IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Mailboxes Etc. v. Plazacorp Retail Properties Ltd., 2008 NSSC 10

Date: 20080114
Docket: SH 177997
Registry: Halifax

Between:

2502731 Nova Scotia Limited,
a body corporate, carrying on business under
the firm name and style of Mailboxes Etc.

Plaintiff

v.

Plazacorp Retail Properties Ltd.,
a body corporate

Defendant

Revised decision: The text of the original decision has been corrected according to the erratum released January 16, 2008.

Judge: The Honourable Justice Glen G. McDougall

Heard: August 28-31, 2006, in Halifax, Nova Scotia

Counsel: D. Timothy Gabriel, Ll.B. and Norman B. Hill, Ll.B., for the plaintiff
David P.S. Farrar, Q.C. and John T. Shanks, Ll.B. for the defendant

By the Court:

INTRODUCTION

[1] The plaintiff, 2502731 Nova Scotia Limited ("2502731 NSL"), operating as Mailboxes Etc., leased commercial premises at 114 Woodlawn Road, Unit 35,

Dartmouth, Halifax Regional Municipality, Nova Scotia. The leased premises are located in what was formerly known as Woodlawn Mall. It is now known as Staples Plaza.

[2] The Defendant, Plazacorp Retail Properties Ltd. ("Plazacorp"), is the owner and landlord with respect to Staples Plaza.

[3] In its statement of claim, 2502731 NSL seeks general and special damages as well as punitive damages for an alleged breach of its lease with Plazacorp. By way of amendment, aggravated damages were also added to the plaintiff's claim.

[4] Plazacorp denies that it has breached its agreement with the plaintiff and, in particular, denies breaching the exclusivity provisions contained in the lease. The defendant further says that the plaintiff should be estopped from pursuing its claim in court because of its failure to abide by the arbitration provisions of the lease. Given the fact that it was the defendant who refused to participate in arbitration when invited to do so by plaintiff's counsel, this aspect of the defence lacks merit and will not be given any further consideration.

SUMMARY / FACTUAL FINDINGS

[5] The plaintiff company was incorporated on October 26, 1995. Its main purpose was to carry on business as a Mailboxes Etc. franchise.

[6] Prior to its incorporation, one of its current shareholders, Gabriela Gruber, entered into a lease for business premises with the then landlord, Annapolis Basin Pulp and Power Company Limited (later Annapolis Basin Group Limited and, later still, Annapolis Group Inc., henceforth referred to as "Annapolis Group"). The leased premises consisted of 995 square feet, more or less, in what was then known as the Woodlawn Shopping Centre or simply the Woodlawn Mall.

[7] The lease was for a period of six years commencing on the 1st day of February, 1995. It was to terminate on the 31st day of January 2001. It included an option to renew for a further period of four years on the same terms and conditions save for a further renewal option and rental rates. The terms and conditions of the lease were negotiated by Gabriela Gruber and her husband, Malcolm St. Croix, with the assistance of Sherry Spicer, an independent leasing consultant. Sometime after the

lease was signed Sherry Spicer took up a position with the Annapolis Group. Her main responsibility was to look after the Woodlawn Mall.

[8] The original lease contained certain provisions which were very important to Ms. Gruber and Mr. St. Croix. They were concerned about the possibility of competition from other Mall tenants. To address their concerns certain clauses were included in the first lease. They provided as follows:

> **Restriction of Use**
>
> 16.2 (a) The Premises shall be used and occupied only for the purpose of operating as a retail service business providing primary services of a mailbox rental with 24 hour access, packaging, shipping, printing and copy services with supporting and ~~axillary~~ auxillary services that may include, sales of packaging supplies and services, key duplicating, Western Union, passport photos and film processing, fax for profit, electronic filing of income tax returns and related services, stationery and office supplies, computer services and other related uses and services. The Tenant will be allowed to add new profit centres with the consent of the Landlord, such consent will not be unreasonably withheld. It is agreed and understood that such supporting and axillary services are only complimentary to the primary services and are not granted any form of exclusivity.
>
> If any other business is operated by the Tenant on the Premises, the Tenant shall cease such operation upon receipt of notice from the Landlord. The Landlord, after written notice to the Tenant, may at its option terminate the Lease.
>
> **Option to Renew**
>
> 22.19 The tenant will have the option to renew this lease for a further four (4) years on the same terms and conditions excepting rental costs, operating costs, Landlord's incentives or leasehold improvements and this option to renew. The landlord must be given notice (90) ninety days prior to expiry of the tenant's desire to renew.
>
> **Exclusivity**
>
> 22.20 Provided that the Tenant is not in default in the performance of its obligations and covenants contained in this Lease, the Landlord covenants and agrees that it shall not use or occupy, nor suffer or permit to be used or occupied any other premises or space in the Centre for the purpose of a retail service business whose concept is to provide primary services of a mailbox rental with 24 hour access, packaging, shipping, printing and copy services and is distinctly similar to the

