

Court of King's Bench of Alberta

Citation: Soltis v Citadel Mews Ltd 2024 ABKB 569

Date: 20240925
Docket: 2303 10236
Registry: Edmonton

Between:

Brian Soltis, As Executor of the Estate of Mary Soltis

Plaintiff

- and -

Citadel Mews Ltd., Devonshire Security Corp. and Gregory Christenson

Defendants

**Memorandum of Decision
of the
Honourable Applications Judge M.R. Park**

Introduction:

[1] The Plaintiff seeks the following partial summary judgment relief:

- a) Joint and several judgment as against the defendants Citadel Mews Ltd. (“**Citadel**”) and Devonshire Security Corp. (“**Devonshire**”) in the amount of \$372,495.00, plus interest and costs.
- b) An order directing that the Mortgage (as hereinafter defined) be transferred or assigned to the Plaintiff at the Plaintiff’s request.
- c) A declaration that notwithstanding any transfer or assignment of the Mortgage, Devonshire is not released of any liability to the Plaintiff.

Background:

[2] Citadel Village East (the “**Property**”) is a retirement complex located in St. Albert, Alberta which offers condominium-style apartment accommodation and various amenities. It is owned and operated by Citadel.

[3] In early April, 2014, the late Edward Soltis (“**Edward**”) and the late Mary Soltis (“**Mary**”) attended at the Property along with their son, Brian Soltis (“**Brian**”). They took a tour of the Property and viewed one of the residential units, to which I will refer as the “**Unit**”.

[4] The Unit was available for occupation pursuant to an arrangement known as a “life lease”.

[5] A life lease is an arrangement that lies somewhere between renting and owing a residential property. The life lease holder typically pays an upfront charge or “entrance fee” in an agreed upon amount and, in exchange, obtains the right to occupy a particular housing unit until such time as the life lease is terminated. Usually, upon termination of the life lease, the initial entrance fee is returned to the lessee, net of an administration fee or charge payable to the landlord. The life lessee will also normally be required to pay a monthly contribution to the operational costs of the complex within which their residential unit is located.¹

[6] On April 7, 2014, Edward and Mary executed an interim contract pursuant to which they agreed to enter into a life lease in respect of the Unit, the term of which was to begin on May 1, 2014. This interim contract assigned a value of \$403,500.00 to the Unit. Edward and Mary were also to receive a parking stall, which was assigned a value of \$15,000.00.

[7] Also on April 7, 2014, Edward and Mary as lessees and Citadel as lessor, entered into a life lease in respect of the Unit (the “**Life Lease**”).

[8] The “entrance fee” payable under by Edward and Mary under the Life Lease was \$403,500.00 (the “**Entrance Fee**”). The Life Lease departs somewhat from the usual arrangements described at paragraph 5 above, in that payment of the Entrance Fee is characterized as a loan by Edward and Mary to Devonshire (the “**Devonshire Loan**”).

[9] Citadel and Devonshire are corporate entities over which the defendant Gregory Christenson exercised some measure of control, in the sense that at all material times, he was a director of both and was a principal of the corporations which hold the issued voting shares in both.

[10] The terms of the Devonshire Loan are set out in a written loan agreement dated April 7, 2014 (the “**Loan Agreement**”), which is incorporated into the Life Lease by way of addendum.

¹ Michael Gibson & Ryley Schmidt, “Life leases in Alberta: Magic, mystery or an interest in real property?”, online: Miller Thomson <<https://www.millerthomson.com/en/insights/condominium-strata-brief/life-leases-alberta-interest-real-property/>>.

[11] The Loan Agreement provides that Devonshire will readvance the Entrance Fee to Citadel pursuant to the terms of a “trust agreement” entered into between those parties (the “**Trust Agreement**”), a copy of which is appended to the Loan Agreement as a schedule.

[12] Pursuant to numbered paragraph 5 of the Loan Agreement (the “**Default Payout Provision**”), the “Mortgage Payout Amount” is payable by the “Borrower” (Devonshire) to the Lender (Edward and/or Mary) within 30 days of the “Termination Date”, subject to the terms of numbered paragraph 6 (more on this to follow).

