Date: 19991108
Docket: CA

153053

NOVA SCOTIA COURT OF APPEAL

[Cite as: Founders Square Ltd. v. Coopers & Lybrand, 1999 NSCA 131]

Glube, C.J.N.S., Bateman and Flinn, JJ.A.

BETWEEN:

FOUNDERS SQUARE LIMITED	)	William L. Ryan, Q.C.
	)	and Roderick Rogers
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
COOPERS & LYBRAND	)	Reginald A. Cluney, Q.C.
	)	and Stephen Kingston
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	September 23, 1999
	)	
	)	Judgment Delivered:
	)	November 8, 1999
	)	
	)	

THE COURT: Appeal is allowed only as to costs as per reasons for judgment of Bateman, J.A., Glube, C.J.N.S., and Flinn, J.A., concurring.

BATEMAN, J.A.:

[1] This is an appeal by Founders Square Limited from a decision of Justice Hiram Carver of the Supreme Court.

FACTS:

[2] The trial of this matter consumed twenty-four court days in February, July, October and December of 1997. Justice Carver filed his written decision on the main issues on February 24, 1998. A second decision on related financial issues and costs is dated October 15, 1998.

[3] The appellant, Founders Square Limited, is the owner and landlord of the premises at 1701 Hollis Street, Halifax, Nova Scotia, known as Founders Square. The respondent, Coopers & Lybrand, is a partnership of accountants with branches in Halifax and throughout Canada. In 1991 Coopers' Halifax offices were located in Founders Square pursuant to a 1986 lease agreement. They vacated those premises in February, 1992. Founders and several other companies owned by A.M. (Ben) McCrea were clients of Coopers for audit, accounting, tax advice and consulting services.

[4] A written Offer to Lease dated June 17, 1986 was executed by both Founders and Coopers. The Offer to Lease specifically provided that it was to serve as an interim lease pending execution of the standard lease of Founders. Although the standard form of lease was not executed by Coopers the parties operated under its terms. It was agreed before trial that the unsigned lease governed the relationship. In accordance

with its terms Coopers occupied the entire 12th floor and about one-half of the 13th floor of Founders Square (a total of 10,595 square feet) for a five-year period running from October 1, 1986 to September 30, 1991. Coopers had the right to extend the term of the Lease for a further five-year period upon six months notice prior to the expiration of the original Lease. Upon renewal, the existing Lease would continue to govern except that the base rent would move from $19.50 to $22.50 per square foot.

[5] In 1990 James Charles (Hap) Wright became the managing partner for Coopers' Halifax office. Mr. McCrea and Mr. Wright met on March 28, 1991 to discuss renewal of the Lease. Founders says that at this meeting the parties agreed to a five-year extension of the Lease. Coopers denies such an agreement. The trial judge found that they reached no agreement.

ISSUES:

[6] The appellant states the following issues:

1. What is the standard of review on appeal?

2. Did the learned trial judge err in concluding there was no agreement to renew the lease for the 12th floor of Founders Square by Coopers & Lybrand?

3. Does the Statute of Frauds make the Lease agreement for the 12th floor unenforceable?

4. Did the learned trial judge err in finding that there was no enforceable one year lease for the 12th floor and one-half of the 13th floor pursuant to Article 23.1 of the lease?

5. Did the learned trial judge err in not finding there are liquidated damages payable by Coopers & Lybrand to Founders Square Limited pursuant to

Article 30.3 of the lease?

6. Did the learned trial judge err in not finding that Coopers & Lybrand breached its obligation to negotiate in good faith or that Coopers & Lybrand is liable on the basis of estoppel and injurious reliance?

7. Did the learned trial judge err in allowing a deduction of $16,900.00 from the amount of rent found to be owed by Coopers & Lybrand to Founders Square Limited for the period of occupancy by Coopers & Lybrand between October 1, 1991 and February 1992?

8. Did the learned trial judge err in assessing costs with respect to this matter including:

   (a) setting the amount involved at $1,459,000.00;

   (b) finding there was an offer of settlement justifying an increase of costs from Scale 3 of Tariff A to Scale 4 of Tariff A;

   (c) failing to award appropriate costs to Founders Square Limited for portions of the Founders Square Limited claim that were found to be valid;

   (d) in awarding only $1,000.00 costs to Founders Square Limited arising from the late admission by Coopers & Lybrand only at the commencement of trial that the lease was binding, despite denying that the lease had any force and effect from the time of filing the Defence and all the way through long, expensive and protracted discovery examinations, through the first day of trial; and

   (e) by failing to award costs to Founders Square Limited arising from inadequate and late document production by Coopers & Lybrand.

9. Did the learned trial judge err with respect to evidentiary rulings through the course of trial including:

   (a) an evidentiary ruling with respect to hearsay evidence;

   (b) ruling that a Coopers & Lybrand witness could have transcripts to review during an adjournment of that witness's evidence; and

   (c) ruling that another Coopers & Lybrand witness could have copies of trial exhibits for review during an adjournment of

his evidence.

10. What is the appropriate quantum of damages?

ANALYSIS:

(i) Standard of Review:

[7] The standard of review is set out by McLachlin J. in **Toneguzzo- Norvell (Guardian ad litem of) v. Savein and Burnaby Hospital** (1994), 162 N.R 161, McLachlin at p 167:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dubé J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal. (Emphasis added)

(ii) Did the learned trial judge err in concluding there was no agreement to renew the lease for the 12th floor of Founders Square by Coopers & Lybrand?

[8] It was the appellant's position at trial that an agreement had been concluded at the March 28th restaurant meeting between Ben McCrea and Hap Wright. McCrea and Wright had materially different recollections of the substance of the meeting. During the meeting Mr. McCrea had made sketchy notes on the back of one of Mr. Wright's business cards. Within a few days after March 28th Mr. Wright made notes of

his recollection of the discussions. At trial, each party interpreted these notes to support his version of events. The appellant says that the notes confirm that Mr. Wright, for Coopers, made an unequivocal commitment to renew the lease for the 12th floor of the building for a five-year period.

