IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Citation: Penniac Construction Limited v. Cominar Real Estate Investment Trust et al – 2013 NBQB 232 Docket No.: M/C/0833/11

BETWEEN: **PENNIAC CONSTRUCTION LIMITED,**

Plaintiff,

- and -

COMINAR REAL ESTATE INVESTMENT TRUST/FONDS DE PLACEMENT IMMOBILIER COMINAR, MICHAEL JOSEPH DALLAIRE, in Trust, FOCUS LOGISTICS LTD., and JEFFREY JOHN WORTON,

Defendants.

DECISION

BEFORE: Mr. Justice Stephen J. McNally

AT: Moncton, New Brunswick

DATES OF HEARING: April 3-5, 2013

DATE OF DECISION: July 9, 2013

APPEARANCES:

James E. Fowler for the plaintiff, Penniac Construction Limited.

Chris G. Keirstead for the defendants, Cominar Real Estate Trust and Michael Joseph Dallaire, In Trust.

W. Hugh Murphy, for the defendants Focus Logistics Ltd. and Jeffrey John Worton.

MCNALLY, J.

(1) In or about the month of March 2011, the plaintiff, Penniac Construction Limited, completed various leasehold improvements on a warehouse property owned by the defendants, Cominar Real Estate Investment Trust and Michel Joseph Dallaire, in trust. The improvements were made to a portion of the premises purportedly leased by Cominar to the defendant, Focus Logistics Ltd.

(2) Penniac is advancing a claim against both Cominar and Focus, jointly and severally, in the amount of $54,231.13 for the cost of its materials and services in providing the improvements, plus interest, costs and disbursements. In addition, Penniac seeks a declaration that it is entitled to a mechanics' lien on all of the defendants' estate and interest in the property, and that in default of payment, all of the defendants' interest and estate in the property be sold, together with an order directing the payment of any deficiency on the sale.

(3) Penniac discontinued its action against Focus' former president, Mr. Jeffrey Worton, personally upon the completion of his testimony at trial. Likewise, Cominar discontinued its cross-claim against Mr. Worton, who consented to both discontinuances without costs. The remaining defendants do not contest that Penniac performed the work and provided the materials claimed and, at trial, they did not challenge the amount claimed by Penniac. The defendants each submit that Penniac has no claim against them and alternatively, they dispute Penniac's entitlement to any interest payable on any claim it may have against them.

(4) Cominar maintains that it did not contract with Penniac for Focus' tenant improvements or, what the parties called, a "fit-up", and consequently it cannot be held liable for them, nor can its estate and interest in the property be subject to a mechanic's lien. Cominar alleges that it had entered into a valid lease agreement to lease the premises to Focus and that Focus, after contracting with Penniac to perform and complete its requested improvements, vacated and abandoned the property. Cominar asserts that

any claim Penniac may have for its work and materials expended in the Focus fit-up lies against Focus only. Cominar has cross-claimed against Focus for any damages it might be found liable to pay Penniac. In addition, Cominar claims damages from Focus in the amount of $283,362.98 for breach of its lease agreement.

(5) In its Statement of Defence, Focus admits that Mr. Worton, as its agent, requested that Penniac provide the materials and work for the fit-up, however, it denies that it is liable to pay for it. Focus further denies that it entered into a lease of the premises with Cominar.

Factual Background

(6) In or about the early part of the month of January 2011, Mr. Jeffrey Worton, the president and CEO of Focus, at the time, and Gerry McBride, the local general manager of Cominar, entered into discussions and negotiations for Focus' rental of warehousing space from Cominar at its 50 MacNaughton Ave. facility. By January 25, 2011 they had come to an agreement with respect to the terms of a lease for the premises and Mr. Worton signed the Offer to Lease with the Cominar Net Standard Lease attached. On the same day, Mr. Worton and Mr. McBride met with James Wade, the president of Penniac, at the site to discuss plans for changes to the premises that Cominar required to accommodate the new tenancy and the leasehold improvements or fit-up that Focus was seeking to accommodate its needs.

(7) In addition to discussing the actual changes being considered for the premises, the participants discussed the fact that pursuant to the terms of the Offer to Lease, Focus would have the option of financing up to $20,000.00 of its leasehold improvements through Cominar. The details of how this would be achieved apparently were not discussed with Mr. Wade and he was not provided, by either Mr. Worton or Mr. McBride, with a copy of the Offer to Lease or the Cominar Standard Net Lease that was attached to and formed a part of the lease agreement. Clause 18.2 of the Offer to Lease provided that the $20,000.00 financing option, if exercised by Focus, would be amortized at a rate of 9% over the term of the lease and added to Focus' base rent.

(8) By February 9, 2011, Penniac had prepared plans for the renovations for both Cominar's work and Focus' fit-up for leasehold improvements. The following day, Mr. Wade forwarded by email to Mr. McBride the drawings and two separate quotations for Cominar's work and Focus' leasehold improvements. The Cominar project quote was titled "Proposed Landlord Work ..." and was priced at $23,955.00 plus HST while the Focus quotation was titled "Tenant Fit-Up for Focus Logistics . . ." and was priced at $54,251.00 plus HST.

