IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R.T. Foods Ltd. v. Xin Dong Sheng Enterprises Ltd.,* 2023 BCSC 1466

Date: 20230823
Docket: S214629
Registry: New Westminster

Between:

R.T. Foods Ltd.

Plaintiff

And

Xin Dong Sheng Enterprises Ltd.

Defendant

Before: The Honourable Justice Majawa

Reasons for Judgment

Counsel for the Plaintiff:	M. Carter
Counsel for the Defendant:	C. Shen S. Nguyen
Place and Dates of Hearing:	Port Coquitlam, B.C. April 12, 2023 and June 16, 2023
Place and Date of Judgment:	New Westminster, B.C. August 23, 2023

Table of Contents

OVERVIEW

[1] The dispute underlying these two applications for summary trial is in respect of alleged breaches of a lease agreement between the parties.

[2] The plaintiff's summary trial application is for judgment in the amount of $149,939.90 in respect of damages it says it incurred arising from the defendant's failure to provide a document that the plaintiff says the defendant was bound to provide under the lease. That document was required by a potential purchaser of the plaintiff's business to close the sale. The sale failed because that document was not provided and the plaintiff seeks damages in respect of that lost sale.

[3] The defendant's summary trial application is for judgment in the amount of $154,929.79. The defendant says that it did not breach the lease; rather, it says that the plaintiff breached the lease and is liable for unpaid rent as well as the rent owing under the lease between the time the defendant terminated the lease agreement and the time that it was able to re-lease the premises to another tenant.

[4] The resolution of these matters is dependent upon the interpretation of a particular clause in the lease agreement and whether that clause required the defendant to execute a bill of sale evidencing the transfer of ownership over certain chattels from the defendant to the plaintiff. For the reasons that follow, I have determined that the defendant breached the lease agreement by not providing the bill of sale and that the plaintiff has suffered damages in the amount of $106,295 as a result.

[5] The defendant's summary trial application for unpaid rent is dismissed because there is no causal link between the lost rent and the tenant's actions. Any losses the defendant has suffered on account of unpaid rent following its termination of the lease is attributable to the defendant's actions in breaching the lease and is of no fault of the plaintiff's.

SUITABILITY FOR SUMMARY TRIAL

[6] The Court may grant judgment under R. 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 unless: (a) the court is unable, on the whole of the evidence adduced on the application, to find the facts necessary to decide the issues; or (b) the court is of the opinion that it would be unjust to decide the issues on the application.

[7] In *Mah Estate v. Lawrence*, 2023 BCSC 411, at paras. 56-59, Justice Gibb-Carsley summarized the principles applicable to determining a matter by summary trial as follows:

> [56] To reiterate, a matter will be suitable for summary trial if the court is able to find the facts necessary to decide the issues before it and it is not otherwise unjust. The court must give full consideration to all of the evidence placed before it and must also consider whether the evidence is sufficient for adjudication. These principles are well established under the predecessor rule to R. 9-7, being R. 18A of the prior *Supreme Court Rules*, B.C. Reg. 221/90. Rule 9-7 and R. 18A before it have been used extensively in this province for decades: e.g., *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.). The principles articulated in these cases were endorsed by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7.
>
> [57] More recently, in *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249, our Court of Appeal held that the suitability for summary trial remains a threshold question to be determined by the court regardless of the parties' positions. The court plays an important gatekeeper role in determining whether a summary trial is suitable:
>
> > [89] The Rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or indeed often the vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so.
>
> [58] To that end, our Court of Appeal in *Cepuran v. Carlton*, 2022 BCCA 76, held that a summary trial supported by affidavits may be sufficient for determination of disputes unless the judge is unable to find the necessary facts or is of the view that it would be unjust to do so. Justice Griffin held that the factors to consider include: the amount of money involved, the complexity of the matter, its urgency, any prejudice likely to arise from the delay, the costs of taking the matter forward to conventional trial in relation to the amount involved, the course of the proceedings, and whether the evidence is sufficient to resolve the dispute: paras. 149, citing *Inspiration* at 214.
>
> [59] I note that conflicting affidavits are not necessarily fatal to a summary trial application. A judge should not decide an issue of fact or law solely on

> the basis of conflicting affidavits even if she or he prefers one version to the other. However, it may be that other admissible evidence will make it possible to find the facts necessary for judgment to be given: *Inspiration* at 215–216, described in *Brissette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at para. 21.

