IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Canadian Western Bank* v. *Watson Lake Bus Lines Co. Ltd., et al.*, 2006 YKSC 30

Date: 20060411
Docket No.: S.C. No.: 05-A0021
Registry: Whitehorse

BETWEEN:

CANADIAN WESTERN BANK

PLAINTIFF

AND:

WATSON LAKE BUS LINES CO. LTD.
JUNCTION-37-SERVICES LTD.
JOHN JAMIESON (aka JOHN E. JAMIESON)
and SAID SECERBEGOVIC

DEFENDANTS

Before: Mr. Justice L.F. Gower

Appearances:

Alan A. Frydenlund — For the Plaintiff
Peter Morawsky — For the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff bank has applied for judgment against each of the defendants for an amount due under a commercial lease of two semi-trailer units, including interest. The defendants admit that the trailers were leased and that the lessees defaulted in making

payments under the lease. The sole issue is whether a condition of the lease requiring the lessees to pay 24 percent interest per annum on any sums due under the lease constitutes a penalty, and is therefore unenforceable, in which case that aspect of the plaintiff's damages would have to be assessed in accordance with common law principles.

FACTS

[2] Watson Lake Bus Lines Co. Ltd. and Junction-37-Services Ltd. leased the two trailer units from North American Lease Underwriters Inc. ("North American") on July 31, 2002. The original term of the lease was due to expire on June 30, 2007. However, at the end of the 60th month of the lease, the lessees had the option to purchase the trailers for a specified sum. In the event that the purchase option was not exercised, the lessees were obliged to continue to lease the trailers for an additional five months until November 30, 2007.

[3] On August 8, 2002, the lease was assigned from North American to the plaintiff bank.

[4] On August 19 and 20, 2002, respectively, the defendants, Jamieson and Secerbegovic signed personal guarantees guaranteeing the lessees' obligations under the lease.

[5] Commencing November 6, 2003, the lessees defaulted in their payments under the lease. On February 10, 2004, the bank gave written notice to each of the defendants that it intended to enforce its security under the lease agreement and demanded payment of the monies owing under the lease, plus interest, which to date the defendants have failed to pay.

[6] Pursuant to the terms of the lease, the bank properly repossessed the trailers and sold them on or about March 10, 2005 for a net sum of $152,793.49. The bank claims remaining damages of $203,300.87 as of April 5, 2005, plus interest at the rate of 24 percent per annum.

[7] The bank's claim for damages arises from para. 17.2(d) of the lease, which purports to provide for the calculation of liquidated damages payable to the lessor upon default. The provision reads as follows:

> "Upon the occurrence of any event of default set forth in this paragraph, Lessor may, in its sole discretion, and in addition to any other remedies it may have at law, exercise one or more of the following remedies:
>
> . . .
>
> (d) Lessor may give notice to Lessee that Lessee shall pay immediately to Lessor as liquidated damages which shall be conclusively deemed to be a genuine pre-estimate of the damages suffered by Lessor and not a penalty and which liquidated damages shall be calculated as follows:
>
> (i) by determining the present value on the basis of an interest rate of six (6) percent per annum unless otherwise prescribed by Lessor and calculated and compounded monthly on the total of all amounts due or to become due under the Lease as rental or otherwise to the expiration of the term or the current renewal term hereof:

(ii) by adding to that present value any other sums otherwise payable by Lessee to Lessor to the end of the term pursuant to the Lease;

(iii) by deducting from the total amount calculated according to subparagraphs (i) and (ii) above the net proceeds of the sale, leasing or other disposition of the equipment less Lessor's cost of disposition; . . .".

