
CANADA / JUDGMENT

1111207 BC Ltd. v. Masala Bites Enterprises Ltd.

2017 BCSC 2184

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 2184 1111207 BC Ltd. v. Masala Bites Enterprises Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1111207 BC Ltd. v. Masala Bites Enterprises Ltd.,

2017 BCSC 2184

Date: 20171011

Docket: 17-2526

Registry: Victoria

Between:

1111207 BC Ltd.

Petitioner

And

Masala Bites Enterprises Ltd. and Naveen Sharma

Respondents

Before: The Honourable Madam Justice Donegan

in Chambers

Oral Reasons for Judgment

Counsel for the Petitioner:

M. Scherr

Counsel for the Respondents:

A. Rafuse

Place and Date of Trial/Hearing:

Victoria, B.C.

July 26, 2017

Place and Date of Judgment:

Victoria, B.C.

October 11, 2017

INTRODUCTION

- [1] This petition is brought under the summary eviction procedure in ss. 18-21 of the Commercial Tenancy Act, R.S.B.C. 1996, c. 57 [CTA] which permits a landlord to regain possession of its leased premises by a writ of possession.
- [2] The petitioner, 1111207 BC Ltd., ("207"), is the registered owner of lands and premises located at 1015 Fort Street, Victoria, British Columbia (the "Lands"). Located on the Lands is a commercial building, a portion of which has been leased for the operation of a restaurant called Masala Bites (the "Leased Premises").
- [3] For a few years, two friends operated the restaurant together - Dharmender Sohal and Naveen Sharma. Mr. Sharma is one of the respondents in this petition. Several months ago, unhappy differences arose between the men leading to the breakdown of their business relationship. They each took steps to try to secure and operate the restaurant independent of one another. Unfortunately, this petition is only one of a few actions arising out of the breakdown of their business relationship. This petition does not purport to resolve all of those differences.
- [4] Section 18 of the CTA permits a landlord to apply to this court where a tenant has wrongfully refused, on written demand, to "go out of possession of the leased land". Section 19 requires the court to inquire into and determine whether the term of the lease has expired or been terminated and provides a summary procedure whereby the parties may provide evidence under oath. If the court determines that the "tenant wrongfully holds against the right of the landlord", it may order a writ of possession be issued by the sheriff to place the landlord in possession of the premises: *Penticton Yacht Club v. Okanagan Houseboat Vacation Ltd.*, 2010 BCCA 117 at para. 2.

- [5] The sections 18-21 procedure has two stages - the first being a preliminary stage in which the landlord must show a prima facie case of entitlement to an order for possession, and the second is the summary hearing to determine the landlord's entitlement to relief. Our Court of Appeal very recently summarized this two-stage procedure in *The Owners, Strata Plan VIS2030 v. Ocean Park Towers Ltd.*, 2016 BCCA 222 at paras. 15-17:
- [15] The Act contemplates a two-stage summary procedure for obtaining the relief requested. The first stage is outlined in ss. 18(1) and 19 of the Act; the second stage is covered in s. 21. Those sections provide:

Landlord may apply to Supreme Court

18 (1) In case a tenant, after the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the leased land, or the land that the tenant has been permitted to occupy, the landlord may apply to the Supreme Court

- (a) setting out in an affidavit the terms of the lease or right of occupation, if verbal;
- (b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing;
- (c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;
- (d) annexing a copy of the demand made for delivering possession, stating the refusal of the tenant to go out of possession, and the reasons given for the refusal, if any; and
- (e) any explanation in regard to the refusal.

Court to appoint time and place of inquiry, etc.

19 If after reading the affidavit it appears to the court that the tenant wrongfully holds and that the landlord is entitled to possession, the court shall appoint a time and place to inquire and determine whether the person complained of was a tenant of the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, whether the tenant holds possession against the right of the landlord and whether the tenant has wrongfully refused to go out of possession, having no right to continue in possession.

