

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Lappin v. Homburg L.P. Management Inc.,  
2009 NSSC 346

**Date:** 20091116

**Docket:** Hfx No. 311517

**Registry:** Halifax

**Between:**

**Susan Lappin**

Appellant

v.

**Homburg L.P. Management Incorporated as general partner for Homco  
Realty Fund(38) Limited Partnership**

Respondent

**Judge:** The Honourable Justice N.M. Scaravelli.

**Heard:** October 9, 2009, in Halifax, Nova Scotia

**Counsel:** Joseph Lappin, C.A. - on behalf of the appellant  
Michael J. O'Hara, Esq., - on behalf of the respondent

**By the Court:**

[1] This is an appeal from a decision of a Small Claims Court Adjudicator allowing the claim of the respondent, a commercial landlord, against the appellant, a medical doctor, for the breach of a commercial lease and dismissing the counterclaim of the appellant against the respondent for breaches of the same lease.

[2] At the relevant time, the parties were signatories to a five year renewal lease extending from September 1, 2003 to August 31<sup>st</sup>, 2008. The “premises” where the appellant conducted her medical practice was part of a strip mall located in Lower Sackville, NS. The appellant vacated the premises without notice on April 30<sup>th</sup>, 2008. The respondent commenced an action for payment of rent for the balance of the term, repair and maintenance expenses, additional rent for failure to operate the appellant’s business together with interest on outstanding amounts, all pursuant to the terms of the lease. The appellant counterclaimed for damages alleging breaches of covenants by the landlord. The appellant further claimed the breaches constituted a fundamental breach of the lease entitling the appellant to treat the lease at an end.

[3] The *Small Claims Court Act* sets out the basis for an appeal of a decision of the Small Claims Court Adjudicator.

Section 32(1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of

- (a) jurisdictional error;
- (b) error of law, or
- (c) failure to follow the requirements of natural justice.

by filing with the prothonotary of the Supreme Court a notice of appeal.

[4] Pursuant to Section 32(4), the Adjudicator is to file a Summary Report of his findings of law and fact as well as a copy of any written reasons for his decision. As in this case, an Adjudicator might only file the written decision. This may be acceptable as meaningful compliance with the section where the written decision sufficiently details the findings of fact and law. In the present case, I am satisfied the Adjudicator in his 28 page written decision made the requisite findings.

[5] The Notice of Appeal based on the grounds of error of law and failure to follow the requirements of natural justice are set out as follows:

## **Appendix A: Grounds of Appeal**

### **Summary of Errors and Failures**

#### **A. Errors of Law**

- A1. The Adjudicator erred in finding that the so-called “Additional Rent” claimed by the Respondent under Clause 22( c) was a genuine pre-estimate of liquidated damages and not a penalty.
- A2. The Adjudicator erred in his analysis of the lease. He failed to recognize that the Appellant had no practical remedies for any breach by the Respondent.
- A3. The Adjudicator erred in his evaluation of much of the testimony of the Appellant and her Husband in that he based that evaluation on his erroneous interpretation of the lease and thereby misunderstood their actions and testimony.
- A4. The Adjudicator erred in finding that the Appellant received substantially all of the benefits she expected under the lease.
- A5. The Adjudicator erred in finding that the Respondent’s actions did not constitute a breach of the Appellant’s right to quiet enjoyment.
- A6. The Adjudicator erred in finding that the failure to give notice of the discontinuance of the security patrols was not, in and of itself, a fundamental breach of the lease. He further erred in not recognizing that the Respondent was negligent in failing to give notice of changes in the security of the Shopping Centre as any reasonable person would realize that such matters were of very serious concern to the tenants of the Shopping Centre.

