Editor's Note: An Erratum was issued by the court for the following decision. The decision was corrected by the Court; the text of the erratum has been appended to this decision.

Date: 20040909
Docket: CI 98-01-07433
Indexed as: Pensionfund Realty Limited et al
v. Keg Restaurants of Manitoba Ltd. et al
Cited as: 2004 MBQB 206
(Winnipeg Centre)

2004 MBQB 206 (CanLII)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

PENSIONFUND REALTY LIMITED and P.C.E.P. PROPERTIES LTD.,

Plaintiffs,

- and -

KEG RESTAURANTS OF MANITOBA LTD., KEG RESTAURANTS LTD., KRAFT CANADA INC., UPTOWN LIMITED PARTNERSHIP and GULP FOOD SERVICES LTD.,

Defendants,

- and -

GRAPES CANADA LTD.,

Third Parties.

Mark Newman and Lana L. Foley for the Plaintiffs

Michael Tracey for the Defendants Keg Restaurants of Manitoba Ltd. and Keg Restaurants Ltd.

Kelly Dixon for the Defendant Kraft Canada Inc.

No one appeared for Uptown Limited Partnership, Gulp Food Services Ltd. or Grapes Canada Ltd.

Judgment delivered: September 9, 2004

McCAWLEY, J.

2004 MBQB 206 (CanLII)

[1] The plaintiffs sue for arrears in rent with respect to commercial premises located in downtown Winnipeg. The action involves the "original premises" comprised of 7,073 square feet and an adjacent 1,148 square foot atrium (the "expansion space").

[2] The complicated facts underlying the various leases, assignments of leases and re-assignment entered into by successive tenants were essentially not in dispute.

[3] Briefly, the original premises were first leased to Canterbury Foods Ltd. for the purpose of carrying on a restaurant business. Canterbury's obligations were subsequently assumed by General Foods Inc. which, in June 1982, sublet the original premises to a corporation carrying on a restaurant business as "The Keg Prime Rib". In November 1984 Keg Restaurants of Manitoba (Keg Manitoba) assumed all rights and obligations under that sub-lease which was assigned to Keg Restaurants Ltd. (Keg) in October 1988.

[4] On December 31, 1989 General Foods renewed its lease with respect to the original premises for a 10 year period running to December 28, 1999. General Foods amalgamated with Kraft Limited to become Kraft General Foods Inc. which assigned its rights and obligations to Keg in June 1990. The landlord consented to this assignment on condition that Kraft remain liable in the event that Keg defaulted. On November 19, 1990 Keg Manitoba ceased operations and in December Keg assigned the original lease, as renewed, to Uptown Limited Partnership through its general partner Gulp Food Services Limited (collectively

referred to as "Uptown"). It was a condition of this assignment that both Kraft and Keg would remain liable in the event of default by Uptown.

[5] On December 30, 1990 the Prudential Assurance Company Limited entered into a lease with respect to the adjacent space directly with Uptown. In January 1991 a further agreement was entered into with Uptown amending certain terms of the original lease, as renewed, and Uptown began operating a restaurant business as a franchisee of Grapes Canada Limited (Grapes) in the leased space. In December 1995 that operation ceased and Uptown defaulted in its rent under both the original lease as renewed and amended and under the expansion lease on which four years still remained.

[6] When Grapes declined to remedy Uptown's default in breach of its indemnification agreement with Keg, the plaintiffs, now the landlord, levied distress against Uptown seizing furniture and equipment. Recognizing its liability for the performance of the lease, Keg purchased the furniture and equipment from the landlord and in February 1996 began paying rent for the original premises. In March 1996 Uptown re-assigned the original lease to Keg which continued paying rent until September 1997. Then, as a result of certain alleged conduct by the landlord, Keg determined its obligations were ended.

[7] Counsel acknowledged that Keg and Kraft were *prima facie* liable under the original lease, as renewed, and that Kraft was entitled to indemnification by Keg to the extent that Kraft might be found liable. The claim against Keg and Kraft with respect to the expansion space was abandoned at the beginning of the

2004 MBQB 206 (CanLII)

trial but it remained as against Uptown and Gulp which claim had been noted in default.

