NOVA SCOTIA COURT OF APPEAL

Citation: *Archibald v. Action Management Services Inc.*, 2015 NSCA 103

Date: 20151117
Docket: CA 432537
Registry: Halifax

Between:

Karen Archibald and The Estate of Adam Archibald

Appellant
Respondent by Cross-Appeal

v.

Action Management Services Inc.

Respondent
Appellant by Cross-Appeal

Judges:	Fichaud, Hamilton and Van den Eynden, JJ.A.
Appeal Heard:	September 10, 2015, in Halifax, Nova Scotia
Held:	Appeal and Cross-Appeal dismissed, per reasons for judgment of Hamilton, J.A.; Fichaud and Van den Eynden, JJ.A. concurring.
Counsel:	Karen Archibald, appellant in person Ralph W. Ripley, for the respondent

Reasons for judgment:

[1] Justice Patrick J. Murray essentially found, that at a meeting on May 31, 2007, the parties orally agreed that their May 21, 2003 commercial lease would be terminated and that the appellant tenants, Karen Archibald and the Estate of Adam Archibald, would be released from their obligations thereunder, on payment of $11,200 to the landlord, the final installment of which was paid on June 5, 2007. He rejected the respondent landlord's (Action Management Services Inc.) argument that the agreement to terminate and release was subject to a second condition, that it entered into an acceptable new lease with a third party. The judge also found the tenants continued to occupy the premises for six months thereafter pursuant to a tenancy at will, at the same monthly rent provided for in the lease.

[2] The tenants, represented by Ms. Archibald, appeal only the judge's finding that a tenancy at will arose in June 2007, arguing no such claim was pleaded or raised during trial. The landlord cross-appeals from the judge's finding that the lease was terminated and the tenants released from their obligations thereunder on payment of $11,200. It argues the judge erred by failing to consider (1) the tenants' continued occupation of the premises for six months thereafter and (2) the provisions of clause 30 of the written lease, a "no oral amendment clause", which it argues prevents the parties from orally agreeing that the lease would be terminated and the tenants would be released from their obligation to pay further rent, on payment of $11,200.

[3] For the reasons that follow, I am satisfied both the appeal and cross-appeal should be dismissed without costs.

Facts

[4] The tenants leased commercial space in Port Hawkesbury from the landlord, in which they operated a Curves franchise. The five year, four month lease began in June 2003, was to end on October 1, 2008, and had a monthly rent of $2,100, including minimum rent and a percentage of common expenses, plus HST.

[5] The tenants began to experience financial difficulties and fell into arrears approximately two and a half years before the end of the lease. Ms. Archibald approached the landlord for a reduction in rent and extension of the term, planning to sell the business. Emails were exchanged, some payments were made and Ms.

Archibald gave the landlord the name of a potential purchaser of the Curves franchise, Gloria Chafe.

[6] Eventually, on May 29, 2007, the landlord sent Ms. Archibald the following email:

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

[7] The parties met on May 31, 2007. Their evidence differed as to what was agreed at that meeting. Ms. Archibald testified that it was agreed the lease would be terminated and the tenants would be released from their obligations under the lease on condition they paid the landlord $11,200, which they did. The landlord's evidence was that there was a second condition that had to be met for the lease to be terminated and the tenants released. The landlord had to enter into an acceptable lease with a new tenant, which did not happen, despite the landlord, in June 2007, instructing a law firm to draft a lease with Gloria Chafe as tenant.

Issues

[8] The three issues that need to be resolved to deal with the appeal and cross-appeal are:

1. Did the judge err when he found as a fact that the parties orally agreed at the May 31 meeting that the lease would be terminated, and the tenants released from their obligations under it, subject only to their paying $11,200, and not subject to a second condition, that the landlord enter into an acceptable lease with a new tenant?

2. If not, did the judge err in finding this oral agreement, together with the payment of $11,200 by the tenants, effectively terminated the lease and the tenants' obligations under it?

