S.E. Fraser Enterprises Ltd. v. W & W Parker Enterprises Ltd., [2009] B.C.J. No. 1961

British Columbia and Yukon Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.J. Ross J.

Heard: April 14-17, June 29, 30, July 2 and 3, 2009.

Judgment: October 1, 2009.

Docket: S083680

Registry: Vancouver

[2009] B.C.J. No. 1961 | 2009 BCSC 1347 | 87 R.P.R. (4th) 15 | 2009 CarswellBC 2639 | 181 A.C.W.S. (3d) 793

Between S.E. Fraser Enterprises Ltd., Plaintiff, and W & W Parker Enterprises Ltd., Defendant

(163 paras.)

Case Summary

Landlord and tenant law — Commercial tenancies — Lease — Term — Renewal — Rent — What constitutes — Additional rent — Action by tenant for declarations that lease renewed and contained option for second renewal and for repayment of additional rent improperly charged allowed in part and counterclaim by landlord for order requiring tenant to rectify breaches dismissed — No option to renew granted as no consideration and no documentation indicating such amendment — Lease renewed for five-year term as landlord received actual notice of tenant's intention and inequitable to permit landlord to rely on provisions requiring written notice — Tenant not in breach of lease — Tenant entitled to $4,288 plus additional amount on account of additional rent improperly charged.

Action by tenant for declarations that the lease was renewed and contained an option for a second renewal and for repayment of additional rent improperly charged and counterclaim by the landlord for an order requiring the tenant to rectify all breaches of the lease. The tenant company was owned and operated by Tso and his wife. They purchased the company from a previous owner in 1986 and took over the existing lease, which had two years left with two five-year options to renew. In 1999, the tenant entered a new lease for one-half of the space it originally occupied. That lease was for a term of five years and provided for an option to renew for two additional terms on six months notice prior to the expiration of the term. Between 1986 and 2003, when renewing the lease, the tenant did not provide written notice of his intention to renew, but rather telephoned the landlord and entered into discussions about the renewal. In 2005, the defendant purchased the building. At that time, the tenant had already exercised its right to the first renewal under the lease, for a term of five years from 2003 to 2008, and there was one further right to renew for five years. In 2006, a sub-tenant vacated the space it sub-leased from the tenant and the tenant found a group of doctors to sub-lease the space. As the doctors were planning to undertake substantial improvements to the space, they wanted a three month rent free renovation allowance and

the option to stay longer. The tenant alleged that it entered into discussions with the landlord and that the landlord agreed to extend the lease to provide a second five-year option and agreed to waive an administration fee as her contribution to the renovation allowance. A handwritten document signed by the landlord indicated that the landlord agreed to provide a second five-year option, but a later document provided by the landlord to the tenant indicated that a lease would terminate in 2008 and a new lease would be negotiated. In 2008, when it came time to renew the lease, the tenant telephoned the landlord to remind her of the expiry date and to indicate his intention to renew the lease. In addition, in response to a letter from the landlord's lawyer in which the landlord alleged breaches of the lease in a number of ways and claimed that the tenant had not provided written notice of its intention to renew the lease, the tenant wrote to the landlord stating its intention to renew the lease. The tenant's lawyer responded to the letter from the landlord's lawyer, addressing the alleged breaches and attaching the tenant's written notice of its intention to renew the lease. Under protest, the tenant paid to the landlord $2,255 related to the administration fee to approve a sublease and $781 for legal fees. In addition, the plaintiff also sought payment of $1,251 for repairs made to the cement outside of the building. A number of other charges, relating to gas charges, repair invoices, hydro charges, appraisal services and postal and photocopying charges were disputed by the tenant.

HELD: Action allowed in part and counterclaim dismissed.

The tenant had not established that the landlord granted a further option to renew as no consideration was provided for the amendment and the documentation did not indicate that such an amendment was made. The lease was renewed for a term of five years as the landlord received actual notice of the tenant's intention to renew the lease through its lawyer and it would be inequitable to permit the landlord to rely on the provisions of the lease that required written notice as the tenant verbally indicated his intention to renew the lease and the landlord did not state that she required written notice, but rather gave the impression that she would respond with a proposal. The tenant was not at any time critical to the exercise of the option to renew, in breach of the lease. The tenant was also entitled to $4,288 plus an additional amount to be calculated on account of additional rent improperly charged.

Counsel

Counsel for the Plaintiff: Kathleen J. MacDonald.

Counsel for the Defendant: Praveen K. Sandhu.

Reasons for Judgment

C.J. ROSS J.

Introduction

1 This is a case concerning the provisions of a commercial lease by which the plaintiff, S.E. Fraser Enterprises Ltd. (the "Tenant"), by lease agreement dated October 30, 1999 (the "Lease") leased premises (the "Premises") at 6448 Fraser Street (the "Property") from the

defendant, W & W Parker Enterprises Ltd. (the "Landlord"). The Lease had a term of five years commencing October 1, 1998 and contained an option to renew for two additional five-year terms. The Lease was renewed for the first renewal term, being the period October 1, 2003 to September 30, 2008. The Landlord purchased the Property in 2005.

2 There are a number of matters at issue:

(a) the first issue is the assertion by the Tenant, which is disputed by the Landlord, that in August 2006 the Landlord granted a further option to renew the Lease;

(b) the next issue concerns the exercise of the option to renew for the second renewal term. The Tenant alleges that it exercised the option to renew the lease for the second renewal term in accordance with the terms of the Lease. The Tenant contends, in the alternative, that the Landlord is estopped from relying upon any deficiencies in notice. The Landlord takes the position that the Tenant did not exercise the option to renew in compliance with the Lease;

(c) the third issue is the Landlord's contention, disputed by the Tenant, that the Tenant could not exercise the option to renew the Lease because at all times material to the exercise of the option, the Tenant was in breach of a number of provisions of the Lease;

(d) the next issue is a dispute with respect to additional rent charged pursuant to the Lease ("Additional Rent"). The Tenant sought to be reimbursed for items charged as Additional Rent that it asserts were either not proper charges or were unreasonably incurred by the Landlord;

(e) the final issue is the Tenant's contention, disputed by the Landlord, that the issues between the parties were settled by agreement prior to trial.

Background

3 The plaintiff company is owned and operated by Phillip Tso and his wife Emmie Siu. They purchased the company from a previous owner in September 1986 in order to operate the pharmacy that was on the premises at 6468 Fraser Street. They took over the existing lease, which at that time had two years left to run with two five-year options to renew.

4 Mr. Tso testified that when the time came to exercise the option to renew, he met with the landlord and discussed the new rental rate. The parties conducted some research into prevailing market rates. The landlord then proposed a new rate and the parties negotiated the new rate. Mr. Tso did not provide any written notice of the intent to exercise the option.

5 At the time they purchased the company, the pharmacy occupied the entire leased space. Sometime after purchase and before 1991, a portion of the space was leased to Dr. Sandhu as a sub-tenant. In 1991 Dr. Gabriel Yong wanted to sublease another portion of the space for his medical office. A renovation was undertaken of the space to make it suitable for that purpose pursuant to a permit from the City of Vancouver. Dr. Yong leased the space on a month-to-month tenancy from 1991 until his death in July 2008.

6 Mr. Tso testified that in 1993 the same process for exercising the option to renew the lease was undertaken. Again, he did not provide any written notice of his intent to exercise the option.

7 It was time to renew again in 1998. At this time Mr. Tso advised the landlord that he no longer wanted to lease the whole space. The landlord agreed to take back approximately half of the space, which was eventually occupied by Nima Spa. Again, Mr. Tso did not provide written notice of renewal.

8 The Lease that is the subject of these proceedings was dated October 30, 1999 between the Tenant and then landlord Lam & Ng Properties Ltd. The Lease provided for an option to renew for two additional terms on six months notice prior to the expiration of the term.

9 In mid-2003, Dr. Sandhu vacated his space. Nima Spa wanted to expand into that space and agreed to sublease on a month-to-month basis. The space was modified to accommodate the spa's needs by opening up the door to what had been the medical office and removing the partition from what had been the examination rooms.

10 In September 2003, Mr. Samuel Wong became the landlord. When it was time to renew the lease, Mr. Tso telephoned Mr. Wong and they had a discussion about renewal. They agreed to use an appraiser to provide information about market rental rates. After receiving this information, they agreed upon a new rental rate and the lease was renewed. Again Mr. Tso did not provide any written notice.

11 Ms. Parker purchased the building in July 2005, through the defendant. Ms. Parker put the building up for sale in April 2006 and accepted an offer of purchase. She then changed her mind about selling the building and litigation followed which was ultimately settled in 2008.

Credibility

12 There is a dispute between the parties with respect to most of the facts at issue in the litigation. Most of the differences are not able to be resolved with reference to documents that were not authored by the parties. As will be discussed in greater detail below, I found the testimony of Mr. Tso and Ms. Siu to be generally credible and reliable. Their evidence was in general consistent with the documents, other than correspondence authored by Ms. Parker. Their account was, in addition, plausible.

13 I did not form the same view of Ms. Parker's evidence. One complication is that English is not Ms. Parker's first language. I have taken that into account in assessing the credibility and reliability of her testimony. However, even when making every allowance for this, I did not form a favourable impression of Ms. Parker's evidence. Her evidence was evasive, frequently not responsive and contained many inconsistencies. Much of it gave the impression of being contrived. During the course of cross-examination concerning the Additional Rent, it emerged that Ms. Parker had either created or caused to be created several different versions of invoices purporting to relate to the same charges. There were different versions of "re" lines for cheques that Ms. Parker signed in relation to what she alleged were expenditures properly charged as Additional Rent. The originals were not produced. Her explanation for the absence of these documents was not credible. Finally, much of her evidence was simply not plausible. In sum, I found her evidence to be neither credible nor reliable.

Additional Term

14 The first issue concerns the assertion that in August 2006 Ms. Parker agreed to grant the

Tenant an option for an additional renewal term for the period from October 1, 2013 to September 30, 2018.

