IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Van-Air Holdings Ltd. v. Delta Charters (1982) Inc.,* 2013 BCSC 1322

Date: 20130726
Docket: S118503
Registry: Vancouver

Between:

Van-Air Holdings Ltd. and Van-Air Marina Hotel Ltd.

Plaintiffs

And

Delta Charters (1982) Inc.

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiffs:	T.G. Keast, Q.C.
Counsel for the Defendant:	H.S. MacDonald
Place and Date of Trial:	Vancouver, B.C. January 28-31 and February 1, 2013
Place and Date of Judgment:	Vancouver, B.C. July 26, 2013

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Introduction

[1] This trial concerned the circumstances, and the consequences of termination, of the sublease of a water lot on the Fraser River (the "Water Lot"), where the defendant ("Delta Charters") operated a marina adjacent to the Delta Vancouver Airport Hotel.

[2] There are, in general terms, four different lease or sublease documents at play:

1. The Water Lot was leased by the Province of British Columbia to the North Fraser Port Authority and its predecessors (the "Head Lease");

2. The Port Authority subleased the Water Lot to the plaintiff Van-Air Marina Hotel Ltd. ("VML"), the governing document for the majority of the time period in question was a lease between North Fraser Port Authority and VML (the "Fourth Harbour Lease");

3. VML in turn subleased the Water Lot to Delta Hotels Limited (the "Delta Hotels Water Lease");

4. Delta Hotels subleased a portion of the Water Lot to the defendant (the "Delta Charters Sublease").

I refer to the Delta Hotels Water Lease and the Delta Charters Sublease as the "Junior Subleases".

[3] The Delta Charters Sublease expired on January 30, 2009, and the defendant over held with Delta Hotels' consent. The Delta Hotels Water Lease expired the following day, January 31, 2009, and Delta Hotels over held with the plaintiffs' consent. The Fourth Harbour Lease was to have expired December 30, 2009, but was extended to December 2014 by way of letter agreement.

[4] In June 2011, the plaintiff Van-Air Holdings Ltd. ("VHL") – which is sole owner of the plaintiff VML – was sold to Mr. Paul Cheung and Mr. Terry Lai. Early in July 2011, Mr. Cheung and Mr. Lai met with Mr. Rick Cockburn, principal of the defendant, and advised that they would be taking over operation of the marina.

[5] On July 29, 2011, Delta Hotels assigned its interest in the Delta Charters Sublease to the plaintiffs. The plaintiffs then purported to give the defendant notice of termination of the Delta Charters Sublease, and provided notice requiring delivery up of vacant possession by August 31, 2011.

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[6] The plaintiffs contend that the defendant's over holding tenancy at that point in time was month-to-month, and the defendant was only entitled to a month's notice of termination.

[7] Delta Charters refused to vacate, and remained in possession. Delta Charters had already paid the property tax component of the "Additional Rent" payable under the Delta Charters Sublease, for the entire 2011 calendar year. Initially, following the delivery of the purported notice of termination, it continued to tender rent payments to Delta Hotels for the "Basic Rent" amounts, but these payments were rejected.

[8] The defendant contends that its over-holding tenancy was year-to-year terminating January 30, 2012, therefore requiring six months' notice of termination during the currency of the Delta Charters Sublease's term. The common-law requirement for six months' notice of termination of a year-to-year tenancy, effective at the end of a tenancy year, is well-settled (see *Reinhardt v. Best* (1966), 57 W.W.R. 757, 59 D.L.R. (2d) 746 (Sask.Q.B.)), and is not in dispute. No such termination notice was given until June 20, 2012. The defendant therefore contends it was entitled to remain in possession until the end of the then-current term, on January 30, 2013, when it did in fact vacate.

[9] There are, broadly, two sets of issues arising out of these circumstances.

[10] The first is whether the Delta Charters Sublease was month-to-month, entitling the plaintiffs to possession as of August 31, 2011, or year-to year, entitling the defendant to remain in possession through to the end of January 2013. If the former, the plaintiffs seek damages by reason of the defendant's wrongful occupation of the Water Lot. If the latter, the plaintiffs claim rent, the defendant's rent cheques having been refused since September 2011.

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[11] The second set of issues involves characterization of certain improvements made by the defendant to the marina, specifically steel docks, piles, and wood docks. The plaintiffs say that these are fixtures, that some were wrongly removed by the defendant when it vacated the premises, and that the remainder should stay with the marina. The defendant contends that these are trade fixtures, and that it is entitled to possession.

[12] For the reasons set out below, I have concluded that the defendant was entitled to six months' notice, and, such notice not having been given until June 2012, was entitled to remain in possession until January 30, 2013. The plaintiff is owed rent, net of certain credits, in the amount of $100,784.27.

[13] I have also concluded that the defendant is entitled to possession of the steel docks, piles, and wood docks that were used in the marina business, and may remove them from the premises.

<u>Nature of the Defendant's Subtenancy</u>

Effect of the Lease and Sublease Provisions

Plaintiffs' Position

[14] It is settled law that a tenant's over-holding upon expiry of a lease of a term of years, and the landlord's acceptance of rent, create a year-to-year lease upon the same terms and conditions as the original lease, so far as they are applicable: *S.L. Ivans Jewellery Ltd. v. Bradbrooke*, [1997] 9 W.W.R. 95 (Sask.Q.B.). This common law rule may be modified by the terms of the original lease, or by subsequent agreement of the parties.