(9) After receipt of the quotes, Mr. McBride suggested to Mr. Wade that he might consider having Mr. Worton sign the Focus quotation to indicate its acceptance of the quote and to authorize the work being done. This advice was followed and Mr. Wade added a clause to the Quotation for Mr. Worton's signature which Mr. Worton signed indicating "Accepted – Please proceed with work ASAP – Focus Logistics Ltd.". A copy of the Quotation signed by Mr. Worton was emailed to Mr. McBride by Mr. Wade on February 25, 2011.

(10) In the meantime, Penniac had already begun to order materials and perform the work. Additionally, Focus requested a change to the scope of the work, deleting one loading dock and also requested that Penniac only submit its bill for the work after April 1 with payment due only on April 25, 2011. Penniac agreed to the change and the terms of billing and completed the work by approximately mid-March. By that time, Focus had already begun to occupy a part of the premises.

(11) On March 18, 2011, Penniac submitted its bill to Cominar for the Landlord Work together with three other invoices; one for repairs completed at another of Cominar's properties, one for unrelated repairs at 50 MacNaughton Ave., and an additional one to Cominar for what was titled the "Landlord's Portion for Focus Logistics Fit-up" which was for "Cominar's Portion", this being Cominar's purported $20,000.00 contribution towards the Focus leasehold improvements or fit-up, less a lien holdback plus HST.

(12) Cominar paid Penniac's account for the Landlord Work in full and that does not form a part of Penniac's present claim. However, neither Focus, nor Cominar, paid any portion of Penniac's account submitted for the Focus fit-up.

Penniac's Claim Against Focus

(13) Although Focus denied in its Statement of Defence that it was liable to pay Penniac any damages, there was no issue at trial that Focus, through its authorized representative Mr. Worton, contracted with Penniac for the supply of materials and services to complete the fit-up to Focus' premises.

(14) Exhibit P-5 is a Quotation dated February 9, 2011 from Penniac to Focus and the attention of Jeff Worton for the "Tenant Fit-Up for Focus Logistics – 50 MacNaughton Ave., Moncton, NB" which provides for the Summary of the Work Included with enclosed drawings and a price of $54,251.00 plus HST. Mr. Worton, as president of Focus signed the Quotation acknowledging its acceptance. Cominar was not a signatory to this Quotation and acceptance.

(15) At the outset of the trial, Penniac amended its Statement of Claim and reduced its claim to account for a portion of the work in the original Quotation that it and Focus subsequently agreed would be deleted. The amended amount claimed is for $54,241.13 inclusive of HST. Focus did not cross-claim against Cominar, nor did it allege in its Statement of Defence that Cominar was liable under the terms of their agreement to pay $20,000.00 towards the costs of its fit-up.

(16) The evidence was clear and indisputable that Focus contracted with Penniac for these leasehold improvements or fit-up, that the work was completed by Penniac under the terms of the contract and that Penniac has not been paid the agreed price for this work. Penniac will therefore have judgment against Focus for $54,241.13 plus simple interest payable on this amount from May 1, 2011, at the rate of four percent per annum together with costs of $5,000.00 pursuant to Scale 3 of Tariff A of Rule 59 of the *Rules of Court* plus its taxable disbursements. Penniac had claimed interest on its account at 2%

per month which I have not allowed as there was no evidence presented to establish that the parties agreed that interest would be payable at that rate on the account. The Court nevertheless has the discretion to award pre-judgment interest on the claim pursuant to section 45(1) of the *Judicature Act,* which I have awarded at 4% per annum.

(17) The only remaining issues are whether or not Cominar is also liable for the cost of the Focus fit-up or any portion of those costs and whether Penniac has a valid mechanic's lien on Cominar's estate and interest in the property. Additionally, there is the issue of Cominar's cross-claim against Focus.

Penniac's Claims Against Cominar

(18) Penniac's claim against Cominar is two pronged. First, it alleges that Cominar introduced Focus to Penniac as a contractor, that it received a copy of Penniac's drawings and Quotation to Focus for its fit-up, was continually on site during construction and knew the nature and extent of the work to be done on the Focus premises which Penniac submits all constitutes that Cominar was either an "owner" as defined in the *Mechanics' Lien Act* or notice to Cominar under section 12 of the *Act,* either of which results in Cominar being liable, and its fee simple estate being subjected to a lien in favour of Penniac, for the amount of its work.

(19) In the alternative, Penniac submits that if it does not have a lien against Cominar for the entire amount of the lien claimed pursuant to the notice provisions under section 12 of the *Mechanics' Lien Act*, Cominar contracted with Penniac to be responsible for the first $20,000.00 payable for Focus' fit-up costs and that Cominar's is liable for this amount.

The Mechanics' Lien Claim

(20) It is often stated throughout the jurisprudence that the mechanics' lien remedy attaching to interests in real property was not known at common law and is purely a creation of statute. Accordingly, the Courts have held that the provisions of the *Act* must be strictly interpreted in determining whether a lien has been created. In *Clarkson Co.*

Ltd. v. Ace Lumber Ltd., [1963] S.C.R. 110, the Supreme Court of Canada explained this approach by adopting the following statement at page 114 of the decision:

> The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.