Court to issue writ of possession

21 (1) If at the time and place appointed under section 19 the tenant, having been notified as provided, fails to appear, the court, if it appears to it that the tenant wrongfully holds, may order a writ to issue to the sheriff, commanding him or her to place the landlord in possession of the premises in question.

- (2) If the tenant appears at the time and place, the court shall, in a summary manner, hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them.
- (3) If after the hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the Supreme Court.

[16] At the first stage of the proceeding the function of the judge is to determine if the landlord has established a prima facie right to an inquiry into the landlord's application for an order of possession . . . The court's jurisdiction is limited to determining if the applicant has demonstrated a triable issue. The court should not weigh the evidence or resolve questions of credibility except in determining if the applicant has complied with the procedural requirements of the proceeding . . . At this stage, the order applied for is "in the nature of an interlocutory order which does not determine the legal rights of the parties" . . . It is simply to grant or not to grant an inquiry into the landlord's application.

[17] The ultimate determination of the landlord's application rests with the judge at the second stage of the proceeding. At that stage the function of the judge is to determine in a summary manner the substantive issues including the reasons for the notice of termination and whether they support the granting of the landlord's application for an order for possession . . .

[6] In this case, given that counsel proceeded directly to the substantive stage, I infer that the respondents take no issue that the petitioner has met the procedural requirements and met its burden of proof at the preliminary stage. Had it been argued, I would have easily concluded that the petitioner had established a prima facie right to an inquiry into the landlord's application for an order for possession.

[7] In short, through this petition, the current landlord of the Leased Premises seeks a determination whether the respondents, or either of them, was a tenant of the petitioner for a term which has expired and, if a tenant, seeks a determination as to whether the tenant holds possession against the right of the landlord, and whether such tenant has wrongfully refused to go out of possession having no right to continue in possession. The petitioner ultimately seeks a writ of possession to the sheriff commanding him or her to place the

petitioner in possession of the Leased Premises.

BACKGROUND FACTS

- [8] In 2014, Mr. Surinder Kumar owned the Lands. In March of that same year, Mr. Phlower Longia, a Victoria businessman, became aware that the first level of the commercial building on the Lands, the Leased Premises, was available to be leased and used as a restaurant. Mr. Longia approached Mr. Sohal about the possibility of opening a restaurant in the Leased Premises.
- [9] Mr. Longia then approached Mr. Kumar and negotiated the terms of the lease. As one of its conditions, Mr. Kumar required Mr. Longia to guarantee the lease. Effective May 1, 2014, Mr. Kumar as landlord, Mr. Sohal as tenant, and Mr. Longia as guarantor entered into a commercial lease agreement for the Leased Premises. I will call this lease the "Original Lease".
- [10] While Mr. Kumar and Mr. Longia were negotiating the terms of the Original Lease, Mr. Sohal approached his friend, Naveen Sharma, about operating a restaurant together out of the Leased Premises. They agreed and became equal partners.
- [11] On or about April 14, 2014, Mr. Sohal registered their partnership under the trade name "Masala Bites Restaurant".
- [12] Mr. Sharma was not named as a tenant on the Original Lease. Aware of this, he was initially unconcerned. However, he soon learned that he would also need to be identified as a tenant on the Original Lease in order to obtain a liquor licence for the restaurant. He was then "added" as a tenant.
- [13] The manner in which Mr. Sharma was added as a tenant to the Original Lease was unusual, to say the least. Mr. Kumar's assistant simply modified the first page of the Original Lease to add Mr. Sharma's name as a tenant, and also added a signature page at the end for Mr. Sharma to sign as a tenant. From my review of the Original Lease and the lease that Mr. Sharma signed, no other terms were modified. No other parties to the Original Lease signed or initialled any changes to the modified document or otherwise signified their agreement to the change in writing. The word "tenant", I observe, is used throughout the document and it was not pluralized when the changes purporting to add Mr. Sharma were made. I will call this new lease the "Modified Lease".
- [14] The respondents take the position that the Modified Lease governs the relationship between the parties in this petition. For the purposes of this petition only, the petitioner agrees.
- [15] The relevant provisions of the Modified Lease include:
1. Term

1.1 Landlord hereby leases the Leased Premises to Tenant, and Tenant hereby leases the same from Landlord, for an "Initial Term" beginning May 1, 2014 and ending May 14, 2017. Landlord shall use its best efforts to give Tenant possession as nearly as possible at the beginning of the Lease Term. If Landlord is unable to timely provide the Lease Premises, rent shall abate for the period of the delay. Tenant shall make no other claim against Landlord for any such delay.

