Citation: Mary Enterprises Ltd v Conway Richmond Ltd 2001 BCPC 0172 | Date: 20010725 | File No: C9813323 | Registry: Richmond

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(Small Claims Division)

BETWEEN:

MARY ENTERPRISES LTD.

CLAIMANT

AND:

CONWAY RICHMOND LTD.

DEFENDANT

AND:

LEE SU-LAN ("MARY") CHEN and YANN-YIH ("THOMAS") CHEN

THIRD PARTIES

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE H. DHILLON

Counsel for the Claimant:	H. Crosby
Counsel for the Defendant:	J. Krupa
Appearing for the Third Parties:	No One Appeared for the Third Parties
Place of Hearing:	Richmond, B.C.
Dates of Hearing:	July 6 and 9, 2001
Date of Judgment:	July 25, 2001

Introduction

[1] The Claimant, Mary Enterprises Ltd., entered into a written lease agreement with the Defendant, Conway Richmond Ltd., to lease premises at 10791 # 3 Road in Richmond, British Columbia for a term of January 1, 1996 through September 30, 1999 ("the Lease").

[2] The Claimant operated a tutorial service and language school on the premises. The landlord began repairs to the building in September 1998. The Claimant alleges the noise and

disturbance caused by the Defendant landlord's agents while the repairs were being undertaken breached the covenant for quiet enjoyment under the Lease, causing it loss of business revenues due to a drop in enrollment and cancellations.

[3] The Defendant denies that the construction in and around the leased premises interfered with the Claimant's business, or caused any damages. It counterclaims for damages for breach of the Lease for unpaid rent due to the Claimant's early termination of the Lease and for remedial costs in returning the premises to their original state.

[4] The Claimant admits that it left the leased premises four months before the end of term, leaving rent unpaid for June through September 1999. It did not remove materials erected on the premises as required under the Lease. It admits liability for the unpaid rent and remedial costs, as set out in the counterclaim, in the amount of $9,055.75.

[5] The Claimant alleges that its losses from the breach of the covenant for quiet enjoyment exceed the amount of the counterclaim, and after set off, it is entitled to judgment in its favour.

[6] The Third Parties, Lee Su-Lan ("Mary") Chen and Yann-Yih ("Thomas") Chen are indemnifiers of the obligations of the Claimant under the Lease. They did not defend their liability at trial. Given the admission made by the Claimant as to its liability for rent and remedial costs, the Third Parties are also jointly and severally liable for this obligation, subject to any set off which the Claimant may prove.

Issues

1. Did the Defendant breach the covenant for quiet enjoyment?
2. If breach is established, what remedy is the Claimant entitled to - is it an abatement of rent for the period of the breach, or are consequential losses also recoverable?

The Lease

[7] The relevant sections of the Lease are as follows:

> ARTICLE VII - COVENANTS OF THE LESSOR
>
> The Lessor covenants with the Lessee as follows:
>
> For quiet enjoyment;...
>
> ARTICLE VIII - GRANT OF RIGHTS BY LESSOR
>
> The Lessor grants to the Lessee an Easement and Right of Way in common with the Lessor and all others having a like right at all times with or without vehicles to enter, go, return, pass and repass over that part of the Office Complex... and to park upon and depart from those parts... provided that nothing herein shall restrict the rights of the Lessor to redesignate the use of the Right of Way Areas, or limit the Lessor's rights pursuant to paragraph 8.02.
>
> Notwithstanding the grant of rights in paragraph 8.01 the Lessee agrees:

> That the Lessor may add to the Building or add other buildings and other improvements upon or adjacent to the Right of Way Areas from time to time, or vary the same without the consent of the Lessee, provided always that at all times during the term or any renewal hereof, the Lessee has reasonable ingress to and egress from the premises over parts of the Right of Way Areas;

Legal Principles

[8] Williams and Rhodes, "Canadian Law of Landlord and Tenant" 4th ed., p. 346 notes that:

> 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 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.

[9] 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.

[10] 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.D. Management Ltd.* (1990), 73 DLR (4th) 375 (BCCA).

