

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Bread Works Inc. v. Tan Coffee, 2014 NSSM 66

Claim No: SCK 423199

BETWEEN:

Name Bread Works Inc. **Claimant**
Address c/o Andrew Montgomery
Taylor, MacLellan Cochrane
50 Commercial Street
Kentville, NS B4N 2E4
Phone (902) 678-6156

Name 3224556 Nova Scotia Limited o/a Tan Coffee **Defendant**
Address c/o Tim Peacock
Kimball Brogan
121 Front Street
Wolfville, NS B4P 1A6
Phone (902) 542-5757

Andrew Montgomery appeared for the Claimant;

Tim Peacock appeared for the Defendant;

DECISION

This is a claim arising out of the purchase and sale of business assets and the sub-lease of commercial property. Specifically, the Defendant, Bread Works Inc. ("Bread Works") was the tenant and occupier of a food service business located at 395 Main Street in Kentville. The Defendant, 3224556 Nova Scotia Limited, operating as Tan Coffee (the Defendant is hereafter referred to as "Tan Coffee"), agreed to sublet the premises and either purchase or rent the equipment. Initially, the matter also included a claim against the principal owner of the Defendant, Mr. Lay Yong Tan. However, when the Claimant filed its Amended Notice of Claim, the claim against Mr. Tan was deleted as it is clear he was neither a party to the contracts in his personal capacity, nor a guarantor.

I note that this decision has been filed beyond the sixty days required by the *Small Claims Court Act*. The particular time line has been held to be directory rather than mandatory, as noted most recently by the Supreme Court of Nova Scotia in *Towle v. Samad*, 2013 NSSC 260.

Nevertheless, the parties and their counsel have doubtlessly been anticipating this decision. Their patience has been greatly appreciated.

Facts

On March 11, 2011 the parties both signed a document entitled, "Offer to Sub-lease and Interim Agreement." The document created a sublease between Bread Works and Tan Coffee. The demised premises were 395 Main St., Kentville, Nova Scotia. The agreement addressed two matters, subletting of the premises and the purchase (and allegedly leasing) of all trade equipment. There were also several items being leased by Bread Works from other companies. These were included in a separate schedule but that issue is not a matter for this hearing. The Defendant was required to pay \$844 per month for six months, commencing March 1, 2011. Thereafter, the Defendant was to pay \$4000 for a period of 60 months, commencing September 1, 2001.

Due to apparent financing difficulties experienced by the Defendant, none of the equipment payments were ever made. The terms of the original purchase were renegotiated while Tan Coffee continued to operate its business at the premises. A new agreement was signed on February 15, 2013. This agreement provided that the purchase price for the assets and equipment and leasehold improvements would total \$100,000. Only a partial copy was in evidence, as the copy tendered was only a photocopy with a Post-It note covering a portion of the financial terms. It appears that \$90,000 was payable by certified cheque with the balance payable by promissory note and post dated cheques. The agreement was conditional upon the landlord, D. M. Reid Jewellers Limited, releasing Tan Coffee from its obligations under the lease. This consent was granted.

Once again, the new agreement was not able to be completed. As a result, a subsequent agreement was negotiated, with Tan Coffee vacating the premises. This document was tendered into evidence and is the subject of the dispute in this matter. It was executed on May 31, 2013, and is referred throughout as either "the settlement agreement" or "the release".

When the Defendant vacated the premises, the Claimant's representatives examined the equipment. They allege certain items were missing and, consequently, they feel they are entitled to reimbursement for their replacement value. More significantly, they are seeking payment for alleged monthly rent payable under the first agreement, namely, \$844 per month over a period of 22 months. The Defendant disputes that there is any amount payable, submitting the release was a release of all obligations. They further allege no equipment was missing and, if so, the amount claimed was excessive.

For the reasons that follow, I find the Claimant has proven a claim for the fair market value of some of the equipment together with the replacement cost of their rental telephone.

Issue

How much is owed by the Defendant to the Claimant as a result of this agreement?

The Evidence

This issue in this matter focuses on the terms of the release. Specifically, the parties agree that it is the first two of the three documents were not completed. Both parties were represented by counsel for the settlement. Aside from the invoices for the purchase of their equipment which is purportedly lost, no additional documentation was tendered into evidence.

The Claimant's evidence consisted of the testimony of Brian and John Fitzgerald. In order to prevent ambiguity in writing this decision, I have found it necessary to dispense with the usual formal courtesy and refer to each gentleman by their first names.

Brian Edward Fitzgerald

Brian Edward Fitzgerald ("Brian") is the principal owner of the Claimant, Bread Works Inc. He met with Mr. Tan in 2011 to discuss subletting the premises. He tendered into evidence the "Offer to Sublease and Interim Purchase. He confirmed the agreement was for a rental of \$844 per month for six months use of the equipment, followed by \$4000 per month for five years. No funds were ever received from the Defendant toward the purchase of the equipment. Consequently, the parties agreed to renegotiate the amount to \$100,000.

