North Vancouver (Corporation of The City) v. Seven Seas S.R. (The), 2000 CanLII 16226 (FC)

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Date: 20000913

Docket: T-503-99

OTTAWA, ONTARIO, THIS 13th DAY OF SEPTEMBER 2000

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

THE CORPORATION OF THE CITY OF NORTH VANCOUVER

Plaintiff

- and -

THE OWNERS AND ALL OTHERS INTERESTED

IN THE SHIP "SEVEN SEAS S.R."

SEVEN SEAS SEAFOOD (WHOLESALE) LTD., DIAMOND ALMAS

AND THE SHIP "SEVEN SEAS S.R."

Defendants

REASONS FOR ORDER AND ORDER

DAWSON J.

[1] Before me, pursuant to Rule 220(1)(*a*) of the *Federal Court Rules, 1998* ("Rules") and the order of the learned Prothonotary Mr. Hargrave, is a request for the determination of the following question of law:

Whether the lease entered into between the parties in 1982 operated, as a matter of law, to supersede all prior agreements, whether written or otherwise, and all rights of the parties vis-à-vis each other, such that the Defendants' right to the continued use and occupation of the Water Lot was terminated upon the termination of the 1982 Lease and all agreements subsequent thereto.

[2] These are my reasons for answering the question in the affirmative.

PRELIMINARY MATTER

[3] The matter proceeded before me on the basis of an agreed statement of facts and a joint book of documents. Counsel, in oral argument, confirmed that the documents contained in the joint book of documents are put before the Court not only as true copies of each document, but also for the proof of the truth of the contents of those documents.

THE FACTS

[4] The facts agreed upon by the parties for the purpose of this motion only are as follows:

Introduction

1. The Defendants and each of them are the owners of the former Ferry No. 5 (the "Defendant Ship"), a ferry that operated between Vancouver and North Vancouver prior to 1959. Since 1959, the Defendant Ship has operated as a floating restaurant.

2. The Plaintiff was the former owner of the Defendant Ship. In the late 1950s, the Plaintiff wished to sell the Ferry No. 5 to Harry Almas, the father of the Defendant, Diamond Almas, and his company, Seven Seas Seafood Restaurant Ltd. ("Seven Seas Seafood").

3. In or about 1958, the Plaintiff's City Council decided to discontinue the ferry service between Vancouver and North Vancouver, take the old ferry dock and operate it as a marina. The Plaintiff constructed a marina at the Foot of Lonsdale Avenue and it was hoped that this would be the centre for a redevelopment of the lower Lonsdale area.

4. The City Council of the day wished to develop the lower Lonsdale area in a fashion similar to Fisherman's Wharf in San Francisco. As part of that redevelopment, the Plaintiff let a tender for the operation of a marina at the Foot of Lonsdale Avenue. A key component of the marina development was the operation and refurbishing of the Defendant Ship as a floating restaurant. (The tender was dated September 20, 1958). The full particulars of the tender package are not available.

The Water Lot

5. The Plaintiff is the registered owner in fee simple of a water lot with a civic address of the Foot of Lonsdale, in the City of North Vancouver, and being more particularly known and described as:

Parcel Identifier No. 006-975-429
Lot 15 of the Bed and Foreshore of Burrard Inlet lying in front of District Lot 271 Plan 19677; and
Parcel Identifier No. 015-989-984
Block H (Reference Plan 2587), except that part shown in heavy outline on Reference Plan 16729, of the Bed and Foreshore of Burrard Inlet lying in front of District Lots 271 and 274
Group l
New Westminster District
(the "Water Lot").

6. Prior to 1982, the Plaintiff leased the Water Lot from the National Harbours Board, which is a

predecessor to the Vancouver Port Corporation, now known as the Vancouver Port Authority.

The Sale of the Defendant Ship in 1959

7. By letter dated November 24, 1958, Harry Almas wrote to the Plaintiff, offering to purchase the Defendant Ship for $12,000.

8. Prior to the creation of the Seven Seas Restaurant, the Almas family and in particular, Harry Almas, was not involved in the restaurant business and required assurances from the City of North Vancouver that, given the investment, the vessel would remain moored at the Foot of Lonsdale Avenue. By letter dated December 1, 1958, Harry Almas again wrote to the Plaintiff, stating,

I understand that the City proposes to go ahead with the construction of a Marina forthwith and that I will be assured of mooring facilities in the most convenient location within the Marina for the floating restaurant into which I propose to convert the vessel, and that, while I understand that the normal type of co-operative arrangements would exist between myself and whosoever operates the Marina, I will be assured by the City of North Vancouver that I will always have permanent mooring facilities and reasonable egress for the vessel to permit dry-docking etc. that may be required from time to time.

9. The Plaintiffs City Council accepted Mr. Almas' offer by a subsequent Resolution, which stated,

That the offer of Mr. Harry Almas as contained in his letters of November 24th, 1958, and December 1st, 1958, for the purchase of Ferry No. 5 for the sum of $12,000 cash be accepted, subject to a satisfactory lease agreement being negotiated between the Solicitors of the City and the purchaser.

10. The Plaintiff through its staff provided assurances verbally and in writing that the vessel could be permanently moored at the Water Lot at the Foot of Lonsdale Avenue.

