

CANADA / JUDGMENT

Fenske v. MacLeod

2020 BCSC 532

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Supreme Court of British Columbia

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2020 BCSC 532 Fenske v. MacLeod

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fenske v. MacLeod,

2020 BCSC 532

Date: 20200406

Docket: S79732

Registry: Nanaimo

Between:

Shannon Fenske

Plaintiff

And

Anne J. MacLeod

Defendant

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Defendant:

W. C. Vaughan

Place and Date of Trial/Hearing:

Nanaimo, B.C.

November 19-22, 2019

January 14-15, 2020

Place and Date of Judgment:

Nanaimo, B.C.

April 6, 2020

Table of Contents

Introduction.. 3

Background/Chronology.. 3

Analysis.. 11

Did the changing of the lock constitute an interruption of the Tenants' right of quiet possession in the premises such that it amounted to a repudiation of the lease?. 12

If the lease was not repudiated by the Lessor in December 2015, what was the status of the lease in January 2016?. 16

What rights did the Lessor have as of January 20, 2016?. 17

Damages.. 23

Legal Theory and Measure of Damages. 25

Double Damages under the Rent Distress Act 27

Damages Payable to One Tenant 30

Mitigation.. 31

Summary of Findings on Damages.. 31

Costs.. 32

Introduction

[1] The plaintiff, one of the two former tenants of commercial premises in Tofino, claims against his former lessor.

- [2] The plaintiff argues that the lessor repudiated the lease for the premises when she changed the lock on the back door and thereby denied him access. He says that changing the lock interrupted his right of quiet enjoyment and constituted a repudiation of the lease. The lessor denies that there was a repudiation.
- [3] Relying on the perceived repudiation, the tenant did not pay rent for the next month. Because the tenant did not pay the rent, the lessor terminated the lease. She then seized and sold the tenant's equipment.
- [4] The plaintiff claims that the lessor had no right to seize or sell the equipment and he claims for wrongful distraint. He also seeks damages for lost prospective profits and punitive damages.
- [5] The trial of this matter proceeded over four days of evidence. Direct and cross-examination delved into multiple issues based on mutual suspicion. In the end, a limited number of facts were relevant. The facts relating to those issues are not substantially in dispute. This decision focusses primarily on the consequences of the events as opposed to the events themselves.

Background/Chronology

- [6] In the summer of 2015, the plaintiff, Shannon Fenske, and his friend Brandon Thompson (collectively, the "Tenants") formulated a plan to open a wood-fired pizza business in Tofino serving take-out food. They required premises that would house a wood-fired oven. They did not need significant seating space.
- [7] On August 19, 2015, Mr. Thompson learned that an existing take-out business at 451 Main Street in Tofino would be closing on October 1, 2015. The suite was at the ground floor of a mixed-use building that also had retail and residential suites. Mr. Thompson informed Mr. Fenske about the nature of the premises. He also contacted the owner, the defendant Ms. Ann MacLeod (the "Lessor"). Upon receiving the email from Mr. Thompson, Ms. MacLeod advised him to speak to the outgoing tenant if they wanted to examine the premises.
- [8] It is evident that Mr. Fenske and Mr. Thompson were keen to rent the premises. On August 27, Ms. MacLeod emailed an application for tenancy and a 24-page lease to Mr. Fenske. The term of the draft lease was one year. The draft lease only named Mr. Thompson as tenant. Mr. Fenske and Mr. Thompson signed and return both the application for tenancy and the draft lease on the same day. The two men requested no edits or amendments apart from Mr. Fenske adding himself in handwriting as a tenant. In a separate email on August 27, Ms. MacLeod suggested that they should inquire about the permit required for the chimney of the pizza oven and the municipal zoning.

- [9] By agreement between Mr. Fenske and Mr. Thompson, Mr. Fenske would expend the funds required to get the business up and running. Mr. Thompson would assist with the renovations and then be responsible for creating the menu and cooking the pizza. Mr. Fenske expected to be a silent partner in the business. There was no formal agreement between Mr. Fenske and Mr. Thompson but there was a general understanding of their respective roles.
- [10] After August 27, 2015, the two men began preparing to open the business. They set an optimistic goal of opening in October 2015. They retained a contractor who planned to start work when they took possession of the premises on October 1. Prior to that date they purchased materials, including used equipment from the prior tenant which they purchased for \$10,000. They arranged for delivery of a wood-fired pizza oven from Italy. The oven was shipped on a rush basis. Mr. Fenske paid \$16,500 for the oven and \$6,916 for air freight, plus GST.
- [11] On September 17, 2015, Mr. Fenske paid the October rent plus an additional month's rent as required under the lease. That additional rent was considered the security deposit under the terms of the lease.
- [12] Mr. Thompson met with Ms. MacLeod in late September 2015. At that meeting, Ms. MacLeod signed the lease. Her position is that there was no binding lease until that date. There is some dispute regarding whether Ms. MacLeod provided the keys or whether the new Tenants obtained the keys from the old tenant. The exchange of the keys is an important issue because there were two (or three) doors to the premises. The "front" door was used by customers. The "back" door led into the kitchen. The parties do not agree whether there was a third exterior door that led to a washroom that is connected to the premises. For the reasons set out below, I find that the existence of that third door is not relevant to the issues to be decided. I further find that the Tenants obtained the keys from the former tenant.
- [13] Mr. Thompson believes that he obtained the keys from the Lessor at their meeting in late September. The Lessor disagrees and says that she advised Mr. Thompson to obtain the keys from the outgoing tenant.
- [14] It is obvious that, if she was going to provide the keys, the Lessor would have been required to cut new keys and provide them before the end of the lease. That would have been an unnecessary expense for the Lessor. It makes more sense that she instructed the new Tenants obtain the keys from the outgoing tenant. The outgoing tenant had an existing set of keys and needed to return them. It is reasonable to infer that he gave them to the new Tenants. That sequence also explains the fact that both the outgoing and the incoming tenants lacked the key to the front door to the premises.

