

CANADA / JUDGMENT

Shanahan v. Turning Point Restaurant Ltd.

2012 BCCA 411

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 411 Shanahan v. Turning Point Restaurant Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Shanahan v. Turning Point Restaurant Ltd.,

2012 BCCA 411

Date: 20121017

Docket: CA039240

Between:

Michael Shanahan

Respondent

(Plaintiff)

And

The Turning Point Restaurant Ltd.

Appellant

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Frankel

On Appeal from the Supreme Court of British Columbia, July 15, 2011

(Shanahan v. Turning Point Restaurant Ltd., 2011 BCSC 956,
Cranbrook Registry, Docket Number 20014)

Counsel for the Appellant:

B.G. McLean

J. Hindess

Counsel for the Respondent:

G.A. Purdy, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 6, 2012

Place and Date of Judgment:

Vancouver, British Columbia

October 17, 2012

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] The landlord of commercial premises, Turning Point Restaurant Ltd., appeals from an order requiring it to pay \$92,900 plus costs to its tenant, Michael Shanahan, for terminating the lease of the premises mid-term for non-payment of rent. That amount reflects an assessment of \$100,000 in damages found owing by Turning Point Restaurant, less \$7,100 owing by Mr. Shanahan to Turning Point Restaurant for moneys due on the purchase of equipment and compensation for damage to the property.
- [2] The central issue at trial, and before us, is the characterization of \$7,600 paid by Mr. Shanahan to Turning Point Restaurant at the beginning of the lease. Turning Point Restaurant says it was a deposit of the first and last months' rent; Mr. Shanahan says it was a general deposit which he was entitled to have applied to rent mid-term when he was late paying rent. Mr. Justice Melnick found it was the latter. In consequence, he found Turning Point Restaurant was not entitled to terminate the lease when it did because it was obliged to apply the deposit to the rent in arrears when requested by Mr. Shanahan to do so. The judge

assessed the damages in issue in this appeal as a remedy for wrongful termination of the lease.

- [3] The origins of the dispute lie in 2008, when one of the principals of Turning Point Restaurant, Mr. Tsadilas, discussed with Mr. Shanahan the possibility of letting the premises to him for operation of a licensed restaurant. They discussed a monthly rent of \$2,800 plus "triple net" costs for taxes and insurance, estimated at \$1,000 per month. Mr. Tsadilas asked that the first and last months' rent be paid in advance. The learned judge found Mr. Shanahan paid \$2,000 cash some time before a written lease was prepared, and two months' base rent – \$5,600 – by a cheque delivered to the office of Turning Point Restaurant's lawyer.
- [4] The Tsadilases left Canada on a vacation before a written lease was prepared and the affairs of the company were left in the care of Mr. Tsadilas's son. Mr. Shanahan's lawyer prepared a lease which the son, on instruction from his parents, signed. On return to Canada, the Tsadilases required certain changes to the lease. The changes were made and agreed to by Mr. Shanahan. They are of no moment to this appeal, except that they reflect the opportunity Turning Point Restaurant had to ensure the lease accurately reflected the transaction, even after the lease had been signed.
- [5] The term of the lease was three years commencing May 1, 2008. The judge found the parties had agreed the first month's rent was due June 1, 2008, so that the first month Mr. Shanahan occupied the premises was without charge. In addition to the terms of the tenancy, the lease gave Mr. Shanahan a right of first refusal in the event Turning Point Restaurant intended to sell the property.
- [6] Mr. Shanahan, although the tenant of the premises, conducted his business as "Shanahan's Bar and Grill" through a corporation, Shanahan's Bar and Grill Inc. The judge found that all of the equipment acquired by Mr. Shanahan was owned by his company. The company gave a security agreement under the Personal Property Security Act, R.S.B.C. 1996, c. 359, to Community Futures Development Corporation and "all of the debtor's present and after acquired personal property used in the business ..." were pledged as collateral. Further, certain moneys borrowed from Community Futures Development Corporation were secured by a mortgage on Mr. Shanahan's home.
- [7] Mr. Shanahan's business was not profitable. As a consequence, he was frequently late in paying the rent. Late payment of rent could lead to default, regulated by this clause of the lease:

5(h) Default by Tenant: That if default is made in payment of rent or any part thereof, and such default continues for 30 days after the due date for payment, or in the case of non-observance or non-performance on the part of the Tenant of any covenant, condition, restriction or stipulation herein contained, express or implied, and which continues for 20 days after written notice of such non-observance or non-performance is delivered to the Tenant, the Landlord may, at its option, cancel this lease by written notice to the Tenant, in which event any accrued monthly rent as of the date of the written notice of cancellation shall immediately become due and payable to

the Landlord.

- [8] Mr. Shanahan did not pay the July 2009 rent at the beginning of July as required. On July 29, 2009, Turning Point Restaurant delivered a letter to him advising he was in rental arrears, that the lease contained a clause allowing it to terminate the lease when the arrears were 30 days, and that he must bring the rent up to date immediately. Mr. Shanahan responded by asking Turning Point Restaurant to apply the deposit moneys it held to the July rent. The judge found:
- [35] ... I find Mr. Shanahan did make that request and that Mr. Tsadilas was probably equivocal in his response to it, and that Mr. Shanahan was probably lulled into a false belief that Mr. Tsadilas had agreed with his request. TPR was obliged to comply with Mr. Shanahan's request. ...
- [9] On August 11, 2009, Turning Point Restaurant purported to terminate the lease for non-payment of rent. Further, on August 10, 2009, Turning Point Restaurant had blocked access to the premises so that Mr. Shanahan could not remove the restaurant's contents.
- [10] Within a short time of these events, the property was sold to a company owned by Mr. and Mrs. Tsadilas, 504361 B.C. Ltd.
- [11] When discussions between the parties aimed at resolving the issues flowing from the August events failed, Mr. Shanahan commenced this action. In it he seeks: a declaration that the lease was valid and subsisting when the writ was issued and that the cancellation of it was void; an order that Turning Point Restaurant return all chattels to him or double their value; damages for loss of profit; damages for loss of value of the business; general damages; punitive damages; special damages; and costs.
- [12] Turning Point Restaurant counterclaimed for: damages for failure to pay for equipment it had sold to Mr. Shanahan in the amount of \$5,000 plus interest; unpaid rent for July and August in the amount of \$7,600; \$2,000 in unpaid utilities; \$500 in reimbursement for certain repairs; \$1,807.27 owing on water and sewer charges; \$3,872.50 in damages for repairs and clean up; \$101.15 to replace the locks; a permanent injunction requiring Mr. Shanahan to surrender or transfer the liquor licence; general and special damages for failure to "make over" the liquor licence to it; and costs.
- [13] The judge found Turning Point Restaurant was not entitled to terminate the lease on August 11, 2009, because Turning Point Restaurant had been required to apply the deposit moneys to the July rent as requested. The judge observed that the lease made no mention of the requirement to pay the first and last months' rent in advance and noted that the lease purported to contain all of the terms between the parties pursuant to this clause:
- 5(a) Entire Contract: That the whole of the contract is contained in this lease agreement.

[14] On the characterization of the deposit and its effect upon Turning Point Restaurant's right to terminate the lease on August 11, 2009, the judge referred to the Entire Contract clause and said:

[35] When the lease was prepared on Mr. Shanahan's instructions, it made no mention of a requirement that he pay the first and last month's rent in advance. ... The lease, however, expressly excluded this prior agreement. Thus, in the financial situation in which he found himself, Mr. Shanahan was within his rights to request that this money be applied to the July 2009 rent ...

[Emphasis added.]

And:

[45] While the provisions of the lease did not give TPR the right to terminate the lease on August 11, 2009, in the face of my having determined that Mr. Shanahan had the right to have the \$3,800 deposit held by TPR applied to the July rent, it is also true that on that day there was then due to TPR a further \$3,800 as of August 1, 2009 (or arguably somewhat less than that if one calculated exactly the triple net costs). ...