[13] The Loan Agreement defines “Mortgage Payout Amount” as being the “Principal Sum” (which is an amount equivalent to the Entrance Fee), less the “Release Fee” and any deductions for amounts owing to Citadel under the terms of the Life Lease.

[14] “Release Fee” is defined as being an amount equal to 6% of the “Suite Value of the Leased Premises” which, again, is an amount equivalent to the Entrance Fee.

[15] “Termination Date” is not defined in the Loan Agreement. However, the parties seem to agree that this term has the meaning given to it in the Life Lease. That agreement provides for a termination date which is the earlier of the termination of the agreement pursuant to Article 6 (which allows the lessee to issue a written termination notice) and the last day of the third month following the lessee’s death.

[16] As alluded to above, Article 6 of the Life Lease allows a lessee to terminate the agreement on 3 clear months’ written notice, to be effective on the last day of the third month of the notice period, provided the notice is delivered on or before the first day of the first month of the notice period. So, for example, a lessee wishing to terminate their lease as of June 30 would need to serve written notice in that regard no later than April 1.

[17] The effect of all of this is that the lessee is generally entitled to receive the Mortgage Payout Amount 30 days from the effective termination date provided for by their written termination notice, while the estate of a deceased lessee is entitled to receive that payout within 30 days from the last day of the third month following the lessee’s death.

[18] As I noted, the 30-day repayment deadline provided for by the Default Payout Provision is subject to numbered paragraph 6 of the Loan Agreement (the “**Deferred Payout Provision**”), which provides as follows:

6. **In the event that the Lender gives notice to the Borrower of its intent to terminate the Lease** at any time in which, prior to the delivery of such notice, six (6%) (the “Threshold”) or more of the Residents have served a Notice of Termination on the Borrower and remain unpaid, then the Mortgage Payout Amount will not become due and payable as aforesaid in paragraph 5, but shall be repaid in accordance with the following:

6.1 The repayment of loan amounts by the Borrower to the Residents shall be done on a “first in first out” basis. Specifically, Residents submitting Notices of Termination in excess of the Threshold will be placed on a pay-out list, in the order in which their Respective Notices of Termination are received, and their respective units shall be placed on a re-let list (the “Unit List”). As units on the Unit List are re-life leased by the Borrower, in accordance with paragraph 6.2 hereof, the Residents

shall be repaid in the order as their names appear on the pay-out list and in accordance with all other terms of this Loan Agreement;

- 6.2 Unless otherwise determined by the Landlord, in its sole and unfettered discretion, those units on the Unit List shall only be re-life leased for an amount that is greater than or equal to the current market value thereof, less ten (10%) percent (but not less than the Mortgage Payout Amount for such unit) (the “Minimum Amount”). However, for greater certainty, interest shall accrue and be paid on the Mortgage Payout Amount, or so much thereof as remains outstanding from time to time, at the Interest Rate, from the Payment Due Date to and including the date that the Mortgage Payout Amount, less applicable deductions under the Lease, has been paid in full to the Lender;
- 6.3 In the event that the Borrower cannot re-life lease the Unit for an amount greater than or equal to the Minimum Amount, and subsequently rents the Unit, the Mortgage Payout Amount shall not become due and payable until such time as the Borrower arranges new mortgage financing to the Borrower’s satisfaction; and
- 6.4 The Lender may from time to time make inquiries to the Borrower in respect of the status of re-leasing those units on the Unit List and any additional information in respect of the re-payment of the Mortgage Amount and the Borrower shall endeavour to provide such information to the Lender; if available. [emphasis added].

[19] So, in the case of a written termination notice, the lessee may have to wait for a payout, depending on how many other written termination notices are then in play. Given the emphasised language of the Delayed Payout Provision, the Plaintiff says it has no application to leases that are terminated because of death. The Defendants say otherwise. More on this to come.

[20] Both the Loan Agreement and the Trust Agreement provide that repayment of the Mortgage Payout Amount is to be secured by way of a mortgage registered against title to the Unit in favor of Devonshire as Edward and Mary’s trustee (the “**Mortgage**”).

