st day of April, 1992;
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> (b) additional rent ("Additional Rent"), being such amounts as shall become due and payable by the Lessee pursuant to the terms of this Lease, or otherwise hereunder. Unless otherwise herein specified, Additional Rent shall be payable by the Lessee to the Lessor within seven (7) days after written notice thereof is given by the Lessor to the Lessee.
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> * * *
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> 6.12.01 DISTRESS
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> All the goods and chattels of the Lessee in or upon the Premises or wheresoever situated shall be liable to distress and sale in the usual manner for any arrears of rent without exemption, including Additional Rent and accelerated rent and none of the goods in the Premises shall be exempt from distress, seizure and sale for arrears of rent and the costs and charges incidental to such distress.
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> 6.12.02 The Lessor may use such force as it may deem necessary for the purpose of gaining admission to the Premises without being liable to any action in respect thereof or for any loss or damage occasioned thereby and the Lessee hereby expressly releases the Lessor from all action, proceedings, claims or demand whatsoever for or on account or in respect of any such distress.

6.12.03 In case of removal by the Lessee of the goods and chattels of the Lessee from the Premises, the Lessor may follow the same for ninety (90) days, for the purpose of distraining pursuant to this section 6.12.

6.12.04 The Lessee agrees that the exercise of the Lessor's right of distress shall in no manner prejudice or adversely affect the Lessor's right to pursue other remedies for recovery of rent hereunder or by law in any manner that the Lessor deems necessary, and the Lessor may distrain, notwithstanding that it has sued for rent or re-entered pursuant to paragraph 6.04.01, and the Lessor may concurrently pursue distress and any other remedy available to it hereunder.

* * *

6.16 WAIVER

The failure of the Lessor to insist upon strict performance of any covenant or obligation of the Lessee in this Lease or to exercise any right or option hereunder shall not be construed as a waiver or relinquishment of that covenant or obligation or any subsequent or other default hereunder. The acceptance of any rent from or the performance of any obligation hereunder by a person other than the Lessee shall not be construed as an admission by the Lessor of any right, title or interest of such person as a sub-tenant, assignee, transferee or otherwise in the place and stead of the Lessee, nor shall it constitute a waiver of any breach of this Lease. If the Lessor should make an error in calculating or billing any monies payable by the Lessee under this Lease, such shall not be deemed to be a waiver of the Lessor's right to collect the proper amount of monies payable by the Lessee hereunder.

6.17.01 INTEREST

The Lessee shall pay to the Lessor interest at the rate of Eighteen per cent (18%) per annum, on all payments of rent and other sums required to be made by the Lessee pursuant to this Lease or which the Lessor has paid on behalf of the Lessee, which have become overdue, so long as such payments remain unpaid by the Lessee, which interest shall be recoverable as Additional Rent hereunder.

* * *

6.18 LESSOR'S EXPENSES ENFORCING LEASE

If the Lessor elects to retain the services of a solicitor, bailiff, rental agent or any other person for the purpose of assisting the Lessor in enforcing any of its rights hereunder or in re-renting the Premises, it shall be entitled to collect from the Lessee the actual cost of all such services as Additional Rent.

* * *

7.01 COVENANTORS' PROVISIONS

The Covenantors acknowledge that they have requested the Lessor to enter into this Lease with the Lessee, that it is a condition of the Lessor entering into this Lease that the Covenantors become a party hereto on the terms and conditions hereinafter contained and in consideration thereof and for other good and valuable consideration received by the Covenantors from the Lessor, the receipt and adequacy of which is hereby acknowledged by the Covenantors:

(a) in addition to their agreements contained in subparagraphs (b) and (c), the Covenantors guarantee to the Lessor the payment by the Lessee of all monies owing or to become due or owing under this Lease and further guarantee to the Lessor the punctual performance of all agreements, obligations and covenants of the Lessee under this Lease; and

(b) in addition to their agreements contained in subparagraphs (a) and (c), the Covenantors as primary obligors and not as guarantors, hereby covenant and agree with the Lessor to pay all monies payable by the Lessee under this Lease, and adopt as their own covenants and agreements each and every obligation, covenant and agreement on the part of the Lessee to be observed and performed under this Lease, and hereby covenant and agree with the Lessor to observe and perform each and every such obligation, covenant and agreement; and

(c) in addition to their agreements contained in subparagraphs (a) and (b), the Covenantors covenant and agree to indemnify and save harmless the Lessor from and against any and all loss, damages, expenses, costs and liabilities whatsoever which shall arise from or be caused by the default or breach of the Lessee under any one or more of the terms or provisions of this Lease.

