PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. No.: 76743

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

TRANSEASTERN PROPERTIES LIMITED

Plaintiff

- and -

BANLAR ENTERPRISES INC., and AADLERS CONTRACTING SERVICES LIMITED

Defendants

D. Bruce Clarke, Esq., and John McKiggan, Esq., Counsel for the Plaintiff.
Lyle Sutherland, Esq., and Ms. C. Hodder, articled clerk, Counsel for the Defendants.

1992, February 20th, Palmeter, C.J.C.C.: This matter was heard by way of a special chambers application on February 6th, 1992 and decision was reserved.

The application made by the Plaintiff requested determination by this Court, of the following matters, namely:

1. An Order determining the validity of a certain chattel

mortgage granted by Banlar Enterprises Inc. to Aalders Contracting Services Limited.

2. An Order interpreting Section 13 of the **Tenancies and Distress for Rent Act**, R.S.N.S. 1989, c. 464 and determining whether a seizure of chattels had been made pursuant to such section.

3. A Recovery Order pursuant to **Civil Procedure Rule 48.**

The basic facts are not really in dispute, and I would summarize them as follows: Banlar Enterprises Inc. ("Banlar") entered into a written offer, to lease certain premises owned by Transeastern Properties Ltd. ("Transeastern") on the 13th day of February 1991. At that time the shareholders of Banlar were Lawrence Foran and Brian Aalders, who was also the principal shareholder of Aalders Contracting Services Limited ("Aalders"). The premises involved were located at 1568 Argyle Street and 5239 Blowers Street, in the City of Halifax. The premises

were to be occupied by Banlar as a beverage room under the name of "Drifter's Pub". On or about March 28th, 1991, one Michael Casey became a twenty-five percent shareholder in Banlar.

Some time after the Offer to Lease was signed Transeastern presented a formal lease to Banlar and requested execution. This formal lease was never signed by the parties. There were a number of chattels located on the premises which were the property of Transeastern, and on the 10th of March, 1991 Banlar and Transeastern entered into a written agreement specifying which of the chattels on the premises were owned by Transeastern.

In and during the months of February, March, May and June, 1991, Aalders was doing some construction work for Banlar on the premises and also advanced monies to creditors of Banlar, on behalf of Banlar. It should be noted that Michael Casey, one of the shareholders of Banlar, testified, under oath, that it was his understanding that any monies paid out by Aalders for Banlar was part of the investment which the partner, Brian Aalders, was to have in Banlar. In any event, the account of Aalders with Banlar stood at the amount of $33,859.35 as of the end of June, 1991.

On the 19th day of July, 1991, Banlar granted a chattel mortgage to Aalders in the amount of $33,859.35 covering chattels located in the premises, including some of the chattels owned by Transeastern and enumerated in the agreement of March 10th, 1991.

Banlar's rental for the premises began to fall into arrears and, on September 20th, 1991, Transeastern sent a notice of default indicating that the arrears were to be paid, in full, by October 1st, 1991, otherwise Transeastern would exercise its right as Landlord. Shortly thereafter Transeastern became aware that the chattels on the premises, including chattels owned by Transeastern, had been moved to a location at 16 Dentith Road in Spryfield in the City of Halifax. Banlar or Aalders had given no notice to Transeastern of their intention to remove the chattels.

On cross-examination of his affidavit, Brian Aalders testified that the chattels had been removed by Aalders because of breach of the Chattel Mortgage. He admitted that the chattels had been removed early one morning after one o'clock, during non-working hours. Evidence would

indicate that the chattels were removed on or about October 7th, 1991.

On October 8th, 1991, Transeastern prepared a Distress Warrant and Notice of Re-Entry and Distraint and delivered the same to one Renny Neumaier, a Bailiff, employed by Stephen Kennedy Bailiff Services for service on Banlar. The Distress Warrant referred to an amount of $9,216.02, being the full amount of rent charged, due and payable on account of a lease between Banlar and Transeastern. On October 8th, 1991 Mr. Neumaier attended at 16 Dentith Road which he believed to be other premises owned or leased by Banlar. He discovered a large number of chattels stored under a tarp at that location and he served a copy of the Warrant upon a carpenter who was in charge of renovating the premises at 16 Dentith Road, who was employed by Aalders. He took an inventory of the chattels and posted a copy of the inventory and the Warrant at 16 Dentith Road. He, on the same day, attended at 1568 Argyle Street and 5239 Blowers Street in the City of Halifax and posted a copy of the Warrant and inventory at that address.