> Tenant's primary product mix and style of service then in use, with the exception of any services presently offered by existing tenants and any prospective chartered accountants offices.

[9] Clause 16.2(a) restricted the tenant's use of the premises by describing its "primary services" and also its "supporting and auxiliary services". It allowed for the addition of new profit centres with the consent of the landlord. It limited the tenant's right to exclusivity to the primary services by stating:

> It is agreed and understood that such supporting and axillary [sic] services are only complimentary to the primary services and are not granted any form of exclusivity.

[10] Clause 22.19 provided an option to renew the lease for a further period of four years on the same terms and conditions save for rental costs, operating costs, landlord's incentives or leasehold improvements and the option to renew.

[11] The benefit of protection from competition from other Mall tenants was intended to be part of any renewed lease.

[12] Clause 22.20 described the nature of the exclusivity rights granted to Ms. Gruber as tenant. The landlord covenanted and agreed:

> ...that it shall not use or occupy, nor suffer or permit to be used or occupied any other premises or space in the Centre for the purpose of a retail service business whose concept is to provide primary services of a mailbox rental with 24 hours access, packaging, shipping, printing and copy services and is distinctly similar to the Tenant's primary product mix and style of service then in use, with the exception of any services presently offered by existing tenants and any prospective chartered accountants offices.

[13] With the exception of services then being offered by existing tenants or those of any prospective chartered accountants' offices, the business's primary service offerings were given protection under the lease. This was important to Ms. Gruber and Mr. St. Croix. After finalizing their lease, they then focussed their energy and resources on establishing and developing their new business.

[14] They devoted a great deal of time and energy in growing the business. Initially they took very little out in the form of wages or salaries. Eventually after several years of hard work they began to see some positive results.

[15] Gross revenues in their first full year of operations amounted to approximately $102,000.00. In each succeeding year gross revenues continued to climb until the year ending July 31, 2000 when it reached approximately $274,000.00. Business revenues appeared to plateau at that time.

[16] For the year ending July 31, 2001 gross revenues were only slightly higher than the previous year coming in at $275,360.00. In fact, gross revenues from photocopying, business services and printing actually went down by about $2,000.00 during that one-year period.

[17] Just a few months prior to this fiscal year end construction of a new Staples Business Depot ("Staples") was commenced at the Woodlawn Mall. It opened for business in August, 2001. Thereafter, for the approximately three and one-half years that 2502731 NSL remained a tenant at the soon to be renamed Staples Plaza, overall revenue and specifically, revenue from photocopying, business services and printing, declined. In the year immediately after Staples opened for business, revenues from photocopying, business services and printing declined from approximately $136,500.00 at year end August 31, 2001 to approximately $106,300.00 for the year ending August 31, 2002. Revenue continued to decrease each year thereafter but not as precipitously as in this first year after Staples' arrival in the Mall. It did not begin to increase again until after Ms. Gruber and Mr. St. Croix relocated their business to the Portland Centre in Dartmouth. What actually caused the downturn in the plaintiff's business is the subject of this litigation along with the alleged breach of contract by the new landlord.

[18] As previously indicated, the initial lease was for a period of six years beginning on February 1, 1995 and ending on January 31st, 2001. It provided for an option to renew for a further four years. In all, the lease would cover a ten year period which coincided with the term of Ms. Gruber's and Mr. St. Croix's franchise agreement with MBE Communications Inc.

[19] The tenants exclusivity rights were exercised on at least three separate occasions during the initial term of the lease. On one occasion Ms. Spicer approached Mr. St. Croix to ask him to discontinue a key cutting service. They could continue to supply their own needs but they were not permitted to offer it to other customers.