[21] The Mortgage provides that on the “Due Date”, the Mortgagor (i.e. Citadel) will pay the “Payout Amount” to the Mortgagee (i.e. Devonshire), provided however that if on the Due Date more than 6% of the “Tenants” have served notice on the Mortgagor to terminate their tenancies, then the Payout Amount shall not become due and payable until the date the Mortgagor has re-let the Mortgaged Premises (i.e. the Unit) (the “**Mortgage Payout Provision**”).

[22] For the purposes of the Mortgage Payout Provision, the following definitions apply:

“**Due Date**” means the date which is 30 days after the date that vacant possession of the Mortgaged Premises is delivered to the Mortgagor.

“**Principal Sum**” means the sum of \$418,500 (which I assume is the total of the values assigned by the Interim Contract to the Unit and the Parking Stall).

“**Tenants**” means all tenants of the Project who have loaned or advanced money to the Lender (i.e. Devonshire).

[23] The Loan Agreement gives Edward and Mary the right to ask Devonshire to transfer/assign the Mortgage to them.

[24] The Trust Agreement gives Devonshire the following options in the case of default by Citadel under the Mortgage: (1) do nothing, (2) take enforcement action or (3) transfer or assign the Mortgage to Edward and/or Mary. The agreement appears to require a transfer/assignment to Edward and Mary if they so request.

[25] As I said earlier, the term of the Life Lease commenced on May 1, 2014. Edward passed away on June 2, 2018, leaving Mary as the remaining resident/lessee under that agreement.

[26] Mary's health began to decline, such that she required additional day-to-day care. Accordingly, in December, 2020, she gave notice to Citadel of her intention to terminate the Life Lease (the "**2020 Termination Notice**").

[27] Upon its receipt of the 2020 Termination Notice, Citadel advised Mary that because more than 6% of the Property residents holding life leases had served notices to terminate their leases, she would be placed into the payment queue provided for by the Deferred Payout Provision (the "**Queue**").

[28] By way of agreement in writing dated December 16, 2020 (the "**Lease Amending Agreement**"), Mary and Citadel agreed as follows:

- a) For the purposes of Queue placement, Citadel agreed to recognize the 2020 Termination Notice, effective December 1, 2020.
- b) Mary would be permitted to continue to occupy the Unit until such time as Citadel/Devonshire was in a position to pay the Mortgage Payout Amount.
- c) Upon receiving notice from Citadel that the Mortgage Payout Amount was payable (the "**Payout Notice**"), Mary was permitted to give one clear month's notice of her intention to terminate the Life Lease, as amended (the "**Revised Termination Notice**"), with the Mortgage Payout Amount to be paid following the expiry of this revised notice period.
- d) If Mary declined to vacate despite receiving the Payout Notice, the Lease Amending Agreement was to be treated as null and void, essentially reinstating the rights and obligations of the parties under the Life Lease.

[29] In or around March, 2022, Citadel served Mary with the Payout Notice. By this time, Mary was too unwell to relocate, and therefore declined to issue the Revised Termination Notice.

[30] Mary passed away on May 4, 2022. She died testate. Her will, which has been probated, names Brian as executor.

[31] After Mary's death, and at Citadel's request, Brian, in his capacity as executor, signed a written "Notice of Termination" in respect of the Life Lease (the "**2022 Termination Notice**"). The termination and payment dates provided for by the 2022 Termination Notice appear to reflect a belief that the Lease Amending Agreement remained in effect.

[32] By way of letter dated June 6, 2022 and addressed to Brian, Citadel acknowledged receipt of the 2022 Termination Notice and advised of the placement of the Estate's claim into the Queue pursuant to the Deferred Payout Provision. Despite the fact that by its own terms, the Lease Amending Agreement was no longer of any force or effect, Citadel represented that it was prepared to acknowledge December 1, 2020 at the date on which the Estate's claim was added to the Queue. This means that as of June 6, 2022, the Estate's claim had the pole position in the Queue.

[33] Vacant possession of the Unit was delivered up to Citadel by the end of June, 2022.

