Citation: MNT V BELLANO Date: 20020227
2002 BCPC 0081 File No: 2001-65924
Registry: VANCOUVER

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

MNT HOLDINGS LTD.

CLAIMANT

AND:

BELLANO CERAMIC TILE COMPANY LTD.

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE RAE

Appearing for the Claimant:	G. CHARALAMBOUS
Counsel for the Defendant:	J. WONG
Place of Hearing:	VANCOUVER, B.C.
Date of Hearing:	FEBRUARY 18, 2002
Date of Judgment:	FEBRUARY 27, 2002

[1] The Claimant, MNT Holdings Ltd., sues for breach of a lease agreement and seeks unpaid rent to the end of the lease term. The Defendant, Bellano Ceramic Tile Company Ltd., counterclaims for damages for breach of the covenant for quiet enjoyment of the leased premises.

[2] Bellano had leased their business premises, located at 5353 Goring Street, Burnaby in December 1999 from Kingsway Development Ltd., and had carried on business at that location to the date of the claim. The lease was amended in February 1999 and the term of the lease was extended to February 28, 2001. The lease was a standard commercial lease that contained all of the usual covenants to pay rent, and taxes, as well as a covenant for quiet enjoyment of the premises.

[3] The leased premises were located in an area in Burnaby zoned M2 for industrial use. Bellano was in the business of supplying ceramic tiles and tiling products. Bellano leased approximately 6,000 square feet of warehouse space and their business was a warehouse retail operation that consisted of a warehouse and a showroom on the main floor, and offices and a

lunchroom on the second floor. There was at all times another tenant in the premises, and this tenant leased approximately 12,000 square feet of warehouse space. A demising wall built to municipal standards separated the tenancies. At one point, Bellano had leased a larger portion of the warehouse and later reduced their space to the original 6,000 square feet. This meant that part of the demising wall had been rebuilt to expand the space, and then rebuilt again to reduce it. Again, the demising was built to municipal standards. There had been a number of tenants in the adjoining warehouse space over the years, but all of those tenants had been in the warehouse and retail business, and there had never been a problem between the various tenants with conflicting uses of the space.

[4] MNT purchased the building some time in the year 2000 and on July 24, 2000 wrote to Bellano and advised them that their lease would not be renewed and that they would require vacant possession of the premises on February 28, 2001, when the lease expired. The adjoining tenant, whose lease expired on January 31, 2001 also received the same notice.

[5] There were apparently some discussions between Bellano and MNT about the possibility of MNT letting Bellano out of the lease early, but MNT refused to do this unless the other tenant, ASBC Warehouse Ltd. was able to leave at the same time.

[6] Some time before October 1, 2000, ASBC Warehouse Ltd. apparently relocated to another premises, and approached MNT about the possibility of subleasing their space to Sugar Mountain Productions for the balance of the lease period. The sublease would run from October 1, 2000 to January 31, 2001. MNT understood that Sugar Mountain was in the business of building movie sets and planned to use the premises for that purpose. MNT agreed to allow ASBC to sublet to Sugar Mountain. Mr. Charambalous of MNT testified that he felt that he was obligated under the lease not to unreasonably withhold his consent. He apparently did not discuss this with Bellano, and Bellano apparently learned by way of the grapevine about the new tenant. When Mrs. Bellano learned that the new tenants planned to be using the premises as a construction site, she was very concerned as to how that might interfere with their business operations and she called Mr. Charambalous to complain to him. There was apparently some conversation around this time but it is not clear what was said or when the conversation was. Mr. Charambalous says Mrs. Bellano complained to him about the new tenants around the time she paid the October rent. Mrs. Bellano says she phoned Mr. Charambalous when she discovered who the proposed tenants were, and claims that Mr. Charambalous told her they would try to minimize the noise.

