S.C.A. 02134

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Pace and Matthews, JJ.A.

BETWEEN:

VINLAND HOLDINGS LIMITED Appellant - and - LEO WISNIOWSKI Respondent	Alex M. Cameron for appellant John H. Graham for respondent Appeal heard: February 6, 1990 Judgment delivered: February 26, 1990

THE COURT: Appeal dismissed with costs to the respondent as per reasons for judgment of Matthews, J.A.; Jones and Pace, JJ.A., concurring

MATTHEWS, J.A.:

This is an appeal from a decision of the Honourable Judge Cacchione dated June 8, 1989, respecting the amount of rent owed by the respondent tenant to the appellant landlord.

The appellant is the owner of certain residential premises situate at 5963 College Street in Halifax. It rents rooms there to students only. The respondent, a medical student, under a written lease in the standard form required by the Residential Tenancies Act, S.N.S. 1970, c. 13, agreed to lease room 25 from September 1, 1987, to September 1, 1988, at $285.00 per month. He abandoned his tenancy on or about February 1, 1988. Mr. P. J. Cabrera, another tenant in the same premises was forced to vacate his room (A2) on or about February 20, 1988, due to flooding. At that time there were three vacant rooms in the premises, A2, 11 and 25. Cabrera agreed to occupy room 11 on a temporary basis. On February 27, 1988, he moved into room 25; stayed there for the remainder of the respondent's tenancy; and on September 1, 1988, entered into a lease of that room for an additional period of one year. On November 24, 1988, the appellant filed an application with the Residential Tenancies Board, pursuant to the Act, claiming damages against the respondent of $1,830.00, being the value of the unexpired term of the respondent's lease, that is, from February 1 to September 1, 1988, minus security deposit, and interest of $155.00.

By virtue of s. 10C(2) of the Act the Board is required to file its report with the County Court. The concluding paragraphs of the Board's report dated January 26, 1989, are:

> The Board is satisfied that Mr. Wisniowski moved out of the room without any notice to the landlord. His impecuniosity is unfortunate, but cannot justify his action, nor are we satisfied that he can find any justification in the condition of the premises.
>
> In the circumstances, the landlord was entitled to have Mr. Cabrera moved into Mr. Wisniowski's room. Mr. Wisniowski certainly had no further need of it. A lease is also a contract and the damages accruing for the vacant room remain the same, whether or not the landlord has shuffled his tenants.
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> The Board is satisfied, on the other hand, that the landlord's restriction to students only amounts in these circumstances to a failure to properly mitigate his damages. The landlord has made an understandable business decision and [sic] restricting the building to students. The Board is not satisfied, however, that he is entitled under the Act to select from a very narrow market, especially in Spring and Summer and still expect the tenant to be held liable. The landlord has a duty under the Act to mitigate his damages and this must prevail over a business decision.
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> The Board therefore recommends to the Court that the landlord's claim be limited to three and a half month's rent in the amount of $997. The tenant is to be credited with the security deposit and interest in the amount of $155 leaving a balance owing of $832.
>
> The Board recommends to the Court that the tenant, Leo Wisniowski be ordered to pay to the landlord, Vinland Holdings Limited, the sum of $832.

By notice of objection dated February 2, 1989, the appellant applied to the County Court to vary the report of the Board. The respondent filed a notice of objection and counter-application dated March 30, 1989.

Judge Cacchione said in concluding his decision:

> I have read the arguments that have been filed in written form. I have listened to the arguments of counsel this afternoon. I am satisfied that the Board did err in two fashions: one, that it did not consider the question of the effect of the surrender, that is, the placing of the new tenant in the unit occupied by the abandoning tenant. As well, it erred in considering that although the landlord had made a business decision and this was a failure to mitigate, it only failed to mitigate for half of the amount.
>
> I am satisfied on the whole that once a new tenant was placed into Mr. Wisniowski's room that the landlord had mitigated his damages with respect to the premises rented by the abandoning tenant; and as such I find that Mr. Wisniowski is liable for the rent for the month of February in the amount of $285.00 minus the security deposit of $155.00.
>
> I am varying the order of the Board to read that the tenant, Mr. Wisniowski, shall pay to the landlord, Vinland Holdings, the sum of $130.00.

The appellant argued, in respect to the comment about the "business decision", that the trial judge earlier in his decision made contradictory statements, firstly:

> With respect to the issue of whether or not the Board erred in finding that the landlord had made an understandable business decision and restricted the building to students, I am satisfied there was no error.

And later:

> Gentlemen, as I have indicated, I have difficulty with two things in this particular decision. One, the Board's conclusion that the landlord made an understandable business decision in not renting his building to persons other than students, and I have difficulty with that because it goes directly to the question of mitigation of damages, mitigation in terms of a class of persons.