3. Did the judge err when he found a tenancy at will arose following the termination of the lease?

Standard of Review

[9] The applicable standards of review are set out in *Union of Icelandic Fish Producers Ltd. v. Smith*, 2005 NSCA 145:

> [42] The applicable standards of review were described in detail by Oland, J.A., for the Court, in **Fralick v. Dauphinee** (2003), 219 N.S.R. (2d) 238; N.S.J. No. 434 (Q.L.)(C.A.) at paras. 19 - 21. I will summarize.
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> [43] A court of appeal is not to interfere with the trial judge's findings of fact unless there is a palpable and overriding error. An error is palpable if it is one that is plainly seen or clear. An overriding error is one that is determinative in the assessment of the balance of probabilities with respect to that factual issue. See **Housen v. Nikolaisen et al.**, [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask. R.; 272 W.A.C. 1; 211 D.L.R. (4^{th}) 577, at ¶ 1 to 5 and **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010; 220 N.R. 161; 99 B.C.A.C. 161; 162 W.A.C. 161, at ¶ 78 and 80. This highly deferential standard applies not only to the trial judge's findings of credibility, but to inferences drawn from the evidence: **Housen** at paras. 18 - 25. If it is alleged that the trial judge failed to consider relevant evidence, the appellate court will be justified in reconsidering the evidence if the omission is material in the sense it gives rise to a reasoned belief that it is one which affected the judge's conclusions. See **Delgamuukw, supra** at ¶ 90 and **K.V.P. v. T.E.**, [2001] 2 S.C.R. 1014; 275 N.R. 52; 156 B.C.A.C. 161; 255 W.A.C. 161, at ¶ 15.
>
> [44] The appellate court is to review questions of law for correctness. Where the alleged error is one of mixed law and fact, such as in the application of a legal standard to the evidence, the standard of review depends on the circumstances. If it is shown that the judge reached his or her conclusion on the basis of the application of an incorrect legal principle or through the mis-characterization of a legal standard, then the standard of review is correctness. See **Housen, supra**, at paras. 26, 27 and 33. Otherwise, the palpable and overriding error standard applies.

Analysis

1. Did the judge err when he found as a fact that the parties orally agreed at the May 31 meeting that the lease would be terminated, and the tenants

released from their obligations under it, subject only to their paying the landlord $11,200, and not subject to a second condition, that the landlord enter into an acceptable lease with a new tenant?

[10] This issue involves a finding of fact made by the judge. We will not interfere with a finding of fact absent a palpable and overriding error. If the judge failed to consider relevant evidence, we can reconsider the evidence if the omission is material.

[11] The landlord argues the judge erred in finding that there was not a second condition to the May 31 agreement, namely, that it had to enter into an acceptable lease with Ms. Chafe. It says the judge failed to adequately consider the evidence concerning the tenants' continued occupation of the premises for six months thereafter. It asks this Court to consider the evidence afresh and find the May 31 agreement was conditional upon it entering into an acceptable lease with Ms. Chafe, suggesting the tenants' continued occupation supports its position.

[12] It is clear from the judge's reasons, 2011 NSSC 358, that he knew the tenants continued in possession of the premises until early December 2007. His statements in paragraphs 8, 25 and 85 indicate he understood the landlord's argument that this continued occupancy was strong evidence against a finding that the parties agreed on May 31 that the lease would be terminated and the tenants released from their obligations thereunder on payment of $11,200, without a second condition.

[13] In paragraphs 59 and 77, the judge refers to Ms. Archibald's evidence as to why they stayed on – to facilitate the tenants' sale of their business to Ms. Chafe, including the entering into of a new lease between Ms. Chafe and the landlord:

> [59] …[Ms. Archibald] had been waiting, she said, for the purchaser, Gloria Chafe, to complete the purchase of her club. She had been waiting also for the lease to be finalized between the purchaser and the Landlord. As she put it, she stayed beyond June 5th, 2007 to facilitate the various parties and transactions that were occurring.

[14] In paragraph 73, he refers to the landlord's failure to make any demand for rent during the six months from June to November of 2007.

[15] Starting at paragraph 88, the judge considers the differing evidence as to the agreement reached and in paragraph 98, makes it clear he accepted Ms.