[34] On July 29, 2022, Brian received an "interim payment" against the Mortgage Payout Amount in the amount of \$20,925.00. No further payments have been made. That payment was accompanied by correspondence from Citadel confirming that the Estate's claim was first in the Queue.

[35] By way of written lease agreement dated October 18, 2022, Citadel "re-let" the Unit to a Jean DeChamplain, effective November 1, 2022. The existence of this lease came to the Plaintiff's attention only after these proceedings were commenced.

[36] On February 23, 2023, Brian requested a transfer of the Mortgage, which request was denied.

[37] On March 28, 2023, Brian requested information from Citadel and/or Devonshire regarding the status of re-leasing vacant units at the Property. He also asked what steps were being taken to refinance the Property to pay out residents in the Queue. Brian's evidence is that his inquiries went unanswered.

[38] This action was commenced by way of Statement of Claim filed on June 7, 2023. A Statement of Defence was filed on June 27, 2023. This summary judgment application was filed on December 6, 2023. It is supported by an affidavit sworn by Brian on November 22, 2023.

[39] On December 7, 2023, Mr. Christenson swore an affidavit in connection with this application, which is responsive to some of Brian's affidavit evidence. Here is what he had to say about the lease to Mr. DeChamplain:

6. No new life leases have been entered into by Citadel Mews Ltd. since the subject mortgage became first in the queue where funds have been received by Citadel Mews Ltd. pursuant to a new life lease in an amount sufficient to repay the amount owing to the Plaintiff. The background of the Dechamplain life lease referred to in paragraph 28 of the Affidavit and attached as Exhibit Q is as follows:
 - a) Jean Dechamplain was a resident of Citadel Mews West (suite 303) with a suite life lease value of \$444,717 and a parking lease of \$15,000 for a total of \$459,717;
 - b) When the Citadel Mews West building was destroyed in a fire in May 2021, Jean DeChamplain moved to another facility called Devonshire (suite 216);
 - c) Jean DeChamplain's Citadel Mews West life lease was transferred to Devonshire (suite 216) with a life lease value of \$386,000 and parking lease of \$15,000 for a total of

\$401,000. Upon Jean DeChamplain's instructions, the excess of \$58,717 was to be used to cover his ongoing monthly costs at Devonshire;

- d) Effective November 1, 2022, Jean DeChamplain chose to transfer to Citadel Mews East (suite 204) with a suite life lease value of \$432,116 and parking of \$15,000 for a total of \$447,116. The transferred Devonshire life lease value of \$401,000 plus the remaining credit balance of \$25,067.37 was applied to the Citadel Mews East life lease for a total credit of \$426,027.37. In order to bring up the total Citadel Mews East life lease to \$447,116, an additional \$21,048.63 was paid by Jean DeChamplain to Devonshire Security Corp. These are the only new funds received.

Issue:

[40] I must determine if the Plaintiff is entitled to some or all of the summary judgement relief sought.

Analysis:

a. The Summary Judgment Test:

[41] Rule 7.3 allows for judgment to be awarded on a summary basis if there is no defence to the Plaintiff's claim, or any part of it.

[42] Summary judgment may be awarded upon the applicant establishing that there is no "genuine issue for trial". There will be no issue requiring a trial when the judge is able to make the necessary findings of fact on the record before them, apply the law to those facts and be satisfied that the process reflects a proportionate, timely and cost-effective means to achieve a just result: *Hyrniak v Mauldin*, 2014 SCC 7.

[43] The analysis to be undertaken by the Court on a summary judgment was set out by the Alberta Court of Appeal in its decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 ("*Weir-Jones*"). The key considerations to be addressed are as follows:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[44] In *Hannam v Medicine Hat School District No. 76, 2020 ABCA 343*, our Court of Appeal provided confirmation and clarity on the summary judgment test set out in *Weir-Jones*. The Court noted that the *Weir-Jones* standard sanctions summary judgment if the presiding judge is left with sufficient confidence in the record such that he or she is prepared to exercise the judicial discretion in to summarily resolve the dispute. More specifically, if the moving party has proved the material facts on the balance of probabilities and advances the law that vindicates their position, summary judgment is appropriate. The outcome does not have to be obvious. Summary judgment cannot be granted if the application presents a genuine issue requiring trial.

b. The Plaintiff's entitlement to a monetary judgment:

[45] As I indicated earlier, the Plaintiff seeks joint and several judgement against Devonshire and Citadel in the amount of \$372,495.00, plus interest. There is no dispute that a liability is owed. Rather, the question is whether that liability has become due.

