SUPREME COURT OF NOVA SCOTIA

Citation: Atlantic Star Forestry Ltd. v. Rogers Communications Inc., 2014 NSSC 341

Date: 20140918
Docket: Tru. No. 410658
Registry: Truro

Between:

Atlantic Star Forestry Ltd.

Applicant

v.

Rogers Communications Inc. and Bragg Communications Incorporated

Respondents

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: July 8, 2014, in Truro, Nova Scotia

Final Written Submissions: June 23, 2014, from the Applicant
June 24, 2014, from the Respondents

Counsel: Robert H. Pineo, for the Applicant
Jeff Aucoin, for the Respondents

By the Court:

[1] This application concerns a dispute over an alleged unauthorized licensing by a tenant of space on a communications tower on the applicant's land. The applicant is Atlantic Star Forestry Limited ("Atlantic Star"), a company incorporated under the Nova Scotia *Companies Act*, R.S.N.S. 1989, c. 81. Atlantic Star carries on the business of Forestry Land Ownership and Management. The respondent, Rogers Communications Inc. ("Rogers") is an extra-provincial corporation registered to carry on business in Nova Scotia.

[2] Atlantic Star is the owner of a parcel of land located at Enfield, Nova Scotia, identified by PID 45270899 ("the subject property"). The predecessors to Rogers and Atlantic Star entered into a lease of a portion of the subject property on January 25, 1988 for the purpose of Rogers erecting and operating a communications tower. There were several renewals of the lease, including renewals on March 4, 1998 and January 1, 2008.

[3] On December 15, 2008 a representative of Rogers contacted Atlantic Star requesting consent to Rogers licensing space to Bragg Communications Inc. ("Bragg") on the communications tower erected on the site. This practice is apparently referred to as co-location.

[4] By January 2009 an agreement had not been reached and no agreement was reached thereafter. In February 2012 Atlantic Star learned that Rogers had allowed Bragg to co-locate equipment on the tower and use the subject property. Atlantic Star had not consented, nor had Rogers or Bragg paid any compensation to them.

[5] Bragg was originally a respondent when this application in court was commenced. However, a settlement was reached with Atlantic Star and the claim against Bragg was dismissed without costs.

[6] Atlantic Star seeks the following remedies against Rogers, the remaining respondent:

1. A declaration that the subject lease is terminated.
2. A declaration that Rogers must vacate the subject property within a reasonable period of time.

3. A declaration that Rogers must restore the subject property to its original condition within a reasonable period of time.
4. Specific damages for the co-location of Eastlink on the subject property.
5. Punitive damages.
6. Costs on a solicitor-client basis.

Evidence:

[7] Affidavit evidence was filed by Ian Johnstone on behalf of Atlantic Star, and Pierre Auger and Eric Cliché on behalf of Rogers. All of these individuals were cross-examined on their affidavits. An affidavit of Martin Briere, which had been filed by Bragg, was referred to in evidence. Mr. Briere was not present at the hearing for cross-examination.

Issues:

[8] The following issues are before the court for determination in this application:

1. Did Rogers give effective notice to renew the lease?
2. Is Atlantic Star entitled to damages for the co-location by Bragg (Eastlink)?
   (a) Did Rogers breach the subject lease?
   (b) Did Atlantic Star unreasonably withhold consent to the proposed co-location?
3. Is Atlantic Star entitled to an award of punitive damages as a result of the co-location?

Issue 1 – Did Rogers give effective notice to renew the lease?

The Lease Document:

[9] The lease document, amendments and renewals are contained in the affidavit of Ian Johnstone.

[10] The predecessors in title to Atlantic Star and Rogers, Scott Paper and Cantel Inc., entered into a lease of a portion of the subject property on January 25, 1988

for the purpose of erecting a communications tower. This lease was subsequently amended and/or renewed on April 7, 1989, May 15, 1989, March 4, 1998 and January 1, 2008.