1.2 Tenant may renew the Lease for one extended term of three years ("the Renewal Term")/ Tenant shall exercise such renewal option, if at all, by giving written notice to the Landlord not less than ninety (90) days prior to the expiration of the Initial Term. The Renewal Term shall be at the rental will be the fair market rent at the time of the exercise of the option for space of comparable size, quality and location of the Leased Premises as determined between the landlord and Tenant. In the event that the said parties cannot agree on the minimum rental within one (1) month after the making of such written request, then the rental shall be fixed by arbitration by a single arbitrator, if the parties an agree on one, and by three arbitrators otherwise, and subject to the provisions of the Arbitration Act of the Province of British Columbia and amendments thereto; and cost of such arbitration to be borne equally between the parties hereto.

4. Sublease and Assignment:

The Tenant shall have the right, without Landlord's consent, to assign this Lease to a corporation with which Tenant may merge or consolidate, to any subsidiary of Tenant, to any corporation under common control with Tenant, or to purchaser or substantially all of Tenant's assets. Except as set forth above, Tenant shall not sublease all or any part of the Leased Premises, or assign this Lease in whole or in part without Landlord consent, such consent not to be unreasonably withheld or delayed.

13. Guarantor

In the event that a Guarantor has been joined as a party to this Lease, this indenture further witnesseth that, in consideration of the Landlord leasing the Leased Premises to the Tenant for the rent and on the terms and conditions herein contained, and of the sum of \$1.00 now paid by the Tenant to the Guarantor, the Guarantor covenants and agrees with the Landlord as follows:

- (a) The Guarantor agrees that in the event of default of the Tenant in the payment of the rest or other sums payable by the Tenant hereunder, from time to time, as an when the same shall become due and payable, or in the event of default of the Tenant in the performance or observance of any covenant, proviso, condition or agreement contained in this Lease and on the part of the Tenant to be performed the Landlord may then demand such rent and other sums in respect of which such default shall have occurred and the amount of all damage that may arise in consequent of the non-observance of non-performance of such covenant, proviso, condition or agreement;

- (b) The Guarantor agrees that the Guarantor shall be jointly and severally bound with the Tenant for the fulfillment of all obligations of the Tenant under this Lease or any renewal thereof, and in the enforcement of any right of the Landlord hereunder and that the Landlord may proceed against the Guarantor as if the Guarantor was named as a Tenant hereunder;
- (c) The Guarantor agrees with the Landlord that no neglect or forbearance of the Landlord in endeavouring to obtaining payment of the rent hereby reserved or other payments required to be made by the Tenant under the provisions of this Lease or any renewal hereof as and when the same shall become due and payable, and no delay of the Landlord in taking any steps to enforce the performance or observance of the several covenants, provisos, conditions or agreements contained in this Lease to be performed or observed by the Landlord, and no extension or extensions of time which may be given by the Landlord from time to time to the Tenant, and no other act or failure to act by the Landlord, shall release, discharge or in any way reduce the obligations of the Guarantor hereunder.

22. Notice

Any notice required or permitted under this Lease shall be deemed sufficiently given or served if sent by certified mail, return receipt requested, addressed as follows:

If to Landlord to: Surinder Kumar, 3356 Ravenwood Road, Victoria, BC V9C 2X4.

If to Tenant to: Dharmender Sohal, 901 Easter Road, Victoria, BC V8X 2Z8.

If to Guarantor: Phlower Singh Longia, 46 Sims Avenue, Victoria, BC V8Z 2J7.