[20] On another occasion Mr. St. Croix complained to Ms. Spicer about a photocopying service being offered by one of the other tenants in the Mall. The other tenant was Canada Manpower. Since Canada Manpower was only offering this service to its own clientele and not to the general public they were permitted to continue the practice.

[21] On another occasion Ms. Spicer discussed with Mr. St. Croix the possibility of a new tenant entering the Mall. It was a cybernet café which offered computer services. Mr. St. Croix voiced an objection and, as a result, the prospective tenant was rejected. The landlord / tenant relationship appeared to be working well for both sides. Ms. Spicer, in her testimony, described Mr. St. Croix and Ms. Gruber as "exemplary tenants". Indeed, when it came time to negotiate the renewal of the lease Ms. Spicer, on behalf of the Annapolis Group, was prepared to eliminate the need for a personal guarantee from Ms. Gruber because of the good relationship that had developed between landlord and tenant.

[22] Prior to the expiration of the first term of the lease Ms. Spicer decided to approach several Mall tenants to negotiate renewals on behalf of the Annapolis Group. The negotiations began long before the lease was due to expire. Ms. Spicer was not privy to any discussions regarding the sale of the shopping centre although she had heard rumours to this effect. Before the new lease could be finalized Ms. Spicer left the Annapolis Group to take a position with another employer. A number of the terms and conditions for a new lease had already been agreed to but final negotiations were left to Mr. Jim Pushie ("Mr. Pushie"), the leasing manager for Plazacorp. This occurred even though the agreement for the sale of the Mall from Annapolis Group to Plazacorp had not yet been finalized. The closing of the sale did not take place until on or about October 4, 2000. The Warranty Deed from Annapolis Group Inc. to Plazacorp Retail Properties Ltd. bears this date. It was registered on October 13, 2000.

[23] Prior to the time when Mr. Pushie had assumed negotiations on behalf of the landlord, a draft of a second lease had already been accepted and initialled by Ms. Gruber on behalf of 2502731 NSL. It was not, however, acceptable to Plazacorp.

[24] When Mr. Pushie took over negotiations for Plazacorp he persuaded Ms. Gruber and Mr. St. Croix to agree to the removal of a clause entitled: "Radius Restriction". Ms. Gruber and Mr. St. Croix tried to have a "Right of First Refusal Clause" added to the lease. They did not succeed. They were, however, successful

in having "The Guarantee" clause removed thereby eliminating the need for Ms. Gruber to personally guarantee 2502731 NSL's performance under the lease.

[25] The landlord's name was changed to reflect that of the new owner, Plazacorp Retail Properties Ltd. The other changes were mainly in the form of deletions from certain clauses, for example, clauses 18.1(a), 20.1 and 22.5.

[26] Mr. Pushie tried to make one other very significant change to the proposed lease. He sought to have clause 22.20 dealing with "exclusivity" removed. Certain cross-outs and other hand-written entries appearing on these drafts have been attributed to Mr. Pushie. Neither Mr. Pushie nor any other witness was called on behalf of the defendant to refute the suggestions made by Mr. St. Croix and Ms. Gruber. I have, therefore, concluded that it was either Mr. Pushie or someone else representing Plazacorp who made these cross-outs and other hand-written entries on the drafts of the lease.

[27] Despite Plazacorp's best efforts, Mr. St. Croix and Ms. Gruber refused to agree to the removal of the exclusivity clause. Nor were there any deletions or changes made to clause 16.2(a) — Restriction of Use. It is, however, interesting to note the change that was made to clause 16.2(b). Clause 16.2(b) of the initial lease stated:

> (b) Nothing shall be done or omitted or permitted by the Tenant upon the Premises which shall be or result in a nuisance.

[28] In the second lease, the clause was amended to read as follows:

> (b) The Tenant covenants not to at any time during the said term or any renewal thereof to use, exercise carry on, or permit to suffer to be used, exercised or carried on in or upon the said premises or any part thereof, any noxious noisome or offensive art, trade, business, occupation or calling and no act, matter or thing whatsoever shall at any time during the said term or any renewal thereof be done in or on the said premises, or any part thereof, which shall or may be or grow to the annoyance, nuisance, grievance, damages or any disturbance and not to operate a business which would conflict with business operated by other Tenants of the Centre.