[11] The original lease provided, at para. 10:

> Provided that in no case shall the term of this Lease extend beyond the 22nd day of November, 2007. Any renewal herein shall be upon the same terms and conditions as are herein contained for the initial term, except that that the rental rate during the renewal term shall be determined by applying the increase in the Consumer Price Index (CPI) between the commencement date of this Lease and the renewal date to the original rental rate, provided however that in no case shall any subsequent rent be less than the original rate. The TENANT shall indicate its intention to renew by giving written notice to the LANDLORD at least 180 days prior to the expiration of the current term.
>
> [Emphasis added]

[12] The lease was renewed on March 4, 1998. Article 3 of the renewal lease stated as follows:

> The Landlord hereby irrevocably grants to the Tenant an option to extend this renewal lease for two additional five-year terms, commencing the 1st day of January 2008 and the 1st day of January 2013. Provided that in no case shall the term of this renewal lease extend beyond the 31st day of December, 2017. The Tenant shall indicate its intention to renew by giving written notice to the Landlord at least 180 days prior to the expiration of the current term. Any renewal exercised hereunder by the Tenant, shall be on the same terms and conditions as are contained in the Original Lease, except… (changes to the rental rate)
>
> [Emphasis added]

[13] The lease required that the tenant receive consent before assignment or sublet of the leased premises. Paragraph 12(b) of the original lease is as follows:

> The TENANT covenants and agrees further with the LANDLORD as follows…That the TENANT shall not assign or sublet this Lease without the written consent of the LANDLORD being first had and obtained, which consent shall not be unreasonably withheld…

[14] There is a dispute between the parties as to whether the subject lease was renewed for a further term ending December 31, 2017.

[15] Rogers says the lease was renewed. Pierre Auger, the Manager of Rogers states the basis for their position as follows in his affidavit filed July 25, 2013:

> 6. A Renewal Lease (The "Renewal Lease") dated March 4, 1998 was entered into between Kimberly-Clark Worldwide Inc. (as successor of Scott Worldwide Inc.), the Landlord, and Rogers Cantel Inc. (now Rogers), the Tenant. Attached hereto as Exhibit "B" is a true copy of the Renewal Lease dated March 4, 1998.
>
> 7. Article 3 of the Renewal Lease stated as follows:
>
> > The Landlord irrevocably grants to the Tenant an option to extend the renewal lease for two additional five-year terms commencing the 1st day of January 2008 and the 1st day of January 2013. Provided that in no case shall the term of this renewal lease extend beond [sic] the 31st day of December 2017. The Tenant shall indicate its intention to renew by giving written notice to the Landlord at least 180 days prior to the expiration of the current term.
>
> 8. Article 3 of the Renewal Lease also states that the rental rates during the renewal terms would be as follows:
>
> 1. Starting January 1st, 2008 and ending December 31st, 2012 the annual rental is $3,487.85 + HST
> 2. Starting January 1st, 2013 and ending December 31st, 2017 the annual rental is $3,592.49 + HST
>
> 9. Rogers exercised the option to renew starting January 1st, 2008 and ending December 31st, 2012.
>
> 10. In October 2011 I instructed Maria Luisa Guerra, A Real Estate Analyst to renew the Lease for the Term of January 1st, 2013 and ending December 31st, 2017.
>
> …
>
> 12. On May 17, 2012, I approved and signed the Renewal Notice (the "Renewal Notice") which was sent to the Applicant. Attached hereto as Exhibit "F" is a true copy of Renewal notice dated May 17, 2012.
>
> 13. I am advised by Ms. Guerra and do verily believe that on July 26, 2012 she received a letter from George White, legal counsel for the Applicant advising that the Lease would expire on December 31, 2012. Attached as Exhibit "G" is a true copy of the letter dated July 26, 2012 from Mr. White to Ms. Guerra.