- [15] On that basis, I find that the Tenants took the keys from the former tenant on September 30, 2015. The Tenants say, and I find, that they did not receive a key to the front door. The former tenant told the incoming Tenants that he always entered the premises by the back door and then unlocked the front door from inside.
- [16] The Tenants planned to replace the front door with double French doors after installing the wood-fired oven. At that point, they would replace the lock. As a result, they did not request a key for the front door, nor did they advise Ms. MacLeod that they needed another key. It is also evident that, if there was a third door, the Tenants never used it and were not aware whether they had a key to it.
- [17] The Tenants began renovations on October 1. Mr. Thompson was on-site most days. Mr. Fenske was attending school in Nanaimo and only attended in Tofino on weekends.
- [18] On October 8, 2015, the Tenants received an email from the District of Tofino, indicating that the building was not zoned for food take-out. Mr. Thompson immediately notified Ms. MacLeod and asked her to sign an application for a temporary use permit. If granted, the temporary use permit would allow for temporary zoning for up to three years. However, Mr. Fenske wanted a permanent resolution to the zoning issue. It is clear from later correspondence that he wanted Ms. MacLeod to permanently resolve the zoning issue with the municipality.
- [19] The zoning issue upset the Tenants and made them suspicious of Ms. MacLeod. In the end, the zoning issue was not a decisive issue between the parties, but it did set events along a certain path. After October 8, Mr. Fenske sought legal advice and rarely communicated directly with Ms. MacLeod.
- [20] Immediately upon receiving the temporary use permit application on October 8 or 9, Ms. MacLeod signed it and returned it by email.
- [21] The Tenants' renovations continued through October 12, 2015. However, at some point in October they received advice about the costs associated with the installation of the wood-fired oven. The building permit required that they construct a high chimney and install an air-exchange mechanism. The total cost of construction and installation would exceed \$20,000. That amount exceeded the Tenants' expectations.
- [22] On October 13, 2015, on Mr. Fenske's instruction, Mr. Thompson went to the municipality and withdrew the application for the temporary use permit. Mr. Thompson gave unsatisfactory testimony about his reasons for withdrawing that application. It was clear from Mr. Fenske's testimony that Mr. Fenske wanted to withdraw the application because he wanted to force Ms. MacLeod's hand and obtain permanent re-zoning.
- [23] On October 20, 2015, Mr. Fenske's accountant wrote a long email to Mr. Fenske and Mr. Thompson, setting out a forecast of the income required to profit from the business. The financial outlook was not optimistic. Based on an initial investment of \$54,000 by Mr. Fenske, the restaurant would have to produce sales of approximately \$950 per day, six days

per week, in order to break even. That forecast included a payment of \$1,500 per month to repay Mr. Fenske's initial investment. It also provided for a small amount for salaries. Mr. Fenske says that he asked his accountant to prepare a dire financial forecast so that Mr. Thompson would not get high hopes about salary. Whatever the reason for the projection, the financial picture was not rosy.

- [24] On October 28, 2015, Mr. Fenske's lawyer sent a letter to Ms. MacLeod stating that it was her responsibility to resolve the zoning issue. Although the lawyer delivered the letter in accordance with the provisions of the lease, Ms. MacLeod was travelling and did not receive it. Further, the legal position taken in this letter is questionable. Ms. MacLeod's email of August 27, 2015, advised the (then potential) Tenants to seek advice regarding building permits and zoning. They had not taken those steps before signing the lease.
- [25] Because Ms. MacLeod did not receive the October 28, 2015 letter, she did not respond.
- [26] On October 31, 2015, Ms. MacLeod emailed the Tenants, seeking access to the premises for her maintenance man, Mr. Dauphinee. Mr. Thompson let him in.
- [27] On November 1, 2015, Ms. MacLeod emailed Mr. Thompson, seeking an update on the renovations. Mr. Thompson did not reply.
- [28] On November 26, 2015, counsel for Mr. Fenske sent a second letter that followed up on the October 28 letter. The letter stated that Mr. Fenske would pay the December 2015 rent under protest because the zoning issue was not resolved. Ms. MacLeod's email response, dated November 29, 2015, denied receipt of the October 28 letter. On the zoning issue, Ms. MacLeod again stated that the temporary use permit should suffice while the Tenants sought a re-zoning application. She noted that the lease was for a term of one year, whereas a temporary use permit could be issued for up to three years.
- [29] Ms. MacLeod sent further emails on December 1 and 3, 2015, indicating that she learned from the zoning official for Tofino that the application for the temporary use permit had been withdrawn. She asked whether the Tenants intended to continue with their business venture. She did not receive a response. She became suspicious that the Tenants sought to escape the lease.
- [30] On December 4, 2015, Mr. Thompson left on a trip to Alberta. He was gone until December 13. Mr. Fenske was still attending school in Nanaimo. He did not attend at the premises between those dates.
- [31] On December 7, 2015, Ms. MacLeod sent a message via Facebook to Mr. Thompson, stating that they were "having a problem in the building" and Mr. Dauphinee needed access to the premises. The Tenants were suspicious of this mode of communication and Ms. MacLeod's reason for wanting access to the premises. Mr. Thompson emailed Ms. MacLeod and asked for further information. She stated that Mr. Dauphinee needed to investigate a rodent issue. In retrospect, that statement was not accurate. However, I find that there was no intention to mislead the Tenants. Further, I accept that Ms. MacLeod chose to contact Mr. Thompson via

Facebook because Mr. Thompson had not responded to her emails of December 1 and 3.

- [32] The actual December 7 problem related to the hot water tank for a residential suite in the building. The upstairs tenant notified Ms. MacLeod that he had no hot water. Although nobody was aware, the hot water for that residential suite came from the water heater in the Tenants' premises. The Tenants had failed to pay the BC Hydro bills for October, November, and December. BC Hydro cut off the electricity to the premises, leading to the hot water problem for the other tenant.
- [33] Mr. Dauphinee attended in the premises and deciphered this problem. He notified Ms. MacLeod who contacted BC Hydro. Upon learning that the hydro bill had not been paid, she took over responsibility for payment of the electricity bills. This information created a suspicion in her mind that the Tenants had abandoned the lease.
- [34] More importantly, when Mr. Dauphinee attended on December 7, he did not have a key that provided access into the premises. With Ms. MacLeod's approval, he drilled out the lock to the back door to gain entry. Neither Mr. Dauphinee nor Ms. MacLeod thereafter wrote to the Tenants to inform them of the changed lock. As discussed above, Ms. MacLeod was not aware that the Tenants did not have a key to the front door, because they had not asked her to provide one.
- [35] On December 12, 2015, Mr. Thompson posted on a Tofino-based buy-and-sell website, "Does anyone now [sic] who own's [sic] they [sic] vincentes [sic] building on Main Street?" The defendant submits that this was evidence that the Tenants were looking for other premises. Whether they were, or were not, it was not a breach of the lease to search for other premises.
- [36] On December 13, 2015, Mr. Thompson returned from Alberta. He attended at the premises and found that the back door lock had been changed. He notified Mr. Fenske by text. There is no indication of Mr. Fenske's response to Mr. Thompson; however, the Tenants did not contact Ms. MacLeod and request either an explanation or a new key.
- [37] On December 20, 2015, counsel for Ms. MacLeod emailed Mr. Fenske's lawyer, setting out her position on the zoning issue and her suspicion that the Tenants were seeking to escape their lease obligations. It is clear from this email that Ms. MacLeod intended to continue to enforce the lease.
- [38] On December 24, 2015, counsel for Mr. Fenske sent a letter to counsel for Ms. MacLeod. The letter states, in part:

[T]he Landlord has changed the locks on the premises gaining entry under the false pretenses of addressing the rat problem. Changing the locks on the premises is a clear breach of the lease We accept the repudiation of the lease and will be reviewing our client's options to recover his losses.