[15] The judge addressed the right of first refusal. He found that the transfer of the property, which took place after August 9, 2009, was effective July 1, 2009, when Mr. Shanahan had a right of first refusal whatever the outcome of the issue of the lease's "termination" in August. The judge referred to conversations between the parties in August about a possible sale of the premises to Mr. Shanahan, and observed:

[38] I accept that, in early August, Mr. Shanahan made enquiries as to how he might fund the acquisition of the premises. I also conclude, however, that his not moving forward with that acquisition was not so much due to the improper termination of the lease by TPR, but rather by his own inability to find a partner with money and his financial incapacity to otherwise fund such a purchase. The parties had spoken of a potential price of \$400,000 in 2008. Undoubtedly, a price of \$357,200 was never mentioned in August 2009. Whether the potential of obtaining the premises at this lower price would have made any difference to Mr. Shanahan's ability to fund the purchase is unknown; but, given his then overall financial circumstances, I find that the purchase was improbable, even if he had accessed his CPR pension.

[Emphasis added.]

[16] Concerning Mr. Shanahan's claims relating to the chattels, the judge found that on August 11, 2009, the only business asset owned by Mr. Shanahan was the lease itself because the assets used in the business were owned by Mr. Shanahan's company. The judge dismissed these claims, saying on this issue:

[42] A problem here is that the equipment, chattels and leasehold improvements effectively seized by TPR in August 2009, did not then belong to Mr. Shanahan, but rather to Shanahan's Inc., which is not a party to this action. Nor, for that matter, are Mr. and Ms. Tsadilas and 50Co. John Tsadilas, one of the two present shareholders of TPR, says TPR has no present interest in the chattels and equipment. TPR has sold the leasehold improvements with the premises to 50Co, although that transaction could not be described as an arm's length transaction for value without notice.

...

[48] Here, Shanahan's Inc. owned all the equipment and improvements and operated the business. Mr. Shanahan was simply the tenant under the lease. In my view, it was not Mr. Shanahan's chattels, equipment and improvements that were distrained (for I find that TPR did effect a distraint -- and sale to 50Co of at least the improvements) or, if I am incorrect, converted. Rather, it was those of Shanahan's Inc. The right to be compensated for this distraint or conversion is that of Shanahan's Inc. Shanahan's Inc. did not assign its cause of action to Mr. Shanahan when it sold him the chattels, equipment and leasehold improvements earlier this year.

[Emphasis added.]

[17] The judge also dismissed Mr. Shanahan's claim for damages for loss of business, and the claim for loss of profits was withdrawn:

[49] Any claim for damages for loss of business is also that of Shanahan's Inc. The claim for loss of profits was withdrawn as undoubtedly it was clear in the evidence there were no profits, although that would have been a claim of Shanahan's Inc. as well.

[18] Having disposed of several of the claims, the judge then turned his attention to the consequences of the wrongful termination of the lease. He held:

[50] So, in these circumstances, what is the measure of the damages suffered by Mr. Shanahan? He possibly lost the right to purchase the premises at what may have been an advantageous price; although, I have already expressed my conclusion that it is improbable that he could have come up with even the price paid by 50Co in August 2009. Mr. Shanahan lost the opportunity to continue with a tenancy of which, technically, he was entitled to enjoy at least until August 31, 2009. (I say August 31, 2009, as the lease gave him 30 days after the due date in which to come up with the rent.)

[51] Mr. Shanahan also became personally liable for certain guarantees he had of the obligations of Shanahan's Inc., including \$81,000 for the collateral mortgage on his home to Community Futures. He also claims to be personally liable for another \$88,000 in debts, which arose from the acquisition of equipment or operations by Shanahan's Inc.

[Emphasis added.]