Archibald's testimony as to the agreement reached on May 31 where it differed from the landlord's:

> [88] The email from the Plaintiff dated May 29th, 2007 is clear in its scope and wording. It follows previous requests by the Plaintiff for a reduction in rent and for an extended term. She informed Action of her intent to sell and she asked their assistance in this regard. Stephen White, the accounting employee for Action sent an email to the Plaintiff asking that negotiations be started, saying something had to be done. The May 29th email from the Plaintiff at page 46 of Exhibit 1 stated the following:
>
> I) It asked the Tenant to offer Action a cash settlement for the current rent and in return it would release her for the remaining term of the lease to October, 2008. That is what it says.
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> ii) It says also that if the offer is agreeable, "we" meaning Action would privately carry out a successful lease with Gloria (Chafe). By "privately" it can reasonably inferred that the new lease would be negotiated without the involvement of Ms. Archibald. The evidence of Gloria Chafe confirmed this when she said in re-direct to the Defendant, "you were assuming I was backing down, but I couldn't tell you", or words to that effect.
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> [89] Ms. Archibald gave clear and convincing evidence as to the events surrounding the May 29th email and the events that followed. Unlike Mr. Webb and Mr. White [the landlord's witnesses], she knew all of the details including date and times of the emails, the date and times of the meeting, the dates and amounts of the cheques, and when they were delivered. She also recounted in detail what was discussed. She stated she was excited when she received the email and intended to respond and promptly to seize the opportunity she believed she had been given. The question is, can and should the offer be accepted on its face so as to constitute offer acceptance and ultimately, consideration?
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> [90] Ms. Archibald provided particulars in her evidence as to how the $11,200 figure was arrived at, at one point jogging the memory of Mr. Webb in respect of a $2,000 reduction. She further described the money order for $5,000 given on May the 31st and described further her promise to be back with the $6,200 as soon as she could. She returned days later, June 5th, with the cheque for $6,200 entered in Exhibit 1, at page 48. She stated that at that time she asked Stephen White for a release and her evidence was that he said he couldn't give her one right away but would get it to her, or words to that effect. Because of this she said she wrote, "PH final rent for release" on the June 5th cheque.
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> [91] Mr. White, for his part, could recall none of the important details relating to the May 31st meeting or subsequent events. He apologized for this at one point. He could not recall the three (3) options which Ms. Archibald said were provided to her as contained at page 40 of Exhibit 1. This followed her earlier

email of May 29th at page 39 asking to be informed of what it would cost her under each scenario. Mr. White was asked by Ms. Archibald on cross examination "you don't remember the circumstances?" To this he replied "well no I don't remember". She then asked "And you don't remember I put a note on the cheque because you were not going to give me the release then and there?" To this he replied "Again, I just don't remember".

[92] Mr. Webb's evidence initially was that he couldn't recall meeting with Ms. Archibald after the May 29th email at page 46 of Exhibit 1. Neither he nor Mr. White could recall whether the "re: line" on the cheque was filled in when it was received by them. Neither knew the dates of the meetings although they assumed correctly that they were held around the same dates as the cheques. Mr. Webb dismissed the email as just an email, even though it provided Action with $11,200 of rent, a substantial sum. Neither explained what was meant by Mr. White's handwriting, Mr. Webb simply stating "it's not mine". Mr. White could give no explanation of why the last payment was entered on the accounting records of Action as the "final payment". Mr. Webb didn't deny discussing the 3 options at page 40 with Archibald but just couldn't recall them.

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

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

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

[96] There are certainly contradictions between the evidence of Mr. Webb and Ms. Chafe, not the least of which is that the lease according to her was much more advanced that(*sic*) what Mr. Webb had presented. It would have been better to have had in evidence the emails to which she referred to shed more light on her evidence. She did say that Ms. Archibald was in the dark and she respected the

> rule about not speaking to her, which verified the privacy aspect of the May 29th email. If Ms. Chafe is to be believed then it was hardly the Defendant that was holding up a lease with Ms. Chafe or had the responsibility of finalizing it.
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> [97] Mr. Webb did not answer directly Ms. Archibald's suggestion that the only condition in the email (Exhibit 1 at page 46) was that she make an agreeable offer. Mr. White in fact agreed with her stating, "I would agree there, yes." Ms. Archibald, when it was suggested to her in cross examination by Action's counsel, Mr. Ripley, that Mr. Webb would have to have to have(*sic*) a new lease with a new Tenant, replied "That is not true, that is not what he stated. I have to disagree." She further stated, "I understand that's his version."
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> [98] **Without recounting further all of the recollections and discrepancies, I have considered the testimony of these witnesses and where the evidence of Mr. Webb and Mr. White differs with that of Karen Archibald, I accept her evidence.** While she may be in a better position to recall, as she dealt only with her lease, her recollections and testimony were presented in a more clear and precise manner as compared with Action's witnesses.
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> [Emphasis added]

[16] The judge then deals directly with the landlord's argument concerning ongoing occupancy by the tenants in paragraphs 110 to 115:

> [110] This leaves the Plaintiff's argument that the Tenant remaining in the premises for almost six months is not indicative of an accord and satisfaction.
>
> [111] It is true that the Defendant remaining in the premises was not a condition of the accord and satisfaction.
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> [112] That, however, does not prevent the court from concluding that there was an accord and satisfaction of the rental arrears as well as the rent owing to the end of the lease. That is what the email forwarded to the Tenant by the Landlord, in fact said. I find it was more than just an email. It was the document which formed the basis of the subsequent accord and satisfaction reached between the parties and I so find.
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> [113] I further find on the basis of the evidence and as given by Ms. Archibald that she made an "acceptable offer" to the Landlord in good faith fully expecting a release. The fact that she had agreed in the lease that a cheque proffered with a memo such as she wrote does not prevent an accord and satisfaction from subsequently occurring. In my respectful view clause 30 of the lease contemplates a situation where a Tenant attempts to secure full payment with part payment by a unilateral act without consent or acceptance from the Landlord. Such is not the case here.
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> [114] The circumstances here bring to mind what Lord Denning said in D & C Builders [[1965], 3 All ER 837], that it would be inequitable for the creditor to

> insist on the greater sum, where the debtor paid the lesser sum in reliance of that promise. Lord Winn in the same case concluded the mere possibility of a benefit "thrown in" can justify consideration separate and apart from the obligation itself.
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> [115] For the foregoing reasons, and on the basis of the findings I have made, I find as a fact that the parties reached an accord and satisfaction and that the requisite elements are present in this case and have been proven by the Defendant on the balance of probabilities. This is so notwithstanding the heavy and substantial burden on the Defendant. The accord was reached on May 31st and satisfied on June 5th, 2007. The rest was up to the Landlord.

[17] The judge's finding as to the terms of the agreement reached by the parties is founded squarely on his credibility finding. The credibility of witnesses is a matter peculiarly within the province of a trial judge who has the advantage of seeing and hearing the witnesses. There are no cogent reasons which would justify this Court in reversing the findings of credibility made by the judge.

[18] It was for the judge to consider all of the evidence, including the continued occupation by the tenants, as he did, and make his finding. Accordingly, I am satisfied the judge adequately considered the evidence of the tenants' continued occupation of the premises in reaching his conclusion and made no palpable and overriding error in his finding of fact that an agreement was reached on May 31 that the lease would be terminated and the tenants released from their obligations under it, on payment of $11,200.

2. If not, did the judge err in finding this oral agreement, together with the payment of $11,200 by the tenants, effectively terminated the lease and the tenants' obligations under it?

[19] This issue is raised by the landlord's argument that clause 30 of the written lease precludes the parties from orally agreeing that the tenants would be released from their obligation to pay further rent and the lease would be terminated, on payment of $11,200 by the tenants. It argues that clause 30 specifically provides that part payment of rent without a written waiver of the tenants' obligation to pay the full amount, does not relieve the tenants of their obligation to pay the balance of rent due under the lease and that the parties cannot ignore the provisions of clause 30 and terminate the lease orally on different terms.

[20] This raises a question of law. The standard of review is correctness.

[21] Clause 30 provides:

> (30.) No Implied Surrender of Waiver: **No provisions of this Lease shall be deemed to have been waived by the Landlord unless such waiver is in writing signed by the Landlord.** The Landlord's waiver of a breach of any term or condition of this Lease shall not prevent a subsequent act which would have originally constituted a breach, from having all the force and effect of any original breach. The Landlord's receipt of Rent with knowledge of a breach by the Tenant of any term or condition of this Lease shall not be deemed a waiver of such breach. The Landlords failure to enforce against The Tenant or any other tenant in the building, any of the Rules or Regulations shall not be deemed a waiver of such Rules and Regulations. No act or action done by the Landlord, its agents or employees during the Term shall be deemed and*(sic)* acceptance of surrender of the Premises, and no agreement to accept a surrender shall be valid, unless in writing and signed by the Landlord. The delivery of keys to any of the Landlords employees or agents shall not constitute a termination of this Lease. **No payment by the Tenant or receipt by the Landlord which is a lesser amount than on account, or shall any endorsement statement on any cheque or any letter accompanying any cheque, or payment as rent, be deemed an accord and satisfaction and the Landlord may accept such cheque or payment without prejudice to the Landlord's right to recover the balance of such rent or pursue any other remedy available to the Landlord.**
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> [Emphasis added]

[22] Clause 30 purports to prohibit the subsequent modification of the written lease except by modifications made in writing with the express consent of the landlord. This type of clause is usually referred to by Canadian courts simply as a type of exclusion clause. In the United States, this kind of clause has its own moniker, being the "no oral amendment clause"; *Beatty v Guggenheim Exploration Co.*, 225 NY 380, 387-88 (1919).