[15] In the present case, the plaintiffs say that the defendant's position was modified by the "Holding Over Clause" in the Fourth Harbour Lease:

> **Holding Over**
>
> 22.1 If the tenant shall hold over after the expiration of the Term hereby granted and if the Term expires before the 30th day of December, 2009 and the Landlord shall accept rent, the new tenancy thereby created shall be a tenancy from month-to-month, terminable on not more than 30 days written notice and the Tenant shall pay as rent during the term of such occupancy a

> rental to be determined at the discretion of the Landlord and shall be subject to the covenants and conditions herein contained so far as the same are applicable to a monthly tenancy.

[16] The plaintiffs say that the Holding Over Clause became incorporated into both the Delta Hotels Water Lease and the Delta Charters Sublease through specific language in those subleases. By way of a Second Sublease Amendment made between VML and Delta Hotels dated July 1, 2003, (necessitated by VML having entered into the new Fourth Harbour Lease with the Port Authority), the Delta Hotels Water Lease had been amended to contain the following term:

> 2. The Sub-Lease shall be on the same terms and conditions as contained in the:
>
> > ...
> >
> > (b) Fourth Harbour Lease, a copy of which is attached hereto as Schedule B, in respect of the period from July 1, 2003 until January 31, 2009,
>
> and Van-Air and Delta Hotels agree to be bound thereby as if Van-Air was the Landlord therein and Delta was the Tenant therein, accept to the extent that such terms and conditions are modified by the terms of this Sub-Lease.
>
> [Emphasis added.]

[17] The Subtenant's Covenants under the Delta Charters Sublease, dated July 1, 2001, did not explicitly state that it would be on the same terms as the Fourth Harbour Lease, or as the Delta Hotels Water Lease. Instead, it included this provision:

> 3. Subtenant's Covenants
>
> > Charters covenants and agrees with Delta Hotels:
> >
> > (a) That other than the obligations of Delta Hotels to pay rent under the Van-Air/Delta Hotels Water Lease and of Van-Air to pay rent under Lease No. 09027 [the Port Authority/Van-Air Harbour Lease], it will perform all of the obligations of Delta Hotels under the Van-Air/Delta Hotels Water Lease and all of the obligations of Van-Air under Lease No. 09027 and be bound by the terms of the Van-Air/Delta Hotels Water Lease and Lease No. 09027 in each case as they relate to the Sublease Premises and as if it was the Tenant and Delta Hotels was the Landlord under the said leases.
>
> [Emphasis added.]

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[18] The Delta Charters Sublease also provided that the Delta Hotels Water Lease would be paramount:

> 12. Paramountcy of Van-Air/Delta Hotels Water Lease
>
> Charters acknowledges and agrees that it has no greater interest in the Sublease Premises than Delta Hotels has under the Van-Air/Delta Hotels Water Lease. To the extent that any right or benefit conferred by this Sublease contravenes or is incompatible with the Van-Air/Delta Hotels Water Lease, Lease No. 09027 or the Province Lease, such right or benefit will be amended or modified so as not to contravene or be incompatible with the Van-Air/Delta Hotels Water Lease, Lease No. 09027 or the Province Lease. Should the Van-Air/Delta Hotels Water Lease, Lease No. 09027 or the Province Lease be terminated this Sublease shall terminate and to the extent that as a result of the termination of the Van-Air/Delta Hotels Water Lease, Lease No. 09027 or the Province Lease Delta Hotels receives compensation from Van-Air or the Commission for Charters' improvements, Delta Hotels agrees to remit such compensation to Charters.
>
> [Emphasis added.]

[19] As noted, the Delta Hotels Water Lease expired on January 31, 2009, and Delta Hotels then over held with consent of VML. The paramountcy clause of the Delta Charters Sublease provided that the defendant had no greater interest in the Water Lot than Delta Hotels had under the Delta Hotels Water Lease. If Delta Hotels was, by over holding, on a month-to-month tenancy, then the plaintiffs argue that Delta Charters would also have been on a month-to-month tenancy.

[20] The plaintiffs then argue as follows. The Second Sublease Amendment to the Delta Hotels Water Lease provided that Delta Hotels would be bound by the terms of the Fourth Harbour Lease between the Port Authority and Van-Air, as if Van-Air was the landlord therein and Delta Hotels was the tenant therein; since Delta Hotels was over holding after the expiration of its lease, the Holding Over Clause of the Fourth Harbour Lease applied to Delta Hotels. By operation of the Holding Over Clause, Delta Hotels' tenancy was month-to-month, terminable on no more than 30 days' written notice. Delta Charters was bound by the terms of the Delta Hotels Water Lease; hence, the plaintiffs say that the defendant's lease was also month-to-month, terminable on 30 days' notice.

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Defendant's Position

[21] In response, the defendant accepts that the Holding Over Clause in the Fourth Harbour Lease would have applied to the Delta Charters Sublease, had the latter expired before December 30, 2009. However, it points to the fact that after the Fourth Harbour Lease and each of the Junior Subleases expired, the landlord under each of those leases – respectively, the Port Authority, VML, and Delta Hotels – continued to bill its tenant Basic Rent, and the property tax component of the Additional Rent, annually, in advance, and accepted annual payments in those amounts, just as had been the case when the leases were in effect. It argues that this billing and acceptance of rent on an annual basis is inconsistent with the establishment of a month-to-month tenancy through holding over, and that the over holding tenancy must have been year-to-year.

Discussion

[22] In regards to the defendant's argument, the Holding Over Clause provided that the rent payable on over holding would be "determined at the discretion of the Landlord". After January 2009, VML continued its practice of passing on to Delta Hotels the annual rent charges levied by the Port Authority, and Delta Hotels passed those charges on down to the defendant. So long as the landlord would be prepared to account to the tenant for any overpayment in the event of termination, I do not think that the continuation of annual billing was, in itself, inconsistent with the over holding tenant having no more security than a month-to-month tenancy. I do not find that the resolution of this issue lies in characterizing the significance of the rent payment terms.

