Federal Court  Cour fédérale

Date: 20130717

Docket: T-1090-11

Citation: 2013 FC 793

Ottawa, Ontario, July 17, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

FLORA BOSA and GLORIA ANGELA BOSA,
LISA BIANCA DIKEAKOS,
SHANNON CHASTITY BOSA YACOUB,
COLIN BOSA, Executors of the Will of
BRUNO BOSA, DECEASED

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA
ON BEHALF OF HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] These reasons pertain to a motion for a summary trial brought by the Plaintiffs in an action contesting the validity of a notice of rent increase ("the Rent Notice") issued to the Plaintiffs by the Crown pursuant to a lease between the parties.

[2] For the reasons that follow, I have concluded that the matter is suitable for a summary trial, and that judgment should issue in the Plaintiffs' favour.

Background

[3] I do not understand there to be any dispute between the parties with respect to the following background facts.

[4] In 1976, the Defendant entered into a lease with a number of companies who are predecessors to the Plaintiffs (the 1976 Lease). The 1976 Lease was assigned to Flora and Bruno Bosa in 1986. In 2008, Bruno Bosa's interest in the lease passed to his personal representatives: Gloria Angela Bosa, Lisa Bianca Dikeakos, Shannon Chastity Bosa Yacoub and Colin Bosa. Together with Flora Bosa, they are the Plaintiffs in this matter.

[5] The 1976 Lease related to a commercial property located at 1441, 1443 and 1445 Craigflower Road in Victoria, British Columbia. As was noted in the recitals to the 1976 Lease, the lands in question are part of the New Songhees Indian Reserve No. 1A, and are administered by the Crown on behalf of certain identified aboriginal individuals under the authority of section 58 of the *Indian Act*, R.S.C., 1970, c. I-16.

[6] The object of granting the original leasehold interest was to allow the original tenants to construct apartment buildings on the leased property. The 1976 Lease was for a term of 65 years, with the rent to be reviewed every five years. The 1976 Lease fixed the base rent for the first two five-year periods, following which the rent was to be established by the Minister, based upon the

fair market rental value. The 1976 Lease further provided the tenants with a right to object to proposed rent increases be referring the dispute to the Federal Court.

[7] Amendments to the rent review process established in the 1976 Lease were made in 1979 and 1981. At issue in this case are the amendments to the 1976 Lease effected in 1981 ("the Lease"), the relevant portions of which state that:

> "2.09 The annual basic rent for each of the first eleven five-year periods and the final three-year period during the last rental period shal[l] be reviewed, fixed and determined by the Minister in an amount which, in the opinion of the Minister, represents the annual fair market rental value of the land which is to be deemed to be subject to the terms and conditions of this lease and which is deemed to be used for the purposes herein demised, at the date of such review, but excepting thereout and therefrom the value of any and all improvements constructed by the Tenant, upon the basis of two independ[e]nt appraisals, one to be obtained by the Minister at his expense and one to be obtained by the Tenant, at the Tenant's expense. If the annual fair market rental value established by the two appraisals differs by more than 15% annually of the higher appraisal, then either the Minister, or the Tenant, or the Mortgagee shall have the right but shall not be obligated to obtain a third independ[e]nt appraisal within sixty (60) days following the date of the receipt by the Minister of the appraisal obtained by the Minister, and the Minister will not fix and determine the basic rent until the expiry of the sixty (60) day period or the submission of the third appraisal to the Minister. For the purposes of this subsection, Lots 6 and 7, Section 2-A, Esquimalt District, Plan 32956, shall be deemed, for the purpose of determining fair market rental value, to be a part of the lands leased by the Tenant and the Tenant agrees to pay rent for the said Lots 6 and 7, during the entire term, notwithstanding that the administration and control thereof may be transferred by Her Majesty during the term of this lease.
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> 2.10 The Parties agree that the Minister will give the Tenant notice by registered mail, (hereinafter called "the rent notice") within ninety (90) days before or ninety (90) days after the commencement of each of the last rental periods, specifying the annual basic rent to operate for each of the last rental periods in question (hereinafter called the "new basic annual rent").