Landlord and Tenant shall each have the right from time to time to change the place notice is to be given under this paragraph by written notice thereof to the other party.

[16] It is common ground that the terms of the Modified Lease required the tenant to give the landlord notice, by February 14, 2017 of its intention to renew the lease a further three years. It is also common ground that the Modified Lease allowed the tenant to assign the lease to a select class of corporation without the landlord's consent. The respondent, Masala Bites Enterprises Ltd., would fall into that select class.

[17] Mr. Longia, the guarantor, deposes that he was not advised of the addition of Mr. Sharma as a tenant and at no time did he consent to such an amendment. In short, he deposes that he did not guarantee any of Mr. Sharma's obligations.

[18] Masala Bites Restaurant opened for business on May 19, 2014.

[19] On January 19, 2015, Mr. Sohal and Mr. Sharma incorporated their business under the name Masala Bites Enterprises Ltd. The two men were equal shareholders in this company.

- [20] On February 1, 2015, Mr. Sharma alleges and deposes that they instructed their accountant to transfer all assets of the partnership, including the Modified Lease, to the new company. This is the date that Mr. Sharma says the Modified Lease was assigned to Masala Bites Enterprises Ltd. Whether there was an actual assignment is one of the issues I am to resolve.
- [21] If there was an assignment of the Modified Lease from Mr. Sharma and Mr. Sohal as tenants to Masala Bites Enterprises Ltd., it is also common ground that no documentation of such an assignment was prepared or exists. It is also common ground that the landlord, Mr. Kumar, and the guarantor, Mr. Longia, were not given any formal notice of any assignment, if one is found to exist.
- [22] On July 29, 2015, the landlord at the time, Mr. Kumar, sold the Lands to a numbered company, 1083396 BC Ltd. ("396"). On that day, counsel for Mr. Kumar gave the other parties to the Modified Lease, that is Mr. Longia (as guarantor) and Mr. Sohal and Mr. Sharma (as tenants) notice of this sale. This notice, by way of letter, was addressed to Mr. Sohal and Mr. Sharma as tenants. In addition to advising them of the sale to its new owner, Mr. Kumar, through his counsel, asked Mr. Sohal and Mr. Sharma to revise their insurance policy and their post-dated rent cheques to reflect the change in ownership of the Lands.
- [23] This notice letter clearly shows that Mr. Kumar, the original landlord, and the new landlord, 396, believed its tenants were Mr. Sohal and Mr. Sharma at the time of the sale. This evidence is reinforced by the affidavit evidence of Albert Berns, counsel for 396. Mr. Berns deposes that when 396 purchased the Lands, the ground floor was operated as a restaurant and tenanted pursuant to the Modified Lease between 396 as landlord, Mr. Sohal and Mr. Sharma as tenants, and Mr. Longia as guarantor.
- [24] In the spring of 2016, rifts began to develop between Mr. Sohal and Mr. Sharma. In May 2016, Mr. Longia tried to reconcile them but to no avail. Later that same month, Mr. Longia met with both men and told them that, as guarantor of the lease, he was liable for any breaches of the lease, and if this occurred he would sue them. Mr. Longia hoped matters between the men would improve, but unfortunately the difficulties between them only deepened.
- [25] In the fall of 2016, Mr. Sohal and Mr. Sharma both made statements that their business relationship was over. The two had discussions about trying to buy one another out or some other arrangements, but no agreement was reached.
- [26] On December 14, 2016, Mr. Sohal and Mr. Sharma discussed renewal of the Modified Lease. Mr. Sharma deposes that he told Mr. Sohal it was important to renew the lease and it had to be done, and that Mr. Sohal "did not voice any opposition to my stated intentions that Masala Bites had to renew the lease. He did repeatedly state that he did not want to continue working together for another three years, but he also stated that there would be an impartial evaluation of the value of the restaurant." In cross-examination at the hearing, Mr. Sharma admitted that during this conversation, Mr. Sohal did not say "yes" (or otherwise agree) when he was asked to renew the lease.

