

Court of King's Bench of Alberta

Citation: Schickedanz North Ltd v Real Estate Assistants Ltd, 2025 ABKB 648

Date: 20251110
Docket: 2101 14768
Registry: Calgary

Between:

Schickedanz North Ltd

Appellant

- and -

Real Estate Assistants Ltd and Cherlyn D. Ewing

Respondents

**Reasons for Judgment
of the
Associate Chief Justice
D.B. Nixon**

I. Introduction

[1] This is an appeal from an Applications Judge (at the time called a Master). Schickedanz North Ltd (“SNLCo”) (the “Appellant”) is the Plaintiff in the underlying action and is the landlord of real property that was leased to the Defendants.

[2] SNLCo is seeking damages from the Defendants in the nature of the present value of lost future rent for the unexpired term of the lease. On June 3, 2022, the Applications Judge dismissed the application by SNLCo for summary judgment against Real Estate Assistants Ltd

(“REALCo”) and Cherlyn D. Ewing (“Ewing”) (collectively, the “Defendants” or “Respondents” or “Lessees”).

[3] This is an appeal of the decision of the Applications Judge. SNLCo continues to seek summary judgment in this appeal.

II. Position of the Parties

[4] The two parties address this dispute from very different perspectives. Further, the Applications Judge focused on a different angle. Briefly, those perspectives are as follows:

A. The Appellant/Plaintiff

[5] SNLCo, in its capacity as Plaintiff, is seeking damages which include the present value of lost future rent for the unexpired term of the lease. Inherent in this claim, SNLCo is refusing to accept that the subject lease was surrendered.

B. The Respondents/Defendants

[6] REALCo and Ewing, in their capacity as Defendants, assert that the underlying lease for the subject property was surrendered. As a result, the Defendants assert that the Plaintiff is not entitled to the present value of lost future rent for the unexpired term of the lease.

C. The Applications Judge

[7] Notwithstanding that this is this is an appeal *de novo* from an Applications Judge (as described below), it is worthwhile to note that the Applications Judge declined to grant Summary Judgment because he perceived appropriate notice had not been given by SNLCo to the tenants. In the context of his decision, the Applications Judge framed this as a “*Highway Properties* notice issue” referencing *Highway Properties Ltd v Kelly, Douglas and Co Ltd*, 1971 CanLII 123 (SCC), [1971] SCR 562.

III. General Facts

[8] SNLCo is the landlord of Bays 115 and 119 of Royal Vista Link in Calgary (the “Property”). REALCo and Ewing were the lessees and tenants of the Property.

[9] REALCo and Ewing entered a lease of the Property from SNLCo on April 5, 2018 (the “Lease”). The operating terms of the Lease include: (i) a term of five years, commencing June 1, 2018; (ii) a minimum payable amount of rent in the amount of \$3,275 per month, payable monthly; (iii) a security deposit in the amount of \$10,027.40; and (iv) that the tenant would pay its proportionate share of operating costs. Given the term of the Lease, it was scheduled to expire on May 31, 2023.

[10] Section 8 of the Lease is framed as “Default and Termination”. While not formally described as such, the events of default are effectively listed in section 8.1 of the Lease. The default provisions include the following triggering events: (i) if the tenant fails to pay rent; and (ii) if at any time during the term of the lease the tenant vacates or abandons the premises.

[11] The remedial provisions of the Lease include section 8.4 of the Lease, which is entitled “Re-Entry”. The key provisions are as follows:

- a. Section 8.4(a) of the Lease stipulates that: “Upon occurrence of any of the events referred to in Section 8.1, the Landlord may, with or without notice or any form of legal process, re-enter the Demised Premises or any part thereof and take possession of the same...No such re-entry and taking of possession of the Demised Premises shall be construed as a termination of this Lease unless the Landlord shall so advise by written notice to the Tenant...”.
- b. Section 8.4(b) of the Lease stipulates that: “Upon the occurrence of any of the events referred to in Section 8.1, the Landlord may re-enter and take possession of the Demised Premises, make such alterations, repairs and renovations as it may deem necessary in order to re-let the Demised Premise, and re-let the Demised Premises or any part thereof as agent for the Tenant for such period or periods and at such rental and upon such other terms and conditions as the Landlord may, in its sole reasonable discretion, deem advisable...”.
- c. Section 8.4(c) of the Lease stipulates that: “Upon the occurrence of any of the events referred to in Section 8.1, the Landlord shall have the immediate right, on notice to the Tenant, to terminate and determine this Lease effective the date specified therein, or if no such date be specified, then effective the date of serving such notice on the Tenant, and the Landlord may in such notice advise the Tenant of its intention to recover from the Tenant the damages hereafter contemplated. No such termination shall prejudice or take away the Landlord’s right to recover from the Tenant all arrears of Rent antecedent to such termination and all damages incurred by the Landlord in connection therewith, including without limitation, the cost of recovering possession of the Demised Premises, the cost of reletting the Demised Premises, and the present worth at the time of such termination of the excess, if any, of the amount of Rent for the remainder of the Term over the then reasonable rental value of the Demised Premises for the remainder of the Term, all of which amounts shall be immediately due and payable by the Tenant to the Landlord.

(Sections 8.4(a), (b), and (c) of the Lease are collectively, the “Lease Remedial Provisions”.)

[Emphasis added.]