[8] It was also common ground that given the *prima facie* liability of Keg and Kraft, the burden of proof fell on them to demonstrate on a balance of probabilities that they were not liable. Kraft adopted the argument of Keg which raised various defences by which it claimed to avoid liability.

1. <u>Overcharging</u>

[9] Keg says that the plaintiffs knowingly and with a view to misleading it, sought payment of an amount greater than that which was due with respect to rent and hydro costs. Keg also alleges a breach of Section 6.04 of the original lease.

[10] The lease was a triple net lease. Accordingly, in December 1995 the landlord provided Uptown with an estimate of the total rent to be paid for 1996 for the original premises and the expansion space. Following Uptown's default, the landlord provided Keg with the same calculation in early January 1996. In a letter dated January 31, 1996 Keg's solicitor, Michael Tracey, requested a breakdown of the rent as between the original premises and the expansion space and indicated that the February rent would not be paid until the breakdown had been received.

[11] Concerned that Keg not be in default of its obligations, Diane Pugh on behalf of Keg independently calculated the rent to be paid by Keg for the original

2004 MBQB 206 (CanLII)

premises and that amount was approved by her superior, Neil McLean. A cheque was forwarded by Mr. Tracey to the landlord's solicitor, John Toone, by letter dated February 6, 1996. This was apparently before Mr. Tracey received Mr. Toone's breakdown under cover dated February 5, 1996 indicating the base rent to be $7,114.26 for the original premises. Diane Pugh's calculation of the base rent was $5,894.17 which was the correct amount.

2004 MBQB 206 (CanLII)

[12] The plaintiff's explanation for the difference was a mathematical error. It turned out that when the proportion of the square footage of the expansion space to the total space (13.96423%) was applied to the total rent payable being $8,268.92, the amount payable in respect of the expansion space was $1,154.70. When this was subtracted from the total rent it left $7,114.22 which effectively equaled the amount stated by Mr. Toone on behalf of the landlord.

[13] One might have expected the matter to end there except the difference in the two amounts also came close to the monthly rent for the expansion space. Keg's position throughout was it was not liable for the expansion space and the evidence disclosed that all parties were operating on this basis. At the same time they recognized the practical wisdom of finding an occupant for the total space which was "in reality a continuous space". However, until a new tenant was found arrears for the expansion space were accumulating.

[14] The issue became even more contentious when a letter written by Mr. Toone on behalf of the landlord to the property managers at the time, Merit Properties Ltd., dated February 4, 1997 came to light in the course of litigation.

It was written in response to Keg's request, due to an apparent overpayment, for an accounting of the hydro and gas consumption charges. Mr. Toone acknowledged to Merit that the lease for the expansion premises was "a stand alone Lease and not guaranteed by the Keg". Nevertheless, he stated he believed that the monthly rent being paid by Keg came close to covering the rent for the expansion space as well as the original premises although he did indicate this was not clear. He requested that Merit Properties direct any accounting through him so as to be dealt with on a "without prejudice" basis and acknowledged the accounting "presumably will result in a lower payment being made by Keg and a refund requested which may change matters". This was a reference to the potential partition of the space with a devising wall which the landlord was entitled to erect but which would have made leasing the original premises much more difficult. This and other correspondence demonstrated a certain inclination on the part of Mr. Toone to be less than forthright in his dealings with Keg and a willingness to engage in some hard-nosed bargaining. This discovery was understandably upsetting to Keg and its solicitor and clearly coloured their view of their dealings with the plaintiffs throughout these proceedings, although they were unaware of the letter at the time.

[15] Jim Neal and Dan Edwards, on behalf of the landlord, both denied any knowledge of any deliberate overcharging of rent. It was their understanding that Keg was never liable for the rent on the expansion space and they stated so categorically, as did numerous other witnesses. The fact that the plaintiffs

2004 MBQB 206 (CanLII)

maintained their position until the eve of trial that Keg was also responsible for the expansion space only exacerbated the situation. This was particularly so since the "one circumstance" under which liability might arguably attach did not present itself here.

