SUPREME COURT OF NOVA SCOTIA
Citation: Action Management Inc. v. Archibald, 2011 NSSC 358

Date:20110929
Docket:SPH No 291925
Registry: Port Hawkesbury

Between:

Action Management Inc.

Plaintiff

v.

Karen Archibald and The Estate of Adam Archibald

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	March 29th and 30th, 2011, Nova Scotia Port Hawkesbury, Nova Scotia
Written Decision:	September 29, 2011
Counsel:	Mr. Ralph Ripley, for the Plaintiff Karen Archibald, for the Defendants

By the Court:

Facts:

[1] This action involves a Landlord and a Tenant in a commercial property in Port Hawkesbury, Nova Scotia. The Tenant, Karen Archibald was the owner and operator of a Curves franchise which was located in the premises owned by the Landlord, Action Management Inc. and located at 811 Reeves Street, and known locally as the Port Hawkesbury "Town Centre".

[2] At the centre the Landlord had a total rental space of 48,000 square feet. The Defendants, which included Ms. Archibald's husband (now deceased) rented 1,800 square feet on the 2nd floor under a 5 year lease.

[3] The lease began on the 3rd day of June, 2003 and ended on the 31st day of October, 2008. The monthly rental was $2,100 plus HST. In 2006, approximately two (2) years prior to the end of the lease the Tenant began to experience financial difficulties and fell into arrears. As the Tenant had to demonstrate a profit to the Curves franchise, she approached the Landlord to ask for a reduction in rent, over an extended term. She made up for some of the payments and the Landlord was patient. Emails were exchanged and this continued into the year 2007.

[4] In May of 2007 the Landlord sent an email to the Tenant requesting that she make an offer for “cash settlement” and mentioned that if it was acceptable she would be released from her obligations under the lease. It mentioned also that the Landlord would negotiate a lease directly with a possible new tenant (Ms. Chafe) whose name had been provided by Ms. Archibald to the Landlord.

[5] The Tenant made immediate arrangements to meet with the Landlord and his representative, Mr. White. She states they did come to an agreement on a lump sum cash settlement for the current rent as well as the rent payable to the end of the term. She made two substantial payments, one on the day of the meeting and the second less than a week later. The total amount paid by the Tenant was $11,200.

[6] With the last payment of $6,200 made on June 5th, 2007 ($5,000 having been paid at the earlier meeting) she understood she would be released from further payments under the lease. She wrote on the cheque that it was “final payment” or words to that effect. She maintains also that the Landlord alone would negotiate a new lease for the premises with Ms. Chafe without Ms. Archibald’s involvement. Consequently she maintains that the Landlord has no cause of action against her.

[7] The Landlord takes a different view. Action says through its representative Mr. Webb that Ms. Archibald was told she would not be released until a replacement tenant was found, and that Tenant signed a new lease acceptable to Action.

[8] Action states also that the lease between it and the Tenant contains a “No Implied Surrender or Waiver” clause and that they are entitled to accept the payments made by Ms. Archibald and apply them to the balance of arrears owing. Those arrears they say were substantially more than the amount paid by the Tenant. This, they say, coupled with the fact that the new possible Tenant did not sign a lease, means there was no accord and satisfaction as maintained by the Tenant. As well, the Tenant remaining on the premises for months after is further evidence of this, the Landlord states. The Landlord is claiming therefore the full balance of rent owed to the end of the lease term in October, 2008 with interest at the rate of 2% per month, as provided in the lease. The amount owing on the lease to the end of the term amounts to $ 47,930.00 (inclusive of tax). The total amount of the Landlord’s claim with interest (2% /mo.) is $ 82,837.00.

[9] Mitigation and whether the Landlord had a duty to mitigate is also a question which may be determined.

Issues:

[10] 1. Was there a Disclaimer , Surrender, and/or Abandonment of the commercial lease dated the 21st day of May 2003?

2. Was there an "Accord and Satisfaction" of the lease between the Landlord and Tenant?

3. Are there further monies owed by the Tenant in damages , rent or otherwise by the Tenant to the Landlord?

The Landlords Position/Claim:

[11] The Plaintiff states this case is simply a matter of interpreting the lease between the parties. A proper interpretation Action says is that the Tenant breached the lease by 1) defaulting on the rent and 2) abandoning the lease, without notice, taking the Tenant's equipment with her.

[12] The Landlord relies on paragraphs 13, 24, and 30 of the lease:

> (13.) Abandonment: The "Tenant" shall not vacate or abandon the Premises at anytime during the term without the "Landlord's" prior written consent.
>
> (24.) Interest and Costs: The Tenant shall pay to the Landlord interest of 2% per month, upon all Rent required to be paid hereunder on the due date for payment thereof until same is fully paid and satisfied. The Tenant shall indemnify the Landlord against all costs and charges (including legal fees) lawfully and reasonably incurred in enforcing payment thereof, and in obtaining possession of the Premises after default of the Tenant or upon expiration or earlier termination of the Term of this Lease or in enforcing any covenant, proviso, or agreement of the Tenant herein contained.
>
> (30.) No Implied Surrender of Waiver: No provisions of this Lease shall be deemed to have been waived by the Landlord unless such waiver is in writing signed by the Landlord. The Landlord's waiver of a breach of any term

> or condition of this Lease shall not prevent a subsequent act which would have originally constituted a breach, from having all the force and effect of any original breach. The Landlord's receipt of Rent with knowledge of a breach by the Tenant of any term or condition of this Lease shall not be deemed a waiver of such breach. The Landlords failure to enforce against the Tenant or any other tenant in the building any of the Rules or Regulations shall not be deemed a waiver of such Rules and Regulations. **No act or action done by the Landlord, its agents or employees during the Term shall be deemed an acceptance of surrender of the Premises, and no agreement to accept a surrender shall be valid, unless in writing and signed by the Landlord**. The delivery of keys to any of the Landlords employees or agents shall not constitute a termination of this Lease. **No payment by the Tenant or receipt by the Landlord which is a lesser amount than on account, or shall any endorsement statement on any cheque or any letter accompanying any cheque, or payment as rent, be deemed an accord and satisfaction and the Landlord may accept such cheque or payment without prejudice to the Landlord's right to recover the balance of such rent or persue(sic) any other remedy available to the Landlord.** (Emphasis added)

[13] There is no dispute that the Tenant was behind in her rent, according to her own evidence. The parties submitted a Joint Exhibit Book (Exhibit 1) and it contains a various statements showing the amount of the rental arrears.