[12] On October 31, 2019, the Defendants delivered a letter to SNLCo (the “October 2019 Lessee Letter”). In the October 2019 Lessee Letter, the Defendants communicated to SNLCo that it was their intention to vacate the Property. In that letter, the Lessees communicated they could no longer continue under the terms of the Lease due to "economic circumstances and personal and professional financial hardship". As part of that process, the Lessees surrendered their security deposit of \$10,027.40 and provided an additional sum of \$5,013.70 to SNLCo.

[13] On May 4, 2021, Counsel for SNLCo issued a letter to the Defendants indicating that they were jointly and severally liable under the Lease (the “May 2021 SNLCo Letter”). While the Defendants acknowledged the May 2021 SNLCo Letter, they assert the Lease had been surrendered prior to the receipt of that correspondence.

[14] In its capacity as the Plaintiff, SNLCo issued a Statement of Claim on December 6, 2021. SNLCo served the Statement of Claim by Substitutional Service on January 18, 2022 (the “January 2022 SOC”).

IV. Issues

[15] The issues in this appeal are as follows.

- A. What is the standard of review?
- B. Is the Affidavit of Alvin Johnston, filed on February 21, 2023, admissible (the “Johnston Affidavit”)?
- C. Is summary judgment appropriate to consider in this case?
- D. If the summary judgment process is appropriate in this case, should summary judgment be granted?
- E. If summary judgment is granted, what is the appropriate quantum of damages?

V. Analysis

[16] Concerning the evidence, the facts in this case must be proven on a balance of probabilities. If not so proven, the application will fail. However, mere establishment of the facts to that standard is not a proxy for summary adjudication: *Weir-Jones* at para 47.

A. What is the standard of review?

[17] As noted above, this is an appeal from an Applications Judge. The standard of review on an appeal of an order from an Applications Judge is correctness: *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166 at para 3. It is sometimes referred to as an appeal *de novo*: *Bahcheli* at para 3.

B. Is the Johnston Affidavit admissible?

[18] SNLCo asserts that the Johnston Affidavit is admissible because it is relevant and material. In contrast, the Defendants assert that the Johnston Affidavit should not be admitted because it is self serving. The Defendants attempt to bolster their argument by further arguing that the Johnston Affidavit was delivered after the ruling of the Applications Judge.

[19] While I acknowledge the arguments that the Defendants advanced, they did not address the tests that I must consider. Neither the date of the affidavit nor the alleged self-serving nature of the evidence form part of the factors that I must consider. If a litigant is concerned with alleged self-serving comments in an affidavit, they can challenge the evidence by way of cross examination. Indeed, the purpose of cross-examination is to test the credibility and reliability of the evidence presented in the affidavit.

[20] The test for admitting evidence on an appeal of an Applications Judge is whether the new evidence is relevant and material: *Rule* 6.14(3). This test has been applied in a broad manner, tending towards permitting evidence in rather than excluding it: *DD v Calgary Counselling Centre*, 2017 ABQB 95 at para 26; *Bahcheli* at para 16. Further, the test for relevancy and materiality in circumstances such as these has been expressed to be “very lax”: *Boyd v Cook*, 2013 ABCA 266 at para 5.

[21] I reviewed the Johnston Affidavit. Based on my review of the evidence embedded in that document, the nature of this case, and my analysis of the law, I find the particulars embodied in that document to be relevant and material. I make that determination because the Johnston Affidavit contains facts that add value to the record for the purpose of establishing the factual narrative between the parties, including the provision of first-hand accounts of interactions between Ewing and the individual who was the Controller of SNLCo at the relevant time. This constitutes new evidence which touches on a link between Ewing and SNLCo, which is central to this appeal.

[22] Based on my review of the evidence and analysis of the law, I find that the Johnston Affidavit should be admitted on this Appeal because it is relevant and material: *Gudzinski Estate v Allianz Global Risks US Insurance Company Limited*, 2012 ABCA 5 at para 21.

C. Is summary judgment appropriate to consider in this case?

[23] Whether summary judgment is appropriate in this circumstance is a threshold question. The principles underlying motions for summary judgment are guided by *Hryniak v Mauldin*, 2014 SCC 7. In Alberta, those principles are refined in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 for their application to the Alberta *Rules of Court*.

[24] Given the dispute underlying this hearing, a brief review of *Hryniak* and *Weir-Jones* is instructive as to whether it is appropriate to consider the application of a summary judgment process in this circumstance. *Hryniak* sets out the following three-part test for when summary judgment is an appropriate procedure at para 49:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result”

[25] The Alberta Court of Appeal considered the *Hryniak* test in *Weir-Jones*, and then summarized the application of the principles. The judicial guidance from that case instructs this Court that the proper approach to summary dispositions should follow the core principles relating to such dispositions, which are: (i) the standard of proof; (ii) the record; and (iii) fairness: *Weir-Jones* at para 47. The appellate court further directed that the test for summary dispositions must be predictable, consistent, and fair to both parties: *Weir-Jones* at para 47.

[26] The appellate court in *Weir-Jones* made it clear that the analysis does not have to proceed sequentially or in any particular order: at para 47. At any stage of the analysis, the presiding judge may determine that summary adjudication is inappropriate or potentially unfair because: (i) the record is unsuitable; (ii) the issues are not amenable to summary disposition; (iii) a summary disposition may not lead to a “just result”; or (iv) there is a genuine issue requiring a trial.

[27] To emphasize the point, there is no policy reason to cling to the old, strict rules for summary judgment: *Weir-Jones* at para 48. Indeed, to cling to such old rules would undermine the shift in culture called for by *Hryniak*: see *Weir-Jones* at para 48.