[23] The leading case in Canada on "no oral amendment clauses" such as clause 30, is *Shelanu Inc. v. Print Three Franchising Corporation*, [2003] O.J. No. 1919 (Ont. C.A.). In *Shelanu*, Weiler, J.A. sets out a two-step framework for a court to apply in determining the effect of a "no oral amendment clause" in a contract. The first step is to determine if the clause applies. In order to apply, the no oral amendment clause must be clear and unambiguous and it must have been intended specifically to apply to the situation that subsequently occurred between the parties. In *Shelanu*, the Court found that the clause in question did not apply because the subsequent oral agreement of the parties did not modify the written contract; instead, the oral agreement had been a surrender and termination of the contract. A surrender and termination of the contract was not the same thing as a

modification, so the clause could not be held to apply to the parties' subsequent dealings with each other.

[24] In concluding that the clause in question did not apply Weiler, J.A. states:

> [44] …**I turn now to consider whether, as against BCD, the words, "waiver, amendment or change" in paragraph 26 would apply. The surrender of the franchise was not a waiver or amendment to BCD's franchise agreement as both these words envisage the continuation of some aspect of the franchise agreement and not, as is the case here, its surrender and termination by agreement of the parties. As Cory J. held in Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611 at para. 66 in concluding that a power to amend a trust did not include the power to revoke it, ". . . amendment means change not cancellation which the word revocation connotes". Similarly, in this case, we are dealing with a revocation of a franchise licence, not an amendment or change to the licence.** Further, in interpreting the Patent Act, R.S.C. 1985, c. P-4, in Harvard College v. Canada (Commissioner of Patents), [2002] S.C.J. No. 77, at para. 161, McLachlin C.J.C. on behalf of the majority, stated:
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> > It is a well-known principle of statutory interpretation that the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of the words or phrases associated with them (P.-A. Côté, The Interpretation of Legislation in Canada (3rd ed. 2000), at pp. 313-14.). Also, a collective term that completes an enumeration is often restricted to the same genus as those words, even though the collective term may ordinarily have a much broader meaning (at p. 315).
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> [45] The principles which govern the interpretation of contracts are essentially the same as for statutory interpretation: River Wear Commissioners v. Adamson (1877), 2 App. Cos. 743 (H.L.) at 763-765 adopted by L'Heureux-Dubé J. in dissent but not on this point in Manulife Bank of Canada v. Conlin, [1996] 3 S.C.R. 415 at para. 40 and also Manitoba (Hydro-Electric Board) v. John Ziglio Co., [1999] M.J. #506 (C.A.). **Applying these principles of interpretation to the phrase, "waiver, amendment or change" in this case, the word change would be construed as including a change that would nevertheless result in the continuation of the agreement not, as here, its revocation and termination. The paragraph does not contemplate what occurred pursuant to the oral agreement, namely, a surrender and revocation of the franchise for 239 Bloor Street East by mutual agreement. Paragraph 26 in BCD's agreement does not conflict with the oral agreement.**
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> [Emphasis added]

[25] In paragraph 50, the Court in *Shelanu*, when dealing with a second type of exclusion clause in that lease, an entire agreement clause, states:

> [50] Clauses such as the entire agreement clause in issue here are normally used to try to exclude representations made prior to the signing of the written agreement. See P.M. Perell, "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998) Advocates' Q. 287. **Nothing in paragraph 27 suggests that an oral agreement to surrender the franchise several years later would be of no effect. It cannot be said the entire agreement clause was clearly intended to cover any and all future contractual relations between Shelanu and Print Three.** See Turner v. Visscher Holdings, [1996] B.C.J. No. 998 (B.C.C.A.). The fact that Print Three and Shelanu entered into and acted upon an oral agreement respecting the surrender of the franchise at 200 Bloor Street West indicates this was not the case. **Indeed, J.M. Perillo, ed., Corbin on Contracts (St. Paul, MN: Western Publishing Co., 1993) states at para. 1295 that an express provision in a written contract forbidding oral variation of the terms of a contract or its discharge is generally unsuccessful with respect to subsequent agreements. The reason he gives is that:**
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> > **Two contractors cannot by mutual agreement limit their power to control their legal relations by future mutual agreement. Nor can they in this manner prescribe new rules of evidence and procedure in the proof of facts and events.**
>
> [Emphasis added]

[26] It is not necessary to consider the second step set out in *Shelanu*, which is to determine if such a clause should be enforced if it does apply, because in our case, as in *Shelanu*, clause 30 does not apply on the facts found by the judge.