Be that as it may, in my opinion, the trial judge's conclusions, as I have quoted, are those which stand, and those conclusions are on appeal before us.

The landlord's duty to mitigate its damages and the tenant's corresponding obligation on termination or abandonment of a lease are, to a large extent, governed by the provisions of the Act, and as set out in the lease. Laskin, J., in Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd. (1971), 17 D.L.R. (3d) 710, said at p. 715:

> In the various common law Provinces, standard contractual terms (reflected, for example, in Short Forms of Leases Act) and, to a degree, legislation, have superseded the common law of landlord and tenant;...

There is a clear duty upon the landlord to mitigate in these circumstances as set out in the lease between the parties:

> Abandonment and Termination - If the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the landlord shall mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.

That the appellant would attempt to rent the room upon the respondent vacating his room during the tenancy is envisioned in the provisions of the lease respecting the tenant's responsibility. Section 8:16 of Schedule "B" to the standard form of lease signed by the parties sets out:

> The Tenant agrees that in the event of the Tenant vacating the Tenant's apartment prior to the expiration of the Lease term, it is agreed that the Tenant shall reimburse the Landlord for any expenses incurred in the course of obtaining a Tenant to occupy the Tenant's apartment for the duration of the Lease term and that the Tenant shall reimburse the Landlord for any loss of rental income sustained as a result of the Tenant's apartment remaining vacant while a new tenant is being obtained.

The common law rule respecting mitigation has been summarized in McGregor on Damages (15th ed., 1988) at p. 168:

> The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.

The facts of this case are unique. They substantially differ from those of any of the cases cited by counsel including Windmill Place v. Apeco of Canada, Ltd. (1976), 16 N.S.R. (2d) 565 (N.S.C.A.), and on appeal to the Supreme Court of Canada, [1978] 2 S.C.R. 385. In Windmill the landlord agreed to rent to the tenant 2,526 square feet in a warehouse containing 62,500 square feet. Shortly thereafter the tenant repudiated that agreement. The landlord had rented none of the rest of the building at that time. Some four months later the landlord rented 17,000 square feet, including the space originally rented to the tenant. The landlord experienced difficulty renting any of the premises

because the market for warehouse space in the Halifax area was depressed. In essence, this Court decided, as set out in the headnote, "that in a multiple-tenant building which is largely vacant and is likely to remain so, the landlord does not recoup or mitigate his loss by renting a small unit to another tenant". Further there was evidence of the "costly" advertising techniques taken by the landlord to rent the premises, largely without success. The Court accepted that the premises in question were not "distinctive or singular" and were "merely a hardly distinguishable part of a large project", and further that the multiple-tenant building was materially vacant and likely to remain so. In upholding the decision of this Court, Ritchie, J., speaking for the Supreme Court of Canada, at p. 387 wrote:

> It is significant that at the date of repudiation the respondent landlord had rented no other part of the new 70,000 square foot building (of which 62,500 square feet were apparently available for rental)....

And also at pp. 388-9:

> It is apparent from the above account that the vacancy created by the appellant's breach did not have any bearing on the new tenant's decision to rent 17,000 square feet of accommodation in the new building. If the premises formerly reserved for Apeco had been the only available space suitable to the new tenant's needs, different considerations would have applied, but the building was more than half empty and the Goodboy's company was at first not interested in renting the Apeco space at all and it was only after some persuasion on the part of the respondent that it was induced to do so.

> It follows, in my view, that the February 1976 transaction could have been concluded even if the appellant had not breached the original agreement and that it was an independent transaction which in no way arose out of the consequences of the breach by the appellant.

He spoke of the duty to mitigate damages at p. 389:

> The case of British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways [[1912] A.C. 673] is generally accepted as a leading authority on the extent and nature of mitigation in breach of contract cases and establishes the general principle that a plaintiff cannot recover for any part of its loss which it has successfully avoided by its subsequent action. This general principle is, however, subject to the qualification expressed by Viscount Haldane in the following language which was adopted by this Court in Karas v. Rowlett [[1944] S.C.R. 1] where Kerwin J., as he then was, said at p. 18:
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> > 'In breach of contract cases the rule was stated in British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways by Viscount Haldane with the concurrence of all the Lords present that "the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business."'

The affidavit of Mr. Cabrera, in evidence before the trial judge, sets out the events in respect to the tenancy in issue, room 25:

> 1. THAT I am the occupant of the premises located at Room 25, 5963 College Street, Halifax, Nova Scotia, and have personal knowledge of the matters hereinafter deposed to except where otherwise stated.
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> 2. THAT on or about September 1, 1987 I leased Room A2, located at 5963 College Street, Halifax, Nova Scotia from Vinland Holdings Limited for a period of one year, at a rent of Three Hundred and Five Dollars ($305.00) per month.