[9] It was Hap Wright's evidence that he and Mr. McCrea did not conclude an agreement at that meeting. There were a number of reasons. Coopers, contemplating a merger with another Halifax accounting firm, was uncertain about its ongoing space requirements. If the merger occurred, it would probably need two full floors of the building. Without the merger, the firm would need only one floor in Founders. Additionally, it was Mr. Wright's view that the proposed rental rate of $22.50 per square foot contained in the renewal option was above market. He was looking for a base rate of $20.50. He testified that Mr. McCrea was not prepared to agree to that rate when they met at McKelvie's restaurant. Mr. Wright said, as well, that he did not have the authority to commit to a lease agreement without the express approval of the Coopers partners and had told Mr. McCrea so at the meeting.

[10] As to the March 28th meeting Mr. McCrea testified:

> There was . . . a firm agreement between us that Coopers & Lybrand would renew their lease on the 12th floor at an effective rate of $20.50, and that Founders Square would hold open the 13th floor until they had concluded their merger negotiations, and that if they required the space or wanted the space, that Founders Square would make that space available to them at a net effective rent of $20.50 also.

[11] Mr. McCrea further testified that Mr. Wright made no reference that day to

requiring partner approval to conclude a deal.

[12] The appellant says that:

> . . . the Learned Trial Judge erred in finding there was no meeting of the minds or no agreement to renew the lease for the 12th floor. Although the key question is whether there was an agreement reached on March 28, 1991, the Trial Judge focused on documents and events after March 28, 1991. For example, the trial decision refers only to a portion of the September 9, 1991 letter from Hap Wright to Mr. McCrea suggesting that Mr. Wright did not make any commitments regarding the 12th floor space either written or verbal. It is submitted that the trial judge erred by failing to consider the evidence with respect to the February 14 and March 28, 1991 meeting and Mr. Wright's notes made shortly after that March 28, 1991 meeting. It is submitted that the error of the Trial Judge was one in law based on a failure to draw the legal conclusion that a binding contract had been entered into on March 28, 1991. (Emphasis added)

[13] Although clothed in the language of an error of law, this is an appeal on findings of fact. In a lengthy decision Justice Carver reviewed the evidence in considerable detail. To sort out the commitments, if any, made at the March 28th meeting at McKelvie's restaurant he reviewed correspondence generated by the parties following that meeting. He found three letters to be of particular assistance. He specifically referred to the letters of April 12th and 15th between Ben McCrea and Hap Wright:

> April 12, 1991
>
> Mr. A.M. McCrea
> Founders Square Limited
> Suite 200
> 1701 Hollis Street
> Halifax, Nova Scotia
> B3J 3M8
>
> Dear Ben:
>
> RE: COOPERS & LYBRAND's LEASE WITH FOUNDERS
>
> As agreed, I outline below my understanding of the various commitments we have both made over the past few weeks regarding our lease with Founders

and the upcoming renewal thereof:

Ben McCrea's Commitment on Behalf of Founders

a) Should Coopers decide to renew their existing lease on the 12th and 13th floors or to renew only their existing space on the 12th floor, Founders will agree to lease either space for an annual rental rate of $20 per sq ft [*it was acknowledged at trial that this should have read $20.50 per sq ft*] for a 5 year period commencing at the termination of the existing Cooper's lease.

b) Should Coopers decide that they need additional space, Founders commits to lease Coopers up to 8,000 sq ft on the 11th floor at an annual rate of $10 per sq ft for a 5 year period. As well, Founders will take back the space currently rented to Coopers on the 13th floor and close the internal staircase between the 12th and 13th floors and install a new internal staircase between the 11th and 12th floors. The space currently leased by Coopers on the 12th floor would carry an annual rental rate of $20 per sq ft [*it was acknowledged at trial that this should have read $20.50 per sq ft*] for the next 5 years.

c) Founders agrees to contribute between $15 and $20 per sq ft towards leasehold improvements on the 11th floor (excluding the internal staircase) should Coopers decide to lease this space.

Hap Wright's Commitment on Behalf of Coopers

a) Given the rental rates and other commitments outlined above, Coopers agrees to renew their lease for existing space on the 12th floor at $20 per sq ft for a period of 5 years starting from the termination of the existing 5 year lease in October 1991.

I appreciate that time is of the essence here, Ben. I am trying to conclude my present negotiations as quickly as possible. I understand that your ability to deliver the space on the 11th floor depends on the earliest possible commitment on our part to take this space.

Please let me know if my understanding of our various commitments is the same as yours. If I don't hear from you in the next week or so, I will assume you are in agreement with the above outline.

Thank you again for your generous offer of assistance in helping us conclude our other negotiations.

Yours very truly,
J. Hap Wright"
(Emphasis added)

[14] McCrea testified that prior to a further meeting with Coopers on April 15th, 1991 he had drafted a letter in response to the above letter of April 12th. Mr. McCrea's

letter, which is reproduced in the trial decision, reads as follows:

April 15, 1991

Coopers & Lybrand
Founders Square
1701 Hollis Street
12th Floor
Halifax, Nova Scotia
B3J 3M8

ATTENTION: Mr. Hap Wright

RE: Founders Square Lease

Dear Hap,

I am very concerned with your letter of April 12, as it is obvious there is a very grave misunderstanding as to what you consider to be Founders Square's commitments.

I have asked you to provide Founders Square with a commitment to at least renew the 12th floor space. I understand you are in the midst of business arrangements which may have some impact and that the need for the 13th floor additional space under your option is still questionable. You had further advised that it is possible you may give up the existing space on the 13th floor which you presently occupy.

You had requested that I review the rental rates that are presently contemplated under the renewal option and I had advised you that since the rates were so badly discounted in the initial negotiations, in fairness to Founders Square you are asking a great deal to reflect deductions from the current leased premises if you do not take on the additional space.

If the additional space involving approximately 2,400 square feet is taken, I believe we can give you some arrangements where the renewal rate for all your space would be approximately $2 less per square foot. If you wish to reduce your space to only the 12th floor, we are prepared to work with you to find a way to make it more cost effective for you and in line with the renewal rate which would be in effect if the additional space was taken. This is on condition you give us a commitment for our mortgage purposes.

In view of all the uncertainties with respect to your requirements, we are prepared to give you more time to make your business decisions upon the basis that you give us a firm commitment for the space on the 12th floor pursuant to the option contained in your Lease with our commitments to negotiate some beneficial operating cost savings which we believe would be in the area of $1.50 a square foot, but very much depends upon the services which would be included and the times for running systems. This would mean an effective rate of $21 or slightly less.