[28] In considering the question as to whether summary judgment is appropriate to consider in this case, I acknowledge that the summary trial process has been entirely repealed. It has been

replaced with a new, streamlined trial process: see Alta Reg 126/2023, amending Alta Reg 124/2010, s 19. *Rule 7.3(4)* provides me the option to order this proceed as a streamlined trial. That said, there is no continuum between a summary judgment and a summary trial. They are distinct processes.

[29] A summary judgment is a separate process under the Alberta *Rules of Court* where one party brings an application to resolve a dispute without a trial on the basis there is no genuine issue for trial. An unsuccessful summary judgment application means that a trial is needed: *Weir-Jones* at para 19. That a summary judgment is granted simply means that the matter at dispute can be resolved in a summary manner, and does not necessarily mean that the applicant has succeeded on the underlying merits: *Homeowners Now Inc v McCotter*, 2025 ABKB 120.

[30] In considering the question as to whether the summary judgment process is appropriate to consider in this case, I note that the factual record before the Court includes five affidavits and the transcript on the Questioning on an affidavit of Ewing. Specifically, those documents are as follows: (i) the Pandarinath Affidavits (filed on February 28, 2022 and July 22, 2025); (ii) the Ewing Affidavits (filed on March 22, 2022 and July 29, 2025); (iii) the Ewing Transcript of Questioning on Affidavit (filed on May 16, 2022); and (iv) the Johnston Affidavit (filed on February 21, 2023) (collectively, the “**Affidavits/Questioning Transcript**”).

[31] As a penultimate comment before addressing the key considerations, I note that the Alberta Court of Appeal directed that both the procedure and the outcome must be just, appropriate, and reasonable. These framework points are important goals in any hearing.

[32] Based on the evidence before me and my analysis of the law, I find that the summary judgment process is appropriate to consider in this case. I make this determination because: (i) the record is suitable insofar as it consists of the Affidavits/Questioning Transcript; and (ii) the issues are amenable to summary disposition insofar as they are relatively narrow.

D. If the summary judgment process is appropriate in this case, should summary judgment be granted to SNLCo?

[33] Since I found above that the summary judgment process is appropriate to consider in this case, I turn to the question as to whether summary judgment should be granted to SNLCo.

1. Analytical Framework

[34] The Alberta Court of Appeal has stipulated that the key considerations in determining whether summary judgment should be granted in a case such as this are fourfold: *Weir-Jones* at para 47. Those key considerations are as follows:

- a. Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b. Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial?
- c. If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a

trial. If there is a genuine issue requiring a trial, summary disposition is not available.

- d. In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

2. Key Considerations

[35] In considering the question as to whether summary judgment should be granted to SNLCo, I turn to address four key considerations: *Weir-Jones* at para 47. I outlined those considerations above, and have framed each of them as questions below.

a. Considering the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis?

i. Incremental Facts

[36] The question as to whether it is possible to fairly resolve the dispute on a summary basis involves an examination of both the state of the record and the issues. Necessarily, this requires an examination of the evidence and the law. To address the question, it is necessary to assess whether uncertainties in the facts, the record, or the law reveal a genuine issue that requires a trial.

[37] Concerning the evidence, the factual record before the Court consists of the Affidavits/Questioning Transcript, which includes five affidavits and the transcript on the Questioning of Ewing.

[38] Based on my review of the record, I infer the Defendants did not cross-examine the SNLCo affiants on their respective affidavits. I draw this inference because I see no evidence which indicates that the Defendants pursued any cross examination. As a result, the factual record upon which SNLCo relies is uncontroverted.

ii. Application of Law to the Facts

[39] To reiterate the question, the inquiry that I need to address at this point is whether it is possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial: *Weir-Jones* at para 47(a). The substantive questions that need to be considered in this context are whether: (i) the Respondents surrendered the Lease to SNLCo; and (ii) the Plaintiff gave appropriate notice to the Respondents so as to be eligible for the present value of lost future rent for the unexpired term of the lease? (These two questions are collectively the “**Substantive Legal Questions**”.)

[40] The Substantive Legal Questions will be determined based on whether: (i) there are sufficient facts before the Court in affidavit format or as a result of Questioning on an affidavit; and (ii) the underlying legal issues are sufficiently narrow that they could be determined on a summary basis rather than by way of trial.

[41] I reviewed the evidence before me in this case, taking into consideration the underlying Substantive Legal Questions. Given these circumstances, I am of the view that the necessary facts are before the Court. As mentioned above, the evidentiary record includes the Affidavits/Questioning Transcript

[42] Since the evidentiary record is sufficient, the next issue is whether underlying legal issues inherent in the Substantive Legal Questions can be appropriately determined on a summary basis rather than by way of trial. In my view, the issues inherent in the two Substantive Legal Questions can be appropriately determined on a summary basis.

iii. Conclusion

[43] Based on my review of the evidence and analysis of the law, I am of the view that it is possible to fairly resolve the dispute on a summary basis. I make this determination based on: (i) the state of the evidentiary record, which includes the Affidavits/Questioning Transcript; and (ii) the nature of substantive legal issues underlying Substantive Legal Questions.

b. Has SNLCo met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial?

[44] The question as to whether SNLCo has met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial requires it to address the issue as to whether the Lease has been surrendered. This is a key issue in this case because if the Lease has been surrendered, the ability of SNLCo to recover the present value of lost future rent for the unexpired term of the lease *may* have been extinguished.