> 2.11 The Parties agree that the payment of basic annual rent shall not be made at the new basic annual rent until the Tenant has been given the rent notice in respect thereof as provided in Section 2.12 hereof and in the event of the relevant five-year period or the final three-year period starting before such a rent notice has been given to the Tenant, the annual basic rent shall continue to be due and paid at the rate operative for the rental period immediately preceding the relevant five or final three year period on each day appointed by this lease for the payment of annual basic rent payable monthly in advance until the rent notice is given to the Tenant. The Parties agree that on the first day after the rent notice is given to the Tenant, which is a day appointed by this Lease for the monthly payment of annual basic rent, there shall fall due for payment the appropriate instalment at the new rate together with, by way of an additional rent adjustment, a sum equal to the difference between the new annual basic rent and the basic rent actually paid for any part of the relevant five or final three year period in respect of which a rent less than the new annual basic rent has been paid.
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> 2.12 The Parties agree that in the event the Tenant disagrees with the fair market rental value of the lands as specified in the rent notice with respect to any five or final three year period, the Tenant may within sixty (60) days from the receipt of rent notice by the Tenant, PROVIDED THAT the Tenant has paid all rents then due as determined by the Minister, and is otherwise not in default under the provisions of this lease, refer the matter to the Federal Court of Canada pursuant to Section 17(3) of the Federal Court Act or to any court of competent jurisdiction for a determination of fair market rental value of the lands in accordance with the terms of this Lease. The Parties agree that if the Tenant does not within sixty (60) days from the receipt of such rent notice, refer the matter to the Federal Court of Canada, the rent stipulated in such rent notice shall be the rent to operate for the five or final three year period to which the rent notice relates…"

[8] The rent was fixed at $160,000 *per annum* for the period between March 18, 2001 and March 17, 2006. The Defendant failed to provide the Plaintiffs with a Rent Notice during the rent review period for the 2006-2011 rental term. Consequently, the Plaintiffs continued to pay the annual rent set for the previous rental term, namely $160,000 *per annum* for five additional years.

[9] In accordance with section 2 of the Lease, the Defendant was required to set the rent payable for the five-year period commencing on March 18, 2011 and ending on March 17, 2016 ("the current rental period"). It is the process followed by the Defendant in this regard that gives rise to this action.

The Process Followed in Relation to the 2011 Rent Increase

[10] Mario von Riedemann was a Senior Designation Officer at Aboriginal Affairs and Northern Development Canada and was responsible for the administration of the Lease in issue. Pursuant to section 2.09 of the lease, Mr. von Riedemann obtained an appraisal from Kutyn Property Services on behalf of the Minister ("the Minister's appraisal") on March 24, 2011. The Minister's appraisal assessed the fair market rental value of the land at $319,950 per annum as of March 15, 2011.

[11] On April 5, 2011, Mr. von Riedemann sent a registered letter to the Plaintiffs proposing that rent for the current rental period be set at $320,000. The letter, which was received by the Plaintiffs on April 6, 2011, reminded the Plaintiffs of their entitlement to obtain an independent appraisal, noting that no such appraisal had yet been received. Mr. von Riedemann's letter further advised the Plaintiffs that if an appraisal was not received from them by May 6, 2011, the Minister would proceed on the basis that the Plaintiffs agreed with the proposed rent increase. It is common ground that at no time prior to the commencement of this action did the Defendant ever provide the Plaintiffs with a copy of the Minister's appraisal.

[12] The Plaintiffs then obtained their own market rent appraisal (the Plaintiffs' appraisal), which determined that the fair market rent of the leased premises for the five year period effective March

18, 2011 was $271,000 *per annum*. A copy of the Plaintiffs' appraisal was sent to Mr. von Riedemann on or about May 4, 2011.

[13] It should be noted that section 2.09 of the Lease provides that where the difference between fair market rental value established by the two appraisals "differs by more than 15% annually of the higher appraisal", the parties have the right to seek a third independent appraisal within 60 days of the date on which the Minister's appraisal was received by the Minister. Section 2.09 further provides that "the Minister will not fix and determine the basic rent until the expiry of the sixty (60) day period or the submission of the third appraisal to the Minister".

