

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Cornwallis Park Development Association v. Baird, 2002 NSSC 92]

BETWEEN:

CORNWALLIS PARK DEVELOPMENT ASSOCIATION

PLAINTIFF

- and -

ROBERT BAIRD AND JUDY BAIRD

DEFENDANTS

- and -

MYBA ENTERPRISES LIMITED

PLAINTIFF BY COUNTERCLAIM

D E C I S I O N

HEARD: At Annapolis Royal, Nova Scotia on October 31 and November 1, 2001.

BEFORE: The Honourable Justice Allan P. Boudreau.

DECISION: April 9, 2002

COUNSEL: John H. Armstrong, Esq.,
Counsel for the Plaintiff.

Ronald D. Richter, Esq.,
Counsel for the Defendants and Plaintiff by Counterclaim

Boudreau, J.

INTRODUCTION:

[1] This case involves counter suits by the parties over the lease of an unsuccessful restaurant operation in Cornwallis Park. The disputes pertain primarily to the alleged failure of the Bairds to pay the electrical power for the restaurant and the opening of a pizza business in the same mall as the Baird's restaurant. The Bairds claim Cornwallis Park failed to install a separate electrical meter for the restaurant and permitted the opening of a competing food service business contrary to the agreements made at the time of entering into the lease.

FACTS:

[2] Cornwallis Park Development Association ("Cornwallis Park") is the corporate body created to oversee and manage the rejuvenation of the largely vacated Armed Forces Basic Training Base at Cornwallis, Nova Scotia. It has carried on business under the names of "Cornwallis Park Development Agency" and "Kespuwick Development". Its mandate has been the sale and transfer of many of the Base's assets, primarily lands and buildings. It oversaw the sale of homes owned by the military and the revival of the former DND Cannex building, which became the Cornwallis Park Mall.

[3] The Base continues to accommodate cadets and cadet leaders and instructors during the late spring and summer and it is also home to the Pearson Peacekeeping Centre. The sale of homes went more quickly than anticipated, putting pressure on Cornwallis Park to attract local private businesses to service this partly military and partly civilian community. Of particular significance was the former Cannex building, renamed

Cornwallis Park Mall. It had been identified as needing a grocery store and a restaurant, among other services.

[4] Robert and Judy Baird personally, and through their company, MYBA Enterprises Limited, had operated an "Irving Big Stop" type operation in Digby for some eight years. They had ceased that operation some time prior to becoming aware of a possible opportunity for a restaurant in the Cornwallis Park Mall. The Bairds first learned of this opportunity during the latter part of February, 1998. Mr. Baird telephoned Marc Phillips who was then the Business Development Manager and the Mall Manager for Cornwallis Park.

[5] The Bairds met with Mr. Phillips the next day to commence their inquiry into the feasibility of establishing a restaurant in the Mall. They were shown the Mall facilities at that time. There had been a previous restaurant/cafeteria operation at that location and there was quite a bit of equipment already in place, albeit somewhat dated and, as it turned out, not very efficient. It was at the second meeting with Mr. Phillips that the Bairds were provided with a copy of the study or analysis of Cornwallis Park Village and the "Proposal Requirements" which are found at tabs 1 and 2 of exhibit 1. The Bairds take no issue with the contents of those documents.

[6] The Bairds have testified they had numerous discussions with Mr. Phillips before signing the lease, but, of the two, Mrs. Baird was the one most involved in the business end of things as she was the business manager of the proposed operation and of the resulting restaurant business. Mrs. Baird has testified that she asked Mr. Phillips at least three

times if a competing restaurant, eating or food service would be permitted in the Mall and that she was assured it would not. She stated emphatically, as did Mr. Baird, that Mr. Phillip's reply was "none, not even a chip wagon". The Bairds have testified they relied on Mr. Phillips representations and assurances in this regard in order to enter into the Lease Agreement. The lease, which is found at tab 5 of exhibit 1 is silent on the non-competition issue.

