

CANADA / JUDGMENT

Smith v. Landstar Properties Inc.

2010 BCSC 843

COURT

Supreme Court of British Columbia

DECIDED

18 June 2010

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2010 BCSC 843 Smith v. Landstar Properties Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Smith v. Landstar Properties Inc.,
2010 BCSC 843
Date: 20100618
Docket: S070133
Registry: Vancouver

Between: Barbara Boyd Smith
Plaintiff
And
Landstar Properties Inc.
Defendant
Before: The Honourable Mr. Justice Willcock
Reasons for Judgment

Counsel for Plaintiff: M.B. Morgan

Counsel for Respondent: D.J. Barker

Place and Date of
Hearing: Vancouver, B.C.
April 23, 2010

Place and Date of
Judgment: Vancouver, B.C.
June 18, 2010

[1] Barbara Boyd Smith, a retired schoolteacher, lent the sum of \$100,000 to Landstar Properties Inc. ("Landstar") in late 2005 on terms set out in a non-convertible debenture. Landstar promised that the loan would be secured against real property. [2] When the loan was not secured as promised, Ms. Smith filed caveats against ten properties in the Township of Langley registered in the name of Landstar or associated companies on September 26, 2006. An application to cancel the caveats was heard in this Court on October 10, 2006. On that application Landstar was ordered to pay Ms. Smith \$100,000 plus interest (calculated at 8% per annum up to and including November 7, 2006) and to pay its solicitors \$25,000 in trust as security for costs and damages said to arise from the failure to register the debenture. The Registrar of Land Titles was ordered to cancel the caveats. Ms. Smith obtained an order for her costs in any event of the cause for the petition, the filing of the caveats

and the application. She was ordered to commence an action on her claim for damages by January 10, 2007.

[3] On January 8, 2007, Ms. Smith commenced this action in which she alleges that she suffered damages as a result of the breach of the contract embodied in the debenture and the negligent misrepresentation that her investment would be secured. Ms. Smith seeks indemnity for costs and disbursements incurred for the filing and removal of the caveats in the sum of \$15,990.60 and general damages measured as the difference between the interest she was paid by Landstar and the interest she would have been paid on an unsecured loan. Landstar applies to dismiss the claim. The parties to the action both seek judgment by way of a summary trial pursuant to Rule 18A.

FACTS

[4] Ms. Smith met John McCutcheon, the President and a principal shareholder of Landstar, in London in early 2004. Mr. McCutcheon was then recruiting Paul Grieve, Mrs. Smith's daughter's partner, to invest in and provide management advice to Landstar. Mr. McCutcheon offered her an opportunity to invest in Landstar and obtain an 8% return. He promised that her funds would be secured by a mortgage against properties being developed by the company. This promise was borne out in the documentation.

[5] Ms. Smith lent \$100,000 to Landstar. Her loan was evidenced by the issuance of a non-convertible debenture in which Landstar covenanted that it would: "... obtain, whenever possible, security on Landstar's interest in its properties while they are being developed, in second position to the bank loan on the land, and if the loans are separate, also the bank loans for the improvements on the land".

[6] The nature of the security was clarified in an exchange of emails. On September 3, 2005, Mr. McCutcheon sent an email to Mr. Grieve in response to his question with respect to the terms of the loan to the company. Mr. McCutcheon wrote: About the debenture. Please be assured that I am showing this to you because I feel that I should, as an opportunity and not a need. It's good paper and not hard to place, so if you have any concerns, let it go. The terms are as follows:

Unit size \$100,000 Canadian;

Term: 2 years, callable after one year, with full price and accrued interest;

Rate: 8% per annum, payable quarterly in arrears;

Security: Corporate guarantee plus second after bank on Park Ridge lots;

Use of proceeds to support 75% bank loan for Park Ridge;

Bonus: 25,000 shares per unit, issued with the debenture.

[7] On November 8, 2005 funds were advanced on the loan. The debenture was executed on the same date.

[8] Mr. Grieve later parted ways with Landstar and Mr. McCutcheon. At that point, Ms. Smith felt it necessary to address the security for her loan. On July 14, 2006, she wrote to Mr. McCutcheon as follows:

The terms of the debenture require... that Landstar will obtain security on the company's interest in all development properties, ranking in priority only after any senior bank finance. Please provide me with copies of the security documents in which my interest appears, together with details of all prior charges.