[16] Whereas it is clear that the lawyer for the landlord exerted considerable pressure on Keg to pay rent for the expansion space, even while admitting Keg was not "legally" responsible but perhaps was "practically", the fact is that the amount of rent for the original premises was clarified and the higher amount was never sought or paid.

[17] A similar issue arose with respect to an alleged overcharging of hydro costs for the original premises. These costs were charged on the basis of a yearly budget. Section 7.01 of the original lease provided for equitable adjustments by the landlord in the event of changes in utility rates and taxes. Electrical charges were to be based on the tenant's check meter.

[18] The evidence disclosed that no adjustments were made in 1996 when Keg took control of the premises even though the space was unoccupied and it was obvious that utility consumption would be down. The evidence also disclosed that, as was standard in the industry, the landlord did not make mid-year adjustments or perform mid-year reconciliations, leaving this to be done after year-end. It was also the case that Keg had embarked upon a business plan in late 1995 and early 1996 to lease the space formerly occupied by Uptown and

2004 MBQB 206 (CanLII)

the expectation of all concerned was that a new operator would be quickly put in place.

[19] It appears that in these circumstances no one addressed their mind to the issue of utility charges until some months later when discussions were underway with a prospective tenant. In October 1996 Keg requested an accounting which resulted in a credit to it of approximately $33,800.00. When the adjustment was made the landlord overpaid Keg by about $5,000.00.

[20] It was argued that the landlord's conduct was sufficiently egregious as to amount to a fundamental breach of contract thereby relieving Keg of its obligations after February 1996. The law is clear that a breach of a fundamental contractual term entitling the innocent party to treat the contract at an end so far as performance is concerned is an exceptional remedy. The breach must be such that the innocent party is deprived of substantially the whole benefit it was intended they obtain (***Print Three Franchising Corp. v. McLellan Printing Inc.***, [2001] M.J. No. 3). Here the alleged breaches were matters of accounting which were remedied and appropriate adjustments made. The explanations for them were plausible and accordingly I find that the evidence falls short of establishing any breach of contract by the plaintiffs. In so finding, I am not unmindful of the underlying allegations of bad faith attributed to the plaintiffs with respect to this and the other defences raised. That allegation will be dealt with separately.

2. <u>Refusal to Consent to Re-Assignment</u>

2004 MBQB 206 (CanLII)

[21] Keg says that the landlord refused to consent to the re-assignment of the lease for the original premises back to it from Uptown unless Keg assumed liability for the entire premises which was a breach of a fundamental term amounting to repudiation.

[22] As noted earlier, in January 1996 Keg had embarked upon a business plan to find a new operator. According to Karen Penner, a property manager/administrator for the landlord from the fall of 1995 to January 1997, a prospect surfaced but went elsewhere because Keg was not in a legal position to deal with the premises. This prompted quick action on the part of Mr. Tracey and after some difficulty, as evidenced by correspondence in January, February and March 1996, he obtained the re-assignment of the lease from Uptown to Keg dated as of March 13, 1996. This was forwarded to the landlord and an executed copy was returned to Uptown.

[23] Despite Keg's arguments to the contrary, there was no evidence before the court of a clear and unequivocal request for the landlord to execute a consent to the re-assignment, or a clear and unequivocal refusal to do so. In making its claim, Keg relies heavily on a letter from Mr. Toone to Mr. Tracey dated April 23, 1996. Having received a copy of the re-assignment and presumably being well aware of the need for the landlord's consent, Mr. Toone wrote that the landlord was continuing to assert its position that "practically, if not legally" Keg was liable for the expansion space and that any consent by the

2004 MBQB 206 (CanLII)

landlord to any occupation would be contingent on arrears of rent for the expansion space being paid. The letter went on to say the following:

> ... The Landlord has forestalled action on arrears in Expansion Premises rent. Presently the Landlord has no intention to realize on its remedies under that Lease, wishing to co-operate with your client to enable your client to either occupy the total Premises or find another operator.

