

1994 CarswellNS 119, 40 R.P.R. (2d) 85, 132 N.S.R. (2d) 324, 376 A.P.R. 324, 118 D.L.R. (4th) 67

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Stewart v. Canada Life Assurance Co.

BEVERLY STEWART v. CANADA LIFE ASSURANCE COMPANY

Nova Scotia Court of Appeal

Hallett, Freeman and Pugsley JJ.A.

Heard: June 15, 1994

Judgment: August 3, 1994

Docket: Doc. C.A. 02984

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Counsel: *Beverley Stewart*, in person.

Gary Richard, for respondent.

Subject: Property; Civil Practice and Procedure

Damages --- Exemplary and punitive damages — Grounds for awarding exemplary and punitive damages.

Landlord and Tenant --- Relationship of landlord and tenant — Creation of relationship.

Nature and elements of the lease — Illegality — Economic duress — Landlord clearly conscious of inequality of bargaining power when forcing tenant to execute lease — Economic duress invalidating lease.

Damages — Exemplary and punitive damages — Landlord and tenant — Landlord's callous disregard for tenant's rights, and contemptuous treatment, entitling tenant to aggravated damages.

The appellant tenant purchased a small canteen business which operated out of leased premises at the respondent landlord's shopping mall. The tenant had very little business experience. When she took over the lease, it was in arrears. The tenant's understanding of the agreement between herself and the previous tenant was that she was not responsible for the rental arrears. When she refused to pay the arrears, the landlord executed a distress for rent on her chattels. The landlord continued to press the tenant to execute a written lease which would provide that she was responsible for her predecessor's arrears. The tenant eventually signed a lease, without obtaining legal advice. The lease obligated her to pay the arrears in addition to her current rent. Later, when the landlord served her with a formal demand for payment of an amount that she did not agree with, the tenant advised the landlord that she was withholding further rental payments. The landlord terminated the tenancy, and sued the tenant for rental arrears, accelerated rent, and other damages.

After termination of the lease, the landlord's agent permitted the former tenant of the premises to enter thereon and remove equipment charged under a chattel mortgage to the tenant. This was done without any notice to the tenant. The ten-

ant commenced an action against the former tenant, and counterclaimed against the landlord. The landlord's action was allowed at trial, despite a finding by the trial judge that the tenant's consent to a term of the lease was obtained by improper exertion on the part of the landlord, which pressure amounted to economic duress. The tenant's counterclaim was dismissed, and she appealed.

Held:

The appeal was allowed.

The landlord was clearly aware of the inequality of bargaining power between itself and the tenant when it imposed terms that it knew the tenant would be required to accept in order to avoid dire financial losses. The landlord's insistence that the tenant execute the lease was unconscionable by any community standard of commercial morality. The economic duress exercised by the landlord served to invalidate the tenant's execution of the lease, and rendered the lease a nullity. To permit the landlord to take advantage of the severability provisions in the lease forced upon the tenant amounted to condoning the abusive behaviour of the landlord and produced an inequitable result. The landlord was entitled to claim for reasonable rent for the months during which the tenant occupied the premises.

There was no legal justification for allowing the previous tenant to remove the tenant's chattels and equipment. The landlord showed a callous disregard for the tenant's rights in permitting this. The landlord further treated the tenant's justified protests with contempt. Such actions on the part of the landlord merited an award of aggravated damages to the tenant in the amount of \$27,000.

Cases considered:

Amirault v. Westminster Canada Ltd. (1994), (sub nom. *Coughlan v. Westminster Canada Ltd.*) 127 N.S.R. (2d) 241, 355 A.P.R. 241 (C.A.) — referred to

Cassel & Co. v. Broome, [1972] A.C. 1027, [1972] 1 All E.R. 801 (H.L.) — referred to

Harry v. Kreutziger (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.) — referred to

Jarvis v. Swans Tours Ltd., [1973] 1 Q.B. 233, [1973] 1 All E.R. 71 (C.A.) — referred to

Lloyd's Bank Ltd. v. Bundy, [1975] Q.B. 326, [1974] 3 All E.R. 757, [1974] 2 Lloyd's Rep. 366 (C.A.) — considered