15 By way of background, by document dated November 24, 2003, the then landlord, Samuel Wong granted the Tenant what was described as a first renewal of the Lease, for a term of five years, commencing October 1, 2003 and ending in 2008. The agreement acknowledged that there was remaining one further right to renew for five years; that is, from 2008 to 2013.

16 It is common ground that in May 2006, the spa vacated the space that it had rented from the pharmacy. It continued to occupy the space next to the pharmacy. Mr. Tso sought new tenants to sublease the space that the spa had occupied. He found a group of doctors who were interested in renting the space, Dr. Adi Mudaliar, Dr. Sevena Khun Khun and Dr. Manny Johal. The doctors were planning to undertake substantial improvements to the space, but wanted a three month rent free renovation allowance and the option to stay longer.

17 It was Mr. Tso's testimony that he discussed the doctors' requests with Ms. Parker. He stated that she agreed to extend the lease to provide a second five-year option and agreed, as will be discussed later, to waive an administration fee as her contribution to the renovation allowance.

18 Ms. Parker agreed that there was a conversation with Mr. Tso about the doctors wanting to sublease the space. She agreed that she did not want the space to be empty and wanted it rented. She denied that she had been told anything about the three-month renovation allowance. It was her testimony that no one told her that the doctors were planning to do any improvements. She denied that there had ever been a conversation in which she was asked to waive the administration fee.

19 A handwritten document dated August 16, 2006 signed by Ms. Parker on behalf of the Landlord and witnessed by Harpreet Dhillon states:

> Aug 16, 2006
>
> This is an official letter that I am going to give S.E.
> Fraser Enterprises an additional 5 (Five) year option.
> (This mean there will be two 5 (Five) year option(sic))
>
> Wendy Parker
> W & W Parker Enterprises Ltd.
> Harpreet Dhillon
> Witness

20 Ms. Parker agreed that she signed the document. She agreed that Mr. Tso explained to her that the proposed renter wanted a longer lease and that the proposal was to extend the lease. She stated that she signed, giving her consent because she wanted to help get the doctors to sublease the space. In cross-examination, it was her testimony that while she signed it, in her mind it was not a binding contract. She agreed that she knew that Mr. Tso would show the document to the doctors and expected that the doctors would rely upon it.

21 Ms. Parker stated that after she signed the consent to sublease she became entitled under the lease to an administration fee. She stated that she asked Mr. Tso to pay this fee and he refused, saying that previous owners had never asked for the fee and he did not need to pay it. This conversation was never put to Mr. Tso in cross-examination.

22 The doctors entered into a sublease agreement with the Tenant in a written agreement dated October 1, 2006. The term of the sublease was from October 1, 2006 to September 29, 2008. The sublease contained an Option to Renew which stated in part:

> Option to Renew
>
> Subject to the Sublandlord exercising its option to renew the Head Lease with the Head Landlord, the Subtenant, provided that it is not in default hereunder, shall have the option of renewing this Sublease for one further period of FIVE (5) years (the "Renewal Term"), all terms of such renewal to be the same as those contained in this Sublease with the exception of this right of renewal which shall be omitted and with further exception of the amount of Basic Rent to be paid pursuant to Paragraph (3) above. The option shall be exercised by the Subtenant delivering written notice exercising the option upon the Sublandlord in the manner for delivery notice herein provided, such notice to be delivered at least six (6) months but no more than nine (9) months prior to the expiration of the term of this Sublease.

Thus, with respect to the issue of renewal, the term of the sublease matched that of the November 24, 2003 renewal document.

23 Ms. Parker delivered a document dated October 2, 2006 which states:

> Consent
>
> October 2, 2006
>
> This is consent for S. E. Fraser Enterprises Ltd. to sublet the property for medical clinic only, based on the head -- lease.
>
> Since the head -- lease has a lot of default statements made by Mr. Samuel Wong. Our lawyer suggested that we are going to have a new head -- lease when this old head-lease ended on October 1, 2008 or earlier. Everything is going to change for better.
>
> Sincerely;
>
> Wendy Parker
>
> Land Lord

24 Ms. Parker stated that she created the document because she wanted to clarify. In cross-examination she stated that the clarification was that she was not going to give Mr. Tso more lease because he was breaching the lease. It was her evidence that while she was happy to have the doctors take over the space, but she was bothered by Mr. Tso's many breaches of the lease and so she decided that she would like to have a new lease after October 1, 2008. She said that she suspected at this time that she would not want the pharmacy's lease renewed. She stated that she does not recall what she meant by the reference to "default statements" and Mr. Wong. The breaches that she had in mind were garbage in the corridors and bathroom, changing of the locks, the sink draining water into the parkade and a unit empty for more than

30 days. She stated that the reference to everything changing for the better meant that the new renter will not be able to breach the lease. She wanted a stronger lease so the breaching would stop.

25 Mr. Tso testified that there was no discussion concerning this document. He did not know what "default statements" Ms. Parker might have been referring to. There was no discussion about a new head lease.

26 The Tenant asserts that the Landlord granted a further option to renew for the period of October 1, 2013 to September 30, 2018. The Landlord denies that such a further term was granted, submitting that there was no consideration for the purported extension.

27 I did not accept Ms. Parker's evidence with respect to this issue. However, I have concluded that the Tenant has not established that the Landlord granted a further option to renew. First, the language of the August 16, 2006 document is not unequivocally contractual but rather appears to be a statement of intention. Second, I agree with the submission of counsel for the Landlord that it appears that no consideration was provided for such an amendment. Finally, I note that the sublease does not refer to such an additional term. Given the doctor's interest in the possibility of security of tenure over the longer term, it seems to me that if an additional renewal term had been granted, it would have been referenced in the sublease. I accept that the prospect of an option to renew for an additional term was discussed but conclude that such discussions did not culminate in a concluded agreement to grant a further option.

28 In the result, I dismiss the Tenant's application for a declaration that the Lease contains a further option to renew for the period October 1, 2013 to September 30, 2018.

Renewal of the Lease

29 The next issue is whether the Tenant exercised the option to renew in accordance with the terms of the Lease. In that regard, Mr. Tso stated that in January 2008 he telephoned Ms. Parker to remind her that the lease would expire in September of that year and that Fraser wanted to renew. He said that she simply said yes and that was the extent of the conversation.

30 It was Mr. Tso's evidence that in mid-March he phoned Ms. Parker to arrange a meeting to discuss renewal of the Lease. She came to the Premises the next day. Mr. Tso said that he provided her with copies of the documents that he and Mr. Wong had used to negotiate the previous renewal. Ms. Parker asked what space Fraser was leasing and he toured the building to show her. He stated that she expressed concern about the pharmacy using a washroom that she felt belonged to her. Mr. Tso explained that it was not part of the common space.

31 The documents that Mr. Tso said he provided to Ms. Parker at the meeting were in Ms. Parker's possession. When Mr. Tso's evidence about these documents was put to Ms. Parker, her answer was that she did not have copies of the entire documents. She agreed that it was possible that Mr. Tso gave them to her, but denied that this occurred in March 2008. However in the period between the beginning of February and the end of March, Ms. Parker provided certain documents to Mr. Peter Eng, an architect she retained to perform detailed measurements of the space. A comparison of the fax heading on a document that Ms. Parker agreed she provided to Peter Eng, with the documents Mr. Tso said he provided to her, confirms that the document provided to Peter Eng is a copy of the document provided by Mr. Tso. Accordingly, it is clear that Mr. Tso provided Ms. Parker with the document sometime between

February and the end of March, thus it follows that she had the document in her possession at that time.

32 Mr. Tso said that Ms. Parker told him that she did not have a lawyer and asked if he could recommend one. He said that he only knew his own lawyer. His wife had a relative who was a lawyer. Ms. Siu provided the name and number of her relative to Ms. Parker. Ms. Parker said she would go see that lawyer. It was Mr. Tso's testimony that there was no discussion at all of any breaches of the lease during this meeting and no suggestion that the lease would not be renewed.

33 Ms. Siu testified that she was present at the pharmacy on the day of the meeting. She went back and forth between the discussion and her work. She recalled her husband and Ms. Parker discussing that it was time to renew the lease and recalled her husband reviewing the blueprints with Ms. Parker. She recalled Mr. Tso explaining that if they could not agree on a rate, the parties could use an appraiser as had been done last renewal.

34 Ms. Siu said that she recalled Ms. Parker saying that she did not have a lawyer. Ms. Siu said that her aunt, Ms. Beverly Hoy, is a lawyer. Mr. Tso said it might be a conflict because she is a relative. Ms. Siu said she gave Ms. Parker Ms. Hoy's name and number.

35 Ms. Parker's evidence was that she was at the pharmacy to deliver the additional rent documents, likely in late January and twice in February and March 2008, each time in the company of Peter Eng for the purpose of taking measurements of the building. She said that the first visit was in February 2008. This visit lasted three to four hours, one hour of which was spent in the pharmacy with the architect. She stated that there was some conversation with Mr. Tso. In the course of the conversation, she introduced Peter Eng to Mr. Tso and explained to Mr. Tso what Peter Eng was doing there. It was her testimony that there was no mention by Mr. Tso of the subject of lease renewal.

36 Ms. Parker stated that the second visit was on about March 3, 2008. It was very short, only about 10 minutes. The purpose was to permit the architect to verify some measurements. Ms. Parker stated that during this visit she asked Ms. Siu for Ms. Hoy's telephone number and Ms. Siu provided the number to her. Ms. Parker stated that she had previously been given the number, but she had lost it. It was her evidence that there was no conversation at all about lease renewal. She was not asked and did not say the reason for wanting Ms. Hoy's number.

37 On her examination for discovery, Ms. Parker stated that she could not recall when Ms. Siu gave her Ms. Hoy's number and could not recall who was present at the time. Ms. Parker also gave evidence at her examination for discovery that she could not remember if she had seen or met with Mr. Tso during the period January to March 2008. Her explanation was that she had made a mistake on her previous discovery.