Owner

(21) Section 4(1) of the *Mechanics' Lien Act* provides that a lien can only be registered against an "owner". There are two methods by which Cominar's interest in the property might be subjected to a mechanics' lien in favour of Penniac for the outstanding account relating to Penniac's fit-up work for Focus. The first method is if Cominar is determined to be an "owner" within the definition of that word under the Act which provides:

> "owner" means a person having an estate or interest in land upon or in respect of which work is done or material furnished at his request, express or implied, and
>
> (a) upon his credit,
> (b) upon his behalf,
> (c) with his privity and consent, or
> (d) for his direct benefit,
>
> and all persons claiming under him whose rights are acquired after the beginning of the work or the furnishing of the material in respect of which a lien is claimed.

(22) An assessment of the circumstances of this case confirms that Cominar did not request, either express or implied, that Penniac perform the work or furnish the materials for the Focus fit-up. Mr. Wade prepared two separate quotes for the work requested by both Cominar as the landlord and the work requested by Focus as the tenant. Mr. Wade entitled his quote to Focus as "Tenant Fit-Up **for** Focus Logistics . . ." [emphasis added].

It is apparent that Mr. Wade was aware that it was Focus who was requesting this work. Further, although a copy of the Focus quote was forwarded to Mr. McBride, it is also apparent that when he responded to Mr. Wade and advised him to include a clause for Mr. Worton's signature to authorize and accept the quote, that this was confirmation that Cominar was not the party requesting the work nor was it assuming any financial responsibility to pay for the work.

(23) In addition, and for the same reasons, I find that although Cominar was consenting to the Focus fit-up work being done on its premises to accommodate Focus' purposes as a tenant, the work was not being done upon Cominar's credit, its behalf, with its privity or for its direct benefit. On this latter point, I accept Mr. McBride's testimony that the tenant leasehold improvements were not for the direct benefit of Cominar, nor were they intended to be for Cominar's benefit at the time the parties entered into their respective agreements with Penniac.

(24) I am satisfied that Focus was the direct beneficiary of the tenant fit-up as the work was completely within the leased premises which were for Focus' sole use and enjoyment. The fact that there might remain some residual benefit to the landlord upon the expiry of the lease, or in the event of an abandonment of the lease as occurred in this case, does not alter the fact that at the time the contract was made and the work performed it was being done at the request of and for the direct benefit of Focus and not Cominar.

Notice Under Section 12(1) of the Mechanics' Lien Act

(25) Penniac also asserts that it put Cominar on notice pursuant to Section 12(1) of the *Mechanics' Lien Act,* with the work it intended to do and materials it intended to furnish on the Focus premises when it forwarded to Cominar a copy of its quotation to Focus and the plans for the project on February 9, 2011.

(26) Section 12(1) of the *Mechanics' Lien Act* provides that:

> Where the estate or interest upon which the lien attaches is leasehold, the fee simple is also subject to the lien if the person doing the work or supplying the material gives notice in writing by registered letter or personal service to the owner or his agent of the work to be done or the material to be furnished, and the owner or his agent fails within ten days thereafter to give notice to such person that he will not be responsible therefor.

(27) There is no issue that Penniac did not give notice under section 12 of the *Act* by registered letter. Penniac relies on the decision of this court in *Robinson Construction Co. Ltd. v. Gould's Starters & Alternators Ltd.*, [1985] N.B.J. No. 117 where Meldrum, J. held that although the electrical contractor's letter to the owner was not sent by registered mail, the contractor was nevertheless entitled to a lien under section 12 of the *Mechanics' Lien Act* as the defendant had been sufficiently notified since it knew of the nature of the work being done. Presumably, Justice Meldrum was satisfied that notification was effected by some form of personal service. This was the only case on point that I was referred to from New Brunswick. The parties referred me to no case where our Court of Appeal has pronounced on the issue.

(28) The issue of sufficiency of notice under Ontario's similar section was addressed by the Ontario Divisional Court in *Pinehurst Woodworking Co. v. Rocco*, [1986] O.J. No. 41, 13 O.A.C. 121. The issue in that case was whether the delivery of plans and specification of work to be performed by the contractor on the leased premises constituted sufficient notice to the owner of the property that its fee simple interest would be subjected to a lien. The evidence was that the contractor did not intend to trigger the operation of the notice provision by the delivery of the plans and specification and the Court concluded that the delivery was not sufficient notice:

> In my opinion where s-s.8(1) [Ontario's equivalent of s. 12 of NB *Act*] requires the contractor to give "notice in writing by personal service" it envisages something more arresting, in the sense of attention getting, than the delivery of plans required to be delivered for other reasons. The notice must be sufficiently distinct and memorable to allow the landlord to know when the fifteen day period, within which he may deny liability commences. That has not been achieved here, doubtless in part because at the time Pinehurst had no intention of triggering the operation of s-s.8(1).