[14] At page 13 of Exhibit 1 is a summary which shows the Defendant owed $16,040. as of the 1st day of January,2007 to the Plaintiff.

[15] The Tenant says the Landlord was well aware of her situation and knew she was taking steps to try to remedy the situation. She gave evidence that she was attempting to find a buyer for her club, and attempted to re-negotiate the terms of the lease (in 2006) seeking lower rent over a longer or extended term. She sent emails to the Landlord, which are contained in Exhibit 1.

[16] An important witness in these proceedings was Stephen White. He was the Account Manager/Bookkeeper for the Plaintiff and had direct dealings with Ms. Archibald. It was he who met with the tenant and Mr. Webb at Mother Webbs restaurant to discuss a termination/surrender of the lease. This was a critical meeting. It was also he who exchanged the critical email sent May 29th upon which the Defendant relies in support of her Defence, which is that the Landlord agreed to settle the current rent and to release her from her lease obligations up to the end of the term in October of 2008.

[17] The Landlord however is undeterred by this evidence and states in its Statement of Claim and in its brief that it is entitled to the entire rent for the balance of the term plus interest at the rate of 24 % per annum as provided in the lease.

[18] The Landlord says that it was entitled to apply her payment to rent as the lease signed by the Tenant allows it and provides no defence for the tenant.

[19] Action states that a lease is a contract and the email of May 29th did nothing to change that contract. Ms. Archibald knew it says that the new lease would have to be signed by Ms. Chafe who the Tenant offered to replace her.

[20] The Landlord says the fact is that they were owed much more than the amount claimed by Ms. Archibald and that she should be required to pay the amount owed as damages for her breach.

[21] The Landlord, Mr. Webb stated in evidence in reference to the email as follows:

> "It was just an email nothing more than that."

> "I told Ms Archibald we would need a new lease signed by Ms. Chafe before we could release her."
>
> “I had contact with Ms. Chafe on two occasions. Once a meeting with her and Karen and the second was a phone call in August or September, 2007.

[22] The Landlord therefore states there was no accord and satisfaction. Further that the amount due includes interest under the lease and is therefore valid. Lastly the Landlord says it did what it could to mitigate its loss but the shopping centre remained "half empty" throughout this period and that its duty to mitigate was minimal , based on the Supreme Court of Canada in **Goldhar v. Universal Sections and Mouldings Limited,** 1963 1 O.R. 189 (Ont. C.A.).

[23] The Landlord concludes by saying it exercised the first of 4 options available to a Landlord (upon default) under the leading authority in Canada for commercial leases, **Highway Properties Ltd. v. Kelly Douglas Limited** (1971) CanLII 123(SCC). That option they say was to do nothing to alter the lease and allow the lease to remain in effect. This, they say, is what Action did leading up to the abandonment of the premises by the Tenant on or about December 3rd, 2007. As a result, their action, on the strength of the lease contract should be allowed.

[24] At this point it should be noted that the original lease contract was not placed in evidence by the Landlord nor for that matter was a copy signed by the Landlord. The evidence was however that it provided a signed copy to the Tenant. The existence of the lease was not disputed by the Tenant but it should be noted that where the Landlord relies on the lease and a strict interpretation thereof, the original lease should normally be produced in evidence. This would remove any doubt as to what was signed as well as the terms agreed to.

[25] In the alternative the Landlord says that even if an accord and satisfaction was reached, the Tenant remained in the premises from June 5th, 2007 when she made her "final payment" to the end of November 2007 thereby repudiating the agreement. The Landlord says by the Tenant remaining she acknowledged that the lease continued and there was no lawful surrender or termination of the lease.

The Tenant's Position/Defence:

[26] The Tenant offered up one defence, accord and satisfaction as contained in paragraphs 3, 4 and 5 of her Statement of Defence.

The key pieces of evidence in support of her position are the meeting at Mother Webb's and the following email:

> "From: "Action Management"
> To: "Karen Archibald"
> Sent: Tuesday, May 29, 2007 5:27 pm
> Subject: RE: Curves an update
>
> Hi Karen. We haven't been able to reach or negotiate anything up to this time. We would like for you to offer a cash settlement for the current rent and for you to release you obligation for the remaining lease to October 2008. You currently owe $21878.72 plus HST.
> If you make an agreeable offer we will privately carry out a successful lease with Gloria. We have not discussed any past rent to Gloria. Please let me know your wishes at your convenience.
>
> Stephen White"

[27] Also the following three (3) options were given to the Tenant by the Landlord were:1) Curves can sublet the space and pay or keep the difference; 2)Curves can keep the space and pay the rent; 3) Curves can make a settlement with Action. These were in a document contained at page 40 of Exhibit 1. In addition the Landlord's account manager Stephen White made a handwritten note in response to the Tenant's effort to reach a compromise which note appears at page 39 of Exhibit 1. This note is attached as Appendix "A".

[28] Whatever the Landlord thought, the Tenant saw this as an opportunity and she wanted to seize it. She responded immediately with a request to meet to discuss a settlement.

[29] The critical witnesses gave evidence in relation to the meeting at Mother Webbs where the alleged settlement took place. The Tenant says an agreement was reached. A summary of her position is as follows:

(1) Action came down from 15K;

(2) She paid two cheques;

(3) She asked for a release;

(4) Mr. White said he could not provide it right at that time;

(5) She wrote on the cheque “final payment for release “and;

(6) The accounting system of the Plaintiff recorded as “final”;

(7) Mr. Webb subsequently instructed a law firm to draft a new lease, in June of 2007, in the name of Gloria Chafe as Tenant.

Action Management - Mr. Gerald Webb

[30] The Plaintiff, Action, gave evidence through its President and Operating Manager, Gerald Webb, age 70. Mr. Webb stated that in 2003 when the lease was negotiated he was the Recognized Agent and the controlling mind of the Corporate Landlord. The Company's business is real estate and in all there are 100 leases upon which they collect rent. Their properties include a mobile home park, 811 Reeves Street, known as the Town Centre in Port Hawkesbury, as well as building lots.

