Novacrete Construction Ltd. v. Profile Building Supplies Inc.

Between
Novacrete Construction Ltd., plaintiff, and
Profile Building Supplies Inc., Profile Woodworking Inc., Carmelo Valente also known as Carmen Valente and Stabile & Associates and Profile Tile Inc., defendants
And between
Profile Building Supplies Inc., Profile Woodworking Inc., Carmelo Valente also known as Carmen Valente, plaintiffs by counterclaim, and
Novacrete Construction Ltd., Pre-Eng Contracting Ltd., John Gregoris, Bruno Scenna, and Max Stanford, defendants by counterclaim

[2000] O.J. No. 3179
Court File No. 93-CU-68592

Ontario Superior Court of Justice
Toronto, Ontario
Himel J.

Oral judgment: February 11, 2000.
(117 paras.)

Landlord and tenant — Termination, forfeiture and reentry — Termination — Acts constituting — Reentry — After abandonment by tenant.

Action by Novacrete for monies owing on a lease and damages to premises. It claimed against Profile Building, Profile Woodworking, Profile Tile and Valente. The defendants counterclaimed for a declaration that the lease was forfeited and for damages. A lease was in effect between Novacrete and Profile Building until April 1995. In May 1992, Valente, the principal of Profile Building, approached Novacrete and sought a reduction of rent because of cash flow problems. Novacrete said it agreed to a temporary reduction but never waived its right to the balance owing under the lease. From June to October 1992, Profile Building paid the reduced rate. Profile Building rented other premises in August. Valente advised Novacrete in September that he could not carry on the lease and that he should look for a new tenant. In October, Novacrete advised that arrears were owing for the previous months. Novacrete noticed movement between the two locations in November and concluded on November 25 that Profile Building had abandoned the premises. It sent a letter that date stating that it was re-entering the premises because of abandonment. It entered and changed the locks the

next day. On November 26, Profile Building still had stock and business supplies at the premises. Some business was still conducted there. Novacrete agreed that Profile Building could remain in possession and gave it new keys. No further rent was paid. In February 1993 Novacrete re-took possession of the premises. It found that there was substantial damage. It did some basic repairs and re-rented the premises in March. Novacrete said that Valente set up a new corporation, Profile Tile, and transferred all assets to that corporation with the intent of defeating Novacrete's claim for rent. Valente had set up the new corporation on the advice of his accountant because the credit resources for the existing corporation had been exhausted. Novacrete also claimed the fraudulent removal of goods under the Landlord and Tenant Act and violation under the Bulk Sales Act. Valente claimed damages arising from Novacrete's actions.

HELD: Action allowed in part. Novacrete acted precipitously in concluding that Profile Building had abandoned the premises. It had no right to enter the premises and change the locks. By doing so, it terminated the lease. The rent reductions were temporary. Novacrete was entitled to assert its strict legal rights and claim the full rent from October on. It was entitled to rent on a month-to-month basis until it took possession in February 1993. The return of the keys to Profile Building did not constitute waiver or affirmation of the original lease. Profile Building caused damage of $35,000 in removing items from the property. Valente did not tortiously induce breach of contract by setting up Profile Tile. While a fraudulent conveyance was not proved, Valente's actions rendered him personally liable for tortious conduct resulting in damage to the premises. Novacrete was a complainant under the Ontario Business Corporation Act and was entitled to compensation under the oppression remedy against Profile Building, Profile Tile and Valente, who were jointly and severally liable for the cost of repairs to the premises. There was no evidence of fraudulent removal of goods. The doctrine of laches applied to the claim for relief under the Bulk Sales Act and that claim failed. Valente's counterclaim failed for lack of proof of damages. Novacrete's claim was allowed at $59,431.

Statutes, Regulations and Rules Cited:

Assignment and Preferences Act.

Bulk Sales Act.

Fraudulent Conveyances Act.

Landlord and Tenant Act, ss. 19(2), 48, 50.

Ontario Business Corporations Act, s. 247.

Ontario Rules of Civil Procedure, Rule 53.08.

Counsel:

Emilio Bisceglia, for the plaintiff.
James Singer, for the defendants.

¶ 1 **HIMEL J.** (orally):— Novacrete Construction Ltd. is suing Profile Building Supplies, Profile Woodworking Inc., Carmen Valente its principal, and Profile Tile Inc. for monies owing on a lease and damages to premises. The defendants counterclaim for a declaration that the lease was forfeited and for damages.

¶ 2 The issue in the case is whether the landlord Novacrete is entitled to the balance of rental monies owing on the lease and damages because the tenant Profile Building Supplies, abandoned the premises. The defendants' position is that the landlord terminated the lease wrongfully, locked the tenant out of the premises and withheld its goods.

FACTUAL BACKGROUND:

¶ 3 Novacrete became the owner property at 4107 Steeles Ave. West in North York in 1991. When it acquired the property, it assumed a five year lease with Profile Building Supplies Inc. for approximately 5,000 square feet. Profile was in the business of retail sales of tile and floor products, general contracting and contracting for installation of tile and other floor products. The arrangement had been documented n a lease dated March 22, 1990. The five year lease began on May 1, 1990 and was to conclude on April 30, 1995. The annual minimum rent was increased each year from $14.50 per square foot to $17.50 per square foot. The tenant also agreed to pay additional rent for expenses incurred by the landlord for maintenance, snow removal, garbage collection, repairs and other such charges. Some of the important provisions of the lease provided that the premises would be used as a showroom and for retail sales (cl. 8.01), that the leasehold improvements became the property of the landlord; that the landlord had right of re-entry and so on. On the purchase, the tenant acknowledged the lease with Novacrete.

¶ 4 In May of 1992, Carmen Valente, the principal of Profile Building Supplies, approached the landlord and said the company was experiencing cash flow problems and asked for a reduction of rent. The landlord says it agreed to a temporary reduction although it says it never waived its right to the balance owing under the lease. For the months of June to October, 1992 inclusive, the tenant paid the reduced rent. This arrangement was not confirmed in writing.

¶ 5 However, in August of 1992, the landlord found out that the tenant had rented premises next door. Mr. Valente advised that he was planning to conduct the retail business next door and continue the lease at 4107 Steeles Ave. West for storage and as a warehouse until a subtenant could be found. In September, 1992, Mr. Valente further advised that his company could not carry on the lease any longer and the landlord should look for a new tenant.

¶ 6 In October, 1992, the landlord sent a letter claiming that arrears were owing for the previous months. The landlord's representative, John Gregoris, says that on October 7, 1992, he went to the premises and saw the tenant removing stock from the warehouse and taking it to the new premises. He took photographs and sent a letter that no stock is to be removed until the tenant fulfills its obligations under the lease. The tenant disputed that it was in default under the lease. Following further discussions, the tenant tendered a cheque for the reduced rent amount.

¶ 7 During November, the landlord observed movement between the two locations and by November 25, 1992, concluded that Profile had abandoned the premises. It sent a letter saying that as a result, it was re-entering the premises. On November 26, Mr. Gregoris attended with a locksmith, changed the locks and when Profile employees arrived, they began moving stock and fixtures to their new premises. The landlord says that it never gave permission to remove any products or fixtures and that in doing so, the tenant caused extensive damage. However following discussions, it agreed that the tenant could remain in possession and the keys were returned to the defendant later on November 26, 1992. It says, however, that no rent was paid for December. Ultimately demands were made for arrears of rent owing and damages which the tenant refused to pay.

¶ 8 Novacrete also says that Mr. Valente set up a new corporation, Profile Tile Inc. and transferred all Profile Building's assets to the new company in order to avoid financial obligations. Initially, the plaintiff's claim was also against Vincent Stabile, the lawyer who represented Mr. Valente and Profile Building. However, when it was satisfied that Mr. Stabile did not have any rental monies held in trust, the plaintiff discontinued the action against him.

THE EVIDENCE:

¶ 9 Novacrete bought the property at 4107 Steeles Ave. West, a two storey building of approximately 16,000 square feet in 1990. At the time, Profile Building Supplies was one of the tenants. It carried on the business of retail sales of tile and floor products and contracting for installation of tiling and floor products. On the purchase, Novacrete assumed the tenancy with Profile and Profile acknowledge the lease. Mr. Gregoris, a professional engineer and an officer and director of Novacrete, looked after the management of the property for the landlord.

¶ 10 Profile's lease was for a five year term ending April 30, 1995 and provided for a minimum rent which increased each year and additional rent for expenses for operating costs.

¶ 11 Profile acknowledged the terms of the lease in July of 1991. In May, 1992, Profile's president and principal, Mr. Valente, approached the landlord about its cash flow problems and sought a reduction in rent particularly because others in the area were charging significantly less at the time. Mr. Gregoris, who managed the day to day affairs of Novacrete, agreed to a rent reduction but now says that he did so on a temporary

basis. His view was that as the economy or the tenant's business picked up, he would expect the tenant to make up the difference. The arrangement was never put to writing. Mr. Valente says he wrote a letter on June 2, 1992, offered $10 a square foot gross for the balance of the lease, but after negotiation agreed to $13 a square foot. As far as he was concerned this was a permanent reduction in rent. For the months June, July, August and September, 1992, the reduced rent was paid and the cheques were cashed.