McBeth v. Dalhousie College & University (1986), 72 N.S.R. (2d) 224, 173 A.P.R. 224, 26 D.L.R. (4th) 321, 10 C.P.C. (2d) 69, (sub nom. *McBeth v. Governors of Dalhousie College & University*) 23 C.R.R. 317 (C.A.) — applied

Peverley v. Arctic Construction Ltd. (1966), 55 W.W.R. 236, 56 D.L.R. (2d) 701 (B.C. C.A.) — referred to

Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 25 C.C.E.L. 81, 42 B.L.R. 111, [1989] 4 W.W.R. 218, 36 B.C.L.R. (2d) 273, 94 N.R. 321, 58 D.L.R. (4th) 193, 90 C.L.L.C. 14,035 — followed

Appeal from decision of Scanlan J. (September 20, 1993), Doc. S.T. 04497 (N.S. S.C.), allowing respondent's action for breach of lease.

The judgment of the court was delivered by Pugsley J.A.:

1 Beverly Stewart, at the age of forty-three, having very little business experience, purchased a business in Novem-

ber, 1990, known as Manhattan Gourmet Hot Dog Stand, which operated out of rented premises in the Truro Mall.

2 She continued in possession of the premises until the landlord, Canada Life, terminated the tenancy in April of 1992, after she had fallen behind in rent payments.

3 Canada Life sued for arrears, accelerated rent, and other damages to which it alleged it was entitled, pursuant to the provisions of a written lease executed by Ms. Stewart in June of 1991.

4 Notwithstanding a finding by the trial judge that Ms. Stewart's consent to a term of the lease was obtained by improper pressure exercised by Canada Life's agent, which amounted to "economic duress," the action was allowed, and damages were awarded against Ms. Stewart in an amount in excess of \$55,000. Her counterclaim was dismissed.

5 She appeals to this Court, submitting the entire lease should be declared void as a consequence of the improper actions of Canada Life's agent, and that her claim for damages should succeed.

Evidence

6 After working as a waitress for 12 years, Ms. Stewart opened a small canteen at Porter's Lake, Halifax County, in 1983.

7 She combined this activity with the management of a newspaper route, while raising her two children as a single mother.

8 Her only other business activity was to obtain subdivision approval for 11 lots near her canteen in March of 1990.

9 In November of the same year, she met Arthur Gillespie, who was operating Manhattan Gourmet, one of five units in the food court at the Truro Mall, some 50 miles from her enterprises at Porter's Lake.

10 After negotiations, she agreed with Mr. Gillespie to:

(a) enter into possession of the premises and pay rental to Canada Life of \$2,778 for the months of November and December of 1990, increasing to \$3,384 in January of 1991, and remaining at that figure for the balance of the tenancy;

(b) assume a loan (\$80,000) from the Royal Bank incurred for the purchase of the capital equipment required to operate Manhattan Gourmet, requiring monthly payments to the Bank of \$2,100 each;

(c) pay \$4,000 for inventory.

11 Any arrears of rent outstanding to Canada Life would be assumed by Mr. Gillespie.

12 Ms. Stewart took over possession as of November 5, 1990, and then approached the Royal Bank about entering into arrangements for the use of the equipment. On completion of those arrangements, she commenced to make the \$2,100 monthly payments to the Bank. In fact, she paid a total of \$27,000 to the Bank from November of 1990 to mid-April of 1992, having negotiated a reduction in the monthly payments, in November of 1991, from \$2,100 to \$1,300.

13 She paid Mr. Gillespie the \$4,000 for the inventory and paid on a reasonable, timely basis the rental payments to Canada Life for November and December, 1990. She also made cash payments to the landlord's representative, representing contribution towards advertisements for the Mall, merchant association charges, etc.

14 Gary Foster, commercial property manager of Pioneer Property Management Limited, manager of the Truro Mall, and agent for Canada Life, met with Ms. Stewart shortly after she commenced operations on November 5th. He was pre-occupied with pre-Christmas season activities in the Mall, and no steps were then taken to finalize the terms of a tenancy. While he mentioned Gillespie owed arrears of rent, Ms. Stewart told Mr. Foster that she would not be responsible for those arrears.

15 They met again in January of 1991. Ms. Stewart explained to him the nature of the arrangements that she had entered into with Mr. Gillespie and the Bank. Mr. Foster testified:

... at that time, Art Gillespie, who was on the lease at that time, was in default under the lease, and I suggested ... I right out told her to enter into a deal like that is ridiculous, we can simply go in, terminate that lease.