38 It was Ms. Parker's evidence that between January 2008 and March 31, 2008 she had no conversations whatsoever with either Mr. Tso or Ms. Siu about the subject of lease renewal.

39 Peter Eng testified that he did accompany Ms. Parker to the building on two occasions, one of which he believed was in February and one in March. He had been retained by Ms. Parker to do new measurements of the space. He testified that he saw Ms. Parker speaking with someone at the building, but he did not know who it was or what they were speaking about. He didn't

overhear the conversation and was concentrating on his own work. Peter Eng said that he was not introduced to anyone at the pharmacy on these visits.

40 Peter Eng stated that Ms. Parker had given him the previous measurements taken by a surveyor to work with. Peter Eng concluded that his own measurements were close, but the previous measurements were larger. He recommended that Ms. Parker use the larger measurements. He then included the surveyor's measurements on the drawings he prepared. He agreed that the drawings were prepared to be attached to the lease and that his measurements were not used for that purpose.

41 Mr. Tso testified that after the meeting he had with Ms. Parker in mid-March, he and his wife waited for a response from Ms. Parker. On March 31, 2008 Ms. Parker came to the store and hand delivered a letter from her lawyer, Ms. Hoy. The letter stated:

> This letter is to inform you that Madam Wendy Parker of W. & W. Parker Enterprises Ltd. has consulted the writer, at your Mr. Phillip Tso's suggestion, regarding your company's rental of the subject property. According to the lease agreement dated the 30th day of October, 1999, there was an option to renew the lease for 2 five year terms, one of which was exercised by your company in November 24, 2003, a copy of which notice is hereto attached for your easy reference. The maturity date would be September 30, 2008. The writer's understanding is that your company has not provided a "... Lessee's written notice mailed by registered post or delivered to the Lessor not later that SIX (6) months before the expiration of the term of this Lease, renew this Lease ....." Therefore your company has no intention to renew the subject lease for a further term of 5 years.
>
> In addition to the aforementioned, our client has instructed the writer that the terms and conditions of the lease agreement have been breached and these instances are referred to in the Lessor's letter dated January 26, 2008, a copy of which is hereto attached for your easy reference.
>
> In further addition to the aforementioned, your company has not paid the outstanding account as presented to your company in the Lessor's letter dated December 18, 2006, a copy of which is hereto attached for your easy reference.
>
> In view of the foregoing, unless these matters are rectified by your company at your expense within 2 weeks from the date of this letter, action will be taken without further notice to you for which all costs will be added to your present indebtedness.

42 With respect to the reference to Mr. Tso's suggestion in the first paragraph of the letter, Ms.

Parker denied that Mr. Tso had ever suggested that she consult Ms. Hoy with respect to the renewal of the lease. She had no idea why her solicitor had made that statement in the letter.

43 Mr. Tso was not at the pharmacy. Ms. Siu was there. She testified that Ms. Parker brought the document in. Ms. Siu said to her "is this the new lease?" and Ms. Parker replied "Speak to my lawyer". Ms. Parker's evidence was that she did not say anything to Ms. Siu when she delivered the letter and Ms. Siu did not say "is this the new lease?" or any words to that effect.

44 Ms. Siu said she opened the letter and was shocked. She could not believe the contents. She telephoned her husband right away. Mr. Tso testified that his wife telephoned him, very upset. He returned to the pharmacy and reviewed the letter and the lease. He felt betrayed and upset. He then wrote a letter to Ms. Parker stating that Fraser intended to exercise the option to renew the lease and sent it off by registered mail that day. Unfortunately, in his distress, he made a mistake in the address. Mr. Tso also contacted his solicitor, Mr. Richard Eng.

45 Mr. Richard Eng sent a letter dated April 3, 2008 by facsimile to Ms. Hoy, Ms. Parker's solicitor. The letter commences:

> I act for S.E. Fraser Enterprises Ltd., the tenant of the subject Premises owned by your client, the Landlord. Further to our telephone conversation on the afternoon of April 2, 2008, I am writing as per your request to summarize my clients' position with respect to the various matters set out in your letter to my client dated March 31, 2008. Hopefully, once you and your client have read this letter, our clients will be able to resolve all outstanding issues.
>
> Firstly, as per your request, I am faxing herewith a copy of my client's letter dated March 31, 2008 pursuant to which formal notice of my client's intention to exercise its option to renew the lease of the Premises was given to your client. The original of this letter was apparently sent to your client by registered mail on March 31, 2008. I am not certain whether your client has received same yet, but I have the receipt evidencing posting of the notice on March 31. My client has advised that during the course of negotiations between our clients, it was understood by all parties it was my client's intention to exercise its option to renew the Lease of the Premises. Please confirm your client's position with respect to the renewal of the Lease.
>
> Next, as I mentioned in my telephone conversation with you, your client has granted my client a second option to renew (to take effect at the end of the option that was exercised by the aforementioned notice. I am faxing herewith a copy of a document dated August 16, 2006 signed by your client which effectively gives my clients a second option to renew for a term of 5 years (which, if exercised by my client, would effectively give my client the right to remain as tenant of the Premises until September 31, 2018). I understand this additional option was granted as one of my clients' subtenants required some assurance that he would be able to remain in the Premises for a significant period of time beyond the 5 year option expiring September 30, 2013 before he would commit to various expenditures relating to his tenancy.

46 The letter then addresses in turn the breaches referred to in Ms. Hoy's letter. These will be discussed in the section dealing with the individual allegations of breaches of the lease. The letter concludes:

I hope this letter satisfactorily addresses your client's concerns and that we will be able to work towards finalizing my client's renewal of its Lease. Please contact me once you have discussed this letter with your client. If any issues have not been satisfactorily addressed, I can seek clarification or further instructions from my client.

47 Ms. Hoy responded by letter dated April 9, 2008 which states in part:

Your letter in 3 pages dated April 3, 2008 in connection to the above matter are acknowledged.

In response to your said letter, our client's instructions are as follows:

1. There has been no written Notice received by our client from S.E.Fraser Enterprises Ltd. ("the tenant") as in accordance with Clause 5.01 of the Lease; there is no reason for the Notice not to have been delivered to the landlord if there is any seriousness to the tenant's intention to renew the lease; you will notice from your letter of above date that the landlord does not even know the name of the subtenant which means the tenant ignores the terms and conditions of the lease agreement.
2. The second option to renew dated August 16, 2006 was signed well in advance of the criteria referred to in Clause 5.01 of the lease; it would have no bearing unless there is a Notice to renew;

48 The letter next deals with responses to the allegations of individual breaches of the lease, which will be discussed below. The letter concludes:

In view of the foregoing, and the fact that the tenant has been notified orally on numerous occasions and then by letter dated January 26, 2008 and nothing has been done, the landlord is not willing to renew the lease.

The terms and conditions of the lease are to be complied with and therefore the premises are to be returned to the landlord at the expiration of its term.

Did Fraser Deliver an Effective Notice of Renewal?

49 The option to renew is laid out in Clause 5.01 of the Lease which states in part:

OPTION TO RENEW

5.01 If the Lessee:

(a) is not then in default of payment of rent or of any of the covenants and agreements on the Lessee's part to be performed,

...

the Lessee may, upon the Lessee's written notice mailed by registered post or delivered to the Lessor not later than SIX (6) months before the expiration of the term of this Lease, renew this Lease for TWO (2) additional terms of FIVE (5) years each on the same terms and conditions as are contained in this Lease except the Basic Rent, rent abatement and right of further renewal.

50 The first issue to be determined is whether the Tenant gave effective notice of the exercise of the option.

51 The principles to be followed were reviewed in *Ross v. T. Eaton Company* (1992), 27 R.P.R. (2d) 33, 11 O.R. (3d) 115 [cited to R.P.R.] (C.A.). as follows:

> ... if an offeree wishes to depart from the method of acceptance prescribed by the offeror (which is not insisted on as the sole method of acceptance), he or she can only do so effectively if the communication is by a method which is not less advantageous to the offeror and the acceptance is actually communicated to the offeror. I would not think that actual communication alone would be sufficient if the method used was not "not less advantageous to the offeror", e.g., notice of acceptance arrived later than would have been the case if the prescribed method had been used in a case where time is important.

52 This approach has been adopted as a correct statement of the law, in this jurisdiction: see *Canada Safeway Ltd. v. A. Schiel Construction Ltd.* (1993), 34 R.P.R. (2d) 320 (S.C.) [Chambers]; and *Masters Realty Inc. v. Bellevue Properties Ltd.*, [1995] B.C.J. No. 672 (S.C.).

53 I find that unlike the situation in *Brewster v. 994620 Alberta Ltd.*, 2007 ABQB 264, a case the defendants rely on, here the method of service of notice is not mandatory. Here, as in *Canada Safeway*, the notice provision is not exclusionary in the sense of expressly prohibiting service of other than registered mail or delivery to the Lessor. The Lease does not contain a time of the essence clause, nor any provisions for deemed delivery.

54 In this case, it is common ground that notice sent by registered mail on March 31, 2008 to the correct address for delivery would have been timely notice in compliance with the terms of the Lease. I find that the Landlord received actual notice through delivery by fax to its solicitor on April 3, 2008. There is no evidence that this was a less advantageous means of communication. In particular, there is no reason to conclude that the notice arrived later than would have been the case if the prescribed method of registered mail had been employed using the correct address for delivery. Accordingly, I find that the Tenant did give timely notice of the intent to exercise the option to renew.

Is the Landlord Estopped from Requiring Written Notice of Renewal?

55 In the event that I am wrong in this conclusion, the next issue to be considered is whether the Landlord is entitled to rely upon the absence of timely written notice in the circumstances of the case.