> 14. On September 28, 2012 I approved and signed a letter to Mr. White indicating that we had given written notice of renewal pursuant to the Renewal Lease to the Landlord in the May 17, 2012 Renewal Notice. Attached as Exhibit "H" is a true copy of the September 28, 2012 letter from me to Mr. White.
>
> 15. I received a letter from Mr. White dated October 2, 2012, which takes the position that the Renewal Notice dated May 17, 2012 was not a notice of renewal. Attached as Exhibit "I" is a true copy [of] the letter dated October 2, 2012 from Mr. White to me.
>
> 16. On November 27, 2012 I approved and signed a letter sent to Mr. White again indicating that the Renewal Notice dated May 17, 2012 conformed with the requirements of the Lease. Attached as Exhibit "J" is a true copy [of] the letter dated November 27, 2012 from me to Mr. White.
>
> 17. I am advised by Ms. Guerra and do verily believe that she received a letter from Robert Pineo, counsel for the Applicant, dated December 21, 2012, which indicated that he was instructed by the Applicant to commence an application to the Supreme Court of Nova Scotia. Attached as Exhibit "K" is a true copy of … Mr. Pineo's letter to Ms. Guerra dated December 21, 2012.

[16] Atlantic Star submit that Rogers has allowed the subject lease to lapse and that it has not been renewed. The factual and legal arguments to support this position is set out at paras. 20 through 24 of its pre-trial submission as follows:

> 20. On May 17, 2012, Rogers purposed to excise rights pursuant to the above stated paragraph of the 1998 Renewal Lease. Rogers provided a written offer to the Applicant to renew the Subject Lease for the period of January 1, 2013 to December 31, 2017. The offer by Rogers provided for the annual base rent, as per the Subject Lease, however, it also contained an added term for the co-location license of Bragg at a rate of $3,000 per annum.
>
> 21. Paragraph 3 of the Subject Lease states that any renewal will be "on the same terms and conditions as are contained in the Original Lease…" with an exception as to the rental rate. By altering a term of the renewal, the notice provided by Rogers to Applicant was not acceptance to a unilateral contract – but a counteroffer.
>
> 22. Adding conditions in any respect, such as Rogers attempted to do, amount to a counteroffer, which is a rejection of the original offer (*Hyde v. Wrench,* (1840) 49 ER 132). The Applicant subsequently rejected Roger's counteroffer.
>
> 23. Once a counteroffer has been made, the original offer can no longer be accepted unless the offeror (the Applicant) reaffirms their original offer

(*Livingstone v. Evans*, [1925] 4 DLR 769). The Applicant did not reaffirm their original offer, nor were any further offers made by either party.

24. For these reasons, the Applicant respectfully submits that Rogers did not provide notice within 180 days of December 31, 2012, as per paragraph 3 of the Subject Lease, and so the Subject Lease has lapsed, and has not been renewed.

[17] The renewal letter is set out at Exhibit "F" of the affidavit of Pierre Auger and is as follows:

May 17, 2012

By email and registered mail

Atlantic Star Forestry Ltd.
c/o Wagner Forest NS Management Ltd.
Ian Johnstone, Region Manager
802 Prince Street, Suite 201
Truro, Nova Scotia B2N 1H1

SUBJECT: Lease Agreement – Renewal Notice
Rogers Site: Enfield (A004/ID: 800 03 001)
Site located on Parcel CT-4, Enfield, Hants County, Nova Scotia

Sir:

In conformity with the Amending Agreement entered into on April 7th, 1989 and its subsequent Lease renewal (herein after the "Lease") between Scott Worldwide Inc., now Atlantic Star Forestry Ltd. (the "Landlord") and Cantel Inc., now Rogers Communications Inc. (the "Tenant"), this letter confirms that the Tenant hereby exercises its option to renew the Lease for a five (5) year period starting on January 1, 2013 and ending on December 31st, 2017 at the following term and conditions:

- The annual base rent will be of three thousand five hundred ninety-two dollars and forty-nine cents ($3,592.49), payable in advance in one and only payment, plus applicable taxes.
- The annual additional rent will be of three thousand dollars ($3,000.00) payable by Eastlink, in advance, in one and only payment, plus applicable taxes. All additional rent will stop being

payable and will be pro-rated as of when Eastlink stops its operation and removes its equipment and only the base rent will payable to the Landlord.

- In the event that the Tenant grants a license to another cellular carrier, Tenant shall pay to the Landlord an additional rent of two hundred and fifty dollars ($250.00) payable monthly, for each additional carrier, starting on the first day of the month following the beginning of construction of the additional carrier. All additional rent will stop being payable and will be pro-rated as of when the additional carrier stops its operation and removes its equipment and only the base rent will be payable to the Landlord.