[24] It appears counsel for the landlord was intent on keeping all options open while hoping that a new tenant would take over the entire space and that a deal could be made. At the time of the letter, the total rental arrears for the expansion space was $11,627.88. There is no doubt that Keg was in a difficult spot, that Mr. Toone knew it and was continuing to put pressure on Mr. Tracey who also was hoping that a new tenant would be found for the entire space. This was best seen in Mr. Tracey's letter of February 6, 1996 in which he states:

> ... In other words, we are asking the Landlord to compromise his demands somewhat for the short term, with a view to ultimately recovering his losses with the introduction of a new operator.

[25] Given the sudden interest shown by Brannigan's immediately following Uptown's default, there was some reason for optimism and both parties wished to avoid a confrontation. Although Mr. McLean described the April 23, 1996 letter as the "defining moment" and indicated there had been some discussion by Keg about ceasing the rent payments, he testified that contrary to his advice the decision was made to continue to pay rent on the original premises on a without prejudice basis in order to avoid litigation. In hindsight, it appears his advice may have been worthy of greater consideration at least in that it may have caused Keg to clarify its position vis-à-vis the lease. However, in the

2004 MBQB 206 (CanLII)

circumstances, it was not unreasonable to hope that a new tenant would be found, a deal struck and a compromise reached with respect to the expansion space arrears. So the issue remained unresolved.

2004 MBQB 206 (CanLII)

[26] Although the plaintiffs expressed an initial intention to actively market the premises, they appear to have stepped back when Keg took the initiative, in order to limit their liability, and began looking for a new tenant both locally and nationally ultimately engaging Neuman Greenberg to assist. The evidence of Diane Pugh described in some detail the efforts made. The evidence also showed that Keg assumed *de facto* control of the premises and that Mr. Tracey was closely involved playing a role far beyond that of solicitor. Indeed he was described as Keg's "local representative" who had the keys to the premises, watered the plants and strategically placed buckets to catch the rain.

[27] No letter was written to the landlord's solicitor demanding its consent to the re-assignment. No proceedings were commenced under ***The Landlord and Tenant Act***, R.S.M. 1987, c. L70, by Keg despite its apparent willingness to begin a civil action when Uptown had earlier been uncooperative in giving its consent. The re-assignment was executed by Keg and returned to Uptown and business continued as if a consent had been signed.

[28] There was no evidence to support the defendants' contention that the landlord hampered Keg's access to the premises or in any way exercised "dominion and control" to the exclusion of Keg which continued in its efforts to find a tenant. The landlord cooperated on a day-to-day basis but never resiled

from its "first position" that Keg was liable for the expansion space as evidenced in a memo prepared by its property manager in January 1991.

[29] Keg made no complaint that the plaintiffs had failed to provide it with a consent to the re-assignment until April 1998, two years later when these proceedings were commenced and lines were formally drawn. Up until then, none of the actions of Keg or Kraft suggested any real concern. Indeed, in late 1996 and early 1997 during discussions involving a potential transaction with Gotkin/Braude Keg sought the consent of the landlord but the deal did not proceed.

[30] Section 16.05 of the lease requires that any waiver must be in writing. The plaintiffs say that despite this provision they waived their right to consent to the assignment or alternatively, that their consent should be implied by their conduct. Keg argues the failure to provide the consent to re-assignment amounted to a fundamental breach and repudiation of the contract. This position, however, flies in the face of Mr. Tracey's letter to Grapes dated April 15, 1996 in which he makes it abundantly clear he did not view the contract as being at an end.