56 The Court of Appeal has held that the court's equitable jurisdiction to grant relief from forfeiture for the non-observance of covenants in an existing lease does not extend to relieve against the failure to comply with conditions precedent to the exercise of an option to renew a lease. In *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*, 2007 BCCA 24, 62 B.C.L.R. (4th) 315, Madam Justice Kirkpatrick, for the court, stated at para. 30:

> In my opinion, it is essential to distinguish between the court's equitable jurisdiction to grant relief from forfeiture for the non-observance of covenants in an existing lease and from the failure to comply with conditions precedent to the exercise of an option to renew a lease. In the former, equity recognizes that a tenant may be permitted to cure its default

> and be relieved from forfeiture to allow it to retain the balance of the term of the lease. In the latter, there is no compulsion on the tenant to exercise the renewal option, but if it does so, the tenant must comply with the conditions precedent. If the tenant fails to comply, it does not suffer a penalty or forfeiture of an existing tenancy. Equity will not intervene.

57 However, while equity will not intervene to grant relief from forfeiture to permit a tenant to cure his default in relation to the exercise of an option to renew, there is an equitable jurisdiction to interfere in cases where the assertion of strict legal rights may be unjust or unfair: see *Litwin Construction (1973) Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459 (B.C.C.A.). This broad jurisdiction has application in relation to the exercise of an option to renew a lease.

58 In *Sami's Restaurant Corp. v. W. Hanley & Co.*, 2002 BCCA 218, 166 B.C.A.C. 230, while the court found that on the facts of the case, the test for estoppel by conduct established in *Litwin* had not been met, the court did not hold that the doctrine had no application. Madam Justice Huddart, for the court, stated at para. 28:

> There is no injustice in permitting the appellants to enforce their legal rights in these circumstances. The appellants have not established that the conduct and behaviour of the respondents, and Mr. Hanley in particular, is such as to make it "wholly inequitable that [they] should be entitled to succeed in the proceeding." This is the fundamental test for the application of estoppel by conduct approved by this Court in *Litwin Construction (1973) Ltd. v. Pan* (1988), 29 B.C.L.R. (2d) 88 (C.A.) at 99. The prevention of injustice caused by reliance is the purpose of estoppel by conduct or acquiescence.

59 Conduct by the landlord amounting to a waiver of strict compliance in relation to the exercise of an option to renew was found in *Doral Holdings Ltd. v. Bargain Books Ltd.*, [1994] O.J. No. 3103 (O.C.J. Gen. Div.) and in *Petridis v. Shabinsky* (1982), 22 R.P.R. 297, 35 O.R. (2d) 215 (H.C.J.).

60 In this case, the Tenant submits that the conduct of Ms. Parker in the period prior to its attempt to exercise the option to renew was such that it would be wholly inequitable to permit the Landlord to rely upon strict compliance with the requirements of Clause 5.01.

61 Counsel for the Landlord submits that the practices of the previous landlords in relation to written notice cannot amount to a waiver by the defendant of its contractual rights. I agree with that submission, except to say that the evidence in relation to past practice is of assistance in relation to reaching conclusions about what occurred between the parties in the period between January and March 2008.

62 In that regard, Ms. Parker's evidence is that there was no communication between the parties in that period on the subject of renewal of the lease. Further, her evidence is that when she delivered the letter of March 31, 2008, there was no conversation at all between herself and Ms. Siu who received the document.

63 As outlined above, the evidence of Mr. Tso and Ms. Siu on behalf of the plaintiff is that there was a telephone call in January in which Mr. Tso told Ms. Parker that Fraser would renew the lease. Then in March, Mr. Tso arranged a meeting with Ms. Parker at the pharmacy during which he again said that Fraser would renew, reviewed the process that had been used in the past to settle the new rent, and provided Ms. Parker with copies of some of the documents that

had been used for that purpose. Ms. Parker requested the name and number of a lawyer and was given Ms. Hoy's name and telephone number. The tenor of the meeting was such that Mr. Tso and Ms. Siu expected Ms. Parker would be responding in short order with a proposal. Ms. Siu testified that she asked Ms. Parker on March 31 when she delivered the letter if this was the new lease or the renewal.

64 I find that the communications occurred as described in the testimony of Mr. Tso and Ms. Siu. My reasons include that it is not disputed that Mr. Tso and Ms. Siu at all material times intended to exercise the option to renew. They had been doing business in that location since 1986 and had no wish to move. They were aware that the deadline for the exercise of the option was approaching. In the circumstances, I think that it is wholly improbable that they would sit back and let the deadline expire while taking no action and having no conversation with the Landlord about the subject. On the other hand, given their past experience, it is very likely that they would conduct themselves as they have described in their testimony consistent with the way they had dealt with renewal each time the issue had arisen.

65 In addition, the reference in the first paragraph of Ms. Hoy's letter is consistent with the testimony of Mr. Tso and Ms. Siu, but inconsistent with that of Ms. Parker. Further, as I found above, Ms. Parker had in her possession the documents that Mr. Tso said he had given her to illustrate the process that had been used with the previous landlord, sometime in the period between February and the end of March.

66 Thus, I find that the Tenant told Ms. Parker that it wished to exercise the option to renew the lease prior to the deadline. Mr. Tso explained the process that he had used with the previous landlord to settle on the new rent and provided her with documents to illustrate the practice. Ms. Parker did not state that she required written notice. Rather, she stated that she wanted to get legal advice, which Mr. Tso and Ms. Siu helped to arrange. Ms. Parker left Mr. Tso and Ms. Siu with the impression that the next step in the process would be that she would respond with a proposal. In reliance on this the Tenant waited for her response. In the circumstances, I find that it would be inequitable to permit Ms. Parker to rely upon the provision in the Lease requiring written notice.

Alleged Breaches

67 The next issue to be addressed is the Landlord's assertion that the Tenant was in breach of a number of provisions of the Lease and, accordingly, by virtue of these breaches, not in a position to exercise the option to renew. In that regard, the authorities provide certain relevant principles to be applied as follows:

(a) where an absence of default is a condition precedent to the exercise of the option to renew under the lease, the tenant must not be in default in order to exercise the option; see *Doria v. 66 Degrees Inc.* *(2000), 30 R.P.R. (3d) 287* (Ont. S.C.J.);

(b) equity will not intervene if the tenant has failed to comply with conditions precedent of an option to renew a lease; see *Clark Auto Body Ltd.*, *supra;*

(c) the equitable doctrine of estoppel or waiver can apply to breaches, see *Chroniaris Enterprises Ltd. v. MKRS Pub Inc.*, *2005 ABQB 867*, *47 R.P.R. (4th) 293*;

(c) the issue is whether the tenant is in breach at the critical date, that is whether there is a subsisting breach, not whether there were breaches in the past: see

Advanced Car Specialities Ltd. v. Jacobsons (1981), 34 O.R. (2d) 630 (H.C.J.); and *853571 B.C. Ltd. v. Spruceland Shopping Centre Inc.*, 2009 BCSC 1187.

(d) a subtenant's breach is not to be attributed to the tenant in the absence of a clause to that effect in the lease: see *Advanced.*

68 Ms. Hoy's letter of March 31, 2008 stated the following with respect to the allegation that the plaintiff had breached the lease:

> In addition to the aforementioned, our client has instructed the writer that the terms and conditions of the lease agreement have been breached and these instances are referred to in the Lessor's letter dated January 26, 2008, a copy of which is hereto attached for your easy reference.
>
> In further addition to the aforementioned, your company has not paid the outstanding account as presented to your company in the Lessor's letter dated December 18, 2006, a copy of which is hereto attached for your easy reference.

69 Certain other breaches were alleged in the counterclaim.

Breaches Alleged as at March 31, 2008

a) Dr. Yong's Air Conditioning Unit

70 The first breach alleged by the defendant is in relation to a heating and air-conditioning unit that Dr. Yong caused to be installed on the roof of the building in 2008. It is alleged that this constituted a breach of Clauses 6.03, 10.02 and 17.02 of the Lease which provide, respectively:

> 6.03 The Lessee will not bring into or upon the Premises any safe, motor, machinery or other heavy articles without the prior written consent of the Lessor, and will immediately make good any damage done to any part of the Buildings or Premises by the bringing in or taking away of the same.
>
> ...
>
> 10.02 The Lessee shall not make any alterations in the structure, plan or partitioning of the Premises, nor install any plumbing, piping, wiring, or heating apparatus without the written permission of the Lessor or his agents first had and obtained and at the end or sooner termination of the term of this Lease.
>
> ...
>
> 17.02 The sole and exclusive right to use or to lease to others for their use the roof or exterior side and rear walls of the Buildings is reserved to and retained by the Lessor.

71 In addition, it is asserted that the Tenant's failure to provide documents with respect to the unit constituted a breach of Clause 15.01 which provides:

> ASSIGNMENT AND SUBLETTING
>
> 15.01 At any time during the lease period, the Lessee has the right to sublet, sublease or assign in whole or in part the Premises and the Lease Agreement to a third party with the provision that the Lessee has first obtained written approval from the Lessor

> or his agent for such sublet, sublease or assignment. The Lessor may not unreasonably withhold such approval and the Lessee shall provide full financial background and information regarding the proposed sub-tenants or assignees to the Lessor for proper evaluation. The Lessee shall pay to the Lessor an administrative charge equivalent to 1/2 monthly Basic Rent payable at the time of the assignment or sublease. The Lessee shall also be responsible for and pay any legal fees and expenses incurred by the Lessor in connection with such assignment or sublease.

72 By way of background, from 1991 until he passed away at the end of July 2008, Dr. Yong operated his medical office as a subtenant of the Tenant on a month-to-month basis. Mr. Tso testified that in 1991 Dr. Yong had a heating and air-conditioning unit (the "HVAC Unit") installed on the roof of the building. The unit provided heat and air-conditioning to the space used by Dr. Yong for his medical office.

73 Mr. Tso stated that sometime in 2007 Dr. Yong approached him and said that the HVAC Unit was no longer functional and that it was not repairable. Dr. Yong told Mr. Tso that the HVAC Unit was a benefit to the building and that the Landlord should be paying for a replacement. He asked Mr. Tso to speak with Ms. Parker about this. Mr. Tso asked Dr. Yong to speak directly with Ms. Parker. Mr. Tso did not know if Dr. Yong did so.