3. THAT on or about February 20, 1988, I was forced to move out of this room because the room became flooded with approximately six inches of water covering the entire floor.

4. THAT on or about February 20, 1988, I was told by Mr. Greg Byrne, an agent for Vinland Holdings Limited, to move into Room No. 11 temporarily.

5. THAT approximately one week after the flood I was told by Mr. Greg Byrne that, if I wished to stay in Room No. 11 I would have to pay Three Hundred and Thirty Five Dollars ($335.00) per month, otherwise, I would have to move into Room 25 on the second floor at a rent of Two Hundred and Eighty-five Dollars ($285.00).

6. THAT after numerous confrontations with Greg Byrne about avoiding another move, I was clearly told by him that I had no choice but to move to Room No. 25 at a rent of Two Hundred and Eighty-five Dollars per month ($285.00).

7. THAT on February 27, 1988, I moved into Room No. 25 and paid Two Hundred and Eighty-five Dollars ($285.00) per month until August 30, 1988.

...

9. THAT in September, 1988 I signed a new Lease for Room No. 25 for an additional period of one year, ending August 30, 1989, and I am presently occupying such premises.

...

Mr. Cabrera gave viva voce evidence before the Board.

There is no evidence before us as to what effort, if any, the appellant made to rent any of these rooms (A2, 11 or 25), except the rather bald statement in the Board's report that Mr. Byrne, on behalf of the appellant, testified "no one came forward" to rent any of the vacant rooms.

However, on January 25, 1988, Mr. Byrne wrote to the respondent, set out the provisions of s. 8:16, and then said:

> This means upon vacating if you do not have a suitable tenant to occupy your room, you will have to pay the rent until then or until the end of your lease. Also, you must pay for all expenses incurred while doing so, e.g. paying the bill of an ad in the paper.

It is noteworthy that the appellant has not demanded payment for any such ad. It is logical to conclude that no such attempt to lease the room was made.

With respect, the remark that no one came forward to rent any of the vacant rooms is not entirely correct. Mr. Cabrera did. He evidently did not wish to return to room A2 after it was made habitable, at least that was not an option given to him by Mr. Byrne. According to the report of the Board, Mr. Cabrera testified that room A2 was unhabitable for six weeks but that Mr. Byrne, on behalf of the appellant "stuck to his testimony of ten days". The Board did not see fit to make any finding in respect to that conflict of evidence. Apparently Mr. Cabrera's affidavit evidence, as previously quoted, was not challenged before Judge Cacchione. Mr. Cabrera did not wish to move from room 11; had "numerous confrontations" with Mr. Byrne; and was "clearly told by him that I had no choice but to move to room 25 at a rent of Two Hundred and Eighty-five Dollars per month ($285.00)". He then moved into room 25. The rooms

then vacant were A2, which was recently flooded and obviously not desirable to Mr. Cabrera, and room 11. It is important that he was "clearly told" by Mr. Byrne that "I had no choice but to move [out of room 11] to room No. 25". It is thus understandable that no one "came forward" to rent room 25; Mr. Cabrera had been moved there by Mr. Byrne. Rooms 2A and 11 were not similar to room 25; witness the reasons given by Mr. Cabrera. Here, in my view, the rental to Mr. Cabrera could not have been concluded if the respondent had not breached the original agreement. It was a transaction which arose out of the consequence of the breach by the respondent. Contrary to the facts in Windmill, the vacancy created by the respondent's breach did not only have a bearing on but was instrumental in the decision of both the landlord and Mr. Cabrera in the rental of room 25. The facts here demonstrate that, in the words of Mr. Justice Ritchie, the premises formerly reserved for the respondent were "the only available space suitable" for Mr. Cabrera's needs and indeed he was told by Mr. Byrne that he had no choice but to move there.

Considering the actions take by the appellant in respect to the tenancy in issue, I agree with the conclusion reached by the trial judge. In the circumstances it is not necessary to deal with the other issues raised by the

appellant. The respondent shall pay to the appellant the sum of $130.00.

I would dismiss the appeal with costs to the respondent.

J.A.

Concurred in -

Jones, J.A.

Pace, J.A.

1989 C.H. 64332 R

IN THE COUNTY COURT OF DISTRICT NUMBER ONE

IN THE MATTER OF: An Objection to a Report of the Halifax and County West Residential Tenancies Board relating to a Tenancy Agreement with respect to Residential Premises;

BETWEEN:

VINLAND HOLDINGS LIMITED

- and -

LEO WISNOWSKI

HEARD BEFORE: The Honourable Judge Cacchione
at Halifax, N.S.
June 8, 1989

DECISION: June 8, 1989, orally at conclusion of hearing.

COUNSEL:
D. Kevin Latimer for the Applicant
Alex M. Cameron for the Respondent.