[31] Action's Town Centre at 811 Reeves Street consists of primary commercial space on the first floor and secondary commercial space on the second floor. Of the total space of 42,000 square feet, about 50% is located on each level. To find Tenants, Mr. Webb stated the most effective method is through the use of Realtors or Brokers to whom they pay a commission. The Tenants here, Adam and Karen Archibald were obtained through a Broker, Joe Deveaux, who also prepared the lease for signature. Mr. Deveaux was not called to give evidence by either party.

[32] Mr. Webb stated the second floor where the Tenant's premises are located is typically harder to rent. He stated his company has had as many as 60 to 80 employees and that in 2003 there were 3 people employed in the accounts office (payable and receivables). One of these persons was Stephen White who gave evidence in that capacity in this matter.

[33] Mr. Webb talked about the rent, common area costs as well as the substantial amount ($60,000) Action put into the premises for repairs in advance of the lease to the Archibalds. He also reviewed the accounting documents included in the Joint Exhibit Book (Exhibit 1). He generally verified the amounts owing but in certain instances he could not recall who prepared what document but confirmed that the reports were prepared "in the office". He did not provide a copy of the lease executed by Action but did indicate he signed a copy and sent it to Mr. and Mrs. Archibald.

[34] Mr. Webb noted that the Tenant made regular monthly payments up to 2006 and that after that the payments became late and unpredictable. He noted things like a missed rental charge for one month by Action and then it being put in twice for March of 06. On April the 1st, 2006 the balance owing in rent was $9,600. This

was brought to the attention of whomever was in charge of collecting the rent at the time. He couldn't identify this person. He stated however he "cross checked" the figures himself.

[35] In regard to Ms. Archibald he could not recall a letter sent to him by her in January of 2007 (Exhibit 1, page 34) but recalled her saying she would "sell the club", referring to her Curves club at his premises. He stated that after January 1, 2007 there was no accrual and that the balance as of that date was $16,040.

[36] His recollection was that he made up an advertisement to assist the Tenant in selling the club. He said he believes it was advertised on the radio but couldn't remember. He recalled there being two possible buyers, but nothing developed and he "thinks he talked to Karen on the phone, but maybe Stephen did" but "that was it".

[37] In terms of some of the more pertinent evidence, Mr. Webb was questioned about the May 29th email from Ms. Archibald at 2:41 pm (Exhibit 1, page 38) where she requested a "bigger break" with a 5 year lease. He acknowledged the email and said that "Ms. Chafe would have to negotiate a lease with us".

[38] In response to a further question about the handwritten note written on the May 29th email (Exhibit 1, page 39) he stated he recognized it but that is was “not my handwriting”. Next Mr. Webb was asked when he met next with Ms. Archibald after May 29th and his testimony was that he couldn’t recall meeting with her after that date. This was a key email and a key meeting in respect of this entire case. He was asked, “when did you meet” his reply was he couldn’t recall. He was asked “did you meet” and he also said in reply to that, he couldn’t recall. The weight of the evidence, including the emails, suggests that Ms. Archibald met with Mr. Webb and Mr. White on May 31st, 2007 to discuss the May 29th email sent to Ms. Archibald at 5:27 p.m.

[39] Mr. Webb was then asked about the cheque which Action received from Ms. Archibald for $6,200 dated June the 5th, 2007. He gave evidence that it was given to Stephen White while at Mother Webb’s as Mr. White had the responsibility and had to answer for it. Mr. Webb stated he did not handle money.

[40] He recalled the meeting saying it wasn’t a long meeting but the restaurant was full and it was in the dining area at a corner table. When asked about the

memo on the “re: line” of the cheque, Mr. Webb could not recall whether the words “PH final rent for release” had been written on it by Ms. Archibald when it was given to Mr. White.

[41] Mr. Webb did agree that Ms. Archibald asked for a release (“because she had Gloria”). Mr. Webb said “we told her we couldn’t give her a release until such time as we had a lease with Gloria (Chafe)”.

[42] Mr. Webb was asked when the meeting was. He didn’t know. It could be a week or a month earlier, same day even. He “assumed” it was very close or around that time, meaning the date of the cheque. In fact the meeting was held on May 31, 2011 as is born out by the evidence of Ms. Archibald and not denied by Mr. White, nor Mr. Webb.

[43] In cross examination Mr. Webb denied that the May 29th email constituted an agreement, stating it was simply an email. He was asked by the Defendant about the sentence which states: “if you make an agreeable offer”, and whether that was a condition and in fact the only condition. He testified he was “struggling with the idea”. It was from his representative, Stephen White. When asked about

the events leading up to the meeting at Mother Webb's, including Ms. Archibald's phone call to confirm, he was unsure and said "he didn't know". He was asked also if he remembered meeting at Mother Webb's on May 31, 2007 in his restaurant? In reply he said he didn't recall that date specifically nor did he recall presenting Ms. Archibald with three (3) options as outlined in Exhibit 1, page 40. He did not deny it but once again, he did not recall. Those options are attached hereto as Appendix "B".

[44] Ms. Archibald asked Mr. Webb about a $15,000 settlement figure originally discussed at the meeting. He admitted that it was part of the discussion but stated also there had to be "successful lease" from Gloria. He was asked whether he agreed that was not what Stephen White conveyed to Ms. Archibald. His answer to that was not direct, stating "in his mind" she would have to pay for the lease or have a successor and a settlement from her, referring to Ms. Archibald.

[45] He did recall Ms. Archibald asking for a release and him saying he couldn't do that until there was "a successful lease". He then said "I don't deny the rest" but stated there was never a condition where she would pay a certain amount and walk away.

[46] Finally in cross examination Mr. Webb was asked whether he recalled how the settlement figure got reduced from $15,000 to $11,200. It was put to him by Ms. Archibald that he was very upset with Mr. White for failing to post $1,800 paid by her and for that aggravation he took off another $2,000. His response was "that part I recall". He was later asked whether he saw the cheque for $6,200 given to Stephen White to which he replied, "I may have".