[31] Had it attempted to do so, the landlord would have been unsuccessful in collecting the rents from Keg and then later asserting the lease was at an end because no consent had been obtained to the assignment [***St. Jane Plaza Ltd. v. Sunoco Inc.*** (1992), 24 R.P.R. (2d) 161 (Ont. C.J., Gen. Div.)] if liability attached to Keg on that basis alone. Similarly, Keg cannot, having engaged in

2004 MBQB 206 (CanLII)

conduct consistent with the affirmation of the lease, successfully assert two years later that it had been repudiated in early 1996. It cannot have it both ways. In my view both parties chose to avoid the issue but by their conduct the landlord implicitly consented to the re-assignment and by their conduct Keg implicitly accepted their consent.

2004 MBQB 206 (CanLII)

[32] Although counsel for Keg argues strenuously that this case falls within the facts of ***Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.*** (1989), 59 D.L.R. (4th) 1 (B.C.C.A.), that case is distinguishable on a number of grounds. One is that here there was no election by Keg at the time to terminate and by its conduct it affirmed the lease. Although Keg also argues that because the rent was paid "without prejudice", the typical contractual rules of affirmation do not apply, in the absence of any agreement by the landlord or other evidence that argument is unpersuasive.

[33] For the foregoing reasons I conclude that there is an insufficient basis on which to find there was a refusal on the part of the landlord to consent to the re-assignment and accordingly this defence fails.

3. Restrictive Covenant

[34] The Keg claims that the landlord breached the restrictive covenant contained in the original lease prohibiting the landlord from permitting the premises to be used "for the purpose of operating a dining restaurant with a concept or menu based on steak, roast beef or seafood or any or all of them" without the prior consent in writing of the tenant. This provision was

subsequently amended through a lease amendment agreement dated January 28, 1991 to include chicken after the December 1990 assignment of the lease by Keg to Uptown. Keg was therefore never entitled to protection with respect to chicken under its lease.

[35] This argument can be dealt with briefly. The J Sprat's Deli which operated from the building where the premises were located from the late 1980's was an open concept, fast food type of restaurant catering largely to the lunch crowd where one would come in for a quick meal and stay no more than 20 to 30 minutes. The evidence compellingly demonstrated that it was not a "dining restaurant" as any reasonable interpretation could be placed on those words. Neither did it have a "concept or menu" based on steak (it was not on the menu), roast beef or chicken. The suggestion that a roast beef sandwich or a chicken breast on a Kaiser bun at a deli offended the restrictive covenant is without foundation. The restrictive covenant did not preclude the operation of another restaurant in the building and whatever others may have said about permitted or restricted uses at any given time is irrelevant.

[36] There being no breach of the restrictive covenant, this defence likewise fails.

4. <u>Breach of Good Faith Duty</u>

[37] Keg invites the court to find that the plaintiffs breached their duty to act in good faith in performance of their contractual obligations amounting to repudiation. Lack of good faith was a common theme running throughout the

2004 MBQB 206 (CanLII)

various defences as well as the other grounds on which Keg and Kraft assert they should not be held liable.

[38] There is no question that Keg undertook its responsibilities with the utmost diligence and good faith. The same cannot be said of the plaintiffs who at times took very hard positions and at least appeared in some instances to be less than forthright in doing so. However, lack of good faith or the presence of bad faith is found nowhere in the pleadings. It is therefore not necessary to consider further this defence including Keg's argument about whether the general law of contract should be extended to include an obligation of good faith as the court was invited to do.

[39] In summary, I find the various defences raised by Keg and Kraft fail to relieve them of their obligations under the original lease.

Distress Sale

[40] Keg asserts that with respect to a distress sale that the landlord conducted in late 1999 to dispose of chattels remaining on the property, the landlord failed to obtain proper value for the goods. It abandoned its argument that the landlord also failed to comply with the provisions of ***The Distress Act***, R.S.M. 1987, c. D90, at the commencement of trial.

[41] Keg did not provide the court with any evidence with respect to the value of the chattels and equipment in 1999. They had been purchased for $47,900.00 plus G.S.T. by Keg more than 3½ years earlier in January 1996. The evidence the court was left with was that, after advertising in the *Winnipeg Free*

2004 MBQB 206 (CanLII)

Press the landlord obtained three bids - being $20,500.00, $17,500.00 and $16,500.00 respectively. It accepted the highest bid and realized a net amount of $17,143.00 which it credited to the claim against Keg and Kraft. In the absence of any other evidence, there is no basis on which to find a failure on the part of the landlord to obtain proper value for the goods.