74 Mr. Tso said that the next thing he recalled was that Dr. Yong asked him if he would pay for the replacement. Mr. Tso said that he would not and suggested that Dr. Yong use portable fans. He stated that in September of that year there was a water leak in the upstairs premises and Ms. Parker came to the premises to investigate. At that time, Mr. Tso asked her if she had discussed the HVAC Unit with Dr. Yong. Ms. Parker told him that she would not pay for a replacement and Dr. Yong would have to look after it himself.

75 Ms. Parker agreed that there had been a conversation with Mr. Tso about the HVAC Unit and that she had been told that the unit was not working. She agreed that she told Mr. Tso that she would not pay to replace the unit, and that it was the renter's responsibility to look after his own unit. She said that she had assumed that the unit was the small air-conditioner inside the office. She had no idea that they were referring to a large machine on the roof.

76 Mr. Tso stated that Dr. Yong tried to use portable heaters that winter, but found it too uncomfortable for himself and his patients. He purchased a replacement unit in January 2008 (the "New HVAC Unit") and had it installed in the same location as the HVAC Unit.

77 Ms. Parker said that she learned of the installation when she received a telephone call from the receptionist of the dentist office on the second floor. The installation crew wanted to have access to that office to assist in the installation and the receptionist was objecting. She said that she went over to the building and had a confrontation with Mr. Tso. She was angry with him for not telling her the unit was on the roof.

78 Mr. Tso said that after that he heard nothing more about the subject until he received a letter dated January 26, 2008 from Ms. Parker that contained a number of complaints. The portions of the letter dealing with the HVAC issue were as follows:

> Re: put an air-conditioning and heater on the roof

> Please tell me who is responsible of Dr. Leung's action? Is he under your sub-lease or he has no lease? Please send me his lease if any and/or other sub-leases of 6460 [Fraser] street. Who is giving him the ideas he can do anything without the owner's consent. I would like to let you know that you and your sub-lessees can do anything on your own properties but not on my property. Please also hand this letter to Dr. Leung.
>
> I informed you that you have breached the lease contract clause of 6.03 to bring into or upon the Premises any safe, motor, machinery or other heavy articles (air-conditioning with heater on the roof) without the prior inform or written consent of the Lessor, and will immediately make good any damage done to any part of the Buildings or Premises by the bringing in or taking away of the same.
>
> You also have breached the lease contract clause of 6.04 The Lessee will observe, obey, conform all rules and regard to the management., use of the Buildings or the Premises.
>
> You have breached the Lease contract clause of 10.02. The Lessee shall not make any alterations in the structure, plan or partitioning of the Premises, nor install any plumbing, piping, wiring, or heating apparatus without the written permission of the Lessor or his agents first.
>
> ...
>
> You have breached the Lease contract clause of 14.01 to interrupt other renter's quiet enjoyment. Your workers demanded to use Dr. Lau's office electrical items. Dr. Lau office had refused it, but Dr. Leung still phoned them and to brother them. It was also [bothering] because I have to drop everything of my work while I received the phone call and come to see what is going on of my building.
>
> I want you to review your Lease contract clause of 10.3, 10.4, and 10.5. I would like to inform you that you have put air-conditioning with heater on the roof. This fixtures shall be the property of the Lessor and shall be considered in all respects as part of the Premises. I am [warning] you as you cannot do this again. I would like to research my right to ask you to remove it at your own cost. Please [hand] in all the papers and grantee documents to me no later than February 15, 2008

79 It was Mr. Tso's testimony that in response to this letter, he asked Dr. Yong about the documents that Ms. Parker had requested. Dr. Yong was so angry that he ignored Mr. Tso. Mr. Tso said that he phoned Ms. Parker and asked her to come meet. She did so and at their meeting, he apologized to her for the situation and asked her what she wanted him to do. She did not respond. She did complain that she had not been given notice. Mr. Tso told her what Dr. Yong's response had been and said that he could not force Dr. Yong to hand over the documents. Mr. Tso said that he asked Ms. Parker if she wanted them to remove the New HVAC Unit and she said no. Mr. Tso testified that there was no further discussion about the issue until Ms. Hoy's letter of March 31, 2008 which made references to breaches of the lease and enclosed the January 26, 2008 letter.

80 Ms. Parker was asked in cross-examination if she had ever asked Mr. Tso or Dr. Yong to remove the New HVAC Unit and she said she could not remember. She agreed that she had taken the position with Mr. Tso that the New HVAC Unit was now a fixture and that it belonged to her.

81 A response was provided in Richard Eng's letter of April 3, 2008. The portion of that letter

dealing with the HVAC issue stated:

> With respect to your client's letter dated January 2008, I will attempt to respond to the significant point set out therein. Firstly, I understand the subtenant who your client refers to as Dr. Leung is in fact named Dr. Yong. He is apparently a month to month subtenant. I understand the circumstances that led to the installation of a new HVAC system to service the Premises were as follows. The previous HVAC unit servicing the Premises was no longer operational. When my client mentioned this to your client, your client apparently indicated it was not her responsibility and apparently stated that it was the tenant's responsibility to replace the HVAC system at the tenant's cost. Based on your client's stated position, my client's subtenant apparently hired a reputable company to install the replacement HVAC system. No damage was caused to the building or roof as the replacement unit was simply installed in place of the old unit which no longer worked. I understand the new HVAC system cost in excess of $15,000.00 and that that system will remain on the Property as it becomes the Landlord's property once it is affixed. There was no intention to breach any provisions in the Lease. Hopefully, this explanation will appease your client.
>
> ...
>
> With respect to the disturbance of your client's other tenant referred to on the second page of your client's letter, my client has advised that this arose due to a misunderstanding as my client's subtenant could not locate the electricity supply to enable it to complete its work.

82 Ms. Hoy responded in her letter of April 9, 2008 which stated in relation to this issue:

> With reference to the installation of the HVAC, the landlord had no prior notification that there was to be an installation of a new HVAC until after the fact. Clause 8.01 refers to the "... repair maintain, and keep in good state ..." ... heating ventilating, and air conditioning equipment and fixtures ...." and clause 8.02 refers to notification to the landlord as to "... any defect .... fixtures, heating apparatus ...." The tenant did not comply with clause 8.02 to give "... immediate notice ...", the tenant cannot simply, proceed to install, spend, as indicated in your letter, $15,000.00, and expect the landlord not to take notification. In this respect, our client requests the name of the installation company plus all guarantee agreements for the installation and equipment.
>
> ...
>
> The disturbance was caused to the other tenant due to the fact that your client neglected to notify the landlord of the installation of the HVAC.

83 Dr. Yong passed away in July 2008 and sometime later Mr. Tso received documents in relation to the HVAC issue, the inspection notice and quote dated February 27, 2007 and the invoice dated January 10, 2008. These were provided to Ms. Parker as part of document production in this litigation.

84 The next correspondence was a letter from Ms. Parker dated September 16, 2008. The Landlord's counsel objected to reference being made to this letter on the basis that it was written in the context of settlement discussions and was therefore privileged. The letter is not marked "Without Prejudice", a factor which I agree is not determinative of the issue. I have concluded that it is preferable to err on the side of caution with respect to the issue of privilege and,

accordingly, will make no reference to this letter and the response to it, save with reference to the issue of whether the parties concluded an agreement to settle this dispute.

85 Part of the relief sought by the Landlord in the counterclaim was an order requiring the plaintiff to rectify all the breaches of the Lease. In response dated January 21, 2009 to a demand for particulars, the defendant stated that the relief sought in relation to the HVAC issue was:

> (a) that the Plaintiff, S.E. Fraser Enterprises Ltd. remove the air conditioning and heating unit placed on the roof of the building at the Plaintiff's cost and be responsible to place the building back to the state in which it as [sic] before the air conditioning and heating unit as [sic] installed and undo all work done to the building for the purpose of connecting the air conditioning and heating unit to the building and place the building back to its original state;

86 I conclude that the Tenant is not and was not at any time critical to the exercise of the option to renew, in breach of the Lease with respect to this matter. The subtenant purchased the unit and arranged for its installation. There is no provision of the Lease making the Tenant responsible for the subtenant's breaches. Accordingly, any breaches committed by the subtenant are not the responsibility of the Tenant and cannot form an obstacle to the exercise of the option to renew.

87 With respect to the acquisition and installation of the HVAC unit, Ms. Parker having told both the subtenant and Mr. Tso that it was the responsibility of the subtenant to deal with the replacement of the unit, cannot now complain that Dr. Yong took her at her word and did so. Nor, having accepted that the unit had become the Landlord's property could Ms. Parker now be entitled to require the Tenant to remove the unit.

88 The subtenant should have given Ms. Parker notice when the unit was to be installed, but the Tenant is not responsible for this breach and, in any event, the breach was spent by the critical dates for the exercise of the option to renew.

89 Ms. Parker did direct Mr. Tso to acquire the guarantee documents from Dr. Yong with respect to the unit. However, I find that this request does not fall within the scope of the financial background and information with respect to proposed subtenants contemplated by Clause 15.01. Accordingly, there was no breach of that clause.

b) Garbage in the Hallway

90 The next alleged breach identified in the pleadings is that the plaintiff leaves boxes, packing materials and other rubbish obstructing the passageways and area adjacent to the Premises. This is said to be contrary to Clauses 13.01 and 17.01 of the Lease which provide:

> MAINTENANCE
>
> 13.01 The Lessee will provide receptacles for refuse and rubbish of all kinds, and will attend to the removal of the same from the Premises at regular intervals, and will not keep nor leave any boxes, packing material or rubbish of any kind in or near the Premises or any passages connected with same, and the Lessee will keep clean and free

> from any rubbish, ice or snow, all walks, passages, yards and alleys adjacent to the Premises.
>
> ...
>
> RESERVATIONS
>
> 17.01 The Lessee agrees that any yard, passage, alley or area connected with the Buildings is for the use of all the occupants of the Buildings and that the Lessee will not obstruct nor hinder the use of same by other occupants of the Buildings and their employees, agents and customers and that the Lessee will keep clean and sanitary the portion of same situated in the rear of or adjacent to the Premises.