¶ 12 In August of 1992, Mr. Gregoris said he approached Mr. Valente because he heard that Profile Building had rented premises in the next building. He learned that he had plans to do a retail business selling tiles and carpets. it was Mr. Valente's evidence that he went to see Mr. Gregoris because business was declining. He could not continue at the premises and planned to find a subtenant or use the space as a warehouse. In September, 1992, there were further discussions when Mr. Valente came to see Mr. Gregoris and said that he could not carry on the lease and asked that the landlord look for a new tenant. Mr. Valente testified that negotiations with the new landlord for space at 4257 Steeles Ave. West began in the late summer or early fall of 1992. He had realized that the rent was too high, premises were less expensive elsewhere and he had to do further cost cutting as business had not improved. A lease was executed some time around September 21, 1992 to commence on December 1, 1992 for 7,200 square feet at $3.25 per square foot plus expenses. The lease stipulated that the premises were to be used for the wholesale and warehouse sale of tile, carpeting and flooring. When the new lease was being negotiated, Mr. Cattana, the new landlord's representative was told of the tenant's other obligation to Novacrete but was re-assured by the fact that Mr. Valente said he intended to sublet the old space or use it for storage.

¶ 13 On October 5, 1992, Mr. Gregoris sent a demand letter for the payment of arrears. He took the position that once he saw the tenant was moving and signed a lease next door, he had the right to claim the full rent and ask for the difference in rent. In his words, "all bets were off." Once Mr. Gregoris demanded the full rent, Mr. Valente decided to move all the office equipment (computer, files, records) off site to where his other company, Profile Woodworking was located. Rosemary Saliba who had been employed by Profile Building in 1992 testified that she worked out of the office of Profile Woodworking at Applewood Crescent in Concord. Mr. Valente also instructed staff to remove the kitchen and to move inventory over to the new premises.

¶ 14 On October 7, 1992, Mr. Gregoris, went to the premises and saw Profile staff removing stock from the warehouse and taking it to the new leased premises. He also saw that the tenant had rented a forklift to move inventory. Concerned that the tenant was abandoning the premises, he wrote a letter to Profile saying that no stock was to be removed from the premises until the tenant fulfilled its obligations. He also set out the arrears owing and that rent payments be brought up to date. Profile replied that it was shipping goods purchased by a firm in the building next door. Profile also said that it was not in default because there was a verbal agreement that it would pay a reduced rent and enclosed a letter which it says it sent with its cheque in June. Mr. Gregoris says he never received that letter and never gave up any rights to claim full rent under the lease. By

mid-October, 1992, Mr. Valente says he asked Mr. Gregoris to take over the lease. Mr. Gregoris says that Mr. Valente never sent possible subtenants to him. Correspondence was sent by the landlord to which there was no reply. Mr. Valente's evidence was that there were discussions during late October regarding termination of the lease and possible subtenants and that he thought he was close to a resolution with the landlord.

¶ 15 On November 11, 1992, Mr. Gregoris instructed the bailiff to attend at the premises. However, Mr. Valente was leaving for vacation. Mr. Gregoris instructed the bailiff to leave and wait until Mr. Valente returned from holidays so they could settle outstanding matters.

¶ 16 During the month of November, Mr. Gregoris says that there was signage removed from over the building. There were no cars parked in front and there was little activity. Some time in late October or November, a sign appeared saying Profile had moved next door. Mr. Gregoris concluded that the premises had been abandoned.

¶ 17 Novacrete sent a letter dated November 25, 1992 to the tenant stating that it had determined the tenant abandoned the premises and that the landlord will re-enter the premises and re-let. The landlord says it did not receive a response.

¶ 18 Mr. Gregoris went to the premises on November 26, 1992 at approximately 10:00 a.m. with the locksmith who opened up the premises. He says the lights were off and there was no activity. There were no papers or articles on the reception counter. There was little stored in the warehouse. At approximately 11:00 a.m., an employee of Profile Building arrived from the location next door, made a telephone call and then other Profile employees arrived. They opened the rear door and began loading boxes, sheet vinyl and removed fixtures and displays. Mr. Valente arrived at 11:30 a.m. He said that he intended to use the premises as a warehouse and the parties agreed to meet the following week. In the meantime, Mr. Valente rounded up some of his sub-contractors and staff and instructed them to remove all goods, stock and fixtures to a safe place. That afternoon, all the material was removed from the warehouse and showroom including shelves, walls, glass displays, ceiling tiles, the kitchen counter and sink, bathtub, all furniture and fixtures.

¶ 19 Michael Ricciardi, who worked for Profile Building at the time, said that he arrived at the premises in the morning and was asked to leave by the landlord. He described the scene as having 75 per cent of the showroom intact. The telephone and utilities were working, the cash drawer, Visa machine, invoices, purchase orders and the fax machine were there and customers were attending for business. He said that the sign, "We have moved" went up shortly after Profile Building started to move in the middle of October but that, in fact, the business was still being transacted at the old premises.

¶ 20 When Mr. Gregoris returned to the scene after a meeting, he observed some damage to the premises and called the police. The police officer arrived at 2:45 p.m. but said that he could not intervene in a civil matter. He took down names of people on the scene and asked their place of employment. One person on the scene was Rick Morretti,

a subcontractor of Profile Building, who recalled being there to pick up vinyl flooring. The officer observed the loading and moving of materials from the showroom, removal of ceiling tiles, fixtures, samples and displays. Despite his concern about the premises, after consulting with his lawyer, Mr. Gregoris returned the keys to Mr. Valente at the end of the day.

¶ 21 In the ensuing days, correspondence passed between the parties. Mr. Gregoris said that he did not consent to the removal of materials from the premises nor did he consent to the change in use to storage or to any renovation of the premises. Mr. Valente said that he would honour the lease but pay rent to his lawyer in trust. He took the position that except for the disagreement about the reduced rent, the tenant was up to date in payments as of November, 1992. He also took the position that business was continuing at Profile Building and that the tenant did not abandon the premises. He relied on clause 8.01 saying that he was permitted to use the premises as a warehouse only under the lease. The landlord maintained that he had the right to review the plans and see how the tenant intended to use the premises before giving his approval. The landlord did not approve of the withholding of rent. He did not believe that the tenant would pay the balance and he needed the rent money to pay the bills. He said that he never terminated the lease and had given the keys back to Mr. Valente on November 26, 1992. The tenant remained in possession in December but paid no rent after November.

¶ 22 Mr. Valente claims that he was carrying on business at 4107 Steeles Ave. West throughout the fall of 1992 and even after November 26. He says that Profile Tile was still under construction until its grand opening on December 23. Invoices written on Profile Building's letterhead show sales were made during that period. Mr. Ricciardi testified that he was working at the old location until just before the opening of Profile Tile on December 23. However, Sam Arnone gave evidence that there was normal business prior to November 26, but that there was little inventory and business at 4107 Steeles Ave. West after that date. The tenant's position was that there were no grounds to conclude that it had abandoned the premises. It says that it did not receive the letter addressed to Profile Building until Mr. Stabile, who was away on holidays, returned and notified the company on November 30, 1992. By then, the tenant had been locked out. It also says that the notice of re-entry was addressed to the wrong premises, that is, the letter referred to 4101 Steeles when the premises were actually 4107 Steeles. The evidence was that the lease referred to 4107 - 4113 Steeles and that letters were mailed to 4107. However, the reference line was always "4101 Steeles." The evidence was that Profile Building replied to those letters.

¶ 23 From October to December, the new premises were under extensive construction. There were signs indicating Profile Building was moving and that Profile Tile was opening. There was evidence led that North York Hydro and Consumers Gas were notified of the new tenant taking possession effective October 1, 1992. The new premises were complete by December 23, 1992, the date of the grand opening. However, there was evidence that business was being conducted at the new premises before that date. Three independent witnesses, Vince Cristello, Joseph Di Leo and Peggy McKay testified that they conducted business at the new location earlier in December and, in

Mrs. McKay's case, she says she picked up materials from the loading dock at the new building on November 20, 1992.

¶ 24 The landlord entered the premises on February 3, 1993 and took photographs. Mr. Gregoris described garbage strewn, ceiling tiles, gold trim, reception counter, lights and displays removed, sink and toilet removed and marble scratched. Photographs filed as evidence did show that display cases, the kitchen, bathtub, toilet, sink, reception counter, ceiling tiles, pot lights and gold valance and other trim had all been removed. At that time, cars were parked in front of the new location, displays were in the front window and the place looked like it was open for business.

¶ 25 Mr. Gregoris arranged to have the locks changed on February 3. Jeff Ford, the bailiff, attended with him and described the scene as follows: "There was a lot of destruction." Mr. Gregoris retained a quantity surveyor to assess the damages and prepare a report on the cost of restoring the property to its original condition. His view was that the total cost to rectify the premises on that basis was approximately $71,738. Richard Vermeulen was qualified as an expert to give opinion evidence on cost consulting. In his view, the place had been trashed and his impression, based upon the fact that individual tiles were chipped and tiles scratched, was that there was an intent to destroy what was left behind so that it would be in an unusable condition. He confirmed his original estimate given on February 22, 1993 for putting the premises back in the position they were in immediately prior to the tenant leaving, but also said that an estimate of costs to provide a basic level of repair was approximately $39,000. On cross-examination, he was asked to identify items in the estimate that were above and beyond the average or basic condition to make the premises leasable. Those included, for example, glass block, mirror tile, ceiling detail, marble podium, a bathtub, a shower, a reception counter, display centre, kitchen cabinets, a sink, the cherry furniture and shelving and the wood frame mezzanine. Removing those costs would reduce the estimate by almost $40,000.