16 On being advised that she was operating a fast food service at Porter's Lake, Foster testified he told her that she should relocate the equipment from that location so that she would not have to assume the loan to the Bank or pay anything for Mr. Gillespie's business.

17 She responded that she was already committed to the arrangements made with Mr. Gillespie and the Bank.

18 After Ms. Stewart had made two payments to the Bank on the chattel mortgage (aggregating \$4,200) and signing a personal guarantee with the Bank for the \$80,000 indebtedness, Mr. Foster advised her, in January 1991, that she would be responsible for outstanding arrears of rent of \$11,000. Part of the arrears included the sum of \$3,602.32, which Mr. Foster had calculated that Mr. Gillespie owed; part consisted of rent for the month of November, which Mr. Foster assumed, incorrectly, had not been paid by Ms. Stewart, and the balance was not only unexplained, but subsequently determined to be not outstanding. In fact, the only rental arrear outstanding by Ms. Stewart was rent for the month of January 1991.

19 Ms. Stewart denied any responsibility for Gillespie's arrears, and maintained that she had, in fact, paid the November rent.

20 Mr. Foster ignored her protests, and caused the sheriff to execute a distress for rent on her chattels on February 8, 1991, for \$11,448.88. At that time, only the rent for the month of January was in arrears. The parties had apparently agreed that rental payments were not due in advance, but on the 1st of the month.

21 Mr. Foster continually pressed Ms. Stewart to execute a written lease containing a term requiring her to assume Gillespie's arrears.

22 In June of 1991, Mr. Foster finally presented a lease to her for signature. Ms. Stewart deposed in an affidavit:

Mr. Foster led me to believe that if I did not pay for Mr. Gillespie's rent, I would be the one to suffer. It was only because of these threats that I made this agreement.

23 Ms. Stewart executed the lease without the benefit of legal advice.

24 One of the schedules stipulates that Ms. Stewart received vacant possession of the premises on May 15, 1989.

25 Mr. Foster testified:

Our interpretation of the lease is that she was going to ... whether she was physically in there operating or not, she

was in charge of that lease from the day it opened for business in 1989 ... *I still have rental arrears and I have my guys get our money.* [Emphasis added.]

26 Section 11.09 of the lease, entitled *Rent Past Due*, provides as follows:

If the Tenant shall fail to pay when due any rent or other amounts payable under this lease, the Tenant shall pay interest thereon at the greater of:

(a) twenty-four (24%) percent per annum; and

(b) six (6%) percent per annum in excess of the prime commercial lending rate charged from time to time by any Canadian chartered bank designated from time to time by the landlord;

calculated, compounded and payable daily, on the unpaid amount from the date due until paid, both before and after judgment.

27 Section 15.18, entitled *Partial Invalidity*, provides as follows:

If any term or provision of the lease or the application thereof to any person or circumstance shall to any extent, be invalid or unenforceable, the remainder of this lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term and provision of this lease shall be valid and be enforceable to the fullest extent permitted by law.

28 Pioneer's records were apparently difficult to interpret, but it would appear that Ms. Stewart, as of the end of July, owed approximately \$13,500 in rent arrears.

29 On August 5, 1991, pursuant to an arrangement worked out between Ms. Stewart and Mr. Foster, Ms. Stewart commenced paying \$1,000 per week to Mr. Foster on account of arrears, and to meet current rent commitments. Mr. Foster acknowledged that sometimes proceeds were applied to current monthly rent, and sometimes they were applied to Gillespie's arrears Foster maintained were still outstanding.

30 Apart from one N.S.F. cheque, delivered on August 12, 1991, Ms. Stewart lived up to her terms of the bargain, paying \$1,000 a week to Foster.

31 The next written communication between the parties was a formal demand for payment, dated November 26, 1991, served on Ms. Stewart by Canada Life's solicitor on Foster's instructions.