- [39] As of that date, Mr. Fenske says that he had spent approximately \$58,000 on equipment and renovations for the pizza business. He was facing further expenditures to construct the chimney and the air-exchange mechanism for the wood-fired oven.
- [40] Mr. Fenske did not pay rent for January 2016.
- [41] The Lessor's counsel responded on January 11, 2016. That letter acknowledged that the back door lock had been changed but stated that the Tenants had access via the front door. The letter rejected the assertion that the Lessor had breach, or repudiated, the lease. The letter further noted that the Tenants had not paid January rent and demanded payment. It indicated that the Lessor reserved her remedies under the lease, "including the right to seize and sell" the Tenants' chattels.
- [42] There were no further communications between the parties until February 16, 2016, when Mr. Fenske's lawyer wrote seeking a mode of resolving the dispute.
- [43] On January 20, 2016, Ms. MacLeod emailed Mr. Dauphinee, advising that, because the Tenants had not paid rent within five days of the January 11 demand, the lease was terminated. That position is not a correct interpretation of the provisions of the lease. I discuss the legal effect of that email below.
- [44] On January 21, 2016, Mr. Dauphinee asked Ms. MacLeod whether she would notify the Tenants to remove their equipment. Ms. MacLeod responded that Mr. Dauphinee should post the premises for rent and plan to change the locks if the Tenants had not removed their equipment. She believed that if the Tenants did not remove their equipment, she would own it. It is common ground that Ms. MacLeod did not notify the Tenants that they should remove their equipment. The Tenants believed (correctly, in my opinion) that they did not have the right to remove the equipment from the premises while there was a dispute.
- [45] On February 5, 2016, Ms. MacLeod instructed Mr. Dauphinee to start selling the equipment in the premises. He commenced that process on February 15, 2016.
- [46] I find that Mr. Dauphinee carried out the sales in good faith with a view to obtaining the best price for the goods. He removed the wood-fired oven from the premises on February 15 and placed in storage. Upon learning of the oven's removal on February 15 from Mr. Thompson, Mr. Fenske responded that he would let the lawyers know. Neither he nor his counsel took any steps to attempt to recover the oven or the other equipment. The oven ultimately sold on May 31 for \$5,000.
- [47] Mr. Dauphinee's efforts resulted in total sales of \$12,182.75 with expenses of \$2,778.75. The Lessor netted \$9,404.

Analysis

- [48] Based on the facts set out above, the following issues arise:

- a) Did the changing of the lock constitute an interruption of the Tenants' right of quiet possession in the premises such that it amounted to a repudiation of the lease?
- b) If not, then what was the status of the lease in January 2016?
- c) Did the Tenants "abandon" the equipment?
- d) Was Ms. MacLeod entitled to distrain, or remove, the equipment?
- e) If the plaintiff is entitled to damages, what is the quantum of those damages?

[49] I address each question below.

Did the changing of the lock constitute an interruption of the Tenants' right of quiet possession in the premises such that it amounted to a repudiation of the lease?

[50] The plaintiff and the defendant take opposite positions on the legal consequence of Mr. Dauphinee changing the lock on the back door on December 7, 2015.

[51] The plaintiff says that the changing of the lock constituted a repudiation of the lease by the Lessor because it interrupted the Tenants' quiet enjoyment of the premises. The plaintiff further says that this interruption constituted a repudiation of the lease. The plaintiff argues that a lessor's intention is not relevant to the interruption of quiet enjoyment and that repudiation can occur regardless of the lessor's intention.

[52] The defendant argues that she did not repudiate the lease. She says that the changing of one lock was necessary for Mr. Dauphinee to gain entry to the premises. She believed that the Tenants had access through the front door. Further, she argues that repudiation requires evidence of intention. She had clearly declared her intention that the lease continued in existence in her lawyer's email dated December 20, 2015, among other correspondence.

[53] Based on my analysis of the law set out below, I find that the changing of the back door lock did not constitute a repudiation of the lease.

[54] The plaintiff's position is that a breach of the right of quiet enjoyment, if significant and permanent enough, constitutes a repudiation of the lease by the Lessor.

[55] The plaintiff notes that the lease specifically provides that the locks may not be changed or added without both parties' prior consent. Hence, by definition, the lock change was a breach of the lease.

[56] It is common ground that quiet enjoyment is a central component of all leases. The plaintiff relies on 0824606 B.C. Ltd. v. Plain Jane Boutique Ltd., 2018 BCSC 1887 [Plain Jane] at para. 99:

- [99] At common law, the implied covenant of quiet enjoyment protects against the landlord derogating from his or her own grant: *Stearman v. Powers*, 2014 BCCA 206 at para. 18; *Shun Cheong Holdings B.C. Ltd. v. Gold Ocean City Supermarket Ltd.*, 2002 BCCA 451 at para. 9 [Shun Cheong]. Few, if any, of the other rights of tenants are more fundamental than the right to quiet enjoyment: *Sundberg v. J.E.D. Holdings Ltd.*, (1984) 36 R.P.R. 103 (B.C.S.C. Chambers) at 103.
- [100] Several decisions have discussed the common law implied right to "quiet enjoyment". I distill the following principles from those decisions applicable to the existence of a cause of action for breach of quiet enjoyment:
- a) whether a covenant has been breached is a question of fact depending upon the facts of each particular case: *Firth v. B.D. Management Ltd.*, (1990), 73 D.L.R. (4th) 375 (B.C.C.A.) at 379;
 - b) a mere "temporary inconvenience" will not amount to a breach of quiet enjoyment. The interference must be of a grave and permanent nature such that it constitutes a serious interference with the tenant's proper freedom of action in exercising its right of possession: *Firth* at 379-380; *Stearman* at para. 18; *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2008 BCSC 235 (Chambers) at para. 55, rev'd on costs: 2009 BCCA 275 [Evergreen];
 - c) the implied covenant for quiet enjoyment is a qualified one protecting the tenant against interference by the landlord or persons claiming through or under the landlord: *Stearman* at para. 19 citing *Kenny v. Preen* [1963] 1 Q.B. 499 (Eng. C.A.);
 - d) a breach of quiet enjoyment may occur even when there is no direct physical interference with the tenant's possession and enjoyment: *Heckert v. 5470 Investments Ltd.*, 2008 BCSC 1298 at paras. 103-108; and
 - e) the fact that a landlord may have acted reasonably is not relevant to whether the tenant's right to quiet enjoyment has been breached: *Heckert* at para 109; *Watchcraft Shop Ltd. v. L & A Development (Canada) Ltd.* (1996), 49 C.P.C. (3d) 17 (Ont. Gen. Div.) at para. 32, citing *Owen v. Gadd*, [1956] 2 All E.R. 28, [1956] 2 Q.B. 99 at 108 (C.A.), and *Pellatt v. Monarch Investments Ltd.* (1981), 23 R.P.R. 8 at 16 (Ont. Co. Ct.).