[9] On July 26, she wrote again to Mr. McCutcheon advising that she had searched the title to properties and could not find a record of the debenture having been registered. She noted that she had received no response to her prior correspondence, and gave Landstar 15 days to secure the debenture against title to the "Park Ridge and Morgan Creek properties". This letter also gave notice of default under the debenture. Negotiations between the parties ensued. When Ms. Smith did not receive

an unconditional offer to redeem the debenture, a caveat was filed against the Park Ridge properties. That caveat was set aside on October 10, 2006 on the terms previously described.

[10] The principal and interest at 8% was paid on November 7, 2006, one year after the execution of the debenture.

[11] Mr. McCutcheon has admitted that he met the plaintiff and delivered the September 3, 2005 email containing the description of the proposed security. He acknowledged in an affidavit sworn in response to interrogatories on October 29, 2007 that the company "elected" not to register the debenture as it was in the best interests of the company not to, "given that it had sufficient funds to cover the debentures". His counsel, in response to a Notice to Admit dated April 19, 2007 acknowledged that Mr. McCutcheon made the representations in the correspondence to the effect the debenture would be registered as a charge against Landstar's land but added that the representation was, to the best of Mr. McCutcheon's belief and knowledge, true. Against that submission, which is not evidence, must be read the evidence of Mr. McCutcheon on examination for discovery that there was no intention to register the debenture against any land in which Landstar had an interest and that Ms. Smith's loan would only be "secured" by a corporate guarantee.

[12] Ms. Smith says that the representation upon which she relied in advancing funds to the company - that her loan would be secured against property - was false, and was made to induce her to lend money. She has obtained and filed with the Court an expert report setting out the opinion of Alexander Hayne, a banker specializing in commercial mortgage lending. Mr. Hayne expresses the opinion that the market interest rate for a secured residential mortgage between 2005 and 2007 was between 12.5% and 18.5% per annum, with a midpoint of 15.5%. He goes on to say: Given the information available to me, and given my knowledge of the real estate development and financing, I conclude the market interest rate for an unsecured \$100,000 loan made in November 2005 by Barbara Boyd Smith to Landstar for the purpose of building single family "spec" homes in 2006-2007 would be between 24% and 36% per annum.

ISSUES

[13] Despite the fact the principal and interest payable pursuant to the debenture have been paid in full, the plaintiff says she is entitled to an order requiring the defendant to pay to her the difference between the 8% return on her investment she has received and a return in the range of 24% to 36% per annum. She also claims indemnity for the costs she incurred in filing her caveat and taking action to secure her loan - the difference between her actual legal fees and the amount she recovered pursuant to the order of October 10, 2006. She claims these costs as an expense incurred in mitigation of her damages. The defendant says the plaintiff has suffered no loss, she received exactly what she bargained for, and there is no provision in the debenture permitting her to claim indemnity for legal costs.

Costs

[14] There are two questions that must be answered in addressing the plaintiff's claim that she is entitled to indemnity for the costs she incurred in filing a caveat and in dealing with the defendant's application to have the caveat cancelled:

1. Whether the question of costs has been addressed in its entirety by the judgment of October 10, 2006; and
2. If not, whether the costs incurred in relation to the application for caveat are recoverable as expenses incurred in mitigation of damages.

Additional Interest

[15] In addressing the plaintiff's claim that she is entitled to additional interest it is necessary to determine:

1. Whether the plaintiff is seeking damages on a basis different from the compensatory basis ordinarily used to measure damages for misrepresentation or breach of contract; and
2. If so, whether departure from the ordinary rule is justified in this case.

ARGUMENT

[16] The plaintiff says the expense she incurred in the proceedings on the caveat was incurred in a separate action, the objective of which was not to recover damages but, rather, to secure her loan. She says that expense was incurred in mitigation of damages and ought to be recovered in its entirety. In support of this proposition, she relies upon 618369 Alberta Ltd. v. Canadian Turbo (1993) Inc., 2004 ABQB 283. That case does not set out the principles but reflects the rule that legal costs may be recoverable as expenses incurred in mitigation of damages if they are not "normal litigation costs".