2004 MBQB 206 (CanLII)

Mitigation

[42] Keg contends that the lease was terminated in 1996 and that the plaintiffs failed to mitigate their losses as they were legally required to do. The defendant Kraft says that the lease was terminated by no later than the date on which the statement of claim was issued being April 23, 1998. Kraft says the plaintiffs elected to terminate the lease then and initially framed their action as one for arrears up to the date of issuance of the claim, and damages representing the loss of revenue for the balance of the unexpired term of the lease obligations to December 31, 1999. The evidence disclosed that in September 1999 an offer was received from the Pony Corral which ultimately led to a new lease with that entity taking over the space in December.

[43] The original statement of claim states at paragraph 24:

> 24. The Plaintiffs have acted reasonably in attempts to mitigate, but to date have been unable to effect a mitigation. Accordingly, the Plaintiffs are entitled to the outstanding arrears as well as damages for loss of revenue for the balance of an unexpired term and the Plaintiffs so claim. The Plaintiffs also claim interest and costs to which they are entitled as more particularly described in the Lease.

[44] Although the statement of claim was subsequently amended, I am satisfied that the lease was effectively terminated by the plaintiffs as of April 23,

1998 and that as of that date the plaintiffs were under a duty to mitigate their damages in accordance with the decision of the Supreme Court of Canada in ***Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.***, [1972] 2 W.W.R. 28. That case considered a range of damages which a landlord may claim where a tenant has repudiated in a commercial context. Although the landlord said it did not terminate the lease until December 1999 and did not take control of the premises until then, the ***Highway Properties*** case makes it clear that the various avenues of recourse available to the landlord are mutually exclusive. It also contemplates a fourth avenue whereby, as here, the landlord elects to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. ***Highway Properties*** and other authorities cited by counsel also state that in a commercial context where the tenant has defaulted and the landlord proceeds on the premise that the lease remains in force, that there is no duty on the landlord to mitigate its loss. Applying those principles here, the landlord's duty to mitigate arose after April 23, 1998. It then falls to the defendants to establish that the plaintiffs failed to take reasonable steps to mitigate their losses.

[45] As noted earlier, in early 1996 Keg engaged in a comprehensive search to find a new tenant for the premises. The evidence of Diane Pugh outlined the efforts made by Keg between January 1996 and August 1997 when it made its last rent payment. The court also heard evidence as to the criteria Keg

2004 MBQB 206 (CanLII)

developed which any serious prospect would have to meet. These included sufficient money to complete a renovation or improvement; experience in the operation of a restaurant so there was some prospect of success; sufficient credit worthiness to back up the ongoing financial obligations under the lease; and an adequate business plan. After close to two years of attempts to lease the space, no offer was received from a tenant who met these criteria. Discussions had been undertaken with the Rib Shack after a proposal was received, but Keg balked at the requirement of a subsidy of approximately $110,000.00 per year.

[46] The court heard evidence from a representative of WOW Hospitality Concepts Inc. with respect to their interest in a new concept involving an Asian bistro to be operated in the premises. Doug Stephen testified that WOW made an offer to lease in March 1998. There were a number of reasons why the transaction ultimately did not proceed which, from the landlord's perspective, included:

(a) WOW wanted the landlord to contribute $310,000.00 towards the cost of tenant improvements;

(b) WOW was only prepared to provide a letter of credit or other security to the landlord of $110,000.00;

(c) WOW wanted an exclusivity against any further and future restaurant or food usage in the building except for the existing J Sprat's Deli;

none of which the landlord was prepared to provide.