[8] The parties agree that this matter can proceed by way of summary trial. Nonetheless, suitability for summary trial remains a threshold question to be determined by the Court: *Mah Estate* at para. 57.

[9] After consideration of the relevant factors, I find that the evidence before me is sufficient to resolve the matter by way of summary trial. While there is some dispute in the affidavit evidence about the subjective intentions of the parties to the lease agreement, I need not resolve those conflicts in order to dispose of the applications. In this case, the essential evidence is the lease itself and the objective circumstances surrounding its execution which are evidenced in communications between the parties as well as in uncontradicted affidavit evidence. The matter itself is not particularly complex; it involves a rather straightforward exercise of contractual interpretation. While the amount of money involved is significant to the parties, the amount is relatively small compared to the costs of taking this matter to trial.

[10] Although there are some deficiencies in the evidence supporting the quantification of damages, I find that given the nature of the dispute and the amounts at issue, there is sufficient evidence before me to assess damages.

BACKGROUND FACTS

[11] At the relevant times, the defendant (the “Landlord”) was the owner of lands and premises located at 14981 Marine Drive in White Rock, British Columbia (the “Premises”). The plaintiff (the “Tenant”) and the Landlord entered into a written lease agreement dated March 21, 2017, for the purpose of leasing the Premises to the Tenant for use a restaurant or pub (the “Lease”). The Tenant took possession of the Premises on or around April 1, 2017. The Lease was for a period of four years and was set to expire on March 31, 2021. The Tenant operated a restaurant at the Premises called Localz on Marine (the “Business”).

[12] The Lease included the following provision found at clause 2.3, which the plaintiff argues operates to transfer ownership of certain chattels to the Tenant and requires the Landlord to provide a bill of sale to evidence that transfer. The interpretation of clause 2.3 is key to these applications and it reads:

> 2.3 Included Chattels: The parties have agreed that the items shown on Schedule "A" to this Lease shall be provided to the Tenant without additional charge. The Landlord shall execute within a reasonable time upon request such further bill of sale as the Tenant may require to evidence such transfer. These are provided on a strictly "as is, where is" basis with no representation or warranty as to their condition or fitness for any use whatsoever.

The included chattels listed in Schedule A to the Lease include items such as tables, chairs, and some kitchen appliances such as an oven, ice maker, grill, and refrigerator.

[13] The Tenant listed the Business for sale in January 2019 and entered into a written agreement for the sale of the assets of the Business with Street Junction Authentic Indian Street Foods Ltd. (the "Buyer") shortly thereafter. The purchase price was originally agreed to be $155,000 but was later amended to be $130,000.

[14] As a condition for the completion of the sale, the Buyer required that the Tenant provide written confirmation from the Landlord that the Tenant was the owner of the included chattels. Consequently, the Tenant requested that the Landlord provide the bill of sale referenced in clause 2.3 of the Lease. Despite having operated the Business at the Premises for nearly two years, the Tenant had not requested a bill of sale from the Landlord until 2019. The uncontradicted evidence of Robert Takhar, the principal of the plaintiff, is that he did not ask for the bill of sale previously because he did not consider the chattels to be of much value and it was not a priority for him to obtain the bill of sale until he entered into negotiations to sell the Business to the Buyer.

[15] The Landlord refused to provide the bill of sale. On the evidence before me, the Buyer ultimately refused to complete the purchase of the Business because the Tenant was unable to provide the Buyer with the bill of sale evidencing the transfer of ownership of the included chattels from the Tenant to the Buyer.

[16] The Tenant had experienced challenges operating the Business and had not paid rent for December 2018, January 2019, and February 2019 during which time the Tenant and the Buyer negotiated the sale of the Business. The Landlord had originally agreed to assign the Lease to the Buyer provided that the three months of outstanding rent would be paid to the Landlord in full from the proceeds of the sale of the Business. After the sale collapsed, the Tenant did not pay any further rent and the Landlord terminated the Lease effective April 9, 2019. The Landlord did not find a new tenant for the Premises until April 2020. The Business is no longer in operation.