All other terms and conditions of the Lease remain in full force and effect except for what it stipulated in the present letter.

In acceptance of the terms and conditions agreed to herein, please initial, sign and date this agreement, forward one (1) copy by email and/or fax at 514-345-6896 and return two (2) original copies by mail to Maria Luisa Guerra, Real Estate Analyst.

We hope everything is to your satisfaction and we remain,

Yours very truly,

Rogers Communications Inc.

Pierre Auger, B.B.A., C. App.
Manager, Real Estate and Third Party
Eastern Canada

The Landlord hereby accepts the above terms and conditions.

Atlantic Star Forestry Ltd.

By: (sign) ________________
Name: ____________________
Title: _____________________
(Duly authorized to act on behalf of the landlord)

[18] The crux of the dispute between the parties is whether the inclusion by Rogers of the additional rent to compensate for the co-location by Bragg and

others, was a counter-offer, the effect of which was that there was no renewal "on the same terms and conditions" as called for in para. 3 of the subject lease.

[19] Rogers argues that the inclusion of the amount for the co-location did not amount to a counter-offer, but rather it was their right to include these additional conditions as long as they were reasonable.

[20] With respect, I am not satisfied that the lease was renewed as argued by Rogers. Firstly, the right to renew was contained in the original lease at para. 10, and in Article 3 of the renewal lease dated March 4, 1998. The right to renew was conditional on renewing "on the same terms and conditions". Despite these provisions, Rogers added two additional conditions. The purported renewal letter of May 17, 2012 added a provision for additional rent payable by Bragg (Eastlink) for co-location, and an additional provision for rent payable should other cellular carriers receive licenses to erect on the Rogers tower.

[21] The letter of May 17, 2012 provided the lease would only be renewed if Atlantic Star agreed to these new provisions. A plain reading of the purported renewal letter would support this conclusion. It included the following statement just above the signature line for Atlantic Star:

> **The Landlord hereby accepts the above terms and conditions.**

[22] Atlantic Star did not sign the purported renewal letter.

[23] As to the effect of the purported renewal letter, on cross-examination Mr. Johnstone stated as follows:

> Q. Now Mr. Johnstone, when you got this letter from Auger you sought legal advice about it, is that correct?
>
> A. Correct.
>
> Q. And now when you received this you knew Rogers intention in sending you this was to renew the lease? You have disagreed about … you disagree about whether or not they did that but you knew that's what they were trying to do with this document didn't you?
>
> A. And to try and imply new lease rent for co-location. So yes they wanted to renew but on new terms.

[24] I conclude the lease was not renewed as contemplated by the terms of the original lease and its amendment on March 4, 1998. I am satisfied that the May 17, 2012 letter was an offer to renew on new terms and conditions. As I have indicated, this letter contained the original renewal provisions but added two new conditions, one of which provided for rental amounts for the co-location by Bragg, and the other for rental amounts for any other carrier who would obtain co-location rights from Rogers.

[25] I am satisfied the subject lease was not renewed. Therefore, it terminated effective January 1, 2013.

[26] I order Rogers to vacate the subject property within a reasonable time. I am satisfied that a reasonable time would be eight months from the issuance of an order setting out the terms of this decision.

[27] Atlantic Star will also be entitled to the rental rates as set out in the proposed renewal letter, namely $3,592.49 plus HST. They will be entitled to this rental amount from January 1, 2013 to the date of vacating the subject property, however, any amounts of rental paid during this period shall be deducted.

[28] Having determined that there has been no renewal of the lease of the subject lands by Rogers for the period January 1, 2013 to December 31, 2017, the question then becomes whether Atlantic Star is entitled to damages for Rogers allowing Bragg to co-locate.

Issue 2 – Is Atlantic Star entitled to damages for the co-location of Eastlink?

(i) Did Rogers breach the subject lease?

(ii) Did Atlantic Star unreasonably withhold consent to the proposed co-location?

(iii) If the subject lease was breached, what is the appropriate damage award?