32 The letter advised that Ms. Stewart was in default of the lease because of non-payment of monies. The arrears demanded were as follows:

(a) Rent as of November 12, 1991	\$23,362.86
(b) Interest in accordance with 11.09 of the lease	22,292.68
(c) G.S.T. on interest	1,560.49
(d) Legal Costs	125.00

Total	\$47,341.03

33 The letter also advised that the landlord had a lien on all "stock-in-trade, inventory, fixtures, equipment and prop-

erty on the premises as security against loss or damage resulting from such default. The stock-in trade, inventory, fixtures, equipment or property is not to be removed until such default is cured."

34 Mr. Foster subsequently acknowledged that the claim set forth in the letter was "grossly incorrect," and arose as a consequence of miscommunication between him and his solicitor.

35 No letter of correction, however, was forwarded to Ms. Stewart.

36 Ms. Stewart testified that:

... in response to this letter, that I disagreed with the amount alleged to be due and owing under the letter and maintained that I was not responsible for payment of arrears, and that they had failed to account properly for the rental cheques that I had made payable to them. That Mr. Foster maintained that my lease was over and that the landlord was terminating my tenancy. However, he continued to accept cheques from me through to December 2, 1991, when he accepted a cheque from me for One Thousand Dollars (\$1,000.00). I also paid him One Thousand Dollars (\$1,000.00) in cash on that same occasion. That I told Mr. Foster that as my lease was terminated on the basis of completely wrong allegations, I was not going to pay any more rent until the matter was straightened out. However, I believe that I did pay two months' rent from the period of December 1991 through to April of 1992.

37 On approximately April 15, 1992, Mr. Foster served Ms. Stewart with a notice of termination, calling upon her to vacate the premises as of Monday, April 20, 1992.

38 Shortly after April 15th, Mr. Foster gave permission to Mr. Gillespie to enter the demised premises and to remove the equipment charged under the Royal Bank's chattel mortgage. He did not advise Ms. Stewart of this arrangement.

39 In the agreed statement of facts entered as an "exhibit" at the trial, it is stipulated:

Following presentation of the termination notice, the premises were locked up and secured by representatives of the landlord. A few days of this occurring, the landlord permitted representatives of the prior tenant to enter into the premises on a weekend and remove from the premises all the chattels contained therein.

40 The evidence at trial indicates that Mr. Gillespie caused the chattels to be removed on Sunday, August 19, 1992.

Background

41 Canada Life commenced action in May of 1992 against Ms. Stewart for arrears of rent, interest on the arrears, merchant association dues, and other charges, consequent upon her failure to live up to the terms of the lease executed on June 11, 1991.

42 Her defence alleged, in part, that the claims were "unlawful and/or unconscionable." The only relief requested was that the action be dismissed with costs.

43 No counterclaim was filed on her behalf.

44 In October of 1992, Ms. Stewart commenced action against Pioneer Property Management Limited, manager of the Truro Mall, and agent for Canada Life, the owner, claiming that as a result of Pioneer's non-performance, Ms. Stewart had suffered losses as a result of rent paid in the amount of \$37,000 and expenses for equipment in the amount of \$27,000.

45 It was apparently conceded by counsel that any claim Ms. Stewart advanced against Pioneer would be treated as a claim against Canada Life.

46 At the commencement of trial on July 22, 1993, an order was taken out consolidating the two actions, with Canada Life assuming the obligation to first lead evidence.

47 Only two witnesses gave evidence at trial, Gary Foster, Commercial Property Manager for Pioneer, and Ms. Stewart.

48 At the conclusion of Mr. Foster's cross-examination, a severe thunderstorm passed through the area. The recording equipment, according to the stenographer's certificate, failed to operate for a period of approximately 20 minutes. It was suggested by Canada Life's counsel, at the hearing of the appeal, that the interruption would embrace more than 20 minutes.

49 There is no transcript available for any of Ms. Stewart's examination in chief, nor a substantial part of her cross-examination.

50 This Court's task in reviewing the facts was assisted by:

1. Agreement of counsel for Canada Life and Ms. Stewart that the Court should have access to the trial judge's notes, as well as four affidavits used in pre-trial motions, three of which were deposed by Mr. Foster, and one deposed by Ms. Stewart.

2. An agreed statement of facts filed as an exhibit before the trial judge.

51 While Ms. Stewart was represented by counsel, from the time litigation commenced up until after trial, she has conducted her own appeal.