[17] The plaintiff says the defendant negligently misrepresented that it intended to secure the loan made by Ms. Smith by registering the debenture against title to its property. She submits that the defendant owed her a common-law duty not to misrepresent its intentions with respect to the security that would be afforded to her. She says the elements of the tort described in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 have been made out. Despite the fact the representation was made to induce her to enter into a contract to lend money to Landstar, the plaintiff says she has a cause of action in tort. The duty in contract and the common law duty in tort are said to be co-extensive.

[18] In *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, *LaForest and McLachlin JJ.* describe the co-extensive duties that arise where a negligent misrepresentation is relied upon by a contracting party: In this class of case, like the others, the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort, such as a more generous limitation period. The contract may expressly provide for a duty that is the same as that imposed by the common law. Or the contractual duty may be implied. The common calling cases, which have long permitted concurrent actions in contract and tort, generally fall into this class. There is a contract. But the obligation under that contract is typically defined by implied terms, i.e., by the courts. Thus there is no issue of private ordering as opposed to publicly imposed liability. Whether the action is styled in contract or tort, its source is an objective expectation, defined by the courts, of the appropriate obligation and the correlative right.

The case at bar, as we see it, falls into this third category of case. The contract, read as we have proposed, did not negate Hydro's common law duty not to negligently misrepresent that it would have the right-of-way cleared by others. Had Checo known the truth, it would have bid for a higher amount. That duty is not excluded by the contract, which confirmed Hydro's obligation to clear the right-of-way.

Accordingly, Checo may sue in tort.

[19] The plaintiff says that if a claim in misrepresentation is made out, the measure of damages should include the interest rate differential, regardless of whether she can establish that she would have earned a higher return on the money if she had known the truth. She acknowledges that damages in tort are intended to be compensatory, and should be measured as the amount required to put her in the position she would have been had the misrepresentation not been made. She says, however that such compensatory damages may be broadly defined and may include,

for example, the loss of opportunity to gain a profit. In this regard, she relies on *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271.

[20] The defendant admits that there was a breach of the contract evidenced by the debenture, consisting of the failure to register the debenture against real property. The defendant says, however, that there is no evidence that Mr. McCutcheon misrepresented his intentions. The defendant denies that there was an intentional or fraudulent misrepresentation and says fraud is not pleaded. Further, the defendant says that if there was reliance upon the representation the debenture would be registered against an interest in land, such reliance was not detrimental as it did not cause damages.

[21] In the alternative, Ms. Smith argues that the defendant breached a contract by failing to register the debenture, and that the measure of damages in contract should reflect the value of the security promised but not provided to her. While damages in contract are ordinarily determined by applying the expectancy principle - putting the plaintiff in the position she would have occupied had the contract been performed - Ms. Smith claims restitution damages - an award that returns to her the profit arising from the breach. She submits such damages are available in contract, "where a defendant has as a result of his or her own breach profited in excess of his or her expected profit had the contract been performed but the plaintiff's loss is less than the defendant's gain". In support of this proposition, she relies on *Attorney General v. Blake*, [2004] All E.R. 385; *Wrotham Park Estate Co. v. Parkside Homes Ltd.* [1974], 1 W.L.R. 798 at 815, 2 All E.R. 321 (Ch.D.) and *Bank of America Canada v. Mutual Trust Co.* [2002] 2 S.C.R. 601.

[22] In response to the claim in contract, the defendant says the plaintiff obtained what she was looking for: the return of her capital and a return on her investment of 8% per annum. The defendant says the plaintiff would not have used her funds to earn a higher return at greater risk if she had understood that the debenture might not be registered. Further, the defendant claims not to have profited from the failure to register the debenture. The defendant says that there are only nominal damages in this case, and there are not such exceptional circumstances as must be present in order to justify an award of damages measured by the profit or potential profit to the defendant rather than the loss suffered by the plaintiff.