<u>Analysis:</u>

(i) Did Rogers breach the subject lease?

[29] Atlantic Star seeks damages against Rogers on the basis of breach of contract, breach of duty of good faith and trespass to the subject property.

[30] Atlantic Star submits that Rogers intentionally allowed Bragg to co-locate on the subject property beginning in 2009 and that Rogers had no authority in contract or equity to allow this co-location. Atlantic Star says it received no notice or compensation for the co-location.

[31] Atlantic Star argued that because of Rogers's breach of this contractual provision, it was deprived of its right to benefit from the co-location on the subject property. As a result, Atlantic Star argues that it is entitled to general damages from Rogers for obtaining a benefit from co-location on the subject property, and special damages as compensation for rent payable to Atlantic Star by Rogers from the date of the co-location.

[32] The position of Rogers is that while it sought consent of Atlantic Star to provide a co-location license to Bragg, this was not required.

[33] Initially the parties agreed that Article 12(b) was the provision in the lease governing this issue. At trial the parties' positions changed. Rogers argues that Article 12(b) is premised on the lease being assigned or sublet. Rogers submits that it did not assign the lease, nor did it sublet. Rogers argues that it and Bragg merely entered into a license agreement, with no transfer of possession as would occur with a sublet, and no transfer of the obligations of the lease to another party as would be the case with an assignment. Atlantic Star agrees with Rogers's position that there was no sub-let or assignment and that Bragg was given a license which was not caught by Article 12(b) of the lease. I agree.

[34] The head lease is still between Rogers and Atlantic Star. There was no assignment or sub-let of that lease.

[35] On cross-examination Mr. Auger agreed substantially with this conclusion:

> Q. You'll agree with me that nowhere in this lease did the landlord grant permission to the tenant to share the property with others? Correct?
>
> A. Ah… I can see Article 12(b), that a tenant shall assign or sub-let this lease with the written consent of the landlord being … having end up paying, which consent shall not be unreasonably withheld.
>
> Q. Correct. And you agree with me that the deals with sub-letting or assignment doesn't it?

A. Yep.

Q. It doesn't deal with licensing does it?

A. Yes, correct.

Q. What's that?

A. Correct.

Q. Okay and it doesn't deal with sharing does it?

A. Correct.

[36] I conclude that Article 12(b) of the lease does not apply to the facts before me and, therefore, the issue as to whether Atlantic Star unreasonably withheld consent is not relevant. What is relevant is whether under the lease Rogers had authority to grant the license to Bragg to co-locate. For the reasons which follow, I am not satisfied it did.

[37] Rogers argues there is nothing in the lease to prevent it from allowing Bragg to co-locate. With respect, the rights respecting its occupation of these lands were clearly set out in the lease document. Under the January 25, 1988 lease, Rogers was given the authority to:

> 5. (a) to erect, operate and maintain, at its own expense, a 400 foot tower with transmitting and receiving antennas on a portion of the LANDLORD'S property approximately 500 foot depth as more particularly described in Schedule "A" attached hereto on which the TENANT would erect, at his own expense, a building to house the electronic equipment used in association with the transmitting and receiving antennas;
>
> (b) to cause to be installed such equipment, hydro and telephone lines as may be necessary for the operation of the said transmitting and receiving antennas, all of which equipment, antennas, hydro, and telephone lines and any appurtenant fittings are hereinafter called "the equipment" and;
>
> (c) to enter upon the premises at all reasonable times for the purpose of the installation, operation and maintenance of the said equipment and/or tower.

[38] It is clear that what is granted to the tenant (Rogers) is the right to erect, maintain and operate a telecommunications tower and to enter upon the premises to install, operate and maintain the said equipment and/or tower. Rogers's rights of

possession are clearly defined in s. 5(c). There is no reference to any right to allow third parties to co-locate on the property.

[39] The parties appear to agree that any right granted in this lease must be found in the four corners of the document, failing which the court can look to the dealings of the parties.

[40] While it is not necessary to my interpretation of the lease, I note that Rogers sought permission from Atlantic Star to co-locate Bragg, which in my view, supports Atlantic Star's argument that co-location and licensing were not permitted under the lease.