[23] The plaintiff's argument in favour of month-to-month over holding appears to proceed from the assumption that the Fourth Harbour Lease's Holding Over Clause, as adopted into the Delta Hotels Water Lease and as adopted into the Delta Charters Sublease through its provisions requiring compliance with the latter, would have made any over holding past the expiry date of those Junior Subleases a month-to-month tenancy.

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[24] It is necessary, in my view, to consider first the operation of the Over Holding Clause, under the Fourth Harbour Lease. For the sake of convenience, I will again reproduce its wording:

> **Holding Over**
>
> 22.1 If the tenant shall hold over after the expiration of the Term hereby granted and if the Term expires before the 30th day of December, 2009 and the Landlord shall accept rent, the new tenancy thereby created shall be a tenancy from month-to-month, terminable on not more than 30 days written notice and the Tenant shall pay as rent during the term of such occupancy a rental to be determined at the discretion of the Landlord and shall be subject to the covenants and conditions herein contained so far as the same are applicable to a monthly tenancy.

[25] The capitalized word “Term”, as used in the Holding Over Clause is defined in the Fourth Harbour Lease:

> “Term” means the period of time described in Section 1.4.

[26] Section 1.4 reads:

> 1.4 TO HOLD the Lands unto the Tenant for a term (the “Term”) of SIX (6) YEARS commencing on the 1st day of JULY, 2003, (the “Commencement Date of Term”) and ending on the 30TH day of DECEMBER, 2009, unless earlier terminated as hereinafter provided.
>
> [Emphasis added.]

[27] The Fourth Harbour Lease, therefore, was to be in effect until December 30, 2009, unless earlier terminated according to that lease’s provisions. The Holding Over Clause, however, would only come into play if the “Term hereby granted” expired before December 30, 2009. Given the wording of Clause 1.4, the only way the “Term” of the Fourth Harbour Lease could expire before December 30, 2009 was if some form of early termination had come about. For example, if a tenant under the Fourth Harbour Lease were to fail in any of its obligations under section 19.1 of the Fourth Harbour Lease – failing to pay the rent, failing to observe any covenant in that lease or in the Head Lease, or becoming subject to a receiver – the landlord was empowered to terminate the lease. If the landlord then allowed the tenant to over hold, the Holding Over Clause would apply; a new tenancy would be created by consent, on the same terms as the expired lease, but on a month-to-month basis. In

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my view the Holding Over Clause, properly interpreted, could only apply in such a case of the tenant holding over by consent after an early termination. The Holding Over Clause could have no application to situations where the tenant over held upon the lease expiring at the end of its intended term, on or after December 30th.

[28] In contrast to the Fourth Harbour Lease, the word "term" is not defined in either the Delta Hotels Water Lease or the Delta Charters Sublease. Neither document uses the word "Term" in its capitalized form. For the plaintiffs to prevail on this issue, the adoption of the Holding Over Clause of the Fourth Harbour Lease into the Junior Subleases would require the definition of the "Term" to be modified, to match the term of the respective sublease, *without* modifying the triggering date provision – "if the Term expires before the 30th day of December, 2009" – in the Holding Over Clause.

[29] If that interpretation of the lease documents were correct, the plaintiffs would have been entitled to invoke the Holding Over Clause and put the defendant under a month-to-month tenancy not only upon early termination, but also upon the expiry of the sublease's full term, (provided of course that it expire before December 30, 2009). But if that were the case, VML, through exercising the Holding Over Clause, would have had greater ability to put its tenants in a month-to-month tenancy, than the Port Authority enjoyed under the Fourth Harbour Lease with respect to VML. In my view, nothing in the terms of the various leases indicates that such an anomalous result was intended. Indeed, to interpret the lease documents in this fashion would in this regard make the terms of the Junior Subleases paramount to the intended effect of the Fourth Harbour Lease – quite the opposite to what was intended by the Delta Charters Sublease's paramountcy clause.

[30] There are two alternative means by which the Holding Over Clause could be incorporated into the Junior Subleases, without creating this anomaly. One alternative is that the word "Term" would continue to be treated as defined in the Fourth Harbour Lease; it would refer to the period of time set out in Section 1.4 of the Fourth Harbour Lease, and not to the period of time over which the Delta Hotels Water Lease was in effect. Specifically, the phrase "after the expiration of the Term

hereby granted" in the Holding Over Clause would refer to expiration of the "Term" granted by the Fourth Harbour Lease. Under this interpretation, as the Fourth Harbour Lease had not yet expired nor been subject to early termination when the over holding of Delta Charters commenced, the Holding Over Clause would have no effect on Delta Charters' tenancy.

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[31] Alternatively, adoption of the Holding Over Clause into the Junior Subleases could be accomplished properly, without expanding the landlord's rights beyond those enjoyed by the Port Authority, by modifying both the definition of "Term", and the triggering date of the Holding Over Clause, to correspond to the term of the sublease in question. In that case, for example, the Holding Over Clause as incorporated into the Delta Charters Sublease would read:

> If the tenant shall hold over after the expiration of the Term hereby granted and if the Term expires before the 30th of January, 2009 … .

Under this alternative interpretation, the Holding Over Clause would also have no effect, as the Delta Charters Sublease did not expire before January 30, 2009.