¶ 26 Mr. Valente's testimony was that debris was left that should have been cleaned out but generally, the premises had been left as they were found when the property was rented. He did admit that certain things should not have been removed such as a toilet, sink, pot lights and ceiling tiles and that some of the marble had been broken or damaged. In his mind, the trades he asked to do the work "got carried away" and acted improperly. He estimated that the cost of repairs would be in the range of $3,000.

¶ 27 After Profile Building left, Novacrete looked for tenants and ultimately entered into leases with subtenants for a portion of the premises. Mr. Gregoris had to provide free rent for set up and certain inducements to the new tenants. The landlord called evidence of an expert in real estate values. He observed the interior and exterior of 4107 Steeles Ave. West and produced a report which compares the property to other similar locations. He also took into account that at the relevant time, the market was in a recession and property values and rental rates were in a state of decline. The report was based upon typical leasehold improvements in a good state of repair although the property had been left in a poor state of repair.

¶ 28 His conclusion was that for a five year term, the best price was $6 per square foot on a net lease. If rented without repairs being done, the rent would have to be reduced by $1 to $1.50 a square foot. In the expert's view, the premises were inferior because of the state of repair and destruction of fixtures by the former tenant including the removal of ceiling tiles and wall areas.

¶ 29 Novacrete's claim is for the unpaid rent at the amount set out in the lease document for the months April to October of 1992 and the full amount for the balance of the lease. As a result of efforts to mitigate, the landlord was able to sublet the premises after March, 1993. The balance of the claim is for repairs to rectify the premises and make them suitable for a new tenant. However, Novacrete did not keep track of actual costs of repair because they sent in their own crews to do the work. The repair work was minimal and only of a basic finish.

¶ 30 The landlord's claim is against Profile Building which signed the lease with Novacrete, against Profile Woodworking and against Profile Tile, the newly incorporated company which bought the assets of Profile Building and against Mr. Valente personally. The allegations are that the tenant contravened section 48 of the Landlord Tenant Act and that the tenant was moving inventory and equipment to avoid a distress. However, Mr. Gregoris admitted that he was aware of the location to which much of the inventory and goods were being moved, namely, practically next door.

¶ 31 The evidence was that Mr. Valente is the sole director and officer of both companies. It is alleged that he and Profile Tile benefited from the concessions given to Profile Building, reduced rent, and used that saving to finance the move to new premises. Novacrete's position is that Mr. Valente and the Profile companies are one and the same; there is only one shareholder And one director and that is Mr. Valente.

¶ 32 In December, 1992, according to Mr. Valente, as a result of not being able to get additional money from the bank and the bank wanting to call in its loan of $60,000, Mr. Valente, with the assistance of his accountant, Joseph Lanno, obtained alternate financing and mortgaged his home and a rental property. He used the money to pay off Profile Building's suppliers and debts of the company and applied the rest to finance Profile Tile. Profile Tile bought inventory and equipment from Profile Building and paid Profile Building for all the renovations to the new premises. It was Mr. Lanno's advice.to incorporate a new company and have it buy the old company's assets at fair market value.

¶ 33 Mr. Valente says he was prepared to pay money into his lawyer's trust account for the duration of the lease. However, after receiving Correspondence from the landlord's lawyer, it was decided that no further rent would be paid.

¶ 34 The landlord purported on November 26 to deem the premises abandoned and re-enter the premises, change the locks and distress any goods. The reason given by Mr. Gregoris was non-payment of rent and the need to protect abandoned premises. However, the letter sent to the tenant did not mention rental arrears as a ground for reentry. There was no conversation with the tenant to try and avoid the impending

action. The landlord also concluded that there was a breach of clause 8.01 of the lease which provides that the premises be used in a diligent and active manner. From his monitoring of the premises for the month of November he was of the view that the business had moved from the location to the new premises.

¶ 35 Mr. Gregoris claims that he never received proposals from Mr. Valente to sublet the premises. However, Mr. Valente testified that he contacted his friend, Anthony Vendetti, a real estate agent, to locate a subtenant and that he referred Toronto Auto Sound in October of 1992. Michael Guida of Toronto Auto Sound visited the premises on a few occasions. He testified that he was interested in the premises at 4107 because of its location on Steeles Avenue, the fact that it had rear overhead garage doors and its showroom capacity. Although no written offer to lease was tendered, Mr. Vendetti conveyed the interest to Mr. Gregoris but was told that he had someone else to take the space immediately. Mr. Guida then leased space at another location on Steeles Ave.

¶ 36 The other subtenant turned out to be Rocco Liscio, a former employee of Profile Building, who ultimately decided not to proceed with a sublease. Mr. Liscio testified that he did not want to offend Mr. Valente, for whom he had worked for a number of years, as Mr. Valente said that he would prefer he not open a flooring place near where he would be in direct competion with Profile Tile. As a result of how Mr. Valente felt and his own finances, he did not rent the premises from the plaintiff.

THE ISSUE OF MULTIPLE DEFENDANTS

¶ 37 It was the evidence of Mr. Valente and his accountant, Mr. Lanno, that it was Mr. Lanno's advice to incorporate a new company in the fall of 1992. Mr. Lanno had prepared the financial statements ending April 30, 1992 which demonstrated substantial losses for the company and a downward trend in sales from its performance in previous years. The economy had been in a recession since 1990 and the mood was that banks were not anxious to lend money to companies involved in the construction industry. Mr. Lanno described Profile Building as insolvent because the Royal Bank would not lend it any more money and wanted the $60,000 loan paid down. There was no demand letter sent by the Royal Bank to Profile Building but the account manager at the time testified that when the bank conducted its review, it determined that it required hard security to continue financing Profile Building. Samson Tang's report was consistent with what Mr. Valente said that the new premises were to be larger and that the new company would focus on retail sales. Mr. Valente decided to go elsewhere and secured money from Laurentian Bank by mortgaging his house and another property to pay down its debts and finance renovations to the new premises. Because Profile Building could not be financed, the decision was made to establish Profile Tile.

¶ 38 Mr. Valente testified that he believed he had to change the direction of his company and move from reliance on contracting and the construction industry to more retail sales. Profile Tile was designed to have more space for a showroom and warehouse in order to provide customers with "self serve", tile and flooring products. He required financing to create the type of operation which would permit this change in focus of the

business. Mr. Valente said that his decision to move was not made until he went to the bank for a loan and decided he had to change the focus of his business from 80 per cent contracting and 20 per cent retail to an emphasis on retail. That evidence contradicts Mr. Tang's evidence as he said that the question of financing arose when Mr. Valente in August, 1992, was seeking additional monies to fund renovations at his new premises. It was also the evidence that the lease specified a limitation on the use of the new premises for retail.

¶ 39 Although Mr. Lanno admitted to preparing financial statements which had aspects that were not in accordance with generally accepted accounting principles, I did not find that the errors were of significance. He presented as an accountant with a great deal of experience in advising small businesses and his advice appeared to be, sound and practical. However, while his advice was to create separate entities, the evidence was that throughout 1992 and 1993, there were adjustments in financial statements between the companies showing that they were treated as if they were one and the same. The same was true for Profile Woodworking which had its salaries and summaries of income statements included in those of Profile Building. It was Profile Woodworking which entered into the lease at the new premises and executed the document "in trust for a company to be incorporated." All the Profile companies were controlled by Mr. Valente who was the sole officer and director of each entity.

¶ 40 When Profile Tile was incorporated in October 1992, it paid off suppliers and creditors of Profile Building. It also paid Profile Building for its inventory and equipment at cost and without PST and GST and for the renovations paid by Profile Building. It did not reimburse Profile Building for salaries paid in December nor did it pay severance to those staff. It did not pay for goodwill. The plaintiff claims that these are benefits owed to Profile Building.

¶ 41 Profile Tile has the same telephone number, same logo, same customers., same suppliers and contractors as Profile Building. In fact, advertisements for Profile Tile refer to the company serving the public over 26 years and demonstrate the entities as one and the same. In conclusion, it is the plaintiff's submission that Mr. Valente and Profile Tile received benefits and acted to the detriment of Profile Building. The only reason Profile Tile was incorporated was to avoid the obligation to Novacrete.

SOME GENERAL COMMENTS ABOUT THE WEIGHT OF CERTAIN EVIDENCE:

¶ 42 At the outset of the trial, there was an order made, at the request of counsel, excluding witnesses, with the exception of the parties, until their testimony. The purpose of such an order is obvious. It is to preserve a witness' testimony in its original state so that it will not be influenced by the testimony of others. It avoids the problem of collusion and eliminates unfairness. If a witness has listened to the evidence of another witness and used the testimony to refresh his or her memory, that may affect the weight to be attached. In this case, the order was made and Mr. Valente chose to give his evidence after hearing the evidence of several defence witnesses. He also admitted on several occasions to having a poor memory. I have considered this factor in my findings.