[7] Mr. Phillips denies making the guarantee or representations alleged by the Bairds. He testified that the most he said, or would have had the authority to say, was that he would not recommend another full service restaurant. He said this was because all proposals for new businesses in the Mall had to be approved by the Board of Cornwallis Park. The procedure was that proposals were first submitted to Mr. Phillips who then passed them on to his superior, Tom Bell. If a proposal was acceptable, Mr. Phillips and Mr. Bell would then recommend it to the Board for formal approval.

[8] I am satisfied and find that Mr. Phillips did make the representations alleged by the Bairds and that he did not tell them he did not have the authority to go that far. I also find that the Bairds relied on those representations in order to enter into the lease. I accept the Baird's evidence in this regard over that of Mr. Phillips for a number of reasons. They appear to have a clearer recollection of what transpired. Mr. Phillips testified that it was Mr. Bell who brought the Bairds to him; whereas the evidence of the Bairds, which I accept, is that it was Mr. Baird who telephoned Mr. Phillips to arrange a meeting. They did not meet Mr. Bell until some time later. Moreover, Mr. Phillips testified that because the homes in the Park had sold much more quickly than anticipated, they were very anxious to attract

service businesses to the Park. Also, the Bairds naturally had the very serious concern of future competition, even though they failed to have this protection inserted in the lease. They said they took Mr. Phillips at his word. Mr. Phillips was the agent of Cornwallis Park with the apparent authority to make those representations.

[9] The Bairds submitted a business proposal which was recommended to the Board by Mr. Phillips and Mr. Bell. That business proposal contained the revenue and expenses predicted or hoped for by the Bairds and is found at tab 4 of exhibit 1. It forecast gross sales of \$420,000.00 for the first year of operation with profits before tax of \$14,832.00. Included in the expenses was a projected annual expense for electricity of \$26,400.00, (an average of \$2,200.00 per month). This estimate was based on the Bairds experience in the restaurant business on projected annual gross revenues of \$420,000.00. However, Schedule "C" of the lease dated March 12, 1998 found at tab 5 of exhibit 1 provides that the electricity to the restaurant (store) would be separately metered. Cornwallis Park agrees it was its responsibility to have this done and that it failed to have this done.

[10] The Bairds commenced their full service restaurant on April 8, 1998. The restaurant also had a cafeteria aspect and it occupied and paid for the space indicated on Schedule "A" of tab 5. The cafeteria and its seating space were outside the liquor licensed restaurant area because the under age cadets were not to be served in liquor licensed premises. There was a significant demand for pizzas, especially by the cadets during the summer months, and the Bairds provided a full pizza service during that time, including delivery. Pizzas were also a menu item in the restaurant. The Bairds have testified that a significant portion of their business came from the sale of pizzas, especially during the summer

months. However, they scaled down the pizza service, hours and delivery, during the off season because of the lower demand. The Bairds testified they never abandoned the pizza service and that they had full intention of continuing with it and to meet seasonal demand and I accept their testimony on this point.

[11] As it often turns out in these new ventures, sales projections and anticipated profits were not met during the first year. The Bairds were having cash flow problems, particularly in 1999. They were having difficulty paying the rent and the electrical bills being assessed to them. The Bairds are contesting the monthly electrical bill assessed to their restaurant and leased premises. They claim it is excessive for that type of an operation. This is in spite of the fact they were being assessed \$1,642.00 plus H.S.T. of \$246.30 for a total of \$1,888.30 per month, some 14% less than the \$2,200.00 monthly average forecast in their proposal. The Bairds had paid the \$1,888.30 per month from April 1998 to approximately May of 1999 without any protest even though the electricity for the restaurant was never separately metered as agreed in the lease. In fact, the monthly amount of electricity was never made a significant issue until the present court action. Cornwallis Park had attempted to have the electricity usage by the restaurant tested and it showed the actual usage was significantly more than the Bairds were being assessed. Cornwallis Park has also tendered actual electrical bills for the present pizza/restaurant operation to show the assessment to the Bairds was reasonable. On the other hand, the Bairds have attempted to show from their previous experience at the Irving restaurant and from another somewhat similar restaurant operation that the usage should have been less than they were being assessed. It certainly appears that the equipment being used by the Bairds was old and inefficient as far as electrical usage was concerned. In the final analysis, the evidence is

inconclusive as to the actual electrical usage of the Baird's restaurant. The Bairds have taken the position that they should not be responsible for any unpaid electricity charges because Cornwallis Park failed to separately meter their usage as required by the lease.