[8] The bank's claim for interest arises from para. 19 of the lease:

". . . Should Lessee fail to pay upon the due date any part of any sum hereby required to be paid to Lessor or to reimburse Lessor immediately upon demand for any expenditures incurred by Lessor under this Lease, Lessee shall pay to Lessor a late charge of TEN ($10.00) DOLLARS for each month or part thereof for which any payments owing is unpaid plus interest at the rate of TWO (2%) PER CENT per month (equivalent to TWENTY-FOUR (24%) PER CENT per year) upon such payments due and unpaid until the date of payment. …"

[9] It is also important to note another provision of the lease, which I will discuss later. Paragraph 17.3 of the lease would have allowed the lessees to redeem the equipment prior to its repossession by the lessor. It provides:

"If at any time prior to Lessor repossessing the equipment or Lessee surrendering the equipment pursuant to subparagraph 17.2, Lessee pays to Lessor the amounts specified to be paid to Lessor as liquidated

> damages under subparagraphs 17.2(d)(i), (ii) and (iii) and the amounts specified in paragraph 19, title to the equipment shall vest in the Lessee.

ANALYSIS

[10] The defendants submitted one case authority, *Keneric Tractor Sales Ltd.* v. *Langille*, [1985] N.S.J. No. 118 (N.S.C.A.), in support of their argument that the 24-percent interest rate constitutes an unenforceable penalty. That case involved leases of 10 items of farm machinery, for a total value in the vicinity of $250,000. At the end of each lease, the lessees were given the option to purchase the machinery at 25 percent of the original price. The lessees defaulted under the leases, and the lessor seized the equipment and sold it. The issue before the Court was the calculation of damages suffered by the lessor as a result of the breach of the leases. The default clause in each of the leases purported to provide for the calculation of liquidated damages upon termination of the lease and repossession of the equipment. In the case of a resale of the equipment, the provision stated that the lessee would be liable to the lessor:

> ". . . for the difference between (a) the sum of all rentals called for by the lease, plus an amount equal to Twenty (20) percent of the aggregate minimum rental charges for the unexpired portion of the lease term, not as a penalty but as and for liquidated damages and (b) the sum of all rental paid and net proceeds of the sale . . ." (emphasis added).

[11] Hart J.A., speaking for the majority of the Nova Scotia Court of Appeal, extensively reviewed the law relating to the proper calculation of damages suffered by owners of goods where persons to whom the goods have been leased breach the lease

contract. He referred to the law as having been in a “state of confusion” for some time, and continued at para. 16:

> “Much of the confusion arises from the tremendous development in the use of chattel leases which now extend all the way from simple bailments for reward to complicated financing arrangements for the sale of all types of manufactured goods and equipment. The owner who rents a truck with a life expectancy of five years for a period of six months would probably only suffer minimal damage if the lessee defaulted after the second month, but the person who is not in the business of leasing chattels, who uses a lease as the method of financing the sale of the unit because it demands no down payment, or because it is preferable from a tax point of view, would probably be damaged upon default by the lessee to the extent of the full purchase price plus finance charges, less the amount that could be recovered from the resale of the goods or their re-leasing . . .”

[12] After reviewing the early Canadian cases, which were based upon English law, Hart J.A. quoted Laskin J., as he then was, in *Highway Properties Ltd.* v. *Kelly, Douglas & Co.*, [1972] 2 W.W.R. 28, at paras. 28 to 31. That case implicitly, if not explicitly, accepted that if a lessee defaults by failing to pay rent, in accordance with the doctrine of anticipatory breach of contract, the lessor may sue for complete damages without waiting until the end of the term of the lease. In other words, a lessor may elect to terminate a lease, but with notice to the defaulting lessee that damages will be claimed on the basis of a present recovery of damages for losing the benefit of the lease over its unexpired term. Laskin J. held that one element of such damages would be “the present

value of the unpaid future rent for the unexpired period of the lease," less any amount recovered by the lessor in mitigation.