[14] As noted above, the Minister received his appraisal on March 24, 2011. Accordingly, the 60-day period contemplated by section 2.09 of the Lease would expire on May 23, 2011. Nevertheless, on May 10, 2011, Rick Sabiston (Mr. von Riedemann's supervisor) wrote to the Plaintiffs advising that the rent payable on the leased premises for the period between March 18, 2011 and March 17, 2016 was fixed at $319,950. Mr. Sabiston's letter went on to recite the provisions of section 2.12 of the Lease, which gives the tenant the right to refer a dispute with respect to the fair market rent to this Court in accordance with subsection 17(3) of the *Federal Courts Act*.

[15] Although the May 10, 2011 Rent Notice was signed by Mr. Sabiston, it appears from both Mr. von Riedemann's affidavit and his cross-examination that it was Mr. von Riedemann himself who actually set the rent for the property in question.

[16] Mr. von Riedemann explained in his affidavit that he set the rent on May 10, 2011 because the Plaintiffs did not contact him with any concerns with respect to the appraisals and because the Lease requires that the Rent Notice be sent by registered mail and there were news reports of an impending mail strike. Mr. von Riedemann further deposes that in his view, the two appraisals did not differ by more than 15%. As a result, he asserts that the Minister was entitled to set the rent any time during the 90-day period leading up to or following the March 18, 2011 commencement of the new rental term.

[17] The Plaintiffs have been paying the new rent since March 18, 2011, on a without prejudice basis.

[18] On July 6, 2011, the Plaintiffs filed their Statement of Claim in which they seek the following relief:

> 1. A declaration that a rental notice dated May 10, 2011 purportedly from the Minister of Indian Affairs and Northern Development relating to the annual basic rent payable for the five year period commencing March 18, 2011 and ending March 17, 2016 pursuant to the terms and conditions of a lease dated April 23, 1976 […] is invalid and of no force and effect.
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> 2. Alternatively, an Order pursuant to Section 2.12 of the Lease determining the fair market rental value of the lands in accordance with the terms of the Lease.
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> 3. An Order that the Defendant reimburse the Plaintiffs for all rental payments made in excess of their obligations under the Lease.
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> 4. Costs, interest and other relief.

The Plaintiff's Motion for a Summary Trial

[19] On February 18, 2013, the Plaintiffs brought a motion seeking a summary trial in this matter. In addition to the declaratory relief identified in the preceding paragraph, the Plaintiffs seek:

> 1. A declaration [that] the rent payable under the Lease for the period from March 18, 2011 to March 17, 2016 (Rental Period) shall continue to be in the sum of $160,000.00 or, $13,333.00 per month;
>
> 2. An Order that the Defendant forthwith repay the Plaintiffs any sums paid by or on behalf of the Plaintiffs in excess of the payments of $160,000.00 per annum or $13,333.00 per month during the Rental Period and pre[-]judgment interest; and
>
> 3. Costs.

Principles Governing Summary Trials

[20] The guiding principles governing summary trials are set out in Rule 216 of the *Federal Courts Rules*, SOR/98-106. Of particular note is Rule 216 (6), which provides that:

216. (6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.	**216.** (6) Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

[21] A plain reading of this rule suggests that the key elements to be considered are the sufficiency of the evidence and whether it would be unjust to decide the issue by way of summary trial.

[22] The principles surrounding summary trials were summarized in *Tremblay v. Orio Canada Inc.*, 2013 FC 109, [2013] F.C.J. No. 105 at para. 24, where the Court addressed many of the authorities referenced by the parties including *Teva Canada Ltd. v. Wyeth LLC*, 2011 FC 1169, 99 C.P.R. (4th) 398, rev'd on other grounds by 2012 FCA 141, [2012] F.C.J. No. 618, *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* [1989] B.C.J. No. 1003, 36 B.C.L.R. (2d) 202) (BCCA), *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2010 FC 966, [2010] F.C.J. No. 1195, and *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263, 46 BCLR (4th) 342. The Court observed in *Tremblay* that:

> The plaintiff bears the burden of demonstrating that a summary trial is appropriate (*Teva*, above, at para 35). In deciding whether a file lends itself to a summary trial, a judge may consider, among other things, the complexity of the matter, its urgency, the cost of taking the case forward to a conventional trial in relation to the amount involved (*Inspiration Management Ltd.* [above]), whether the litigation is extensive, whether the summary trial will take considerable time, whether credibility is a crucial factor, whether the summary trial will involve a substantial risk of wasting time and effort and whether the summary trial will result in litigating in slices (*Wenzel Downhole*, above, at para 37, citing *Dahl* [above at para 12].