[46] This question should be simple to answer. The obligation to pay the Mortgage Payout Amount is triggered when the Life Lease is terminated. That occurs on the earlier of the lessee's passing and the lessee's issuance of a written termination notice. However, there are complicating factors here.

[47] The 2002 Termination Notice was issued on the same day that Mary passed. This means that regardless of which triggering event applies, the life lease termination date was August 31, 2022. This creates an issue, because, arguably, the Deferred Payout Provision only applies where the triggering event is the issuance of a termination notice. Therefore, at least on the face of it, figuring out which came first, the chicken (i.e. Mary's passing) or the egg (i.e. the 2022 Termination Notice) is important.

[48] In my view, the chicken came first here. When Mary died, the Life Lease termination mechanism was put into process. From my perspective, a termination notice issued following the lessee's passing is legally meaningless.

[49] With all of that said, in terms of resolving this application, it does not matter which triggering event applies, nor does it matter who is right about the applicability of the Deferred Payout Provision in the event of a lessee's death. For the purpose of the analysis, we could assume that the Defendant is correct and that the Deferred Payout Provision applies in the case of a lessee's passing. Alternatively, we could assume that the 2022 Termination Notice was the triggering event here, in which case there is no dispute that the Deferred Payout Provision applies. All paths lead to the same destination.

[50] As I explained, the Queue operates on a “first in, first out” basis. If you are in first position in the Queue, you are the first to be paid when a unit in the Property is re-life leased. At all material times, Mary’s name was the first in the Queue.

[51] Mr. DeChamplain held a life lease in a unit located in a complex known as “Citadel Meadows West” (the “**Citadel West Unit**”). The unit itself was assigned a value of \$444,717.00. Mr. DeChamplain also had a parking stall valued at \$15,000.00. I will refer to this life lease as the “**Citadel West Unit Life Lease**”.

[52] In 2021, the Citadel West Unit was apparently rendered uninhabitable owing to a fire. Mr. DeChamplain then moved to another unit in a complex known as “Devonshire Manor” (the “**Devonshire Unit**”). That unit was valued at \$386,000.00. Mr. DeChamplain also took a parking stall at Devonshire Manor, which was assigned a value of \$15,000.00.

[53] Mr. Christensen’s evidence is that the Citadel West Unit Life Lease was “transferred” to the Devonshire Unit. That is incorrect. What in fact occurred is that Mr. DeChamplain entered into a new life lease in respect of the Devonshire Unit (the “**Devonshire Unit Life Lease**”).

[54] In terms of the “purchase price” payable for the Devonshire Unit Life Lease, Mr. DeChamplain was given a credit for the amount paid to secure the Citadel West Unit Life Lease. The assigned value of that life lease exceeded the assigned value of the Devonshire Unit Life Lease. The excess, to which I will refer as the “**Rent Credit**”, was credited against the “rent” payable by Mr. DeChamplain under the Devonshire Unit Life Lease.

[55] In or about November, 2022, Mr. DeChamplain moved again, this time to the Property and, specifically, into the Unit. Once more, Mr. Christenson’s evidence is that there was a “transfer”, this time of the Devonshire Unit Life Lease. Again, that is incorrect.

[56] At or around the time he relocated to the Property, Mr. DeChamplain entered into yet another life lease, this time in respect of the Unit (the “**DeChamplain Unit Life Lease**”). For the purposes of that lease, the unit was assigned a value of \$432,116.00. Mr. DeChamplain again took a parking stall, which was valued at \$15,000.00.