[32] Whichever of those two alternative views of the lease wordings might be used, neither the Fourth Harbour Lease, nor either of the Junior Subleases, became subject to early termination, within the meaning of the Fourth Harbour Lease, at any material time. In my view, the Holding Over Clause, properly interpreted, could therefore never have come into effect, in the circumstances of this case.

[33] I pause at this point to note that it appears from the manner in which the Delta Hotels Water Lease was assumed by VML in 2011, with the restaurant excepted, that both VML and Delta Hotels had proceeded on the assumption that Delta Hotels' tenancy was month-to-month only, presumably by virtue of operation of the Holding Over Clause. But Delta Hotels, in my view, was entitled to more than that. It was entitled to a year-to-year tenancy expiring January 31, and was entitled to continue to sublet to the defendant until January 31. Delta Hotels, I infer, misapprehended its tenure rights, but that misapprehension cannot have affected the right of Delta Charters to a continuing year-to-year subtenancy.

[34] It follows from this analysis that the paramountcy clause in the Delta Charters Sublease could not operate so as to limit Delta Charters to a month-to-month tenancy.

[35] I find that when the full term of the Delta Charters Sublease expired on January 30, 2009, and when the full term of the Delta Hotels Water Lease expired on January 31, 2009, the Holding Over Clause had no application. Instead, the common-law rule applied and both Delta Hotels and Delta Charters became over holding on a year-to-year basis. No month-to-month tenancies arose under the terms of the lease documents.

[36] Accordingly, the defendant was entitled, under the terms of the lease documents, to six months' notice.

Effect of Delta Charters' Partial Payment of Rent Amounts

[37] Alternatively, the plaintiffs say that Delta Charters became a month-to-month tenant in August 2010, when the defendant began paying its Basic Rent on a monthly basis.

[38] The evidence relating to this circumstance is as follows. Mr. Cockburn, principal of the defendant, testified that around the time his sublease was to expire in January 2009, he began making overtures to Delta Hotels' manager, Mr. St. Germain, about renewing the lease. The marina area was going to require dredging in the near future – the Fraser River, he testified, deposits about a foot of silt annually, and the marina had not been dredged since 2001 – and he wanted some security of tenure before making that investment. Mr. St. Germain made him aware that Delta Hotels' lease was expiring at the same time, and that their negotiations with the plaintiffs would have to conclude first. He indicated that Delta Hotels was happy with Delta Charters staying on, and their relationship would continue as normal.

[39] The following summer, the defendant paid the property tax bill in full, and also paid the annual rent for the period July 2009–June 2010.

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[40] Mr. Cockburn said that when matters still had not been resolved by the following summer, he again approached Mr. St. Germain to see if there had been any movement on the lease renewals. Mr. Cockburn suggested that it would be appropriate only to be paying rent on a monthly basis. In his evidence at trial, he used the word “installment” to describe this proposed arrangement. Though I am not satisfied that he used actually used that term in conversation with Mr. St. Germain, I do find that this was Mr. Cockburn’s intention. Mr. St. Germain, he said, agreed to his proposal, and in August the defendant paid Delta Hotels the sum of $7,295.12, representing rent for the months of July and August.

[41] Thereafter, Delta Hotels sent Delta Charters monthly invoices for electricity based on meter readings; a monthly garbage fee; and a monthly lease payment. However, the invoices from Delta Hotels continued to refer to the annual amount of rent. For example, the August 31, 2010 invoice included the following itemized charge:

> **3. Monthly Lease Sept 2010** $43,770.72 Annually $3,647.56

[42] On May 20, 2011, Delta Hotels forwarded to Mr. Cockburn the 2011 property tax notice, requesting that he pay the full sum of $11,085.73. The general ledger for the defendant’s holding company Spanish Banks Marine Ltd. shows a payment to Delta Hotels in that amount on June 27, 2011.

[43] Delta Hotels’ manager Mr. St. Germain testified that he had no recollection of Mr. Cockburn requesting a switch to monthly billing, and could not recall having been aware that the defendant was only making monthly payments towards the Basic Rent. He did recall having had discussions with Mr. Cockburn on a number of occasions as to him wanting an extension on his lease and an indication of Delta Hotels’ intentions. He testified that he gave Mr. Cockburn no assurances, and that the extension of his lease would be discussed once Delta Hotels had negotiated its lease extension with the plaintiffs. He is certain that he would have told Mr. Cockburn that the status quo would continue until then. He said that Delta Hotels

was considering extending Mr. Cockburn's tenure as manager of the marina, but was also speaking with another party who was interested in taking over.

[44] Mr. St. Germain denied any knowledge of the billing cycle of the Port Authority's rent billings to the plaintiffs, and the plaintiffs' billings to Delta Hotel. He testified that he would not have had the authority to grant Mr. Cockburn's request to change the rent to monthly payments; that decision would have to have been made by the general manager, or the controller, or someone else from Delta Hotels' corporate offices.

[45] In cross-examination, Mr. St. Germain agreed that he was Mr. Cockburn's primary contact with Delta Hotels. Asked if the discussion with Mr. Cockburn to pay rent in monthly installments ever happened, or if he simply could not recall, he said that he could not recall.

[46] I do not think it is likely that Mr. Cockburn would have made a switch to monthly payments unilaterally, without some discussion with Mr. St. Germain or another person in authority. Delta Hotels did continue to send invoices which noted the annual rent. Moreover, payment of the property tax component of the Additional Rent continued as an annual lump sum.