[23] With these principles in mind, the first issue for determination is whether the issues raised by the parties are suitable for determination through a summary trial.

Is This Matter Suitable For Disposition By Summary Trial?

[24] The parties agree that, to the extent that the Court can resolve the issues based upon the wording of the lease, the matter is suitable for disposition by way of a summary trial. The parties also agree that the Court can have regard to the course of dealings between the parties between March and May of 2011 in deciding the issues raised by the Plaintiffs' motion.

[25] The Defendant does, however, object to the Court having regard to the course of dealings between the parties in relation to previous rent increases. In particular, the Defendant argues that the Court should not have regard to evidence adduced by the Plaintiffs with respect to the 1996 rent increase, and specifically, evidence as to whether the Crown provided the Plaintiffs with a copy of its own appraisal at that time.

[26] I note that the Defendant has provided no explanation as to why responding evidence could not be provided on the issue of past practice. That said, I do not need to address the Defendant's objection, as I am satisfied that the issues before the Court can be resolved based without regard to whatever may have transpired in 1996.

[27] It is also apparent from both the record before the Court and the parties' submissions that the matter is not overly complex, and that there is sufficient evidence in the record for a determination of the issues. A summary trial would, moreover, allow for the just, most expeditious and least expensive determination of this proceeding on its merits, as contemplated by Rule 3 of the *Federal Courts Rules*. Finally, given that a summary trial would be dispositive of the action, it would not result in "litigating in slices". The matter is, therefore, suitable for disposition by summary trial.

The Validity of the 2011 Rent Notice

[28] The Plaintiffs have pointed to what they say are a number of defects in the process followed by the Minister in fixing the rent for the period between March 18, 2011 and March 17, 2016, the effect of which is to render the Rent Notice delivered by the Defendant on May 10, 2011 of no force

and effect.

[29] Having failed to provide the Plaintiffs with a valid Rent Notice within the 90-day period specified in section 2.10 of the Lease, the Plaintiffs say that the Defendant is not entitled to any increase in rent for the current rental period, and that they should be entitled to continue paying the rent charged for the previous rental period, namely $160,000 *per annum*.

[30] I will address each of the Plaintiffs' arguments in turn.

i) ***The Failure to Provide the Plaintiffs with a Copy of the Minister's Appraisal***

[31] The first procedural defect identified by the Plaintiffs is the failure of the Defendant to provide them with a copy of the Minister's appraisal.

[32] Dean Reed is the Senior Manager of Properties and Leasing for Bosa Developments Corporation, which manages the lands leased to the Plaintiffs. According to Mr. Reed's affidavit, he received a copy of Mr. von Riedemann's letter informing him of the proposed rent increase on or about April 6, 2011. Mr. Reed telephoned Mr. von Riedemann shortly thereafter, and in the course of the telephone call, Mr. Reed states that he asked Mr. von Riedemann for a copy of the Minister's appraisal. Mr. Reed deposes that Mr. von Riedemann stated that he would "look into it" and get back to Mr. Reed.

[33] Mr. Reed further deposes that approximately one week later, he had a follow-up conversation with Mr. von Riedemann, at which time Mr. von Riedemann advised Mr. Reed that he

would not be providing Mr. Reed with a copy of the Minister's appraisal, as "it was not their policy or practice to do so": Reed affidavit at para. 18. According to Mr. Reed, the Plaintiffs only received a copy of the Minister's appraisal after this action was commenced, through the pre-trial document production process.

[34] I note that Mr. von Riedemann's affidavit is entirely silent on the question of whether Mr. Reed requested a copy of the Minister's appraisal, and counsel for the Crown has specifically stated that he is not relying upon portions of Mr. von Riedemann's cross-examination that touch on this issue.

[35] In these circumstances, I find that Mr. Reed did request that Mr. von Riedemann provide him with a copy of the Minister's appraisal in early April of 2011, and that Mr. von Riedemann refused to do so.

[36] Mr. Reed further deposes that Mr. von Riedemann's refusal to provide the Plaintiffs with a copy of the Minister's appraisal prevented the Plaintiffs from considering whether or not to get a third appraisal in accordance with section 2.09 of the Lease.

[37] Nothing in section 2 of the Lease expressly requires that a copy of the Minister's appraisal be provided to the tenant. The question, thus, is whether the provision of the Minister's appraisal to the tenant is an implied term of the contract.