> One point that was not brought up in our discussions was the significant cost of closing in the existing staircase between the 12th and 13th floor, if your decision relates only to the 12th floor. This would require some further discussion, since we could very much reduce this cost if you agreed that the stairs did not have to be removed.
>
> We would appreciate at least a commitment for the 12th floor pursuant to the Lease, as discussed.
>
> Yours very truly,
> FOUNDERS SQUARE LIMITED
>
> A.M. McCrea, P.Eng.
> President
> (Emphasis added)

[15] This letter was not sent to Mr. Wright. However, following the April 15th meeting, a second letter, bearing the same date and marked "confidential" was prepared and forwarded by McCrea to Wright:

> April 15, 1991 CONFIDENTIAL
>
> Coopers & Lybrand
> Founders Square
> 1701 Hollis Street
> 12th Floor
> Halifax, Nova Scotia
> B3J 3M8
>
> ATTENTION: Mr. Hap Wright
> RE: Founders Square
>
> Dear Hap,
>
> I am afraid you have very badly misunderstood our discussions the other day at lunch.
>
> You had explained to me that you were in the midst of continuing business discussions which may require Coopers & Lybrand to take additional space which, in effect, could be more than the 12th and 13th floors.
>
> I made you aware that the 8,300 square feet of space currently occupied by Midland on the 11th floor which has approximately seven years of the Term remaining may be capable of being negotiated as a sublet or termination, since they are currently only using approximately 3,000 square feet. The basis of this negotiation would be that the existing Midland's use be relocated to the ground floor which would require Founders Square to commit upward to $100,000 for

tenant improvements. Based on there being no tenant improvement cost to Midland, I believe from my limited information of their previous offers to third parties that it may be possible to negotiate to obtain that space from them at an effective annual rate of $10 to $12. This is only a guess.

There is absolutely no way that you could expect Founders Square to contribute to the leasehold improvements under this arrangement nor is there any way we could change the Term of the Midland space if it is a sublet.

You have tied your current Lease into this potential negotiation which is an obviously unacceptable position.

I am very concerned to see the extent of this misunderstanding and the commitment of such a misunderstanding to paper. Could we please have these matters clarified at an early date.

Yours very truly,

FOUNDERS SQUARE LIMITED

A.M. McCrea, P. Eng.
President

[16] After referring to Fridman, The Law of Contract, 2nd Ed. Justice Carver wrote:

> I find there was no agreement to renew the lease for the 12th floor at Founders Square by Coopers & Lybrand. The duty is on the plaintiff to prove its claim by a balance of probabilities. I find they have not met that duty. When you look at all the evidence, particularly the notes of Mr. Ben McCrea upon Ex. No. 3, the “personal card”, the notes of Mr. Wright made very shortly after March 28, 1991, Hap Wright’s letter to Founders Square Limited on April 12 and the two letters from Founders Square Limited to Coopers & Lybrand of April 15, 1991, I find there was no meeting of the minds on March 28, 1991. The big question here was the quantum of rent and the space needed. By the letters of April 15, 1991, there was no agreement of the rent being $20.50 per square foot as has been alleged by Founders Square.
>
> I have looked carefully at both letters of April 15, 1991, particularly the letter that did not have typed upon it "confidential".
>
> I noted in paragraph two, "I have asked you to provide Founders Square with a commitment to at leas[t] renew the 12th floor space." That to me does not refer to a letter of commitment for a mortgage company. It is, in my opinion, a request for a commitment to at least renew the 12th floor.
>
> I turn to paragraphs three and four which read:
>
> "You had requested that I review the rental rates that are presently contemplated under the renewal option and I had advised you that since the rates were so badly discounted in the initial negotiations, in fairness to Founders Square you are asking

> a great deal to reflect reductions from the current leased premises if you do not take on the additional space.
>
> If the additional space involving approximately 2,400 square feet is taken, I believe we can give you some arrangements where the renewal rate for all your space would be approximately $2 less per square foot. If you wish to reduce your space to only the 12th floor, we are prepared to work with you to find a way to make it more cost effective for you and in line with the renewal rate which would be in effect if the additional space was taken. This is on condition you give us a commitment for our mortgage purposes."

There is nothing in those paragraphs to tell me there was, even at this date, a meeting of the minds re the $20.50 for the 12th floor. There were negotiations, but not firm bind[ing] commitments.

> Again I refer to further paragraphs in the same letter:
>
> "In view of all the uncertainties with respect to your requirements, we are prepared to give you more time to make your business decisions upon the basis that you give us a firm commitment for the space on the 12th floor pursuant to the option contained in your Le[a]se with our commitments to negotiate some beneficial operating cost savings which we believe would be in the area of $1.50 a square foot, but very much depends upon the services which would be included and the times for running systems. this would mean an effective rate of $21 or slightly less.
>
> One point that was not brought up in our discussions was the significant cost of closing in the existing staircase between the 12th and 13th floor, if your decision relates only to the 12th floor. This would require some further discussion, since we could very much reduce this cost if you agreed that the stairs did not have to be removed.
>
> We would appreciate at least a commitment for the 12th floor pursuant to the Lease, as discussed."

These paragraphs are also evident there was not meeting of the minds.

In the letter dated April 15, 1991, marked "confidential" written after the meeting on that date if there had been a binding commitment I thought it would have been spelled out in detail.

I also refer to the letter from Hap Wright dated September 9, 1991 to Founders Square Limited where Mr. Wright said in the last paragraph of his letter, "I repeat Ben, that I did not make any commitment regarding the 12th floor space either written or verbal." That has a ring of truth. <u>I watched Mr. Wright give his evidence. He may have been forgetful about events that happened six to seven years ago, but I took him as a very credible witness</u>.
(Emphasis added)

[17] The judge's comments at a later point in the decision further reveal his view of the evidence:

> . . ..Mr. Wright was prepared to commit to the 12th floor alone if the rate could reach $20.50. Mr. McCrea was not prepared to reduce the base rate, but talked about reducing the rate by approximately $2.00 through rebates in operating costs. . . .
>
> If there were understandings at the McKelvie's meeting, it was obvious by the letters of April 15, 1991 from Ben McCrea to Mr. Wright there were serious misunderstandings. If there was a firm price of $20.50 for the 12th floor, which I really question, it was by no means firm from the content of the letter on the meeting table dated April 15, 1991. After that, Mr. McCrea kept talking about a commitment, but there is no evidence I accept, where anyone from Coopers & Lybrand accepted they were taking Floor 12 and a firm price had been agreed to. . . .
>
> . . . Here it was the plaintiff's own action of waffling on the rental price so obvious in the first letter of April 15th re the 12th floor. One of the big problems here was the partnership did not trust the word of Mr. McCrea. That is why they wanted two people present when negotiations took place and why they wanted confirmation in writing. . . . It was Mr. McCrea's own indefiniteness over the $20.50 and how he was going to reach it that caused problems here.