[29] The re-wording of this particular clause, did not prevent 2502731 NSL from competing with existing or prospective tenants but it certainly placed greater restrictions on any activities that it might have wished to pursue.

[30] The final draft of the second lease was not presented to the principals of 2502731 NSL for signature until on or about January 15, 2001. The lease term was back-dated for a five (5) year period commencing on the 1st day of February, 2000 and ending on the 31st day of January, 2005. It was signed by both the landlord and the tenant. It gave the tenant protection against competition from other Mall tenants, both existing and prospective,

> ... for the purpose of carrying on its principal business as a retail service business whose concept is to provide primary services of a mailbox rental with 24 hour access, packaging, shipping, printing and copy services business.... [Reference: Lease dated the 1st day of February, 2000 - clause 22.20 "Exclusivity"]

[31] Shortly after the new lease was signed Mr. St. Croix heard a rumour that Staples might be re-locating to the Woodlawn Mall. He immediately contacted Mr. Pushie. According to Mr. St. Croix, Mr. Pushie denied knowing anything about the rumour and even went so far as to state that he would never do that to him.

[32] Mr. St. Croix accepted Mr. Pushie's word and did nothing more until he received a memorandum from Plazacorp Group dated May 14, 2001. The memorandum was directed to: "All Tenants of Woodlawn Mall" and was signed by Ralph Champion, Project Manager. It began as follows:

> As you are aware we have begun demolition for construction of the new Staples Business Depot at the edge of the property.
>
> This is a very exciting time for us as ultimately there will be a new 25,000 SF Staples store....

[33] Up until receiving this memorandum there had been no sign of any proposed construction. Mr. St. Croix testified that construction of the new Staples store did not commence until either the same day he received his copy of the memorandum or possibly the day following. When he contacted Mr. Pushie to discuss this latest development, Mr. Pushie denied having previously discussed the topic with him.

[34] Both Mr. St. Croix and Ms. Gruber were very concerned for the continuing viability of their business. They grew even more concerned after receiving a subsequent memorandum from Mr. Pushie on behalf of the Plaza Group announcing the immediate change of name from Woodlawn Plaza to "Staples Plaza". This memorandum was dated August 21, 2001.

[35] In an effort to maintain their current business levels, Mr. St. Croix and Ms. Gruber devoted even more time and financial resources to advertising and marketing. After the Mall was re-named, every time they promoted their own business they were, in effect, helping to spread the name of one of their competitors. They were also limited in the amount of in-Mall advertising they could do. Such in-Mall advertising had to be shared with other Mall tenants. They did what they could to promote their business to Mall shoppers.

[36] After Staples opened for business at the newly re-named Staples Plaza in August, 2001, Mr. St. Croix and Ms. Gruber noticed an immediate decrease in 2502731 NSL's business volumes.

[37] Prior to moving to the new location, Staples had previously operated from a location in the Burnside Industrial Park. The old location was several kilometres from their new location. From the time Mr. St. Croix and Ms. Gruber first started up their business in 1995 there was a Staples outlet operating in the Burnside Industrial Park. Despite this, their business revenues steadily grew until the time Staples opened its doors next to them in the re-named Staples Plaza.

[38] 2502731 NSL hired Mr. Hugh A. Davidson, C.A., C.B.V., of Lyle Tilley Davidson, Chartered Accountants, to provide an opinion on the economic loss suffered by the company as a result of the alleged violation of the lease by Plazacorp.

[39] Mr. Davidson has been a Chartered Accountant since 1978. He also achieved the designation of Chartered Business Valuator in 1997. Based on his training and experience which included giving expert testimony in court on three prior occasions, the Court accepted Mr. Davidson as an expert in the area of business valuations and therefore able to express opinions as to loss of net earnings and loss of business goodwill.

[40] The Court also heard from Mr. John Carruthers, C.A., C.B.V. Mr. Carruthers has been a Chartered Accountant since 1982 and a Chartered Business Valuator since 1993. He is with the accounting firm of Grant Thornton, LLP.

[41] Mr. Carruthers was called by the defence. Based on his training and experience the Court qualified Mr. Carruthers to provide opinion evidence on the appropriate methodology to use when calculating losses in net earnings and business goodwill.