He noted that by the end of the lease, there were 23 months of used leaseholds. The parties renegotiated the agreement and signed the release in May 2013. It is his evidence that the inventory was to be returned. When it was, he noticed a significant amount of the inventory was not returned. He identified the spreadsheet and invoices in support of this claim. He testified that the total amount is \$5846.13 which was the purchase price of the items.

He visited the new location of Tan Coffee to attempt to locate the missing equipment. When he attended initially, the woman at the restaurant refused them access. Eventually, they had an opportunity to examine the premises with Mr. Tan present. Some items were located and returned while others remain missing.

Under cross examination, he acknowledged that he understood what he was signing when the documents were executed. He was aware Mr. Tan needed to obtain financing. There was no reference in the agreements to inventory. He acknowledged he only examined the premises at Tan's location in Windsor.

John Dermot Fitzgerald

John Dermot Fitzgerald ("John") works for Paddy's Pub and Rosie's Restaurant in Kentville. He assists Brian in some of the operations of Bread Works. He testified to examining Bread Works' records and identified several items which were purchased and missing from the new inventory. He attended with a Bread Works employee to the new Tan Coffee location in Windsor to identify any items and several were found. He prepared a spreadsheet supported by invoices for this

claim. The list contains 120 items which runs the gamut from large to small items. The costliest claim is for 18 chairs valued at \$100 each for a total of \$1800, the smallest being a spatula for \$1.19. John acknowledged he could not locate an invoice for the chairs. He testified the values given were replacement costs.

Lay Yong Tan

Mr. Tan is the principal owner of Tan Coffee. He testified to signing both agreements and found the sum of \$4000 per month to be unworkable. The parties renegotiated and he accepted the sum of \$100,000 and the second agreement was signed. Mr. Tan testified that this proved “unworkable”. The parties renegotiated an agreement for the payment of property taxes and a full release. They had located a new tenant for the premises and he was released from his obligations. He testified that he did not remove any chairs or wood shelving, although several smaller items were found at Tan Coffee. He was not careful to inventory the items when he moved. He testified that he had not received notice of any issues until he received the documents from Small Claims Court.

The Documents

I have quoted below several of the key portions of the documents signed on May 11, 2011 and the Release of May 31, 2013. It is to be noted that each party was represented by counsel. Neither party is alleging *non est factum* or other legal principle to set the agreements aside.

Offer to Sub-Lease and Interim Agreement

The agreement appears to have been brokered by Chambers Developments Inc. and the document prepared by them.

As noted at the outset of this decision, the agreement provides the following obligations for payment, which I have detailed below:

Rent - \$12 per square foot per month + “Tenant’s Share of Realty Taxes” + Tenant’s share of operating costs + “Business Taxes”

Deposit - \$2653

The equipment is addressed under the following paragraph:

”PURCHASE OF TRADE EQUIPMENT

The sub-Tenant agrees to purchase all trade equipment from the Tenant as itemized in the attached Schedules “A 1-4, B 1-33, C1-75, D1, E1 and F” under the following payment terms:

Commencing March 1st, 2011, a monthly payment (paid in advance of the month) the amount of \$844.00 per month for a period of six (6) months.

Commencing September 1st, 2011, a monthly payment (paid in advance of the month) the amount of \$4000 per month for a period of sixty (60) months.

Following completion of all payments, the Tenant shall render a receipt to the Sub-Tenant indicating payment in full for all trade equipment listed in Schedule "A". The Tenant may terminate this lease. Offer to Lease, and reclaim ownership of the trade equipment, if there is any default in the payment schedule or the lease rentals or rental schedule if any default is not corrected within 30 days. The Tenant shall supply to the Sub-Tenant a Bill of Sale for all trade equipment described in all of the above schedules, following receipt of the first payment." (Underlining mine)

The second document is an agreement of purchase and sale of the equipment dated February 15, 2013. Aside from the new payment terms, it is a well-drafted but typical agreement of purchase and sale with the usual covenants. Otherwise, it does not have any impact on this matter.

The third document, "Settlement and Release Agreement" references the two previous agreements in its recitals. It acknowledges service of a Notice of Default resulting in the termination of the lease on May 31, 2013. The parties negotiated a settlement of their obligations which consist of the following:

- The tenancy ends as of July 31, 2013;
- The Defendant is to make a series of payments to the Landlord and the Claimant for property taxes for the previous and current rental periods and for rent due up until July 31, 2013.