THE LANDLORD BREACHED THE LEASE BY REFUSING TO PROVIDE THE BILL OF SALE

[17] Whether or not the Landlord breached the Lease by refusing to provide the Tenant with the bill of sale in February 2019 is dependent upon the proper interpretation of clause 2.3 of the Lease. The Landlord submits that the Lease did not include transfer of ownership of the included chattels; rather, it says that the Lease only provided the Tenant with the use of the included chattels. The Tenant says that the proper interpretation is that the parties agreed that ownership of the included chattels would transfer to the Tenant.

Relevant Legal Principles

[18] The modern approach to contractual interpretation is to read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. This was discussed by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47:

> [47] … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine “the intent of the parties and the scope of their understanding” …To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be

> difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed…. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> [Citations omitted.]

[19] The surrounding circumstances in existence at the time the contract was executed are relevant to the interpretation of a provision even if there is no ambiguity in the provision itself: *British Columbia (Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc.,* 2016 BCCA 283 at para. 42 [*Columbus Real Estate*]. However, the surrounding circumstances cannot operate to create an ambiguity or contradict the plain meaning of the words that exist in the contract. A contract's interpretation is still to be grounded in the text of the contract and should not "deviate from the text such that the court effectively creates a new agreement": *Sattva Capital Corp.* at para. 57.

[20] Permissible evidence of the surrounding circumstances is limited to "objective evidence of background facts at time of execution of the contract"; the subjective intentions of the parties to a contract are not to be considered as part of the factual matrix comprising the surrounding circumstances. Consideration of a party's subjective intentions remains prohibited by the parol evidence rule: *Sattva Capital Corp.* at paras. 58 and 59. Moreover, the court can only have resort to the factual matrix that existed at the time the contract was executed; the parties' subsequent conduct is not be used when interpreting a contractual provision: *Wade v. Duck,* 2018 BCCA 176 at paras. 29-30.

[21] Finally, the factual matrix that the court can consider in its interpretive exercise must be common to both parties; it cannot be solely the version of facts put forth by only one party. In *Taggart v. McLay,* 1998 CarswellBC 2911, [1998] B.C.J. No 3079, Lambert J.A. put it this way at para. 7:

> [7] … It is proper to look at and understand the factual matrix as it would be perceived by the parties in interpreting the contract but, of course, one has to accept the factual matrix common to both parties and not individualized versions of the factual matrix, in lending background to any questions of interpretation.

Discussion

[22] I have concluded that that clause 2.3 of the Lease operates to transfer ownership of the included chattels listed in Schedule A to the Lease from the Landlord to the Tenant and that it required the Landlord to provide the Tenant with a written document to evidence that transfer.

[23] For ease of reference, I will reproduce clause 2.3 of the Lease here and I have underlined the impugned sentence:

> 2.3 Included Chattels: The parties have agreed that the items shown on Schedule "A" to this Lease shall be provide to the Tenant without additional charge. <u>The Landlord shall execute within a reasonable time upon request such further bill of sale as the Tenant may require to evidence such transfer</u>. These are provided on a strictly "as is, where is" basis with no representation or warranty as to their condition or fitness for any use whatsoever.

[24] In my opinion, the words of clause 2.3 are clear and unambiguous. Read plainly, they require the Landlord to "provide" the Tenant with a bill of sale that evidences the transfer of the included chattels to the Tenant. When read with the other words of clause 2.3, the plain and unambiguous interpretation is that clause 2.3 operates to transfer ownership of the included chattels, by "providing" them to the Tenant on an as-is where is basis. The words clearly state that the Landlord is to give the Tenant a document evidencing that transfer upon request.

[25] I have come to this conclusion after considering the factual matrix comprising the surrounding circumstances at the time the Lease was executed. I will address each of the factors that the Landlord suggests are appropriately considered as part of the factual matrix in interpreting the Lease.