52 The grounds of appeal advanced by her are as follows:

1. That the learned trial judge erred in finding against the weight of the evidence in favour of the respondent;

2. That the learned trial judge erred in failing to consider that representatives of the respondent were responsible for obtaining the signatures of the appellant on the lease by false pretences, thereby avoiding [sic] the lease itself;

3. Such other grounds of appeal as may appear.

53 Her brief factum, filed a month in advance of the hearing of this appeal, embraced issues not specified in the grounds of appeal, namely:

Now I want to be compensated for everything that has happened such as: bad faith, harassment, embarrassment, (putting Sheriff notes on the business), taking my money only to rope me into signing a lease (June 1991), and then behind my back, talk to people in an effort to take over my business or the space month after month with no intention of letting me stay there. Mentally I will be scarred for life and so will the rest of my family.

54 She also requested in her factum a retrial on the grounds:

... my evidence was not documented due to a thunderstorm in the area as well as the fact that other people or witnesses to the events were not called upon to speak or testify on my behalf regarding the situation in Truro.

55 Counsel for Canada Life summarized in his factum the allegations he considered were raised by her "as gleaned from the notice of appeal and her factum."

56 This Court asked counsel for Canada Life to address the issue of whether Ms. Stewart should be entitled to an award of punitive or aggravated damages in view of the trial judge's conclusions concerning the "economic duress" imposed by Mr. Foster on Ms. Stewart.

57 Counsel submitted that the facts would not justify an award of either punitive or aggravated damages, and further, no relief of that nature had been requested by or on behalf of Ms. Stewart at any stage of the proceedings.

Findings of the Trial Judge

58 Acknowledging that Ms. Stewart was a very capable and hard-working individual, the trial judge commented on her lack of business experience and naiveté.

59 He referred to Pioneer's "sloppy bookkeeping or business practices," which led to difficulties between the parties.

60 He characterized the February 1991 distress for rent, and the November 26, 1991 demand letter, as indicative of the "heavy handed methods" employed by Canada Life in dealing with Ms. Stewart.

61 He continued:

This abuse of power, going beyond the legal rights which the plaintiff actually enjoyed, *set the stage for subsequent events*. The defendant, while very ambitious and hard-working, was at a severe disadvantage in any dealings that she had with the plaintiff ... The plaintiff, through Mr. Foster, used the threat of closure or termination of the tenancy to induce the defendant to sign the lease, requiring the defendant to pay the arrears of the prior tenant. (Emphasis added.)

62 The trial judge stated:

The economic duress, in terms of consequences for the defendant, are equated to the situation in the case of *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation*, [1982] 2 All E.R. 67.

63 The trial judge concluded that Ms. Stewart faced "catastrophic losses" if her operations were closed by Canada Life in June of 1991, and accordingly she was obliged to sign the lease prepared by Mr. Foster in order to protect the investment she had made.

64 In demanding Ms. Stewart pay Gillespie's arrears, Mr. Foster was demanding something that "was not a legal right," and, accordingly, the trial judge found or determined that the terms of the contract relating to payment of Gillespie's arrears were void.

65 He further determined that there was no evidence to indicate that Ms. Stewart was in any way influenced to agree to the other terms of the lease. Since there was no evidence to indicate the lease varied from the standard negotiated by Canada Life, nor any evidence that the provisions were "unduly harsh or oppressive," the trial judge relied on s. 15.18 to hold the balance of the lease valid.

66 He accordingly held that Canada Life was entitled to rental arrears, three months' accelerated rent, interest at 24 per cent per annum, and a contribution to merchant association charges.

67 With respect to the counterclaim advanced by Ms. Stewart, he concluded:

Ms. Stewart continued to operate until April 15, 1992, at which time she left the premises. Mr. Foster, on April 19, 1992, allowed Mr. Gillespie to enter the premises and remove all of the equipment owned by the defendant. There is no evidence of any legal authority before the court which would justify Mr. Foster allowing Mr. Gillespie to remove the defendant's equipment from the premises.

68 While accepting the evidence that Ms. Stewart had paid \$27,000 in loan payments to the Bank, the trial judge concluded that:

There is no evidence to indicate the actual value of the equipment, or what the potential liability of Ms. Stewart is to the Royal Bank in relation to the balance of the loan payment.