On October 31st, 1991 Transeastern prepared an amended Warrant of Distress and Notice of Re-Entry and Distraint covering some $23,040.05, being the original amount

claimed of $9,216.02, plus three months accelerated rental of $13,824.03. The Bailiff, Mr. Neumaier, posted a copy of the amended Warrant at 16 Dentith Road and at 1568 Argyle Street and 4239 Blowers Street on the 31st day of October, 1991.

VALIDITY OF CHATTEL MORTGAGE

The applicant contests the validity of the chattel mortgage given by Banlar to Aalders on two grounds, namely:

1. Banlar had not obtained the necessary authority to grant the chattel mortgage, pursuant to the provisions of Section 87(1) and 102 of the **Companies Act**, R.S.N.S. 1989, c. 81; and

2. The affidavit of **Bona Fides** attached to the Chattel Mortgage does not meet the requirements of Section 9 of the **Bills of Sale Act**, R.S.N.S., 1989, c. 39.

It is not necessary to enumerate the sections in the **Companies Act** referable to the granting of a Chattel Mortgage, other than to say that such a mortgage must have the authority of a special resolution of the company granting it, and that all shareholders of the company shall have notice of the meeting of shareholders which passes the special resolution.

Affidavit evidence adduced shows that Banlar passed a special resolution authorizing borrowing and issuing security therefore, in February of 1991, a copy of which was filed with the Registrar of Joint Stock Companies at Halifax on February 27th, 1991. This is what is known as a general form of special resolution which authorizes borrowing on the part of Banlar and to secure the repayment thereof, and authorizes the Directors to exercise such powers.

Mr. Casey, one of the shareholders in Banlar, testifed that he did not receive any notice of the intention of the company to execute the Chattel Mortgage on July 19th, 1991. This was disputed by the witness Brian Aalders. A copy of the Shareholders' Agreement between Brian Aalders, Lawrence Foran, Michael Casey and Banlar, dated March 28th, 1991 was submitted which indicated that no major decisions respecting the company, including the mortgaging of any asset, would be made without the consent of all shareholders.

In my opinion, it is not necessary for me to consider the Shareholders' Agreement or any argument between the shareholders. On the face of it, there was a properly executed special resolution on file and I am unable to conclude that Banlar did not have the corporate authority to execute the Chattel Mortgage on July 19th, 1991.

Passing on to the Affidavit of Bona Fides attached to the Chattel Mortgage, the affidavit states that the mortgage was in consideration for "a present advance being made by the mortgage to the mortgagor is justly due or accuring due from the Mortgagor to the Mortgagee."

Section 9 of the **Bills of Sales Act**, R.S.N.S., 1989, c. 39 states:

> "9. Where a bill of sale, other than a bill of sale within the scope of s. 8, is given to secure the payment of an ascertained amount due or accruing due from the grantor to the grantee, or of a present advance being made by the grantee to the grantor, it shall, when presented for registration be accompanied by an affidavit of the grantee, or one of the several grantees, or his or their agent, stating that the amount set forth in the bill of sale as being the

> **consideration therefore is justly due or accuring due from the grantor to the grantee or is a present advance being made by the grantee to the grantor, as the case may be,** and that the bill of sale was executed in good faith and for the purpose of securing to the grantee the payment of such amount, and not for the mere purpose of protecting the chattels therein mentioned against the creditors of the grantor or for the purpose of preventing the creditors from recovering any claims which they may have against the grantor"
>
> (emphasis mine)

Banlar and Aalders argue that the Chattel Mortgage was granted to secure an amount due or accruing due **and** a present advance, and that the affidavit is merely typographically incorrect. The affidavits of Mr. Foran and Mr. Aalders seem to indicate that of the $33,859.35 amount (they both state in their affidavits that the Chattel Mortgage amount was $33,859.85), that $23,474.68 was due and owing and that $10,385.17 was a present advance made on July 19th, 1991. I do not accept this and it is not substantiated by the evidence before me, certainly on the basis of the affidavits which I find to be extremely convoluted.