[18] The trial judge's finding turned upon his acceptance of Mr. Wright as a credible witness. He was required to resolve conflicting evidence and did so. Mr. Wright had expressly denied making a commitment at the March 28th meeting. He denied, as well, that they had reached any firm agreement as to the rental rate per square foot, providing his interpretation of the notes following the March 28th meeting and the subsequent correspondence. The judge made a clear determination of credibility, and one that was open to him on the material presented at trial. His finding of facts and drawing of evidentiary conclusions cannot be said to reflect palpable and overriding error.

[19] The appellant says that the trial judge placed too much emphasis on these

letters and should have restricted himself to the evidence of the meeting of March 28th. It is the appellant's submission that the content of the letters is not reflective of Mr. McCrea's view that an agreement had been concluded - essentially, that the April 15th letters were Mr. McCrea's reaction to Mr. Wright's letter of April 12th and written in an attempt to salvage the situation and preserve a working relationship with Coopers. While this is a possible explanation for the content of the McCrea letters, it was open to the judge to interpret the letters as supportive of the respondent's position that no agreement was made on March 28th. This is an evidentiary conclusion within the province of the trial judge (**Toneguzzo**, **supra**). There is no basis upon which this Court should conclude differently.

[20] As Chief Justice Lamer wrote (for himself and Cory, McLachlin, and Major JJ.) in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010:

> [para88] On a final note, it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was "overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue" (Schwartz, supra, at p. 281).
>
> [para90] It is not open to the appellants to challenge the trial judge's findings of fact merely because they disagree with them. I fear that a significant number of the appellants' objections fall into this category. Those objections are too numerous to list in their entirety. The bulk of these objections, at best, relate to alleged instances of misapprehension or oversight of material evidence by the trial judge. However, the respondents have established that, in most situations, there was some contradictory evidence that supported the trial judge's conclusion. The question, ultimately, was one of weight, and the appellants have failed to demonstrate that the trial judge erred in this respect.

(iii) Does the Statute of Frauds make the lease agreement for the 12th floor unenforceable?

[21] The position of the appellant with respect to this ground of appeal assumes that there is some form of lease agreement between the parties for the 12th floor, which is enforceable notwithstanding the Statute of Frauds. Having found that the trial judge did not err in concluding that there was no lease agreement, it is unnecessary to deal with this ground.

(iv) Did the learned trial judge err in finding there was no enforceable one year lease for the 12th floor and one-half of the 13th floor pursuant to Article 23.1 of the lease?

[22] It was the appellant's alternative submission that if the court determined that there was no agreement to a 5-year renewal, then the respondent was obligated, under the terms of the lease, to a one year term. Article 23.1 of the lease provided:

> 23.1 Expiration of Lease. Tenant shall give Landlord six (6) months' written notice prior to the date of expiration of this Lease of its intention to vacate the Premises, failing which Landlord may at its option give written notice to Tenant within a period of not less than thirty (30) days before the date of the expiration of this Lease that this Lease is renewed for a further period of twelve (12) months from the date the Lease would otherwise expire, under the same terms and conditions as herein set forth. If neither of the notices hereinabove described is given and Tenant remains in possession of the Premises after the expiration of the Term of this Lease, or any renewal, it shall be deemed to be a tenancy from month to month and subject otherwise to the provisions of this Lease insofar as the same are applicable.
> (Emphasis added)

[23] The trial judge found that neither party had given notice as contemplated by this provision. Thus, the tenancy became month to month. This is consistent with the evidence and in accord with Article 23.1 which specifically provides for a month to

month tenancy in the absence of notice. It is the appellant's submission that Justice Carver erred in not considering letters of August 6th and August 30th from McCrea to Wright to be effective notice under Article 23.1:

August 6, 1991

PRIVATE & CONFIDENTIAL

Coopers & Lybrand
Founders Square
1701 Hollis Street
12th Floor
Halifax, Nova Scotia
B3J 3M8

ATTENTION: Mr. Hap Wright
Managing Partner

Dear Hap,

I wish to express to you in the strongest possible terms my extreme disappointment in the way in which our Landlord/Tenant relationship is going and the fact that I am now hearing about the success of your business discussions in a public form together with suggestions from one of your partners to a member of our staff suggesting that Coopers & Lybrand are 'going to the market.'

Several months ago, I met with you to discuss your space requirements and, in particularly, your requirements on the 13th floor in face of the desire of LASMO Nova Scotia Limited to take over the 13th floor space. At that time you indicated to me that you could not make a definitive decision with respect to the 13th floor, due to the uncertainties which may result from your ongoing business discussions with a third party. Over the several intervening months we have continually discussed with you the requirements of LASMO and the fact that we must make decisions with respect to their requirements. We have identified to you the very preferential arrangements which may be available to you if we could quietly and quickly deal with the 11th floor (Midland).

We have left all options open to you including the 13th floor upon the basis there was an understanding relative to the 12th floor and we have now committed ourselves to relocating the tenant on the 7th floor of Founders Square to satisfy LASMO at very significant cost to Founders Square (approximately $300,000 in additional capital for relocation). All this has been done to satisfy my commitments to you that we would keep your options open to allow you to conclude your business negotiations one way or the other before you had to advise us as to the options of the 11th floor or the 13th floor. We did feel that given the history of our commitment, the circumstances of the original lease and its intentions and the fact that we were providing you complete flexibility and that your commitments with respect to the 12th floor was solid and we would be able to negotiate a beneficial package for you.

The public awareness of your requirements for additional square footage will, we

believe, impact upon our ability to deal with the Midland situation and the longer it is left the more problematic this is likely to become. I believe there should be a frank, confidential discussion at an early date.