[41] I am satisfied that Rogers had no authority to allow Bragg to co-locate. Accordingly, Atlantic Star is entitled to damages.

What are the appropriate damages?

[42] Atlantic Star seeks damages of $25,000 for each year of the co-location by Bragg. Rogers suggests $3,000 is a more appropriate amount.

[43] Atlantic Star's basis for asserting that $25,000 is the fair market value for rental is that this is the amount reflected in the most recent negotiations between it and Rogers. For example, in an email from Ian Johnstone to Maria Luisa Guerra of Rogers dated March 20, 2012, a proposal was provided for payment in the following amounts:

1. Year one to five - $25,000.
2. Year six to ten - $27,500.
3. Year eleven to fifteen - $30,250.
4. Year sixteen to twenty - $33,275.

[44] The proposal also allowed Rogers to add additional carriers. Ms. Guerra replied on March 28, 2012 proposing the following amounts:

1. The first term of five years - $20,000.
2. Second term of five years - $22,000.
3. Third term of five years - $24,000.
4. Fourth term of five years - $26,000.

[45] I am not satisfied that these higher amounts are reflective of market value for the rights that Rogers sought. These offers were made in the context of Rogers seeking a renewal for a further 20-year period. In addition, it appears other carriers would be allowed to use the tower and install equipment on Rogers's tower without Atlantic Star's consent.

[46] I am satisfied that $3,000 per year would be a more appropriate amount. It must be remembered that initially Mr. MacKinnon, on behalf of Atlantic Star, offered a rental amount of $2,000 per year, although it was not accepted by Rogers.

[47] Martin Briere in his affidavit provided a summary of the amounts for co-location being paid by Bragg (Eastlink) on other sites:

> 14. For the Enfield site, Eastlink would not under normal circumstances agree to a head agreement fee. However, following discussions with Greg Leonard, I authorized him to agree to a head agreement fee of $3,000 to facilitate Rogers' lease renewal with the Applicant despite the fact that there was no business case for Bragg to be on the Enfield Tower with such a large head agreement fee given the limited rural customer base being served by the tower (approximately 41 customers).
>
> 15. I approved the $3,000 fee for Enfield at that time only because Bragg was attempting to negotiate co-location at another Rogers' site owned by the Applicant at Mount Uniacke that was critical to our unrelated cellular wireless business. Ultimately, the Applicant requested a commercially unreasonable head agreement fee for the Mount Uniacke site as well, so Bragg found an alternative to the Mount Uniacke site and ceased co-location negotiations for that site.
>
> 16. When Rogers later requested that Bragg agree to head agreement fee over and above $3,000, that request was refused on the basis that there was no business case for Bragg to be on the Enfield Tower at such a rate. Attached hereto and marked as Exhibit "E" is a true copy of an email exchange between Greg Leonard (Bragg), Kathleen Giraudel (Rogers) and myself through November 2012.
>
> 17. Since becoming operational on the Enfield Tower, Bragg has reached the Offer to Share stage with Rogers on fifty-nine (59) sites in the Maritimes for our separate cellular wireless operations. Despite the profitability of cellular wireless sites compared to BRNS sites, of those fifty-nine cellular sites:
>
> (a) Fifty-two (52) sites have no head agreement fees;

(b) Four (4) sites have head agreement fees of $1200.00 or less/year; and

(c) Only three (3) sites have head agreement fees of more than $3000.00 annually, all of which are in and around the metro Halifax area. One of those sites is owned by the Applicant.

18. The Applicant is the only landlord for whom Rogers has requested that Eastlink pay a head agreement fee of more than $4000.00.

19. Bragg's experience with other wireless service providers (and with its own landowners) for cellular wireless site is that most do not request head agreement fees, a few request minimal fees, a very few request head agreement fees above $3,000.00, and only on extremely rare occasions are head agreement fees in excess of $3,500.00 sought.

[48] Clearly, a compensation amount for damages in the amount of $3,000 is more reflective of the market value.