[26] I agree with the Landlord that the context of the Lease is not necessarily consistent with a transfer of ownership of the included chattels. However, the fact that the overarching purpose of the Lease is to lease the Premises to the Tenant to

operate the Business, is not necessarily incompatible with a transfer of ownership of certain chattels. Parties are free to, and often do, structure agreements that achieve each parties' objectives; even if those objectives are not necessarily shared by entities involved in similar commercial agreements. This contextual factor does not support a conclusion that the words in clause 2.3 are ambiguous, and nor does it support the Tenant's interpretation.

[27] The words of the offer to lease also do not support the Landlord's interpretation. Like the Lease itself, the offer to lease discusses the included chattels as being "provided" to the Tenant and that the items to be included are for the sole benefit of the Tenant. In my view, the portions of the offer to lease relied upon by the Landlord in support of its position are equally supportive of the transfer of ownership of the chattels as was reflected in the final version of the Lease.

[28] The Landlord relies upon *Columbus Real Estate* at para. 50 in support of its position that I can consider common industry practice as part of the factual matrix comprising the surrounding circumstances. The Landlord submits that it is not customary for a lease to transfer ownership of property, and therefore, I should not interpret clause 2.3 to do so. It says that the sentence requiring the Landlord to provide a bill of sale must have accidentally been included, and if read without it, which it says would be consistent with industry practice, no transfer of ownership occurs.

[29] Without making a finding of such, I will assume, consistent with the Landlord's position, that it is not customary for a lease of a premises to transfer ownership of included property. While I agree that it may be appropriate to consider prevailing custom and practice when interpreting a contractual provision, I do not agree with the Landlord that in this case, consideration of such practice leads to a conclusion consistent with its interpretation of the Lease. The problem with the Landlord's argument on the facts of this case is that, if it is not standard practice to include a term such as the underlined portion in clause 2.3, then it does not stand to reason that it was "boilerplate" type language that was inadvertently left in the Lease from a

template or some other precedent. If it is in fact not common practice, then someone must have entered that term intentionally at some point in time. If it was left in the Lease from another similar agreement, then that undermines the Landlord's position on the commonality of the industry practice. It is noteworthy that the Lease was prepared by the Landlord and presented to the Tenant.

[30] Although not referenced by the Landlord, there are two other factors that I have considered as part of the surrounding circumstances in this case. On the evidence before me, the Tenant was aware that the Landlord had acquired the included chattels when he acquired the Premises as part of a distressed sale. The chattels were in a dilapidated stated and provided to the Landlord on an "as is, where is" basis. Essentially, the Landlord inherited the chattels with the purchase of the Premises and I infer that they were not particularly valuable. In these circumstances, it is not unreasonable that the Landlord would agree to transfer ownership of the chattels to the Tenant as part of the Lease.

[31] Finally, I note that the parties engaged in two-way negotiations at the time the Lease was executed. The Tenant received the Lease as an attachment to the offer to lease provided by the Landlord. The Tenant made a number of changes to the attached lease in handwriting and those changes were initialled by both parties. One of those changes is immediately above clause 2.3. This leads me to conclude that the parties were engaged in the review of the terms of the Lease at the time it was executed, including with respect to the impugned provision.

[32] The Landlord says that the proper interpretation of clause 2.3 is that the items listed in the included chattels were owned by the Landlord and provided to the Tenant for their use at no additional charge. It submits that the provision should be interpreted as if the underlined sentence above was not present. In support of taking this approach to interpretation, the Landlord relies upon *Wei Guang Real Estate Development Ltd. v. Nettwerk Productions Ltd*., 2021 BCSC 215 at para. 21 [*Wei Guang*], where Church J. held that the use or omission of a key word might appropriately be a question of interpretation.

[33] While that may be the case in certain circumstances, the Court's decision in *Wei Guang* is distinguishable from this case. In *Wei Guang,* Church J. was determining whether the word "not" had been omitted from a contractual provision. In those circumstances, it is reasonable that determining whether one word was omitted was an interpretive exercise. However, in the circumstances of this case, the Landlord is asking the Court to ignore an entire sentence, not to determine whether the omission of one word was intentional or not. In my view, reading the Lease to omit the entire underlined sentence goes well beyond the interpretation exercise envisioned by Church J. in *Wei Guang.* Removing the impugned sentence would effectively create a new agreement and does not, in my view, accord with the surrounding circumstances I have discussed. The sentence exists in the Lease and it cannot be ignored; parties are presumed to intend the legal consequences of the words they choose: *Eli Lily & Co. v. Novopharm Ltd.,* [1998] 2 S.C.R. 129 at para. 56.