Yours very truly,
FOUNDERS SQUARE LIMITED

A. M. McCrea, P.Eng.
President

August 30, 1991

Coopers & Lybrand
Founders Square
1701 Hollis Street
Suite 1200
Halifax, Nova Scotia
B3J 3M8

ATTENTION: Mr. Gary Stafford

RE: Premises - 12th Floor, Founders Square

Dear Gary:

This letter is in confirmation of our understanding arising from the meeting I had with you on August 27th, concerning your leasing arrangements on the 12th Floor of Founders Square.

We confirm to you our position that your firm has exercised its option to take the 12th Floor space for a further term of five (5) years at the expiry of the present lease term on September 30, 1991.

Based upon this assurance, we do not feel it necessary to exercise the option reserved to the Landlord in the Lease to continue the lease for a further term of one (1) year in the absence of a notice from the Tenant six months prior to the end of the term that it was vacating the premises.

We require written confirmation of your firm's position in connection with our ongoing financing and would greatly appreciate anything you might be able to do to bring this about.

Yours very truly,

FOUNDERS SQUARE LIMITED

A.M. McCrea, .Eng.
President

(Emphasis added)

[24] As Justice Carver noted, there was no evidence before the Court that the August 30th letter, even should it constitute adequate notice, which it does not, was delivered within the requisite time.

[25] The appellant says that on a proper interpretation of Article 23.1, it is sufficient that in those letters Founders gave notice that it intended to bind Coopers to a long-term commitment, thereby rejecting a month-to-month tenancy. I disagree. The lease is specific in its requirement that notice be given, and the consequences in the absence of notice.

[26] In view of the express wording of the lease there is no merit to this ground of appeal nor to the appellant's alternative argument that a one year term was created at common law.

(v) Did the learned trial judge err in not finding there are liquidated damages payable by Coopers & Lybrand to Founders Square Limited pursuant to Article 30.3 of the lease?

[27] It is common ground that for the months of February and March of 1991 (during the original five-year term of the lease) and from October 1991 to February 1992 (during the month-to-month tenancy) Coopers diverted the rent monies otherwise owing in satisfaction of accounts due from Founders and related companies to Coopers for

accounting services. It was the appellant's submission at trial that because Article 5.1.4 forbids offsets against rent this diversion of rents amounted to nonpayment and Coopers were therefore in default under the lease. This default, says the appellant, triggered the provision for liquidated damages contained in Article 30.3 of the lease. The relevant portions of the lease are:

> 5.1.4 OFFSETS AGAINST RENT
>
> Tenant hereby waives and renounces any and all existing and future claims, set-off and compensation against any rent or other amounts due hereunder and agrees to pay such rent and other amounts regardless of any claim, set-off or compensation which may be asserted by Tenant or on its behalf.
>
> 30.1 EVENTS OF DEFAULT
>
> Each of the following events (hereinafter call and "Event of Default") shall be a default hereunder by Tenant and a breach of this Lease:
>
> (i) if Tenant shall violate any covenant or agreement providing for the payment of rent, including increased rent, or additional rent and such violation continues for a period of five (5) days following notice of non-payment being given in writing to Tenant:
>
> . . .
>
> 30.3 PAYMENT OF MONIES IN THE EVENT OF DEFAULT
>
> In any of the foregoing cases Tenant shall pay any and all monies payable under this Lease up to and including the day of such termination or re-entry whichever shall be the later.
>
> In addition there shall immediately become due and payable in one lump sum as liquidated damages, and not a penalty, the aggregate rental for a period of one (1) year or if less than the one (1) year remains of the term hereof, the aggregate of rental for the unexpired portion of the term.
>
> (Emphasis added)

[28] Justice Carver's decision on this issue was brief:

> In this case certain rent monies were applied to overdue accounts not only against Founders Square Limited, but other companies controlled by Mr. McCrea. It is argued [that] by doing so without authorization places the defendants in default. Under the circumstances of this case, I would not treat this

misapplication of rent as a default.

[29] And at a later point in the decision:

> With respect to outstanding rent or improperly applied rent and operating costs, I ask the parties to try and resolve this issue. If not, I will resolve it.

[30] In his supplemental decision Justice Carver fixed the amount of rent owing. Regarding the February/March 1991 nonpayment of rent, there was no evidence before the trial judge that Founders had given the "notice of nonpayment" required by Article 30.1(i) of the lease. There was, as well, some evidence from Coopers partner Gary Stafford that Founders had acquiesced in and perhaps agreed to such diversions in the past. I am satisfied that Carver, J. was correct in his finding that this nonpayment did not amount to a default.

[31] By letter of October 4th, 1991 from McCrea to Wright, Founders objected to Coopers' practice of offsetting rents against invoices for services. The letter further provided that: "The foregoing circumstances, if payment is not made within five (5) days of this notification to you, would constitute an event of default under the terms of the lease, and we call upon you to remedy this situation within that time."

[32] Assuming, without deciding, that this diversion of rent did amount to a "default" under the lease, I am troubled by Article 30.3 which sets the amount of liquidated damages payable at "the aggregate rental for a period of one (1) year or if less than the one (1) year remains on the term hereof, the aggregate of rental for the

unexpired portion of the term." In my view, this provision does not contemplate nor accommodate the nonpayment of rent during a month-to-month tenancy. "Term" as used in Article 30.3 must refer to an original lease period exceeding one year. "Term" as defined in Article 3 means the full lease period under the original agreement or a renewal. Had the diversion of rents occurred during the five-year term, with less than one year of occupation remaining, the damages would have been reduced to an amount equal to the rent for the unexpired portion of the term. It is illogical to suggest, as does the appellant, that when nonpayment occurs during a month-to-month tenancy, it was the intention of the parties that the damages revert to the equivalent of a full year's rent. The original lease having expired, the parties were in a month-to-month tenancy. There was no "term" as contemplated by Article 30.3, in a month-to-month tenancy. Article 23.1, reproduced above, provides in relevant part that a deemed month-to-month tenancy shall be "subject otherwise to the provisions of this lease insofar as the same are applicable". I am satisfied that this Article in the lease simply does not apply to the circumstances which arose between October 1991 and February 1992.

[33] The record reflects that there was continuing correspondence between Coopers and Founders from October 1991 to February 1992 attempting to resolve the question of the amount of rent outstanding. Unfortunately the parties were unsuccessful in settling this issue before trial. Never, however, did Founders suggest that it was entitled to liquidated damages due to the alleged default. In the circumstances, I cannot conclude that Justice Carver erred in finding that there was no default. I would dismiss this ground of appeal.