[38] An implied term may be found based upon the presumed intention of the parties where the implied term is "necessary 'to give business efficacy to a contract'" or where the reasonable person would say that the parties had obviously assumed such a term to be part of the contract: see *M.J.B. Enterprises v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, [1999] S.C.J. No. 17 at para. 27.

[39] Mr. von Riedemann's refusal to provide Mr. Reed with a copy of the Minister's appraisal is baffling. Common sense dictates that the parties would have intended that the Minister should provide the tenant with a copy of the Minister's appraisal as a matter of course. It is only by providing the tenant with a copy of the Minister's appraisal that the tenant would be able to determine how the rent proposed by the Defendant had been arrived at, whether the proposed rent was reasonable, and whether there were any issues as to the methodology employed by the Minister's appraiser in arriving at a fair market rent. It is only then that the tenant would be in a position to ascertain whether there was any question as to the fairness of the proposed rent increase, whether they needed to get their own appraisal, and what issues had to be addressed in that appraisal.

[40] The uncontroverted evidence of Mr. Reed was that the failure of the Minister to provide the Plaintiffs with a copy of the Minister's appraisal prevented the Plaintiffs from making a meaningful decision as to whether to exercise their right to secure a third appraisal before the Minister set the rent for the current period.

[41] I accept Mr. Reed's evidence in this regard. As I have already observed, common sense would dictate that the failure of the Minister to provide the Plaintiffs' with a copy of the Minister's appraisal would limit the tenant's ability to ascertain whether a second appraisal was necessary. So too would it interfere with the tenant's ability to determine whether a third appraisal was required.

[42] I would note that Mr. von Riedemann's April 5, 2011 letter did not tell the Plaintiffs when it was that the Kutyn Property Services appraisal had been received by the Minister. Indeed, Mr. von Riedemann's letter makes no mention whatsoever of the Minister even having received an appraisal, although it appears that Mr. Reed subsequently became aware of the existence of the Minister's appraisal, if not its contents, as a result of his telephone discussions with Mr. von Riedemann.

[43] Without knowing whether the proposed rent increase corresponded to the fair market rent identified in the Minister's appraisal, the Plaintiffs would not have been able to determine whether their own appraisal differed from the Minister's appraisal by more than 15%, and whether they even had a right to obtain a third appraisal, further limiting the ability of the Plaintiffs to exercise their rights under the rent review provisions of the Lease.

[44] It will also be recalled that where the Minister's and tenants' appraisals differ by more than 15%, section 2.09 of the Lease provides that the parties have 60 days from the date of receipt by the Minister of the appraisal obtained by the Minister to obtain a third appraisal. While the Plaintiffs did in fact provide the Minister's with their appraisal in a timely manner, the information provided by the Minister did not even allow the Plaintiffs to ascertain when the 60-day time limit contained in section 2.09 of the Lease would start to run.

[45] I am therefore satisfied that by failing to provide the Plaintiffs with a copy of the Minister's appraisal breached an implied term of the Lease and prevented the Plaintiffs from fully exercising their rights in relation to the rent review process.

ii) ***Was there a 15% Difference in the Appraisals?***

[46] As noted above, section 2.09 of the Lease provides that the annual base rent for each five-year period contemplated by the Lease is to be fixed by the Minister based upon "the annual fair market rental value of the land which is to be deemed to be subject to the terms and conditions of [the Lease]". The annual fair market rental value is to be determined based upon two independent appraisals, one obtained by the Minister and one by the Tenant.

[47] It is only where "the annual fair market rental value established by the two appraisals differs by more than 15% annually of the higher appraisal" that either party has the right to seek a third appraisal.

[48] The parties agree that the difference between the two appraisals in this case was 15.3%.

[49] The Defendant nevertheless argues in his memorandum of fact and law that the Plaintiffs had no entitlement to the process contemplated by section 2.09 of the Lease, as the annual fair market rental value established by the two appraisals did not differ by more than 15% annually of the higher appraisal.

[50] The Defendant contends that "15.3%, when rounded off, is 15%". This argument is based upon a definition contained in the Oxford Concise English Dictionary, which, the Defendant says, defines "per cent" as "one part in every hundred". According to the Defendant, this means that any number between 15% and 15.99% is equivalent to 15%.