In advance of trial Mr. Carruthers prepared a report which was limited to a critique of the "Economic Loss Claim Report" prepared by Mr. Davidson. In the terms of reference he indicated:

> Therefore, it must be understood that our limited critique report and the comments herein do not constitute our opinion on the economic loss of the Company.

[42] His conclusions state that:

> 8. Based on the information and documentation reviewed, the explanations provided to us, and subject to the assumptions, qualifications, and restrictions noted herein, it is our opinion the Report prepared by Mr. Davidson for 2502731 Nova Scotia Limited is overstated based on the following:
>
> a.) different averaging methods were employed to calculate the estimated lost net earnings that appear inconsistent with each other; and
>
> b.) industry and economic conditions existing during the period do not appear to have been taken into consideration.
>
> 9. Additionally, we believe the calculation of loss in the value of good will is not supportable and requires a full valuation to be completed to assess the impact, if any, on goodwill.

[43] I will make further comments on the reports and evidence offered by both Mr. Davison and Mr. Carruthers later in this decision. For now I will simply indicate that effective cross-examination of both experts by opposing counsel helped to point out certain weaknesses and deficiencies in each of the two reports tendered.

ISSUES

[44] The Court must determine the following issues:

> 1. Has the defendant, Plazacorp, breached its lease with the plaintiff, 2502731 NSL?
>
> 2. If Plazacorp is found to have breached its lease with 2502731 NSL, what damages, if any, has 2502731 NSL suffered as a result of that breach?

DISCUSSION

ISSUE # 1: Has the defendant, Plazacorp, breached its lease with the plaintiff, 2502731 NSL?

[45] There are two clauses in the February 1, 2000 lease that deal with exclusivity. The first clause, under the heading of "Restriction of Use", is found at part (a) of clause 16.2. It provides:

> **Restriction of Use**
>
> 16.2 (a) The Premises shall be used and occupied only for the purpose of operating as a retail service business providing primary services of a mailbox rental with 24 hour access, packaging, shipping, printing and copy services with supporting and auxiliary services that may include, sales of packaging supplies and services, key duplicating, Western Union, passport photos and film processing, fax for profit, electronic filing of income tax returns and related services, stationery and office supplies, computer services and other related uses and services. the Tenant will be allowed to add new profit centres with the consent of the Landlord, such consent will not be unreasonably withheld. It is agreed and understood that such supporting and auxiliary services are only complimentary to the primary services and are not granted any form of exclusivity.
>
> If any other business is operated by the Tenant on the Premises, the Tenant shall cease such operation upon receipt of notice from the Landlord. The Landlord, after written notice to the Tenant, may at its option terminate this Lease.

[46] Clause 22.20, under the heading "Exclusivity", reads as follows:

> **Exclusivity**
>
> 22.20 It is understood and agreed that so long as the Tenant is in possession of the whole of the Premises in accordance with the terms of this lease, and so long as the Premises are being used for the purposes set out in section 16.2 and the Tenant is not in default under this lease or any renewal or extension thereof, the Landlord covenants and agrees that it will not, at any time during the term of this lease, lease or re-lease space to any tenant in the Centre, with the exception of services presently offered by existing tenants, as presently constituted at the commencement of the term of this lease including any expansion or additional buildings which may be added to the Centre, for the purposes of carrying on its principal business as a retail service business whose concept is to provide primary services of a mailbox rental with 24