(vi) Did the learned trial judge err in not finding that Coopers & Lybrand breached its obligation to negotiate in good faith or that Coopers & Lybrand is liable on the basis of estoppel and injurious reliance?

[34] The appellant says that the respondent, in the period following the March 28th meeting, did not deal forthrightly with Founders. It complains that, while ostensibly continuing to negotiate for space in that building, Coopers really intended to relocate. The trial judge found that the respondent "did not breach its obligation to negotiate in good faith to the detriment of' Founders Square and that Coopers did not create a legitimate expectation of contract in the mind of Mr. McCrea. This conclusion turns upon the judge's view of the evidence offered at trial. He found Mr. Wright to be credible and preferred his evidence to that of Mr. McCrea. The evidence of the actions and reactions over the period after the March 28th meeting is open to interpretation. The appellant says that not until the letter of September 9, 1991 did Mr. Wright deny that he had made a commitment to occupy the 12th floor - that throughout the summer Coopers led Mr. McCrea on. Clearly the trial judge disagreed with this characterization of the evidence, as do I. It should have been clear to Mr. McCrea from Mr. Wrights' letter of April 15th, reproduced above, that any arrangements for the 12th floor were conditional upon a suitable price. Mr. McCrea persisted in his assertion that Mr. Wright had made a firm commitment. Unfortunately, in the intervening period, the merger became a reality and Coopers' space requirements changed. The bad faith allegation must be assessed in the light of Justice Carver's finding that Coopers made no commitment to the 12th floor

space. The continuing problems in the negotiations were created by Mr. McCrea's dogged insistence that such a promise had been made. In this regard the trial judge said:

> Mr. Wright was prepared to commit to the 12th floor alone if the rate could reach $20.50. Mr. McCrea was not prepared to reduce the base rate, but talked about reducing the rate by approximately $2.00 through rebates in operating costs. . . .
>
> Mr. McCrae kept talking about a commitment, but there is no evidence I accept, where anyone from Coopers & Lybrand accepted they were taking Floor 12 and a firm price had been agreed to. The fact that no commitment letter was forthcoming from Hap Wright, a prompt man in getting back according to Pam Murray, should have told Mr. McCrea something was just not right. If he felt he had a commitment, which I fail to see from his letter of April 15 re commitment to price, he had a duty to be certain of that and not just rely on an assumption based on a false premise. The fact that he had not received confirmation for his mortgage company, which he lead all to believe was vital, should alone have given some cause for reservation. I can not find where Coopers & Lybrand created a legitimate expectation of contract in the mind of the plaintiff to cause him to move ahead without further assurance and do the renovations for other tenants. Here it was the plaintiff's own action of waffling on the rental price so obvious from the first letter of April 15th re the 12th floor. One of the big problems here was that the partnership did not trust the word of Mr. McCrae. . .
>
> Also, if Mr. McCrea had been committed and not evasive on April 15, 1991 and he was able to deal with Midland with an option, the deal would have been completed long before the Toronto people became involved and Collins Barrow lease assumption would not have been an issue as the Halifax partners still had authority to finalize the contract. Almost at the time head office became involved, Mr. McCrea knew Hap Wright had no authority and he was going to have to work with them. He had to know by then, with no six months notice, with no commitment letter and being told by Mr. Blainey, all was off the table, any reliance on any commitment, if there was one, was on shaky, shaky ground. At this point, he was no different than any other landlord, except Coopers & Lybrand wanted to stay there and wanted to keep the [Founders] account.
>
> Hearing the evidence I am satisfied Hap Wright wanted to stay at Founders Square. In fact, Hap Wright dearly wanted Mr. McCrea to try and cooperate rather than write feisty letters. . .
>
> (Emphasis added)

[35] These findings of fact by the trial judge, which the evidence supports, are, in my view, fatal to the appellant's claim of bad faith, estoppel and injurious reliance.

[36] A component of the bad faith claim relates to the negotiation of a sublet of space leased by Midland Doherty on the 11th floor of the building. Mr. McCrea had suggested to Mr. Wright that Midland Doherty had excess space which they were prepared to sublet at a favorable rate. He had previously refused a sublet to a tenant proposed by Midland but was prepared to consent to a sublet of that space by Coopers, should they require more than the 12th floor. A sublet of this space at a favorable rate was part of the package to be offered by Founders to Coopers and would bring Coopers' effective rental rate below the face lease rate. As part of the bad faith argument, Founders complains that Coopers' public announcement of the merger, without advance notification to Mr. McCrea, scuttled any prospect of arranging a sublet of the 11th floor at a favorable rate. This, according to the appellant, resulted in Founders being unable to put together a competitive financial package for the merged firm. The trial judge found, however, that it was Mr. McCrea's unwillingness to commit to the $20.50 base rate that caused the delay in reaching a deal and therefore, resulted in the alleged lost opportunity with Midland. It bears noting, as well, that there is no evidentiary foundation for Founders' claim that the Midland sublet was no longer a financially feasible option.

[37] In addition, the appellant complains that had Mr. Wright told Mr. McCrea at the March 28th meeting that it would be the landlord's obligation to assume the lease buyout for the firm with which Coopers might be merging, Mr. McCrea would not have pursued leasing arrangements with Coopers. He could not afford a buyout and would

have ended negotiations. Mr. Wright acknowledged in his evidence that at that first meeting he had advised Mr. McCrea that the lease buyout would be the responsibility of Coopers' head office and not a concern for Founders. Justice Carver found, however, that had Mr. McCrea been timely in accepting the $20.50 base rate, the lease buyout would not have become an issue. It only became such when Coopers' head office took over the leasing negotiations in August of 1991. There is evidence to support this finding by the trial judge.

[38] The appellant says that Coopers, in inviting lease proposals, set conditions for Founders which were far more onerous than those required of other prospective landlords. Coopers' motive in doing so was to create a situation that made it impossible for Founders to tender competitively, while ostensibly indicating a preference to stay in Founders Square. The trial judge did not accept this characterization of the evidence. In so doing I am not satisfied that he erred.

[39] The appellant has raised other examples of alleged bad faith on the part of Coopers and injurious reliance by Founders. I am satisfied that these issues are without merit. The trial judge did not err.