[51] Given that the two appraisals did not differ by more than 15%, the Defendant submits that there is no need to address the question of whether the 60-day period provided for the Plaintiffs to obtain a third appraisal was respected.

[52] I note that this argument was not pressed at the hearing, and in my view, it is entirely without merit. Words in a contract are to be interpreted in light of "their ordinary and natural sense and cannot be distorted beyond their actual meaning": *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70, [2000] B.C.J. No. 164 at para. 18. Moreover, the plain and ordinary meaning is to be given to words in a contract "unless to do so would result in an absurdity": *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489, [2005] B.C.J. No. 2134 at para. 20.

[53] Clearly, in its ordinary and natural sense, 15.3% is more than 15%. As a consequence, the Plaintiffs had a right to obtain a third appraisal, provided that they did so within 60 days of the receipt by the Minister of the Minister's appraisal.

The Defendant's Failure to Wait 60 Days Before Setting the Rent

[54] The next question for determination is what is the effect of the Minister's failure to comply with the 60-day period referred to in section 2.09 of the Lease?

[55] Mr. von Riedemann was of the view that the 60-day provision was not engaged in this case as the two appraisals did not differ by more than 15%. As explained above, given that the difference between the two appraisals was admittedly 15.3%, this was clearly incorrect.

[56] What is not in dispute is that section 2.09 of the Lease explicitly states that "the Minister will not fix and determine the basic rent until the expiry of the sixty (60) day period or the submission of the third appraisal to the Minister". Thus, on the face of the contract, the Minister was precluded from fixing the rent prior to the expiry of the 60-day period contemplated by section 2.09 of the Lease, which in this case expired on May 23, 2011. The Minister nevertheless proceeded to fix the new rent on May 10, 2011.

[57] What consequences should then flow from the failure of the Minister to adhere to the timelines established in section 2.09 of the Lease?

[58] There is a presumption in contract law that a time period contained in a contract will not be literally and strictly enforced unless the parties have expressly made time of the essence in the contract: see *Sail Labrador Ltd. v. Challenger One (The)*, [1998] S.C.J. No. 69, [1999] 1 S.C.R. 265 at para. 53. There is no express "time is of the essence" provision in the Lease.

[59] In the absence of an express "time is of the essence" provision, regard may also be had to the nature of the property involved or the circumstances of the case to see if they call for such an interpretation: *Sail Labrador Ltd.*, above at para. 54. That is, the Court must examine the circumstances surrounding the contract in question in order to assess whether it would be inequitable to presume that time was not of the essence in the exercise of the rent review provisions of the Lease: *Sail Labrador Ltd.*, at para. 63.

[60] The object of granting the original leasehold interest to the predecessors of the Plaintiffs was to allow the original tenants to construct apartment buildings on the leased property. The overall term of the lease was set at 65 years, presumably allowing a reasonable period for the lessees to recoup their capital investment in the property.

[61] The Lease in this case allows for the Minister to unilaterally set the fair market rent for the leased premises, subject to the tenant's right to have the rent reviewed by this Court. Thus, the Plaintiffs are to at least some extent at the mercy of the Minister insofar as maintaining the profitability of their investment is concerned.

[62] The process set out in section 2 of the lease sets up a protocol to be followed in the determination of the fair market rent for each five-year rent period. While the Minister has the right to unilaterally set the rent, the tenant is given input and some measure of protection through the appraisals process contemplated by section 2.09 of the Lease. In light of these circumstances, I am of the view that it would be inequitable to presume that time was not of the essence in relation to the 60-day time period set out in section 2.09 of the Lease.

[63] The Defendant argues that there is no evidence before the Court that the Plaintiffs ever had any intention of seeking a third appraisal, with the result that no prejudice to Plaintiffs has been shown to have resulted from the failure of the Minister to respect the terms of the Lease. However, I have found that the actions of Mr. von Riedemann caused prejudice to the Plaintiffs, preventing them from fully exercising their rights in relation to the rent review process, and inhibiting their ability to make a meaningful decision as to whether to exercise their right to secure a third appraisal before the Minister set the rent for the current period.

[64] There is a strict protocol established by the Lease governing rent increases which must be adhered to by the Minister, given the need for certainty in commercial transactions. It is simply not open to the Minister to unilaterally abridge the period as was done here.