(29) In *1276761 Ontario Ltd. v. 2748355 Canada Inc.*, [2006] O.J. No. 4740, the Ontario Superior Court of Justice, Divisional Court reconfirmed the *Pinehurst* test after it had been applied inconsistently in other decisions that followed it. At paragraph 32 the Court said:

> **32** In our view, the very use of the word "notice" in the statutory provision is significant. We agree with Sutherland J. on behalf of the court in *Pinehurst Woodworking Co.* that the notice in any particular case envisages something arresting in the sense of attention-getting" and that it must be "sufficiently distinct and memorable to allow the landlord to know when the 15 day period, within which he may deny liability, commences."
>
> **33** It is also significant that the notice must be in writing and that the words "the improvement to be made" requires the notice to be given before the work is undertaken.
>
> **34** Because of the 15 day period within which the landlord can disclaim responsibility it is important that there be a "trigger point," that is to say an identifiable document which starts the clock running. It should be clear, and the document being relied upon as "notice" should not be buried or overshadowed in a document delivered for some other purpose. Landlords, particularly those who may have many tenants, are entitled to a fair warning if the rights and interests of parties are to be properly and equitably balanced under the *Construction Lien Act.*
>
> **35** A defective or incomplete Form 2 could constitute notice under s. 19(1) if it otherwise clearly signals a potential liability. However, we conclude that "notice events" taken singularly or cumulatively are not sufficient by themselves to satisfy the notice requirement to a landlord under s. 19(1) of the *Construction Lien Act.* These events may supplement the written notice a contractor is relying upon if the events took place before the delivery of that document, but it is a question of fact in each case as to whether the "written notice" is adequate in the sense of signalling potential liability.
>
> **36** In our view the motions judge correctly concluded that the memo of March, 2000, even in the context of the other facts and circumstances, did not clearly signal a potential liability on the part of the landlord and did not constitute adequate notice under s. 19(1) of the *Construction Lien Act.*

(30) The "notice events" that the Divisional Court was referring to in that case were events such as the landlord being provided with the details of the work, meetings between the landlord and contractor relating to the work, the review and approval of the plans by the landlord, the landlord's awareness of additional work and its own independent

awareness of the construction costs. The Court concluded that such "notice events" taken singularly or cumulatively are not sufficient by themselves to satisfy the notice requirement to a landlord under the provisions of Ontario's comparable section 12 of the *Act*.

(31) The approach taken by the Ontario Divisional Court in *Pinehurst* and *1276761 Ontario Ltd. v. 2748355 Canada Inc.* is attractive as it takes a practical approach to the very issue that has arisen in this case and the concerns relating to the sufficiency of the notice required under section 12(1) of the *Act*. In short, what is required is that the notice "clearly signal a potential liability on the part of the landlord". I am inclined to adopt this approach despite this court's prior ruling in *Robinson* which was decided a year before the *Pinehurst* decision was released in 1986. Obviously, neither Justice Meldrum, nor the counsel in the *Robinson* case, would have had the benefit of the *Pinehurst* decision at the time and it is not clear from a reading of *Robinson* that the issue was as extensively canvassed in that case as it was in the *Pinehurst* and *1276761 Ontario Ltd. v. 2748355 Canada Inc.* decisions.

(32) Mr. McBride testified that despite all his many years and experience in the commercial leasing business he was not even aware of the provisions of section 12 of the *Mechanics' Lien Act* and its potential to subject the fee simple interest of a landlord to a mechanics' lien for work done at the request of a tenant. Ignorance of the law is obviously not a defence, however, it is a factor to consider when determining if notice is effected merely by sending the landlord a copy of a quotation of work intended to be performed for a tenant and the plans to accompany it.

(33) In his testimony, Mr. Wade said that he forwarded the Focus quotation to Mr. McBride because he was the owner of the building and he had to notify him that he would be doing work there, that the work would add value to the premises, it would have a direct benefit on the building and to put him on notice that "someday we may be where we are right now unfortunately". Although not stated specifically, I take from this

testimony that Mr. Wade was intimating that he was putting Mr. McBride on notice pursuant to section 12 of the *Act*.

(34) Quite frankly, I do not accept that this was his purpose or that he intended to put Cominar on notice to a claim that its interest in the property would be subject to a lien for the Focus fit-up work. In my view, this line of testimony too conveniently, but not coincidentally, tracks the wording of section 12(1) and other factors related to the *Mechanics' Lien Act* and Penniac's claim under it. I am not satisfied that Mr. Wade was sufficiently familiar, if at all, with the provisions of section 12(1) at the time he sent the quotations and I believe that if he was familiar with the section and it was truly his intention to put Cominar on notice, he would have specifically said so. Mr. Wade did not appear to me to be one to mince words and he struck me as having no hesitation in clearly stating what he means to say.

(35) Further, when Mr. McBride advised Mr. Wade to ensure that he got Mr. Worton's signature on the quotation, I would have expected Mr. Wade to have raised the section 12(1) notice issue with McBride at that time so that they both clearly understood what their respective intentions were concerning who was ultimately responsible for the payment of the Focus fit-up work.

(36) Contrary to his testimony, I find that Mr. Wade's only purpose in sending Cominar a copy of the Focus quotation was to ensure that Cominar approved the nature and scope of the work to be done on its building and was not intended to be, nor did it, constitute notice under section 12(1) of the *Act*.

(37) In its most favourable light to Penniac, the forwarding of the quote would amount to no more than a potential "notice event" but in the circumstances of this case it was not one that clearly signaled "a potential liability on the part of the landlord" under the provisions of section 12(1). Therefore no lien arises pursuant to the provisions of section 12(1) of the *Act*.