[34] The Landlord argues that if the Lease is interpreted such that ownership of the included chattels was to be transferred to the Tenant, then the Lease should be rectified to accord with the "true agreement" which it says did not include transfer of ownership. However, nowhere in the Landlord's response to civil claim is the equitable remedy of rectification pleaded. Despite having filed the response to civil claim in June 2019, the Landlord has not amended its response to civil claim, and it did not apply to do so at the hearing of the summary trial application. As in a conventional trial, the issues in a summary trial are framed by the pleadings. It is not open to the Landlord to seek rectification of the Lease on the pleadings as they stand. In any event, given the very narrow circumstances in which rectification may be granted as discussed in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, I am not persuaded that the remedy is available in the circumstances of this case: there is simply no evidence of a mutual mistake made when the Lease was reduced to writing.

[35] For the foregoing reasons, I have concluded that clause 2.3 of the Lease operated to transfer ownership of the included chattels to the Tenant and that the

provision required the Landlord to provide the Tenant with a bill of sale evidencing the transfer of ownership. The Landlord's failure to provide the Tenant with the bill of sale when requested to do so in February 2019 was a breach of the Lease.

THE TENANT'S DAMAGES RESULTING FROM THE LANDLORD'S BREACH OF THE LEASE

[36] The Tenant submits that he is entitled to damages arising from the collapse of the sale of the Business to the Buyer. An award of damages for breach of contract is intended to restore the plaintiff to the position they were in before the injury was suffered. The onus is on the plaintiff to prove, on a balance of probabilities, what injury has been suffered to establish the entitlement to damages: *Mundell v. Wesbild Holdings Ltd.,* 2007 BCSC 1326 at paras. 37 and 38.

Discussion

[37] On or around January 29, 2019, the Tenant agreed to sell the assets of the Business to the Buyer for $155,000. Among other things, the purchase agreement provided that, by February 15, 2019, the Buyer would receive and approve a list of assets and would receive the Landlord's approval to assume the Lease of the Premises. Importantly, the purchase agreement required the Tenant to provide the Landlord's written agreement that the Tenant owned all of the assets the Buyer viewed on the Premises, which encompasses the included assets listed in Schedule A to the Lease (i.e. the included chattels).

[38] On February 14, 2019, the Landlord confirmed that it did not object to assigning the Lease to the Buyer provided that the outstanding rent owed by the Tenant was paid. The Landlord calculated the outstanding amount owing from December 2018 to February 2019 as being $28,644.34. The Tenant agreed to this and advised the Landlord that the outstanding rent would be paid from the proceeds of the sale of the Business.

[39] In and around this time, the Tenant requested that the Landlord provide the bill of sale evidencing transfer of ownership of the included chattels to the Tenant, as provided for in clause 2.3 of the Lease. The Landlord refused to do so; instead, it

took the position that it still owned the included chattels. Some discussions followed about the possibility of the Tenant paying the Landlord for the included chattels. I do not find that entering into these discussions is an admission by the Tenant that ownership of the included chattels was not transferred to it by operation of the Lease. Rather, I find that The Tenant entertained these discussions because its back was against the wall given the conditions required by the Buyer and the position taken by the Landlord. The Landlord demanded $45,000 in order to transfer the included chattels to the Tenant. The Tenant did not agree to this amount. The bill of sale was not provided.

[40] On February 15, 2019, the subject removal date for the purchase agreement was extended to February 20, 2019. On February 20, 2019, the Tenant and Buyer amended the purchase agreement such that the purchase price would be $130,000 plus $19,939 as the Buyer's reimbursement of the Tenant's lease deposit for a total of $149,939. However, it remained a condition of the agreement that the Tenant was to provide written confirmation from the Landlord that the Tenant owned the included chattels, and that they therefore could be sold to the Buyer by the Tenant as part of the sale of the Business.