[19] Finally, the judge assessed damages for wrongful termination of the lease. He said in its entirety on this issue:

[53] In the result, I would award Mr. Shanahan damages of \$100,000 against TPR for its high-handed, unjustified action in terminating his lease. I cannot grant any relief to Shanahan's Inc., of course, because it is not a party. However, I have set the amount of damages here to reflect that TPR wrongfully terminated the lease, failed to honour the provisions of that lease respecting offering him a right of first refusal, and deprived him of the opportunity, however remote I think it may have been, to recover from the difficult financial circumstances in which he found himself in August 2009.

[Emphasis added.]

[20] In response to the counterclaim, the judge, as earlier noted, reduced the \$100,000 damage award by \$7,100, and gave judgment in the amount of \$92,900.

Grounds of Appeal

[21] Turning Point Restaurant contends the judge erred on the issue of liability and quantum of damages by:

- (1) finding that the termination of the lease was unlawful;
- (2) awarding punitive damages, or in assessing the amount of damages; or
- (3) alternatively to (2), awarding compensatory contract damages for lost opportunity.

Discussion

Liability

[22] Turning Point Restaurant recognizes that without a legal basis for attaching the deposit to the last month's rent, its appeal on the liability issue cannot succeed. Accordingly, it vigorously disputes the judge's conclusion that it was obliged to apply the last month's rent to the rent owing for July as requested by Mr. Shanahan. It says the judge was wrong to apply the Entire Contract clause and, by so doing, holding there was no collateral oral agreement between the parties for payment of the first and last months' rent. It says Mr. Shanahan made a judicial admission that the deposit was an amount of the last month's rent in his statement of claim:

6. At the time of commencement of the Lease, the Defendant requested that the Plaintiff pay an additional month's rent, plus "triple net" costs, in the amount \$3,800.00, as security for unpaid rent, which the Plaintiff did (the "rental security").

[23] To the extent that an oral agreement that the deposit was for the first and last months' rent is inconsistent with the lease's Entire Contract clause, Turning Point Restaurant observes that the Entire Contract clause was not pleaded by Mr. Shanahan, and arose as a feature of the case only through the judge's questions. It says it is entitled to rectification of the lease to

reflect the parties' common intention in respect to pre-payment of the last month's rent, and, given Mr. Shanahan's "admission" and his failure to plead the Entire Contract clause, it was not necessary for it to plead rectification when it filed its statement of defence.

- [24] In any case, Turning Point Restaurant contends that the Entire Contract clause did not preclude the operation of a collateral oral agreement because the parties evidenced an intention not to have the written contract encompass all their contractual relations. Last, it says when Mr. Shanahan paid the deposit by cheque and the \$2,000 in cash, the money was appropriated by agreement to payment of the last month's rent.
- [25] Mr. Shanahan disputes the characterization of his statement of claim as a judicial admission, and says rectification is not available to Turning Point Restaurant because it did not seek that relief at trial. Further, he disputes the characterization of the advance moneys paid as an appropriation to the last month's rent and says the judge was correct because the deposit simply stood as a credit to him, without special restriction. Last, he says he was lulled into relying upon the application of the deposit to the July rent, as he requested, because Mr. Tsadilas was equivocal in his response to that request.
- [26] Whether Turning Point Restaurant was entitled to refuse to apply the deposit it held to the last month's rent as it contends, or was required to accede to Mr. Shanahan's request as the judge found, required the judge to determine the terms of the contract, including whether there was a collateral contract. This required him to characterize the discussions that had taken place before the written lease was prepared. Determining the content of a contract, as distinct from interpreting the terms, is largely a question of fact. On questions of fact, this court's role is constrained by the deference we owe the trial judge who has been immersed in the case, heard the witnesses and appreciated the incremental development of the parties' cases through the evidentiary and argument phases of the trial. This well-known deference is, perhaps, best described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.
- [27] In this case, the judge declined to find a contractual term that the deposit was held as the last month's rent. He based this conclusion on the absence of such a term in the contract, particularly given the opportunity to revisit the written agreement upon return of the Tsadilases from vacation.
- [28] That there is no such term in the lease is plain. The only way such a term could be found is by finding a collateral agreement, or by rectification. The latter theory was not presented but is suggested by the judge's finding in respect to Turning Point Restaurant's opportunity, not taken, to have the term added to the lease when the Tsadilases returned from vacation:

- [35] ... Given that Mr. Shanahan agreed to the changes TPR wanted, even after John Tsadilas signed the lease on the instructions of his parents, I have no doubt that he would have agreed to the addition [of a requirement that he pay the first and last months' rent in advance] as well, particularly as he had agreed to it verbally and he had acted throughout, until near the end of July 2009, as if he assumed that the extra \$3,800 he paid before the start of the term of the lease was for the last month of it.
- [29] Even so, I do not consider rectification would have been available at trial had it been sought, as Turning Point Restaurant disputed at trial that it had received the entire deposit which it contends was to be applied to the first and last months. That is, Turning Point Restaurant would have it that it was a term of the agreement that \$7,600 was required to be paid as a deposit (for the first and last months' rent), yet it also contended from the beginning that the full amount required had not been paid. In essence, Turning Point Restaurant was contending that Mr. Shanahan had been in breach of the term it now seeks to rely upon since the beginning of the lease in May 2008.
- [30] The test for rectification is described in cases referred to by Turning Point Restaurant. In *Bank of Montreal v. Vancouver Professional Soccer Ltd.* (1987), 15 B.C.L.R. (2d) 34 (B.C.C.A.), Madam Justice McLachlin (now C.J.C.) said at 36-37:

Before rectification can be obtained, the applicant must establish:

1. that the written instrument does not reflect the true agreement of the parties;
2. that the parties shared a common continuing intention up to the time of signature that the provision in question stand as agreed rather than as reflected in the instrument.

See: *Jocelyne v. Nissen*, [1970] 2 Q.B. 86 at p. 98, 99, [1970] 1 All E.R. 1213 (C.A.); *Frederick & Rose (London) Ltd. v. William H. Pim Jr. & Co. Ltd.*, [1953] 2 Q.B. 450 at p. 451.

The standard of proof of these elements is a stringent one because of the danger of imposing on a party a contract which he did not make. While it may not be so high as the criminal onus of proof beyond a reasonable doubt (see *Jocelyne v. Nissen*, supra; *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 93 D.L.R. (3d) 221 (Ont. H.C.J.), aff'd. 106 D.L.R. (3d) 576 (C.A.)), terms such as "certainty" (*Rose v. Pim*, supra) and "convincing proof" (*Jocelyne v. Nissen*) are appropriate.

See also Mr. Justice Lowry in *Edgewater Casino Inc. (Re)*, 2010 BCCA 17 at para. 20.

- [31] In this case, given the inconsistency between Turning Point Restaurant's contention the deposit was required for the last month, and its contention the deposit was never entirely paid such that Mr. Shanahan had been "off-side" this term from the beginning, I do not consider the high standard of proof required to order rectification would be found to have been met. It is less than obvious that a term was intended to be in the agreement when it is alleged by the proponent of the term that the term was never satisfied.