Mr. Stephen White

[47] Mr. Stephen White, age 39, also gave evidence on behalf of the Plaintiff. He stated his employment with Action ended in September of 2007 but he was still employed with Action for the months of June, July and August, 2007. He was hired by Action in 2003 as a store manager and was promoted to deal with its rental holdings. His job description included making sure rent was paid on time, dealing with arrears, contact with Tenants and taking necessary steps in that regard. His recollection was that 811 Reeves Street was not fully rented and that typically 50 percent or close to that would be rented. He reported to Mr. Webb directly. He

had minimal involvement with attracting new Tenants and stated he had more "residential experience".

[48] He stated he would have reviewed the main terms of the lease with Ms. Archibald but had little or no dealings with Adam Archibald. Mr. White confirmed that the rental report generated on January the 21st, 2008 by Action (Exhibit 1, pages 10, 11)showed the dates when rent was collected. He confirmed that the last payment of rent by Tenant was June the 5th, 2007. He stated also that he was familiar with the Tenant payment history (Exhibit 1, pages 12, 13) and that this document was either maintained or overseen by him.

[49] Mr. White stated that as of January 6th, 2006 the Tenant had a zero balance. After that date he said he was not receiving regular rent payments and the balance began to grow. At that time he immediately started trying to contact Curves or Ms. Archibald and admitted having difficulty contacting her. He stated it was "a little bit of time" before he could contact her. He acknowledged that a charge was missed in January 2006 and confirmed that two(2) cheques were received in July 06 and that two(2) more cheques were received in August of 06 leaving a balance as of January 1st of 07 in the amount of $16,040.

[50] There were two more cheques paid in January of 07 which reduced the balance to $12,956. He said he "vaguely recalled" receiving the last of the payments, $5,000 on May 31st and $6,200 on June the 5th, 2007. Mr. White prepared a statement to June 1st, 2007 (Exhibit 1, page 16) and sent it to Ms. Archibald to "start negotiations". He acknowledged her January 06 email (Exhibit 1, page 34) seeking a reduction and her May 19th email offering to extend the lease (Exhibit 1, page 19). He couldn't recall exactly when negotiations started but it was within the first six (6) months of 2006. He stated the lease was not extended. He recalled her asking for a "clearance" and said there was never an agreement to reduce the rent, stating only Mr. Webb had that authority.

[51] Mr. White recalled that in late 2006 Ms. Archibald was trying to find a buyer for the club but he had no involvement with the ads for this. He recalled being told in April of 2007 that Ms. Archibald was trying to find someone to start a new lease and "obtain a release from us". He said he met with Gloria Chafe once or twice and described her as the lady Karen presented as buying the Curves franchise. He said he didn't remember any discussion with her specific to a lease nor did he have any discussion with the other lady, Amy Fougere. He said he

"really didn't remember" the discussion around giving the Tenant a bigger break with a five (5) year lease. He identified the note on page 39 of Exhibit 1 as his handwriting including the amount owing of "$21,878.72" as of that date, May 29th, 2007.

[52] In his direct evidence Mr. White vaguely remembered Ms. Archibald requesting a release and said that they weren't willing to release anything until they had someone to take over and a full, "actual reasonable offer" on the rent. He stated further that the date of June 5th, 2007 relates to the last entry and the cheque would have been received around that period of time. From that point forward he said there were no further lease payments.

[53] On cross examination by Ms. Archibald Mr. White was asked why he recorded the June 5th, 2007 cheque as the "final payment". He could not recall. When asked if he provided documents (referring to the handwritten note on page 39) to Mr. Webb for an affidavit disclosing documents, he could not recall. He agreed with Ms. Archibald that the only condition in the May 29th email was that she "make an agreeable offer". It sounded like that, he said.

[54] When asked to confirm whether May 31st was the meeting date at Mother Webb's he said he couldn't argue with it, but didn't know for sure. He was also asked about the document at page 40 of exhibit 1 containing the three (3) options which Ms. Archibald states were placed before her. He was asked whether option number 3 was the most applicable to her making an agreeable offer? To this he replied "I don't really recall". When asked about her giving a $5,000 cheque to Mr. Webb on that day (May 31st) he said he remembered a cheque, but didn't remember how much.

[55] Mr. White was asked about page 48 of Exhibit 1 containing the cheque for $6,200 but said he didn't remember the exact circumstances. He was asked again and said that "no I don't remember, I apologize but...". He was asked whether he remembered Ms. Archibald putting a note on the cheque (because you were not giving me a release then and there) and he replied, "Again, I just don't remember."

Law and Analysis

1. Was there a disclaimer , surrender, and/or abandonment of the commercial lease dated the 21st day of May 2003 ?

[56] The Plaintiff argues that it is entitled to the full amount of its claim under the terms of the lease. The Plaintiff in its brief and in oral argument cited clause 13 (Abandonment) and clause 30 (No Implied Surrender or Waiver).

[57] Under clause 13 the Tenant is prevented from vacating the premises before the end of the term without the Landlord's prior consent in writing. Here the lease expired on October 31th, 2008. The evidence, which is uncontroverted is that the Tenant left at the end of November or December the 3rd, 2007 at the latest.

[58] In **Queen's Square Development v Financial Agencies Ltd.,** 1989 CanLII 1481 (NSSC), the term "abandon" was defined (as taken from Blacks) as:

> "To desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one's right or interest...it includes the intention, and also the external act by which it is carried into effect."

[59] In the present case there is little doubt on the evidence that the Tenant left with intent not to return. She had been waiting, she said, for the purchaser, Gloria Chafe, to complete the purchase of her club. She had been waiting also for the lease to be finalized between the purchaser and the Landlord. As she put it, she stayed beyond June 5th, 2007 to facilitate the various parties and transactions that were occurring.

[60] For its part the Landlord expressed surprise when it learned the Tenant had left with the equipment. Action subsequently informed the Tenant that she had to give notice in writing. The Tenant sent an email to the Landlord on December 3rd, 2007 explaining the circumstances of her moving out. She said she decided to close the club and attempted to phone him the previous Thursday to let him know.