[41] When the Landlord initially indicated its agreement to assign the Lease to the Buyer, it provided a proposed assignment of lease to the Tenant. On or around February 27, 2019, the Landlord provided the Tenant with an amended assignment of lease in which clause 2.3 was amended to remove the impugned sentence. The Landlord still refused to provide the bill of sale.

[42] The Tenant continued to make efforts to fulfill its duties to the Buyer under the purchase agreement but was unable to meet the requirement regarding evidence of ownership of the included chattels. On February 28, 2019, the Buyer refused to complete the purchase of the Business because it had not received the bill of sale regarding the included chattels; the Buyer described this as a "fundamental" term of the purchase agreement and it was the only item outstanding. On the evidence before me, I find that if the Tenant had been able to provide the bill of sale to the

Buyer, the Buyer's purchase of the Business would likely have completed and the Tenant would have received $149,939. Pursuant to the agreement between the Tenant and the Landlord, $28,644 from these proceeds would have been paid to the Landlord on account of the three months of back-rent owed by the Tenant. Thus, the total amount that the Tenant would have received but for the Landlord's breach of clause 2.3 was $121,295.

Mitigation

[43] The Landlord submits that if it did breach clause 2.3 of the Lease then the Tenant is not entitled to damages amounting to the full value of the collapsed sale of the Business. The Landlord argues that the Tenant did not mitigate its damages. The onus is on the Landlord to prove, on a balance of probabilities, that the Tenant failed to mitigate its damages: *Mundell* at para. 38.

[44] I do not agree with the Landlord that the Tenant failed to mitigate its damages. Over the course of a few weeks after the sale of the Business collapsed, the Tenant continued to negotiate with the Buyer to salvage the deal; however, they were unable to reach an agreement. The Business remained listed for sale and was marketed by the listing agent. A few prospective purchasers viewed the Business and the Premises in March 2019; however, the Tenant did not receive any other offers. The Landlord terminated the tenancy on April 9, 2019, as the Tenant had not paid rent since December 2018.

[45] In my view, the Tenant's attempt to salvage the agreement with the Buyer and its continued marketing and listing of the Business were reasonable steps to take by the Tenant in the circumstances.

[46] I do not agree with the Landlord that in order to mitigate its damages, the Tenant should have agreed to purchase the included chattels for the $45,000 that the Landlord demanded in February 2019. In my view, the duty to mitigate does not go this far. Rather, what is required of the Tenant was to take reasonable steps to mitigate; it is not necessary for the Tenant to take unusual steps or risks in mitigating its damages: *Mundell* at para. 39. In my view, paying $45,000 to the Landlord for

assets which the Lease provides are already owned by the Tenant would be unusual.

[47] I accept that the duty to mitigate may sometimes include accepting an offer from the party who has breached the contract as discussed in *Fill-More Seeds Inc. v Victoria Seeds Inc.,* 2009 BCSC 1732 at paras. 90-92 [*Fill-More*]. However, *Fill-More* is distinguishable from this case. In the case at hand, the Landlord's demand for $45,000 has no basis in the Lease, whereas in *Fill-More,* the breaching party sought funds that were already owed to it under the contract with the other party as a condition of delivering further goods under the contract. In the circumstances of the case before me, it would be unreasonable to expect the Tenant to pay the amount demanded by the Landlord as a means of mitigating its damages because doing so has no basis in the agreements between the parties. In any event, the evidence is that the Tenant did not have enough funds to pay the $45,000 and its other debts, including its debt to the Canada Revenue Agency. It is these debts that were a significant factor in the Tenant's decision to sell the Business.

Quantification

[48] While I do not find that the Tenant failed to mitigate its damages, I do agree with the Landlord that the Tenant's damages are not equivalent to the entire purchase price of the collapsed sale. This is because after the deal collapsed and the Tenant vacated the Premises, it retained some of the chattels that it owned that were on the Premises (the "Retained Assets"). The Retained Assets were indisputably owned by the Tenant; they were not the included chattels that are the subject of clause 2.3 of the Lease which were left at the Premises. As the Tenant acknowledges, the Retained Assets have some value. Since the collapsed sale was a sale of all of the Business's assets, the Retained Assets are part of the assets that would have formed part of the purchase price agreed to by the Buyer. If the Tenant's damages are assessed to be the entire purchase price of the collapsed deal, it will effectively receive double compensation in respect of the Retained Assets.