[11] 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 D.L.R. (3d) 220 (Sask. Q.B.).

[12] Whether a covenant for quiet enjoyment has been breached is a question of fact*: Owen* v. *Gadd; Firth* v. *B.D. Management Ltd.*, *supra.*

Facts

[13] In 1998, the Claimant, Mary Enterprises Ltd., operated a business known as "The Learning Centre in Richmond" on the main floor of a low-rise office complex owned by the Defendant, Conway Richmond Ltd. In August 1998, the Defendant gave notice to its tenants, including the Claimant, of its intention to repair or refurbish the exterior of the building and to install new windows.

[14] The renovation work was a major undertaking. The outside layer of the building was to be removed, windows were to be installed, the face of the building was to be rebuilt, and finished with an application of stucco. The changes were largely cosmetic, with some structural components.

[15] The Defendant's contractors required the use of the parking area, including a playground which was part of the Claimant's demised premises, in order to carry out the renovations.

[16] The work started in September, first with the erection of scaffolding which went all around the building. The playground was cordoned off. The Defendant installed a construction superintendent, Steve Bell, in an office on site to oversee the progress of the work and to deal with tenant concerns.

[17] The construction hours were generally 7 a.m. to 3 p.m. A great deal of material was removed from the face of the building, and the Claimant complained in early September about the lack of clean up of the outside areas. The Defendant had its contractor hire a full time clean-up person to do site clean up. A bin was brought on site to contain the demolition materials.

[18] At trial, the Claimant's complaints related to the untidiness of the site, the poor appearance of the premises during construction, the difficulty of its patrons in accessing the building parking and the doorway due to construction materials, the use of power from their premises without permission, the use of the playground without permission, the removal of their signage during construction, and the disruption of their services due to the noise of construction.

[19] The Defendant agrees that there was some disruption and inconvenience to its tenants, including the Claimant, arising from the construction. It says that it retained an experienced superintendent, Steve Bell, to ensure that its contractor carried out the work in an organized and professional manner. Bell and property manager, Verla van der Merwe, took steps to keep the tenants advised and to work around their schedule and needs as much as possible. The work was carried out within schedule.

[20] The Defendant's property manager, Verla van der Merwe, kept notes of the general progress of repairs, which are also in evidence. I heard from Steve Bell about the course of construction.

[21] The Claimant's representatives, Mary Lee and Jim Smith, took photographs of the site during the construction. They testified about the general disruption the construction and resulting noise caused to themselves and others in the premises. Both Lee and Smith were unclear as to the dates on which the photographs in evidence were taken.

[22] As to the progress of the work itself, I prefer the evidence of van der Merwe and Bell to that of the Claimant's witnesses. I am of the view, having regard to the notes of van der Merwe and Bell's reasonably straightforward recollection of the stages of the work, that the stucco application for The Learning Centre was complete by the end of October 1998. The majority of the photographs appear to be taken in the early part of the renovations. I find that the work occurred over a total of four months, from September through December, 1998, with the major work ocurring during the first 8 to 10 weeks.

[23] The Claimant concedes that under Article 8.02 of the Lease, the landlord was entitled to perform improvements and additions to the office complex, and the renovations fell within that definition. It says, however, that in doing the work, it prevented the Claimant and its invitees from having reasonable ingress to and egress from the premises, as provided under Article 8.02.

[24] In some of the photographs on which the Claimant relies, there is debris particularly during the demolition phase of construction. However, other photographs show generally clean pavements, and appropriate hoarding. The Defendant 's tenant, Ken Harms, gave evidence of a clean, well maintained work site. Harms said that he was on site every day, and work crews cleaned up after finishing work in the early afternoon. This is consistent with Bell's evidence of a regular clean-up regimen.

[25] The evidence also indicates that the Defendant arranged for alternative parking adjacent to the premises for use by tenants and visitors. Customers were able to access the building through walkways designated for such use.