- [32] As I do not consider rectification is a viable theory, the absence of a pleading of rectification and the reasons advanced by Turning Point Restaurant for its absence are of no real moment; the point turns on the substance of the concept of rectification and not, in my view, the absence of pleadings.
- [33] The alternative route to finding the term advocated by Turning Point Restaurant is through a collateral agreement adhering to the lease that is not negated by the Entire Contract clause. Such a result was found, for example, in *Turner v. Visscher Holdings Inc.* (1996), 23 B.C.L.R. (3d) 303 (B.C.C.A.).
- [34] The judge declined to find such an agreement, and in doing so, referred to the Entire Contract clause. The Entire Contract clause was not pleaded, but was in the lease placed before the judge. It was open to the judge to look at the complete written document so as to appreciate the entire context when determining whether there was an enforceable prior agreement. Nor has the lack of pleading the Entire Contract clause as an answer to the collateral agreement argument prejudiced Turning Point Restaurant in the litigation by denying it a chance to seek rectification because, as I have discussed above, that position was incompatible with the pleading it advanced that there was an incomplete payment.
- [35] In addition to the Entire Contract clause, the judge noted the absence of the term advocated by Turning Point Restaurant in the written agreement and the Tsadilases' opportunity to amend or add to the document when they returned from their vacation. Further, Turning Point Restaurant took the position that Mr. Shanahan had not paid the entire amount of the deposit it said was required, a position which runs contrary to its claim there was a binding agreement for pre-payment of the last month's rent. In these circumstances, it was open to the judge, in my view, to decline to find there was an enforceable agreement in respect to pre-payment of the last month's rent.
- [36] Turning Point Restaurant also complains that the finding of the judge is contrary to Mr. Shanahan's statement of claim. I have earlier replicated that pleading (at para. 22). It speaks of payment of "an additional month's rent, plus 'triple net' costs ... as security for unpaid rent". That pleading plainly does not admit that the deposit was only for last month's rent. I would not accede to this submission.
- [37] Last, Turning Point Restaurant submits that the last month's rent pursuant to the prior agreement was an appropriation of that payment that was irrevocable. It cites, in support of that proposition, *Bank of Nova Scotia v. Neil* (1968), 69 D.L.R. (2d) 357 (B.C.C.A.). The notion of appropriation of a payment is a concept applied in debtor-creditor disputes. Here, the payment in dispute was not paid while the parties were in such a relationship, and is not a basis, in my view, to assign the pre-payment to the last month's rent.

- [38] In conclusion on the issue of liability, Turning Point Restaurant challenges the factual conclusions of the judge as to the contents of the enforceable agreement between the parties. For the reasons I have set out above, I am of the view there is no reversible error in the judge's conclusions as to those contents. Accordingly, I would not interfere with the judge's conclusion that Turning Point Restaurant wrongfully terminated the lease.

Damages

- [39] Turning Point Restaurant says the judge erred in his assessment of damages generally, or in awarding punitive damages, or in awarding compensatory damages for lost opportunity.
- [40] In assessing damages, the judge referred to the "high-handed" conduct of Turning Point Restaurant, the wrongful termination of the lease, the failure to honour the right of first refusal, and the denial to Mr. Shanahan of a chance (however remote) to recover from his poor financial position. Yet he did not break the award into heads of damage as is usual. It is left uncertain as to which of these aspects of the case - those that would attract punitive damages and those that would attract compensatory damages including for lost opportunity - were considered by the judge as worthy of a portion or all of the damages. Without an apportionment, the award is opaque. One cannot discern the amount, if any, awarded as punishment, and the amount, if any, awarded for wrongful termination of the lease. That being so, in my respectful opinion, it is open to this court to consider whether the damages awarded are within the range of damages that might appropriately be awarded on the facts (apart from damages) found by the judge.
- [41] I would start this consideration by setting to one side the issue of punitive damages. This leaves damages for breach of the lease. In *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*, [1971] S.C.R. 562, 17 D.L.R. (3d) 710, the Supreme Court of Canada affirmed the availability of the full array of remedies found in the law of contract to remedy breach of a lease.
- [42] The issue here is the proper assessment of damages. Provided the item claimed is not too remote, the claimant is entitled to be compensated to a level that will put him in the same position as if the contract had been performed. What loss, in this case, can properly be said to have flowed to Mr. Shanahan by virtue of the wrongful termination of his lease?
- [43] Two of the measures often used are loss of profits and loss of business. Here, the claim for loss of profits was withdrawn and the claim for loss of business was dismissed because the business was run by Mr. Shanahan's company, not a party to the action. Likewise, a claim for the value of the chattels was not available because they belonged to Mr. Shanahan's company.
- [44] That leaves only those items identified in the judge's paras. 50, 51 and 53, replicated above at paras. 18-19, as a basis for an award of damages - Mr. Shanahan's lost chance to exercise his right of first refusal, his lost right to enjoy the tenancy to at least August 31, 2009, his personal liability on guarantees of the obligations of his company, and his lost chance to

recover from his poor financial position. The judge further recorded Mr. Shanahan's claim that as a result of the business failure he became personally liable for debts of \$88,000 he had incurred for the equipment or operations of his company. Significantly, however, the judge did not find that this asserted claim was proved.