[7] Sugar Mountain moved into the premises on October 1 and Bellano was immediately unhappy. Mrs. Bellano says that there was constant, intermittent and erratic construction noise all day to the point that she was not able to use the telephone to deal with her customers. She could hear the sound of hammers, whining saws, routers and compressors. There were between twenty and forty people coming and going from the space, and Bellano sometimes had to park their cars across the street because there was no parking space on the leased premises. She saw people working with paper masks and shields over their faces. She saw people moving large movie sets onto flatdeck trucks for shipping. There were some pre-existing holes in the demising wall from forklift damage caused by both the former tenant and Bellano. There was a constant odour of cedar dust and strong paint and glue coming from the adjoining space. Mrs. Bellano has an allergy to cedar and her health began to suffer. Bellano had previously installed an air filter system in the premises, but it was unable to handle the dust generated by the work going on in the adjoining space, and as a result Mrs. Bellano noticed a strong concentrated cedar smell in the bathroom. She consulted her family doctor and made a complaint to the Workers Compensation Board. The Worker's Compensation Board investigated and accepted her claim for a respiratory irritation aggravating a pre-existing respiratory condition and attributed it to increased exposure to dust at her workplace. Mrs. Bellano started to wear a paper mask and use a puffer, but was not able to wear earplugs because they interfered with her ability to carry out her duties. Mr. Gallello is a regular customer of Bellano. He testified that he is in and out of their business on a daily

basis, and confirms that in October 2000, there was constant construction noise from the adjoining space and strong odours of cedar dust and glue or lacquer. The new tenants worked Monday to Friday at approximately the same hours as Bellano, although Bellano was also open on Saturdays.

[8] She says she phoned MNT a number of times and talked to a secretary. She said they arranged for someone to come out and investigate, but that person did not make the appointment. She says that Mr. Charambalous came out in person to investigate on October 25. She felt he was dismissive of her complaints and says he told her the noise was "no big deal" and suggested she wear earplugs. Mr. Charambalous says he went out to investigate and felt that Mrs. Bellano was exaggerating, and formed the opinion that she was trying to get out of her lease obligations.

[9] Bellano had been looking for new premises since receiving their notice in July, and as a result of the difficulties with the activities of the new tenant, they stepped up their search, and found new premises that they were able to occupy at the end of November, They had signed a lease that was to begin January 1, but were apparently able to move in November 1. They vacated the premises by the end of November, and did not pay any rent for December, January, or February. The monthly rent for the subject premises was $3745 including GST. MNT seeks an order that Bellano pay these arrears.

[10] Rod Lyons is an architect and he was involved in designing the part of the demising wall that was expanded and later returned to its original position when Bellano expanded and then later reduced the size of their leased space. He recalled that the tenants on either side were in the retail and warehouse business and the wall was designed to separate two businesses primarily involved in leasing warehouse space. The wall was designed for low impact noise between tenancies. He said that a wood working shop would be rated high impact in terms of noise. He also agreed that noise, sawdust, and paint smells would travel between holes in the demising wall.

[11] MNT says that a woodworking shop was a permitted use for the building, that the demising wall was built to municipal standards, and that since neither the municipality nor the Worker's Compensation Board took any action to shut down the woodworking shop, Bellano has nothing to complain about since they cannot show that MNT was in breach of any municipal or provincial regulations or bylaws. He further says that Bellano was attempting to terminate their obligations under the lease early so that they could take possession of new premises.

[12] MNT formed the opinion in early October that Bellano was attempting to get out of their lease obligations early, and used the new tenants as an excuse to do that. The evidence does not bear this out. Bellano was making efforts to relocate their business because they knew that their lease would not be renewed when it expired at the end of February. They decided that the conditions in their existing premises were intolerable and moved out at the end of November. They had by that time signed a lease effective January 1, 2001, but were able to take possession early on December 1. These actions are as consistent with the allegations of Bellano that they could no longer carry on business at the subject premises as they are with the allegation by MNT that they were attempting to avoid their lease obligations, and MNT has not proven their allegation.

[13] Bellano seeks an order dismissing the claim and counterclaims for an abatement of their rent for October and November. They also seek compensation for the cost of an adapter they had to purchase for the new space because it had an inadequate power supply for their equipment. The cost of the adapter was about $2200. They also counterclaim for loss of business revenue but abandoned that claim at trial.

[14] Counsel has referred to a decision of this Court that in my view thoroughly reviews the law on the issue of breach of the covenant for quiet enjoyment and the damages flowing from such a breach. The decision I refer to is ***Mary Enterprises Ltd.* v. *Conway Richmond Ltd*.** (2001) BCJ no 1626, a decision of this court rendered July 25, 2001.