[*Italic emphasis in original; underline emphasis added.*]

- [57] The plaintiff argues that the changing of the lock constituted a serious interference with the Tenants' quiet enjoyment of the premises. Further, that interruption was serious enough to constitute a repudiation of the lease.
- [58] Dealing first with the seriousness of the interruption of quiet enjoyment: the result of changing the back door lock was serious in that it prevented entry to the premises. Second, although the Lessor acted reasonably, that fact is not relevant to the consideration of whether the right to quiet enjoyment was breached.

- [59] However, I find that the changing of one lock was, at worst, a "temporary inconvenience" to the Tenants. The Tenants had been in possession of the premises for more than two months. They had taken no steps to request a key, or replace the lock, on the front door. The Lessor had no knowledge of that situation.
- [60] It is clear that if the Tenants had requested a new key to the back door, or had initially requested a key to the front door, the Lessor would have provided one.
- [61] The plaintiff relies on a number of cases relating to the legal consequences of a lessor changing the locks. In particular, the plaintiff relies on *Country Kitchen Ltd. v. Wabush Enterprises Ltd.* (1981), 120 D.L.R. (3d) 358 (N.L.C.A.) and *Mybrie Investments v. Icana Techno Corp.*, 1997 CanLII 2140 (B.C.S.C.).
- [62] However, those cases discuss the legal consequences in relation to the remedies available to the lessor. Put broadly, a lessor who changes the locks and takes possession of premises is not entitled to distrain for rent because the lessor has terminated the lease. In some cases, the lessor does not "intend" to terminate the tenancy or limit its remedies when he or she changes the locks. Those cases say that the "intention" of the lessor in changing the locks is not relevant.
- [63] However, in this case, the action of the Lessor, via Mr. Dauphinee, was to change one lock, on one door, because he needed access to investigate the hot water issue. The Tenants may have interpreted that action as being significant, but the evidence is clear that the Lessor did not intend to repudiate the lease. Ms. MacLeod's intention was clear in the letter that her counsel sent on December 20. That letter clearly contemplates the continuation of the lease. It arrived four days before the plaintiff's lawyer purported to accept the repudiation of the lease.
- [64] The defendant argues, correctly in my opinion, that intention is important in lease repudiation. The defendant points to several cases including *Business Depot Ltd. v. Lehndorff Management Ltd.* (1996), 24 B.C.L.R. (3d) 322 at 345 (C.A.), where Justice Southin wrote:
- 67 How is it to be judged whether the alleged repudiator has evinced an intention no longer to be bound? Simply by asking, in accordance with a fundamental principle of the law of contract (see *Smith v. Hughes* (1871), L.R. 6 Q.B. 597), whether viewed objectively or, to put it another way, by applying the standard of the reasonable man, the conduct evinces the requisite intention.
- [65] *Business Depot Ltd.* was cited in *Il Camineto di Umberto Restaurant (1982) Ltd. v. Watson* (1997), 47 B.C.L.R. (3d) 120 (C.A.), where Justice Gibbs wrote for the court:

21 The conclusions below cannot reasonably be supported if they do not accord with the intention of the actor in each instance: the respondents in the case of the cancellation; the appellant in the case of the refusal to assign. See Lord Keith of Kinkel at p. 586 of *Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.* [1980], 1 All E.R. 571, quoting from Lord Coleridge C.J. in *Freeth v. Burr* (1874), L.R. 9 C.P. 208:

In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract.

22 Lord Keith called Lord Coleridge's statement "the guiding principle".

[66] I have found that it was clear that the Lessor did not intend to repudiate or terminate the lease in December 2016. Without that intention, the act of changing the lock on one door to gain access cannot be interpreted as a repudiation of the lease.

[67] Changing the lock on one door interfered with the Tenants' right of quiet possession, but in a temporary manner that did not rise to the level of repudiation.

[68] It follows that the Tenants were not entitled to rely on the changing of the lock as a repudiation of the lease. It further follows that the lease continued into January 2016.

If the lease was not repudiated by the Lessor in December 2015, what was the status of the lease in January 2016?

[69] It follows from my discussion above that the lease continued in existence and the Tenants were in default as of January 1, 2016, because they did not pay rent.

[70] The Lessor's lawyer's email dated January 11, 2016, put the Tenants on notice that they were in default and indicated that the Lessor "retained all of its remedies." The Tenants did not remedy the default.

[71] It is common ground that the Lessor did not provide any notice of her intentions following the January 11, 2016 letter from her lawyer. As discussed below, the requirement for the lessor to provide notice is an important step in the proceeding because it indicates to the tenant the jeopardy he or she faces.

[72] The defendant ultimately re-let the premises as of March 1, 2016, without providing notice to the Tenants. Hence, the lease terminated, at the latest, by that date.

[73] The parties do not agree on the actual date of the termination of the lease.

[74] The defendant's position is that the Tenants repudiated the lease by not paying rent on January 1. She says that the lease terminated on February 15, the date that Mr. Dauphinee started selling the Tenants' equipment.

[75] Mr. Fenske's primary position, which I have rejected, is that the lease terminated upon Mr. Dauphinee changing the lock on December 7. In alternative arguments, Mr. Fenske says that an email from the Lessor to Mr. Dauphinee dated January 20, 2016, terminated the lease. It stated:

I have given them more than the legal 5 days notice; the lawyer sent a letter to them dated January 11th probably received on the 14th or 15th. I think it is now safe to post for rent by Saturday at the latest. At least you can start talking about it though. Then we change the locks and if they haven't gotten their fixtures out, I own them.