(38) Further and in any event, in my view, if the forwarding of the Focus quotation to Mr. McBride could have been considered sufficient to constitute notice to Cominar under

section 12 of the *Act*, then similarly Mr. McBride's advice to Mr. Wade to have Mr. Worton sign and authorize the quotation to ensure that Penniac was paid by Focus would constitute notice from Cominar to Penniac under section 12(1) that Cominar would not be "responsible therefor".

(39) Penniac's claim for a mechanics' lien upon the estate or interest of Cominar in the property is therefore dismissed.

Focus' Option to Finance $20,000 of Tenant Fit-up Through Cominar

(40) Mr. Wade alleges that at his meeting with Messrs. McBride, Worton and Allen on January 25, 2011, Mr. McBride confirmed that Cominar would pay for the first $20,000.00 towards Focus' leasehold improvements or fit-up costs. He was supported in this assertion by the testimony of Mr. Worton. For his part, Mr. McBride agrees that there was a discussion concerning Focus' option to finance up to $20,000.00 of the fit-up costs with Cominar but that there was no agreement that Cominar would pay for or pay Penniac for the first $20,000.00 of Focus' fit-up. Further, Cominar submits that in any event, Focus never exercised this option to finance $20,000.00 of the fit-up costs with Cominar and therefore it was never payable to Focus pursuant to the terms of the lease agreement.

(41) To put the discussion in its proper context it is useful to review the Offer to Lease that was signed by Mr. Worton on behalf of Focus on the same day that the meeting occurred. Although a copy of this was not provided to Mr. Wade, the Offer to Lease was the only discussion or agreement memorialized in writing by any of the parties on that day regarding the option to finance the fit-up costs. Clause 18.2 of the Offer to Lease provides:

> 2. Tenant's Work
>
> All other work within the Premises not specified in this Agreement shall be to the Tenant's account and the Tenant accepts the premises in an "as is, where is" condition.

> The Landlord, at the tenant's option, will amortize up to a maximum of $20,000.00 of the cost of the Tenant's Leaseholds and add the cost of the leaseholds to the Tenant's Base Rent. This cost will be amortized at 9% over the term of the Lease.

(42) Mr. McBride's version of the discussion concerning the $20,000.00 option is consistent with what Cominar and Focus agreed to in writing on that same day. Although in retrospect, Mr. Wade may recall the discussion otherwise, or may have misunderstood what Mr. McBride and Mr. Worton were discussing concerning the $20,000.00, I am satisfied on the balance of probabilities that Mr. McBride's version is the more accurate version of what he, Mr. Worton and Mr. Wade discussed in relation to Focus' option to finance up to $20,000.00 of its fit-up.

(43) Mr. Wade's version of the discussion is significantly at odds with what Cominar and Focus agreed to in writing and in my view if the discussion was being had along the lines advanced by Mr. Wade it is likely that either Mr. Worton or Mr. McBride would have clarified things immediately as they were both aware of what the parties had specifically agreed to on that same date and it would have been fresh in their minds.

(44) I put little stock in Mr. Worton's testimony relating to this discussion where it differs from that of Mr. McBride. Mr. Worton was clearly an un-co-operative party to the action and a reluctant witness. He failed to attend a scheduled examination for discovery and his attendance at the trial was compelled by counsel for the plaintiff by a Notice to Attend. Mr. Worton seemed embittered by the whole situation and disinterested. He confirmed that he had been removed from his position as president of Focus shortly after negotiating this lease with Cominar and was dismissed as an employee approximately two weeks before the commencement of the trial.

(45) In short, I accept Mr. McBride's testimony that Cominar did not agree at the meeting of January 25, 2011, or at any time thereafter, to pay for the first $20,000.00 towards Focus' fit-up of the leased premises and Cominar is not responsible or liable to Penniac for those costs. Cominar agreed to provide Focus the option of financing with Cominar up to a maximum of $20,000.00 towards Focus' leasehold improvements, to be

amortized at 9% and added to the base rent. This option had never been exercised by Focus, contrary to Mr. Worton's testimony at trial.

(46) The purported email that Mr. Worton said he sent to Mr. McBride to exercise the option was not produced and I do not accept that it was sent. The rental rate paid by Focus for the months of March and April 2011 covered only the base rent payable under the lease and did not contain any additional amount for what should have been the amortization costs had the option been exercised. Finally, the testimony of Mr. McBride and the emails exchanged between he and Mr. Worton on March 21, 2011, Exhibit C-16, where they discussed proposed amendments to the lease to provide for the payments for the $20,000.00 financing option and a further $28,000.00 in financing, clearly demonstrate that the option had not been exercised by that date and there is no evidence to establish that it was ever exercised prior to Focus vacating the property and abandoning the lease.

(47) Mr. Wade's Quotation of February 9, 2011 to Focus for the entire cost of the tenant fit-up and the fact that Mr. Wade followed Mr. McBride's advice and had Mr. Worton sign the quotation accepting it and authorizing the work on behalf of Focus, support the finding that Mr. McBride did not commit Cominar to pay or to pay Penniac for the first $20,000.00 of the Focus fit-up. I am not convinced that Mr. Wade's billing to Cominar on March 18, 2011 for $20,000.00 towards the Focus fit-up would justify a finding to the contrary. A failure by Cominar to immediately dispute this cost does not constitute an admission or confirmation on its part that it agreed to be responsible for this amount. Obviously, a bill sent by one party is not determinative of a liability to pay on the part of the recipient and after all, Mr. Wade forwarded a subsequent bill dated April 4, 2011 to Focus seeking payment of $54,241.13, the entire cost of the Focus fit up. In my view, Mr. Wade was simply and understandably hedging his bets and looking for payment from whoever might be prepared to pay his substantial outstanding account.