[12] There is also an issue regarding the renovation work required under the lease. This is outlined in schedule "D" to tab 5 of exhibit 1. The Lessor, Cornwallis Park, did not perform all the work listed under "Lessor to do" and it was agreed that this work would be completed by the Bairds and they would get a \$3,000.00 allowance or credit in return. As it turned out the existing Co2 system was not up to regulation and it could not simply be recharged as anticipated. A new system had to be installed at a cost of approximately \$2,700.00, rather than a cost of approximately \$1,000.00 for recharging the system. Cornwallis Park paid the \$2,700.00 and deducted this amount from the \$3,000.00 credit agreed for the Schedule D work performed by the Bairds. As a result, the Bairds were paid \$300.00 only. They now claim the \$2,700.00 they were not paid because of the deductioun for the replacement of the Co2 system.

[13] The Bairds also claim lost revenues or profits as a result of the opening of a competing pizza business in the Cornwallis Park Mall. By December of 1998 Mr. Phillips had been replaced by Theresa Brickland as manager of the Mall. There were discussions between the Bairds and Ms. Brickland commencing in early 1999 regarding the restaurant's financial difficulties and these continued sporadically throughout the spring of 1999. While the possibility of a revised proposal from the Bairds was discussed, the Bairds did not submit a formal revised proposal to Ms. Brickland for the Board's consideration.

[14] It was during the spring of 1999 that Ms. Brickland received a proposal for a new retail pizza business in the Mall. Ms. Brickland testified she did not consider a new pizza and donair business in the Mall, next door to the Baird's restaurant, as direct competition. She said she considered it "healthy competition" only. Ms. Brickland testified that the Bairds expressed serious concern when she told them about the new pizza business. She said they told her it would "run them out of business". Ms. Brickland said she "did what she thought best for the Mall and the Park" and that she did not believe Mr. Phillips had made any promises to the Bairds.

[15] The new pizzeria opened in mid May of 1999. Ms. Brickland stated that the new pizzeria only had one table for customers to sit at while waiting; however, there were many tables in the adjacent open area which was being rented by the Bairds. In fact this became a problem and source of contention because the pizzeria clientele was using the tables situated in the Bairds' rented space.

[16] The Bairds testified their pizza sales were significantly reduced as a result of the competing pizzeria. Overall sales would also be affected because there was a finite clientele for meals, lunch or dinner, from the community being served by the Baird's restaurant and the new pizzeria. A meal served by the pizzeria would be a meal not served by the Baird's restaurant, and *vice versa*.

[17] The Bairds have presented evidence attempting to quantify the income lost as a result of the competing pizzeria. Mrs. Baird testified that the sale of pizzas alone was down by 50% during the summer of 1999 and that they had tried to offset that somewhat by

adding “munchie platters” to their menu. Mrs. Baird also stated that when she expressed her concern to Ms. Brickland, Ms. Brickland responded that the Bairds “should not be selling pizza in any event because theirs was a family restaurant”.

[18] The Bairds have filed a statement comparing the revenues and expenses for the months of April to August of 1998 with the same months of 1999 (exhibit 10). Mrs. Baird testified that the large part of the drop in sales for June of 1999 was as a result of the new pizzeria competition. However, on cross-examination Mrs. Baird acknowledged there were no separate records of pizza sales, as this was not part of their accounting procedures. But it should be remembered that sales in general would be affected. The defendant points out that the restaurant’s net loss for the total months compared in exhibit 10 was better in 1999 than 1998. But is this necessarily fatal to the Bairds’ claim? In my view, one cannot simply look at the bottom line in isolation. Sales and revenues must be considered because those are the figures that were primarily affected. It was not just pizza sales that would be affected as noted in paragraph [16] above.