¶ 43 A further comment about the manner in which the evidence was called is that on a number of occasions, counsel for the defence had to be admonished about the use of leading questions in examination-in-chief of witnesses. There were objections by the plaintiff's counsel and rulings by me. As an overall comment, I can only add to those rulings the rationale for the existence of the rule against leading questions which is cited in Sopinka and Lederman, The Law of Evidence in Canada, (Butterworths: Toronto, 1992) at page 833:

> (1) The bias of the witness in favour of the examiner;
>
> (2) The advantage the examiner has over his adversary in knowing what the witness, evidence is; this creates a danger that leading questions will only bring out what is helpful to the party calling the witness rather than a balanced version of the witness, knowledge;
>
> (3) The propensity of a witness to assent readily to suggestions put to him by the party calling the witness.

¶ 44 Leading questions of one's own witnesses on matters on which the witness should not be led affects the value or weight of the evidence.

ISSUES:

¶ 45 The following are the issues raised at trial:

1. Did the tenant abandon the premises or was Profile Building carrying on business on November 26, 1992? If so, was the landlord justified in re-entering the premises?
2. If the tenant did not abandon the premises, did the landlord have the right to re-enter the premises and change the locks on November 26, 1992?
3. Did the landlord give sufficient notice under s. 19(2) of the Landlord and Tenant Act for the purposes of re-entry?
4. Did the landlord's actions constitute a termination of the lease?
5. Did the landlord have an obligation to mitigate? Is the tenant responsible where it says it produced a subtenant who was refused by the landlord?
6. Was the reduction of rent agreement a permanent or temporary arrangement?
7. Were there arrears of rent owing by the tenant?
8. What is the effect of termination of the lease by the landlord?

9. Did Mr. Valente induce breach of contract?

10. Is Mr. Valente able to rely on legal advice?

11. Did the defendants cause damage by removing the fixtures, stock, inventory and equipment? If so, what is the extent of the damages?

12. Is Mr. Valente personally liable as a director of Profile Building?

13. Is the landlord a "complainant" under the Business Corporations Act?

14. Did the tenant fraudulently remove goods or chattels from the premises so as to be liable under sections 48 and 50 of the Landlord and Tenant Act?

15. Are the defendants in contravention of the Bulk Sales Act?

16. Should the defendant succeed on a counterclaim for punitive damages?

THE LAW:

¶ 46 The landlord and tenant relationship is one which is governed by contract, statute and case law. The lease itself may contain express covenants and certain covenants may be implied in law. The usual covenants include the covenant for quiet enjoyment, the covenant to pay rent and other expenses, the covenant to keep premises in repair and allow the lessor to enter to view the state of repair and the covenant by the lessee permitting re-entry by the lessor in the event of default in payment of rent. See Williams and Rhodes, Canadian Law of Landlord and Tenant, 6th edition (Carswell: Toronto, 1988) at page 3-48.1.

¶ 47 At common law, parties may waive their rights under the contract. However, as Fridman says in the Law of Contract, Third Edition, (Carswell: Toronto, 1994) at page 545:

> Waiver, said MacDonald J.A. in British American Oil Co. v. Ferguson, was a voluntary and intentional relinquishment of a known existing legal right, whether arising under contract or by law. To establish waiver, it had to be shown that the person waiving his rights had full knowledge of their existence and their nature. If a party were obliged under the contract to perform in a certain manner, or by a certain time, the beneficiary of performance could be deprived of the right to insist upon proper performance under the contract, or to complain if such a performance did not occur, where he informs the party obliged to perform that proper performance was no longer necessary. The common law held the party waiving his rights under the contract to his "indulgence," and did not let

> him go back on what he had said, at least where it affected the other party's position. Nor could the beneficiary of the waiver repudiate such waiver and later insist upon strict adherence to the original contract.

¶ 48 Even where the elements of waiver are established, an oral waiver cannot override the express provisions of a written agreement which provide that variations and waiver may be made only in writing and signed by the parties. See, Inc. Robur et Securitas v. M.H. Ingle Associates Ltd. [1992] O.J. No. 845 (Gen. Div.) which applied Hawrish v. Bank of Montreal [1969] S.C.R. 515; Bauer v. Bank of Montreal, [1980] 2 S.C.R. 102 and Carman Construction Ltd. v. Canadian Pacific Railway Co. et al. [1982] 1 S.C.R. 958.

¶ 49 Waiver may exist in that one party by his conduct led the other to believe that the strict rights under the contract will not be insisted upon but the arrangement may be temporary. In W.J. Alan Co. Ltd. v. El Nasr Export & Import Co., [1972] 2 Q.B. 189 at 213, Lord Denning discussed the principle of waiver and wrote:

> " ... He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice on that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them: Tool-Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. [1955] 1 W.L.R. 761."

¶ 50 Where there are breaches of the lease, the parties may exercise certain rights which are provided by the lease, common law and statute. The landlord may use a summary remedy of distress which permits the sale of certain goods so that the proceeds may be applied to arrears of rent. In that circumstance, the lease continues and the tenant remains in the premises. However, the landlord must elect between the remedies of termination and distress. In Highway Properties Ltd. v. Kelly, Douglas & Co., [1971] S.C.R. 562, the Supreme Court of Canada recognized the range or remedies that the landlord might pursue in a commercial tenancy including continuing the relationship and suing for damages, terminating the lease and suing for rent and damages and mitigating the tenant's liability for unpaid rent by re-letting on the tenant's account without forfeiting a lease.

FINDINGS AND CONCLUSIONS:

1. Did the tenant abandon the premises or was Profile Building carrying on business on the morning of November 26, 1992 at 4107 Steeles Ave. West? If so, was the landlord justified in re-entering the premises under the lease?

¶ 51 Clause 8.01 of the lease provides that the tenant shall use the premises only for the purposes of a showroom, warehouse, and the wholesale and.retail sales of any floor product. It also provides that the tenant shall commence its business on the commencement date under the lease and "operate its business in a diligent, active and

continuous manner in the whole of the Leased Premises throughout the Term of this lease."

¶ 52 Relying on this provision, the landlord wrote to the tenant on November 25, 1992 that he has determined that the tenant "has completely abandoned the premises" and that he will re-enter to protect the premises and take reasonable actions to deal with the breaches of the lease. Whether the tenant did, in fact, abandon is therefore relevant to the consequences of the actions which then followed.

¶ 53 Following the meeting in October when Mr. Gregoris learned that Profile Building was moving and sent the letter of October 5, 1992 demanding the full rent, the tenant began the process of moving parts of his operation out of 4107 Steeles Ave. West. He transferred the computers, files and records to Profile Woodworking's location and inventory from the warehouse to the new premises observing the property being moved, noticing less activity at 4107 and that the sign said, "We are moving", Mr. Gregoris concluded that the tenant was abandoning the premises. The letter of November 25th reflected this.

¶ 54 However, Mr. Valente had said to Mr. Gregoris that he would sublet the premises or use them for storage. That evidence is corroborated by several witnesses.

¶ 55 Mike Ricciardi testified that he was told in September about the move but that Mr. Valente said he intended to keep the old location as a warehouse for carpeting and vinyl. Sam Arnone testified that he learned about the plan for the new premises in the late summer of 1992 when Mr. Valente talked of having a showroom of flooring materials for "do it yourself sales." He also said that he intended to sublease the old premises or use them as a warehouse. The account manager from the Royal Bank testified that he was informed of Mr. Valente's plan to sublease the premises or use them as a warehouse.

¶ 56 While I accept that there were certainly signs that Profile Building was in a state of transition including the fact that Mr. Valente had new leased premises, was transferring property to the new site and that there was activity at the new site, I find that the landlord acted precipitously in entering the premises on November 26 and changing the locks. I find that the tenant had not abandoned the premises in that there were tile and other flooring samples on site and much of the showroom was intact at 4107 Steeles Ave. West. The telephone worked; there was a Visa machine and other equipment at the old premises. The trades were still loading up there and the new premises were under construction at the time and not ready for occupation. Furthermore, the emphasis of the business at the time was on contracting and not on retail so much of the transactions would take place off site. I accept Mr. Valente's testimony that while the sign went up in October saying "We have moved", the day to day operation was still at 4107 Steeles Ave. West. I am, therefore, not satisfied on a balance of probabilities that the tenant had abandoned the premises. In my view, Mr. Gregoris was probably right to be concerned by what he had seen while he monitored the premises, but his assumptions were not correct that Profile Building had closed down and that it was no longer functioning at

4107 Steeles Ave. At this point, there was no reason to doubt Mr. Valente's assertions that he would sublet or use the premises for storage.