[76] Ms. MacLeod was cross-examined regarding the provision of the lease upon which she relied in this email. Ms. MacLeod was not able to identify the applicable provision. That is because no applicable provision exists.

[77] On that basis, the plaintiff says that, in the absence of any notice of her decision to the tenants, Ms. MacLeod's intention must be garnered from her email to Mr. Dauphinee. As of January 20, 2016, the plaintiff argues, Ms. MacLeod indicated to Mr. Dauphinee that the lease had terminated.

[78] I accept the plaintiff's position on the date of the termination of the lease. The Lessor terminated the lease by evincing an intention to advertise it as being available to rent. I infer from her email that if a new tenant had approached her, she would have agreed to lease the premises as of that date.

[79] As of January 20, 2016, the Lessor was in possession of the security deposit. According to the terms of the lease, the Lessor was to deliver the security deposit, less any proper deductions, to Mr. Fenske at the end of the lease. The Lessor did not return those funds. There is no evidence that the Lessor used those funds to repair any damage to the premises. Hence, I find that the Lessor accepted the security deposit (which Mr. Fenske paid in September 2015) as the last month's rent. Hence, once she terminated the lease, and kept the security deposit, the Tenants did not owe any rent. The security deposit became the January rent payment.

[80] I find that the lease terminated on January 20, 2016. As of that date, no rent was owing.

[81] Thereupon, Ms. MacLeod's statement that "if they haven't gotten their fixtures out, I own them" becomes the foundation of this action.

What rights did the Lessor have as of January 20, 2016?

[82] The next issue relates to the rights of the Lessor once the lease terminated. As discussed above, the Lessor did not provide any notice to the Tenants to retrieve their equipment. It is also common ground that the Tenants did not contact the Lessor and ask for an opportunity to take their items.

- [83] The Supreme Court of Canada outlined the remedies available to a lessor in *Highway Properties Ltd. v. Kelly, Douglas and Co.*, [1971] S.C.R. 562 [Highway Properties]. Those options were recently restated in *Plain Jane*:
- [179] Clearly, by December of 2015, the defendants were in default under the Lease for non-payment of rent. As noted, in *Highway Properties*, the Court provides a list of options available to a Landlord where a tenant is in fundamental breach of a lease. Those four options were recently summarized by [C.] Ross J. as follows in *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2018 BCSC 66 at para. 319:
- [319] In *Highway Properties*, the Supreme Court of Canada identified four mutually exclusive courses of action open to a landlord when a tenant repudiates the lease. Those options are as follows:
- (a) Option 1: Affirm the lease, insist on performance. This option means the landlord can insist on specific performance and sue for rent monthly as it becomes due, or wait until the lease expires and sue. The lease is still "alive".
 - (b) Option 2: Accept repudiation, terminate the lease, and accept surrender of lease. The landlord cannot sue for prospective damages because the termination of lease also terminates the covenant to pay rent. Under this option the landlord must give notice of termination. After termination, the landlord may commence an action for rent accrued and for damages for breaches of the covenant up to the date of termination. The landlord may re-enter the premises if there is a provision for re-entry in the lease.
 - (c) Option 3: Affirm the lease, insist on performance, and re-let on the tenant's account. This option involves the landlord rejecting the repudiation, re-letting the property on the tenant's behalf and holding the tenant liable for any deficiency in the rent for the balance of the lease. This option must be set out in the lease. Rent collected from the new tenant is applied against the obligation of the old one.
 - (d) Option 4: Accept repudiation, terminate the lease, and give notice for a claim for the present recovery of damages, including prospective rent. This is the "Highway Properties" option, where the landlord provides a "Highway Properties" notice to the tenant that damages will be claimed for the loss of the present value of the unpaid future rent for the unexpired term of the lease - the expectation value of the remainder of the lease.
- [180] [C.] Ross J. also referred to Pearlman J.'s helpful summary of applicable principles in the trial court decision of *Stearman v. Powers (c.o.b. Walkabout Casual Wear)*, 2016 BCSC 263 at para. 50, aff'd 2017 BCCA 165 (except in relation to costs):

To summarize the applicable principles:

- (a) where the tenant repudiates the lease and abandons the premises, the four options available to the landlord under *Highway Properties Ltd.* are mutually exclusive;

- (b) rather than accept the tenant's repudiation of the lease, the landlord may enter the premises and re-let them on the tenant's account in order to mitigate. The landlord must provide the tenant with clear notice of its intention to do so: *Highway Properties Ltd.*, pp. 570, 573;
 - (c) similarly, if the landlord elects to terminate the lease, and sue for damages for the unexpired term of the lease, it must provide the tenant with clear and timely notice: *Langley Crossing Shopping Centre [v. North-West Produce Ltd., 2000 BCCA 107]*; *Irie Enterprises Ltd. [v. Shortee's Canadjun Restaurant Ltd., 2001 BCSC 1192]* at para. 48;
 - (d) in order to recover for prospective, contractual losses under the lease after re-entry, the landlord must qualify its re-entry by notice to the tenant;
 - (e) if the landlord fails to qualify the re-entry, it will be taken to have exercised the second option in *Highway Properties Ltd.* and to have elected to terminate the lease while retaining the right to sue for the rent accrued due, or for damages to the date of termination of the lease: *Wing Lee* at para. 24.
- [84] The Lessor concedes that the only common law remedy that was available to her was "option (b)" from *Highway Properties*: accept repudiation, terminate the lease, and sue for any rent accrued. She also concedes that she did not give notice of the remedy that she would pursue. Finally, she did not commence any action for rent accrued, presumably, because there was none owing.
- [85] Hence, at common law, the defendant was only entitled to a certain type of remedy, and she took that remedy. She accepted the repudiation and terminated the lease. I have already found that, as of that date, no rent was owing.
- [86] As discussed above, the issue of "notice" from the lessor is an important one. With regard to the remedy pursued by a lessor, it is not sufficient for the lessor to state that he or she "reserves all rights and remedies" as the defendant did in her lawyer's January 11 email. In *Langley Crossing Shopping Centre v. North-West Produce Ltd., 2000 BCCA 107*, Justice Esson wrote for the court at para. 13:
- [13] Before us, there was discussion of the question whether there could be any utility in the landlord being required to give express notice in a timely way of its election to seek prospective damages. There is sound reason for requiring the landlord to make clear which of the four mutually exclusive courses it proposes to follow. If it intends to follow the first course of doing nothing other than insisting on performance of the terms, or if it intends to follow the fourth course of terminating and suing for prospective damages, it behooves those liable on the lease to take steps to rectify the situation, perhaps by securing a new tenant or applying for relief against forfeiture. The second and third courses do not create the same threat to a solvent tenant or indemnitor. For the very reason that the landlord's remedies are mutually exclusive, it is not sufficient to simply give notice of its intention to exercise its "rights" under the lease. [Emphasis added.]