- [27] Mr. Longia became increasingly concerned about his exposure as a guarantor of the lease and decided not to guarantee any renewal. On December 20, 2016, through his counsel, Mr. Longia provided written notice to the landlord, 396, that he would not consent to renewal of the lease when it ended on May 14, 2017. He further provided notice that he would not guarantee any new lease that might be entered into after that time.
- [28] After sending this letter, an agent for 396 contacted Mr. Longia and asked him if he would be interested in purchasing the Lands. Negotiations ensued over the next months between Mr. Longia, the agent, and the principal of 396 for the purpose of the purchase of the Lands. Mr. Longia deposes that neither Mr. Sohal nor Mr. Sharma were involved in these negotiations.
- [29] On January 25, 2017, Mr. Sharma, on the advice of counsel, wrote to 396, the owner of the Lands at the time, in an effort to renew the Modified Lease.

Re: Renewing the lease on 1015 fort st. Victoria BC

We are advising you with respect that we are renewing the current lease for a further period of (3 years) as said out in our current lease agreement Paragraph number 1.Term./sub para 1.2). that we need to tell you in written 90 days prior that we want to continue, We will appreciate if you could give us one more further period as an option to extend the lease. We will wait for your response.

Thanks

Naveen Sharma

Masala Bites

1015 Fort st.

Victoria BC

V8V 3K5

- [30] Mr. Sharma testified about this letter. He acknowledged that he did not name the corporate enterprise, Masala Bites Enterprises Ltd., in his letter, nor did he indicate on the letter that he was signing as one of its directors. However, he maintained that his use of the word "we" in the letter did not refer to himself and Mr. Sohal and their partnership, but rather to Masala Bites Enterprises Ltd.
- [31] While Mr. Sharma sent this letter in an effort to follow through on his plans to renew the Modified Lease for another three years, his business partner, Mr. Sohal, had other plans.

- [32] On February 6, 2017, Mr. Sohal, through his counsel, wrote to the landlord at the time, 396, as well. Through this letter, Mr. Sohal gave 396 notice that "Mr. Sohal does not desire to renew the lease and does not consent to any renewal." As with Mr. Sharma's letter, there is no reference to the corporate entity Masala Bites Enterprises Ltd. in this letter, as the tenant or otherwise.
- [33] 396 did not renew the Modified Lease. Counsel for 396, Mr. Berns, deposes that 396 did not renew the lease because the guarantor, Mr. Longia, provided notice he would no longer guarantee it and Mr. Sohal also advised that he did not wish to renew the lease.
- [34] On March 15, 2017, the petitioner, 207, incorporated. Mr. Sohal is the director of 207. On March 28, 2017, 207 purchased the Lands from 396. In his negotiations with 396 for the purchase, Mr. Longia was told the Modified Lease had not been renewed.
- [35] Mr. Sharma made a number of inquiries to determine the status of the lease renewal. It was not until April 2017 that he learned of the Longia and Sohal letters declining to renew the Modified Lease. When he learned of these letters, he had his counsel send 396 a letter. In this April 6, 2017 correspondence, Mr. Sharma asserted through counsel that because the Modified Lease had been assigned to Masala Bites Enterprises Ltd., 396 ought to disregard the letters from Mr. Longia and Mr. Sohal declining to renew the lease.
- [36] On April 12, 2017, counsel for 396 corresponded back. 396 disagreed with Mr. Sharma's view and wrote that its former tenants of the Modified Lease were Mr. Sohal and Mr. Sharma, and confirmed that the Modified Lease was not renewed by 396 because Mr. Sohal advised he did not wish to renew and Mr. Longia would not continue his guarantee.
- [37] On May 1, 2017, rent was not paid.
- [38] On May 3, 2017, Masala Bites Restaurant was shut down by order of the health authority.
- [39] On May 14, 2017 at 11:59 p.m., the term of the Modified Lease expired.
- [40] On May 25, 2017, counsel for Mr. Sharma tendered rent for "the month of May", calculated at the former lease rate. 207 did not cash the cheque.
- [41] On June 1, 2017, the rent was not paid.
- [42] On June 5, 2017, a Notice to Quit was delivered to Mr. Sohal, Mr. Sharma, and Mr. Longia, and Masala Bites Enterprises Ltd., with a deadline to quit the Leased Premises on June 16, 2017. Mr. Sohal and Mr. Longia subsequently quit the Leased Premises.
- [43] On June 22, 2017, 207 returned the rent cheque for the month of May and demanded rent from May 1 to May 14, 2017.
- [44] On June 27, 2017, 207 delivered the respondents a Demand for Possession. The respondents did not quit the Lands.