> hour access, packaging, shipping, printing and copy services business then in use under the firm and name of Mail Boxes Etc. Canada or such other trade name employed or intended to be employed by the Tenant or its permitted successors or assigns in any of its operations and in accordance with the terms of this lease.
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> It is further understood and agreed that the Landlord is not obliged to enforce the aforementioned covenant (the "covenant") against any person, firm, corporation or other entity if by doing so it shall be in breach of any laws, regulations, or enactments from time to time in force, and no provision of this lease is intended to apply or to be enforceable to the extent that it would give rise to any offence under the Competition Act (Canada), or any statute that may be substituted therefor or may be enacted with similar intent, as from time to time amended. The Landlord and the Tenant acknowledge that this covenant of exclusivity is granted solely at the request of the Tenant and for the Tenants' protection. The Landlord and Tenant further recognise and acknowledge that there are certain areas of the Tenant's operations which may complete directly with the operation of other tenants in the centre and as well that certain areas of other tenant operations which may compete directly with the Tenant's operations.
>
> The Landlord agrees that upon receiving written notice it shall enforce the above granted covenant of exclusivity in favour of the Tenant against other tenants should other tenants principal business operations or a significant portion of their operations be distinctly similar in mix and style to the Tenant's product of service as aforementioned. The Landlord agrees that it will not look to the Tenant for any expenses, legal fees, damages or other costs associated with either protecting or defending the Tenant's exclusivity rights.
>
> Notwithstanding the aforementioned, the Landlord and the Tenant further agree to resort to arbitration pursuant to the Arbitration Act of Nova Scotia should the Landlord and Tenant not be able to agree whether the degree of competition mentioned herein is distinctly similar or not in mix and style. In the event the ruling is in favour of the Landlord, the tenant shall indemnify and hold harmless the Landlord for any loss, injury, liability or damage whatsoever suffered by the Landlord in connection therewith, including all expenses incurred in connection with any claims, actions or proceedings brought by, on behalf of or against the Landlord as a result of the covenant, whether of a criminal or civil nature, and will reimburse the Landlord for any and all costs and expenses incurred in connection with any enforcement of the covenant by the Landlord, including all fees related to said arbitration, legal fees and expenses.

[47] To determine the nature and scope of the protection accorded to 2502731 NSL by Plazacorp the Court must give effect to the intentions of the parties from the words of the contract. As Estey, J., said in **Consolidated Bathurst Export Ltd.** v. **Material**

Boiler & Machinery Insurance Co., [1980] 1 S.C.R. 888; 112 D.L.R. (3d) 49; 32 N.R. 488, [1980] I.L.R. 1-1176 (S.C.C.):

> ...in all contracts effect must be given to the intention of the parties to be gathered from words they have used.

[48] In the case of **Eli Lilly & Co.** v. **Novapharm Ltd.**, [1988] 2 S.C.R. 129, Justice Iacobucci, at paragraphs 54-56, said:

> 54 The trial judge appeared to take Consolidated-Bathurst to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in Lampson v. City of Quebec (1920), 54 D.L.R. 344 (P.C.), at p. 350:
>
> > . . . the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself .... [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses. . . ."
>
> 56 When there is no ambiguity in the wording of the document, the notion in Consolidated-Bathurst that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. This is consistent with the following dictum of this Court, in Joy Oil Co. v. The King, [1951] S.C.R. 624, at p. 641:

> . . . in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer.

[49] The contractual intent of the parties can readily be determined by reference to the words they used in drafting the lease. There are no ambiguities. There is, therefore, no real need to consider extrinsic evidence as to the subjective intentions of the parties at the time they entered into the contract except perhaps to provide some context.

[50] It was very important to Ms. Gruber and Mr. St. Croix to have protection from competition within the shopping mall. They successfully negotiated this when they agreed to enter into the first lease. They also tried to ensure themselves a degree of future protection by insisting on a similar provision in the new lease.

[51] It was only after Mr. Pushie took over negotiations on behalf of the landlord that this became an issue. Despite his best efforts he was unable to convince Ms. Gruber and Mr. St. Croix to eliminate this provision. The new lease gave 2502731 NSL the same kind of protection that had been given to Ms. Gruber in the original lease.

[52] The landlord

> "covenants and agrees that it will not..... lease or release space to any tenant in the Centre .... including any expansion or additional buildings which may be added to the Centre, for the purpose of carrying on its principal business as a retail service business <u>whose concept is to provide primary services of a mailbox rental with 24 hour access, packaging, shipping, printing and copy services business .....</u>. [Emphasis Added] ; [See Lease, Clause 22.20 - EXCLUSIVITY]

[53] By allowing the Staples store to set up in the Mall and then to re-name the location "Staples Plaza", Plazacorp was clearly in breach of its covenant not to lease space to another tenant which carried on principal business activities that included many of the primary services offered by 2502731 NSL.

[54] It was argued that only a small percentage of Staples' overall business revenues were derived from such things as printing, copying, packaging and shipping. While this may be true when one looks only at the overall product and service mix offered by Staples it does not hold up, however, when one compares the floor space dedicated

to these business activities and the revenue generated at Staples in comparison to what existed at 2502731 NSL.