ANALYSIS:

(a) Rent

[19] There is no dispute that the rent for September 1999 in the amount of \$2,530.23 plus HST of \$379.53 for a total of \$2,909.78 remains unpaid. This portion of the plaintiff’s claim is therefore allowed.

(b) Electricity

[20] I find that the amount of monthly electricity, being \$1,888.30 (including HST), assessed and billed to the Bairds is due and payable by agreement of the parties. The Bairds accepted this amount as fair and reasonable and had paid it until May of 1999. The evidence does not establish that this amount was an unreasonable assessment for the Bairds' electricity usage. On the contrary, the evidence points to the fact that this amount was a reasonable assessment which the Bairds had accepted and agreed to pay. This is supported by both the plaintiff's and the defendant's evidence on this issue. In all probability, the actual electricity usage of the Bairds' restaurant appears to have been significantly higher than the amount agreed upon by the parties. The fact the electricity supplied to the Bairds' restaurant was not separately metered as required by the lease does not relieve the Bairds of their obligation to pay for electricity. The Bairds acquiesced in this arrangement for many months and paid the agreed upon assessment. The Bairds did not make this a significant issue until the present proceeding.

[21] I therefore find that the Bairds are obligated to pay Cornwallis Park the total of the unpaid electricity assessments for the months of May 1999 to September of 1999; i.e., 5 months, for a total of \$9,441.50.

(c) Unpaid Food Catering

[22] The Bairds had made a counterclaim for food catering provided to and unpaid for by Cornwallis Park. The amount originally claimed by the Bairds was \$1,150.00 but the evidence establishes that the invoice to Kespwick Development (exhibit 9) was in the amount of \$1,118.17. This amount has been acknowledged as unpaid by Cornwallis Park,

but in fairness, it was being considered all along in its claim calculation as a credit to the Bairds. This can be seen from exhibit 3. Therefore, the Bairds are awarded the sum of \$1,118.17 in order to complete the accounting for this proceeding.

(d) Renovation Allowance

[23] As stated previously, the Bairds have claimed they are owed \$2,700.00, being the unpaid portion of the renovation work which was the responsibility of Cornwallis Park, but which they performed. The Bairds had originally received an allowance of \$3,000.00 for this work, but Cornwallis Park deducted \$2,700.00 for its cost of replacing the Co2 system. I find that it was the Bairds' responsibility under the lease to charge the existing Co2 system and no more. On the evidence presented, this cost would have been approximately \$1,000.00. I find it was the responsibility of Cornwallis Park to provide the rented premises with a functional and chargeable Co2 system. They were impliedly obliged to do so under the lease. The Bairds costs should have been \$1,000.00 and no more. The remainder of the \$2,700.00 costs of replacing the entire system is the responsibility of Cornwallis Park. I therefore award the Bairds the sum of \$1,700.00 still owing to them under their \$3,000.00 renovation allowance.

(e) Loss of past Income or profits

[24] As mentioned earlier, the Bairds have claimed lost past income alleging Cornwallis Park permitted a competing food service to open in the Cornwallis Park Mall contrary to the leasing agreement and therefore caused a loss of income. I have found that Cornwallis Park, through its ostensible agent, Marc Phillips, agreed with and promised to the Bairds that no competing food service would be allowed in the Mall. I have also found he had the

apparent authority to do so and that he did not qualify his promise or representation in any meaningful way. I find that the Bairds relied on this promise or representation. This was a promise or collateral agreement for which the Bairds agreed to open a restaurant in the Mall and is enforceable and binding on Cornwallis Park.