The liability and obligations of the Covenantors under this Lease, and pursuant to the foregoing subparagraphs shall be joint and several and shall not be released or affected by the bankruptcy, insolvency, receivership or winding up of the Lessee, nor by any act, omission, indulgence, release, postponement, waiver, compromise, settlement, extension or other thing whatsoever done by or consented to by the Lessee or the Lessor, save for the payment in full of the rents and all other monies at anytime owing or payable hereunder and the performance of all the Lessee's obligations and duties under this Lease.

[7] It is common ground that the tenant did not pay all the rent reserved by the lease. As the learned judge put it:

> By 1 May 1989 the business of Knitwear was experiencing serious difficulties, and it could not meet all its obligations, the principal one being the rent. Mrs. Tsuruda told Mr. Kidd of her difficulties, and asked him if he would agree to a reduction in rent. He, displaying a good-natured wish to help his tenant through a difficult time, did so: and here arises a major issue. What was the effect of this agreed reduction?

[8] I need not recount all he said on this issue. It is sufficient to note that, having recited events between then and December 1991, the learned judge concluded that the appellant's conduct toward the tenant in this case did bring the appellant's claim within the doctrine of *Central London Property Trust Ltd. v. High Trees House Ltd.* (1946), [1947] K.B. 130, [1956] 1 All E.R. 256.

[9] Insofar as the learned trial judge's conclusion covered allegedly unpaid rent, both basic and additional, from the summer of 1989 to December 1991, I consider he has made a finding of fact and his reasons disclose no error in law.

[10] Subject, therefore, to the question of the effect of clause 6.16 of the lease, the appellant cannot recover for rent allegedly due from the time when the promissory estoppel took effect until December 1991.

[11] That being so, I need not address Mr. Gregory's invocation of s. 40 of the *Law and Equity Act.*

[12] As to clause 6.16, I simply do not think that, upon its true construction, it prevents a promissory estoppel from taking effect according to its terms.

[13] The learned judge described what happened in December 1991, thus:

> There matters rested until Saturday, 13 December 1991, when the defendant Accurate Bailiffs and Collection Agency Ltd. ("the Bailiff") entered and took possession of the premises and goods therein under the landlord's warrant. Mr. Kidd says he had heard rumours that Knitwear was about to abandon the premises and further stated that he observed the stock was low. Mrs. Tsuruda gave evidence to the contrary. Not much turns on this, as Kabob was exercising rights which it believed it had under the lease, and had indeed been advised again and again by its solicitors and rental agent to take the step complained of. That it took so long to do so might be said to be surprising, but the evidence of Mr. Kidd and his solicitor, Mr. Luther, persuades me that Mr. Kidd was interested in seeing Mrs. Tsuruda succeed in her enterprise, and so granted her much indulgence, as indeed he had done throughout. The evidence in general further persuades me that it was the continual pressure of the advice given to Mr. Kidd which finally persuaded Kabob to distrain for its long overdue full rent.
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> The distraint took the plaintiffs by surprise. After much frantic activity, they were able, by means of a substantial payment to be held in trust by Kabob's solicitors, to persuade the Bailiff to withdraw.

[14] The warrant to the bailiff was to distrain the goods and chattels "for the sum of -----thirty-eight thousand eight hundred ten -----12 Dollars being several months basic rent due to me for the same on the 1 st day of December A.D., 1991, not including taxes or operating expenses owing".