- [45] Accepting that \$81,000 is the amount of Mr. Shanahan's personal liability on the guarantees secured by the mortgage, and that this loss to Mr. Shanahan was within the reasonable contemplation of the parties, should Turning Point Restaurant be held accountable for that liability? The judge clearly was of the view that Mr. Shanahan's business was in serious financial trouble. His conclusion is firmly grounded in the number of times the rent was in arrears, the non-payment of rent in July, the fact August rent was in arrears at the time the lease was terminated, the lack of profitability noted by the judge and the improbability Mr. Shanahan could have exercised his right of first refusal to purchase the property.
- [46] The claim for loss on the guarantees derives from the obligation of the primary debtor, Mr. Shanahan's company. In a sense, it is a claim for the loss of the business's opportunity to repay the debts that were guaranteed by Mr. Shanahan.
- [47] I consider the correct approach to assessment of Mr. Shanahan's loss is described by Mr. Justice Cumming in *Pacific Destination Properties Inc. v. Granville West Capital Corp.*, 1999 BCCA 115 at para. 55, 65 B.C.L.R. (3d) 27:

In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1992), 73 B.C.L.R. (2d) 212 (C.A.) this Court considered the principles applicable to damages, including a claim of loss of opportunity. At pages 228-229, the court referred to the following as a correct statement of the applicable law for loss of opportunity (as set out by the trial judge):

When deciding whether the plaintiff suffered any damages as a consequence of the actions of the defendant, Bradshaw must prove the existence of a loss on a balance of probabilities. It has done so. But when it comes to assessing the actual amount of the loss the standard of proof is not so strict.

Determining the amount of damages in these circumstances is largely a matter of assessing the strength and weaknesses of various possibilities. It is much like measuring the amount of a past or future loss of income in a personal injury action. The more certain the possibility of the loss the greater the award; the less certain the possibility the smaller the award. When looking at events that may have taken place but for a certain event, it is impossible to say what would have probably happened when the event came about, because one does not know the nature of the circumstances at the relevant time when the event might have occurred. The best that can be estimated are the possibilities, not the probabilities.

- [48] In *Pacific Destination Properties*, the Court said the claimant's success was "probable". Nonetheless the Court discounted the claim by one-third to adjust for uncertainties and negative contingencies. See also *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943.

- [49] Applying that approach to this case, in my view the discount must be much deeper. I consider Mr. Shanahan has established he has a probable loss; his business was closed prematurely. However, the scale of the loss in relation to the guarantees must be reduced significantly to properly reflect the significant possibility the business would not have continued long past August 11, 2009, when the lease was terminated, and Mr. Shanahan's financial position would not have recovered. In addition, there is the loss of the right to exercise the right of first refusal, and loss of the right to quiet enjoyment of the property until at least August 31, 2009. Neither of these losses in the circumstances, however, will attract significant damages.
- [50] Discounting the amount of Mr. Shanahan's liability on the guarantees to reflect the likelihood the business would not have survived, and recognizing the loss of the opportunity to exercise the right of first refusal and the loss of the opportunity to enjoy the premises for some further periods of time, it seems to me damages can be not much more than nominal. I would assess damages at \$12,500.
- [51] What, then, of punitive damages? Turning Point Restaurant says that although the judge did not describe the damages as punitive, they effectively were such damages because he said the sum was for "its high-handed, unjustified action in terminating his lease". It refers to the observations of Justice Binnie in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 70:
- [70] Fourth, the incantation of the time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount. Lord Diplock in *Cassell*, *supra*, at p. 1129, called these the "whole gamut of dyslogistic judicial epithets". A more principled and less exhortatory approach is desirable.
- [71] Fifth, all jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.
- [52] Turning Point Restaurant submits that an award of \$100,000 is out of all proportion to the case, and refers to cases involving leases in which punitive damages on a much smaller scale were awarded in cases that went beyond mere unlawful termination: *Parkes v. Howard Johnson Restaurants Ltd.* (1970), 74 W.W.R. 255 (B.C.S.C.) (an award of \$4,000), *YK Human Resources Corp. v. Dinco Holdings Inc.* (2005), 144 A.C.W.S. (3d) 347 (O.S.C.J.) (an award of \$4,500), and *M.D. Sloan Consultants Ltd. v. Derrickson* (1991), 61 B.C.L.R. (2d) 370, 85 D.L.R. (4th) 449 (C.A.) (an award of \$25,000). In the latter case, the landlord used 12 security guards at the leased marina, and had a pit bull present to prevent the tenant and its customers from accessing the marina. Turning Point Restaurant says its conduct, while found to be wrongful, was not carried out with malice and was in the belief it was acting lawfully and in a commercially reasonable manner. As to the complaints in relation to the chattels, it refers