- A7. The Adjudicator erred in finding that the Respondent's cumulative actions did not constitute a fundamental breach of the terms of the lease.
- A8. The Adjudicator erred in finding that the Appellant had waited too long to raise various breaches of the terms of the Lease by the Respondent in that he did not consider the application of Clause 45 of the lease which states that no breach of the terms of the lease is considered waived unless such waiver is in writing and signed by the Landlord or the Tenant, as the case may be.
- A9. The Adjudicator erred in his recording of the testimony of certain of the respondent's witnesses. This error is not related to the reliability of credibility of the testimony, which is of course, the prerogative of the finder of fact, but is an error as to the actual testimony given.

**B. Failures to follow the Requirements of Natural Justice.**

The Adjudicator failed to follow the Requirements of Natural Justice in that he failed to assess the evidence before him without Bias.

B1 Assessment of the lack of Documentation.

The Adjudicator erred in not applying the same criteria to the appellant and to the respondent regarding the existence or non existence of documentation relating to testimony and issues raised.

B2 Significance of the size of Hillside.

The Adjudicator exhibited bias in stating that the Respondent would have paid attention to the Hillside lease in the matter of the Estoppel certificates without any direct evidence, but did not ask why they did not have evidence of any concerns or issues with Hillside.

B3 Failure to assess Testimony.

B3.1 The adjudicator did not examine the errors on the face of the affidavit of Brenda Ruggles.

B3.2 The Adjudicator did not examine where the testimony of Brenda Ruggles contradicted her affidavit.

B3.3 The Adjudicator did not assess the significance of the Respondent's errors on the matter of the signs.

These matters are all significant and the failure to address them indicates bias on the part of the Adjudicator.

**Standard of Review**

[6] Error of law in the context of the Small Claims Court of Appeal is discussed in *Brett Motor Leasing Ltd., v. Welsford* (1999), 181 N.S.R. (2d) 76, Saunders, J. (as he then was) described error of law as follows:

14. One should bear in mind that the jurisdiction of this court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where

the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[7] The standard of review is restricted by the absence of a transcript of the evidence adduced before the Small Claims Court Adjudicator. On appeal, I must accept the facts as found by the Adjudicator and, therefore, cannot entertain submissions by parties as to whether the findings are supported by the evidence adduced at the hearing.

### **Grounds of Appeal**

[8] The first ground of appeal dealing with the Adjudicator's interpretation of clause 22 ( c) of the lease (the additional rent clause), constitutes an alleged error in law. The remaining allegations of errors of law and breach of natural justice are based upon findings of fact made by the Adjudicator on the evidence before him and are not matters to be reviewed by this Court on appeal. The Adjudicator reviewed in detail evidence regarding the alleged breaches by the landlord and concluded that, to the extent any of the allegations were valid, they fell short of giving rise to having the

lease rescinded on the basis of total breach of contract. Further, even though the tenant did not expressly waive any alleged breaches, the tenant's failure to report these problems directly to the landlord were an indication of the lack of significance to the tenant.

[9] In terms of the ground of denial of natural justice, there is no indication that the Adjudicator failed to conduct a fair hearing. He heard the evidence and submissions of both parties and provided reasons for his decision.

### **Additional Rent Clause**

[10] Clause 22( c) of the lease provides:

( c) the Tenant will diligently and efficiently conduct its business in and use the whole of the Premises continuously and actively thought(sic) the Term in an up-to-date, first class and reputable manner befitting the Shopping Center and on the days and during the hours that the Landlord from time to time designates and in a manner, including maintaining an adequate sales force to serve to serve(sic) properly all customers, and carrying at all times a stock of merchandise of such size, character, quality and price, as to ssure(sic) the transaction of a maximum volume of business on or from the Premises consistent with a good business practice. Failure by the Tenant to be open during the hours and days as the Landlord may request from time to time shall entitle the Landlord to a payment of \$100.00 per diem, as Additional Rent, which the Tenant specifically agrees is a genuine pre-estimate of liquidated damages representing the minimum amount of damages which the Landlord shall be deemed to have suffered for loss of percentage rentals payable by other tenants in the Shopping Center to which the Landlord might have otherwise become entitled, and

to the loss of the effect of the advertising and commercial expenses incurred by the Landlord on behalf of the Shopping Center, and are without prejudice to the Landlord's right to claim and prove a greater sum as damages or to avail itself or any other remedies for breach hereunder.