[15] Upon the bailiff going in, the tenant, as the judge noted, found the money to secure the claim. It is that sum which is referred to in the second paragraph of the judgment.

[16] It is common ground that no rent had been paid on 1st December, although the existing understanding was that the tenant would pay $1,000.00 each month.

[17] On the 24th December, 1991, the tenant received a demand from the appellant, which I quote in part:

> We have had many discussions with you about your outstanding rent under the above lease, which has not resulted in the outstanding balance being paid or reduced. We have made numerous and repeated requests for payment and you have given us a series of excuses for non-payment and advised us of a number of plans to generate the necessary funds. We have been extremely accommodating by not taking legal action against you in this regard, in an attempt to give you the opportunity to fulfil your obligations to us. However, despite your assurances that the amounts would be paid, the outstanding balance has not been paid, and in fact has continued to increase.

> We are enclosing a statement of account showing the base rent, common area charges and property taxes, showing a balance owing to December 31, 1990 of $51,269.68. In support of this, we enclose Review Engagement Reports from our Certified General Accountant Hanne Damgaard for the years in question as well as Operating Expense Allocations. We also enclose a separate Statement of Interest, showing the interest owing under the lease to December 31, 1990, amounting to $18,732.16. Finally, we enclose a 1991 statement of account dated December 16, 1991, showing a cumulative balance owing for rent, common area charges and property taxes of $79,044.65 as of December 31, 1991. The total of the foregoing amounts owing by you is $97,776.71.
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> * * *
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> If the foregoing amounts are paid, commencing January 1, 1992 the following payments will be due under your lease in advance on the first day of every month during 1992:
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> | | |
> |---|---|
> | (a) Basic Rent | $3,150.03 |
> | (b) Common Area Charges | 294.52 |
> | (c) Property Taxes | 541.67 |
> | (d) Monthly Total | $3,986.22 |

[18] From the 1st January, 1992, to the end of the term, the tenant made substantial payments but those payments fell considerably short of the rent, both basic and additional, reserved under the lease.

[19] I come then to the first question. Was the tenant entitled to damages for trespass?

[20] The learned judge referred to that issue in this way:

> I conclude, then, that Kabob is bound to honour its commitment not to insist upon full payment of rent – at the very least, without reasonable notice that it was going to do so. …

[21] He then found that there had been no reasonable notice and went on:

> The estoppel in equity against Kabob which prevents it from enforcing its legal right to full payment of rent also, by necessary implication, discharges the guarantor. The counterclaim must accordingly be dismissed.
>
> By the same token, the distraint for rent was unlawful. It amounts to a trespass, which will attract damages, and on this sole head of claim the plaintiff succeeds.

[22] I am unable to agree with the learned judge on this point. At that stage, there was outstanding for the month of December the agreed upon rent of $1,000.00.

[23] That a distress when no rent is overdue is illegal and a trespass is trite law, but what of excessive distress? In *Tancred v. Leyland* (1851), 16 Q.B. 669, 117 E.R. 1036 (Ex. Ct.), Parke B. said, in a case in which the goods had been taken and sold:

> As some rent is admitted to have been due at the time of the distress, the distress itself was not a wrong to the plaintiff below; there is no allegation that an

> unreasonable quantity of goods were taken, so as to constitute an excessive distress; and the only questions are, whether the fact of making a distress for rent, some rent being due, is rendered illegal by being accompanied by a claim or pretence, by the defendant, that more was due than really was due, or by being followed by a sale of the goods distrained for those pretended arrears, in the manner described in the latter part of the first count.
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> * * *
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> That being so, the only remaining question is, whether the simple fact of making a distress, accompanied by an untrue claim or pretence that more was due than really was due, is actionable. It is said that it was so at common law: and the argument is therefore founded on the supposition that the common law casts a duty on a landlord distraining to inform the tenant what is the arrear of rent for which he distrains.
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> We think that the common law casts no such obligation on the distrainor. It has been expressly laid down that, if the lord distrain for rents or services, he has no occasion to give notice to the tenant for what thing he distrains; for the tenant, by intendment, knows what things are in arrear for his lands …

[24] Counsel for the tenant has not put before us any authority casting doubt upon this statement by Baron Parke of the common law. Indeed, it would take a great deal of judicial temerity to doubt anything on a question of property law said by that great judge.