[61] With respect to clause 30 of the lease the Plaintiff argues strongly the situation here is not a surrender. Action says, faced with the circumstance of a Tenant moving out, as the Tenant did here, its course of action was prudent and it did nothing to alter the landlord /tenant relationship. It simply commenced an action for rent and damages, for the breach.

[62] Citing **Williams and Rhodes, Canadian Law of Landlord and Tenant (6th ed)** the Plaintiff, Action, argues that nothing short of eviction of the Tenant will amount to a surrender. It says no eviction occurred here.

[63] The Plaintiff further argues there was no "retaking" by Action and no distraint, unlike many other options used by Landlords in commercial situations. Instead the Plaintiff states the Defendant committed the unilateral act of disclaiming the premises by its actions of moving out without proper notice.

[64] In its brief the Plaintiff cited the leading authority for remedies available to commercial landlords in Canada, the case of **Highway Properties v Kelly Douglas** 1971 CanLII 123. This well known case discussed four (4) options a Landlord has when a Tenant breaches a commercial lease agreement. The Landlord in the present case relies on the first of those options which states:

> "He may do nothing to alter the relationship of the Landlord and Tenant, but simply insist on the performance of the terms and sue for rent or damages on the footing that the lease remains in force".

[65] The preamble to selecting which of these courses of action a Landlord may take, has as a qualifier “where a Tenant is in fundamental breach of the lease or has repudiated it entirely”. In other words it assumes a breach of the lease.

[66] It is also predicated on the lease remaining in force, something the Tenant here argues was not the case at the time she moved out.

[67] In **Elia v Chater**, 1998 CanLII 2123 NSCA, cited by the Plaintiff, Justice Cromwell explained the difference between a disclaimer and a surrender:

> “A disclaimer is a unilateral act terminating the lease while a surrender involves giving up the lease with the consent of the landlord: see L.W. Holden and G.B. Morawetz, Bankruptcy and Insolvency Law of Canada (3d, revised) vol 2 at 5 - 143. A surrender may be either express or implied. If implied, it is referred to as a surrender by operation of law. This may occur if the tenant accepts from the landlord a new lease incompatible with the existing lease or if the tenant delivers up possession to the landlord and the possession is accepted by the landlord: see Anger and Honsberger, supra at 291-292**. Whether or not there has been a surrender by operation of law is to be determined by considering and drawing appropriate inferences from the conduct of the parties.** As Moorhouse, J. said in Ferguson v Craig, [1954] 4 D.L.R. 815 at 819-20 "Surrender in law has been denied as a surrender effected by the construction put by the court on the acts of the parties, in order to give to those acts the effects substantially intended by them...": see also Daulat Investments v Ceci's

> Home for Children reflex (1991), 85 D.L.R. (4th) 248 (Ont. Ct. Gen. Div.) At 2561-262." (emphasis added)

[68] The conduct of the parties therefore is entirely relevant in determining whether there has been a surrender of the lease. If the Landlord, by its conduct, accepts that a lease is being surrendered, then an implied surrender by operation of law can occur. If so it could relieve the Tenant from further liability under the lease for the balance of the term.

[69] In **Machula v Tramer**, 1972, 1 WWR 550 the issue was whether the Landlord had accepted a surrender of the lease before the lease term expired, thereby precluding the Landlord from succeeding on his claim for payment of rent for the balance of the term.

[70] Similar to the facts in the present case the Tenant in **Machula** issued two (2) cheques representing his last rent payments. The Court at paragraph 13 identified the issue as follows:

> "In the instant case, it is required to determine whether the Plaintiff accepted the Defendant's abandonment which in turn would bring about a surrender in law."

[71] The Court concluded that the Landlord accepted the abandonment by the Tenant stating at paragraph 15:

> "There is nothing in the acts of the Plaintiff towards the Defendant during the times that the Defendant later returned to Ituna that can be construed in any way other than that the Plaintiff had accepted the abandonment."

[72] In that case the Plaintiff resumed control of the premises when the Tenant abandoned them. Also there had been no demand for rent for eight (8) months. The Court considered also the acts and words of the parties including those of the Landlord who said "I'm sorry to see you go." and "It's one of those things." Finally the Court referred to **Highway Properties** and the requirement for a "contemporaneous assertion" by the Landlord of its right to full damages over the unexpired term, which assertion was not made, no such notice having been given.

[73] In the present case, there is no dispute that the Tenant was in default of rent payments. There was also no demand between June and November of 2007 for rent payments. The Tenant, however, remained in the premises and retained the keys/possession unlike the Defendant in **Machula**.

[74] In the present case, the actions of the parties and words were not as clear as in **Machula** as to whether there was in law an acceptance by the Landlord Action. To conclude however that the Landlord did nothing to alter the relationship is to ignore the events which occurred between the parties some six months earlier, in late May and early June of 2007.

[75] While there was no demand, there was also no clear election in writing by the Landlord to the Tenant that it was still treating the lease as being in existence. The communication could have been better.

[76] The operative time, as argued by the Plaintiff, as stated in **Highway Properties** is the time of repudiation of the lease by the Tenant. The Plaintiff therefore states that no prior notice of election was required prior to the Tenant's decision to leave. The Tenant also continued to accept and receive income from her business in the premises during the months preceding her departure.

[77] I find therefore, on the balance of probabilities that there was no surrender in law of the 2003 lease and that the Landlord did not accept the abandonment by the Tenant at the time she left the premises in late November of 2007. Had she moved

out earlier, returned the keys making her position clear, the finding may have been different. She explained her reasons for staying to facilitate the parties. That still does not lend itself to there being a surrender.

[78] At this point, however, the matter of liability is not finalized as the validity of the lease itself is still subject to whether there was an accord and satisfaction of the lease as argued by the Tenants. If there was, then the lease terms including those with respect to abandonment and surrender could be altered or deemed no longer legally enforceable. In that instance the relationship of the parties would be governed by the terms of the new accord.

[79] I turn now to discuss the issue of whether there was an accord and satisfaction of the lease in question.

2. Was there an "Accord and Satisfaction" of the lease between the Landlord and Tenant?

[80] In her defence the Defendant states that she negotiated a settlement of the lease with the Landlord on May the 31st, 2007 during a meeting with the Plaintiff and his employee. This “cash settlement” requested by the Landlord included in return a promise to release the Tenant of her obligation for the remainder of the Lease to October the 30th, 2008.