...

[11] At the hearing, the appellant argued the provision calling for a payment of \$100.00 per day constituted a penalty and was, therefore, unenforceable. The respondent argued the amount was a valid claim for liquidated damages. In allowing the landlord's claim for additional rent, the Adjudicator undertook a penalty versus liquidated damages analysis and determined the provision for the payment of \$100.00 per day was a reasonable pre-estimate of damages.

[12] I have determined that clause 22( c) of the lease is enforceable independent of a penalty/liquidated damages analysis. Clauses of this nature can only be classified as a penalty where payment results from a breach of the contract by one of the parties as opposed to the requirement for payment upon the happening of an event which does not result in a breach of the entire contract.

[13] In *Busby + Associates Architects Ltd. v. Good Fortune Investments Ltd.*, [2001] B.C.J. No. 835 (B.C.S.C.), Chamberlist J. said the following:

75 The subsequent contract included the same clause, save and except the payment was reduced from \$100,000.00 to \$50,000.00 after negotiations between the parties. The provision calls for payment not on breach of a condition but rather on an event occurring which is not a breach of the contract. The difference between whether such a term is to be considered as a penalty or a genuine pre-estimate of liquidated damages or simply a contractual provision freely entered into by the parties to a contract is discussed in Chitty on Contracts, Sweet & Maxwell, 26<sup>th</sup> Edition, p. 1831, c. 26. At p. 1176, the learned authors state:

The law on penalties is not applicable to many sums of money payable under a contract. Thus, it is not relevant where the plaintiff claims an agreed sum (a debt) which is due from the defendant in return for the plaintiff's performance of his obligations, or which is due upon the occurrence of an event other than a breach of the defendant's contractual duty owed to the plaintiff. In *Campbell Discount Co. Ltd. V. Bridge*, a hire-purchase agreement permitted the hirer at his option to terminate the hiring during the period of the agreement, and provided that the hirer should thereupon pay a sum by way of agreed compensation for the depreciation of the chattel; the Court of Appeal held that the owner could recover the agreed sum, since being payable upon an event not constituting a breach of the agreement, it fell outside the scope of the law as to penalties . . .

76 In the later decision of *Export Credits Guarantee Department v. Universal Oil Products Co. and Others*, [1983] 1 W.L.R. 399, the House of Lords again had to consider the effect of a provision for the payment of monies upon an event other than breach. Lord Roskill, speaking for the House of Lords, stated the matter as follows, at p. 402;

My Lords, the reason why the appellants' submissions failed in the courts below can be simply stated. The clause was not a penalty clause because it provided for payment of money upon the happening of a specified event other than a breach of a contractual duty owed by the contemplated payor to the contemplated payee...

[14] In *Polaroid Canada Inc v. Continent-Wide Enterprises Ltd.* [2000] O.J. No. 2205(Ont. C.A.) (See also *Polaroid Canada Inc.*) the Court stated:

[9] It was also submitted that the export price policy was a penalty clause. The trial judge considered that a penalty clause is an obligation to pay damages by reason of a breach of the agreement. This was not the present case as it applied in the absence of any breach. He also considered the provision in the policy that the surcharge was in addition to any other right that Polaroid may have had. He remarked that this was not the language of a penalty clause. He concluded that the export price policy was not a penalty. We agree with this conclusion.

[15] In the present case, although the appellant breached the lease agreement by vacating the premises prior to expiration of the term, clause 22(c) operates independently of this breach. Under this provision, the tenant has an obligation to remain open during regular business hours. Failure to remain open during business hours in itself, would not constitute a breach of the lease agreement. It is an event that would be actionable on its own. Accordingly, the provision cannot be considered a penalty clause.

[16] As a result, the Adjudicator's decision to enforce the clause 22( c) is upheld for different reasons.

[17] Appeal is dismissed.

J.