[45] To be clear, the Respondents assert that SNLCo has no entitlement to the present value of lost future rent for the unexpired term of the lease because the Lease has been surrendered. If the Respondents are correct in terms of the surrender of the Lease, I am of the view that there will be a genuine issue requiring a trial because section 8.4(c) of the Lease Remedial Provisions includes a narrative that may allow SNLCo to recover the present value of lost future rent for the unexpired term of the lease.

[46] To properly consider this question, we need to understand the context underlying the dispute.

i. Incremental Facts

[47] As noted above, the Defendants delivered the October 2019 Lessee Letter to SNLCo. In that letter, the Defendants communicated to SNLCo that it was their intention to vacate the property and that they could no longer continue under the terms of the Lease due to "economic circumstances and personal and professional financial hardship". As part of that process, the Defendants surrendered their security deposit of \$10,027.40 and provided an additional sum of \$5,013.70 to SNLCo.

[48] SNLCo acknowledged receipt of the October 2019 Lessee Letter. However, there is no evidence that SNLCo provided the Defendants an acknowledgement of the termination of the Lease that would satisfy the notice requirements reference in the Lease Remedial Provisions.

[49] By not issuing such a termination notice, I infer that SNLCo was implicitly affirming the continuation of the Lease and the rights afforded to it thereunder. In making this inference, I acknowledge that the Defendants filed an Affidavit wherein Ewing alleged the SNLCo response to the October 2019 Lessee Letter as “mutual agreement” of a “surrender” of the Lease. The question is whether there has been a “giving up of possession of the premises by the tenant and the acceptance of possession by the landlord that is inconsistent with the lease” that results in

surrender: *Marathon Realty Co v Pogon Professional Services Corp*, [1994] BCJ No 167 (BCSC). As discussed below, this “mutual agreement” is not clear on the record.

[50] After the delivery of the October 2019 Lessee Letter, the Defendants made some efforts to sublet the Property on their own. The uncontested evidence is that the Defendants made these efforts to sublet the Property between November 1, 2019 and the Spring of 2020. The actions of the parties must be looked at to determine whether they are inconsistent with the lease.

[51] As is noted above, sections 8.4(a), (b), and (c) of the Lease were collectively defined above as the “Lease Remedial Provisions”.

ii. The Law

[52] The law of contract governs agreements and obligations between parties, whereas the law of real property governs ownership, transfer, and rights related to land and buildings. While these two legal paths are distinct, they often intersect. One of the intersections is where contracts are used to convey property ownership that involves a real estate transaction.

[53] In addition to the intersection of contract and real property, the nature of a lease engages another legal twist to the framework of law. In the classification of property interests, a lease falls under the umbrella of personal property. Personal property classification in turn splits into two categories, being (i) chattels personal; and (ii) chattels real: Eran Kaplinsky, Malcolm Lavoie & Jane Thomson, eds, *Ziff's Principles of Property Law*, 8th ed (Toronto: Thomson Reuters, 2023) at 93 [*“Ziff's Principles of Property Law”*]. Concerning leases, the classification sequence involves the following waterfall: (i) personal property; (ii) then to chattels real; and (iii) then to leases: *Ziff's Principles of Property Law* at 93.

[54] I touch on the classification of property above so that we collectively have that framework in mind as we go through the analysis. Notwithstanding that a lease falls under the classification of personal property and chattels real, a lease is also a demise of real property under which exclusive occupation is conferred by a landlord on a tenant.

[55] A leasehold estate delimits the duration of the tenant’s holdings. During the term of a lease, a landlord’s right to actual possession is suspended. That said, the landlord retains a reversionary interest in the underlying real property: *Ziff's Principles of Property Law* at 335.

[56] As touched on above, there are differences between contracts *simpliciter* and a lease agreement dealing with real estate. Damages in a contract context strive to place the innocent party in the position they would have been had the contract been a suitably performed. The traditional rule in relation to the surrender of leaseholds is different. The acceptance by a landlord of a surrender of a lease ends the tenant’s estate in the underlying real property. When a surrender occurs, the obligation of the tenant to pay rent typically vanishes. Coincidentally, the right of the landlord to sue for ancillary future losses also vanishes unless there is a contractual term which saves it. Notwithstanding that it falls under the classification of personal property and chattels real, this limitation concerning damages is based on the traditional concept that a lease is primarily a land interest: see *Ziff's Principles of Property Law* at 358.

[57] The limitation concerning the availability of damages in a lease has been shifting over the last four or five decades. The pivotal case on this question is *Highway Properties*. At issue in *Highway Properties* was an agreement between the landlord and a tenant who would run an “anchor” business within a supermarket, and the agreement contained terms that required the tenant to carry on business continuously once possession was taken up. The store turned out not

to be successful, and the property was abandoned within two years. As this was an “anchor” for the supermarket, the abandonment of the tenant’s business undermined the viability of the landlord’s property. The landlord subsequently advised the tenant that it intended to retake the premises and hold the tenant liable for the damages resulting from its wrongful repudiation of the lease.

[58] Ultimately, Justice Bora Laskin (as he then was) for a unanimous Supreme Court of Canada concluded that it was no longer sensible to preclude a landlord from enjoying the range of remedies available on the breaching of a commercial contract: *Highway Properties* at 576. This heralded an important shift in commercial tenancy law in Canada away from traditional property law and toward contract law principles.

iii. Application of the Law to the Facts

[59] The Defendants assert that the Plaintiff seemed agreeable to the surrender of the Lease, and that the surrender was arrived at by mutual agreement between the parties. Before I get into the analysis, I find the Defendants’ use of the phrase “seemed agreeable” interesting. While I will get into the detail below, in law there is either “agreement” or there is “no agreement”. As a preliminary comment, the phrase “seemed agreeable” does not suggest that there has been a “meeting of the minds”.