[81] In her submission the Defendant referred to the following paragraph taken from **British Gazette and Trade Outlook Ltd.,** 1933 2 KB 616 (C.A.) to explain her defence. In that case, Scrutten L.J. stated:

> “...Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged.. The satisfaction is the consideration which makes the agreement operative. Formerly it was necessary that the consideration should be executed: “I release you from your obligation in consideration of 50 bounds now paid by you to me.” Later it was conceded that the consideration might be executory: “I release you from your obligation in consideration of your promise to pay me 50 pounds, and give me a letter of withdrawal.” The consideration on each side might be an executory promise, the two mutual promises making an agreement enforceable in law, a contract.

[82] In **Queen's Square**, 1989. CanLII 1484 NSCC, Roscoe, J. stated that remedies in a commercial lease are subject to the law of contract:

> "I agree with the plaintiff's submission that the specific provisions of the lease between the parties dictate the remedies available to the landlord and it is the law of contract as opposed to the law of real property that applies in the circumstances. It remains, then, to determine whether the actions of the defendant, in moving its business to Dartmouth, constitute a breach of the tenants covenants contained in the lease."

[83] The Defendant states therefore that one contract replaced another. That is the accord reached on May the 31st,2007 and completed on June the 5th, 2007 with the "final payment", replaced the lease between the parties dated May 21st, 2003. The terms of this new accord, she says, were dictated by the Plaintiff not her in the May 29th email (Exhibit 1, page 46). Satisfaction of the accord took place with the payments of $5,000 on May 31st and $6,200 on June the 5th, 2007.

[84] The Defendant cites **Trust Guarantee Co. v Dinning**, 1927, CanLII 1481 NSCC, in support of the proposition that whether what has occurred amounts to a accord and satisfaction is a question of fact, not a question of law. (See also **Fridman Law of Contracts** (5th Ed) at p 573).

[85] The Plaintiff's position on this issue is summarized in its brief on page 12 as follows:

> "In the instant case, in reviewing the facts, it is clear that at the time that the Defendant suggests that a cheque was proffered, the arrears were larger than the payment, the Defendant was attempting, but never did succeed in obtaining an alternative tenant for the property, then continued to remain in the premises without paying rent for a further almost 6 months. All of those facts would certainly suggest that with a "heavy and substantial" onus upon her, that the Defendant will not satisfy the Court, that the Plaintiff in cashing the cheque amounted to a full accord and satisfaction."

[86] Further the Plaintiff has correctly in my view cited the New Brunswick case of **Sears v Russell,** 2006, NBQB 271 to illustrate to the Court that the onus which the Defendant must meet is a "heavy and substantial" one.

[87] What then is the evidence in the present case which would support a finding of fact that Action and the Tenant reached an accord and satisfaction of the lease? Does this evidence, if any, meet the heavy and substantial burden imposed upon the Defendant?

[88] The email from the Plaintiff dated May 29th, 2007 is clear in its scope and wording. It follows previous requests by the Plaintiff for a reduction in rent and for

an extended term. She informed Action of her intent to sell and she asked their assistance in this regard. Stephen White, the accounting employee for Action sent an email to the Plaintiff asking that negotiations be started, saying something had to be done. The May 29th email from the Plaintiff at page 46 of Exhibit 1 stated the following:

I) It asked the Tenant to offer Action a cash settlement for the current rent and in return it would release her for the remaining term of the lease to October, 2008. That is what it says.

ii) It says also that if the offer is agreeable, "we" meaning Action would privately carry out a successful lease with Gloria (Chafe). By "privately" it can reasonably inferred that the new lease would be negotiated without the involvement of Ms. Archibald. The evidence of Gloria Chafe confirmed this when she said in re-direct to the Defendant, "you were assuming I was backing down, but I couldn't tell you", or words to that effect.

[89] Ms. Archibald gave clear and convincing evidence as to the events surrounding the May 29th email and the events that followed. Unlike Mr. Webb and Mr. White, she knew all of the details including date and times of the emails, the

date and times of the meeting, the dates and amounts of the cheques, and when they were delivered. She also recounted in detail what was discussed. She stated she was excited when she received the email and intended to respond and promptly to seize the opportunity she believed she had been given. The question is, can and should the offer be accepted on its face so as to constitute offer acceptance and ultimately, consideration?

[90] Ms. Archibald provided particulars in her evidence as to how the $11,200 figure was arrived at, at one point jogging the memory of Mr. Webb in respect of a $2,000 reduction. She further described the money order for $5,000 given on May the 31st and described further her promise to be back with the $6,200 as soon as she could. She returned days later, June 5th, with the cheque for $6,200 entered in Exhibit 1, at page 48. She stated that at that time she asked Stephen White for a release and her evidence was that he said he couldn't give her one right away but would get it to her, or words to that effect. Because of this she said she wrote, "PH final rent for release" on the June 5th cheque.

[91] Mr. White, for his part, could recall none of the important details relating to the May 31st meeting or subsequent events. He apologized for this at one point. He

could not recall the three (3) options which Ms. Archibald said were provided to her as contained at page 40 of Exhibit 1. This followed her earlier email of May 29th at page 39 asking to be informed of what it would cost her under each scenario. Mr. White was asked by Ms. Archibald on cross examination "you don't remember the circumstances?" To this he replied "well no I don't remember". She then asked "And you don't remember I put a note on the cheque because you were not going to give me the release then and there?" To this he replied "Again, I just don't remember".

[92] Mr. Webb's evidence initially was that he couldn't recall meeting with Ms. Archibald after the May 29th email at page 46 of Exhibit 1. Neither he nor Mr. White could recall whether the "re: line" on the cheque was filled in when it was received by them. Neither knew the dates of the meetings although they assumed correctly that they were held around the same dates as the cheques. Mr. Webb dismissed the email as just an email, even though it provided Action with $11,200 of rent, a substantial sum. Neither explained what was meant by Mr. White's handwriting, Mr. Webb simply stating "it's not mine". Mr. White could give no explanation of why the last payment was entered on the accounting records of

Action as the “final payment”. Mr. Webb didn’t deny discussing the 3 options at page 40 with Archibald but just couldn’t recall them.