[27] Clause 30 provides that no provisions of the lease shall be deemed to have been waived by the landlord unless such waiver is in writing signed by the landlord. Its words indicate that it governs the obligations of the parties under an ongoing lease following a waiver. It does not contemplate the situation as found by the judge, that the parties reached a separate agreement that the lease would be terminated and all of the tenants' obligations under it would be released on their payment of $11,200 to the landlord. Nothing in clause 30 suggests an oral agreement such as this between the parties some years later would be of no effect. It cannot be said clause 30 was clearly intended to cover any and all future contractual relations between the parties.

[28] As accepted in *Shelanu*, parties by mutual agreement may agree orally to terminate a written lease without regard to the terms provided for in the lease. By accepting Ms. Archibald's evidence, this is what the judge found had happened at the May 31 meeting.

[29] In light of his finding of fact as to the agreement reached on May 31, I am satisfied the judge did not err in law when he found clause 30 did not apply. He did not err in finding the parties' oral agreement, together with the payment of $11,200, effectively terminated the lease and the tenants' obligations thereunder.

3. Did the judge err when he found a tenancy at will arose following the termination of the lease?

[30] This is the issue raised by Ms. Archibald on appeal. She argues the judge erred in law in finding the tenants were tenants at will from June to November, 2007, as this issue was not pleaded in the Statement of Claim or argued at trial. She says she was prejudiced by this; that if she had recognized this was a possibility, she would have introduced further evidence, especially concerning the appropriate amount of rent.

[31] Ms. Archibald raised the same issue with the judge in her submissions on costs. He addressed it as follows in his costs decision, reported at 2012 NSSC 163:

> [23] The Defendant's position is that she is entitled to costs and the Plaintiff is not. She argues the claim succeeded upon was not pleaded by the Plaintiff. She argues further the issue of her as an "overholding Tenant" was not properly framed by the Plaintiff.
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> [24] While not specifically pleaded, the Statement of Claim at paragraph 8(d) stated "Such further and other relief as this Honourable Court may see as just".
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> [25] Section 41 of *Judicature Act* R.S., c. 240, s. 1., allows this Court, as a superior court to grant legal or equitable relief as the Court deems appropriate, based on the evidence and circumstances.
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> [26] The bulk of the evidence in the two (2) day trial related to whether there was an accord and satisfaction. As part of the trial, however, evidence was given in relation to when the Defendant as Tenant had vacated the premised and under what circumstances.
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> [27] As the relationship was governed by a lengthy written commercial lease, the parties must be aware of the lease contract and potentially what liability may flow from it, including at common law.

[32] In the landlord's Statement of Claim, after setting out the details of the lease and the tenants' alleged breaches of it by failing to pay rent and abandoning the premises, the landlord claimed:

8. The Plaintiff, Action Management Services Inc., therefore claims against the Defendant, as follows:

> (a) Total amount of Rent due under the Lease Agreement, including past rent and amount payable for the entire term of the Lease Agreement to October 2008, in the amount of $41,454.16 Canadian;
>
> …
>
> (d) Such further and other relief as this Honourable Court may see as just;

[33] The Alberta Court of Appeal dealt with the principles to be applied in determining if a statement of claim is deficient in *W.S. Johnson & Sons Ltd. v. Odland*, [1989] A.J. No. 1182 (CanLII):