¶ 57 I have carefully considered the cases where the ground for re-entry by the landlord was abandonment of the premises and in those cases, the facts were overwhelming in demonstrating such abandonment. For example, in 615314 Ontario Ltd. v. 396380 Ontario Inc. [1995] O.J. No. 1518 (Gen. Div.), the court found the tenant had discontinued operating the business and abandoned the premises where the evidence was that the tenant wrote to the landlord that he wished to terminate the lease, advertised a "going out of business" sale, placed a sign on the front door saying "Closed", paid less than the full rent and none after June, removed most of its inventory after the sale and left only a few items and much debris, contacted the tax department saying March 13 was the last business day and handed the keys over to the landlord when requested in July of 1993. Although the tenant said it had plans to re-open in the fall on 1993 selling higher quality furniture, there was almost no evidence to substantiate that intention. In Barmond Builders Ltd. v. Mark 3 Investment Corp. [1993] O.J. No. 1186 (Gen. Div.), the tenant advised the landlord that it intended to vacate the premises on September 1, did vacate And the landlord re-entered and changed the locks. The court found that the tenant did abandon the premises and that the landlord's action were lawful.

¶ 58 In the case before me, it was not until after the landlord changed the locks that the tenant transferred all goods and inventory including the sample boards out of the premises. The fact that the landlord returned the keys at 4:30 p.m. on November 26 is also indicative that he was uncertain about the tenant's "abandonment" and did not want to be seen to be excluding the tenant from the premises.

¶ 59 Whether the tenant was carrying on business after November 26 at 4107 Steeles Ave. is another issue. Clearly, there was no inventory or goods at the premises, the offices had been moved out and all business, in my view, was transacted elsewhere. Blinds and paper had been put up on the windows. The independent witnesses confirmed that they picked up materials at the new location in December. The state of the premises was such that it is doubtful that business could be conducted there other than perhaps, the cutting of carpet because of the open space available. Although some invoices are on Profile Building letterhead for transactions in late November and December, I find that those sales were made at locations other than 4107 Steeles Ave. I find that Profile Building was no longer carrying on business at 4107 Steeles Ave. after November 26. The question is, however, the relevance of whether Profile Building was carrying on business at 4107 Steeles Ave. from November 26 to February 3, when the landlord re-entered and changed the locks again.

2. If the tenant did not abandon the premises, did the landlord have the right to re-enter the premises and change the locks on November 26, 1992?

¶ 60 The landlord's position is that, in addition to abandoning the premises, the tenant committed multiple breaches of the lease. They included breach of the use clause (8.01), removal of goods without consent (13.02), posting of signs without consent (7.12),

keeping the premises in good order and condition (7.01) and changing uses without the landlord's consent. I find that those alleged breaches are not sufficient to constitute grounds for reentry under the lease. In his notice, the landlord did not say that he was relying on rental arrears or these breaches as a reason for re-entry. The only reason stipulated was abandonment.

3. Did the landlord give sufficient notice under s. 19(2) of the Landlord and Tenant Act for the purposes of re-entry?

¶ 61 Section 19(2) of the Landlord and Tenant Act provides specific note requirements where the reason for re-entry is other than arrears of rent. In this case, the landlord re-entered the premises on November 26 and changed the locks after alleging in a letter addressed to the tenant's lawyer that the tenant breached certain covenants and had abandoned the premises. No reference was made to arrears of rent. The landlord was required to give notice under s. 19(2) of the Act. In Re 780046 Ontario Inc. and Columbus Medical Arts Building Inc. (1994) 20 O.R. (3d) 457 (Ont. C.A.), Laskin J.A. wrote as follows:

> Notice is a protection to the tenant. It's purpose is to warn the tenant that its leasehold interest is at risk and to give the tenant an opportunity to preserve that interest by remedying the breaches complained of and, where necessary by compensating the landlord. Because courts have not looked favourably upon the remedies of re-entry, forfeiture, and termination they have insisted that landlords strictly comply with the notice requirements in s. 19(2) of the Act: see Ellis v. Breslin (1974), 2 O.R. (2d) 532 (H.C.J.) and Mount Citadel Ltd. v. Ibar Developments Ltd. (1976), 14 O.R. (2d) 318, 73 D.L.R. (3d) 584 (H.C.J.) and Koumoudouros v. Marathon Realty Co. (1978), 21 O.R. (2d) 97, 89 D.L.R. (3d) 551 (Div. Ct.).

¶ 62 The language of s. 19(2) stipulates that if a landlord proposes to exercise a contractual right of re-entry for breach of a covenant other than the covenant to pay rent, prior notice is mandatory. If the notice of forfeiture does not allow time for remedy of the breach, the court may exercise its discretion to grant relief from forfeiture: Re Vanek and Bomza; Re BP Canada Ltd. and Bomza (1976) 14 O.R. (2d) 508 (H.C). The failure to give notice may render the re-entry invalid.

¶ 63 The courts have recently held that a more flexible approach rather than a technical approach to the law about notice of termination should be adopted: Goodyear Canada Inc. v. Burnhamthorpe Square Inc. (1998), 41 O.R. (3d) 321 (Ont. C.A.). However, in the case before me, I am not satisfied that the notice conformed with s. 19(2) in that it did not specify the breach, require the tenant to remedy the breach and permit a reasonable time to remedy the breach. I find that the notice given by the landlord in the letter of November 25 was not sufficient in conveying to the tenant its rights and obligations in remedying what it considered to be breaches of the lease. Applying an objective test, a reasonable person receiving the notice would not have been informed about the breaches, the remedies and the time limits imposed.

4. Did the landlord's actions constitute a termination of the lease?

¶ 64 If the landlord had no grounds to re-enter the premises and change the locks, did his conduct result in terminating the tenancy? The tenant argues that the changing of the locks on November 26 resulted in a termination of the lease and the creation of a month to month tenancy. Therefore, there is no responsibility for the balance of the five year lease once the tenancy is terminated.

¶ 65 The effect of changing the locks by the landlord and excluding the tenant has been held to constitute a termination of the lease. See: Country Kitchen Ltd. v. Wabush Enterprises Ltd. (1981), 120 D.L.R. (3d) 358 Nfld. C.A.; Coopers & Lybrand Limited v. Royal Bank of Canada and Saskatchewan Power Corporation [1982] 5 W.W.R. 156 (Sask. Q.B.). Generally, the courts have viewed the changing of the locks and excluding the tenant as an act of forfeiture disentitling the landlord to the remedy of distress: Clarkson Co. v. Consortium Group Ltd. (1983) 40 O.R. (2d) 771 (H.C.J.). There are other cases where the lease has been held not to be terminated where the locks are changed. In Glenmac Corp. v. McGonigal [1991] A.R. 55 (Alta. C.A.), the court concluded the lease did not terminate where the tenant was given the new keys after the locks were changed until after the distress and remained in possession until then. The mere act of changing the locks did not terminate the lease because there was no intent to deprive the tenant of the use of the premises. In Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd. (1980) 29 O.R. (2d) 106 (H.C.), the court found that there was no intention on the part of the landlord to terminate the lease where the locks were changed to secure goods but the tenant was told that the lease continued and that it could re-enter the premises upon payment of arrears of rent. Similarly, in Falwyn Investors Group Ltd. v. GPM Real Property (6) Ltd. [1998] O.J. No. 5258 (Gen. Div.), where the tenant was in arrears of rent, the court held that the distress by the landlord was not illegal and the changing of the locks was done to secure the goods for distress and did not terminate the lease.

¶ 66 I find on the facts of this case the landlord's conduct amounted to a termination of the tenancy. The locks were changed, the staff were asked to leave and the business of the tenant was completely disrupted. Although the landlord's letter states that it was re-entering the premises without terminating the lease, the occupancy rights of the tenant had been effectively terminated. Returning the keys at the end of the day did not amount to a reaffirmation of the lease. The earlier actions of the landlord that day were unequivocal and constituted exclusion of the tenant. There was no evidence that the landlord's actions could be construed as an effort to protect the premises and distrain goods rather than terminate the lease. In fact, the landlord's letter stated that the purpose of re-entry was to re-let the premises. While the aspect of re-letting the premises does not constitute a termination of the tenancy, the circumstances as a whole where the reason for re-entry was not arrears of rent, support the finding that the landlord had terminated the lease. The landlord's actions were inconsistent with the continuation of the lease. As Cockburn C.J. said in Oastler et al. v. Henderson (1877) 2 Q.B.D. 575, by changing the locks and excluding the tenant, " ... they thereby did an act so inconsistent with the continuance of the defendant's term, that they were estopped from denying that it

was at an end." From November 26 on, the relationship between the parties became a month to month tenancy and the landlord cannot make claims under the terms of the lease past that date.

¶ 67 I also find that the actions of the tenant in accepting the keys at the end of the day on November 26 and continuing to occupy the premises for the next few months did not constitute a waiver of its rights and an affirmation of the original lease. The cases cited by the plaintiff on waiver and estoppel are not relevant to this case. Furthermore, this was not a mere temporary inconvenience to the tenant. On the contrary, the landlord's conduct fundamentally altered the relationship between the parties.

5. Did the landlord have an obligation to mitigate? Is the tenant responsible where it says it produced a subtenant who was refused by the landlord?

¶ 68 Mr. Valente's evidence, which was corroborated by correspondence written by him at the time and what he told others such as the representative of the new landlord, was that he would honour the lease and attempt to find a subtenant. If he was unsuccessful, he would use the premises as a warehouse. He made certain efforts to find a subtenant.