2004 MBQB 206 (CanLII)

[47] Although Keg felt the landlord acted unreasonably, it failed to explain how, for example, it was reasonable for Keg to have earlier refused to provide a $250,000.00 improvement allowance without receiving repayment of it in the form of higher rent and yet be critical of the landlord's refusal to contribute $310,000.00 to facilitate the WOW deal. As well, some caution on the part of the landlord was justified because of the recent history at that location and the fact that the restaurant business is known to be risky. The plaintiffs were also under no obligation to accept an offer which would put them to unreasonable expense in order to make a deal (Treitel, *The Law of Contract*, 10th Ed. (1999) p. 911).

[48] Much of the evidence of Keg with respect to the plaintiffs' alleged failure to mitigate related to events prior to April 23, 1998. The WOW prospect was the only one which presented itself after that. Although there is some legitimacy to Keg's assertion that the landlord delayed in responding to WOW's offer (two months) without any convincing explanation, there were legitimate business and logistical reasons for the deal ultimately not going through which had nothing to do with the delay.

[49] In support of its argument that the plaintiffs were not committed to finding a tenant confident in the knowledge that they could look to Keg to cover the rent, Keg points to the fact that the plaintiffs never installed any signage to facilitate the marketing of the premises until December 1998; that between September 1998 and September 1999 the property manager at the time,

2004 MBQB 206 (CanLII)

Morguard, conducted only four showings; and that Morguard included the original premises and expansion space in its marketing property report for the first time in June 1999 just five months before the end of the renewal term. There was also evidence that at this time the premises were being treated as one space and the rent being sought was $13.00 a square foot not $10.00 a square foot, which was the rate for the original premises and approximates the amount being paid by the current tenant. Jim Neal also acknowledged that on one occasion a prospect was told the rent was as much as $15.00 a square foot which was above market at the time.

[50] Overall the evidence demonstrates a less than aggressive approach on the part of the plaintiffs and its agents after April 1998 to find a tenant. It is not difficult to see why, in the context of the hard-nosed approach taken by the landlord through their counsel on other issues, some mistrust arose on the part of Keg accompanied by a belief that this was a deliberate strategy.

[51] On the other hand, Keg's own difficulties in marketing the premises despite its serious efforts over a twenty month period and the obvious fact that the longer the space sat vacant the more difficult it was to lease were also significant factors. When all is said and done, despite numerous showings and some other interest, throughout the whole period beginning in 1996 only three prospects were prepared to write an offer. No other evidence was ever put before the court of any other serious prospects.

2004 MBQB 206 (CanLII)

[52] Overall I find that Keg's claim that the plaintiffs failed to take reasonable steps to mitigate has not been proved.

Health Code Infractions

[53] Although Keg purported to include in its arguments alleged health code infractions of which Keg was never made aware, this issue was not included in the pleadings and need not be dealt with further.

Calculation of Damages

[54] The plaintiffs' claim for damages from each of the defendants to November 1999 was set out in a detailed calculation. The amounts were not at issue except for the rate of interest. The rate claimed is in accordance with Section 4.03 of the original lease and was also addressed briefly in the evidence of Neil McLean who admitted on cross-examination that Keg has entered into a number of leases bearing similar interest rates. I see no reason to interfere with the rate of interest to which the parties contractually agreed.

[55] The plaintiffs also argue that, although the lease was terminated in November 1999 under the agreement with the Pony Corral, no rent was payable for the month of December. They claim $5,894.00 representing one month's rent on the original premises at $10.00 per square foot. In my view this claim is not properly payable. The landlord was free to make whatever contractual arrangement it wished with the new tenant. That the arrangement included one month's free rent is not the responsibility of the defendants.

2004 MBQB 206 (CanLII)

[56] In accordance with the foregoing reasons,

1. The plaintiffs shall have judgment inclusive of interest at Toronto-Dominion Bank prime plus 5% to the end of August 2003 and thereafter at the same rate as follows:

   (a) jointly and severally as against the defendants Uptown Limited Partnership and Gulp Food Services Inc., Keg Restaurants of Manitoba Ltd., Keg Restaurants Ltd. and Kraft Canada Inc. with respect to the original premises in the amount of $408,512.85; and

   (b) jointly and severally as against the defendants Uptown Limited Partnership and Gulp Food Services Inc. with respect to the expansion space in the amount of $242,531.42.