(48) Mr. Wade produced a hand written note he prepared of two points of discussion that he purportedly had with Mr. McBride when he met him at a local coffee shop on April 18, 2011, after they learned that Focus had vacated the premises. The more

important of the two points relates to what Mr. McBride purportedly told Mr. Wade concerning the $20,000.00 contribution referred to in the Offer to Lease and states:

> THE LEASE IS ATTACHED TO THE AGREEMENT TO LEASE AND SAYS THAT COMINAR WILL CONTRIBUTE 20,000.00 TOWARDS FOCUS'S FIT UP. HE WANTED US TO INVOICE THEM (COMINAR) DIRECT TO MAKE SURE WE GOT PAID – HE DIDN'T WANT TO WRITE THE CHQ TO FOCUS AND THEM CASH THE CHQ & NOT PAY US – "I WANTED TO MAKE SURE YOU GOT PAID".

(49) Mr. McBride described the meeting as a session of commiseration where both he and Mr. Wade were licking their wounds following Focus vacating the premises. With regards to their discussion concerning the $20,000.00, he denies telling Mr. Wade that the lease agreement provided that Cominar would contribute $20,000.00 towards Focus' fit up but that it was an option which had not been exercised by Focus. He agrees he advised Mr. Wade that if the option had been exercised that it was his intention to try to get Focus to agree to Cominar writing the cheque to Penniac directly to ensure that Focus could not cash it and then not pay Penniac.

(50) In his testimony, Mr. Wade said that he prepared these notes after the meeting with Mr. McBride at the coffee shop and on his return to the office. The first part of the note says: "MET WITH GERRY McBRIDE ON OR ABOUT APRIL 18th, 2011 . . ." which causes me to doubt that the notes were actually written on the day of the meeting. If they had been written on that same day, there obviously would have been no purpose in using the words "**on or about** April 18th" rather than simply "today" or "on April 18th". I suspect, that the notes were actually written sometime after April 18, 2011 to reflect what Mr. Wade recalled of the important points of the meeting.

(51) The note is largely self-serving and in my view does not likely accurately reflect what Mr. McBride told Mr. Wade about the $20,000.00 option that was available to Focus under the terms of the lease and which had never been exercised by Focus. On this issue, I prefer the testimony of Mr. McBride, largely for the same the reasons that I have already discussed in coming to my conclusions relating to the discussion of January 25,

2011, in addition to the further points I just addressed relating more specifically to the April 18 meeting.

(52) For the foregoing reasons, Penniac's claims against Cominar are dismissed. Cominar is entitled to costs payable by Penniac in the amount of $5,000.00 under Scale 3 of Tariff A in successfully defending its claims. Cominar is also entitled to its taxable disbursements.

Cominar's Cross-Claim Against Focus

(53) On January 25, 2011, Focus accepted and executed a formal Offer to Lease 11,520 square feet of Cominar's rental property located at 50 MacNaughton Avenue in the City of Moncton for a term of three years commencing March 1, 2011 at a base monthly rent of $7,200.00 plus applicable taxes, as well as various other charges relating to the property (it being a net lease). Paragraph 1 of the Offer to Lease provided that:

> The parties shall execute the Landlord's standard form lease, Schedule "L" herein, subject to the incorporation of the provisions contained in this Offer to Lease. The parties agree that the Lease shall be executed prior to occupancy and that the Landlord's obligation to provide occupancy or any penalties, damages or costs arising from a delay in the occupancy due to a failure to execute the Lease shall be waived by the Tenant.

(54) Shortly thereafter, Focus contracted with Penniac to complete various leasehold improvements for its occupancy. Penniac's work was completed in or about the middle of the month of March 2011. Focus moved in and occupied the premises for a period of time and paid the agreed monthly base rental payments to Cominar for the first two months of March and April 2011. The cheques for these payments were deposited by Cominar and were cleared and honoured at the bank. On April 7, 2011, counsel for Focus notified Cominar that Focus was "unable to enter the lease that was contemplated" and that it "vacated the premises and will not be returning".

(55) In its Defence to Crossclaim, Focus generally denied Cominar's allegation that it had a valid lease with Cominar. Focus also pleaded, *inter alia*, that Cominar's claim was

frivolous and vexatious, contrary to Rule 29.01(b) of the Rules of Court, that it constituted an attempt to commence an entirely unrelated action to Penniac's claim, was contrary to the *Mechanic's Lien Act*, would hinder and delay the trial and therefore ought to be dismissed (these latter procedural pleas were all addressed and resolved pursuant to an earlier Court order).

(56) On the morning of the trial, counsel for Focus and Worton filed and served his Pre-Trial Brief in which he set out the particulars of Focus' submissions in response to Cominar's crossclaim on both of the issues of liability and damages at paragraphs 23 to 28, which I will summarize as follows:

a) No lease was signed;
b) Absent a lease, section 19(1) of the Landlord and Tenants Act provides for one month's notice on a month to month tenancy;
c) Cominar sold the building in question to a numbered company in January 2012;
d) The portion of the building occupied by Focus was leased to another tenant sometime in 2012; and
e) By Surrender of Lease executed by Bird Holdings Ltd. agreed to pay Cominar, $10,357.42 plus HST as security deposit paid on behalf of Focus.