[57] In terms of the purchase price payable to acquire the DeChamplain Unit Life Lease, Mr. DeChamplain was given a credit for the amount paid to secure the Devonshire Unit Life Lease (\$401,000.00), as well as a credit for the balance remaining under the Rent Credit (\$25,067.37). That left a shortfall of \$21,048.36 (\$447,116.00 [value of DeChamplain Unit Life Lease] - \$401,000.00 [value of Devonshire Unit Life Lease value] - \$25,067.37 [value of remaining Rent Credit]), which Mr. DeChamplain satisfied by way of a cash payment.

[58] The DeChamplain Unit Life Lease is dated effective November 1, 2022. In my view, as of that date, the Unit was re-life leased to Mr. DeChamplain in the sense contemplated by the Deferred Payout Provision.

[59] Under the Deferred Payout Provision, not only must a unit be re-life leased in order to trigger a payment obligation, the new lease must also meet or exceed a certain value threshold, the

calculation of which is set out in the Deferred Payout Provision. There is no suggestion that the DeChamplain Unit Life Lease did not meet or exceed that threshold.

[60] The requirements of the Deferred Payout Provision were met on November 1, 2022. Mary's name was first in the Queue as of that date. Devonshire was required to pay the Plaintiff within 30 days. It has not done so. Accordingly, the Plaintiff is awarded judgment against Devonshire for the remainder of the Mortgage Payout Amount, plus any applicable contractual interest. It is unclear to me how the Plaintiff has determined that the amount outstanding is \$372,495.00. If the parties cannot agree as to what portion of the Mortgage Payout Amount remains to be paid, they may appear before me in morning Chambers to speak to that issue.

[61] At this juncture, I see no basis to award judgment against Citadel and I therefore decline to do so.

c. The Plaintiff's entitlement to a transfer/assignment of the Mortgage:

[62] The amount secured by the Mortgage is to be paid by Citadel to Devonshire on the "Due Date", which is 30 days from the date on which Devonshire obtains vacant possession of the Unit. As noted above, vacant possession of the Unit was delivered up to Devonshire by the end of June, 2022.

[63] Under the Mortgage, payment is deferred if, as of the Due Date, more than 6% of Property life lease holders have given notice to terminate their leases. In that case, payment is not due until Citadel has re-let the Unit.

[64] The Unit was leased to Mr. DeChamplain effective November 1, 2022. Despite that, the liability secured by the Mortgage has not been satisfied. Citadel is in default of its obligations owed pursuant to the Mortgage.

[65] Brian, in his capacity as executor, has asked Devonshire to transfer the Mortgage to him. Devonshire has declined to do so. Brian argues that Devonshire is contractually required to transfer the Mortgage upon request. I do not agree.

[66] The difficulty the Plaintiff faces is that the Loan Agreement does not oblige Devonshire to transfer or assign the Mortgage under any circumstances, including when it is in default. The Loan Agreement simply permits the Plaintiff to ask for a transfer. Implicit in that is an option for Devonshire to decline the request, which it has done.

[67] If the Mortgage is in default, the Trust Agreement seems to contemplate that Devonshire is required to transfer/assign it to the lender (i.e. the Plaintiff) at the lender's request. Assuming that requirement exists, the Plaintiff is not privy to the Trust Agreement and has no right to insist on its performance.

[68] There are, perhaps, remedies available to the Plaintiff to get the Mortgage into the Estate's hands or to effectively enforce it if Devonshire is found to have breached any duties owed to the

Estate to take realization steps. However, the argument before me was not framed up in such a way.

[69] Given the foregoing, I am not prepared to grant an order directing Devonshire to transfer or assign the Mortgage to the Plaintiff. In light of that, it is unnecessary for me to consider whether I should make a declaration concerning the effect of such transfer/assignment on Devonshire's liability to the Plaintiff.

Conclusion:

[70] The Plaintiff's application is allowed, in part.

[71] If the parties cannot agree as to costs, they may appear before me in morning Chambers to speak to that issue.

Heard on the 15th day of March, 2024.

Dated at the City of Edmonton, Alberta this 25th day of September, 2024.

M.R. Park
A.J.C.K.B.A.

Appearances:

Kelly Hannan and Andrea Lutsch, Lawson Lundell LLP
for the Plaintiff

Kevin P. Chapotelle, Bryan & Company LLP
for the Defendants