[45] On July 1, 2017, rent was not paid. On July 3, 2017, Masala Bites Restaurant re-opened under the sole management of Mr. Sharma.

[46] On July 12, 2017, this Petition was filed.

ANALYSIS

[47] Section 21 of the CTA requires that I determine whether this case is "clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord." I agree with the petitioner that my determination here turns ultimately on the answer to one broad question: Did the tenant or tenants to the Modified Lease deliver a valid Notice to Renew the Modified Lease on or before the deadline to renew of February 14, 2017?

[48] To answer this question, I must first determine the identity of the tenant or tenants as of February 14, 2017.

Who were the tenants on February 14, 2017?

[49] It is important for me to reiterate that Mr. Sharma takes the position that he was added as a tenant on June 14, 2014, and Mr. Sohal, who is not a party to this Petition, takes the position that he was not. Mr. Longia also deposes that no one sought his agreement to add Mr. Sharma as a tenant. However, again, for the purposes only of this petition, 207 accepts that Mr. Sharma was properly added as a tenant on June 14, 2014, and submits that as of February 14, 2017, Mr. Sohal and Mr. Sharma were joint tenants of the Modified Lease and Mr. Longia was the guarantor.

[50] The petitioner says that these are the parties that could, collectively, exercise the option to renew the lease for a further three years if they gave notice of such within the specified time.

[51] The petitioner says that since only one party did so and the others declined to do so, there was no valid renewal and, therefore, the Modified Lease expired on May 14, 2017 at 11:59 p.m.

[52] The respondents submit that Masala Bites Enterprises Ltd. was the tenant as of February 14, 2017, by way of an assignment of the Modified Lease. Although no formal documentation exists to support the existence of the assignment, the respondents argue that the totality of the evidence known to the parties supports its existence. By the terms of the Modified Lease, the respondents say consent of the landlord and guarantor for the assignment was not required, nor was formal notice.

[53] Mr. Sharma says that he and Mr. Sohal ran the business together. Mr. Sohal was aware that they had incorporated a company through which they ran their business. They organized their accounting to reflect that the corporation paid the rent and they prepared tax returns in the company name. Insurance policies were obtained in the company name. Mr. Sharma

says that he trusted Mr. Sohal and believed that Mr. Sohal would have advised the landlord at the time of the renewal, 396, of the assignment to Masala Bites Enterprises Ltd. He also argues that, as a director of the petitioner, Mr. Sohal's knowledge of this assignment becomes the knowledge of the petitioner.

[54] The Modified Lease, he emphasizes, does not require the consent of the landlord for an assignment to a certain class of company. Masala Bites Enterprises falls within that class. Nor did the Modified Lease require the consent of the guarantor for such an assignment.

[55] I find there was not an actual assignment of the Modified Lease to Masala Bites Enterprises on February 1, 2015, or at any time. Mr. Sohal and Mr. Sharma may have obtained insurance policies, prepared tax returns, and done their accounting to reflect that their corporation paid the rent and claimed the rent as an expense, but I agree with the petitioner that this is not evidence of an assignment. The parties' tax planning does not affect the legal relationship between the landlord and the tenant. Indeed, the documentation adduced in this hearing only supports the conclusion that at all material times the tenants to the Modified Lease were Mr. Sohal and Mr. Sharma. For example:

* All of the rent cheques over the years fail to disclose the existence of the corporate entity, they simply contain the business name of the general partnership, "Masala Bites".