(vii) Did the learned trial judge err in allowing a deduction of $16,900.00 from the amount of rent found to be owed by Coopers & Lybrand to Founders Square Limited for the period

of occupancy by Coopers & Lybrand between October 1, 1991 and February 1992?

[40] Founders Square claimed unpaid rent and operating costs for February and March 1991 and the months, October 1991 through February 1992 plus interest. As set out above, Coopers had not paid rent and operating costs for these months claiming a right to an offset for outstanding accounting fees.

[41] In the first decision, the trial judge did not quantify the amount of outstanding rent owed by Coopers. He asked the parties to try to resolve that issue themselves. Unable to do so, each made written submissions to the judge. In the supplementary decision he said:

> **RENT** I find the amount of rent owing is $137,147.78 which is the total claim for rent of $154,047.78 less the deduction of $16,900.00. I note paragraph 3 of the letter dated February 19, 1992 states:
>
> > We have applied against this an allowance for an offset claimed but not acknowledged with respect to accounting services for Founders Square Limited in the amount of $16,900.00. This leaves a balance due of $147,120.08.
>
> When you take into consideration the last sentence “this leaves a balance of $147,120.08" together with the next sentence “if we do not receive payment of this sum by the close of business today, we shall be forced to initiate proceedings to protect our interest with respect to this debt” there is no doubt Founders Square was accepting the $16,900.00 due and owing and was reducing the rent by that amount.
>
> Founders Square is entitled pursuant to the Lease to interest on $137,147.78 at the prime rate plus 2% per annum as per the lease.

[42] The letter of February 19, 1992, written by MacIntosh to Wright and which attaches a two-page schedule of rental arrears, reads:

> Dear Mr. Wright:
>
> Enclosed is a breakdown of the rental account that Coopers & Lybrand are obligated to with respect to space at Founders Square.
>
> The amount owing is $164,020.08.
>
> We have applied against this an allowance for an offset claimed but not acknowledged with respect to accounting services for Founders Square Limited in the amount of $16,900.00. This leaves a balance due of $147,120.08.
>
> If we do not receive payment of this sum by the close of business today, we shall be forced to initiate proceedings to protect our interests with respect to this debt.
>
> We would only take such measures with the greatest reluctance and as a final resort. I am sure that, viewing the situation objectively, you will agree that from a business point of view we would have no other alternative. We hope, in view of the long association between our companies, that this does not become necessary.
> (Emphasis added)

[43] The appellant says that the judge erred in allowing the deduction of the $16,900 amount. At the outset of trial Coopers had abandoned a claim to set off. This, says the appellant, precluded Coopers from taking the position at the conclusion of the trial, that the invoice for accounting fees should be deducted from the outstanding rent. Coopers, on the other hand, says that the acknowledgment at trial that Coopers was abandoning the set off claim did not preclude it from seeking credit for amounts previously accepted by Founders to be a proper credit against rentals. It was Coopers submission, accepted by the trial judge, that the February 19th letter reflected an agreed credit - that the intent of the wording “but not acknowledged” means not previously acknowledged by Founders. The wording of the letter is open to that interpretation. It was not written “without prejudice”. In my opinion it cannot be said that the trial judge committed reversible error in accepting this meaning. As to whether the concessions made by Coopers at the commencement of trial precluded this claim, this argument was

fully aired before the trial judge, who did not find favour with the appellant's argument. I would dismiss this ground of appeal.

(viii) Did the learned trial judge err in assessing costs with respect to this matter including:

(a) setting the amount involved at $1,459,000.00;

[44] **Civil Procedure Rule 63** states in relevant part:

> In these Tariffs, the "amount involved" shall be . . .
>
> (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
>
> (i) the amount of damages provisionally assessed by the court, if any,
> (ii) the amount claimed, if any,
> (iii) the complexity of the proceeding,
> (iv) the importance of the issues.

[45] The appellant says that the costs award to Coopers was excessive. Each party filed written submissions with the trial judge about the "amount involved". It was Founders' submission that the total maximum claim advanced by it exclusive of GST and interest totaled $1,236,476.40**.** This sum, when netted against the amounts found owing by Coopers to Founders resulted in a total of $1,083,270.59. Coopers submitted that the net amount involved was $1,862,665.80. The trial judge fixed the amount involved at $1,459,000.00 without elaboration. This figure is close to the mid point between the two figures.

[46] Costs are within the discretion of the trial judge. As with any discretionary

order, appellate courts are reluctant to interfere. In **Conrad v. Snair** (1996), 150 N.S.R. (2d) 214 (at p. 216), Flinn, J.A. said:

> Since orders as to costs are always in the discretion of the trial judge, this appeal is subject to a clearly defined standard of review. This court has repeatedly stated that it will not interfere in a trial judge's exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice. (See *Exco Corp. v. Nova Scotia Savings & Loan Co. et al* (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331 (C.A.); *Turner - Lienaux v. Nova Scotia (Attorney General) et al* (1993), 122 N.S.R. (2d) 119; 338 A.P.R. 119 (C.A.); and *Hawker - Siddeley Canada Inc. v. Superintendent of Pensions (N.S.) et al* (1994), 129 N.S.R. (2d) 1940; 362 A.P.R. 194 (C.A.)); See also *Elsom v. Elsom* (1989), 96 N.R. 165 (S.C.C.))." (Emphasis added)

[47] The appellant has not identified an error of law in the trial judge's exercise of discretion. Founders says only that the trial judge should have chosen a different figure or offered an explanation for selecting $1,459,000.

[48] In the written submissions each party set forth a reasoned explanation for the proposed "amount involved". In the circumstances, I am not satisfied that in failing to give reasons for choosing an amount within the range the trial judge erred. This is not to say that a trial judge need never offer reasons for fixing an amount involved. Where the amount ultimately accepted is not self evidently related to the factors enumerated in the tariff nor the submissions of the parties, failure to give reasons might constitute reversible error.