A letter dated July 15th, 1991 attached to the affidavits of both Mr. Snow and Mr. Foran, from Aalders to Banlar, indicates the amount due and accuring due as of the end of July, 1991 was $33,859.35, the exact amount

of the Chattel Mortgage. There is no question, in my mind, therefore, that the full sum of $33,859.35 was justly due or accruing due from Banlar to Aalders as of July 19th, 1991, and that no part thereof was a "present advance being made."

The applicant refers to the case of **Jollimore v. Bauld**, (1950) 4 D.L.R. 242 (N.S.S.C.A.D.) where the Court considered the validity of a Chattel Mortgage which contained an affidavit that did not distinguish between whether the debt was given to secure a part debt or a present advance. They determined that the Chattel Mortgage in question was revoked as against subsequent purchases. In speaking for the Court, Hall, J.A. stated at p. 250:

> "It is obvious that the Legislature took great care to distinguish between bills of sale given to secure past debts on the one hand, and those given to secure present advances on the other and to require that an affidavit of bona fides should contain whichever of the two averments is appropriate to the nature of the particular transaction. It would be consistent with this provision to embody both types of transaction in one document provided the affidavit contained an averment as to the particular consideration given to secure the past debt and the present advance respectively.

and further at p. 251:

> "In my view the affidavit here used fails altogether to comply with the provisions of s. 9 in substance; and in particular in failing as a whole to represent the true character of the transaction (whatever it was) in respect of which it was given."

In the case before me the Affidavit of Bona Fides did not represent the true character of the transaction. In **Jollimore** the Court of Appeal held that it was important in making a clear distinction in the affidavit. At p. 251, Hall, J.A. states:

> "I do not think that the express terms of s. 9 should be whittled down or that s. 26 countenances an affidavit which not only fails to give the precise information required by s. 9, but which in its very prolixity and duplicity is meaningless. ... It must be remembered also that we are dealing with the validity of an instrument which is declared to be absolutely void against certain classes of persons unless registered and the onus of proof that such an instrument is in conformity with the Act is clearly upon the party alleging its validity."

The solicitors for the Defendants have referred to the case of **Re: Miller (bankrupt) (1986)**, 72 N.S.R. 2nd, 395 (N.S.S.C.A.D.). Jones, J.A., in speaking for the

Court, did not overrule the decision in **Jollimore** but distinguished it from **Miller** because, in **Miller**, although the affidavit of bona fides was silent as to whether the money represented a present advance or monies due or accruing due, it was possible to tell from the face of the document itself what the true consideration was.

In my opinion this is not the case before me. The affidavit of bona fides is potentially false and one cannot tell whether the consideration was for a present advance or for monies due or accuring due. Again, in my opinion, the error is one of substance and is not cured by Section 26 of the **Bills of Sale Act**, which states:

> "Effect of defect or irregularity
>
> 26 No defect or irregularity in the execution or attention of a bill of sale or renewal statement, no defect, irregularity or omission in any affidavit accompanying a bill of sale or renewal statement or filed in connection with its registration and no error of a clerical nature or in the immaterial or non-essential part of a bill of dale or renewal statements shall invalidate or destroy the effect of the bill of sale or renewal statement or the registration thereof, unless, in the opinion of the court or judge before whom a

> question relating thereto is tried, the defect, irregularity, omission or error has actually misled some person whose interests are affected by the bill of sale. R.S., c. 23, s. 25."

In my opinion the defect, irregularity, omission or error in the Chattel Mortgage has actually misled Transeastern, whose interest were affected by the bill of sale. Also subsequent creditors of Banlar would also be misled by this document.

In my opinion none of this was an arms length transaction. Brian Aalders was a principal of both Aalders and Banlar. He was aware of all the dealings with Transeastern. He was aware that a number of chattels in the Chattel Mortgage were owned by Transeastern and <u>could not</u> be mortgaged by Banlar.

Certainly the chattels owned by Transeastern, and removed from the premises, should never have been removed.

I have a great suspicion that the Chattel Mortgage was executed to defeat creditors of Banlar and, in particular, to prevent Transeastern from exercising its rights as Landlord.