[60] In their submissions, the Defendants argued that the law is clear that a surrender requires a clear act by both landlord and tenant alike, but landlords must be cautious, steps such as taking possession of the premises or changing the locks by a landlord may be cited as evidence of a surrender: David Bish, *Canadian Bankruptcy and Insolvency Law for Commercial Tenancies* (Toronto: LexisNexis, 2016) at 223. While I believe this is an accurate statement of the law, its application is not that straight forward in this case.

[61] As a preliminary matter, I acknowledge two cases which the Defendants brought to the attention of the Court concerning the issue of surrender. Chronologically, they are, first, *Office Specialty Manufacturing Co v Eastern Trust Co* (1931), 13 CBR 166, 3 MPR 526 at para 18 (NBCA), and, second, *New Regina Trading Co v The Canadian Credit Men's Trust Assn*, 1933 CanLII 72 (SCC), [1934] SCR 47.

[62] I recognize that I did not address the Defendants’ assertion in respect of either *Office Specialty Manufacturing* or the *New Regina Trading* in my review of the relevant law above. The reason that I did not address these cases is because I do not think that either of them are relevant to the dispute between the Defendants and SNLCo.

[63] Concerning *Office Specialty Manufacturing*, the focus of that case was on the alleged wrongful distress of personal property (office furniture and equipment) that remained within a rented premise. After reviewing matters, the New Brunswick Court of Appeal commented that given the actions taken by the parties, it would be difficult to conceive of evidence stronger than was present in this case because the tenant gave up and of the landlord took possession of the premises: *Office Specialty Manufacturing* at para 18. The Court of Appeal made this determination because the trustee purported to surrender the premises and the landlord accepted possession and changed the locks.

[64] With respect, I do not accept the Defendants assertion that the clinical situation in *Office Specialty Manufacturing* reflects the law of surrender in Alberta in the context of the SNLCo circumstances. In my view, the law has shifted since 1931 when *Office Specialty*

Manufacturing was decided. As I state elsewhere in this judgment, the *Highway Properties* case compels me to consider the terms of the Lease, and one of those terms stipulates that for there to be a surrender the landlord needs to advise the tenant by written notice. Based on my review of the evidence, there is no indication that the subject written notice was ever issued by SNLCo.

[65] Concerning the *New Regina Trading* case, the Supreme Court of Canada commented that “[i]t is established law that delivery of possession by the tenant to the landlord and the landlord’s acceptance of possession, effects a surrender of the lease by operation of law”: at 53. While that narrow proposition is good law in Canada, the context involving SNLCo and the Defendants is different.

[66] In contrast to the SNLCo situation, the landlord in *New Regina Trading* refused to permit the lessee (by then represented by the trustee) to remain in possession, and demanded that possession of the leased property be given up. That sequence of facts does not exist between SNLCo and the Defendants in this case. To the contrary, the SNLCo as the landlord did not refuse to permit the Defendants to remain in possession as tenants. That being the case, the *New Regina Trading* case is distinguishable from the SNLCo case.

[67] Having dealt with the two cases which the Defendants brought to the attention of the Court concerning the issue of surrender, I turn to consider the importance of the terms of the Lease in this circumstance. Given the judicial guidance in *Highway Properties*, the terms of the Lease must be considered notwithstanding a lease is also a demise of real property. I make that comment because the *Highway Properties* case established that commercial leases are as much contracts as they are conveyances of estates in land, and we must heed the terms and conditions therein. While I will comment more on this below, “[i]t is no longer sensible to pretend that a commercial lease... is simply a conveyance and not also a contract”: *Highway Properties* at 576.

[68] As a final comment concerning the alleged surrender, I am of the view that the conduct of the Defendants subsequent to October 31, 2019 strongly supports a determination that the Lease was not surrendered. I make this observation because the assertions of the Defendants that the Lease was surrendered on October 31, 2019, when the October 2019 Lessee Letter was delivered to SNLCo, is inconsistent with the subsequent conduct of the Lessees.

[69] As noted in my review of the law above, the acceptance of a surrender of a lease ends a tenant’s estate in the underlying real property. As such, when a surrender occurs the obligation of the tenant to pay rent vanishes as do other rights, entitlements and obligations the tenant had under the subject lease. That being the case, the efforts by the Defendants to sublet the Property between November 1, 2019 and the Spring of 2020 is inconsistent with their assertion that Lease had been surrendered in October 2019. If the Lease had been surrendered on October 31, 2019, then the Defendants would not have had the jurisdiction to relet the Property because a surrender of the Lease would have extinguished any such rights and entitlements.

iv. Conclusion

[70] Based on my review of the evidence and analysis of the law, I find it likely that the Respondents did not surrender the Lease to SNLCo. I make this determination because the contractual prerequisites stipulated in the Lease have not been satisfied. That is, the terms of the Lease stipulate that for there to be a surrender, the landlord needs to advise (or acknowledge) the tenant by written notice that the surrender is accepted. As mentioned above, there is no indication that the subject written notice was ever issued by SNLCo.

[71] This view is strongly supported by the subsequent conduct of the Lessees wherein they made ongoing efforts between November 1, 2019 and the Spring of 2020 to sublet the Property. If the Defendants had surrendered the Lease upon the issuance of the October 2019 Lessee Letter, that would have terminated their estate in the underlying Property. That termination would have coincidentally extinguished any right or entitlement of the Defendants to sublet the Property.

c. Has the resisting party put its best foot forward and demonstrated that there is a genuine issue requiring a trial?