ANALYSIS

Indemnity for Costs in Relation to the Caveat

[23] While the debenture is silent with respect to costs arising out of default, that silence does not preclude the plaintiff claiming indemnity for costs in relation to steps properly taken in mitigation of damages. Ms. Smith filed caveats on September 26 2006 in order to obtain the security provided for in the contract, and no other relief. The sole relief sought in Vancouver Registry Action No. S066504, commenced by Landstar, was an order removing the caveats upon terms. The caveats were not registered to protect the fruits of litigation, or some right or interest other than security in the property. The caveats were themselves security in the nature of that which the defendant had agreed to provide pursuant to the debenture.

[24] Filing a caveat in order to obtain a charge against property that one has bargained to obtain is equivalent to purchasing substitute goods in a market where the defendant has failed to provide the goods he has promised to deliver. The legal costs the plaintiff seeks are simply the transaction costs of obtaining security equivalent to the bargained-for security. Similar damages have routinely been awarded in relation to such similar expenses as of protesting non-payment of debts and commissions on collection efforts (see *Prehn v. Royal Bank of Liverpool* (1870) L.R. 5 Ex 92).

[25] The October 10, 2006 order provided that Ms. Smith was entitled to the costs of the petition and the filing of the caveat. In the course of argument, I questioned whether that order might have been meant to finally address all claims for costs arising out of the motion that was before this court on October 10, 2006. If the plaintiff was entitled to seek indemnity for costs at that time and did not do so and if the order finally addressed the matters in issue, the doctrine of res judicata might prevent her from seeking anything further. The order, however, provided for the sum of \$25,000 to be paid to the solicitors in trust: "as security for costs incurred (including costs payable to the respondent as outlined below)." Both the wording of that order and the amount of security appear to have been determined in contemplation a claim for costs in addition to those awarded on the application. In my view, the order cannot be said to have been final in relation to claims for indemnity. I therefore find that the matter is not res judicata. I allow the plaintiff's claim for costs incurred in the efforts taken to perfect her security in the sum of \$15,990.60, being the actual legal costs incurred prior to January 8, 2007, less those recovered pursuant to the October 10, 2006 order of Mr. Justice Davies.

The Claim for Additional Interest

As damages in tort

[26] The plaintiff's claim for additional interest is founded, in part, upon argument that she has a claim in tort for misrepresentation and that the admitted breach of contract also constitutes admission of the elements of that claim: the making of a false statement to one who might reasonably rely upon it, reliance and consequential damages. I find that Mr. McCutcheon's representations to Ms. Smith with respect to the terms of the loan were false. Mr. McCutcheon acknowledges that the company had no settled intention of providing the promised security. He appears to have considered registration of debentures as a measure the company could "elect" to take to secure its creditors. He was at least careless in describing Landstar's intentions in a manner that was likely to mislead investors. Ms. Smith clearly relied on the representations and her reliance was foreseeable by Landstar. All the requirements for negligent misrepresentation are met in this case.

[27] There remains an issue with respect to the measure of damages. The plaintiff cannot argue that she would have invested in a high-risk, high-return investment had the defendant not represented that the investment would be secured. The evidence is that she would not have made an investment without security. On that evidence I cannot find that she would have negotiated a higher return on an unsecured investment than the rate the defendant agreed to pay for a secured investment. She would, rather, have sought a secured investment elsewhere. She cannot be said to have a claim to lost profit. If the plaintiff must establish that she would have made a high-risk investment in the absence of the misrepresentation in order to claim the interest differential, her claim in tort must fail.

[28] In relation to claims in tort, however, as the author notes in McGregor on Damages, 18th ed. (U.K.: Sweet & Maxwell, 2009) at 460 :

It has long been accepted that if a defendant makes use of the claimant's goods in circumstances where the claimant would not have made use of them himself, the claimant is nevertheless entitled to damages for their tortious use.

[29] The Courts have recognized the peculiar problems arising from claims for compensation for the wrongful use of property where the defendant cannot establish a financial loss. In *Attorney General v. Blake* [2000] 4 All E.R. 385 (C.A.) Lord Nicholls addressed the issue:

I shall first set the scene by noting how the court approaches the question of financial recompense for interference with rights of property. As with breaches of

contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that, in the oft quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong: *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25, 39. Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user: see *Whitwam v. Westminster Brymbo Coal Co.* [1892] 2 Ch. 538, and the 'wayleave' cases such as *Martin v. Porter* (1839) 5 M. and W. 351 and *Jegon v. Vivian* (1871) L.R. 6 Ch. 742. A more recent example was the non-removal of a floating dock, in *Penarth Dock Engineering Co. Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359.