- [87] Hence, the lessor is required to provide notice, in part, so that the tenant knows the jeopardy he or she faces.
- [88] I noted above that the Lessor did not provide notice of her intended remedy in January or February 2016. However, that is not the end of the confusion. In this case, the Lessor has taken different positions as the action progressed:
- a) The lawyer's letter dated January 11, 2016, stated that lease continued, and Lessor expected rent to be paid.
 - b) The response to civil claim, filed December 16, 2016, pled that the lease was unenforceable because it was not signed by the Lessor.
 - c) The amended response to civil claim, filed October 15, 2019, takes the position that the Tenants defaulted by failing to pay rent and the defendant exercised her right pursuant to the lease to dispose of the equipment. The basis of this theory was that the Tenants had abandoned the equipment.
- [89] At trial, the Lessor's position was that the lease terminated due to non-payment of rent in February 2016. However, with respect to the remedies available to the Lessor, she puts forward three alternative arguments, all of which fall outside of the bounds of the remedies described in Highway Properties.
- [90] First, she argues that the Tenants could be considered to have abandoned their equipment. She notes, correctly, that she could not be expected to store the equipment indefinitely. However, establishing that goods have been abandoned by the tenant requires meeting a high evidentiary burden. Both counsel agree that the applicable onus and burden are set out in *Stewart v. Gustafson*, [1998] CarswellSask 581 (Q.B.) which noted:
- [16] In the result, intention often must be inferred by using the approach commonly employed in criminal law where intention is of paramount importance.
- [91] Counsel for the Lessor concedes, properly in my opinion, that the elements necessary to establish abandonment by the Tenants are not made out on the facts of this case. Of primary importance, the Lessor never provided notice to the Tenants that she wanted them to remove the equipment. Failing notice by the Lessor, it is hard to formulate an argument that the Tenants' intention can be inferred from any action or inaction on their part.
- [92] I find that there was no abandonment of the equipment by the Tenants.
- [93] Second, the Lessor argues that there were remedies available in the provisions of the lease. Clause 40(d) of the lease provides that the lessor can remove and store any equipment remaining in the premises after lease terminates. Further, the lessor can sell the goods to pay the tenant's debts. According to the lease, the lessor can deduct the cost of selling the goods from the sale proceeds. The lessor is then required to pay any remainder to the tenant.

- [94] On the basis of Clause 40(d), the Lessor argues that she was entitled to remove and sell the Tenants' goods.
- [95] In response, the plaintiff argues that the only remedies available to a lessor are those four remedies set out in Highway Properties. The only authority supporting such an additional remedy is a Newfoundland case that has not been applied in British Columbia. He argues that it would open floodgates for lessors to rely on a new remedy not provided in Highway Properties.
- [96] I do not need to decide that issue, because, as I have found, there was no rent owing when the Lessor terminated the lease. The Lessor had accepted the security deposit as the January rent. Hence, there was no basis for the Lessor to seize goods for the payment of rent. Clause 40(d) did not apply because the Tenant had no debt to the Lessor.
- [97] Further, even if one of those contractual remedies were available in law, the Lessor cannot rely on it, because she gave no notice of her intention to do so.
- [98] Third, the Lessor argues that the plaintiff is estopped from claiming that his goods were wrongfully seized or distrained. She argues that this is a case of first instance. She argues that the plaintiff "set her up" because he did not actually want his goods back. As evidence of this position, she notes that the plaintiff never requested a chance to recover his goods from the premises. On February 15, 2016, the plaintiff knew that Mr. Dauphinee had advertised the pizza oven for sale. Mr. Fenske's lawyer sent a letter the next day but did not seek return of the oven or any other equipment. She argues that I should infer from that conduct that the plaintiff did not want the equipment back.
- [99] I find that Mr. Fenske is not estopped from claiming damages. Any such estoppel would have to be grounded in a failure of the Tenants to request their equipment after receiving formal notice from the Lessor. The Lessor provided no such notice. At best, the facts that form the basis of the "estoppel" argument would influence the measure of damages. I deal with that argument below.

Damages

- [100] It follows from my reasoning above that the Lessor was not entitled to take possession of the equipment at the premises. Before doing so, she should have provided notice to the Tenants to remove their goods. She did not. Instead, she misinterpreted the terms of the lease. I note, again, that the lease was in the form that she provided. The Tenants had no input on the terms of the lease. Further, the Lessor misinterpreted her own contract during a period when she had counsel retained for the specific purpose of interpreting and enforcing the lease.
- [101] The Lessor's removal and sale of the equipment was improper. As a result, the plaintiff is entitled to damages.

[102] The plaintiff seeks damages under the following heads:

- a) Compensation for equipment and material removed and sold by the defendant.
- b) Compensation for the loss of prospective profits from the business.
- c) Punitive damages.

[103] I will deal with the claims for damages for loss of prospective profits and punitive damages first. They are dismissed.

[104] First, with respect to the claim for loss of prospective profits, to the extent that the plaintiff was denied the chance to earn future profits, that loss was occasioned by the termination of the lease, not the removal of the equipment. I have found that the Lessor properly terminated the lease due to the Tenants' failure to pay rent. Any prospect of future profits ended when the Lessor terminated the lease. Termination of the lease was neither tortious nor a breach of contract.

[105] Further, the lease was for a term of one year. The financial projections prepared by Mr. Fenske's accountant saw the restaurant paying back his initial investment over a period of more than four years before he started making any profit. Mr. Fenske cannot claim for loss of profits that would only have occurred after the term of the lease. I dismiss the claim for prospective profits.

[106] Second, the plaintiff sought to amend his amended notice of civil claim during the trial to plead a claim for punitive damages. That amendment was allowed. In final argument, the plaintiff set out several facts justifying a claim for punitive damages. Those facts included the Lessor's "forced entry" into the premises under "false pretenses". I have found, above, that the entry by Mr. Dauphinee on December 7, 2015, was required and was not done under false pretenses. The plaintiff also argues that the late disclosure of documents should attract a punitive damage award. I find that none of the facts set out by the plaintiff justify an award of punitive damages. There was no conduct by the defendant (outside of the wrongful distraint) that would justify a claim for punitive damages.