[55] The Staples Printing Centre was located near the front entrance to the store. It occupied more square feet of floor space than did the entire Mailboxes, Etc. outlet. It was a very profitable part of Staples' operation and it competed directly with much of what 2502731 NSL had to offer.

[56] I find that the defendant, Plazacorp, breached its lease with the plaintiff, 2502731 NSL, by allowing Staples to set up in the former Woodlawn Mall and it continued that breach by refusing to abide by the provisions of its lease when it was requested to do so.

ISSUE # 2: If Plazacorp is found to have breached its lease with 2502731 NSL, what damages, if any, has 2502731 NSL suffered as a result of that breach?

[57] Now that I have decided that Plazacorp was in breach of its lease with 2502731 NSL, it remains to be determined if the plaintiff suffered any loss as a result of that breach. The loss, if any, has to have resulted from that breach.

[58] Counsel for the defendant argued that the downturn in the plaintiff's business could have resulted from any number of different factors. They suggested that the plaintiff bears the burden of connecting its loss to the arrival of Staples at the Woodlawn Mall. It was pointed out that 2502731 NSL had seen a slight reduction, year over year, in revenues from photocopying, business services and printing as at year end July 31, 2001. It should be noted, however, that the company's overall revenues from all sources was slightly higher that year when compared to the previous year.

[59] 2502731 NSL showed fairly consistent growth from the time of its inception up to the time Staples relocated from the Burnside Industrial Park to the Woodlawn Mall. It then incurred a rather precipitous decline in gross revenue particularly in those product and service areas where it competed directly with Staples.

[60] The plaintiff is not required to eliminate every possible cause for its decline in business no matter how remote. I am satisfied that the plaintiff's business took a hit as a direct result of the relocation of the Staples outlet to the newly renamed, Staples Plaza.

[61] I am further satisfied that Ms. Gruber and Mr. St. Croix did everything they could to mitigate their losses. They were not prepared to walk away from the lease their company had entered into with Plazacorp. Nor were they prepared to give up on a business that they had poured so much of their time, energy and financial resources into. They acted honourably throughout and deserve to be compensated for the damages they suffered as a result of Plazacorp's breach of contract.

[62] In order to assist the Court in determining the amount of damages to be awarded, the plaintiff retained the services of Mr. Hugh A. Davidson, C.A., C.B.V. As previously indicated the Court qualified Mr. Davidson as an expert in the area of business valuations. As such he was permitted to offer opinions on loss of net earnings and business goodwill.

[63] In order to challenge the report and testimony of Mr. Davidson, defendant's counsel retained the services of Mr. John Carruthers, C.A., C.B.V. The Court accepted the qualifications of Mr. Carruthers enabling him to provide opinion evidence on the appropriate methodology for calculating losses in net earnings and business goodwill. Mr. Carruthers prepared a report limited to a critique of the report prepared by Mr. Davidson. It was Mr. Carruthers' opinion that Mr. Davidson's report had overstated lost net earnings. Furthermore, he challenged Mr. Davidson's calculation of loss in the value of good will suggesting that it was not supportable and would require a full valuation in order to assess the impact.

[64] Earlier I indicated that the plaintiff is not required to eliminate every possible cause for its decline in business. It need only show, on the balance of probabilities, that there was a breach of the lease by the defendant and that as a result of that breach damages were suffered by the plaintiff. In calculating lost net earnings Mr. Davidson made several assumptions. He assumed that the decrease in photocopy and retail revenue experienced by 2502731 NSL during the period from August, 2002 to January, 2005 was directly attributable to the establishment of the new Staples outlet. He did not conduct any independent market research to determine if there were any other market forces at play which might have affected the company's bottom line. Based on the approach taken he estimated lost net earnings to be $86,000.00 for this period.

[65] Mr. Davidson went on to calculate lost business goodwill by applying a multiple of five to the estimated decrease in future maintainable net earnings of

$27,000.00. This produces a total estimated loss in business goodwill of ($27,000.00 x 5) = $135,000.00. When combined with the estimated loss in net earnings of $86,000.00, the total estimated loss of income suffered by the company amounts to $221,000.00.