[65] I also do not accept Mr. von Riedemann's explanation as to why he failed to wait until the end of the 60-day period before setting the rent, including his concerns about a possible postal strike. There was no immediate urgency to the matter. The 60-day period referred to in section 2.09 of the Lease relates to the obtaining of appraisals, not the fixing of the new rent. Section 2.10 of the Lease requires that notice of the new rent be provided to the tenant within 90 days before or 90 days after the commencement of the new rental period. As a consequence, Mr. von Riedemann actually had until June 15, 2011 to provide the Plaintiffs with the Rent Notice, and he has not provided a reasonable explanation for his failure to respect the notice provisions of the Lease.

[66] For these reasons, I have concluded that the Minister's failure to respect the 60-day period provided for in section 2.09 of the Lease has the effect of nullifying the Rent Notice provided to the Plaintiffs in Mr. Rick Sabiston's letter of May 10, 2011.

The Minister's Failure to have Regard to the Plaintiffs' Appraisal

[67] There is a second ground for invalidating the Rent Notice provided by Mr. Sabiston on May 10, 2011. That is the absence of evidence demonstrating that the Plaintiffs' appraisal was actually considered by Mr. von Riedemann in fixing the rent for the current rental period.

[68] It will be recalled that in accordance with the provisions of section 2.09 of the Lease, the annual basic rent for each of the rent periods is to be "reviewed, fixed and determined by the Minister in an amount which, in the opinion of the Minister, represents the annual fair market rental value of the land". The "annual fair market rental value of the land" is to be determined by the Minister "upon the basis of two independ[e]nt appraisals", one to be obtained by the Minister, and one to be obtained by the Tenant.

[69] Implicit in this is that while the Minister was not obliged to adopt the conclusions of the Plaintiffs' appraiser, the Minister had to at least *consider* the Plaintiffs' appraisal in setting the fair market rent. The Minister's obligation in this regard is, moreover, subject to the requirements of honesty and good faith: *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755, 18 D.L.R. (4^{th}) 548 at paras. 18-20.

[70] I would start by observing that while the Defendant noted the existence of the Plaintiffs' appraisal at paragraph 6 of the Statement of Defence, paragraph 4 of the Statement of Defence pleads that "[t]he Minister calculated the fair market rent in reliance of [*sic*] the appraisal prepared by Christopher M. Kutyn of Kutyn Property Services, dated March 24, 2011 [the Minister's appraisal]".

[71] It should further be noted that the $319,950 annual rent set in the Rent Notice is precisely the figure for the annual fair market rent identified in the Minister's appraisal.

[72] More importantly, the evidence of Mr. von Riedemann on this point (both in his affidavit and in his cross-examination) suggests that reliance was placed only on the Minister's appraisal in setting the rent for the current period, as, according to Mr. von Riedemann's affidavit "[i]n the Minister's opinion, the fair market rental value was reflected in the Defendant's Appraisal": see para. 14 of the von Riedemann affidavit. Nowhere does Mr. von Riedemann suggest that any consideration was ever given to the analysis contained in the Plaintiffs' appraisal.

[73] Tellingly, although the Plaintiffs' argument with respect to the failure of Mr. von Riedemann to have regard to the Plaintiffs' appraisal was clearly spelled out in their memorandum of fact and law, nowhere in the Defendant's memorandum of fact and law does the Defendant ever take issue with the Plaintiffs' claim that Mr. von Riedemann failed to consider the Plaintiffs' appraisal in setting the rent for the current rental period.

[74] In particular, the Defendant identifies the areas where it is alleged that there is conflicting evidence or credibility issues in paragraph 23 of his memorandum of fact and law. No conflict in the evidence or issue of credibility has been identified by the Defendant on this point.

[75] I am therefore satisfied that the "annual fair market rental value of the land" in this case was not determined by the Minister on the basis of two independent appraisals, but was determined only on the basis of the Minister's own appraisal. Thus, in addition to the breaches of the express and implied terms of the Lease identified in the previous sections of these reasons, the Minister also failed to comply with the rent increase provisions of the Lease in this regard.