[47] The plaintiffs say that in requesting a switch to monthly payment of Basic Rent, what the defendant was doing and was intending to do was asserting what it perceived to be its rights as a month-to-month tenant. I do not find this to have been the case. When Delta Charters began making monthly payments of the Basic Rent in August 2010, it did not claim any credit for already having already paid the taxes to the end of the calendar year 2010. When it paid the 2011 property tax, it made no attempt to prorate that amount or pay it in installments, as it (according to the plaintiffs) would have been entitled to do under a monthly tenancy.

[48] I find that neither Delta Hotels nor the defendant intended the change in the frequency and amount of Basic Rent payments made by the defendant to affect the defendant's tenure. I find that the lease continued to be on a year-to-year basis.

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Effect of Conversations between the Parties' Principals

[49] Finally, the plaintiffs point to events of late June and early July 2011, following the purchase of VHL by Mr. Cheung and his minority partner Mr. Lai. Mr. Cheung and Mr. Lai each testified to having had a conversation with Mr. Cockburn, on separate occasions, in which the subject of the defendant's lease status came up. Mr. Lai testified to Mr. Cockburn having said that his lease had expired and was month-to-month. Mr. Cheung testified that he advised Mr. Cockburn of his understanding that the lease was month-to-month, and Mr. Cockburn acknowledged this.

[50] The plaintiffs do not say that these conversations give rise to an estoppel, or constitute a waiver on the part of the defendant. Instead, it is said they simply indicate an acknowledgement on the part of the defendant of the tenancy being month-to-month, as provided for in the terms of the lease documents and as intended by the defendant in changing the frequency of its Basic Rent payments.

[51] I have rejected the plaintiffs' arguments as to the interpretation of the lease documents and as to the significance of the change to monthly Basic Rent payments. As a matter of law, the tenancy was year-to-year, and required six months' notice. Accordingly, the conversations which took place between the principals are of little import, and I need not resolve all of the conflicts in the evidence as to what was said, nor make comprehensive findings as to what was intended. I will only say two things. First, I accept Mr. Cockburn's evidence that he had never even heard the phrase "month-to-month" prior to receipt of the plaintiffs' letter of July 29, 2011 giving one month's notice, and that he had no understanding of their being any connection between the frequency of his rent payments, and his eviction. I would find that he did not use that phrase himself to describe his tenancy; if he heard the phrase used by Mr. Cheung or Mr. Lai, he would not have understood it as a term of art, and would not have understood it to mean anything other than a description of his rent payments as being made monthly. Second, it follows from this that I do not regard any evidence as to what Mr. Cockburn may have said or acknowledged on the occasions of his first meeting or meetings with Mr. Cheung

and Mr. Lai as being evidence of what he had intended, in 2010, in changing the frequency of his Basic Rent payments.

[52] This issue of the status of the lease is resolved in the defendant's favour. The July 29, 2011 letter from the plaintiffs' solicitors purporting to serve of notice of termination of the defendant's month-to-month subtenancy was ineffective, and the defendant was entitled to continued occupation under a year-to-year tenancy, until January 30, 2013.

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Calculation of Rent Owing

[53] This leaves the question of what rent was payable up to and including January 2013.

[54] The parties are agreed as to the Basic Rent payable. The annual rent charged by the Port Authority was passed on to the defendant, with one-twelfth payable each month. The monthly Basic Rent for each month, September to December 2011, was $3,647.56 plus GST/HST. As of January 2012, the Basic Rent increased to $5,754.70 per month, plus GST/HST. The total Basic Rent owing for September 2011 to and including January 2013 is $89,401.32, plus HST of $10,728.16, for a total of $100,129.48.

[55] The defendant is also liable for Additional Rent, composed of electricity, garbage removal for eighteen months, from August 2011, to and including January 2013, and property tax.

[56] The electricity fees were based on consumption as measured at the meter, and are documented for the months August 2011 - December 2012. The plaintiffs claim an additional amount for the month of January 2013; as the charges were not available at the time of trial, $3,000 was claimed, as an estimate based on the January 2012 usage of $3,762.71, adjusted for lower occupancy. I find this estimate reasonable. The electricity charges are allowed in the amount of $34,721.08, plus HST of $4,166.53, for a total of $38,887.61.

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[57] Garbage removal, at $200 per month, is agreed at $3,600.00, plus HST of $432.00, for a total of $4,032.00.

[58] The property tax component of the Additional Rent is contentious. Under Clause 2.5 of the Delta Charters Sublease, the defendant was liable for all Additional Rent charges owed by Delta Charters to VML "to the extent they relate to the Sublease Premises". VML passed on to Delta Charters all property taxes related to the Water Lot. The marina, however, took up only a portion of the Water Lot; some portion was occupied by a restaurant operated by Delta Hotels. The defendant, it is agreed, was only responsible for a proportionate share of the taxes.

[59] The plaintiffs claim that the defendant owes a pro-rated portion of the 2012 taxes, which totaled $10,858.05; and, for the month of January 2013, claim an additional $^{1}/_{12}$ of the 2012 taxes, the 2013 tax amount not being available at the time of trial.

[60] During the process of document discovery in this action, the defendant learned that Delta Hotels had been inconsistent, over the years, in calculating the defendant's proportionate share. For years in which documents were found, it was seen that Delta Hotels billed the defendant for 29% of the property taxes in 2001 and 2002; 27.64% in 2003; and 31.32% for 2006. There is no evidence as to how Delta Hotels determined those specific percentages, and no evidence that Delta Hotels provided the defendant in 2003 or 2004 with any explanation of the changes, or any warning that a different proration formula was being used.