I am not satisfied, on the very limited evidence as presented to the court, that Ms. Stewart incurred any damages as a result of the plaintiff allowing Mr. Gillespie to remove the equipment. There is simply not sufficient evidence before the court to determine quantum of damages, if any, that Ms. Stewart incurred, or stands to incur, as result of the removal of the equipment.

Issues

69 The issues raised in this appeal are as follows:

1. Should Ms. Stewart be entitled to a new trial, since her examination in chief and part of her cross-examination are not available?
2. Has the trial judge committed error in permitting Canada Life to recover damages arising out of certain provisions of the written lease, in light of the tactics employed by Canada Life's agent?
3. Has the trial judge committed error when he concluded there was not sufficient evidence to establish that Ms. Stewart suffered damages in light of the tactics employed by Canada Life's agent, and should Ms. Stewart be entitled to aggravated or punitive damages?

Issue One

Should Ms. Stewart be entitled to a new trial, since her examination in chief and part of her cross-examination are not available?

70 It is clear that a new trial is not ordered simply because a transcript cannot be obtained, but only when required by the interests of justice (*Peeverley v. Arctic Construction Ltd.* (1966), 56 D.L.R. (2d) 701 (B.C. C.A.)).

71 In addition to the trial judge's opinion of slightly in excess of twelve pages, the Court has been greatly assisted by the opportunity of reviewing the typed transcript of almost 80 pages, twelve and one-half pages of handwritten notes of the trial judge, the four affidavits, and the agreed statement of facts.

72 There is no suggestion by counsel for Canada Life, or Ms. Stewart, that the notes of the trial judge are deficient, or that he failed to deal with any of the issues raised.

73 I conclude that a new trial would not advance the interests of justice, and accordingly dismiss this ground.

Issue Two

Has the trial judge committed error in permitting Canada Life to recover damages arising out of certain provisions of the written lease, in light of the tactics employed by Canada Life's agent?

74 The trial judge severed any offensive provisions in the written lease requiring Ms. Stewart to pay Gillespie's arrears, and held the rest of the lease to be valid.

75 The association between Canada Life and Ms. Stewart should be viewed in light of the trial judge's findings that, although a very capable and hard-working individual, Ms. Stewart was somewhat naïve, and not an experienced business person.

76 Her lack of business sophistication should be contrasted with that of Mr. Foster, who had many years' experience in the property management field, and was fully conversant with commercial leases.

77 The evidence conclusively determines that this was not a case where Mr. Foster was moved solely by his own self-interest, "unconscious of the distress he was bringing to the other" (*Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, per Denning, M.R., at p. 765), but rather a case where Mr. Foster, conscious of the inequality of bargaining power, imposed terms that *he knew Ms. Stewart would be required to accept in order to avoid catastrophic financial losses*:

— At the time of the first meeting *on or about November 5, 1990*, Mr. Foster initially indicated to her that Gillespie was in arrears of rent. She responded that while she would not be responsible for rental arrears, but that she would attempt to secure payment of the arrears from Gillespie.

— The trial judge concluded that Mr. Foster did not advise Ms. Stewart *until January of 1991* that she would be responsible for Gillespie's arrears. Mr. Foster further stated that she was responsible for an outstanding amount of \$11,000. At this point, he was aware that she had arranged to take over an obligation to the Royal Bank in the amount of \$80,000, and had already paid approximately \$10,000 in rent and mortgage payments. Mr. Foster's estimate of arrears of \$11,000 was grossly inaccurate. The arrears to Gillespie, according to Foster's calculation, only amounted to \$3,600. Foster had further failed to take into account a payment of \$2,800 made by Ms. Stewart for the month of November. The trial judge was satisfied that Ms. Stewart again informed Mr. Foster that she would not be responsible for the rental arrears.

— Notwithstanding Ms. Stewart's position, Mr. Foster caused the sheriff to distrain for rent on *February 8, 1991*, for a sum in excess of \$11,000. Ms. Stewart's total obligation at that time could not have exceeded \$3,300. The trial judge concluded that the excessive distress for rent was indicative of "the heavy handed methods" Foster used in dealing with Ms. Stewart.

The trial judge made the further important finding that "this abuse of power, going beyond the legal rights which the plaintiff actually enjoyed, set the stage for subsequent events."