91 Ms. Parker's evidence is that she observed garbage in the hallway from the time she purchased the building in 2005, and that it was a constant problem and concern. Mr. Tso's response to this issue is that the pharmacy does not and has not left anything out obstructing the passageways. He stated that they have their own garbage bin and recycling box for paper products, both of which are used to deal with the garbage.

92 In cross-examination counsel showed Mr. Tso a photograph which was said to have been taken on the day of his examination for discovery, March 4, 2009. The photograph shows four small plastic containers shaped like buckets for holding files; and what looks like a small black wastepaper basket with a small white plastic bag, containing something tied at the top, sitting on top of the wastepaper basket. These objects are sitting on the door mat, against the door of what was identified to be Dr. Mudaliar's premises. The corridor is not obstructed. I did not regard what was depicted in the photograph as consistent, in the sense of constituting a significant problem, with the complaints made by Ms. Parker on the subject.

93 Mr. Tso's evidence was that every day a janitor comes to Dr. Mudaliar's premises and cleans the office. If there is garbage the janitor puts it in the bin, and sometime the garbage will be put in the corridor to wait until the janitor takes it to the bin.

94 Dr. Mudaliar testified that the plastic bins were file folders that were likely placed there while his staff reorganized his files. He stated that his staff disposed of the garbage every day during the week and that a cleaning service takes the garbage out on the weekends. There would be some occasions, for example, if it was raining heavily, when garbage would be left for a short period in the hall by the door. He said that such a period would be relatively brief and that under no circumstances did any garbage ever obstruct the hall.

95 This complaint was identified in Ms. Parker's letter of January 26, 2008 in which she stated:

> You have breached the Lease contract clause of 13.01 to leave a lot of boxes packing material or rubbish of any kind in near the entrance, bathroom and storage places that is above the ceiling on the corridor -- The lessee will keep clean and free from any rubbish, all walks, passages yards and alleys adjacent to the Premises.

96 Richard Eng responded to this issue in his letter of April 3, 2008 as follows:

> My client has advised that it has or will ensure that any boxes of packing material or rubbish are removed from areas where they should not be kept.

97 Ms. Hoy responded in her letter of April 9 2008 as follows:

> With reference to the "... packing material or rubbish ..." as referred to in your letter of above date, please have the tenant remove these within this month, otherwise our client will engage someone to remove these items which will be added to the tenant's costs.

98 The reply to the demand for particulars dealt with this issue as follows:

> (d) that the plaintiff remove anything placed in the common areas of the building and, in particular, of the hallways and walkways of the building;

99 I do not accept Ms. Parker's evidence that garbage was a problem in the building or that the hallways were obstructed with piles of garbage. I find that the Tenant was not in breach of these provisions of the Lease at any time and, in particular, at any time relevant to these proceedings.

100 I accept Dr. Mudaliar's evidence with respect to the subtenant's practices concerning garbage disposal and find that these do not constitute a breach of the Lease. In any event, the subtenant's behaviour does not amount to a breach for which the Tenant is responsible. Finally, there is no evidence that the subtenant was in breach of the Lease at any of the critical times in relation to the Tenant's option to renew.

c) Plaintiff Has Changed the Locks to the Exterior Back Door

101 The allegation is that the Tenant has changed the locks to the exterior doors in breach of Clauses 8.01 and 10.02 of the Lease which provide:

> REPAIRS
>
> 8.01 The Lessee shall at its own cost and expense repair, maintain, and keep in good state of repair consistent with the standards of a careful owner, the Premises, and all equipment and fixtures therein including, without limiting the foregoing, exterior and interior doors, windows, glass partitions, glass and plate glass within the Premises or attached to or forming part of any exterior or partition wall of the Premises, heating ventilating, and air conditioning equipment and fixtures, and plumbing and electrical equipment and fixtures within the Premises (and elsewhere if such equipment and fixtures situate other than within Premises are provided exclusively for the benefit of the Premises). The Lessee shall make all repairs required hereunder;
>
> (a) in a good and workmanlike manner;
>
> (b) with reasonable expedition; and
>
> (c) in accordance with all laws and regulations of governmental and other authorities having jurisdiction.

102 Mr. Tso's evidence in relation to this issue is that the lock was changed after a break-in at the building that damaged the lock. It was his evidence that the key remained the same.

103 Dr. Mudaliar testified that there was a break-in January 2007. Thieves smashed in the back door and broke the lock. Following the break-in, the locksmith had to replace the glass and the

lock on the back door leading to the alley. He believed that the key was not changed. He agreed in cross-examination that he was not 100% certain that the key was not changed.

104 Although the pleadings refer only to the lock at the exterior back door of the Premises, Ms. Parker gave evidence with respect to a number of locks. When asked which locks had been changed, her answer was "mostly the front and back". She complained of locks being changed in the space rented by Dr. Mudaliar. She stated that Dr. Yong had changed the lock in the back storage room. She recalled a conversation with Dr. Yong when she was repairing the tile in the hall in about September 2005. At that time he told her that he had changed the lock. She stated that Ms. Siu told her that the lock to the bathroom had been changed. It was her testimony that she had been given a master key by the realtor at the time of purchase of the building. It was her evidence that she had not checked to see if her master key worked because she had been told that the locks had been changed and, that in any event, she had lost the master key. She stated that she only mentioned the door key to the back room at the back door entrance in her letter of January 26, 2008 because she had forgotten the other changes when she wrote it. Ms. Parker denied the suggestion that she never had a master key.

105 The issue was raised in Ms. Parker's letter of January 26, 2008 as follows:

> You have breached the Lease contract clause of 6.03 and 10.2 to change the door key on the back room door near the back door entrance. I would like you to put back the original door lock on the door before February 15th 2008.

106 Richard Eng's letter of April 3, 2008 dealt with the issue as follows:

> With respect to the reference in your client's letter to the change of the door key on the back room door, my client has advised that there was a break-in which resulted in the insurance company installing a new lock and key system as the old one was broken. As the room in question contains confidential patient files, my client prefers not to provide a copy of the key to your client. Please advise if this will be agreeable to your client.

107 Ms. Hoy responded to this issue in her letter of April 9, 2008 as follows:

> With reference to the tenant's "... change of the door key on the back room door ..." the landlord is entitled to a copy of the key. Copies of all keys to all locks in the building should be available to the landlord.

108 The response to a demand for particulars seeks an order that the plaintiff remove and undo any alterations made to the exterior of the premises at the front and back doors of the building and put the building back to its original state.

109 I find that the lock was changed on the exterior back door following a break-in that had resulted in damage to the lock. I find that this act did not amount to a breach of the Lease, nor to Clauses 8.01 or 10.02 in particular. It is not clear to me that the exterior back door in question is part of the Premises, but if it is the Tenant was maintaining the lock as contemplated by Clause 8.01 in that the damage caused by the break-in was being repaired. I find that this did not constitute an alteration to the structure, plan or partitioning of the Premises, nor other act contemplated by Clause 10.02. The other matters were not the subject of pleadings, but in any event, I do not find any breach by the Tenant has been made out with respect to these

allegations.

d) Plaintiff has Laid Cement Front and Back

110 The next alleged breach refers to cement laid by the plaintiff outside the front and back doors of the building. This was also alleged to constitute a breach of Clauses 8.01 and 10.02 of the Lease.

111 Mr. Tso's evidence is that in 2006 there was a hole in the cement in the back near the garbage bin. It was at least 18 inches deep and was a hazard. He said that he spoke with Ms. Parker about it, but did not get any response. Eventually he hired a contractor to come and fill in the hole.

112 Ms. Parker denied that there was ever a conversation about the hole in the cement. She denied that Mr. Tso ever discussed any concerns about this with her. When asked if she wanted Mr. Tso to remove the cement filling in the hole, she replied that before she did not have this idea, but now she would like him to remove it. She could not recall when she came to this idea. When asked to say what was wrong with the cement, she answered that she did not know. She said that she did not ask him to put it in and so he should not have done so.

113 With respect to the cement work in the front of the store, Mr. Tso testified that when he moved into the building in 1986 the entry into his unit was inside the building. As a result of changes that took place in 1991, that area became outside the pharmacy. Mr. Tso stated that vinyl indoor tile had always covered that area. It was suggested to him in cross-examination that in fact the area outside his storefront had been covered in the same outdoor tile as elsewhere on the building exterior. He denied that this was the case. Ms. Siu's testimony on this issue was to the same effect.

114 Mr. Tso stated that there was a slope between the entry to the pharmacy and the sidewalk that had been in place since 1991. It was his testimony that by 2006 the tiles were coming up. Mr. Tso was not able to make them stay in place and they constituted a hazard. It was his testimony that he spoke with Ms. Parker and asked her what they should do about the problem and she said nothing. Finally, when the contractor came to fill in the hole in the alley, Mr. Tso had him take up the tiles and smooth over the cement underneath. He provided the invoice dated December 12, 2006 in the amount of $1,908.00 to Ms. Parker, but she did not reimburse him for the cost of doing the work.

115 Ms. Parker's evidence was that she could not recall what type of tile there was on the exterior of the pharmacy before the work was done, but she thought that it must be outdoor tile like the kind used elsewhere around the building. She denied that there was any conversation with Mr. Tso about the state of the tiles in front of the pharmacy. She said that if there had been such a conversation, she would have insisted that he use tiles that matched the rest of the building.

116 Ms. Parker dealt with this issue in her letter dated December 18, 2006. In relation to this issue, the letter stated:

> Thank you for doing the cement floor on the outside of the parking lot and the front of 6448 and 6460 of Fraser Street and I appreciate you were very helpful to me.