(57) Focus did not move to amend its Defence to Crossclaim at trial. Nevertheless, I will address the arguments advanced by Focus at trial relating to the crossclaim in addition to what it has pleaded.

(58) First, Focus alleges that there was in fact no lease agreement entered into, despite its concession that Mr. Worton signed the Offer to Lease on behalf of Focus and that he was authorized so to do. In support of its position that there was no valid lease signed, Focus relies upon the language in paragraph 1 of the Offer to Lease which said that "[T]he parties agree that the Lease shall be executed prior to occupancy ..." and that since this had not occurred, Focus maintains that there was no lease entered into by the parties.

(59) The law recognizes that parties may enter into valid and binding lease agreements in the absence of signing a formal "Lease" form or document. In *Canada Square Corp.*

et al. v. VS Services Ltd. et al. (1982), O.R. (2d) 250 (CA) the landlord and tenant negotiated the terms of a restaurant lease during the working drawings stage of the development of a commercial building. The president of the tenant set out in writing the terms of the proposed lease agreement which was accepted by the landlord. The parties proceeded for some time on the basis that this was the final agreement, when the tenant advised that it would not go ahead with it. The Ontario Court of Appeal upheld the trial judge's decision that the parties entered into an enforceable lease agreement. The judgment of the Court was delivered by Morden, J.A. who stated at page 9:

> There is no disagreement between the parties to this appeal on the requisite terms of a valid agreement for lease. Both rely on the following passage in Williams, Canadian Law of Landlord and Tenant, 4th ed. (1973), at p. 75 as follows:
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> > To be valid, an agreement for a lease must show (1) the parties, (2) a description of the premises to be demised, (3) the commencement and (4) duration of the term, (5) the rent, if any, and (6) all the material terms of the contract not being matters incident to the relation of landlord and tenant, including any covenants or conditions, exceptions or reservations.
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> I shall deal later with requirement (6), which relates to material terms. It comes into play only in certain cases. It may be said now that conditions (1) to (5) are invariable requirements.

(60) In *Palk v. Trinity Developments Ltd.* (1979), 33 N.B.R. (2d) 1 (Q.B.) the parties executed an offer to lease space in a shopping mall. Unlike in the instant case, both parties agreed that the offer to lease was a valid lease agreement; however, the landlord contended that the tenant failed to supply the requested floor plans on time and relied on a breach of contract provision within the agreement to terminate the lease. The Court found in favour of the plaintiff/tenant for breach of the agreement and stated at paras. 22 and 23:

> 22. Lord Blackburn stated in Smith v. Hughes (1871), L.R. 6 Q.B. 297, at 607, (cited in the Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd., [1964] SCR 614 (...)):
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> > If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed

by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would equally bound as if he had intended to agree to the other party's terms."

23. There was consideration given for the contract, there was a breach of the contract by the defendant, and no material breach caused or contemplated by the plaintiff, or seriously complained of by the defendant until the notice. The plaintiff suffered financial loss as a direct result of such breach, and is entitled to compensation therefor from the defendant in damages.

(61) In the instant case, the evidence is clear and not contested. Mr. McBride and Mr. Worton, on behalf of their respective employers, negotiated the terms of the lease agreement. Mr. Worton, on behalf of and with the authority of Focus, signed the Offer to Lease, with Cominar's standard form lease attached, which the parties agreed they would sign subject to the incorporation into it of the provisions contained in the Offer to Lease.

(62) In short, the Offer to Lease identified "(1) the parties, (2) a description of the premises to be demised, (3) the commencement and (4) duration of the term, (5) the rent, if any, and (6) all the material terms of the contract . . ." Indeed, considered together, the Offer to Lease and the standard form lease which was attached as agreed and acknowledged by the parties, provided for the entirety of a comprehensive commercial lease arrangement, which in this case included all of the provisions, conditions and terms of the agreement negotiated and agreed to by the authorized representatives of both Focus and Cominar. It is beyond dispute, in my view, that the parties entered into a valid and binding lease agreement.

(63) In addition, the parties acted upon the agreement. Both Focus and Cominar undertook various improvements to the property, at substantial cost, to accommodate the tenancy. At the time of signing the Offer to Lease, Focus paid the security deposit *"simultaneously upon executing* ***this Lease****"* as it agreed to do, pursuant to clause 12 of the Offer to Lease. Focus took possession of the premises sometime during the month of March 2011. It also paid a further month's rent for the month of April and had moved some items into the space. On several occasions after the Offer to Lease was signed, Mr. Worton assured Mr. McBride and Cominar verbally and in emails that the signing of the Lease was imminent and would be attended to immediately.

(64) Although ultimately the standard form Lease document was never signed by Focus, there was never any indication from Focus that there was any issue that the Offer to Lease did not constitute a valid and binding lease between the parties because the standard form Lease had not been signed by Focus prior to Focus taking occupancy. Indeed the only delay in getting the standard form Lease signed was due to Focus' failure to sign and return it, despite having taken possession of the premises.