> [10] The Appellant contended, as an issue preliminary to what I have referred to as the principal issue, that the Respondent's Statement of Claim was deficient in that it failed to raise the issue of the rental agreement and to ask for the appropriate relief because of it. It would follow, according to the Appellant's argument, that the trial judge should not have ruled on the "separate" rental arrangement.
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> [11] In considering this last mentioned issue, we note the statement of the function of pleadings as set out in Williston & Rolls (1970) Vol. 2, Ch. 15, p. 637, as follows:
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> > "1. To define with clarity and precision the question in controversy between litigants.
> >
> > 2. To give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them. A defendant is entitled to know what it is that the plaintiff asserts against him; the plaintiff is entitled to know the nature of the defence raised in answer to his claim.
> >
> > 3. To assist the court in its investigation of the truth of the allegations made by the litigants.
> >
> > 4. To constitute a record of the issues involved in the action so as to prevent future litigation upon the matter adjudicated between the parties."
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> [12] The British Columbia Court of Appeal in *Scott Bros. v. N.W. Hullah* (1967) 59 W.W.R. 173 found pleadings to be defective in a case where the facts supporting the cause of action on which the plaintiff relied had not been set out in the Statement of Claim. In doing so, the court made it clear that the "form" of the pleading under modern law, is not the critical consideration. Instead a court should review the statement of facts in the pleading to determine whether they are sufficient to support the cause of action advanced. In writing for the Court, Bull, J.A. said:

> "It is recognized that the former niceties and technicalities of pleadings are not so strictly considered in this modern time. The form of the action is not now of the essence in pleadings, and the statement of facts is now to be considered to ascertain whether or not they contain or describe a cause of action and, as stated in *Odgers on Pleadings and Practice*, 18th ed., p. 170:
>
> > 'Each party now states the facts on which he relies; and the court will declare the law arising upon the facts pleaded. If on those facts the plaintiff would have been entitled to recover in any form of action, he will now recover in the action which he has brought.'"
>
> (p. 178)

[34] A reasonable reading of the Statement of Claim indicates the landlord is seeking rent up to and including October 2008. At the commencement of the hearing before us, Ms. Archibald agreed she understood the landlord was seeking rent to October 2008, that the Statement of Claim had alerted her to the fact she was at risk for rent until then, although she somewhat drew back from that position later. She agreed she attempted in her defence and at trial, to focus the trial on the events that took place up to June 5, 2007, when the lease was terminated and the tenants released from their obligations thereunder on payment of $11,200, not wanting to deal with the tenants' obligations thereafter. She agreed in hindsight "maybe she was too unilateral in her thinking". She also agreed the issue of fair rent for the six months following June 5 was explored to some extent at trial, but wants the opportunity to now present to the judge all of the evidence she feels is relevant.

[35] The landlord points out that when Ms. Archibald was asked about circumstances after June 2007, she refused to answer. For example:

> **Q.** And would you agree with me that as it related to Gloria, you never did reach an agreement with her with respect to her buying the club, did you?
>
> **A.** Well, Gloria will testify to that shortly once I'm finished, but I did have a valid purchase sale*(sic)* agreement with Gloria, yes, I did.
>
> **Q.** So did you actually sign an agreement?
>
> **A.** Absolutely. And we sent it off to Curves International.
>
> **Q.** The reason I say that is that in the … in the document disclosure I never seen*(sic)* a copy of any agreement signed between you and Ms. Chafe. So there was one signed but it wasn't disclosed in the … in the process?
>
> **A.** Well, I had, and again my position in this case today is that what happened after June 5th has no bearing on me and Gloria's presence here today

> may speak to an issue between Mr. Webb and Ms. Chafe or myself and Ms. Chafe, but the situation between myself and Mr. Webb ended on June 5th and I really didn't know if … I didn't think that the purchase sale agreement was relevant to this proceeding because our agreement terminated June 5th.
>
> **Q.** When you're saying that in your view nothing was relevant after June 5, 2007 that's despite the fact that you continue to remain in those premises for five months after that?
>
> **A.** Correct.

[36] Ms. Archibald is a sophisticated self-represented appellant. She ran several Curves franchises. She is in the final stages of obtaining her accreditation as a real estate appraiser with the Appraisal Institute of Canada. She admits she knew the tenants were at risk for rent to October 2008, but tried to focus her defence on events prior to June 5, 2007. The tenants were not ambushed or taken by surprise at trial or by the judge's determination that a tenancy at will arose.

[37] Given that a reasonable reading of the Statement of Claim alerted the tenants to the fact the landlord is seeking rent until October 2008, and Ms. Archibald's understanding of that but reluctance to deal with it, I am satisfied the judge did not err in finding a tenancy at will arose.

Disposition

[38] I would dismiss both the appeal and cross-appeal, without costs, as success was divided.

Hamilton, J.A.

Concurred in:

Fichaud, J.A.

Van den Eynden, J.A.