[93] What they did recall, both Mr. Webb and Mr. White, was advising Ms. Archibald that a new lease would have to be in place with Ms. Chafe before Action would release her from the rent obligation for the term of the lease.

[94] Ms Gloria Chafe gave evidence that she and Mr. Webb had come to a verbal agreement but that she could not get all of the terms in writing. She stated she agreed on the term, 3 years as well as the rent ($1490. per month) but could not get the “price” in writing. She referred to emails which we not introduced in court except for the Nov. 7th email at pg 49. This email she said was a follow up to three previous emails she said she sent to Action without a reply. Perhaps the most troubling part of her evidence, which went unchallenged, was her statement that the first time she saw the draft lease was when the defendant called her to testify for her in this matter. Also she said she was told by Action that it could not finalize a lease with her until they settled the lease with the Defendant.

[95] Mr. Webb gave evidence in rebuttal that he had contact with Ms. Chafe on two occasions only, the first at a meeting with Ms. Chafe and the Defendant and the second a telephone call in August or September of 2007. He said he was a non participant at the meeting and when asked could not remember if it was prior to receiving the $11,200. He said also the figure in the draft lease at page 22 of Exhibit 1 was an "exploratory" figure only. This was contrary to Ms. Chafe's evidence.

[96] There are certainly contradictions between the evidence of Mr. Webb and Ms. Chafe, not the least of which is that the lease according to her was much more advanced that what Mr. Webb had presented. It would have been better to have had in evidence the emails to which she referred to shed more light on her evidence. She did say that Ms. Archibald was in the dark and she respected the rule about not speaking to her, which verified the privacy aspect of the May 29th email. If Ms. Chafe is to be believed then it was hardly the Defendant that was holding up a lease with Ms. Chafe or had the responsibility of finalizing it.

[97] Mr. Webb did not answer directly Ms. Archibald's suggestion that the only condition in the email (Exhibit 1 at page 46) was that she make an agreeable offer. Mr. White in fact agreed with her stating, "I would agree there, yes." Ms. Archibald,

when it was suggested to her in cross examination by Action's counsel, Mr. Ripley, that Mr. Webb would have to have to have a new lease with a new Tenant, replied "That is not true, that is not what he stated. I have to disagree." She further stated, "I understand that's his version."

[98] Without recounting further all of the recollections and discrepancies, I have considered the testimony of these witnesses and where the evidence of Mr. Webb and Mr. White differs with that of Karen Archibald, I accept her evidence. While she may be in a better position to recall, as she dealt only with her lease, her recollections and testimony were presented in a more clear and precise manner as compared with Action's witnesses.

[99] I am further satisfied that the circumstances described by Ms. Archibald represent an accord between her and Action to accept a lesser sum. I find as a fact based on the foregoing evidence that she made an offer that was acceptable to Action and she paid them the consideration for that offer, which they received.

[100] I pause here to consider whether the evidence further supports a finding of both accord and satisfaction, in terms of the requisite elements as enunciated in the case law.

[101] In **Slaney and Slaney v Edney,** 1979 22 Nfld & PEIR 95, at paragraph 22:

> "There must be both accord and satisfaction and an accord without satisfaction is no discharge."

[102] In **British Russian Gazette** and in **Fridman 5th ed Law of Contracts** (572) it is stated that the consideration for the accord must not be the "actual performance of the obligation itself". Thus a closer examination of the cases involving settlement of a debt for a lesser amount is warranted.

[103] In **D&C Builders v Rees** 1965, 3 All ER 837 Lord Denning included the following statement at page four:

> "In applying this principle, however, we must note the qualification: The creditor is only barred from his legal right when it would be inequitable for him to insist upon them. Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, **then it is inequitable for the creditor afterwards to insist on the**

> **balance.** But he is not bound unless there has been truly an accord between them." (Emphasis added)

[104] In **Sears v Russell,** 2006 NBQB 271 cited by the Plaintiff the Court discussed what constitutes a full settlement in the case of a lesser sum:

> "11. Where a creditor cashes, certifies, deposits or otherwise negotiates with a cheque delivered on condition of full settlement, accepting receipt may be evidence of accord and satisfaction, but not conclusive evidence and no presumption of the kind should be drawn. The creditor is at liberty to cash and keep the funds and disregard the condition as long as he or she does not agree otherwise or communicate **express acceptance** of the condition."(Emphasis added)

[105] In **Sears** referring to the case of **IBI Group v Lefevre**, 2004 Carswell BC 506, Justice Glennie pointed out that there are two (2) important considerations in determining whether there has been expressed acceptance, when for example a creditor cashes, deposits or negotiates a cheque. The first is for the payor, the Tenant in this case, to prove that Action expressly accepted the part payment as full payment. The standard of proof is on the balance of probabilities notwithstanding that the onus has been described as "heavy and substantial". Secondly, what governs is the intention of the recipient and whether it was expressly communicated. In this case that would be Action. What is required is evidence beyond "mere

acceptance" according to the "weight of authority" and that "silence" generally is not expressed acceptance. (See **I.B.I. Group** in **Sears** at paragraph 11)

[106] In terms of the consideration being more than the obligation itself, the obligation of the Tenant in the present case was to pay rent. The Plaintiff argues that at the time the cheque was proffered, the arrears were larger than the payment. Firstly this was not the only evidence of consideration. Even if it was, however, it could be argued that the cheque was proffered at the request of the Plaintiff as it asked the Tenant to make an agreeable offer. If the offer was agreeable, it matters not what the amount of the cheque was, compared to the arrears. In addition the Landlord, Action, sought to negotiate a new lease with a new Tenant, something it had maintained it wanted. The way it was worded describes how Action wanted to proceed. It wished to negotiate that new lease "privately".

[107] In **D & C Builders v Rees** [1965] 3 All E.R. 837, Lord Justice Winn referring to a note in **Smith's Leading Cases** at page 366 stated:

> "But, if there be any benefit, **or even any legal possibility of benefit,** to the creditor thrown in, that additional weight would turn the scale and render the consideration sufficient to support the agreement." (Emphasis added)

[108] In the present case the evidence supports an additional benefit of allowing the Landlord to negotiate privately with the Tenant a new lease which Action went so far as to prepare in draft. Beyond that the email is silent as to any further obligation of Ms. Archibald. Ms. Archibald accepted these terms as part of the agreeable offer she made to the Landlord. I therefore find that there was consideration beyond the obligation itself.