[13] In *Keneric Tractor*, Hart J.A., at para. 34, acknowledged that if the parties to a lease have agreed to a method of calculating the liquidated damages in advance in the contract, then that would be the measure of damages, unless such a calculation would amount to a penalty. If so, the damages would have to be assessed in accordance with the common law. At para. 40, he continued that the wording of the default clause in the lease before the Court, quoted above at para. 10, constituted a penalty and was "unenforceable," as it was "arbitrary and had no relation to the actual damage suffered" by the lessor. However, Hart J.A. allowed that even under a common law assessment of damages, a lessor would be allowed to recover as its loss the value of the purchase price as well as a reasonable amount for finance charges up to the time of repossession, less any rents paid and less the amount recovered upon resale of the equipment with an allowance for the expenses of repossession and resale.

[14] Para. 17.2(d) of the lease, quoted above at para. 7, obviously represents the intention of the parties in this instance to provide for the calculation of liquidated damages upon default, which is expressly specified not to be a penalty. The defendants take no issue with this provision. In other words, unlike the clause in *Keneric Tractor Sales*, which was ultimately held to amount to a penalty, and was therefore unenforceable, the defendants here agree that para. 17.2(d) is enforceable. Beyond that, however, the defendants argue that, to the extent that they have delayed in their payment of the liquidated damages, they should not be charged interest at the rate of 24 percent per annum. They say the 24-percent rate is arbitrary and does not reflect the

actual damage suffered by the plaintiff bank. The defendants have calculated that the effective annual interest rate under the lease, assuming it had been honoured to the end of its term, would have been about 4.66 percent. Therefore, the 24-percent rate gives the bank a “bonus” and it should be viewed as a penalty. Although the 4.66 percent figure is not mentioned anywhere in the lease, the defendants argue that it is the appropriate rate to use in compensation for the delay the plaintiff has suffered in receiving payment of its liquidated damages. In the alternative, the defendants submitted that the plaintiff bank should be limited to pre-judgment interest under the *Judicature Act*, R.S.Y. 2002, c. 128.

[15] It is common ground between the parties that the application of para. 17.2(d) to these facts results in a calculation of liquidated damages from February 10, 2004. That was the date the defendants received notice of the bank’s intention to enforce its security under the lease. The calculation then runs to the expiry of the original term of the lease, being June 30, 2007. (Here, the bank concedes that under the principle of *contra proferentem*, as the lease was prepared by the bank, any ambiguity with respect to when the original term of the lease ends, should be interpreted in favour of the lessees. Thus, any uncertainty about the possible extension of the lease to November 30, 2007, through the application of the option to purchase clause, should be resolved in favour of the lessees.) That results in a calculation of the present value to the lessor of the unexpired original term of the lease from February 10, 2004 to June 30, 2007, based on an interest rate of six percent per annum as provided for in para. 17.2(d). Precisely what that value is continues to be a matter of discussion between the parties. However, they have not asked me to decide the point. They are relatively

confident that they will be able to agree on the value of the liquidated damages, and only failing that will they return to this Court for an assessment of those damages. The sole issue the parties have asked me to adjudicate is whether the interest rate of 24 percent per annum applies to the amount of liquidated damages under para. 17.2(d) or, if not, what rate of interest should apply.

[16] The defendants argued that para. 19 is ambiguous about whether it applies to para. 17.2(d) and therefore the principle of *contra proferentem* dictates that I should resolve that ambiguity by interpreting para. 19 against the bank, as the effective author (assignee) of the lease. However, a plain reading of para. 19 indicates that it was the intention of the parties that any delay in the payment of liquidated damages should attract interest at the rate of 24 percent per annum:

> "Should Lessee fail to pay upon the due date <u>any part of any sum hereby required to be paid to Lessor</u> . . . Lessee shall pay to Lessor . . . interest at the rate of TWO (2%) PER CENT per month (equivalent to TWENTY-FOUR (24%) PER CENT per year) <u>upon such payments due and unpaid</u> until the date of payment. …" (emphasis added)

An amount calculated as due and payable for liquidated damages under para. 17.2(d) easily falls within the broad language "any sum hereby required to be paid to Lessor". Therefore, I find no ambiguity in para. 19 and accordingly I have no need to resort to the principle of *contra proferentem* in interpreting para. 19.