to Whiten, para. 50, to the effect it is the plaintiff that must be the victim of the defendant's unlawful conduct. This requirement is not met in this case, it says, because the chattels belonged to Mr. Shanahan's company, not Mr. Shanahan.

[53] Mr. Shanahan does not dispute these principles but says they do not apply here. In so saying, he relies upon *Elia v. Chater* (1998), 167 N.S.R. (2d) 166 (C.A.):

[57] Punitive damages are rarely awarded in contract. However, in *Vorvis*, supra, the Supreme Court of Canada held:

...while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award. ... In an action based on a breach of contract, the only link between the parties for the purpose of defining their rights and obligations is the contract. Where the defendant has breached the contract, the remedies open to the plaintiff must arise from that contractual relationship, that 'private law', ... (at 207-208)

[58] Leases are not ordinary contracts; possession and quiet enjoyment are not purely commercial commodities. Perhaps for this reason, punitive damages have been awarded against landlords where their unlawful acts towards tenants have been found to be deserving of punishment: *Parkes v. Howard Johnson Restaurants Ltd.* (1970), 74 W.W.R. 255 (B.C.S.C.); *M. D. Sloan Consultants Ltd. v. Derrickson* (1991), 85 D.L.R. (4th) 449 (B.C.C.A.). As a general rule, punitive damages are rightly refused in most commercial cases. However, where the actionable wrong is markedly divergent from the general standard of business morality and where the totality of the award for compensatory (including aggravated) damages is not sufficient to punish and deter, the trial judge is entitled to consider an award of punitive damages: *Canada Life Insurance v. Stewart* (1994), 118 D.L.R. (4th) 67 per Pugsley, J.A., for the court at p. 83.

[54] Mr. Shanahan says punitive damages are appropriate because Turning Point Restaurant blocked his access on August 10, 2009, when it had no right to do so, changed the locks on August 11, 2009, with no right to do so, had no right to terminate the lease, and had no right to refuse his request to remove chattels and improvements from the premises. He refers as well to evidence of an improper motive, as to which the judge made no finding.

[55] Accepting the judge's view disapproving of the conduct of Turning Point Restaurant, there is a basis for an award of punitive damages. Considering the view that punitive damages should be as low as will properly deliver the court's expression of disapproval, past cases in which damages have been assessed in commercial landlord and tenant disputes, and the behaviour found to be worthy of opprobrium in those cases, I would assess punitive damages in the amount of \$2,500, for a total of damages payable to Mr. Shanahan in the amount of \$15,000. From this must be deducted the damages owing by Mr. Shanahan on the counterclaim, \$7,100.

[56] In conclusion, I would set aside the order appealed, and substitute judgment in favour of Mr. Shanahan in the net amount of \$7,900.

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Frankel"

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Prepared on 29 October 2026 · Esheria