[72] This question need only be addressed if the moving party has met its burden: *Kostic v Thom*, 2021 ABCA 406 at para 22. SNLCo is the moving party in this Appeal. Since I determined that the Defendants likely did not surrender the Lease, I am of the view that the moving party has met its burden.

[73] The question as to whether the Defendants (in their capacity as the resisting parties) have put their best foot forward and demonstrated that there is a genuine issue requiring a trial requires the issue of notice to be addressed. While the Defendants did not address the notice issue in their written submissions, their Counsel acknowledged the notice issue during oral argument. In particular, the Defendant's Counsel asserted during oral argument that the first notice which SNLCo gave that it was seeking prospective damages was when it served the Defendants with the January 2022 SOC. That said, in my view, it is clear on the evidence that the first notice which SNLCo gave that it was seeking prospective damages was when it issued the May 2021 SNLCo Letter.

i. Incremental Facts

[74] There is no evidence that SNLCo provided verbal or written notice in either calendar year 2019 or 2020 that indicated it was seeking damages from the Defendants in the nature of the present value of lost future rent for the unexpired term of the lease.

[75] As I indicated above, the first notice from SNLCo to the Defendants that damages were going to be sought was in the May 2021 SNLCo Letter. The schedule attached to that letter included amounts that were calculated by reference to the alleged lost future rent for the unexpired term of the lease until the Property was subsequently leased out at a rate equal to or greater than what was stipulated in the Lease.

[76] The second notice from SNLCo to the Defendants that prospective damages were going to be sought was in the January 2022 SOC. In its submissions to the Court, the Defendants made specific mention of the fact that “[t]he Plaintiffs did not issue a Statement of Claim ... until December 6, 2021, and did not serve the Statement of Claim until after January 18, 2022, by ... Order for Substitutional Service”. Implicit in the January 2022 SOC is a claim for damages that included the alleged lost future rent for the unexpired term of the lease until the Property was subsequently leased out at a rate equal to or greater than what was stipulated in the Lease.

[77] The Appellant asserts that prospective damages are not being sought. Rather, it asserted in oral argument that “by the time my client had commenced its lawsuit, effectively all of the lease rental damages had already accrued. So, this action here is more so in the nature of arrears than any prospective damages under the *Highway Properties* doctrines.”

ii. The Law

[78] The issue concerning the need for notice engages *Highway Properties* and the impact which that case has had on the law involving leases and related remedies. SNLCo asserts that the Applications Judge incorrectly declined to grant summary judgment because of what he perceived to be a *Highway Properties* notice issue.

[79] Given this determination by the Applications Judge, a review of certain aspects of *Highway Properties* is warranted. As stated by Justice Bora Laskin (as he then was), “[i]t is no longer sensible to pretend that a commercial lease... is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land”: *Highway Properties* at 576.

[80] Through these judicial observations, Justice Bora Laskin pulled leases into the twentieth century. He effected this by recognizing the contractual aspects of a lease. As a result, the Supreme Court effectively diminished the real property law dimension of a lease.

[81] Several years later, Master Funduk further commented that “[t]he ‘estate’ concept of a lease (which concept is based on the lord-vassal relationship) antedates the development of the law of contracts, as is pointed out in *Highway Properties*”: *Hallbauer v Shipowick*, 1985 CanLII 1184 at para 80.

[82] Generally, to trigger the right to sue for prospective losses, appropriate notice must be given by the landlord to the tenant: *Ziff’s Principles of Property Law* at 359. As a result, a landlord who terminates a lease without proper notice to the tenant to the effect that claims will be made for future losses will be limited to those losses which exist at the time of termination: *Ziff’s Principles of Property Law* at 359; *Stearman v Powers*, 2017 BCCA 165 at paras 53 and 56.

[83] The purpose of a notice in these circumstances is to make it clear to the tenant which avenue the landlord is pursuing so that the magnitude of the tenant's liability can be assessed by it: *Ziff’s Principles of Property Law* at 359. In the absence of such notice on a timely basis, a tenant will not have the appropriate information to make a fully informed decision.

[84] In considering the debate, I reviewed two additional cases that touch on the mid-term abandonment of a lease. Those cases are *Deerfoot Mall (Calgary) Ltd v Dalmont Enterprises*, 1987 ABCA 83 and *Vinet’s Store (1973) Ltd v Video Update Canada Inc*, 2000 ABQB 679. These cases are instructive in terms of identifying and applying the judicial guidance of *Highway Properties* concerning commercial tenancy law in Alberta.

[85] In *Deerfoot Mall* the Alberta Court of Appeal had to determine what remedies the landlord had against a tenant who abandoned the premises and repudiated its lease before the period of the lease expired. After considering *Highway Properties*, and subject to any special provisions in the lease, Prowse JA indicated that a landlord has four options available when a tenant repudiates the lease and abandons the premises. I summarize those four options as follows.

- a. The landlord may accept the surrender and sue for damages sustained to the date of surrender.

- b. The landlord may do nothing and advance a claim for rent against the tenant as it falls due.
- c. The landlord may refuse to accept the surrender and notify the tenant that he will attempt to relet the premises on the tenant's account. In this circumstance, the lease continues and the deficiency between the rent provided for in the lease and the rent received may be claimed as it falls due.
- d. The landlord may refuse to accept the surrender, terminate the lease and sue for damages. Under this alternative, "one element of such damages would be the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period": *Deerfoot Mall* at para 15; *Highway Properties* at 570.