[61] In the copy of the June 2006 statement of account from Delta Charters in evidence, the property tax amount of $6,527.36 is noted as "Revised per Rick". Conceivably, this indicates an initial attempt on the part of Delta Hotels to pass on a greater share, or perhaps even 100%, of the property taxes. However, this cannot be determined; if that note was a reference to Mr. Cockburn having sought an adjustment of the rent charge, he gave no evidence as to what that revision entailed.

[62] In the years 2007, 2009, 2010, and 2011, Delta Hotels billed the defendant 100% of the property taxes. Those amounts were paid by the defendant in full. I accept Mr. Cockburn's evidence that this was not intended and that he only discovered this in the time period leading up to trial.

[63] The defendant says that it was overcharged in those latter four years, and submits that it ought to have been charged only 29% – the figure used in the first two years of the sublease, which is also, it points out, very close to the average of the percentage figures actually used in the years when a prorated figure was billed.

[64] Applying the 29% figure to the 2012 taxes of $10,858.05 yields $3,148.83. The defendant says that it would only be liable for $^{13}/_{12}$ of this amount (12 months of 2012, plus January 2013): $3,411.23.

[65] The defendant further claims that it was overbilled a total of $30,549.42 (71% of the property taxes paid in 2007 and 2009 - 2011). As the plaintiffs are assignees of Delta Hotels' liabilities under the sublease, it claims credit or set-off in that amount.

[66] The plaintiffs, however, say that Delta Hotels, in those years when it prorated the property taxes, charged the defendant too little. On the basis of the square footage covered by the marina, the plaintiffs say that the prorated share attributable to the marina's operations was as much as approximately 88%. The plaintiffs do not seek any retroactive adjustment of the amount of taxes payable for the years in which only 29% or thereabouts was charged by Delta Hotels; but for 2012, they say, the deduction from the tax bill should be only $1,300.00.

[67] I find that the billing to the defendant of 100% of the property taxes was an error made on the part of Delta Hotels. In those years when it prorated the taxes, Delta Hotels claimed only 29% of the total, or a percentage very close to that. In my view, regardless of whether the wording of the lease could have permitted proration on the basis of square footage, it is far too late in the day for the plaintiffs – who stand in the place of Delta Hotels, as landlord – to be seeking a revision of the

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proration formula in their favour. Without having given the defendant any prior notice of recalculation of the proration formula, the plaintiffs cannot change the formula and are bound to apply the 29% figure. I find in the defendant's favour on this issue.

[68] I therefore find the property tax component of the Additional Rent owed to be $3,411.23.

[69] Against the rent owed, a credit or set-off in the amount of $30,549.42 is allowed in respect of past overpayment to Delta Hotels of property taxes.

[70] The defendant further claims credits for two adjustments made by the Port Authority which it says were never passed on to it: a credit note issue to VHL by the Port Authority in July 2011 in respect of Basic Rent for the period July 2009 to December 2011, in the amount of $14,844.68 (inclusive of GST/HST); and, a refund from the Port Authority made in January 2011, in the amount of $281.93. There is a notation in the plaintiffs' ledgers of a refund being payable to Delta Yachts in the latter amount, but no evidence that such credit was ever given.

[71] I find both those credits to be owed to the defendant. There will be a further credit or set-off in the amount of $15,126.61.

[72] Lastly, the plaintiffs claim contractual interest at the rate of 6%. This is said to arise from the following provision of Clause 2.5 of the Delta Charters Sublease:

> From the date any Rent or other amounts payable under this Sublease are due until they are actually paid, they will bear interest at the rate of 3% per annum above the prime rate designated from time to time by the Royal Bank of Canada.

I accept the plaintiffs' evidence that the applicable Royal Bank prime rate was 3%.

[73] However, I find this provision to have no application to the circumstances of the present action. Rent cheques were tendered by the defendant and were returned. The defendant, I find, has continued to be willing and able to make its rent payments. The plaintiffs, having wrongly denied the defendant's year-to-year tenancy, cannot now claim contractual interest for unpaid rent.

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[74] The net amount owed by the defendant is as follows:

Basic Rent	$100,129.48	
Electricity	$ 38,887.61	
Garbage	$ 4,032.00	
Property Tax	$ 3,411.23	
Subtotal:		$146,460.32
Less Property Tax Overpayment	$ 30,549.42	
Less Port Authority Credits	$ 15,126.61	
Subtotal Credits:		- $ 45,676.05
Total Allowed:		$100,784.27

Ownership of Improvements

Background

[75] Mr. Cockburn had first moved his chartering business into the marina in 1979. Delta Hotels had just taken over the adjoining hotel from the Hyatt companies. Hyatt had leased the marina to a third party. Mr. Cockburn arranged with Delta to manage the marina in return for 10% of the moorage revenue.

[76] As noted above, Mr. Cockburn testified that silting of the river bed is a continuing problem at this location. The Fraser River, he explained, deposits silt to a depth of about one foot per year. Dredging is required every few years. Delta Hotels tried to dredge in the vicinity on a couple of occasions between 1979 and 2001, but they were constrained by the design and construction of the docks and piers, which were fixed in place. This meant that suction dredging had to be attempted, rather than the more effective clamshell method.

[77] By 2001, the marina had heavily silted-up. Many of the berths were unusable, and occupancy had dropped to 25%. A number of the docks were breaking up. In Mr. Cockburn's words, Delta Hotels had taken all possible revenue out of the assets.

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[78] Mr. Cockburn then negotiated with Delta Hotels, offering to sublease the Water Lot and build a new marina. This led to execution of the Delta Charters Sublease.