[107] That leaves the issue of the quantum of damages for the wrongful distraint of the Tenants' goods and equipment. Four main issues arise:

- a) Under what legal theory does the plaintiff claim and what is the proper measure of damages?
- b) Should the damages be doubled pursuant to the Rent Distress Act, R.S.B.C. 1996, c. 403 [Act]?
- c) Is the plaintiff entitled to a full measure of damages, or should his claim be only for half of the loss suffered?
- d) Did the plaintiff fail to mitigate his loss?

- [108] Based on the arguments of the parties related to each of these issues, the potential range of damages payable to the plaintiff is anywhere from \$3,000 to \$75,000. In my opinion, an award of damages at either end of that spectrum would be unfair to one party or the other. As a result, I set out below my considerations under each issue, and then assess the fair result having consideration of all of the issues together.
- [109] View in its totality, the plaintiff argues for an award based on his actual investment in the equipment. He argues that that figure should be doubled pursuant to the provisions of the Act. On that basis, he seeks a damage award for wrongful distraint in the amount of \$75,660.
- [110] In response, the Lessor argues that the starting point for damages should be her net recovery from the sale of the equipment. She also argues that the wood-fired oven was not in the premises, and thus not subject to distraint. She further argues that, because Mr. Fenske was only one of the two tenants, he can only recover half of any damages awarded. Finally, she says that he failed to mitigate his loss.
- [111] I discuss the issues and the parties' positions below.

Legal Theory and Measure of Damages

- [112] The plaintiff frames his claim for damages as a claim under the Act. He says that the right of a lessor to distraint ends upon the termination of a lease. Hence, he argues, the Lessor improperly distrained against his goods.
- [113] The plaintiff says that the proper measure of damages should be based upon the full value of the items he purchased for the business. He invested a total of \$58,052 into the business. Of that amount, he paid \$37,830 for items that were seized and sold by the Lessor. Those payments included the \$10,000 to the prior tenant for the existing equipment and the \$16,500 for the wood-fired oven. The remainder of the payments were for labour, delivery or other costs.
- [114] Relying on *Plain Jane* (supra) Mr. Fenske argues that he is entitled to the full amount of his investment in the equipment. *Plain Jane* involved the wrongful distraint of the inventory of a retail-clothing boutique. The court stated that the measure of damages should "make the defendant whole" (*Plain Jane* at para. 218). The court awarded damages based upon the "inventory cost" of the goods. Like this case, the boutique had gone out of business. However, in the case at bar, the items sold were not inventory.
- [115] In support of the replacement cost argument the plaintiff also relies on *P.C. Bang Pacific Theatre Ltd. v. Klar Enterprises Inc.*, 2019 BCSC 759 at para. 128:

[128] Replacement cost may be used as the starting point to determine tort damages for loss of property, subject to adjustments as may be appropriate in the circumstances of the case, as set out in British Columbia Court of Appeal's decision in *Nan v. Black Pine Manufacturing* (1991), 55 B.C.L.R. (2d) 241 at 252 (C.A.):

The result of the application of these principles, in most cases involving the tortious loss of or damage to property, will be that replacement costs will at least be the starting point for the assessment of damages. Whether or not the damages based on such costs should then be adjusted, either for pre-loss depreciation or post-reinstatement betterment, will depend on what is reasonable in the circumstances. No rules can be fashioned by which it can invariably be determined when such allowances should be made. It must, in all cases, turn on the facts peculiar to the case being considered.

[116] However, later in *P.C. Bang Pacific Theatre*, Wilson J. wrote at para. 132:

[132] Before replacement cost should be considered as the basis for assessing damages, however, there must be an intention to actually replace the goods. Absent such evidence, the best evidence of the value of the goods seized may be the realization from the auction. The BC Court of Appeal came to a similar conclusion in *Chan v. Farrell Estates Ltd.*, 2001 BCCA 92:

[117] In response, the defendant argues that the net amount recovered in the sale of the items is the appropriate measure of damages.

[118] I note that the reasoning in *Plain Jane* related to the improper seizure of retail inventory. Those items, if sold at retail prices by the boutique, could have realized more than the "inventory cost". The goods in the case at bar were not meant for sale. They would be used for the preparation of food for service to the public. The plaintiff did not go back into business. He did not seek to replace the equipment.

[119] Applying the reasoning in *Plain Jane* and *P.C. Bang*, I find that the proper measure of damages is the amount recovered by the Lessor in selling the items. That amount was \$12,180.75 realized in the sale of the items, including \$5,000 for the pizza oven.

[120] The defendant seeks credit for the costs she incurred in selling the items, totaling \$2,778.75.

[121] I decline to allow the Lessor the costs of liquidating the equipment. I have already found that she improperly distrained the equipment. She incurred costs because she had Mr. Dauphinee undertake the sales, and he took a percentage. If she had sold the items herself, there would have been no expense. It would be unfair to the plaintiff to allow that deduction. It was the act of selling the equipment that constituted the conversion. In those circumstances, the Lessor should not get to deduct the cost of carrying out the wrongful act.

[122] The defendant also argues that the pizza oven was never in the premises. As a result, she says that it was not subject to "distrain" under the Act. I disagree. The oven was delivered to the Lessor's property. It was sitting on a pallet in a parking area of the property. Although the Lessor claims that that area was not part of the leased premises, neither she nor her

property manager made any complaint about its presence. I find that it was on the premises and distrained along with the other equipment. I also note that this was another changed position on the part of the Lessor. Her original position was that the equipment, including the oven, had been abandoned.

[123] Further, as I have found above, the defendant clearly believed that as of February 15, 2016, the plaintiff's equipment became her property by operation of the provisions of the lease. She removed the oven because she believed that it was her property to sell. That action, in my opinion, constituted an unlawful distress.

Double Damages under the Rent Distress Act

[124] The next issue is the plaintiff's claim for double damages under the Act.

[125] Section 10 of the Act provides for double damages:

Double damage and costs against wrongful distress

10 If distress and sale is made for rent alleged to be due, and no rent is due to the person distraining, or to the person in whose name or right the distress is taken, then the owner of the property distrained and sold, or his or her personal representatives, may, by proceeding against the person distraining, or the personal representatives, recover double the value of the property distrained and sold, together with full costs of the proceedings.

[126] The plaintiff argues that the defendant distrained against his property when no rent was due. He says that the Lessor should pay double damages because of the manner in which she undertook the seizure. He points to the following facts:

- a) She misinterpreted her own lease, while she had counsel.
- b) She acted in a manner that was "illegal".