[26] It goes without saying that any renovation to existing premises, as contemplated by Article 8.02, will cause some physical disruption and unsightliness. The duty of the landlord and its agents or contractors is to keep that disruption to the minimum needed to effect the work. On the evidence in this case, I am not persuaded that the Defendant failed to ensure that the work proceeded with dispatch or failed to provide reasonable access to and from the premises during construction. The east doorway and south doorway afford access to the Claimant's premises. At one stage, for a period of time, construction materials were placed at the east entrance until used. However, it can not be said that access to the building by the south entrance was not available during this time. In addition, a temporary inability to access one of two doorways would not be sufficient to support a breach of Article 8.02 the Lease.

[27] Next, I consider the allegation of breach of the convenant for quiet enjoyment. It is agreed by the parties that the landlord's right to renovate must be balanced with the tenant's corresponding right to quiet enjoyment during the course of the renovation.

[28] I have considered the evidence of the Claimant's witnesses, including Brian Cohen and Heather Lieberman, both of whom were part-time or on call instructors and worked under contract for the Claimant. Both Cohen and Lieberman recalled being disrupted in their teaching activities by construction noise. Cohen said that at times it was almost impossible to conduct classes and one had to shout to be heard.

[29] I accept that the Defendant's construction activities, including use of power machinery and hand tools, would and did cause noise to a level that was not conducive to running a tutorial business. I find that the noise was not constant, but came and went in accordance with the nature of the work being done. As Lieberman noted, at times it was very noisy, and at other times it was quiet. I find that the hours when the noise was likely to occur was during the construction hours of 7 a.m. and 3 p.m. It is probable that some noise disruption occurred from time to time over the four month period of construction, abateing as the construction moved to the west side of the building and then to the adjoining building in the latter months.

[30] Ken Harms owns and operates a school on the subject lands in an adjoining building. His premises faced onto the construction. He testified that he never felt unsafe and never received any complaints from his students or their parents about the construction. He agreed that there was noise, but his business was not disrupted by it.

[31] I accept the Claimant's evidence that the noise of construction was a source of distraction and annoyance for those participating in its classes at The Learning Centre. Noise alone may constitute breach of the covenant for quiet enjoyment if it constitutes a "substantial interference, by the covenantor..., with the enjoyment of the premises for all usual purposes": Williams and Rhodes, supra.

[32] Educational instruction and, in turn, comprehension and retention of information, can not be effectively carried out if there is unwarranted noise. I am satisfied that the activities of construction did cause the Claimant an unwarranted interference with the use of its premises for the purposes for which they were let, being an educational institution. This interference was a breach of the covenant for quiet enjoyment of the premises as a learning centre.

[33] The issue that remains to be resolved is the remedy for this breach of covenant by the landlord.

Damages

In *Highway Properties Limited* v. *Kelly Douglas & Co. Ltd.*, 17 D.L.R. (3d) p. 710

at page 721, the Supreme Court said:

> There are some general considerations that support the view that I would take. It is no longer sensible to pretend that a commercial lease, such as the one before this Court, 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. Finally, there is merit here as in other situations in avoiding multiplicity of actions that may otherwise be a concomitant of insistence that a landlord engage in instalment litigation against a repudiating tenant.

[34] I take from the foregoing that contractual damages may be recoverable, if proved, in addition to an abatement of rent where a breach of a provision of lease is alleged. As to abatement, it is available if the following is established:

> "It seems to me that the primary requirement for an abatement is that the tenant establish that the tenant is not receiving or enjoying a benefit which the tenant had reasonably expected in return for paying rent." Re *Caldwell et al.* and *Valiant Property Management* 33 O.R. (3d) 187 [1997] O.J. No. 1532 I

[35] The burden lies on the Claimant to prove, on a balance of probabilities, that it has suffered damages caused by the breach of covenant for quiet enjoyment. Although the Claimant has established a breach of its quiet enjoyment of the premises, has it established any damages in the nature of consequential losses, such as a loss of enrollment or increase in the drop out rate of students arising from the Defendant's breach of covenant?