[86] In *Vinet's Store*, the defendant (Video Update Canada Inc) entered a lease in August 1988 with the plaintiff (Vinet's Store (1973) Ltd) (the "Video Update 1988 Lease"). The leased premises were in the Town of Vegreville, Alberta (the "Vinet Lease Premises").

[87] Over the course of subsequent years, the Video Update 1988 Lease was assigned to various entities. The Video Update 1988 Lease also was renewed in 1993 and subject to an addendum in 1996: see *Vinet's Store* at para 4 (Statement of Agreed Facts paras 9 and 10).

[88] Under the cover of darkness during March 1997, the lessee to the Video Update 1988 Lease moved from the Vinet Lease Premises to a new business location. All the equipment of the lessee was removed from the Vinet Lease Premises to the new site: *Vinet's Store* at para 4 (Statement of Agreed Facts para 16).

[89] The Statement of Agreed Facts confirmed that the parties to the Video Update 1988 Lease (as renewed in 1993) had not negotiated a surrender agreement prior to the lessee abandoning the Vinet Lease Premises: *Vinet's Store* at para 4 (Statement of Agreed Facts para 20). Of particular relevance in *Vinet's Store*, the parties had entered into a detailed agreement evidenced by 103 clauses: at para 45. Included in the terms of the Video Update 1988 Lease, the parties agreed that the landlord (Vinet's Store):

...shall forthwith and notwithstanding any other provisions of this lease, or any rule of law or equity to the contrary, be entitled to recover from the Tenant as a genuine pre-estimate by parties hereto of the damage suffered by the Landlord and as and for liquidated damages, and not as penalty, an amount equal to the rent reserved for the unexpired portion of the term hereby demised: *Vinet's Store* at para 45.

[90] After considering matters, the Court in *Vinet's Store* determined that the quoted words in the above paragraph had to be construed to mean that while the tenant may lose certain rights because of the breaches committed against it, the lease, while expiring in terms of the right of a tenant to maintain his estate in the land, left the tenant liable between the parties in respect of breaches of any one or more of the various covenants which comprised the totality of the contractual agreement between the parties: *Vinet's Store* at para 46. The Court in *Vinet's Store* further commented that its view of matters was consistent with the statement of Justice Bora Laskin, which acknowledged the termination of the estate: at para 46.

[91] While the court in *Vinet's Store* commented that it was not in any position to suggest that the doctrine of surrender is no longer operative in Alberta, it found that that doctrine has no application in the circumstances of that case. As a consequence, the court in *Vinet's Store* found the defendant liable in respect of the base rent claim and the additional rent claims as set out in the Agreed Statement of Facts: *Vinet's Store* at para 48.

iii. Application of the Law to the Facts

[92] The key issue at this stage of the analysis involves *Highway Properties* and the impact which that case has had on the law concerning notice under a commercial property lease arrangement and associated remedies. As I noted above, SNLCo asserts that the Applications Judge incorrectly declined to grant summary judgment because of what he perceived to be a *Highway Properties* notice issue.

[93] As I read this jurisprudence, the *Deerfoot Mall* and *Vinet's Store* decisions further signal a migration away from the antiquated concept that leases are derived from the conveyance of a proprietary right (as derived from the lord-vassal relationship) and as such must be interpreted pursuant to the fiction that “the law of property” is different from “the law of contract”. In my view, the perception is that even the language of *Highway Properties* fails to clearly articulate the law of commercial leases with respect to the commercial realities and simple language of the twenty-first century. In making this observation, I acknowledge that Master Funduk recognized this point in *Hallbauer*: see para 80.

[94] *Highway Properties* established that commercial leases are as much contracts as they are conveyances of estates in land. That being the case, it was “untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land”: *Highway Properties* at page 576. That said, it is important to note that the language of *Highway Properties* concerning the then existing “three options” being expanded to “four options” appears to have taken root as *ratio decidendi*, when it is the broader aforementioned concept that leases are as much contracts as they are proprietary conveyances which was the actual *ratio*.

[95] As I read the decision, *Highway Properties* stands for the proposition that: (i) the content of the lease itself is a memorialization of the common intentions of the parties to the lease, including the prescription of remedies for breach; (ii) where the lease is silent, the common law of contractual interpretation and property law can fill the gaps, including the then existing “three remedies”; and (iii) it would be “untenable” to limit the parties’ contractually agreed remedies due to the archaic characterization of leases as estates in land to the exclusion of contractual remedies. As the Court in *Vinet's Store* wisely stated, if a surrender of the estate precluded the exercise of the contractual remedies in the lease, why would the parties bother with a lease at all: see *Highway Properties* at 571 and 576; and *Vinet's Store* at para 47.

[96] Embedded within *Deerfoot Mall* and *Vinet's Store* are comments concerning *Highway Properties* which elucidate the gravitation towards the modern interpretation of commercial leases, which is predominantly contractual: see *Deerfoot Mall* at para 15; and *Vinet's Store* at paras 49 and 50. Given this judicial drift, I am of the view that the law is sufficiently settled that I am bound to consider the common law remedies and the contractual terms between the parties in the Lease. In coming to this determination, I note that there is no statutory or common law prohibition concerning the application of the relevant contractual terms.