[25] Ms. Brickland conveniently and inappropriately disregarded the Bairds' position and protests. As she said, she used only her opinion as to what may be direct competition, but I found her views very one sided. She called the new pizzeria "healthy competition" and in the end stated she did what she "thought in the best interest of the Mall", not the Bairds. This was most likely because she did not believe that Mr. Phillips had made the promises or representations which I have found he did make to the Bairds.

[26] In the result, I find that Cornwallis Park broke its agreement with the Bairds by permitting the opening of the new pizzeria. This new business was in significant competition with the Bairds' cafeteria and restaurant business. I find that a significant portion of the Bairds' May to August of 1999 clientele was affected, primarily, but not restricted to the pizza side of their business. I find that Cornwallis Park is, because of the breach of its agreement, liable to the Bairds for a portion of income lost during the period May 16 to August 31, 1999.

[27] The question then is, what income loss have the Bairds proven, on a balance of probabilities, was caused by the plaintiff's breach? The Bairds have provided exhibit 10 as a calculation of the business' lost gross revenues from April to August of 1999, inclusive. It should be noted that the new pizzeria did not open until May 16, 1999. Therefore, if one

takes only one half of the decline in gross revenues for May of 1999, this amounts to \$6,366.54. The decline in gross revenues for the months of June to August of 1999 is as follows:

June	\$ 14,197.60
July	4,050.71
August	<u>3,030.54</u>
Total	\$ 21,278.85
Add ½ of May, 1999	<u>6,366.54</u>
Total Decline in Revenues	<u>\$ 27,645.39</u>

Mrs. Baird testified that their pizza business alone was down approximately 50% in the summer of 1999. She also testified that the large part of the drop in revenue in June of 1999 was due to the new pizzeria competition because that is a busy month due to the preparation for cadet camps. I accept her testimony in this regard because she was very involved in the daily management of the business.

[28] I am satisfied and find on a balance of probabilities that at least 50% of the drop in the Bairds' restaurant business and gross revenue was due to the new pizzeria competition. I therefore attribute 50% of the total decline in gross revenues for the period May 16 to August 31, 1999 to this competition. That is 50% of \$27,645.39 for a net reduction of \$13,822.69. Mrs. Baird has also testified that their food cost was 35% of gross sales or gross revenues. I therefore reduce the net reduction in revenues of \$13,822.69 by a further \$4,837.94 for a net loss of revenue or sales of \$8,984.95. I find that the Bairds have proven that the breach of their agreement and understanding by Cornwallis Park has caused them a direct loss of \$8,984.95. I therefore award them this amount.

(f) Loss of Future Income

[29] I am not satisfied that the Bairds have proven a loss of future income because of the breach. The Bairds found themselves with an unprofitable restaurant operation and I am not satisfied it would have been profitable during the term of the lease. The most likely or probable scenario is that the Bairds saw an opportunity in September of 1999 to cut their losses, and they did. The claim for loss of future profits is therefore dismissed.

CONCLUSION:

[30] In summary, I have awarded Cornwallis Park the following:

(a)	Unpaid rent	\$ 2,909.78
(b)	Unpaid electricity	<u>\$ 9,441.50</u>
	<u>Total</u>	<u>\$ 12,351.28</u>

[31] I have awarded the Bairds and MYBA Enterprises the following:

(c)	Unpaid food catering	\$ 1,118.17
(d)	Unpaid renovation allowance	\$ 1,700.00
(e)	Loss of past income	<u>\$ 8,984.95</u>
	<u>Total</u>	<u>\$ 11,803.12</u>

[32] I am not allowing any interest on the claim or the counterclaim because they are just about equal.

[33] Cornwallis Park shall therefore have judgment against the Bairds in the net amount of \$548.16. If the parties cannot agree on the question of costs they may make submissions to the court in writing on or before April 26, 2002.

[34] An order will issue accordingly, prepared by counsel for Cornwallis Park and consented as to form by counsel for the Bairds.

Boudreau, J.