The same principle is applied to the wrongful detention of goods. An instance is the much cited decision of the Court of Appeal in *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* [1952] 2 Q.B. 246, concerning portable switchboards. But the principle has a distinguished ancestry. Earl of Halsbury L.C. famously asked in *The Mediana* [1900] A.C. 113,117, that if a person took away a chair from his room and kept it for 12 months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? To the same effect was Lord Shaw's telling example in *Watson, Laidlaw & Co. Ltd. v. Pott, Cassels, and Williamson* (1914) 31 R.P.C. 104, 119. It bears repetition:

'If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise."`

Lord Shaw prefaced this observation with a statement of general principle: 'wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle ... either of price or of hire.' [emphasis added]

[30] I find the plaintiff has made out a claim in misrepresentation and that the defendant by that misrepresentation obtained an unsecured \$100,000 loan in November 2005 for the purpose of building single family "spec" homes in 2006-2007. I find that the law ought to yield a recompense to the plaintiff measured as the difference between the interest actually paid to the plaintiff and the price a reasonable person would have paid for an unsecured loan, the market interest rate described by Mr. Hayne.

As damages in contract

[31] In the event I am wrong in finding that a claim in misrepresentation is made out on the material, I will address the plaintiff's claim that the capital came into the possession of the defendant lawfully upon terms, but was used on different terms, in breach of the contract. Despite the admitted breach, the defendant says the plaintiff

has been made whole and is now in the position she would have occupied had there been no breach. The security promised, the defendant says, was but a means to an end: ensuring that at the end of the day the defendant would receive her principal and interest at the contract rate.

[32] In effect, the defendant says while it benefited from the breach (it acknowledges that it was in the company's interest to have less secured debt on its balance sheet or registered against the real estate in its name), the plaintiff did not suffer a corresponding loss. It says whether the debenture had been registered or not, the loan would now have been repaid. Once the plaintiff has been fully repaid and has earned 8% per annum on her investment there is no remaining loss or threat of loss due to the absence of security. Despite the fact the money was used on terms inconsistent with the contract, the defendant says both the fact the plaintiff was at risk for a period and the fact that the defendant enjoyed unsecured money at secured rates are immaterial to the claim.

[33] Lord Nichols, in *Blake* at p. 396-397, notes that in contract, as in tort, damages are not always narrowly confined to recoupment of financial loss. At p. 398 he suggests that in cases of "skimped performance", cases where the goods or services provided do not meet the promised description, contract law should permit a claim for the difference in price "without straining any principle", even where the goods or services served the purpose without occasioning any financial loss. So long as the objective is not disgorgement - recovery of the profit earned by the use of the property - but compensation in some form, some reasonable payment may be ordered as compensatory damages.

[34] Lord Hobhouse, in *Blake*, dissents from the majority view that the law should permit an account of profits as a remedy for breach of contract, but shares Lord Nicholls' view that where the breach of contract consists of the wrongful retention or use of another's property the measure of damages may be the value of the use of that property. Referring to the line of cases where damages have been awarded for the misappropriation of assets, he observes that damages for the loss of use of an asset: "can be assessed by the sum which has been expended on its acquisition and/or maintenance or interest upon its capital value during the period of deprivation" (at p. 411).

[35] The judgment in *Blake* suggests that it is not a departure from the rule that damages in tort and contract are intended to be compensatory, to use value of the use of property wrongfully enjoyed as a measure of damages.

[36] *Blake* is also relied upon by the plaintiff as authority for the proposition that in some circumstances restitutionary damages are available for breach of contract. The extent to which restitutionary damages are available in contract is reviewed in *McGregor* at pp. 465-476, where the view is expressed that, in England at least, restitutionary damages in contract are available in only three circumstances; where the defendant has obtained:

1. Benefit by under-performance of the contract;
2. Benefit by breach of a negative stipulation in the contract; and
3. Benefit by making a more profitable contract with a third party.