¶ 69 However, Mr. Gregoris had entered into discussions with Rocky Liscio about subletting the premises. I find that it was because of Mr. Liscio's finances as well as his concern about offending Mr. Valente that he decided not to sublet the premises. I also find that both Mr. Gregoris and Mr. Valente were confident that the deal with Mr. Liscio was quite certain and they discussed terms of termination of the lease. Mr. Gregoris was discouraging to Mr. Vendetti when he called about a prospective tenant.

¶ 70 I find that Toronto Auto Sound was interested in the premises and prepared to negotiate an offer to lease but went elsewhere after hearing the landlord's position. Mike Guida's testimony about the three reasons for liking 4107 Steeles Ave. West had a ring of truth and that testimony was substantiated by Mr. Vendetti. Their evidence was straightforward and their credibility was not impugned on cross-examination. I find that the defendants were prepared to make a sincere effort to sublet the premises and that Mr. Valente was diligent in his search prior to November 26.

¶ 71 Mr. Gregoris' actions on November 26 created confusion. Although the letter of November 25 gave notice of re-entry in order to re-let the premises, the notice did not comply with s. 19(2) of the Landlord and Tenant Act. Furthermore, I have found that the tenant did not abandon the premises and that the re-entry and changing of the locks terminated the lease. The fact that Mr. Gregoris returned the keys presumably so as to be able to say that he did not intend to exclude the tenant, does not alter the relationship. The lease was at an end. It was because of Mr. Gregoris' actions that the premises were not rented sooner. Had Mr. Gregoris stayed with the plan to re-enter and re-let the premises, he may have been successful in finding tenants sooner than March. The fact that he had to make certain concessions with new tenants is quite usual in these circumstances.

6. Was the reduction of rent agreement a permanent or temporary arrangement?

¶ 72 The evidence was that Mr. Valente approached Mr. Gregoris when he was experiencing financial problems and realized that the cost of similar space elsewhere was significantly less than what he was paying. He attempted to negotiate a reduction in rent by offering to pay $10 per square foot on a gross basis but Mr. Gregoris wanted $13 per square foot. Mr. Valente relented and paid at that rate for the months of June through October. There was no written confirmation of the arrangement. The cheques were tendered and cashed. Mr. Valente testified that he believed this to be a permanent arrangement; Mr. Gregoris described it as a temporary reduction. When the economy changed or Mr. Valente's business improved, he would recoup the difference and revert to the amount under the lease. There was no discussion about how that would be determined.

¶ 73 On the evidence before me, I am satisfied that the arrangement would have been a permanent one for the duration of the lease if the tenant had continued to occupy the premises. The parties intended to waive the provision of the lease regarding the quantum of rent and substituted a term of the agreement with a new one. Rent cheques were tendered and accepted and on the evidence, the parties created a new agreement. Had the contract between the parties not addressed this issue, the fact that the parties acted on a promise with respect to a reduction of rent and showed that they intended it to be legally binding may have resulted in estoppel: Central London Property Trust Ltd. v. High Trees House, Ltd. [1956] 1 All E.R. 256 (K.B.) at 259. However, the lease agreement provided that the receipt of a lesser amount of rent by the landlord did not constitute a waiver of the landlord's rights to the full rent. Moreover, the landlord may revert to his strict legal rights under the lease by giving reasonable notice and making it clear that he wanted to insist upon his legal rights: W.J. Alan & Co. Ltd. v. El Nasr Export Import Co., supra, p. 213. Accordingly, the landlord may bring the reduction in rent to an end by serving notice on the tenant. The landlord's letter of October 5 terminated the arrangement to pay the lesser amount. For the months following the notice, the landlord is entitled to look to the amount of rent specified under the lease.

¶ 74 Finally, the agreement to reduce the rent was never reduced to writing. In considering the consequences of a reduction in rent, it is to be noted that if a lease is in writing, an agreement to reduce the rent must be in writing. Hilton v. Goodhind (1827), 172 E.R. 269, 2 Car. & P. 591. As Williams & Rhodes, Canadian Law of Landlord and Tenant, supra, p. 6:1:11 states:

> "A mere oral agreement to reduce rent will not create a new demise; it works no surrender by operation of law; it is only an indulgence to which the landlord may put an end at any time: Crowley v. Vitty (1852), 155 E.R. 968, 7 Ex. 319; Clark v. Chittick (1934), 42 Man. R. 205 (C.A.).

¶ 75 Applying the relevant law to the facts of this case, I hold that the reduction in rent was a temporary reduction only. The parties discussed and negotiated the term of rent. There was a promise by the landlord to hold in abeyance its right to the payment of

full rent and the tenant relied upon the promise. Once the landlord gave notice that the covenant to pay the rent stipulated in the lease was to be revived, the indulgence was brought to an end.

7. Were there arrears of rent owing by the tenant?

¶ 76 In his letter of October 5, 1992, the landlord alleged that the tenant was in default and owed monies for common expenses for April and May, 1992 and the difference between the rent paid and the rent specified under the lease for the months June through October, 1992 inclusive. According to the tenant, the common expenses were always charged after the fact once all bills were in and the amount was levied against the tenant after the anniversary of the lease. For this reason, the tenant says it was not in default. However, the tenant's counsel admitted at trial that these amounts are still owing. As to the differential in the amount said, the tenant believed that to be a permanent reduction agreed by the parties and claims not to be in default for that amount. The landlord did not receive rent for the months of December, January or February. The locks were ultimately changed on February 3, 1993. The tenant had offered in November to pay the rent into his lawyer's trust account but this was not acceptable to the landlord.

¶ 77 I am satisfied on a balance or probabilities of the following:

> I find that the tenant owed the monthly common expenses but that these amounts were not in arrears at the relevant time. I find that the arrangement after the discussion in June was to be a permanent one at least until the landlord gave notice otherwise and that the tenant does not owe any differential for the months June through October. I find that, following the notice given on October 5, the amount owing is at the amount under the lease less the deposit of the last month's rent. Since I have held that the landlord's conduct on November 26 resulted in a termination of the lease, the tenant owes rent on a month to month tenancy for the months of December and January during which time it was in occupation of the premises.

8. What is the effect of termination of the lease by the landlord?

¶ 78 The case of Highway Properties outlines the remedies and courses of action available to a landlord in a commercial tenancy where the tenant is in fundamental breach of the lease. However, where the landlord elected to terminate the lease by his conduct, the remedies include the right to sue for rent accrued due and damages. The changing of the locks terminated the tenancy and the landlord cannot distrain for accelerated rent nor claim the rent after the changing of the locks: Country Kitchen Ltd., supra, p. 362; Beaver Steel Inc. v. Skylark Ventures Ltd. (1983) 47 B.C.L.R. 99 (S.C.) at 110; Mundell v. 796586 Ontario Ltd., (1996), 3 R.P.R. (3d) 277 (Gen. Div.).

¶ 79 The fact that the tenant continued in possession after the changing of the locks did not revive the terms of the lease agreement. As the court wrote in Ng v. Au (1992) 28 R.P.R. (2d) 141 (Sask. Q.B.) at 148, "Quoting from Scarf supra, the court in Winbaum v. Ginou, [1947] O.R. 242, [1947] 2 D.L.R. 619 (H.C.), went on to say that when a landlord does an unequivocal act consistent without the repossession of the premises, he has exercised his right of re-entry, even if he has not physically taken possession." I find in the case before me that the relationship became a monthly tenancy. The landlord's effort to continue the lease by saying that he was not terminating, by returning the keys at the end of the day and allowing the tenant to occupy the premises for a further two months did not change the nature of the relationship. The circumstances of this case are similar to those in Mundell where Eberhard J. held at paragraph 25:

> "In all the circumstances, I am persuaded that the Landlord at all times intended to forfeit the tenancy and constructed the fiction of recognising an ongoing tenancy only to preserve the integrity of the purported distress and additional rights to accelerated rent which it was at that time claiming."

9. Did Mr. Valente induce breach of contract?

¶ 80 The common law has long recognized the tort of intentional interference with contractual relations. Fleming described it in The Law of Torts, Ninth edition, at page 758 where he wrote:

> "The expansive promotion of the tort by English courts has brought an increasing range of activities within its fold. Liability will attach if the intervenor, with knowledge of the contract and intent to prevent or hinder its performance, either (1) persuades, induces or procures one of the contracting parties not to perform his obligations, or (2) commits some act wrongful it itself, to prevent such performance. The first is usually described as "direct," the second as "indirect" interference, the first involving immediate pressure on one of the contracting parties, while in the second the intervenor acts at one remove, so to speak, typically by procuring the withdrawal of the contractor's labour with a view to making it impossible for him to perform his contract with the plaintiff. In the first case, it is invariably the other -- innocent -- party to the contract who has cause to complain, the breacher having presumably gained from his inducement. But where unlawful means have been employed to force rather than persuade him into breach, he may himself have suffered financial loss for which he is entitled to recover."

¶ 81 The tort of inducing breach of contractual relations is discussed in United Cooler (Niagara 1980) Ltd. v. Zafir [1992] O.J. No. 1258 (Gen. Div.) where Then J. quoted from the decision of Posluns v. Toronto Stock Exchange and Gardiner (1964), 46 D.L.R. (2d) 210, aff'd 53 D.L.R. (2d) 193 and outlined the elements to maintain such a cause of action:

(a) A valid and enforceable contract.