The final two paragraphs are the release of their covenants. Paragraph 10 states as follows respecting the release of the Defendant:

"THAT upon the completion of the above payments and the provision of vacant possession of the Premises, including all equipment identified in the Sub-Lease and the purchase agreement, Bread Works does hereby remit, release and forever discharge 3224556 and its successors and assigns, and Lay Yong Tan, his heirs, successors, and personal representatives of and from all manner of actions, causes of action, debts, accounts, covenants, contracts, claims and demands which against 3224556, Bread Works ever had or now has or which its successors or assigns, or any of them hereafter can, shall or may have for or by of any cause, matter or thing whatsoever existing up to the present time or which may arise in the future, and more particularly, but not so as to restrict the generality of the foregoing, from all claims, debts, demands, manner of actions, causes of action which Bread Works has or may have against 3224556 or Lay Yong Tan arising out of or attributable to the Sub-Lease or the purchase agreement, and any personal guarantee(s)." (Underlining mine)

The Law

It is a widely held principle of contract law that the parties to a contract intend the consequences of their words. To that end, reference is made to the following passage from the Supreme Court of Canada in *Eli Lilly v. Novapharm*, [1998] 2 S.C.R. 129, where Justice Iacobucci stated the following for the majority of the Court:

“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

...Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face....

...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.”

Findings

In reviewing the facts of this case, I am satisfied that the terms of the contract between the parties can be determined from the wording in the documents.

Claim for Rental Payments for Equipment

The question to be determined is the nature of the contract concerning the trade equipment. In my opinion, for the reasons stated below, I find the arrangement respecting the equipment to be solely for the purchase of it.

The parties entered into the business arrangement with a view to renting the property and arranging for the purchase of the trade equipment on-site. As a result, the initial agreement cited above makes it clear that the payment of \$844 per month is part of a “purchase”. The document does not make reference to leasing or other rental arrangements for the equipment. Furthermore, the original arrangement also provided for a single remedy on default, namely the right for the Claimant to "reclaim ownership of the equipment." There is nothing in this document concerning an alternative provision for its rental or payment for depreciation. Further, I find the reference to “leaseholds” does not include the equipment, otherwise it would have been identified as such.

In addition, I am persuaded by the language of the settlement agreement, which was negotiated with the assistance of counsel. Paragraph 10 cited above makes it abundantly clear that it deals with “any and all claims and causes of action arising out of both agreements”. I find the intention of both parties was to terminate the existing arrangement and “release and forever discharge” each of them from their obligations.

As a result, I find the position of the Claimant, that it is entitled to \$844 per month as rent for use of the equipment, was never part of the contract between the parties. Furthermore, even if I were incorrect in this conclusion, I find any claim arising from that to have been settled and discharged by the settlement agreement. Accordingly, the claim for rental payments for the use of the equipment is dismissed.

Claim for Missing Equipment.

The Claimant also seeks reimbursement for equipment that was lost. In reviewing the evidence, I find that employees of the Defendant company removed equipment from Bread Works. Mr. Tan testified that equipment was found at the new Tan Coffee location. He described their conduct as "not careful." Based on this, I am satisfied on a balance of probabilities that other equipment remains missing. I find the Defendant liable in conversion for the loss of these items. Consequently, the Claimant is entitled to damages.

In assessing damages in tort, the objective is to put the parties in the position that they would have been in had it not been for the tort. In the case of conversion, the value of the missing items is their fair market value at the time of the conversion. I reject Mr. Montgomery's submission that "wear and tear" is an item of general damages and limited to \$100. "Wear and tear" is a component of depreciation, if not synonymous with it. Thus, with appropriate evidence, it can be used to determine the fair market value of the missing items of personal property.

As noted, the spreadsheet contained in Exhibit 4 is lengthy and consists primarily of nominally valued items. The total claim, \$5846.13, is based on replacement cost. In my opinion, replacement cost for items that have been used over the course of several years will be excessive.

The largest claim was for 18 chairs valued at \$100. There is no evidence as to the initial cost of any chairs or their depreciation. The parties did acknowledge that 10 tables and 40 chairs formed part of the property to be returned. There is no indication if these chairs are part of that schedule or a different set. In any event, no value is given. I find the evidence does not support this portion of the claim. I find the claim for the telephone system, valued at \$640, has been proven and I allow it. I am satisfied that several items remain missing, although I am not prepared to go through the items individually. Accordingly, I assign a somewhat arbitrary figure of \$500, representing the balance of the items outstanding. This includes the depreciated value of the carving table and wooden shelves. As a result, I allow \$1140.00 as compensation for these lost items.

The Claimant shall also have its costs of \$193.55.

Conclusion

In summary, the claim is allowed in part. I find the Defendant, 3224556 Nova Scotia Limited, liable to the Claimant, Bread Works Inc., for \$1333.55.

An order shall issue accordingly.

Dated at Halifax, NS,
on November 21, 2014.

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)