[25] It follows that the appellant's appeal from the judgment against it for damages must be allowed.

[26] That brings me to the counterclaim.

[27] Insofar as the counterclaim extends over the whole of the term, it must fail, at least until December 1991 because of the learned judge's findings on the issue of promissory estoppel. The tenant's position is that if the promissory estoppel contained within it a term that the appellant could revive the obligation to pay full rent upon giving reasonable notice, the demand of 24th December, 1991, was ineffective to revive the obligation before the term ended on 30th April, 1992. Failing acceptance of that position, the tenant says the notice could not take effect until at least the 1st February, 1992.

[28] Where notice must be given to effect a purpose, at least two questions arise:

1. Must the notice be for a reasonable period?

2. If so, must the notice specify the period correctly – a so-called "dated notice": see *Australian Blue Metal Ltd. v. Hughes,* [1962] 3 All E.R. 335 (P.C.), especially at 341-343?

[29] Each of these questions must be determined in the absence of express contractual provisions on the facts of the case. In light of the course of conduct between the tenant and the appellant over more than two years, I am of the opinion that the landlord was

entitled to give, and the tenant was obliged to accept, notice reasonable in length to revive the obligations of the lease, but the notice need not be a dated notice, and that, in this case, a reasonable time, from the 24th December, 1992, to revive the obligation for both the basic rent and the additional rent, was to the 1st February, 1992.

[30] The tenant is therefore liable for the amounts payable under the lease for the final three months of the term.

[31] Is the tenant also liable under clause 6.18 for the bailiff's expenses and solicitors' fees in the amounts claimed or at all? This question was not fully addressed by counsel in argument.

[32] The bailiff's invoice comprises claims for levying, man in possession, and mileage. By far the largest item is $3,881.00 for "settling commission". As the appellant was not entitled to the amount claimed in the warrant and which was secured to prevent the goods being taken away, I am of the opinion that the appellant can only recover the items for levying, etc. and commission on the amount for which the distress was proper of $1,000.00.

[33] The claim for solicitors' fees, as disclosed by the solicitors' accounts put in evidence at the trial, includes substantial amounts for the conduct of this action in which the appellant has largely failed. Clause 6.18 cannot be construed to mean that the lessor, who has a right but of a much, much less amount than it asserted, may claim the whole of its costs, although it may be entitled to something under this clause.

[34] If counsel cannot settle upon the proper amount for solicitors' fees under the clause, they may make written submissions. I leave it to them to arrange between themselves a schedule for doing so.

[35] As to the liability of the personal respondents, the learned judge cannot have had directed to his attention clause 7.01 of the lease. Such a clause means what it says and takes effect according to its terms: see *Credit Fonder Trust Co. v. Zatala Holdings Inc.* (1986), 4 B.C.L.R. (2d) 25 (C.A.).

[36] The appellant is therefore entitled to judgment on its counterclaim against the personal respondents for the same amount as it is entitled to against the tenant. That judgment will be for basic rent of $9,450.09 and three months "additional rent", that is to say, one-quarter of all items comprising "additional rent" for the year 1st May, 1991, to

30th April, 1992, plus interest as provided in the lease, together with such amount as may be determined to be due under clause 6.18.

[37] The final matter is costs.

[38] In light of the success below of the tenant on the issue of promissory estoppel, which defeated by far the greater amount of the appellant's claim, there will be no costs in the court below to either party.

[39] It is my tentative view that, the appellant having had some success in this Court, it is entitled to its costs here on the scale appropriate to the final amount of its judgment but not including the cost of the transcript which did not assist it upon that part of the claim upon which it succeeded. If this tentative view is not accepted by both parties, counsel may make written submissions on this point as well.

Appeal allowed in part.