* Documentation regarding dealings with the Vancouver Island Health Authority and the Liquor Control and Licensing Branch were with Mr. Sohal and Mr. Sharma and/or the partnership, "Masala Bites".

* On July 29, 2015, counsel for the landlord at the time, Mr. Kumar, corresponded with the tenants naming them as Mr. Sohal and Mr. Sharma. No one corrected Mr. Kumar or advised him of any assignment. When 396 purchased the Lands from Mr. Kumar, the evidence is clear that 396 understood the tenants to be Mr. Sohal and Mr. Sharma.

[56] In attempting to renew the Modified Lease in January and February of 2017, Mr. Sharma did not refer to any assignment or to the corporate entity in any of his correspondence. Indeed, it appears the first mention of an alleged assignment appeared in March and April of 2017, when counsel for Mr. Sharma became involved, well after the deadline to exercise the option had expired.

[57] Overall, I find the evidence clearly establishes that at the time of the renewal deadline, the landlord at the time, 396, believed that Mr. Sharma and Mr. Sohal were the tenants of the Modified Lease and Mr. Longia was the guarantor. As the petitioner was not even in existence at that time, any knowledge of an alleged assignment the respondents ask me to find was held by the petitioner due to Mr. Sohal's apparent knowledge is, I conclude, irrelevant.

[58] The only conclusion to be reached on the evidence is that as of February 14, 2017, the tenants under the Modified Lease were Mr. Sohal and Mr. Sharma, with Mr. Longia as guarantor.

[59] As a result, the next question to be answered is whether Mr. Sharma's January 25, 2017 correspondence seeking to renew the Modified Lease was a valid notice to renew requiring the renewal to occur.

Was Mr. Sharma's January 25, 2017 letter a valid notice to renew?

[60] The parties to the Modified Lease agreed to the tenant's absolute right to renewal of the lease for a further three years, subject only to the giving of written notice within the prescribed time. There are two tenants here. One gave notice of his intention not to renew, and the other gave notice of his intention to renew. There is also a guarantor, who also gave notice of his intention not to renew. In these circumstances, the law is clear.

[61] The petitioners point to *Zacharopoulos v. Sykiotis Enterprise* (1992), 89 DLR (4th) 57, a Manitoba Court of Appeal decision in very similar circumstances. In this case, Mr. Zacharopoulos had two business partners, Mr. Wilson and Mr. Zegarac, who ran a restaurant in a strip mall owned by Sykiotis Enterprises. Sykiotis leased the restaurant premises to the three men for a term of five years, with the right to renew the lease for two successive five-year periods on the same terms and conditions except for rent.

[62] A short time after entering into the lease agreement, Mr. Zacharopoulos and Mr. Wilson bought Mr. Zegarac's interest in the restaurant. He released all rights and interest in the restaurant, including all leases, to the two men. Mr. Zacharopoulos then later purchased Mr. Wilson's interest. Mr. Zacharopoulos continued to operate the restaurant and pay the rent. Sykiotis knew that Mr. Zacharopoulos was the sole owner of the restaurant and occupant of the Leased Premises.

[63] Prior to the expiration of the lease, Mr. Zacharopoulos gave Sykiotis notice of his intention to renew the lease for a further term of five years. Disagreements erupted over the new rent sought to be charged and the landlord claimed that the tenant, Mr. Zacharopoulos, had breached covenants, etc. Those circumstances are not relevant or applicable to this case.

[64] What is important is that Sykiotis lost at trial and appealed. On appeal, Sykiotis argued a new case, one which was raised in the pleadings but not argued at trial. It was on this new argument that Sykiotis was successful.