[127] The distinction between an illegal and an irregular distraint was discussed by Judge Dyer in *Song v. Gooch et al.*, 2010 BCPC 79, an impressive 323-paragraph examination of landlord tenant law:

[289] As Olsen states at p. 8-19 of his text, wrongful distress may be grouped into two categories which I have referred to above (a) irregular and (b) illegal or sometimes called unlawful distresses. He states, and I accept, that an irregular distress occurs when a landlord or his bailiff distrains as here for rent due but:

1. takes excessive distress, or
2. fails to comply with either statutory or common law requirements which I have alluded to above as "problems", for example, no inventory is taken, no sworn appraisals are shown to have been obtained, unauthorized bailiff fees are claimed, or the landlord himself purchases the goods distrained.

[290] I do not think Olsen intended his list to be exhaustive. By counterpoint Olsen states at p. 8-21 of his work that an illegal distress occurs where the landlord or his bailiff distrains and (a) there is no tenancy or (b) when no rent is due or when (c) rent is due but for example, the lease is terminated or exempt goods are seized. He lists other examples.

[128] On that basis, the plaintiff says that the distraint was not simply irregular, it was illegal.

[129] The defendant argues that the plaintiff cannot claim under the Act because the lease specifically contracted out of it. She points to clause 37 of the lease which provides:

If and whenever the Tenant is in default in payment of any money, whether hereby expressly reserved or deemed as rent, or any part of the rent, the Landlord may, without notice or any form of legal process, enter upon the Premises and seize, remove and sell the Tenant's goods, chattels and equipment from the Premises or seize, remove and sell any goods, chattels and equipment at any place to which the Tenant or any other person may have removed them, in the same manner as if they had remained and been distrained upon the Premises, all notwithstanding any rule of law or equity to the contrary, and the Tenant hereby waives and renounces the benefit of any present or future statute or law limiting or eliminating the Landlord's right of distress.

[130] The defendant is correct that the parties, subject to the specific terms of the lease, the parties had contracted out of the Act. The plaintiff argues that the provisions of the lease only relieve the Lessor from the more onerous procedural provisions of the Act. Clause 37 does not relieve the Lessor from the damage provisions. For example, the Act requires the Lessor to have the goods appraised by two appraisers before selling them. The provisions of the lease exempt the Lessor from that requirement.

[131] I find that I do not need to address the plaintiff's argument in this regard. Based on my findings above, the tenant was not in default of payment of any money as of the date that the Lessor seized the goods. Clause 37 does not apply in this situation because the Tenants were not "in default". The lease had been terminated by the Lessor for the failure to pay January 2016 rent. The Lessor held the security deposit and applied it to January's rent. The Lessor was not entitled to distrain when no rent was owing and the lease was terminated.

[132] As a result, I find that the exclusion in clause 37 does not apply. It follows that the Act does apply in this circumstance.

[133] I accept the plaintiff's argument that the defendant's conduct meets the standard required for an award of double damages under s. 10 of the Act. The Lessor had counsel on the specific issue of interpretation and enforcement of the lease. She did not seek the advice of her counsel, but instead interpreted the provisions, incorrectly, and to her own advantage. She improperly assumed ownership of equipment. Her representative sold the goods on her behalf. She deposited the sale funds into her account.

[134] I find that the plaintiff is entitled to double damages. Those double damages are punitive in nature.

Damages Payable to One Tenant

- [135] The next issue relates to the defendant's argument regarding the damages payable by a lessor to one of several tenants. The defendant says that, because Mr. Fenske was one of the two tenants, he is only able to recover half of the damages.
- [136] The defendant relies on *Hamilton v. Ball*, 2006 BCCA 243 as authority for the proposition that, where one of a group of co-owners of property sues on a property interest, he or she can only sue for his or her interest (and not for the entire group's interest). The defendant says that Mr. Fenske and Mr. Thompson were joint tenants and in a partnership. Hence, Mr. Fenske can only claim half of the interest in the equipment.
- [137] The defendant's submission would make sense and would protect lessors in situations where they may face multiple actions, by multiple tenants, each seeking the full value of the lost property interest.
- [138] However, those are not the facts in the case at bar.
- [139] I set out above the breakdown of obligations as between Mr. Fenske and Mr. Thompson. Mr. Fenske was the investor, and Mr. Thompson was going to bring his skills to the business. Mr. Fenske purchased the equipment that the defendant eventually seized. Those were the general roles assigned to each partner.
- [140] On those facts, Mr. Thompson has no cause of action for the wrongful distraint of the equipment. He suffered no loss by its removal. There was no partnership agreement pursuant to which Mr. Thompson gained partial ownership of the equipment when each piece was purchased.
- [141] Conversely, Mr. Fenske lost the entire amount of the value of the equipment.
- [142] I do not accept the defendant's argument with respect to Mr. Fenske's partial interest in the equipment. Mr. Fenske is entitled to full compensation for the wrongful distraint of the equipment.

Mitigation

- [143] Finally, the defendant argues that the plaintiff failed to mitigate his loss by seeking to stop the defendant from removing and selling the equipment. The theory of this defence appears to be that, if the plaintiff had stated, "Please stop selling my equipment", then the defendant would have acceded to that request.
- [144] I note that the defendant has always taken the position that she had the right to sell the equipment. As of the date of trial, the defendant had not returned any of the funds resulting from the sale of the equipment. Hence, I cannot infer that, if asked, she would have agreed to give the equipment back to Mr. Fenske.

[145] Further, an aspect of successfully arguing a failure to mitigate is establishing that the proposed steps that should have been taken by the plaintiff would likely have been effective in reducing the loss. In this case, that evidence could have been established by the Lessor testifying that, if asked, she would have returned the equipment to the plaintiff. She did not provide that testimony.

[146] I do not find that there was a failure to mitigate.

Summary of Findings on Damages

[147] Having considered the issues of the proper measure of damages, the double damages payable under the Act, and the defendant's argument that the damages should be halved, I am satisfied that

- a) the proper measure of damages is the amount achieved in the sale of the equipment, without reduction for the cost of selling the goods;
- b) the plaintiff is entitled to double damages under s. 10 of the Act based on the improper actions of the defendant; and
- c) the plaintiff is entitled to full damages, not halved, or decreased for mitigation issues.

[148] As noted, the proper measure of damages is \$12,180.75. That figure is doubled pursuant to s. 10 of the Act for a total damage award of \$24,361.50. The plaintiff will be entitled to interest on that award from the date of seizure of the equipment.

Costs

[149] Counsel requested that I not address the issue of costs. I will hear submissions on that issue if necessary.

"A. Ross J."

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