[36] In considering this question, I am assisted by the discussion of proof and assessment of damages in *Amadon Properties Ltd.* v. *Pacific Apparel Inc*., [1990] B.C.J. No. 2115 :

> Counsel for Pacific submits that a difficulty in assessing damages should not be a bar to an award and that the court must do its best to estimate the probable loss on the material available to the court. In this connection he cites Waddams The Law of Damages (1983) pages 611 - 613.This concept is based on probable loss. The learned author says this at page 612, paragraph 1053:
>
> "In Anglo-Canadian law, on the other hand, perhaps because of the decline in the use of the jury, the courts have consistently held that if the plaintiff establishes that he has probably suffered a loss, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages. (*Sperry Rand Canada Ltd.* v. *Thomas Equipment Ltd.* (1982), 135 D.L.R. (3d) 197 (N.B.C.A.)) If the amount is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that he might

> have been expected to adduce if his claim were sound, the omission will tell against him.
>
> In *Ratcliffe* v. *Evans* Bowen, L.J., said:
>
> "As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To Insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."
>
> In *Wood v. Grand Valley R. Co*. (1915), 51 S.C.R. 283, 22 D.L.R. 614, Davies, J., said referring to the English case of *Chaplin* v. *Hicks*:
>
> "It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned Judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or Judge must under such circumstances do the "best it can' and its conclusion will not be set aside even if "the amount of the verdict is a matter of guess work".
>
> Although the majority of the court agreed to set aside the assessment of damages at trial in that case this was, it seems, on the ground that the plaintiff had failed to put the trial court in possession of information in his power". Anglin, J., said: "The assessing tribunal is... entitled to such assistance by proof of material relevant facts as the claimant may under the circumstances reasonably be expect to afford it."

[37] I accept the foregoing as the correct statement of law on the issue of proof of damages. The burden lies on the claimant to show that it has probably suffered a loss due to some act or omission of the Defendant, and secondly, the Claimant must adduce such evidence as is in its power to produce in proof of its damages.

[38] As to the evidence of damages in the case at bar, the Claimant initially expressed its concern about the impact of construction on business in a letter dated September 18, 1998. In the letter, Mary Lee for The Learning Centre said that one parent had withdrawn her child from care and was given a $5,000 refund, being a full years tuition, because of the construction. The letter goes on to say that given the anticipated three month period of construction, The Learning Centre was reviewing its situation and considering its options.

[39] I conclude that early in the construction, the Claimant was alert to the possibility of damage to it business. It was in a position to keep careful notes of enrollments and cancellations, and to record the full extent of any refunds given to customers.

[40] By November 1998, the Claimant had commenced this lawsuit. At that time, it alleged that its losses were refund of fees sought by clients in the amount of $6,016 plus an abatement of rent of three months.

[41] At trial, the Claimant put forward some accounting evidence to show loss of revenues, and hence loss of profits. It is a ledger summary of revenues and expenses prepared by Martin Fong, accountant, covering two periods, one for the pre-construction period of February 1, 1998 to July 31, 1998, and the second for the construction period of September 1998 to January 1999.

[42] For the six month period before the start of construction, the statement shows a sales figure of $75,571. This figure is based "basically on the bank statements of the Claimant," according to Fong. He performed no analysis as to the source of the revenues.

[43] Mary Lee testified that this document was prepared primarily for use in an adoption application for which she was required to show her earnings.

[44] A second statement for the renovation period September 1998 to January 1999 reflects sales figure of $9,527. This on its face is a significant decline in sales. It again is based again on the bank statements of the Claimant.

[45] Mr. Fong performed no independent audit with respect to either statement. He could not distinguish which income was generated by attendance at the school or which came from attending at the client's home.

[46] Mr. Fong also provided a monthly breakdown of income for the Claimant (Exhibit No. 3) showing approximately $15,000 in sales for September 1998. He recorded only $520 in sales for October, no sales in November, and under $5,000 in sales in each of December 1998 and January 1999. The Claimant did not produce evidence of monthly revenues for a similar period in 1996 or 1997 for comparative purposes.

[47] Nor did the Claimant produce any filed tax returns indicating profit or loss for the years 1996, 1997, 1998 or 1999.

[48] The statements prepared by Fong are not opinion evidence of probable loss of profits.