— Mr. Foster's knowledge of Ms. Stewart's lack of business sophistication was apparent to him from the very outset. He suggested to her that it was ridiculous for her to enter into negotiations with Gillespie, or to negotiate with the Royal Bank for the equipment. He advised her that he would distrain for rent, terminate the tenancy with Gillespie, and enter into new negotiations with her, and that she should use her Porter's Lake equipment to operate Manhattan Hot Dog. This position, resulting in the landlord giving up any right to collect rental arrears from Ms. Stewart, was abandoned by Foster almost within 24 hours. Ms. Stewart's unwillingness to accept Foster's proposal, based upon her

assertion that she had already made arrangements with the Bank and Mr. Gillespie, was an indication of the quality of the person with whom he was dealing.

— The trial judge found that Mr. Foster threatened to terminate the tenancy to induce Ms. Stewart to sign the lease. It is significant that the written lease was not presented to her *until June of 1991*, when she faced catastrophic losses if her operations were closed.

— After the lease was executed, Ms. Stewart and Mr. Foster entered into an arrangement in August of 1991, wherein she agreed to pay \$1,000 a week to retire the Gillespie arrears, as well as her own arrears. With the exception of one payment of \$1,000 on August 12th (a cheque which was returned N.S.F.), she lived up to her side of the agreement, and made 17 payments of \$1,000 each from August 5th until the end of November.

— The only written communication she received during this period of time was a letter sent by Canada Life's solicitor, demanding \$47,341. The trial judge commented as follows:

I note that Mr. Foster, on behalf of the plaintiff, instructed his solicitor to demand the sum of \$47,341.03, when in fact rental arrears and all monies due by Ms. Stewart and her predecessor would not have totalled anything approaching \$47,000. Mr. Foster indicated to the court that this demand letter was definitely an error between he and his solicitor, yet he had never informed the defendant of the fact that this amount was incorrect.

It is not difficult to imagine the concern and upset caused to Ms. Stewart by actions of this kind. Notwithstanding her disagreement with the amounts alleged to be owing, according to her affidavit, Mr. Foster maintained that the lease was over, and that he was terminating her tenancy. She responded by advising him that "as my lease was terminated on the basis of completely wrong allegations, I was not going to pay any more rent until the matter was straightened out."

She continued, however, to make payments to the Royal Bank on the chattel mortgage.

— On April 15, 1992, a formal Termination of Tenancy was served upon her, requiring her to leave the premises by Monday, April 20th. The premises were padlocked, and Foster then gave permission for Gillespie to enter on Sunday, April 19th, and remove all of the equipment used in the operation of the business.

78 Foster's insistence on Ms. Stewart executing the lease was unconscionable by any community standard of commercial morality (*Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (B.C. C.A.)).

79 This is not a case of inequality of bargaining power — Ms. Stewart had no bargaining power. Foster knew this to be the case, and took advantage of it.

80 The economic duress exercised by Mr. Foster, in my opinion, invalidates the execution of the lease by Ms. Stewart, and renders the lease a nullity.

81 To permit Canada Life to take advantage of the severability provisions in the very document its agent forced Ms. Stewart to execute would be to condone Foster's abuse, and to "perpetrate an injustice and produce an unfair result" (*The Law of Contract in Canada*, G.H.L. Fridman, 3d edition (Toronto: Carswell, 1994), p. 325).

82 I would accordingly relieve Ms. Stewart of any obligation under the lease.

83 Canada Life should, however, be entitled to a claim for reasonable rent for those months Ms. Stewart occupied

the premises.

84 In November of 1990, a few months before Foster commenced asserting undue pressure, Ms. Stewart agreed to a rental, commencing January 1991, of \$3,384 per month. This was a rent negotiated by the parties, who, were at the time, equal in bargaining power.

85 The order taken out before the trial judge, in the presence of Ms. Stewart, provided that Ms. Stewart should pay rental arrears in the amount of \$25,641.15.

86 I would, therefore, set aside the award of damages made by the trial judge in the amount of \$55,137.42, and substitute the figure of \$25,641.15, representing the rental arrears agreed upon.

Issue Three

Has the trial judge committed error when he concluded there was not sufficient evidence to establish that Ms. Stewart suffered damages in light of the tactics employed by Canada Life's agent, and should Ms. Stewart be entitled to aggravated or punitive damages?