[49] I award general damages to Atlantic Star, payable by Rogers, in the amount of $3,000 yearly, from the date of co-location to the date of Rogers's removal of its tower on the Atlantic Star site.

Issue 3 – Is Atlantic Star entitled to an award of punitive damages as a result of the secretive co-location of Eastlink?

[50] In his affidavit, Ian Johnston states, at paras. 15 and 17:

> 15. During a telephone conversation with Maria Luisa Guerra from Rogers on February 12, 2012, I was surprized[sic] to learn the Rogers had allowed Bragg to co-locate (install equipment on the tower and use the Subject Property) on Rogers's tower on the Subject Property since 2009. The Applicant had no prior knowledge of this co-location and had no[sic] consented to this. A *true copy of the communications between Atlantic Star and Bragg are attached to this affidavit as Exhibit "14".*
>
> 17. Following the commencement of the present proceeding, I received through legal counsel a copy of the Rogers-Bragg agreement. The agreement requires Bragg to not speak with the landlord (the Applicant). *A true copy of the email with the Rogers-Bragg agreement is attached to this affidavit as Exhibit "16".*

[51] At paras. 52, 53 and 54, of their pre-trial submission, Atlantic Star sets out the applicable law:

> 52. The law surrounding punitive damages was reviewed in the leading Supreme Court of Canada case, *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 [*Whiten]* and its companion case, *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.,* 2002 SCC 19 [*Sylvan Lake].*
>
> 53. At paragraph 36 of *Whiten,* Binnie J. stated:
>
> > 36 Punitive damages are awarded against a defendant in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency': *Hill v. Church of Scientology of Toronto …* the test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour.
>
> 54. The three objectives of punitive damages were also restated in *Whiten* at paragraph 43, as "retribution, deterrence and denunciation".

[52] Atlantic Star asserts that the conduct of Rogers is such as to give rise to punitive damages. It submits that Rogers was intentionally deceitful and oppressive in granting the co-location license to Bragg when it knew it had no authority to do so. Atlantic Star also alleges that Rogers surreptitiously and deliberately concealed the license. Atlantic Star was not aware of the co-location until February 12, 2012. When Atlantic Star became aware of the co-location agreement, it asked for a copy of the agreement between Rogers and Bragg, and Rogers refused.

[53] It was only after the commencement of the present proceedings, according to Atlantic Star, that it received a copy of this agreement. One of the terms of that agreement was that Bragg not speak with Atlantic Star. Atlantic Star submits that this illustrates a conscious and deliberate course of conduct to deceive Atlantic Star and to conceal its own bad faith.

[54] In S.M. Waddams, *The Law of Damages,* (Toronto: Canada Law Book, looseleaf) at 11.210, the conduct required for punitive damages is described as follows:

> The kind of conduct that attracts punitive damages has been described with a wide variety of colourful words and phrases. These include malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal, grossly fraudulent, evil, outrageous, egregious, callous, disgraceful, wilful, wanton, in contumelious disregard of the plaintiff's rights, or in disregard of "ordinary standards of morality or decent conduct."

[55] I am not satisfied that this case is one where punitive damages are appropriate. While I do not condone the actions of Rogers, it is clear on the facts that Rogers did seek the landlord's consent for the co-location of Bragg on the tower. Mr. Cliché described during cross-examination that Rogers was under pressure at the time from Bragg and, believing they were headed to an agreement on consent, Bragg was allowed to co-locate.

[56] As to the issue of the agreement between Bragg and Rogers not to disclose any information about their co-location to Atlantic Star, there was evidence from Rogers that there are similar provisions in all of its agreements, similar to the one here between Bragg and Atlantic Star. I am not satisfied that punitive damages are appropriate in the circumstances.

[57] In summary, I order the following:

1. That the subject lease is terminated effective January 1, 2013.
2. That the subject property be vacated within a period of eight months from the date of the order issued in respect of this matter.
3. That Rogers must restore the property to its original condition within the same time period.
4. That Rogers must pay as damages to Atlantic Star the sum of $3,000 for each year for the co-location of Bragg on the Rogers tower from the date of co-location until the property is vacated.

[58] I will hear the parties as to costs.

Pickup, J.