(b) An awareness by the defendant of the existence of the contract.

(c) A breach of the contract procured by the defendant.

(d) Such breach being effected by wrongful interference on the part of the defendant

(e) Damage suffered by the plaintiff as a result thereof.

¶ 82 The elements of the tort are also discussed by MacFarland J. in Ontario Store Fixtures Inc. v. Muffins Inc. (1989) 70 O.R. (2d) 42 (H.C.). To succeed in this claim, it must be shown that there is deliberate disruption of contractual rights in others: Fraser v. Board of Trustees of Central United Church (1982) 38 O.R. (2d) 97 (H.C.).

¶ 83 The case of Said v. Butt [1920] 3 K.B. 497 is longstanding authority for there McCardie J. wrote at p. 506:

> "... if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken."

¶ 84 Where an agent acts in good faith in the interests of his principal and in accordance with his duties, he is protected for such an action, but where the contract is not bona fide but rather with a view to the best interests of the agent, the case falls outside the protection outlined in Said v. Butt and may constitute inducing a breach of contract: McFadden v. 481782 Ontario Ltd. (1984) 47 O.R. (2d) 134 (H.C.).

¶ 85 The evidence from Mr. Valente and Mr. Lanno was that Profile Building was in trouble in 1992 and needed to cut its expenses. At the same time, it was expanding its financing base in order to implement a change in location and a change in focus from contracting to retail. The Royal Bank was not prepared to extend funding without hard security. Mr. Valente decided to go elsewhere and secured funds from Laurentian Bank by mortgaging some of his personal assets. The monies were used to pay off certain debts and finance renovations for the new site. With Mr. Lanno's advice, Mr. Valente incorporated a new company to operate a business with an emphasis on retail sales of flooring products. The new company paid for the renovations to the new premises and a modest amount for equipment and inventory. All of the assets of Profile Building were transferred to the new company. While there was nothing paid for goodwill, there is no evidence that the goodwill of the company had a value. It was clear that the liabilities of the company exceeded its assets. In my view, Mr. Valente was doing what he deemed necessary to minimize exposure for Profile Building and himself personally by reducing expenses in a time of economic recession.

¶ 86 I find that he was acting in a bona fide manner and in the interests of the corporation when he took the steps he did. He attempted to sublet the premises and demonstrated a willingness to honour the lease by using the premises for storage, if necessary. These actions do not constitute wrongful interference, that is a deliberate interference in the contract between the landlord and Profile Building such that the company was prevented from performing its contractual obligations. The evidence pointed out by the plaintiff as demonstrating that Mr. Valente was acting in his own interests and not in the interests of Profile Building fell far short of the test. In my view, the elements of the tort of inducing breach of contractual relations are not made out in these circumstances.

10. The issue of reliance on legal advice.

¶ 87 Mr. Valente took the position at trial that his actions were the result of legal advice received from Mr. Stabile. Mr. Stabile testified for the defence about the receipt by his office of correspondence from the landlord dated November 25 advising of the re-entry. That letter was not received until November 30 when Mr. Stabile returned from holidays in Jamaica. By then, much had happened. Mr. Stabile had been consulted to advise on the dispute about the existence of an agreement on the rent reduction. Following the locks being changed on November 26, Mr. Valente was advised that Mr. Gregoris, conduct resulted in a termination of the lease. Mr. Stabile offered to receive and hold monies in trust for the landlord but the landlord declined.

¶ 88 Mr. Valente says Profile did not continue to use the premises as a warehouse after November 26, did not make rental payments and did not repair the damage caused by the trades because of legal advice received. However, he admits that Profile Building continued to occupy the space until February and says that it continued to carry on business even after November 26, 1992.

11. Did the defendants cause damage by removing the fixtures, stock, inventory and equipment? If so, what is the extent of the damages?

¶ 89 The plaintiff claims the cost of repairs of the premises as presented in the report of Mr. Vermeulen, a quantity surveyor. As outlined above, he testified about the cost of repairing the premises at the time of his report in February, 1993 based upon their condition prior to the tenant vacating. He estimated the cost at approximately $71,000. He did not consider the tenant's obligation under the lease to remove all fixtures erected by the tenant during the lease and repair any damage caused during the removal. He agreed that an estimate of basic repairs would be approximately $40,000 less. The evidence was that Novacrete did not expend the monies to repair the premises. It did some of the work itself and some work was left to the new tenants who received certain incentives including paying a lesser rent.

¶ 90 In Dunlop Construction Products Inc. (Receiver of) v. Flavelle Holdings Inc. (1996) 31 O.R. (3d) 58 (C.A.), one issue was the landlord's claim for the cost of repairs when it did not intend to actually effect those repairs. The court cited a number of cases

where the landlord was awarded damages for breach of the tenant's covenant based upon the estimated costs of repair despite the fact that the landlord had not effected the repairs. In Church of Scientology of British Columbia v. Ahmed (1983) 146 D.L.R. (3d) 219 (B.C.S.C.), in fact, it was clear that the landlord was never going to effect the repairs.

¶ 91 On the evidence, I find that the premises were damaged by the tenant during the removal of chattels, equipment and trade fixtures. I accept the evidence of Mr. Vermeulen and the police officer as to the state of the premises. The photographs and videotape produced at trial demonstrated the condition as well. I do not find Mr. Valente's assessment of the cost of repairs to be credible. He was understating the damage and underestimating the costs associated in remedying the situation.

¶ 92 Applying the law to the facts of this case, I find that the estimate of the cost of repairs made by Mr. Vermeulen once he eliminated the items which could be considered over and above a basic level and in keeping with the state of the premises when the tenant entered into the lease, is the correct estimate to which the landlord is entitled, namely, $35,000.

12. Is Mr. Valente personally liable as a director of Profile Building?

¶ 93 The plaintiff's position is that the conduct of Mr. Valente was such to cause him to shed his identity with the corporation and expose himself to personal liability for the corporation's alleged wrongdoing.

¶ 94 The case of Salomon v. Salomon & Co. Ltd., [1895-9] All E.R. 33 (H.L.) is the leading decision that a company once legally established must be treated like any other independent person with rights and liabilities. The courts will not lift the "corporate veil" and make the principals of the corporation liable for the obligations of the corporation unless certain circumstances exist. In Said v. Butt, supra, the court described the protection afforded to a person who acts within the scope of his authority and in the best interests of the company. However, in ADGA Systems International Ltd. v. Valcom Ltd. [1999] O.J. No. 27, the Ontario Court of Appeal wrote at paragraph 18:

> "The consistent line of authority of Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the company, always subject to the Said v. Butt exception."

After reviewing the case law in the area, the court stated:

> "These Canadian authorities at the appellate level confirm clearly that employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation."

¶ 95 In my view, the actions of Mr. Valente in establishing a new corporation and transferring assets to that corporation were not sudden acts done in suspicious circumstances. Rather, I find that Mr. Valente pursued that course to create a viable business, obtain financing and survive in a time of economic recession. The assets transferred to the new corporation were of a nominal value. This is not the type of case which can be considered a fraudulent conveyance. There was no judgment against Profile Building at the time. However, while I do not find that there was fraudulent intent proven,the court may intervene in appropriate circumstances nonetheless.

13. Is the landlord a "complainant" under the Business Corporations Act and entitled to an oppression remedy under Section 247?

¶ 96 In the case before me, the plaintiff landlord claims to be a "complainant" within the meaning of the Business Corporations Act. It relies on Prime Computer of Canada Ltd. v. Jeffrey (1991) 6 O.R. (3d) 733 (Gen. Div.) where a judgment creditor claimed relief against the president and shareholder of the judgment debtor and the court found the corporate defendant had acted in a manner that was oppressive or unfairly prejudicial to the applicant. Similarly, in SCI Systems, Inc. v. Gornitzki Thompson & Little Co. [1997] O.J. No. 2115 (Gen. Div.) Epstein J. held, following a judgment, that the acts of a company and its directors were oppressive to the applicant and that the directors were personally liable and required to compensate the applicant for the judgment.

¶ 97 The court has a broad power to "make an order to rectify the matters complained of" where it has found that oppressive conduct has occurred: Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc. (1998) 40 O.R. (3d) 563 (Ont. C.A.) which quoted the reasons and upheld the decision of Blair J. who wrote:

> "... When the power of the director is exercised in a fashion which causes an act or omission of the corporation which effects an unfairly prejudicial result, or a result which unfairly disregards the interests of the complainant -- or which causes the business or affairs of the corporation to be conducted in a manner which has the same effect -- those powers themselves have been "exercised in a manner" which is caught by the section, in my opinion. Liability therefore lies directly with the director, under the section, in appropriate cases."

¶ 98 The oppression remedy is a broader remedy than what is available for fraudulent conveyances. The courts have also taken an expansive view of whether a person with a claim for damages should be considered a creditor for the purposes of the Act. In Gignac, Sutts and Woodall Construction Co. v. Harris [1997] O.J. No. 3084 (Gen. Div.) the court wrote at paragraph 83:

> "As this was a small closely held company, it was the conduct of the respondents which resulted in the applicant's being left unpaid with no likelihood of recovery by execution against the company. The respondents

were responsible for that result."