(b) finding there was an offer of settlement justifying an increase of costs from Scale 3 of Tariff A to Scale 4 of Tariff A;

[49] At the conclusion of the trial the judge awarded costs to the respondent based

upon Tariff “A”, Scale 3. In his supplemental decision Justice Carver said:

> I set the amount upon which costs will be based at $1,459,000.00.
>
> In my decision I directed the defendant have its costs based on Scale 3, Tariff “A”. At that time I was unaware there had been an offer of settlement. I am of the opinion if I set the tariff for calculating fees based upon no knowledge of an offer to settle, I can later change my position once I am made aware of an such offer.
>
> I find the settlement offer exceeded Founder’s Square’s recovery in this action.
>
> *Rule 41A.11* states:
> Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.
>
> I am prepared to increase the award of costs due to its offer to settle. I set the costs based on Tariff “A”, Scale 4 on $1,459,000.00.
> (Emphasis added)

[50] Offers to settle are authorized by **Civil Procedure Rule 41A.02** which provides:

> 41A.02. A party may serve upon an adverse party an Offer to Settle (Form 41A(A)) any claim between them in the proceeding and, where there is more than one claim between them, to settle one or more of them, on the terms therein specified.

[51] The cost consequences of an unaccepted offer to settle are set out in **Rule 41A.09**:

> *Effect of failure to accept*
> 41A.09. (1) Unless ordered otherwise, where an offer to settle was made by a plaintiff at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where the plaintiff obtains a judgment as favourable or more favourable than the terms of the offer to settle, that plaintiff shall be entitled to party and party costs plus taxed disbursements to the date of the service of the offer to settle and thereafter to taxed disbursements and double the party and party costs.

> (2) Unless ordered otherwise, where an offer to settle was made by a defendant at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where the plaintiff fails to obtain a judgment more favourable than the terms of the offer to settle, the plaintiff shall be entitled only to party and party costs plus taxed disbursements to the date of service of the offer to settle and the defendant shall be entitled to party and party costs plus taxed disbursements from the date of such service.

[52] Coopers' offer was made on January 29th, 1997. The trial commenced on February 4th, 1997. To benefit from **Rule 41A.09**, the offer must be made at least seven days before trial (see **Rule 41A.03**). This does not, however, prevent the judge from considering the offer in the overall award of costs under **Rule 41A.11** which provides:

> Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.

[53] The judge awarded to the appellant a sum for outstanding rent, operating costs and damages totaling approximately $260,000. In addition, Coopers was ordered to complete, at its expense, certain "make good work" on the premises vacated. The value of this work was about $50,000. Accordingly, the total amount awarded to Founders was $310,000. They were required to pay costs of $83,315. Coopers offer to settle consisted of two parts: (i) a payment to Founders of $200,000, all inclusive (costs and interest) and (ii) the abandonment of several outstanding actions for professional fees initiated by Coopers against Founders and other companies controlled by Ben McCrea (the amounts claimed by Coopers totaling $271,000, rounded). The amounts claimed in these actions were disputed by Founders. These actions had not yet been tried and were not before Justice Carver.

[54] In holding that the amount of the Coopers offer exceeded the Founders result, Justice Carver must have assigned a value to the offer to settle the additional litigation. In my view, in so doing he erred. The provisions of **Rule 41A.02** which provides that one party may offer to settle "any claim between them in the proceeding and, where there is more than one claim between them, to settle one or more of them" refers to multiple claims in the same proceeding, not claims in separate proceedings.

[55] There are sound policy reasons for not permitting, for **Rule 41A** purposes, settlement offers which incorporate settlement of other actions. There is no evidentiary basis upon which the judge can evaluate those pending actions. It would be cumbersome and undesirable for the parties, at the conclusion of a trial, to engage in further "mini-trials" to evaluate the merits of the extraneous claims. Additionally, it would be open to an offeror to initiate spurious separate claims to bolster the apparent value of a settlement offer. Similarly, the offeror might include in a generous settlement offer a term which he knows will be unacceptable to the offeree, in order to position on the ultimate disposition of costs. My comments are limited to offers which the offeror seeks to have weighed within **Rule 41A**. Parties are otherwise free to make such offers, but may not use them for cost purposes. (See for example, **Morrison v. Pankartz**, (1995) 122 D.L.R. (4th) 352 (B.C.C.A))

[56] Justice Caver moved the costs from Tariff A, Scale 3 to Tariff A, Scale 4 solely on the basis that the Coopers' offer exceeded Founders' result . In these

circumstances he erred in doing so. I would allow this ground of appeal and restore the costs at the Scale 3 level. For clarity, the trial costs payable by Founders will be $48,145 ($7,375 plus 3% of the amount involved in excess of $100,000) plus such disbursements as were allowed at taxation. From that sum will be deducted the $1,000 costs payable by Coopers to Founders.

> **(c) failing to award appropriate costs to Founders Square Limited for portions of the Founders Square Limited claim that were found to be valid;**
>
> **(d) in awarding only $1,000.00 costs to Founders Square Limited arising from the late admission by Coopers & Lybrand only at the commencement of trial that the lease was binding, despite denying that the lease had any force and effect from the time of filing the Defence and all the way through long, expensive and protracted discovery examinations, through the first day of trial; and**
>
> **(e) by failing to award costs to Founders Square Limited arising from inadequate and late document production by Coopers & Lybrand.**

[57] To reflect Founders' success on portions of its claim Justice Carver ordered costs of $1,000. Founders says that it should have received costs based upon an "amount involved" reflecting Coopers' monetary obligation to Founders. Costs are

within the discretion of the trial judge. I am not satisfied that the trial judge erred in his exercise of discretion.

(ix) Did the learned trial judge err with respect to evidentiary rulings through the course of trial including:

(a) an evidentiary ruling with respect to hearsay evidence;

(b) ruling that a Coopers & Lybrand witness could have transcripts to review during an adjournment of that witness's evidence; and

(c) ruling that another Coopers & Lybrand witness could have copies of trial exhibits for review during an adjournment of his evidence.

[58] Dealing with these complaints together, I am not persuaded that in the circumstances of this case Justice Carver erred in ruling as he did on these issues. Accordingly, I would dismiss this ground of appeal.

DISPOSITION:

[59] The appeal is allowed to the limited extent of ordering that the costs be fixed in accordance with Tariff A, Scale 3 as set out above. In all other respects the appeal is dismissed. As the respondent has been substantially successful, I would award costs payable by the appellant to the respondent fixed at $15,000 plus taxed disbursements on appeal. This amount is something less than 40% of the revised trial costs, reflecting

Founders' partial success on the appeal.

Bateman, J.A.

Concurred in:

Glube, C.J.N.S.

Flinn, J.A.