[66] In his "limited critique report", Mr. Carruthers suggested that Mr. Davidson had over-stated the estimated lost net earnings by utilizing different and inconsistent averaging methods and for failing to take into consideration industry and economic conditions. Based on using four year and five year averages, Mr. Carruthers' estimates of lost net earnings were $66,000.00 and $60,000.00 versus the $86,000.00 estimated by Mr. Davidson. Furthermore, Mr. Carruthers expressed the opinion that Mr. Davidson's calculation of loss in the value of business goodwill was not supportable. He felt a full business valuation would be necessary to assess the impact, if any, on goodwill. As such he could not express an opinion as to the amount of goodwill lost, if any, due to the opening of the new Staples outlet. In cross-examination, Mr. Carruthers agreed that it is probable that the opening of the Staples outlet in the new location would have created significant competition for 2502731 NSL. He also agreed that it would be difficult to have an impact on revenue without an impact on goodwill. He stated that it is the degree of that impact that is being debated. His criticism of Mr. Davidson's report was in the methodology used and not so much the conclusions reached.

[67] Both counsel effectively pointed out the weaknesses in the reports prepared by the other party's expert. Mr. Carruthers did not simply accept the proposition that 2502731 NSL's decline in revenue was caused solely by the arrival of the new Staples outlet in the renamed Staples Plaza. He did not carry out any primary market research himself but he did consider various secondary sources in making his calculations. It is likely that other market forces were also at play. These other market forces could possibly explain the slight reduction in gross revenues from photocopying, business services and printing that 2502731 NSL experienced for the year ending July 31, 2001.

[68] The average estimate of lost net earnings based on Mr. Carruthers' calculations is $63,000.00. This is $23,000.00 less than the estimate determined by Mr. Davison. Mr. Davidson took a rather conservative approach to estimating this figure but because he relied on the assumption that the decrease in photocopy and retail revenue during the period from August 2001 to January, 2005 was solely attributable to the establishment of the new Staples outlet, I have concluded that the appropriate figure

should be somewhat less than his estimate of $86,000.00. Given the limited scope of Mr. Carruthers' engagement I am also not prepared to accept his estimated average figure of $63,000.00. After considering all the evidence but particularly the evidence of the two expert witnesses I set the amount of lost net earnings suffered by 2502731 NSL as a result of the breach of the lease by Plazacorp at $75,000.00.

[69] As to the loss in goodwill I, too, have some concerns in the methodology used by the plaintiff's expert. Mr. Carruthers' when pressed on cross-examination indicated that the multiplier of five used by Mr. Davidson in calculating lost goodwill could be justified by assigning points for risk. He, however, maintained the position that in order to determine if goodwill exists a cash flow valuation approach must be applied to the entire company. The results from this valuation approach must then be compared to the net assets of the company to determine if any goodwill exists. Valuations would have to be completed as of July 31, 2001 and January 31, 2005 and then compared to determine if the goodwill, if any, had diminished over this period. Because of the limited scope of his retainer, Mr. Carruthers did not perform these calculations.

[70] The Court is therefore left with the calculations provided by Mr. Davidson. Given the concerns I have with the methodology used by the plaintiff's expert, I am prepared to set the amount that I feel is a reasonable estimate of the loss in business goodwill suffered by 2502731 NSL. I set the amount at $50,000.00.

[71] Losses attributable to Plazacorp's breach of its lease with 2502731 NSL therefore totals $125,000.00. It will have judgment for this amount along with pre-judgment interest at a rate to be agreed upon by the parties failing which the Court will decide after receiving the further submissions of counsel. Pre-judgment interest will be paid for the period beginning August 1, 2001 to the date of judgment.

[72] The plaintiff is also seeking aggravated and punitive damages based on the stressful effects this whole episode has had on Ms. Gruber and Mr. St. Croix and also on the conduct of Plazacorp's representatives in their dealings with them. Based on the evidence it would seem that Plazacorp's representatives were less than forthright when dealing with the two principals of 2502731 NSL. They deserved better. I am not, however, prepared to order either aggravated or punitive damages. The conduct of Plazacorp's representatives might have fallen short of what should be expected in the world of business but it was not so egregious as to warrant a further award of

punitive damages, nor am I satisfied that the situation warrants an award of aggravated damages.

[73] I will leave it to counsel to attempt to reach an agreement on costs. If an agreement is not forthcoming, I invite counsel to file written submissions with the Court within 45 days of the release of this decision.

McDougall, J.