[17] Further, I am persuaded that para. 17.3 of the lease is also significant. Where that condition applies, a lessee may obtain title to the leased equipment at any time prior to its repossession (seizure) by the lessor, upon payment of the liquidated damages

calculated under para. 17.2(d) “and the amounts specified in paragraph 19,” that is interest at the rate of 24 percent per annum accrued on the amount of those damages. Once again, I see no ambiguity here. It was clearly the intention of the parties that if the lessees intended to purchase the leased equipment prior to repossession by the lessor, they must pay the amount of liquidated damages calculated under para. 17.2(d), plus any interest accrued on that sum, if it has not been paid “upon the due date,” at 24 percent per annum. However, even here, the defendants argue that the reference to “the amounts specified in paragraph 19” in 17.3 also constitutes a penalty. For the reasons which follow, I disagree.

[18] As I understood him, counsel for the defendants also seemed to suggest that there was some significance to the fact that para. 17.3 of the lease, quoted above at para. 9, refers to “amounts specified in paragraph 19,” whereas para. 17.2(d) does not. Para. 19 of the lease is, of course, the provision creating the obligation to pay 24 percent interest on any sum due under the lease. And, since para. 19 is not referred to in para. 17.2(d), this calls into question whether the 24-percent rate applies to the damages under 17.2(d). However, that argument can be disposed of by recognizing that para. 17.2(d) contemplates the lessee paying “immediately” to the lessor the amount of liquidated damages calculated under that provision. Obviously, a payment which is made immediately, or on the date demanded, incurs no interest and para. 19 would not be applicable. But what if the amount of the liquidated damages calculated under para. 17.2(d) is not paid immediately? What rate of interest should apply to the delayed payment of that sum?

[19] While the rate of 24 percent may be arguably arbitrary, in the sense that the parties might have picked any reasonable rate of interest, having agreed to 24 percent, why should I now undo the bargain made? Further, it is not arbitrary to expect that a lessee will be required to pay a reasonable rate of interest on any unpaid liquidated damages calculated under para. 17.2(d). The effective rate of interest over the entire term of the lease, as calculated by the defendants (4.66%) is not the only rate which may be considered to be reasonable. I do not know whether there were other background costs or expenses incurred by the bank, or its assignor North American, which were taken into account by the parties in agreeing to 24 percent. Also, I think I can take judicial notice that rates of interest varying from 18 percent to 24 percent are common in the modern commercial world of credit card contracts and accounts receivable.

[20] Finally, this is a different situation from that in *Keneric Tractor*, where the default clause purported to entitle the lessor to include in the calculation of liquidated damages “an amount equal to 20 percent of the aggregate minimum rental charges for the unexpired portion of the lease term”. As I interpret the judgment, that was held by the Nova Scotia Court of Appeal to bear no relation to the actual damage suffered by the lessor. Nevertheless, the Court of Appeal would have, and did allow the lessor to be entitled to “a reasonable amount for finance charges” up to the time of the repossession of the chattels. Why then would the plaintiff lessor in this case not be entitled to “a reasonable amount” for interest up to the time of payment of the liquidated damages duly calculated under the lease?

[21] I find that it was the clear intention of the parties that any delay in the payment of such liquidated damages would be compensated by additional interest at the rate of 24 percent per annum. Having made that finding, there is no basis to consider the defendants' alternative argument that the bank should be limited to pre-judgment interest under the *Judicature Act*, since s. 35(6)(b) of that *Act* provides that interest is not payable under that section if it is otherwise payable by "right," i.e. in this case, by contractual right or obligation.

CONCLUSION

[22] With reference to the plaintiff's notice of motion filed November 10, 2005, the plaintiff is awarded interest on the liquidated damages claimed against each of the defendants at the rate of 24 percent per annum, calculated monthly. The parties have agreed to be responsible for determining the precise amount of those liquidated damages. If they are unable to agree on that amount, they may return before me to reconvene the hearing. Costs are awarded to the plaintiff.

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GOWER J.