[49] As a result of the foregoing, I conclude that the value of the Retained Assets must be considered in the assessment of the Tenant's damages. The difficulty in this case is that the evidence of the value of the Retained Assets is less than ideal. On the evidence before me, it appears that the Buyer and the Tenant had come to an agreement that all of the chattels on the Premises had a value of $19,500. This is the only evidence before the Court of the total value of the Retained Assets and the included chattels.

[50] The Tenant declined to apply for leave to re-open its case to tender better evidence of the value of the Retained Assets. While it would be preferable to have better evidence of the value of the Retained Assets, given the amounts involved and the time and cost of obtaining such better evidence, I am satisfied that I can sufficiently assess the Tenant's damages on the evidence in the record.

[51] I have reviewed the list of Retained Assets and the included chattels. As discussed, the Tenant itself takes the position that the included chattels had very little value. It has declined to apply to re-open the summary trial to tender better evidence of the value of the Retained Assets. I find that vast majority of the $19,500 attributed to the Business' assets were in respect of the Retained Assets and only a small amount should be attributable to the included chattels. In the circumstances, I find that the value of the Retained Assets is $15,000 and the award of damages should be reduced by this amount.

[52] The Tenant is entitled to be put in the same position it would have been, but for the Landlord's breach of the Lease. Had the Landlord complied with clause 2.3, the Tenant's sale of the Business would have completed and the Tenant would have received $149,939. As the parties had agreed, the Tenant would have then paid $28,644 in back-rent to the Landlord. The damages award is further reduced by $15,000 to account for the Retained Assets. Consequently, the Tenant is entitled to damages in the amount of $106,295 for the Landlord's breach of the Lease.

THE LANDLORD'S CLAIM FOR UNPAID RENT

[53] The Landlord's application for summary trial seeks payment for unpaid rent under the Lease in the amount of $154,929.79. As referenced earlier, the Lease was set to expire on March 31, 2021, and the Landlord terminated the tenancy on April 9, 2019. The Landlord argues that upon termination, it provided sufficient notice of its intention to seek the rent owing for the remainder of the unexpired term of the Lease. However, the Landlord acknowledges that, at most, it would only be entitled to the rent owing under the Lease until March 31, 2020, as it found a new tenant for the Premises beginning on April 1, 2020.

[54] The fundamental problem with the Landlord's summary trial application is that its resolution is dependent upon the disposition of the Tenant's summary trial application. As I have found that the Tenant's sale of the Business would have completed had the Landlord not breached the Lease, it follows that the Buyer would have assumed the Lease. Pursuant to the assignment of the Lease proposed by the Landlord, the Tenant would have been released from its obligations under the Lease, including its obligation to pay rent. Had the sale completed, the Buyer would have been responsible for paying rent to the Landlord beginning on March 1, 2019. The fact that the Landlord did not receive rent under the Lease for the period between March 1, 2019, and March 31, 2020, is not the Tenant's responsibility; it was caused by the Landlord's failure to provide the Tenant with the bill of sale as it was required to do pursuant to the Lease.

[55] The only part of the Landlord's claim for unpaid rent that is sustainable is with respect to the rent that the Tenant did not pay for the months of December 2018, January 2019 and February 2019. However, as discussed above, this has already been accounted for in the assessment of damages within the Tenant's summary trial application. Consequently, the Landlord's summary trial application for unpaid rent is dismissed.

CONCLUSION AND DISPOSITION

[56] The Landlord breached the Lease by failing to provide the Tenant with the bill of sale evidencing the transfer of ownership of the included chattels. The Landlord's breach resulted in the collapse of the Tenant's sale of the Business. The Tenant is entitled to damages in the amount of $106,295 in respect of the Landlord's breach.

[57] The Landlord's application for summary trial in respect of unpaid rent is dismissed because the Tenant is not responsible for the Landlord not receiving rent following the collapse of the sale of the Business.

The Tenant is entitled to its costs of both applications.

"Majawa J."