The Consequences of the Defects in the Process

[76] For the reasons given, I am satisfied that the Minister breached the express and implied provisions of section 2 of the Lease by failing to provide the Plaintiffs with a copy of the Minister's appraisal, by failing to respect the 60-day period provided for the Plaintiffs to obtain a third appraisal, and by fixing the rent without considering the Plaintiffs' appraisal. These defects have the effect of invalidating the Rent Notice provided by the Minister.

[77] Section 2.11 of the Lease provides that until such time as a Rent Notice is provided in accordance with the terms of the Lease, "the annual basic rent shall continue to be due and paid at the rate operative for the rental period immediately preceding the relevant five- or final three-year period". As a consequence, in the absence of a valid Rent Notice having been delivered by the Minister, it follows that the rent for the current rent period should continue at the rate of $160,000 *per annum*.

Unjust Enrichment

[78] The Defendant acknowledges that he does not benefit financially from this transaction, but argues in his memorandum of fact and law that if this Court were to set the rent for the current rental period at $160,000 *per annum*, the Plaintiffs would be unjustly enriched at the expense of the former Certificates of Possession Holders who are the beneficial interest holders under the Lease.

[79] I note that counsel for the Defendant did not pursue this issue in his oral argument and has offered no authority to support an argument of unjust enrichment based upon an alleged detriment to a non-party third party.

[80] I also note that the Plaintiffs object to this argument being advanced for the first time in the memorandum of fact and law filed by the Defendant on this motion. I agree that it would be unfair to the Plaintiffs to consider this argument, given that it was not pleaded in the Defendant's Statement of Defence, with the result that the Plaintiffs have had no opportunity to discover the Defendant in relation to this issue.

The Defendant's Alternative Argument: Should This Court Fix the Rent?

[81] The Defendant maintains that there was no material breach of the rent provisions of the Lease. However, if the Court was to determine that there was indeed such a breach, the Defendant argues in the alternative that rather than invalidate the Rent Notice, I should instead fix a new fair market rent based upon the record before me.

[82] Given my earlier conclusions as to the consequences of the defects in the process followed by the Minister, it is not necessary to address this argument. I would, however, note that this is another argument that appears for the first time in the memorandum of fact and law filed by the Defendant on this motion.

[83] Had I been required to fix the rent, I would have concluded that the record before me is insufficient to decide this issue on a summary basis. Because the two appraisals were introduced into evidence through the affidavits of Mr. Reed and Mr. von Riedemann respectively, neither side has had any opportunity to cross-examine the authors of either appraisal. As a result, I would have directed the trial of this issue.

Conclusion

[84] For these reasons, the action is allowed.

[85] In terms of relief, a declaration will issue that the Rent Notice dated May 10, 2011 provided by the Minister of Indian Affairs and Northern Development relating to the annual basic rent payable for the five-year period commencing March 18, 2011 and ending March 17, 2016 is invalid and of no force and effect.

[86] A further declaration will issue declaring that the rent payable under the Lease for the period from March 18, 2011 to March 17, 2016 shall continue at the rate of $160,000.00 *per annum*.

[87] The Defendant will be ordered to reimburse the Plaintiffs for all rental payments made in excess of their obligations under the Lease, together with pre- and post-judgment interest.

[88] The Plaintiffs shall have their costs of this action fixed at $15,000, inclusive of fees and disbursements.

JUDGMENT

THIS COURT:

1. Declares that the Rent Notice dated May 10, 2011 provided by the Minister of Indian Affairs and Northern Development relating to the annual base rent payable for the five-year period commencing March 18, 2011 and ending March 17, 2016 is invalid and of no force and effect;

2. Declares that the rent payable under the Lease for the period from March 18, 2011 to March 17, 2016 shall continue to be at the rate of $160,000.00 *per annum*.

3. Orders that the Defendant reimburse the Plaintiffs for all rental payments made in excess of their obligations under the Lease, together with pre- and post-judgment interest. Pre-judgment interest shall be paid at the rate of 1% *per annum* on $32,677.97 from May 27, 2011, and on each monthly overpayment thereafter from the date upon which the payment was made. Post-judgment interest shall be at 3% *per annum* from the date hereof until the date of payment.

4. Orders that the Plaintiffs shall have their costs of this action fixed at $15,000, inclusive of fees and disbursements.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1090-11
STYLE OF CAUSE:	FLORA BOSA ET AL v. AGC ET AL
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 18, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
DATED:	July 17, 2013

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