Lease and Sublease Provisions

[79] The Delta Charters Sublease stated, in its recitals, that Delta Charters was proposing to undertake the dredging and other works described in Schedule Three thereto. Schedule Three provided as follows:

> SCHEDULE THREE
>
> Plans and specifications for dredging and dock reconstruction for marina at 3500 Cessna Drive, Richmond, BC to be completed by Delta Charters (1982) Inc. by December 31, 2001.
>
> 1. Obtain all required permits and licenses at its expense.
>
> 2. Dredge 4.71 acres of marina to 0 minus 2 meters and have removed 33,000 cubic meters of fill as limited by permits.
>
> 3. Remove and dispose of approximately 100 old piles and all unused material from old docks.
>
> 4. Drive approximately 92 new piles for new docks as shown on Schedule “C” attached.
>
> 5. To construct and install a total of 30,500 square feet of new docks as follows:
>
> a) 4150 square feet of steel constructed with 24” diameter steel tubing and ¼” steel structural members topped with treated wood decking. CAD drawings with construction detail attached as Schedules “A” and “B”.
>
> b) 18,400 square feet of 8 foot wide docks to be constructed with treated lumber supports and decking and 24” deep foam floatation.
>
> c) 8000 square feet of 4 foot wide docks to be constructed with treated lumber supports and decking and 24” deep foam floatation.
>
> 6. All docks to be installed and configured in accordance with marina plan attached as Schedule “C”.

[80] The Delta Charters Sublease described responsibility for the improvements in the following terms:

> 9. Charter’ Work
>
> . . .

> 9.3 Charters will, upon the expiration or sooner determination of this Sublease, unless otherwise agreed by Delta Hotels, at Charters' expense and to the satisfaction of Delta Hotels, forthwith remove or cause to be removed from the Sublease Premises all boats and all pilings, ramps, docks and other improvements which may have been erected, placed or otherwise deposited thereon by Charters, or its subtenants, or others during the Sublease Term.

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[81] The plaintiffs rely upon certain additional provisions of the Fourth Harbour Lease.

[82] The Fourth Harbour lease defines "Improvements" and "Fixed Improvements" in such a manner that a dock or a piling is to be regarded as an improvement, and may be regarded as a fixed improvement, depending on the circumstances:

> "Fixed Improvements" means improvements which are by their nature, degree of affixation or utility substantially affixed to the Lands and "Fixed Improvement" means any one of them".
>
> "Improvements" means all structures, erections, docks, wharfs, pilings, materials, effects and things erected, brought, placed or being upon the Lands at any time and includes Fixed Improvements and "Improvement" means any of them.

[83] The Fourth Harbour Lease sets out the Tenant's responsibilities for the improvements, including the following:

> **Construction, Maintenance and Operation of Improvements**
>
> 6.1 Improvements at any time erected, brought, placed or being upon the Lands, whether existing prior to or during the Term of this Lease, and all Goods of the Tenant shall be entirely at the risk of the Tenant in respect of loss, damage, injury, destruction or accident from whatsoever cause arising
>
> . . .
>
> **Removal of Improvements**
>
> . . .
>
> 7.2 The Tenant will, upon the expiration or sooner determination of this Lease, if required by the Landlord, at the Tenant's expense and to the satisfaction of the Landlord, forthwith remove or cause to be removed from the Lands any Improvements which may have been erected, placed, or otherwise deposited thereon by the Tenant, or its sublessees, or others during the Term.
>
> 7.3 On the expiration or sooner determination of this Lease, or upon the withdrawal of any portion of the Lands as described in Section 7.1, the Tenant may within 30 consecutive days thereafter, with the prior written permission of the Landlord, the determination of whether or not to grant such

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> permission being in the sole discretion of the Landlord, remove any Improvements owned by the Tenant which may be situate on the Lands . . .

Construction of the Improvements

[84] VML consented to Delta Hotels subletting to Delta Charters, and consented to Delta Charters making the improvements.

[85] The defendant then undertook dredging, and construction of the new marina. It covered a larger area than the preceding operation, though room was made for larger boats, so that the total number of berths was reduced slightly.

[86] The marina docks are accessed by steel ramps which are fixed to the land. The pre-existing ramps were left in place, but the defendant replaced their wood decking. The ramps lead to steel docks that run parallel to the shoreline. Branching off the steel docks at right angles, perpendicular to the shoreline, are a number of 8-foot wide docks or "legs", named 'A -' through 'G -dock'. Branching off each of the legs ('A' through 'G' docks) are a number of 4-foot wide wood "fingers", to which boats are moored.

[87] All of the steel docks, legs, and fingers were constructed by the defendant. The legs and fingers were mostly of new construction, but incorporated some floatation foam recycled from the old docks. The defendant also installed a new electrical system, which incorporated one small steel junction box from the old marina, the main feed, and the transformers. Steel tie-up rings were also recycled.

[88] The whole structure of the new docks was constructed so that every eight to ten years it could be disassembled, to allow for big dredging equipment to come in. The steel docks that run parallel to the shoreline were constructed with steel-framed square openings through which piles were driven. No piles are used along the legs. The steel docks were attached to the ramps, and the steel docks and legs, and the fingers, attached to each other with hinges. The fingers were attached to piles with steel hoops, allowing the fingers to rise and fall with the tide. Disassembly for dredging would entail pulling the piles at the steel docks; pulling the pins one each of

the hinges; and then either pulling the piles at the fingers, or detaching the steel hoops.

Positions of the Parties

[89] The plaintiffs point to the fact that Clauses 7.2 and 7.3 of the Fourth Harbour Lease apply to all improvements, not just fixed improvements. They argue that as the landlord has not required Delta Charters to remove the improvements, as referenced in Clause 7.2, and has not given written permission for improvements to be removed, as required by Clause 7.3, no improvements may be removed.