> But I must inform you that I am not happy of the cement floor you have put on the property between 6448-6460 of Fraser Street. Because the cement you put it on are too [pop] up at the front.
>
> I also not too happy about the renovations you have given out for the Doctors. It will be [much] better if you inform me about what kind of the alterations they did and the plan how they did on the property.
>
> This letter services as a reminder that please [review] the lease of page 8 & 9, Clause 10.01, 10.02, 10.03 and 10.05.

117 Mr. Tso stated that when he received the letter, he telephoned Ms. Parker and asked her what she wanted the Tenant to do. She mentioned that she wanted the front area retiled in outdoor tile to match the rest of the building. Mr. Tso told her that the original tile that had been in place was not the outdoor tile that was found elsewhere in the building exterior, but indoor vinyl tile. He stated that if she wanted the work done, she could do it as triple net and he would pay her for part of the work. She did not reply.

118 The matter was not referred to again in correspondence until Ms. Parker's letter of January 26, 2008 in which she stated:

> You have to breach the contract clause of 6.03 and 10.02 to put the cement on the back of the floor near the back door entrance and on the front floor near the front door entrance. It is also considered in all respects as part of the Premises. I would like to inform you that I want you to repair your cement on your front floor near your front door entrance as same as the front floor on the front door entrance of 6438 at your own costs. If you do not want to do that, I would call some one to do it at your own cost.

119 Richard Eng responded to this issue in his letter of April 3, 2008 as follows:

> Finally, with respect to your client's complaint regarding the placement of cement on the floor near the back door entrance, my client has advised that the existing cement was unsafe so my client had to have it repaired to prevent anyone from falling and injuring themselves. My client also has repaired the cement near the front of the Premises for the same reason. Apparently your client wants ceramic tile installed in the front entrance area. However, because of the contour of the ground near the front entrance, my client has advised that it is not possible to properly install ceramic tile in that area so just cement was installed. If your client is able to find a contractor who is able to do this, my client is prepared to pay the reasonable cost of same.

120 Ms. Hoy dealt with the issue as follows in her letter of April 9, 2008:

> If the existing cement as referred to in page 3 of your letter was unsafe, the landlord should have been notified. The landlord wants the front entrance cement removed as soon as possible.

121 I find that the Tenant was not in breach of the Lease at any critical time in relation to the exercise of the option to renew as a result of either filling in the hole in the back lane or removing the indoor vinyl tile and smoothing the cement in the front. I accept Mr. Tso's evidence that in each case he discussed the problem in advance with Ms. Parker and she did not

respond. In each case a hazard existed that needed to be addressed and Mr. Tso did so. I find that this did not in the circumstances constitute a breach of the Lease.

122 With respect to the hole in the lane, after the work was done, there was nothing more to be done. There are no complaints about the quality of the work.

123 With respect to the cement in the front, in 2006 in response to Ms. Parker's December 18, 2006 letter, I find that Mr. Tso asked Ms. Parker what she wanted him to do. He explained to Ms. Parker that the area in front had not been covered in the outdoor tile and offered to contribute to the cost of tiling the area. Ms. Parker did nothing to follow up until 2008 at which time Mr. Tso, through his counsel, again offered to pay the reasonable costs of covering the area in tile of Ms. Parker's choosing. Again she did not follow through. In the circumstances, in my view, the Tenant cannot be faulted.

e) Failure to Pay December 18, 2007 Invoice

124 This charge arises in relation to the administration fee to approve a sublease provided for in article 15.01 of the Lease, which stated in part:

> ... The Lessee shall pay to the Lessor an administrative charge equivalent to 1/2 monthly Basic Rent payable at the time of the assignment or sublease. The Lessee shall also be responsible for and pay any legal fees and expenses incurred by the Lessor in connection with such assignment or sublease.

125 In August 2006, Mr. Tso was in negotiations to sublease space to three physicians, Drs. Mudaliar, Khun Khun and Johal. The doctors were planning to undertake extensive and expensive renovations to the building and had negotiated a three month rent free period with Mr. Tso as a renovation fee. Mr. Tso testified that he discussed this with Ms. Parker and asked her to contribute in some fashion to the costs. It was his evidence that she agreed to waive the administration fee. It was Mr. Tso's evidence that Ms. Parker was enthusiastic to help because she wanted the doctors to move in. She was aware that they were going to improve the building, including painting and installing new tile and cabinets.

126 Ms. Parker's evidence is that while she knew the doctors were in negotiations with respect to a subtenancy, there was never any discussion with Mr. Tso about a renovation period, or indeed about the renovations that were planned. She stated that she never agreed to waive the administration fee. In fact, it was her evidence that she demanded the fee from Mr. Tso after she signed the consent, but that at the time he said he did not have to pay because previous owners had not demanded the fee. This conversation was never put to Mr. Tso in cross-examination.

127 It was Mr. Tso's evidence that there were no further discussions concerning the administration fee until he received the invoice dated December 18, 2006 which stated:

> Re: <u>Administrative charge and legal fees</u>
>
> Based on the Clause 15.01 of your Lease. W & W [Parker] Enterprises Ltd. has the right to charge SE Fraser Enterprises Ltd. of 1/2 month's basic rent as an administrative fee, as well as the right to charge any legal fees and expenses incurred by you in connection with any consent to sublease and sublease.

Therefore

Administrative fee of 1/2 month basic rent is ($ 4481.75/2)= $2240.88

Photocopy $15.00

Legal fee from Chen & Leung Co. $781.00

Total $3036.88

Please Pay ASAP

Please disregard the legal fee if you has paid it.

128 Mr. Tso stated that when he received the invoice he telephoned Ms. Parker. He reminded her of her agreement to waive the administration fee. She responded that he just needed to pay the legal fee. Mr. Tso then wrote her a cheque for the $781.00 legal fee and provided it to Ms. Parker.

129 With respect to the legal fees, Ms. Parker's evidence on examination for discovery was that Mr. Leung, Ms. Parker's solicitor in this matter, never reviewed the sublease, never prepared any documents relating to the sublease, never reviewed Ms. Parker's consent or did any work at all in relation to the sublease or Ms. Parker's approval of the sublease. After confirming that she charged, and Mr. Tso paid, $781.00 in relation to legal work on the sublease, Ms. Parker then changed her evidence to say that she now thought that Mr. Leung did review the sublease.

130 Mr. Tso said that there was no further discussion concerning the administration fee until the correspondence concerning renewal of the lease in 2008. The administration fee is not referred to in Ms. Parker's letter concerning alleged breaches of January 26, 2008. In the meantime in 2007, Ms. Parker owed Fraser a credit of $3,551.62 which Ms. Parker paid to Mr. Tso without reference to the administration fee. Ms. Parker's explanation at trial was that she did not think she should mix up the two. She said that she did not know how to do this, that she did not know how to deduct.

131 Ms. Parker's evidence was that she asked Mr. Tso for payment of the administration fee every time she visited the building. On her examination for discovery, she could not recall how many times she had raised it, or if she had asked more than once.

132 Richard Eng's letter of April 3, 2008 stated as follows with respect to this issue:

> ... We with respect to the invoice dated December 18, 2006 issued by your client to mine, my client paid the sum of $781.00 to your client in January of 2007. Phillip Tso has advised me that he had a number of discussions with your client in or around that time wherein your client agreed to waive the requirement to pay the Administration Fee equal

> to a half month's rent and agreed to accept the $781.00 reimbursement of legal fees to satisfy my client's obligation. I have in my possession a copy of my client's cheque in the amount of $781.00 which I understand your client deposited on March 20, 2007.

133 Ms. Hoy responded in her letter of April 9, 2008:

> There is no written approval for the subletting as in accordance with Clause 15.01; in this same clause there is the "... administrative charge equivalent to 1/2 monthly Basic Rent payable at the time of the assignment or sublease. The Lessee shall also be responsible for and pay any legal fees and expenses incurred by the Lessor in connection with such assignment or sublease." An account was presented to the tenant and unless the tenant has a signed agreement with the former landlord which is valid and binding on the present landlord, the present landlord is entitled to be paid. In addition, the landlord does not waive the fee and did not waive the fee at any time; the sum of $781.00 may be deducted from the total account thus making the sum of $2,255.88 due and owing ($3,036.88-$781.00)

134 I accept Mr. Tso's evidence with respect to the administration charge. It seems to me more likely that he would have sought some contribution from the Landlord to the inducements being offered to the subtenant. His conduct in paying the $781.00 legal fee, but not the remaining portion is consistent with the existence of an agreement to waive the balance. The fact that Ms. Parker did not refer to this issue in her letter of January 26, 2008 is consistent with the Tenant's version, as is the fact that Ms. Parker refunded amounts to the Tenant. I do not accept her explanation that she did not know how to deduct. It follows that the Tenant was not in breach of the Lease with respect to the administration charge because the Landlord had agreed to waive its portion of the charge.

Additional Breaches in the Further Amended Counterclaim

> a) Installation of a Sink Draining into the Parkade

135 This allegation was included in the further amended counterclaim pursuant to leave to amend granted at the commencement of the trial. The pleading asserts:

> In breach of clauses 8.01 and 10.02, the Plaintiff and/or a sublessee of the Plaintiff acting on behalf of the Plaintiff renovated a portion of the Premises which renovations included installing a sink with a down pipe draining to the parkade on the level below. These renovations were done without the Defendant's written consent.

136 Mr. Tso's evidence is that the sink was constructed in premises leased by a subtenant prior to the 1991 renovations. He stated that the drawing submitted to obtain the permits for the 1991 renovations show the sinks already present. At the time, the sink did not drain directly into the parkade, but into the sewer pipes, that are visible in the ceiling of the parkade. At some point, these connecting pipes were removed. Mr. Tso did not know who had removed the connecting pipes, speculating that it might have been thieves or vandals.

137 As noted above, it was Ms. Parker's evidence that she became aware of this issue when the owner of Nima Spa brought it to her attention shortly after Ms. Parker purchased the building. This was when Nima Spa still occupied the space, which means that it would have been some time before May 2006. Ms. Parker said in cross-examination that Mr. Ranji from

Nima Spa told her that he had "made the sink", that the sink was not connected, and that he would like Ms. Parker to connect it for him.