(65) These facts were not challenged or disputed by Focus. Again, its position is that the Offer to Lease provided that the parties agreed "that the Lease shall be executed prior to occupancy..." and failing that requirement being met, the agreement was not valid. There are a number of problems with this approach and interpretation of the agreement reached between the parties. Firstly, if that is the interpretation to be given to the agreement then the condition was clearly waived by the parties as Focus took occupancy despite the standard form Lease not having been signed by Focus.

(66) Secondly, it seems clear, upon a reading of the entire clause, that although the parties intended that the Lease would be executed prior to occupancy, a failure in that regard would not result in the agreement being invalid or void *ab initio*. The entire relevant portion of clause 1 provides that: "The parties agree that the Lease shall be executed prior to occupancy and that the Landlord's obligation to provide occupancy or any penalties, damages or costs arising from a delay in the occupancy due to a failure to execute the Lease shall be waived by the Tenant". This was a provision designed and intended to protect the Landlord from its obligations to provide occupancy, damages, penalties or costs arising from a delay in occupancy due to a failure to execute the Lease (presumably by either party) and that any claims in that regard would be waived by the tenant. By allowing Focus to take occupancy prior to Focus' execution of the Lease, Cominar obviously waived this requirement.

(67) In any event, since the occupancy of the premises by Focus was not delayed due to its failure to execute the Lease, the provisions of that portion of clause 1 simply do not

apply. Even if the provisions of clause 1 did apply, it deems that the tenant waives any claims it might have against the Landlord under the agreement.

(68) Further, I am satisfied that in any event, on the facts of this case as already detailed, Focus waived the requirement of the Lease being executed prior to occupancy as it took occupancy despite the fact that it was not executed by all of the parties. Focus was responsible for failing to execute the Lease prior to taking occupancy and Cominar obviously waived this requirement when giving up occupancy despite that fact. Finally, Focus gave no notice to Cominar, either before or at the time that it took occupancy of the premises, that it was taking occupancy on some other basis (such as a month to month lease) and not under the same terms and conditions that the parties agreed to in writing when they signed the Offer to Lease.

(69) I am satisfied in the circumstances that Focus entered into a valid binding lease agreement to lease and pay rent for the premises for a period of three years, that Focus unilaterally vacated and abandoned the premises after a period of two months, and is liable to pay damages to Cominar for this breach. In light of this finding, section 19(1) of the *Landlord and Tenant Act* that provides for a one month notice period in a month to month lease has no application to this case.

(70) With respect to the issue of damages, Focus asserts that Cominar sold the property to a numbered company on January 24, 2012. There is no issue that Cominar transferred title to the parcel of land on which the premises were located in January 2012 but the evidence of Mr. McBride was that it maintained a right to lease the property and to receive the rental income from the premises despite this transfer. In fact, Cominar entered into an Offer to Lease and lease with SMS Equipment Inc. on May 25, 2012 for a portion of the premises that was abandoned by Focus. Cominar has been receiving rents from SMS since then. The issue of the Surrender of Lease from Bird to Cominar, raised by Focus at trial but not pleaded in its Statement of Defence, has no effect on Cominar's right to lease the premises to Focus or to claim against Focus for damages resulting from its breach of the lease.

(71) On the issue of mitigation, I am satisfied that Cominar took reasonable steps in its efforts to re-lease the premises and mitigate its losses following Focus' breach of the lease agreement. Focus provided no evidence on this issue and never seriously challenged the evidence advanced by Cominar. Unfortunately, as of the date of trial, Cominar, despite its substantial efforts to re-lease the premises, was successful in leasing only a portion of the former Focus premises and although it secured a higher square foot rental rate, the overall rent is substantially less than what it would have received under the Focus lease.

(72) The SMS' lease is the only portion of the premises that were subsequently leased and its lease took effect on August 1, 2012 at a gross square foot rate of $12.88 or $5,889.60 per month, as opposed to Focus' gross square foot rental rate of $10.88 per square foot for a monthly rental of $10,444.80 per month. Cominar entered as Exhibit C-31, its calculation of its lost rents and damages due to Focus' breach of the lease. Essentially it provides the calculation for the difference it will actually receive in net rent for the premises from what it would have received under the terms of the Focus lease up to February 28, 2014, which totals $243,220.80. To this is added a further $3,500.00 for additional expenses incurred to Cominar as a result of Focus' breach. The rental rates, the methodology adopted by Cominar in calculating its damages, its conformity with the legal principles that apply when calculating damages resulting from a breach of a lease and the actual calculations were not challenged by Focus, although it maintained that it was not responsible for any such losses.

(73) In my view, the methodology utilized by Cominar to calculate its losses due to Focus' breach of the lease are reasonable, are amply supported by the evidence and are in accord with the legal principles applicable for determining damages for breach of a commercial lease. Consequently, I accept Cominar's evidence and submissions that its damages and losses resulting from Focus' breach of the lease agreement totals $264,720.80, exclusive of HST.

(74) Cominar will therefore have judgment against Focus for $264,720.80 plus costs of $12,316.17 under Scale 3 of Tariff A and its taxable disbursements.

STEPHEN J. MCNALLY
Judge of the Court of Queen's Bench of
New Brunswick