[109] In terms of whether the Landlord expressly accepted part payment as full payment, the evidence, in my view, is supportive of the following findings of fact:

1. Other than the two final cheques provided in May and June, 2007 no further cheques were provided or requested by the Landlord.
2. No further demand for rent payments occurred for the six months between June and November of 2007.
3. The Landlord reduced to writing by his own hand that it would accept an agreeable offer.
4. There is no evidence to suggest that the amount offered was not acceptable other than the Landlord's evidence that a new lease would be required before a release would be given. I have already, on the basis

of credibility, made a finding that the evidence of the Tenant is accepted over that of the Landlord.

5. The consideration for the acceptable offer was paid to and received by the Landlord.

[110] This leaves the Plaintiff's argument that the Tenant remaining in the premises for almost six months is not indicative of an accord and satisfaction.

[111] It is true that the Defendant remaining in the premises was not a condition of the accord and satisfaction.

[112] That, however, does not prevent the court from concluding that there was an accord and satisfaction of the rental arrears as well as the rent owing to the end of the lease. That is what the email forwarded to the Tenant by the Landlord, in fact said. I find it was more than just an email. It was the document which formed the basis of the subsequent accord and satisfaction reached between the parties and I so find.

[113] I further find on the basis of the evidence and as given by Ms. Archibald that she made an “acceptable offer” to the Landlord in good faith fully expecting a release. The fact that she had agreed in the lease that a cheque proffered with a memo such as she wrote does not prevent an accord and satisfaction from subsequently occurring. In my respectful view clause 30 of the lease contemplates a situation where a Tenant attempts to secure full payment with part payment by a unilateral act without consent or acceptance from the Landlord. Such is not the case here.

[114] The circumstances here bring to mind what Lord Denning said in D & C Builders , that it would be inequitable for the creditor to insist on the greater sum, where the debtor paid the lesser sum in reliance of that promise. Lord Winn in the same case concluded the mere possibility of a benefit “thrown in” can justify consideration separate and apart from the obligation itself.

[115] For the foregoing reasons, and on the basis of the findings I have made, I find as a fact that the parties reached an accord and satisfaction and that the requisite elements are present in this case and have been proven by the Defendant on the balance of probabilities. This is so notwithstanding the heavy and substantial burden

on the Defendant. The accord was reached on May 31st and satisfied on June 5th, 2007. The rest was up to the Landlord.

[116] It is important to note here that my finding does not include occupation of the premises by the Tenant after the date the accord was satisfied June 5th, 2007. I find therefore, that the Tenant remaining in the premises for six (6) months was not a condition of the accord and satisfaction. Therefore that issue must be assessed separately in terms of whether the Tenant owes an amount to the Landlord for occupation and possession between June the 5th and December 3rd, 2007. I turn now to address that issue.

3. Are there further monies owed by the Tenant in damages , rent or otherwise by the Tenant to the Landlord?

[117] The accord and satisfaction left the relationship between the Plaintiff and Defendant somewhat uncertain as to the right to occupy the premises. The accord addressed two items, (I) the arrears of rent as of June the 5th, 2011 and (ii) the rent for the balance of the term to October, 2008.

[118] Without the obligation to pay rent and without a term, Ms. Archibald was in effect a Tenant without a lease as if it had expired.

[119] In **Hubbard v. Hamburgh et al.**, 1993 16 OR (3d) 368 the Court held that a tenancy at will was created when the lease between the parties expired, and would continue until the Landlord took proper steps to recover possession. The Court in **Hubbard** referred to the definitions of Tenant at Will and Tenant at Sufferance as contained in Black's dictionary. A Tenant at Will was described as:

> "One who holds possession of premises by permission of owner or Landlord but without a fixed term...in this case the lessee is called a 'Tenant at Will' because he has no certain or sure estate, for the Lessor may put him out at any time."
>
> Tenant at Sufferance:
>
> "One who rightfully being in possession continues after his right is terminated. He has no estate or title without right..."

[120] Paragraph 15 of the lease describes a Tenant at Sufferance as the Tenant remaining in possession without the consent of the Landlord "after the expiration or other termination of the lease". An accord and satisfaction is a form of termination or discharge of the lease by the subsequent agreement between the parties.

[121] In the present case the Landlord took no steps to re-take possession as he did not recognize the accord and satisfaction. The subsequent agreement did not deal with the issue of continued occupation by the Tenant, who was otherwise without rights. In short there was no certain or sure estate. Consequently I find that subsequent to the date of the accord and satisfaction, June the 5th, 2007, the Tenant was a Tenant at Will.

[122] Accordingly, as a Tenant, the Defendant should pay to the Landlord rent for the Tenant's use and occupation. I find that the Tenant, Archibald, shall pay to the Landlord rent equal to six months in the amount of $2,100 per month for a total of $12,600 plus applicable taxes, for the period from the June 5th, 2007 to December 3rd, 2007.

[123] I have considered that the actual period may be a few days less than six months but in the circumstances I believe this to a fair exercise of my discretion in settling the period for which rent should be paid.

[124] The Plaintiff will further be entitled to pre-judgment at the rate of 5 %.

[125] In my respectful view I do not believe Section 15 of the lease applies so to charge the Tenant, two times the current rent. The current rent was settled by the accord and satisfaction.

[126] Furthermore and for similar reason Section 24 of the lease requiring interest at 24 % is not clearly applicable given that it also refers to rent required to be paid "hereunder" meaning the lease as opposed to the Tenancy at Will.

[127] The rate of 5 % interest was put forth by the Plaintiff, as an applicable rate for pre-judgment interest. It was suggested by the Plaintiff this was agreeable to the Defendant but her brief or submissions did not address this point. I am satisfied in the circumstances, however, that it is a fair rate even if it is somewhat higher than other pre-judgment interest rates awarded. Each case must be determined on it's own merits.

[128] I shall hear further from the parties with respect to costs.

[129] Order accordingly.

J.