138 Ms. Parker said that she was certain that the hole in the parkade ceiling with the emerging pipe was not there when she purchased the building. On her examination for discovery, her evidence was that she could not remember if the problem existed when she purchased the building. Her explanation for this inconsistency was that she forgot a lot of things at her discovery because she was not sleeping well.

139 I find that the sink was installed in the building prior to 1991 prior to Nima Spa occupying space in the building and long before Ms. Parker purchased the property. This is consistent with the documentary evidence. Accordingly, the question of Ms. Parker's written consent does not arise.

140 I find further that when the sink was installed it had a down pipe that connected to the sewer pipe. The only evidence to the contrary is Ms. Parker's testimony with respect to a conversation with Mr. Ranji. I do not accept this evidence and in any event, it is hearsay with respect to the facts allegedly asserted by Mr. Ranji.

141 I find that the connection was destroyed at some point by persons unknown. There is, however, no evidence to support an inference that either the Tenant or any of the subtenants had anything to do with that act. It follows that the Tenant was and is not in breach of any provisions of the Lease with respect to this allegation.

b) Renovation of the Premises

142 This allegation was also included in the amendments to the further amended counterclaim made at the commencement of the trial. The pleading asserts:

> In breach of clauses 8.01 and 10.02, the Plaintiff or one or more sublessees of the Plaintiff acting on behalf of the Plaintiff further renovated the Premises whereby the structure of the building was altered and a portion of the Premises converted from a spa into a medical office.

143 Mr. Tso agrees that renovations were undertaken when the doctors took over the space formerly occupied by the spa. His evidence is that these renovations did not alter the structure of the building. The renovations at issue amounted to restoring partitions that had been removed by the spa, new floor tiles, painting, and moving the door to the washroom to correspond to the floor plan of the City of Vancouver 1991 building permit.

144 It was Mr. Tso's evidence that he reviewed the floor plans with Ms. Parker in 2006 and explained what the doctors proposed to do. He received her verbal approval to carry out the work. He agreed that he did not seek or obtain her written permission.

145 Ms. Parker's letter of December 18, 2006 stated in part:

> I [am] also not too happy about the renovations you have given out for the Doctors. It will be [much] better if you inform me about what kind of the alterations they did and the plan how they did on the property

146 In cross-examination with respect to this letter, Mr. Tso stated that Ms. Parker had come down to the building every week in August 2006 and he had showed her what the doctors were going to do. He had reviewed the plans for the renovations with her. During the renovations she came and looked at what was being done. She never mentioned at the time that she was not happy. He said that after he got the December letter he called her and asked her what she wanted. There was no response.

147 I find that the work undertaken did involve alterations to the partitioning of the Premises, albeit to restore the partitions to their previous state. Accordingly, Clause 10.02 is engaged. However, I find that Ms. Parker was advised of what was proposed and did give her verbal approval to the plans. Having done so in 2006, I find that she is estopped from later raising the issue of the absence of written notice. I find that the Tenant was not in breach of the Lease in relation to this allegation.

c) Iron Bars on the Window

148 This allegation was also added to the further amended counterclaim at the commencement of the trial. The pleading asserts:

> In breach of clauses 8.01 and 10.02, the Plaintiff and/or a sublessee of the Plaintiff acting on behalf of the Plaintiff installed iron bars at the front window of a portion of the Premises.

149 Mr. Tso's evidence is that the doctors added iron bars to the inside of their windows at the recommendation of the police after they had experienced a break-in. Ms. Parker was aware of this and had never raised any concerns to him about the bars. Dr. Mudaliar testified that on the recommendation of the police, the bars, together with an accordion gate, were installed after the break-in that occurred in January 2007. It was his testimony that he told Mr. Tso what he was going to do, that Mr. Tso did not give him permission and he did not ask for permission. He did not believe that he required permission to upgrade the security to his premises.

150 In my view, the act of installing the security bars following the break-in was consistent with the provisions of Clause 8.02. I find further that the bars did not amount to an alteration to the structure, plan or partitioning of the Premises, nor did they constitute plumbing, piping, wiring or heating apparatus. Accordingly, their installation did not fall within Clause 10.02 of the lease. Accordingly, I find that there was no breach of the Lease with respect to this issue.

d) Failed to Provide Documents Regarding the Sublease of Dr. Yong and Others

151 This allegation of breach is found in the Further Amended Counterclaim. Mr. Tso's evidence was that there were no such documents, and that Dr. Yong was on a month-to-month tenancy. Further, Dr. Yong died in July 2008. In any event, such documents had never been requested. I find that there was no breach of the Lease with respect to this issue.

152 With respect to the "and others", there is no evidence that documents were requested concerning the subtenancy of Drs. Mudaliar, Khun Khun and Johal. No complaint was made with respect to this issue prior to the amendments at trial. Having approved the subtenancy in 2006, and having been silent about this issue until trial, I find that Ms. Parker waived any

requirement to provide financial documents with respect to the prospective subtenants and cannot now raise this issue as a breach by the Tenants of the Lease. I find that there was no breach of the Lease by the Tenant with respect to these provisions.

153 In the result, I find that the Tenant was not in breach of the Lease either at the time it gave notice of the exercise of the option to renew or thereafter. Accordingly, the Tenant was entitled to exercise the option to renew.

Additional Rent

154 The Tenant's claim in relation to this issue is as follows:

Summary of Amounts Claimed by the Plaintiff (excluding pre-judgment interest)

Overpayment of rent for period of Aug/05 to Dec/05		3,234.29
Overpayment of rent for period of Jan/06 to July /06		3,515.07
Overpayment of rent for period of Aug/06 to July/07		6,811.89
Administrative Fee relating to Sublease: paid under protest		2,255.88
Legal fees improperly claimed as relating to sublease		781.00
Cement Repairs paid for by the Plaintiff	**1,908.00**	
Less: Plaintiff's share (34.39%)	**-656.16**	1,251.84
Total		17,849.97
Less Reimbursement April 9/09		-7,902.58
Less Reimbursement April 14/09		-3,665.53
Balance of Plaintiff's Claim		6,281.86

155 The reimbursements refer to amounts that were settled and repaid by the Landlord during the course of the trial.

156 With respect to the administrative fee relating to the sublease, I have found that the Landlord agreed to waive that fee. Accordingly, the $2,255.88 paid under protest by the Tenant should be repaid. With respect to the $781.00 legal fee claimed in relation to the sublease, Ms. Parker admitted that her solicitor did not perform any work in relation to the sublease; accordingly, the charge was not proper and this amount should be refunded to the Tenant.

157 With respect to the cement repairs, the expense is in relation to the repair of a significant hazard in the back lane of the Property. The Tenant had requested that Ms. Parker to deal with the issue, but she did not do so. Eventually the Tenant retained a contractor to repair the hole. There is no suggestion that the work was not properly done or that the charge is unreasonable for the work that was done. In the circumstances, I conclude that the Landlord should pay the Tenant $1,251.84, being all but the Tenant's 34.39% share of the expense.

158 With respect to the balance of the charges that are still in dispute, I am unable to conclude that any of the charges were properly charged by the Landlord as additional rent. The amounts still at issue with respect to alleged overpayment in 2005 were in relation to:

(a) Terasen Gas charges -- These relate to the Landlord charging as additional rent a portion of the credit balance. The explanation was that Ms. Parker had provided a large deposit when she purchased the building and this was being used up over the course of several months. However there was no documentary evidence to support this explanation and, given the unsatisfactory nature of the Landlord's evidence concerning Additional Rent in general, I am unable to conclude that it was the correct one.

(b) A series of repairs invoiced in September 2005 -- It is not at all clear from either Ms. Parker's testimony or the documents what work was done in relation to these charges. I conclude that it is more likely than not that this work related to capital improvements that Ms. Parker was making to the Property in relation to her intention to sell the Property. As such they are not properly charged to the Tenants as Additional Rent.

159 The amounts still at issue concerning the alleged overpayments in 2006 and 2007 were:

(a) A charge in April 2006 for flooring repair -- I believe that the Landlord no longer claims this amount, however if that understanding is not correct, I find that it is not clear what this charge relates to. It is more likely than not related to capital improvements. I find that it was not a legitimate Additional Rent charge.

(b) Hydro charges for 2006 -- I find that the Landlord charged more than once for the same charge. The disputed amounts are not proper Additional Rent charges.

(c) Appraisal services in 2006 and 2007 -- My understanding is that the Landlord has resiled from asserting that these were proper Additional Rent charges. However if that understanding is incorrect, I find that there is no evidence that these were proper charges.

(d) Postal and photocopy charges -- these charges were significant and to my mind beyond what could reasonably be anticipated. Ms. Parker was not able to provide an explanation to support charges of the magnitude claimed. I conclude that these amounts were not justified as Additional Rent.

160 In the result, the Tenant is entitled to judgment in the amount to be calculated by counsel consistent with these Reasons.

Was there a Settlement?

161 The Tenant submits that the issues in the litigation were subject to a settlement. The burden is on the Tenant, having alleged an agreement to settle, to prove that agreement. I have considered the testimony and the correspondence over which privilege was claimed for the purpose of determining if an agreement to settle was concluded. I find that the Tenant has not discharged its burden of proof and conclude that the matter was not settled prior to trial, either in whole or in part.

Summary

162 In the result, the Tenant is entitled to:

(a) a declaration that the Lease has been renewed for the term of October 1, 2008 to September 30, 2013;

(b) judgment for the difference between the amount paid by the Tenant on account of Additional Rent and the amount properly paid calculated in accord with these reasons; and

(c) judgment for $2,255.88, being the administration fee paid under protest; $781.00 being the legal fees improperly claimed in relation to the sublease and $1,251.84 being the cost of cement repairs, less the Tenant's proportionate share.

163 The counterclaim is dismissed. Unless the parties have further submissions with respect to costs, the Tenant is entitled to its costs at Scale B.

C.J. ROSS J.