[65] The Manitoba Court of Appeal held that the landlord was only obliged to give what it covenanted to give in the lease - a renewed lease with the joint and several covenants of the three original tenants. Relying on *Finch v. Underwood* (1976), 2 Ch. D. 310, and *Loveless v. Fitzgerald* (1909), 42 S.C.R. 254, the court held at para. 16:

- [161] The principle is a simple and obvious one. For binding obligations to arise, there must be acceptance of the terms of an offer. Sykiotis Enterprises offered to renew the lease for two successive five-year periods. It is in the nature of a unilateral contract which is subject to the rule of strict compliance. The offer was made to Zacharopoulos, Wilson and Zegarac. Zacharopoulos alone gave notice of his intention to renew the lease, and his former partners have denied giving permission or consent to a renewal. The offer to renew the lease was made to three; it cannot be accepted by one. [The three tenants] were jointly and severally liable to [the landlord] under the covenants in the original lease. [The landlord] is entitled to have the benefit of the same covenants in the renewed lease. In my view, that was a condition of its offer to renew the lease, and one which required strict compliance.
- [66] This principle applies to the case at bar. The offer to renew was made to Mr. Sharma and Mr. Sohal as tenants and Mr. Longia as guarantor. Mr. Sharma alone gave notice of his intention to renew the lease and his former partner, the other tenant, denied giving permission or consent to a renewal. Importantly in this case, the guarantor also denied giving permission or consent to a renewal. In order for there to have been a valid notice to renew the Modified Lease, the notice must be delivered by both Mr. Sharma and Mr. Sohal and agreed to by Mr. Longia as guarantor, or the landlord is not required to renew or extend the term.
- [67] I should add that in the event that I am wrong and there was or could be found to have been a valid assignment of the Modified Lease from Mr. Sharma and Mr. Sohal to Masala Bites Enterprises Ltd., it remains important to remember that the Modified Lease had a guarantor. The guarantor did not agree to the renewal.
- [68] In these circumstances, it was certainly open to the landlord and Mr. Sharma and/or Masala Bites Enterprises Ltd. to choose to enter into a new contract or lease, but neither can be compelled to in these circumstances.

CONCLUSION

- [69] Therefore, as of February 14, 2017, the respondents, Mr. Sharma and Masala Bites Enterprises Ltd., or either of them, were not entitled to exercise the option to renew or extend and the Modified Lease expired on May 14, 2017, at 11:59 p.m.
- [70] I conclude the petitioner has proven that the respondents, or either of them, therefore hold possession of the Leased Premises against the right of the petitioner and have wrongfully refused to go out of possession of the Leased Premises. The landlord petitioner is entitled to an immediate writ of possession as sought.
- [71] Counsel, I have observed that no submissions were made on the issue of costs, nor was a claim made for costs in the pleadings. I do not know if there is anything to be said on that topic or not.

[SUBMISSIONS AT 9:54:53 TO 10:01:03 A.M.]

- [72] THE COURT: I am not persuaded to vary my decision with respect to the timing of the writ of possession. I am going to maintain my decision it be immediate.
- [73] I am declining to order costs. No costs were sought in the pleadings, no submissions were made, and it appears as though costs will be dealt with in other respects in other proceedings.
- [74] MR. RAFUSE: My Lady, just one very -- one minor, would you stay the order -- the Writ of Possession to October 14, which would be the anniversary date of the lease? That would also give time to Mr. Sharma to basically pack up his bags and vacate the premises.
- [75] THE COURT: What is today?
- [76] MR. RAFUSE: Today is the 11th.
- [77] THE COURT: Oh, all right, so you are asking for a few days to get things organized? It seems reasonable.
- [78] MR. SCHERR: October 14, we will agree to that.
- [79] THE COURT: All right, so as opposed to an immediate writ of possession, possession will occur on October 14.
- [80] MR. SCHERR: That's -- I'm going to suggest we say noon, October 14th.
- MR. RAFUSE: I would suggest 11:59 p.m., October 14th, the usual and standard date -- or time and date -- or excuse me, usual standard time for vacating possession.
- [81] MR. SCHERR: Well, that's not the usual standard time for a writ of possession, because not too many bailiffs operate at 11:59 p.m.
- [82] THE COURT: I am not going to get into quarrelling about hours. The time the respondents shall provide possession to the petitioner is on or before 5:00 p.m. on October 14, 2017.

"S.A. Donegan J."

DONEGAN J.

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