2. The counterclaim of Keg Restaurants of Manitoba Ltd. and Keg Restaurants Ltd. as against the plaintiffs is dismissed.

3. Keg Restaurants of Manitoba Ltd. and Keg Restaurants Ltd. shall have judgment:

   (a) jointly and severally as against the defendants Uptown Limited Partnership, Gulp Food Services Inc. and Grapes Canada Limited in the amount of $289,025.07 with interest in accordance with the provisions of ***The Court of Queen's Bench Act*** (of Manitoba), S.M. 1988-89, c. 4, Cap. C280; and

2004 MBQB 206 (CanLII)

(b) jointly and severally as against the defendants Uptown Limited Partnership, Gulp Food Services Inc. and Grapes Canada Limited in the amount of $408,512.85 with interest from September 1, 2003 at the Toronto Dominion Bank prime plus 5%.

[57] The parties have indicated they wish to speak to the issue of costs.

_______________________________ J.

2004 MBQB 206 (CanLII)

Date: 20040909
Docket: CI 98-01-07433
Indexed as: Pensionfund Realty Limited et al
v. Keg Restaurants of Manitoba Ltd. et al
Cited as: 2004 MBQB 206
(Winnipeg Centre)

2004 MBQB 206 (CanLII)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	Mark Newman and Lana L. Foley for the Plaintiffs
PENSIONFUND REALTY LIMITED and P.C.E.P. PROPERTIES LTD., Plaintiffs,	Michael Tracey for the Defendants Keg Restaurants of Manitoba Ltd. and Keg Restaurants Ltd.
- and -	
KEG RESTAURANTS OF MANITOBA LTD., KEG RESTAURANTS LTD., KRAFT CANADA INC., UPTOWN LIMITED PARTNERSHIP and GULP FOOD SERVICES LTD., Defendants,	Kelly Dixon for the Defendant Kraft Canada Inc.
- and -	No one appeared for Uptown Limited Partnership, Gulp Food Services Ltd. or Grapes Canada Ltd.
GRAPES CANADA LTD., Third Parties.	Judgment delivered: September 9, 2004

McCAWLEY, J.

ERRATUM

There are a few errors in the above-noted judgment. They should be corrected as follows:

1. Paragraph 28, line 1, the word " plaintiffs' " should read " defendants' "; and
2. paragraph 56, numbers 1 and 3 should be replaced with the following:

"1. The plaintiffs shall have judgment inclusive of interest at Toronto-Dominion Bank prime plus 5% to the end of August 2003 and thereafter at the same rate as follows:

(a) jointly and severally as against the defendants Uptown Limited Partnership and Gulp Food Services Inc., Keg Restaurants of Manitoba Ltd., Keg Restaurants Ltd. and Kraft Canada Inc. with respect to the original premises in the amount of $408,512.85; and
(b) jointly and severally as against the defendants Uptown Limited Partnership and Gulp Food Services Inc. with respect to the expansion space in the amount of $242,531.42."

"3. Keg Restaurants of Manitoba Ltd. and Keg Restaurants Ltd. shall have judgment:

(a) jointly and severally as against the defendants Uptown Limited Partnership, Gulp Food Services Inc. and Grapes Canada Limited in the amount of $289,025.07 with interest in accordance with the provisions of ***The Court of Queen's Bench Act*** (of Manitoba), S.M. 1988-89, c. 4, Cap. C280; and
(b) jointly and severally as against the defendants Uptown Limited Partnership, Gulp Food Services Inc. and Grapes Canada Limited in the amount of $408,512.85 with interest from September 1, 2003 at the Toronto Dominion Bank prime plus 5%."

The original judgment which appears in the court file has been amended to reflect these changes. For the convenience of counsel, hard copies of the pages on which these errors appeared (pp. 11, 22 & 23) are enclosed with this Erratum. We apologize for any inconvenience these errors may have caused.

Encl.

2004 MBQB 206 (CanLII)