[97] As I read it, *Highway Properties* does not stand for the proposition that written notice must be given to the tenant of the landlord's intention to re-let and sue for prospective damages in order to successfully access such a remedy, *simpliciter*. Rather, *Highway Properties* and the subsequent caselaw in Alberta stands for the proposition that if the lease is silent as to that remedy, perhaps such notice is required. However, if the lease prescribes any additional remedies, then such remedies are available to the landlord. That is, these additional remedies are not modified by the fiction that a determination of legal surrender precludes the landlord's exercise of such contractual remedies. This includes the ability of the landlord to re-enter without notice to re-let as the tenant's agent. As such, I construe *Highway Properties* and the subsequent cases to no longer preclude the ability of a landlord to exercise of its contractual remedies.

[98] The Appellant stated the current rule is as follows: If a remedy sought is embedded in the lease, that remedy is available. I agree with that statement of the law, but that does not resolve the issue in this case. Therefore, the question before this Court is whether SNLCo has provided adequate notice of the remedy it was seeking or whether the remedy sought is embedded in the lease.

[99] Given the above analysis, I turn to consider three questions concerning notice in the context of this application.

(i) Did the May 2021 SNLCo Letter constitute adequate notice?

[100] Based on my review of the evidence and analysis of the law, I am not satisfied for the purposes of a summary judgment that the May 2021 SNLCo Letter constituted adequate notice. I make this determination because the May 2021 SNLCo Letter was not issued on a timely basis. Indeed, that letter was issued by SNLCo approximately 18 months after the Defendants gave notice that they were vacating the Property. Insofar as the purpose of a notice in these circumstances was to make it clear to the Defendants which avenue the landlord was pursuing so that the magnitude of the tenant's liability could be assessed by it on a timely basis, a delay of over 18 months does not meet that test.

(ii) Did the January 2022 SOC constitute adequate notice?

[101] Based on my review of the evidence and analysis of the law, I am also not satisfied for the purposes of a summary judgment that the January 2022 SOC constituted adequate notice. I make this determination because the January 2022 SOC was not brought to the attention of the Defendants on a timely basis. Indeed, that pleading was not served by SNLCo on the Defendants until approximately 26 months after the October 2019 Lessee Letter was issued, wherein the Defendants gave notice that they were vacating the Property. Insofar as the purpose of a notice in these circumstances was to make it clear to the Defendants which avenue the landlord was pursuing so that the magnitude of the tenant's liability could be assessed by it on a timely basis, a delay of over 26 months does not meet that test.

[102] I emphasize this point particularly because the Appellant argued during the hearing of the summary judgment appeal that it was not seeking prospective rental loss but instead it was seeking something akin to rental arrears. I am not satisfied that it would be just in the present circumstances to determine that this is appropriate, especially considering the delay both for the May 2021 SNLCo Letter or the January 2022 SOC.

(iii) Did the provisions within the Lease constitute adequate notice?

[103] Based on my review of the evidence and analysis of the law, I find that there is no terminology in the Lease which would constitute adequate notice. I make this determination because the Lease contained many provisions, but it did not address any notice in respect of prospective damages on a proactive basis. These are sophisticated parties. The responsibility for this deficiency lies with SNLCo because it had the opportunity to address matters on a proactive basis: see *Vinet's Store* at para 48.

iv. Conclusion

[104] Based on my review of the evidence and analysis of the law, I find that the Defendants, resisting parties in this case, put their best foot forward and effectively demonstrated that there is a genuine issue requiring a trial. The issue involves the lack of adequate and timely notice by SNLCo concerning its desire to seek damages from the Defendants in the nature of the present value of lost future rent for the unexpired term of the Lease. I make this determination because this delay has effectively changed it from seeking the present value of lost future rent to seeking arrears.

d. Will a summary judgment provide a just result?

[105] In any event, as the presiding judge, even if the other elements of the test are met, I must be left with sufficient confidence in the state of the record such that I am prepared to exercise judicial discretion to summarily resolve the dispute.

[106] Based on my review of matters, the facts are not in dispute and sufficiently clear and uncontroverted for summary determination. I acknowledge the arguments raised by Ms. Ewing. However, the focus of her arguments is her legal characterization of what transpired, rather than a determination of what transpired.

[107] As I noted above, summary judgment is an appropriate option in this case. That said, the narrow question at this stage is whether summary judgment should be granted. Based on the evidence before me and my analysis of the law, the answer to that question is no. I make that determination because I find that there is a genuine issue regarding trial as to whether the notices provided by SNLCo and the provisions of the lease actually allow for the remedy that SNLCo is seeking.

E. If summary judgment is granted, what is the appropriate quantum on the damages?

[108] As I have determined that this is not an appropriate case for summary judgment as there is a genuine issue requiring trial, it is not proper at this stage to determine the appropriate quantum of damages.

VI. Conclusions

[109] Based on my detailed review of the evidence and analysis of the law above, my summary conclusions are as follows:

- A. What is the standard of review? Correctness.
- B. Is the Johnston Affidavit admissible? Yes.

- C. Is summary judgment appropriate to consider in this case? Yes.
- D. If the summary judgment process is appropriate in this case, should summary judgment be granted? No.
- E. If summary judgment is granted, what is the appropriate quantum of damages? As summary judgment is not granted, it would not be proper to determine the appropriate quantum of damages at this stage.

[110] In summary, I uphold the decision of the Applications Judge.

VII. Costs

[111] The parties may speak to costs if they cannot otherwise agree.

Heard on the 25th day of March 2025.

Subsequent evidence filed on the 21st day and 29th day of July 2025.

Subsequent submissions dated the 29th day of July 2025.

Dated at the City of Calgary, Alberta this 10th day of November 2025.

D.B. Nixon
A.C.J.C.K.B.A.

Appearances:

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