Accordingly, I find that the Chattel Mortgage of July 19th, 1991 is invalid as against the rights of Transeastern against Banlar and the chattels.

SEIZURE UNDER TENANCIES AND DISTRESS FOR RENT ACT

Section 13 of the **Tenancies and Distress for Rent Act**, R.S.N.S. 1989, c. 464 states:

> "If any lessee of any message, land or tenement, upon the demise whereof any rent is in arrears and due, fraudulently or clandestinely conveys from such demise premises his goods, with intent to prevent the landlord distraining the same, such landlord, by himself or his servants, may within twenty-one days then next ensuing such conveying away, seize such goods, wherever found, as a distress for such rent, and dispose of the same as if they had been distrained upon the premises, unless such goods are sold in good faith and for a valuable consideration before such seizure, in which case they shall not be liable to a distress."

The Defendants submit that in order to satisfy Section 13 four requirements must be met, namely:

(a) The lessee must remove the goods;

(b) The goods must be fraudulently or clandestinely removed from the demised premises;

(c) There must be evidence of an intent to prevent the landlord distressing on the goods; and

(d) The landlord must seize these goods within 21 days.

In my opinion the lessee did remove the goods. The Chattel Mortgage was invalid as against Transeastern and Mr. Foran, in his affidavit, admits to giving consent to Aalders to remove the chattels. Banlar and Aalders conspired together to remove the goods, in my opinion. Secondly, there is no question in my mind, and I so find, that the goods were fraudulently and clandestinely removed from the demised premises. All evidence before me supports this finding.

Dealing with the third requirement, that is intent to prevent the landlord distressing on the goods,

we have the letter from Transeastern to Banlar of September 20th, 1991 indicating the arrears and intention to exert its right as Landlord. One can assume that not only Banlar, but also Aalders, was aware of this letter. I so find the intent required.

The last requirement is seizure within 21 days. What is seizure? In my opinion it is not necessary to take actual physical possession of goods to constitute seizure. I accept the finding of the Court of Appeal in **Noseworthy v. Campbell and Curtis** (1928-29), 60 N.S.R. 377 (N.S.S.C.A.D.) where Chisholm J.A., states at p. 305:

> "To constitute a seizure it is not necessary that there should be any physical contact with the goods seized. Such contact of itself does not amount to a seizure. An entry on the premises in which the goods are situation, together with an intimation of an intention to seize, will amount to a valid seizure. ... Some act must be done to intimate that a seizure has been made. Here the Constable told the plaintiff that her goods were seized and he took a list of the. The Constable did every act necessary to constitute a valid seizure."

I am satisfied that the Bailiff, in this case, did all acts necessary on October 8th, 1991 to constitute a valid seizure

under Section 13 of the **Act.** It was done within 21 days of the removal and constitutes a seizure.

I have some difficulty with the validity of any seizure under the amended Warrant of Distress of October 31st, 1991. This was within the 21 day period and claimed an amount which was not covered in the written Offer to Lease executed by the parties. Accelerated rental was set forth in the formal lease presented, which was never signed, and I have no evidence whether this was, in fact, the agreement between the parties.

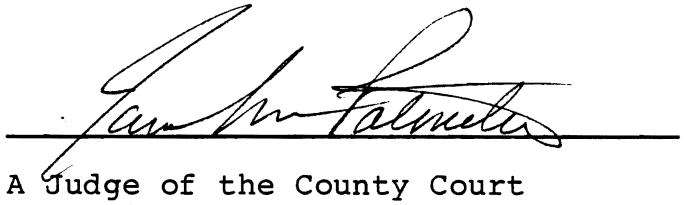
In any event, I do not have to determine this at this time because I find there was a valid seizure on October 8th, 1991, based on the Warrant of Distress issued on that date.

RECOVERY ORDER

After considering the foregoing, I find, the Plaintiff is entitled to a Recovery Order under the provisions of **Rule 48** of the **Civil Procedure Rules** based on the seizure of October 8th, 1991.

COSTS

The Plaintiff shall be entitled to its costs on this proceeding which shall be based on Scale 1 of Tariff A of **Civil Procedure Rule 63** exclusive of disbusements. For the purpose of such determination, I find the sum involved to be $9,000.00.



A Judge of the County Court
of District Number One