[49] Having put the landlord on notice in September 1998 about loss of business, the Claimant failed to record or adduce evidence one would expect in the circumstances. The Claimant's representative did not provide any evidence of the usual or expected enrollment for the fall term in 1996 or 1997, and any change in 1998. The Claimant did not adduce evidence of the number of applications for enrollment filled by clients in August 1998 which were not proceeded with or cancelled. Apart from the refund cheques of $5,756 to one customer, and $260 to another, totalling $6,016 and paid in September, there was no further evidence of refunds.

[50] Mary Lee testified that she experienced "lots" of loss of enrollment but gave no specifics.

[51] Brian Cohen and Heather Lieberman testified that they had not been called to tutor as much as expected in the Fall of 1998. Each assumed that this was due to a lack of enrollment caused by the construction. Yet the contract tutor expenses for the five month period of construction (September 1998 to January 1999) is $6,904, which is comparable to the $8,904 contract tutor expenses for the longer, six month period immediately before construction started.

[52] In answer to the claim for damages, the Defendant relies on the evidence of Ken Harms, who carried on a pre-school to grade 12 learning assistance business in an immediately adjacent building, owned by the Defendant, which also underwent renovation at the time. Harms says his clients did not abandon his services, and he issued no refunds during the relevant time. He says that the majority of his students came in the afternoon, after school, by which time the

construction crews were finished. He believed that the Claimant provided services to students generally after school, between 4 p.m. to 6 p.m.

[53] Harms said that even before construction, for a period of one year, he saw very few clients entering the Claimant's premises. He wondered how it stayed in business. Harms said that his business in fact increased after the renovations were done due to improved premises.

[54] I find that the allegation of a substantial loss of sales, and hence profit, is not established on a balance of probabilities. Such evidence was capable of being marshalled since the Claimant was alleging it as early as September 1998. If examined uncritically, the statement of revenues for the six month period before the start of construction might be some evidence of an average net income of $5,000 per month. The period is selective, and the information was used to support an adoption application. The Claimant has not provided the best evidence that, under the circumstances, it reasonably ought to have produced as to its financial picture both before and after the construction in proof of its claim of a probable loss of profits: see *Wood v. Grand Valley R. Co*. (1915), 51 S.C.R. 283 per Anglin J.

[55] It would be wrong to simply presume, without evidence which the Claimant was capable of adducing from which the proper inferences could be drawn, that the Claimant would have earned a net income of $5,000 per month had the renovations not been undertaken by the Defendant.

[56] In fact, when it filed this claim in Provincial Court in November 1998, it alleged only losses related to tuition refunds in the amount of $6,016. I find that the best evidence of loss is the tuition refunds as alleged in the Notice of Claim and supported by documentation showing re-payment to clients. I accept that these payments, which ocurred in September, are likely related to the construction activities of the Defendant. The direct loss to the Claimant is established at $6,016.

[57] I have also found that there was a breach of the covenant for quiet enjoyment. I am of the view that the Claimant is entitled to some abatement of rent because for a period of four months, to varying degrees, the Claimant did not obtain or enjoy the benefit it had expected in return for the rent paid.

[58] An average monthly rent during the relevant time was $3,347.48 per month, for a total of $13,389.92. As noted in *Pellatt* v. *Monarch Investments Ltd.,* I [1981] O.J. No. 2258*,* the Claimant has not been encumbered with loss of its full use of the premises. There is evidence that with the construction ending in early afternoon, schooling or tutorial services could have been provided after normal school hours. As well, I am satisfied that some services were provided on the premises during the day. I am of the view that it would be appropriate to abate 50% of the rent, over a four month period, resulting is a rebate of $6,694.96. This sum takes into account that loss of use of the play area, and is additional to the $6,016 loss of revenue.

[59] The Claimant has established damages in the amount $12,710.96 After setting off the amount of the allowed counterclaim of $9,055.75 for non-payment of rent in 1999, the Claimant is entitled to a payment order for $3,655.21 and court order interest on this sum from January 1, 1999 to date. In addition, the Claimant may recover its filing fees, and reasonable expenses or disbursements, as agreed to or as determined by a Registrar of Provincial Court.

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H. Dhillon

Provincial Court Judge