[90] The plaintiffs further rely upon the common law principles that even a slight degree of affixation raises a presumption that an improvement is to be considered a fixture, and that the presumption may be rebutted by reference to the intended use of the improvement – whether, for example, the improvements are situated on the land for the better enjoyment of the land, or for the better enjoyment of the improvements qua chattels. In this regard, they place reliance on *Boxrud v. Canada* (1996), 124 F.T.R. 46 (T.D.), and the authorities cited therein. They ask that I apply the reasoning employed by Spencer J. of this court in *Vancouver Port Corp. v. MacLeod*, [1992] B.C.J. No. 1511 (B.C.S.C.) , who, in finding that a float attached to pilings on a water lot was a fixture, remarked that it was significant that the float was attached to the piles by any means at all.

[91] Delta Charters says that the portable nature of the docks, the ease with which they may be disassembled, and the circumstances in which the docks were installed, point to them being trade fixtures. That is, a type chattel.

Discussion

[92] In my view, the provisions of the Fourth Harbour Lease relied upon by the plaintiffs have no application to the defendant's claim over the subject improvements.

[93] Clauses 7.2 and 7.3 of the Fourth Harbour Lease are limited in their scope. Unlike Clause 6.1, quoted above, they do not purport to govern all improvements

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brought onto the land at any time. They affect only to the status of improvements that would be on the Water Lot upon expiration of the lease.

[94] Under the terms of the original lease and sublease documents, Delta Charters' tenure was to expire on January 30, 2009. Each subsequent year-to-year over holding would terminate on January 30th. Delta Hotels' tenure was to terminate the following day, January 31st.

[95] As noted above, the Delta Hotels Water Lease provided that it was to be on the same terms as the Fourth Harbour Lease, and the Delta Charters Sublease obliged the defendant to fulfill Delta Hotels' obligations under the former. As I have found above, after the Delta Hotels Water Lease expired on January 31, 2009, a new year-to-year over holding tenancy was created. This meant that Clauses 7.2 and 7.3 would apply to improvements still on the Water Lot on January 31 of the year in which the year-to-year tenancy of Delta Hotels expired.

[96] Nothing in these terms prevented Delta Hotels from concluding a subtenancy agreement requiring a subtenant whose lease expired on January 30th to remove improvements that the subtenant had brought onto the Water Lot.

[97] Clause 9.3 of the Delta Charters Sublease contained such a requirement.

[98] As also noted above, the Delta Charters Sublease did not provide that it was on the same terms as the Fourth Harbour Lease. Instead, Delta Charters was bound to perform the obligations of Delta Hotels under the Fourth Harbour Lease, as if it was the tenant and Delta Hotels the landlord. This did not prevent Delta Charters from removing any improvements that were not considered fixtures as between Delta Hotels and Delta Charters, before the Delta Hotels lease expired.

[99] In my view, the question of whether the docks and pilings are fixtures or chattels is to be resolved by applying the conventional test articulated in *Stack v. T. Eaton Co.*, [1902] 4 O.L.R. 335 at 338, as adopted by the British Columbia Court of Appeal in *LaSalle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549 and in *Heathron Developments Ltd. v. Kemp Concrete Products*

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(1998), 56 B.C.L.R. (3d) 284 (B.C.C.A.). In *Stack*, Meredith C.J., speaking for the Ontario Divisional Court, said:

> 16 I take it to be settled law:
>
> (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
>
> (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue as chattels.
>
> (3) That the circumstances necessary to be shewn to alter the *prima facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
>
> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and of the annexation.
>
> (5) That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

[100] This test, in my view, is entirely consistent with the Fourth Harbour Lease's definition of a fixed improvement.

[101] With respect to the plaintiffs, the "circumstances" referred to in paragraph (3) of the *Stack* test would include the manner in which the articles in question were described by its tenant Delta Hotels, and the subtenant Delta Charters, in the Delta Charters Sublease.

[102] Under Clause 9.3 therein, Delta Charters was required, upon expiration, to remove "all pilings, ramps, docks and other improvements which may have been erected, placed or otherwise deposited thereon by Charters . . . during the Sublease Term". This Clause did not give Delta Hotels the right to require Delta Charters to leave the articles in place. The terms of the Clause are clear: the articles could only be left at the Water Lot by mutual agreement.

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[103] In my view, Clause 9 of the Sublease clearly implies that all the docks and pilings constructed or installed by Delta Charters were intended, as between Delta Hotels and Delta Charters, to be treated as contemplated by paragraph (5) of the *Stack* decision. The docks and pilings were brought onto the Water Lot by agreement between Delta Hotels and Delta Charters, for the purposes of Delta Charters' business in operating a marina. They were trade fixtures. They were to be fixtures during the term of the Delta Charters Sublease, with a right to Delta Charters to convert them back into chattels upon termination of the Sublease.

[104] The plaintiffs, having assumed Delta Hotels' rights and obligations under the Delta Charters Sublease, are bound to treat the improvements in the same manner.

[105] Accordingly, I find that Delta Charters is entitled to remove all steel docks, wood docks, and pilings, from the Water Lot. The ramps, which were affixed to the land, and which predated the Delta Charters Sublease, are to remain.

Costs

[106] The defendant has prevailed on all issues, and appears entitled to its costs under Scale B. If there are special circumstances relevant to an award of costs which need to be brought to my attention, the parties may arrange to make submissions before me, through the Manager, Supreme Court Scheduling – Vancouver.

"A. Saunders J."

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