¶ 99 Similarly, I find that Mr. Valente as the sole shareholder and director of Profile Building, Profile Woodworking and Profile Tile, exercised his powers in an unfair manner which disregarded the interests of the plaintiff and that under the statute, the court is empowered to make an order it thinks fit including compensating an aggrieved person. By transferring all the assets of Profile Building to Profile Tile, he has caused prejudice or oppression to the landlord who is entitled to recover compensation for damages.

14. Did the tenant fraudulently remove goods or chattels from the premises so as to be liable for double the value of the goods under section 48 and 50 of the Landlord and Tenant Act.

¶ 100 The landlord alleges that the tenant removed goods fraudulently or clandestinely from the premises to prevent the landlord from distraining for arrears of rent and claims the penalty under s. 50 of the Act. In the cases cited by the landlord, the facts were held to support such a finding by the court. In the case before me, I find that the tenant believed that it was not in arrears in rent, moved goods during the daylight hours from the old to the new premises and even put a sign on the window indicating that it was moving. The onus is on the landlord to establish fraudulent intent on a balance of probabilities. I am not satisfied that the landlord has met that burden of proof. As to the removal of goods on November 26, I find that the tenant believed that he had not only the right to remove his inventory and equipment but that he was doing so as required under the lease once the landlord had changed the locks. The removal of chattels was done with the knowledge of the landlord and there is no evidence of fraudulent intent by the tenant. Furthermore, there is no evidence led by the landlord as to the value of goods removed to avoid distraint which would attract the penalty section of the Act.

15. Are the defendants in contravention of the Bulk Sales Act?

¶ 101 Novacrete alleges that Profile Building put the property in which it had an interest beyond the reach of the plaintiff by transferring assets to the new company. Because Profile Building disposed of all its inventory and equipment, it is argued that the sale is void for failure to comply with the provisions of the Bulk Sales Act. The plaintiff relies on Chicopee Food Market Ltd. (Trustees of) v. Knechtel Corp. [1992] O.J. No. 2824 (Gen. Div.), where the court found that the defendant in purchasing the inventory and equipment at cost was attempting to gain a financial advantage over other creditors and declared the sale void for lack of compliance with the Bulk Sales Act.

¶ 102 In that the sale of the assets took place in 1992, the Action was commenced in 1993 and the claim under the Bulk Sales Act was not made until 1999, I find that the doctrine of laches applies and the claim made under this legislation must fail.

16. Should the defendants succeed on a counterclaim for punitive damages?

¶ 103 The defendants allege that Mr. Valente was embarrassed in front of staff and customers on November 26 when the landlord changed the locks. He believed that he was not in arrears at the time and that the landlord's conduct was harsh and high-handed. There was no evidence led by the defendants about the counterclaim for damages. However, the defendant still argues that punitive damages should be ordered.

¶ 104 Punitive damages may be awarded in exceptional cases where the defendant's conduct is malicious, reckless, vindictive, high-handed or outrageous. The aim of punitive damages is not to compensate the plaintiff but, rather, to punish the defendant. It is a way of expressing outrage at egregious conduct and serves as a deterrent to the defendant and others from acting in this manner. In Vorvis v. Insurance Corporation of B.C. [1989] 1 S.C.R. 1085, the Supreme Court of Canada delineated the distinction between aggravated and punitive damages and held that punitive damages can only be awarded in circumstances where the conduct is of such a nature that it merits punishment because it is harsh, vindictive, reprehensible or malicious. In Hill v. Church of Scientology (1995) 126 D.L.R. (4th) 129, the Supreme Court of Canada emphasized at page 186 that:

> "punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence."

¶ 105 In that exemplary damages must be related to loss actually sustained, there can be no cause of action where the only remedy sought is punitive damages unrelated to any actual or compensatory damages alleged: Spasic Estate v. Imperial Tobacco Ltd. [1998] O.J. No. 4906 at paragraph 5 which relies on Guaranty Trust of Canada v. Public Trustee (1978) 87 D.L.R. (3d) 417 (H.C.); Mancini (Trustee of) v. Falconi [1989] O.J. No. 1407.

¶ 106 It should also be noted that in most purely commercial cases, exemplary damages may not be appropriate: Waddams, The Law of Damages: paragraph 11: 250-260. Furthermore, I am not persuaded that the landlord's conduct in changing the locks on November 26, 1992 was so malicious, reckless, vindictive, high-handed or outrageous that it justifies punishment by punitive damages.

A GENERAL COMMENT ON THE CONDUCT OF THE CASE

¶ 107 There is a general comment I wish to make about the conduct of the trial. Throughout the case, it was evident that both sides produced documents and other information to each other after the trial began. Disclosure prior to trial was not complete. The plaintiff's videotape of the scene, although available long ago was not given over until the trial commenced. Invoices of the defendant's sales during the relevant period were discovered late by the defendant and disclosed after the trial began. Witnesses were called who were not named on the lists of witnesses exchanged prior to trial. These are just examples of late discovery and disclosure by both parties in the litigation. On several occasions, where I considered the evidence to be relevant, I granted leave pursuant to Rule 53.08 in order to ensure that justice was done and I would

have attached terms such as adjournment but that was not desired by the party affected. The result of this type of trial preparation is that the parties are sometimes taken by surprise, are not able to prepare properly and the trial does not proceed efficiently. That type of conduct is to be avoided if possible.

¶ 108 The Rules of Practice requiring full discovery and disclosure of documents and witnesses prior to trial are designed to facilitate settlement and promote a fair and efficient trial. Repeated non-compliance with the Rules affects the general impression of the evidence at trial. Furthermore, rather than assist the trier of fact, this type of conduct makes the task more difficult.

SUMMARY OF CONCLUSIONS:

¶ 109 My conclusions may be summarized as follows:

1. I find that Novacrete acted precipitously in forming the conclusion that Profile Building had abandoned the premises and had no right to enter the premises and change the locks on November 26, 1992.

2. I find that the landlord did not have the right to re-enter the premises and change the locks based upon other breaches of the lease. Those breaches have not been proven on a balance of probabilities.

3. The landlord did not give sufficient notice under s. 19(2) of the Landlord and Tenant Act for reentry and the re-entry was invalid.

4. The landlord's actions in changing the locks and asking employees to leave constituted a fundamental breach of the lease and terminated the relationship. For the months of December and January, the tenant occupied the premises on a month to month basis.

5. The landlord had an obligation to consider proposals by the tenant for subtenants and a duty to mitigate any losses.

6. The rent reduction for the months of June to October became temporary as the landlord gave notice that it wished to assert its strict legal rights and claim the full rent.

7. Profile Building admits it owed monthly expenses for April and May, 1992 and they remain unpaid. However, given the procedure for levying those additional charges following the anniversary of the lease, the tenant was not in arrears. Nonetheless, those amounts are now owing. For the months June through October, the landlord agreed to receive a reduced rent. once notice was given on October 5, 1992, the full rent under the lease was owed.

8. The return of the keys and continued occupation of the tenant did not constitute waiver or affirmation of the original lease.

9. The elements of the tort of inducing breach of contract were not proven on a balance of probabilities. There was no deliberate disruption or interference in contractual rights.

10. The tenant caused damage when removing fixtures, inventory and equipment. A fair assessment of repair costs to compensate for the loss is $35,000.

11. While it is not proven on a balance of probabilities that there was a fraudulent conveyance, Mr. Valente's actions render him personally liable for tortious conduct resulting in damage to the premises.

12. Novacrete is a complainant under the Ontario Business Corporation Act and is entitled to compensation under the oppression remedy against Profile Building, Profile Tile and Carmen Valente who are jointly and severally liable for the cost of repairs to the premises.

13. There is no evidence of fraudulent removal of goods under s. 48 of the Landlord and Tenant Act.

14. The claim for relief under the Bulk and Sales Act fails and the doctrine of laches applies.

15. The counterclaim of the defendant fails for lack of proof of a claim for damages.

RESULT:

¶ 110 The plaintiff's claim for damages is allowed as against Profile Building, Profile Tile and Carmen Valente personally, jointly and severally as follows:

(1)	expenses of April, 1992	$ 1,783.35
(2)	expenses of May, 1992	1,808.33
(3)	rent full amount for December and January (2 X $8,845.33)	17,790.66
(4)	cost of repairs	35,000.00
(5)	rent for the differential For November	3,049.50
	TOTAL	59.431.84

(6) interest from February 3, 1993 in accordance with the Courts of Justice Act

¶ 111 The claim under the Business Corporations Act is allowed and the oppression remedy is granted. I find the defendants are jointly and severally liable for the rental amounts outstanding (less the amount credited for the payment in advance of last month's rent) and the cost of repair.

¶ 112 The claim for rent from February, 1993 to April, 1995 is dismissed.

¶ 113 The claim of wrongful interference with contractual relations is dismissed.

¶ 114 The claim under s. 48 of the Landlord and Tenant Act is dismissed.

¶ 115 The claim under the Fraudulent Conveyances Act and the Assignment and Preferences Act is dismissed.

¶ 116 The claim under the Bulk Sales Act is dismissed.

¶ 117 The defendant's counterclaim for damages is dismissed.