87 The trial judge concluded that:

there was no evidence to indicate the actual value of the equipment, or what the potential liability of Ms. Stewart is to the Royal Bank in relation to the balance of the loan payment,

and accordingly dismissed her counterclaim.

88 In addition to determining that there was no legal justification for Foster to allow Gillespie to remove the equipment, the trial judge had the following evidence before him:

1. The chattel mortgage between the Bank and Hub Town Foods Ltd. (Gillespie's company), dated August 8, 1989, recites a loan for the purchase of the fast food equipment in the amount of \$90,000;
2. At the beginning of November, 1991, the loan stood at approximately \$80,000, and that was the amount Ms. Stewart agreed to pay for the equipment;
3. Ms. Stewart paid to the Bank, on account of the loan, \$27,000 over the next 18 months. This would, of course, include payments for interest, at the rate set out in the chattel mortgage, as well as payments on account of principal;
4. The replacement value of the articles taken by Gillespie were estimated at \$62,475 in an exhibit filed during the trial;
5. Ms. Stewart deposed in her affidavit that the seizure "effectively left me unable to continue to operate the business and placed me in a position where I could no longer pay rent."

89 There is no evidence that the Bank was dissatisfied with Ms. Stewart's performance, or that it was planning to take any steps to repossess the equipment.

90 While the evidence is limited, and while it may be difficult to quantify the damages, such difficulties should not be a deterrence when the aggrieved party has a just cause (*Jarvis v. Swans Tours Ltd.*, [1973] 1 All E.R. 71 (C.A.)).

91 I am further of the opinion that this is an appropriate case for an award of aggravated damages.

92 In *Vorvis v. Insurance Corp. of British Columbia* (1989), 58 D.L.R. (4th) 193 (S.C.C.), McIntyre, J., stated at p. 202:

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose.

93 Foster acted with a callous disregard for Ms. Stewart's rights, and treated her legitimate protests with contempt.

94 The effect of his actions were to terminate her business.

95 Unlike the situation in *Vorvis* (supra), where the trial judge concluded that the previous conduct of the defendant was not considered sufficiently offensive, standing alone, to constitute actionable wrong, I conclude that the actions of Foster, as detailed above, commencing in January of 1991, and continuing until mid-April, 1992, were sufficiently offensive to constitute a wrong for which Ms. Stewart should be compensated.

96 I would allow the counterclaim, and assess damages in the amount of \$27,000, including an award for aggravated damages.

97 While the pleadings filed on Ms. Stewart's behalf did not specifically request aggravated damages, her defence pleads that Canada Life's claims were unlawful "and/or unconscionable."

98 Canada Life could reasonably expect, in view of this plea, and also in view of the very detailed allegations raised in her affidavit, filed some six months before trial, that a claim for aggravated damages would be advanced.

99 The actions of Mr. Foster from early January of 1991 until April, 1992, were so divergent from the standards of business morality in this community that an award of punitive damages could be considered.

100 I have concluded, however, the assessment of damages on the counterclaim in the amount of \$27,000 is not only sufficient as compensatory damages, but also serves the "second purpose of punishment or deterrence" (see the comments of Lord Reid in *Cassel & Co. v. Broome*, [1972] A.C. 1027, at p. 1089, as well as *Amirault v. Westminster Canada Ltd.* (1994), (sub nom. *Coughlan v. Westminster Canada Ltd.*) 127 N.S.R. (2d) 241, at p. 300 (N.S. C.A.)).

Conclusion

101 I would allow the appeal, set aside the award of the trial judge, allow the counterclaim in the amount of \$27,000, against which I would set off the sum of \$25,641.15 for rental arrears, leaving a balance outstanding to Ms. Stewart of \$1,358.85.

102 As Ms. Stewart was represented by counsel at trial, I would award her trial costs to be taxed on Scale 3, with the amount involved deemed to be \$56,000.

103 Ms. Stewart conducted her own appeal. In other jurisdictions, a successful litigant, not a solicitor, who appears in person is not entitled to costs (M. Orkin, *The Law of Costs* (Aurora, Ont.: Canada Law Book, November, 1993), p. 2-62).

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104 In the light of the reasons of this Court in *McBeth v. Dalhousie College & University* (1986), 72 N.S.R. (2d) 224, I would award costs on the appeal to Ms. Stewart in the amount of \$500.

Appeal allowed.

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