[15] I quote from page two and three of that decision:

> "Williams and Rhodes, "Canadian law of Landlord and Tenant" 4th ed., p. 346 notes that:"
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> "The covenant for quiet enjoyment is an assurance against the consequences of a defective title including any disturbance founded thereon, and against any substantial interference, by the covenantor or those claiming under him, with the enjoyment of the premises for all the usual purposes. If the covenant is express, it displaces any implied covenant. An express covenant may be restricted or absolute. If there is no express covenant, a restricted covenant for quiet enjoyment will be implied from the mere contract of letting....Even an express covenant for quiet enjoyment will not permit a lessor to derogate from his grant by using adjoining premises in such a way to be an injury to those demised."

[16] The Court went on further to note:

> " In ***Owen* v. *Gadd*** (1956) 2 Q.B. 99, the Court held that a substantial physical interference with the enjoyment of the demised premises would constitute breach of the covenant for quiet enjoyment."
>
> "The interference with the tenant's normal and lawful use of the premises must be a substantial one of a grave and permanent nature, as opposed to a temporary inconvenience: ***Firth* v. *B.C. Management Ltd.*** (1990) 73 DLR (4th) 375 (BCCA)"
>
> " The covenant is not confined to direct physical interference by the landlord and may apply to any conduct of the landlord or his agents which interferes with the tenant's rights of occupancy: ***Pellatt* v. *Monarch*** Investments Ltd. (1981) O.J. No. 2258 (Co.Ct.); ***Irvine Recreations Ltd*. v. *Gardis*** (1982), 133 DLR (3d) 220 (Sask Q.B.)"

[17] Although MNT was in compliance with municipal and provincial bylaws governing use of the premises when they agreed to lease to Sugar Mountain, they had an overriding obligation to consider whether the proposed new tenants would represent a substantial interference with the right of Bellano to quiet enjoyment of the premises. The evidence suggests that MNT gave little or no consideration to that issue when they agreed to the sublease to Sugar Mountain. MNT apparently had little information as to the activities that would be carried on in the premises other than that Sugar Mountain would be building props for movie sets. They did not discuss this with Bellano, nor consider whether the new tenants might interfere with the business activities of Bellano. When Mrs. Bellano raised her concerns early on MNT dismissed them. The evidence suggests that in response to a number of complaints MNT made only one brief visit to the premises in late October, and made a suggestion that Mrs. Bellano wear earplugs to deal with the noise. It was unreasonable to expect Mrs. Bellano to carry on her duties in this particular

business wearing earplugs. I am satisfied on the evidence that the activities carried out by Sugar Mountain in the adjoining premises represented a substantial interference with the activities carried on by Bellano. It was permanent in nature, since it appeared that Sugar Mountain would be carrying on these activities until the expiry of Bellano's lease, and it appeared that MNT was not prepared to take any action to reduce the inconvenience to Bellano. I am satisfied that MNT was in breach of their covenant to Bellano for quiet enjoyment of the premises and accordingly the claim is dismissed.

[18] Bellano counterclaims for abatement of rent for October and November and the cost of an adapter because the power supply in the new premises was not compatible with their equipment. I am unable to find a causal connection between the actions of MNT and the need to purchase the adapter. My understanding from the evidence was that the new landlord had represented to Bellano that the power supply was adequate for their equipment and that this did not turn out to be the case. I find this to be an issue between Bellano and the new landlord, and dismiss the claim for the cost of the power adapter.

[19] The burden lies on Bellano to prove, on a balance of probabilities that it has suffered damages caused by the breach of covenant for quiet enjoyment. There is no evidence to suggest that Bellano suffered any consequential losses, such as loss of business as a result of the breach of the covenant for quiet enjoyment. It would appear from the evidence that the damages claimed are for inconvenience, and it is appropriate for this Court to consider whether Bellano has made a case that they are entitled to an abatement of rent.

[20] In ***Re Caldwell et al*** **and** ***Valiant Property Management*** 33 O.R. (3d) 187 (1997) O.J. No. 15321 the court had this to say about abatement of rent:

> "It seems to me that the primary requirement for abatement is that the tenant establishes that the tenant is not receiving or enjoying a benefit which the tenant had reasonably expected in return for paying rent."

[21] I am satisfied on the evidence that Bellano is entitled to abatement of rent for the months of October and November 2001, because they were not able to enjoy the benefit they were entitled to expect in return for the payment of rent for those months. There will be an abatement of one-half of the rent paid for those two months. I grant judgment against MNT on the counterclaim in the amount of $3745 together with reasonable expenses and prejudgment interest from November 1, 2001.

MARGARET E. RAE

PROVINCIAL COURT JUDGE