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You Can Incur Liability Even Before Signing a Contract

By Denis Paquin

Many people are under the impression that their liability only applies the moment they sign a contract. This article will examine three types of situations in commercial leasing where the courts have found lessors liable for actions or omissions that took place before any agreement was signed.

1) Is it necessary to negotiate in good faith even before a contract is signed?

In February 2006, the Superior Court rendered a judgement in the matter of *Blum-Lussier* v. *Lirange.* [1] The plaintiff, hoping to get into the maple production business, approached a neighbour who owned a maple grove which contained several thousand maple trees. At the meeting, the plaintiff told the defendant what the term of the lease might be and the rent (based on the number of tappings) that she would be willing to pay, a figure that was within industry norms and corresponded to the amount the defendant had asked for in a draft lease he had prepared several years earlier for an unsuccessful transaction; which draft he sent to the plaintiff following their initial meeting. Wishing to begin operations the following season, the plaintiff must quickly get to work. In the months following the initial meeting, the defendant saw that the plaintiff had carried out major work that would only make sense within the context of her operating the defendant's maple grove. Once the plaintiff had opened up a road in both maple groves, built the sugar cabin and ordered the equipment, the whole to the full knowledge of the defendant (and sometimes with his participation), the parties met to finalize the lease. It was then that the defendant requested a rent that was three times more than the amount initially offered by the plaintiff — the transaction fell through. The plaintiff claimed damages from the defendant for her investment, to which the defendant replied that only the plaintiff was to blame, as she had been warned that they had no contract and should, therefore, be careful. According to the Court, from the very moment the defendant realized the plaintiff was fully committed to her project and took for granted that she would be allowed to operate the defendant's maple grove, the defendant had an obligation to act in good faith[2] in his talks with the plaintiff. If he did not want to rent her the maple grove, he had several opportunities to clearly convey that message to her and to end negotiations formally before substantial costs were incurred.

To answer the question asked at the outset, one may conclude that, even without a contractual relationship, there are circumstances, as shown in this decision, under which certain behaviour will give rise to the possibility of extra-contractual remedies due to the absence of good faith. The plaintiff was awarded close to $75,000 in damages. The only investments she was not reimbursed for were those made after the defendant had informed her of the new rent, the Court having determined that, as of that date, the plaintiff knew that her project was at risk.

2) Who is liable when zoning by-laws do not allow for the projected use?

Several decisions were recently rendered in files where lessees had taken possession of premises only to realize after the fact that zoning bylaws prevented the premises from being used for the purposes stated in the lease. In one of these cases, *Goodman* v. *Groupe de divertissement S.A.F. inc.*,[3] the lease contained a provision that gave the lessee seven days to ensure that he could obtain an occupation permit (the lessee took a year before raising his inability to obtain this permit). In his ruling, Justice Michel Pinsonnault of the Court of Québec reiterated the line of reasoning that he applied in *Appartements Analena enr.* v. *Bakka:*[4]

> [TRANSLATION] It is fundamental and crucial that a lessor (and, by the same token, his representatives) wishing to lease out a commercial space in his building be specifically aware of the requirements, especially the restrictions, to which the building and the space to be leased are subject under the applicable zoning bylaws.

According to Justice Pinsonnault, a lessor cannot, by virtue of article 1858 of the *Civil Code of Québec* [5] (C.C.Q.), rent premises if zoning bylaws prevent the space from being used as intended by the lessee. Moreover, he must advise his lessee of the situation before the lease is signed so as to prevent the lessee from incurring unnecessary costs.

Interestingly, the Court of Appeal confirmed the lower court judgment terminating the lease in *Appartements Analena enr.* v. *Bakka*,[6] based on the legal disturbances warranty set out in article 1858 C.C.Q. Adding that the lessee had not waived the warranty obligation provided for in said article, the Court of Appeal indicated, without taking a position, that article 1858 C.C.Q. might not be of public order in commercial leasing matters.

3) Can a sale argument constitute a representation that is binding on the lessor?

Over the last few years, a certain number of decisions[7] have been rendered to the effect that some representations made by lessors or leasing agents in their negotiations with potential lessees could be more than just sale arguments, becoming representations likely to bind the lessor even if the lease contains a provision stating that the signed document replaces any previous agreement, regardless of its nature. The courts recognize that parties might somehow embellish the reality during negotiations, exaggerating some advantages or minimizing certain inconveniences; these "white lies" are often part and parcel of negotiations, and are to be expected by the contracting parties. However, at some point a line is crossed, and a sale argument becomes a representation the co-contracting party is entitled to insist upon. If a lessor were to tell its lessee that it envisages expanding near the lessee's premises, which expansion would generate additional goodwill, the lessor was simply expressing an idea that it might never intend to carry out. If, on the other hand, the lessor were to indicate that it will be expanding (as already indicated on a plan submitted to the lessee) and add that it was approached by lessees "X and Y", the lessee might be entitled to take for granted that an expansion would take place in the foreseeable future.

4) Conclusion

In a negotiation, while some things are better left unsaid in a "sales" pitch, silence is not appropriate if it is likely to prejudice a potential co-contractor. It is to be remembered that article 1375 C.C.Q. requires

parties to conduct themselves in good faith "at the time the obligation is created". As we have just seen, an obligation is not necessarily created on the date the contract is signed.

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1) EYB 2006-101132, 2006 QCCS 657 (CanLII) S.C. Frontenac; See: http://www.canlii.org/qc/jug/qccs/2006/2006qccs657.html;

2) Article 1375 C.C.Q.: "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.";

3) AZ-50394075; 2006 QCCQ 10067;

4) 2004 CanLII 19334 (QC C.Q.); See: http://www.canlii.org/qc/jug/qccq/2004/2004qccq10806.html;

5) Article 1858 C.C.Q.: "The lessor is bound to warrant the lessee against legal disturbances of enjoyment of the leased property.";

6) 2006 QCCA 111; See: http://www.canlii.org/qc/jug/qcca/2006/2006qcca111.html;

7) *Société de gestion Place Laurier Inc.* v. *3336140 Canada Inc. et Parfumerie Duquin Ltée*, 2004 CanLII 39127 (QC C.A.); *Pâtisserie de Gascogne Inc. et 2527-1420 Québec Inc.* v. *Le 4817 Sherbrooke Inc.*, 2004 CanLII 3322 (QC C.A.), [2004] R.J.Q. 2103.