[37] In respect of the first of these categories, the only one potentially applicable to Landstar's breach, *McGregor* concludes, at p. 471 (¶12-034) that not only is there little authority in law or justification in principle for the proposition that restitutionary damages are available in cases of "skimped performance" but that Lord Nicholls' view that contract law already provides a remedy in such cases is: "highly dubious in the absence of a substantial breach of contract allowing the claimant to repudiate".

[38] There is little authority, and no Canadian authority has been brought to my

attention, for measuring damages in contract as the value of expenses saved by "skimped performance". That measure looks predominantly at the effect of the breach upon the defendant. In general the cases suggest that approach is to be avoided. I regard the injunction in *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, 2002 SCC 43, at para. 31, that the courts should not deter efficient breaches of contract, as a bar to measuring damages as the value of expenses saved by the party in breach. I cannot find sufficient support for this measure of damages to allow the plaintiff's claim on this basis.

[39] I find, however, that a claim for additional interest may be founded upon the defendant's use of the plaintiff's capital in breach of the contract. I accept the view expressed in *Blake* that where a breach of contract consists of the wrongful retention or use of another's property (here, capital), the measure of damages may be some measure of the value of the use of that property (in this case, interest), whether or not the plaintiff suffered a financial loss as a result of the unauthorized use of the asset.

[40] An award reflecting the interest rate differential founded upon that principle should not deter efficient breaches of contract. The award here, like the award in *Bank of America*, has the effect of returning the value of the use of the capital from the defendant to the plaintiff, from whom it was misappropriated by the breach. In *Bank of America*, the court allowed a claim for compound interest noting:

A contrary rule would lead to inequity and provide incentives to breach contracts. If courts were restricted to simple interest in assessing damages for breach of contract, an apparent abuse could occur in the following way. Money lent at compound interest would accrue compound interest until there was a breach of contract by the borrower. The lender would then sue and only be entitled to simple interest on the judgment. This would encourage borrowers not to repay loans. Contract law is not the enemy of parties to an agreement but, rather, their servant. It should not frustrate their mutually agreed intentions but, instead, absent overriding policy concerns, should permit those parties to obtain the benefit of their intended agreement.

[41] This is not a case of an "efficient breach" of a contract, a breach caused by a reallocation of resources to their optimum use. A judgement that does not reallocate profit from the defendant to the plaintiff but, rather, has the defendant pay the market cost of the asset used (in this case the time-value of unsecured money) should not lead to an inefficient result. To the contrary, dismissing claims in the nature of that made by the plaintiff will encourage borrowers to breach the terms of financing agreements, leading to inefficiencies in the market. Dismissing claims for the interest differential where the borrower has intentionally avoided the obligation to provide security will lead to inequity and serve as an incentive to breach contracts. As the servant of the parties to this agreement the law should not so frustrate their mutually agreed intentions.

JUDGMENT

- [42] The plaintiff is entitled to damages in the amount of \$15,990.60 as indemnity for the costs of the action to secure her loan.
- [43] In addition, the plaintiff is entitled to an award to compensate her for the interest she would have been paid on an unsecured loan to the defendant had such been negotiated at market rates at the date the loan was made. The evidence is that money invested in an unsecured loan in these circumstances would have earned interest at 24% to 32%. These figures were not contested by the defendant. However, because Mr. Hayne describes interest rates for residential mortgages that are approximately 4% higher than the return agreed to by Ms. Smith as interest on a secured loan, there is a basis for concluding that his estimates are at the high end of the market. I therefore assess damages at the lowest end of his spectrum. I find that the value of the unsecured loan in the hands of Landstar from November 8, 2005 to November 7, 2006 was 24% per annum. The plaintiff is entitled to an award for the differential between the interest paid on \$100,000 at 8% and interest for the relevant period at 24%: 16% of \$100,000, the sum of \$16,000.
- [44] The plaintiff will therefore be entitled to damages in the total sum of \$31,990.60 plus interest. ____ "Willcock J." ____ The Honourable Mr. Justice Willcock
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