11. The Defendant Ship was required to be kept on the Water Lot. This was an agreement by the then City Council and staff and was in keeping with the assurances to the Almas family. The City was quite adamant that the vessel was to remain in North Vancouver. It could not be moved to another location. This greatly restricted the Defendants' ability to recoup their investment should problems arise.

12. By letter dated December 17, 1958, the Plaintiff's City Clerk wrote to Harry Almas' solicitors to advise Mr. Almas that the Plaintiff had accepted his offer subject to the lease agreement, and to commence negotiations for the lease agreement, stating:

Some of the points that would probably be required to be in the lease would be a commencement date for completion of the reconversion of the ferry into a floating restaurant, the payment of $2,500 a year rental to include taxes, the right of the purchaser to moor the vessel on City property at the Foot of Lonsdale, the term of the lease to be for a period of five years at a rental to be agreed upon.

13. After some negotiations, the parties reached an agreement and, on April 27, 1959, the Plaintiff entered into a Memorandum of Agreement with Seven Seas Seafood to sell the Defendant Ship to Seven Seas Seafood. The key portion of the Memorandum of Agreement is as follows:

1. The City agrees to sell to the Company [Seven Seas Seafood] and the Company agrees to purchase from the City North Vancouver Ferry No. 5 for the sum of Twelve Thousand ($12,000.00) Dollars (the receipt whereof is hereby acknowledged by the City). The Company acknowledges that the Company has examined the said North Vancouver Ferry No. 5, that the Company accepts the said Ferry in its present condition, and that the City has made no representations with respect to the condition of the said Ferry or the equipment thereon.

2. The City agrees to construct a Small Boat Marina upon the lands and lands covered by water, shown outlined in red on the plan attached, initialled by the parties hereto and marked "A". In the event that the construction of the said Marina is not commenced on or before the 1st day of June, 1959, the Company shall have the option, which may be exercised on or before the 30th day of June, 1959, of transferring to the City all its right, title and interest in and to the said North Vancouver Ferry No. 5 and upon the delivery to the City of the necessary documents of title transferring the said Ferry to the City as aforesaid, the City shall repay to the said Company the sum of Twelve Thousand ($12,00 0.00) Dollars, being the said purchase price of the said Ferry.

3. The Company agrees to convert the said Ferry into a restaurant and to maintain and operate the same as a restaurant upon the said lands covered by water shown cross-hatched in red on the said Plan marked "A", during the term of the Lease hereinafter mentioned and any renewal thereof.

4. The City agrees with the Company that it will restrict parking upon the lands outlined in green on the said Plan marked "A" designating the area for use by the patrons of the Ferry restaurant to be operated by the Company so that there will be adequate parking for the said patrons, between the hours of 5 p.m. and 12 midnight.

5. The parties hereto agree to enter into a lease in the form of the lease attached, initialled by the parties hereto and marked " B".

14. The Plaintiff and Seven Seas Seafood also entered into a lease for the Water Lot dated April 27, 1959. The lease provided, inter alia, as follows:

To have and to hold the same unto the Lessee for and during the term of five (5) years to be computed from the lst day of June, 1959, yielding and paying therefor the suns of Two Thousand Dollars ($2,000.00) per annum, including taxes, payable in advance on the 1st day of June in each and every year during the term of this lease or any renewal thereof, commencing on the lst day of June, 1959.

And the Lessee hereby covenants to and with the Lessor in manner following, viz.:-

1. That it will pay the rent hereby reserved as herein provided.

2. That it will not during the said term assign or sublet the said lands covered by water or any part thereof without the written consent of the Lessor first had and obtained, such leave not to be unreasonably withheld.

3. That it will use the said lands covered by water for the purpose of mooring North Vancouver City Ferry Number 5 for restaurant purposes only.

And the Lessor hereby covenants to and with the Lessee in manner following, viz.:-

1. If the Lessee duly and regularly pays the said rent and performs all and every [of] the covenants, provisos and agreements herein and on the part of the Lessee to be paid and performed the Lessor will at the expiration of the said term of five (5) years, upon the written request of the Lessee mailed by registered post to or delivered to the Lessor, not later than three (3) months before the expiration of the said term, grant to the Lessee a renewal lease of the said lands covered by water for a further term of five (5) years at a rent to be agreed upon by the parties hereto or failing agreement, to be determined by arbitration by an arbitrator appointed under the Arbitration Act of British Columbia whose decision shall be binding on the parties hereto, but in no event to be less than Two Thousand Dollars ($2,000.00) including taxes, per annum, and subject to the same covenants, provisos and agreements as are herein contained, save and except this covenant of renewal.

Provided always and it is expressly agreed that if the rent hereby reserved or any part thereof shall be unpaid for fifteen (15) days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the said Lessee, his executors, administrators or assigns, then and in either of such cases it shall be lawful for the said Lessor at any time thereafter to enter into and upon the said demised premises or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess and enjoy as of its former estate anything herein contained to the contrary notwithstanding.

15. Harry Almas and Seven Seas Seafood subsequently expended in the range of $120,000 to $150,000 in the refurbishment of the Defendant Ship from a passenger/car ferry to a floating restaurant.

16. By letter dated July 10, 1959, the Plaintiff's City Clerk wrote to Harry Almas,

stating:

"I wish to advise that the Ferry No. 5 purchased by you from the City can now be moved into its permanent mooring."

17. Since that time, the Defendant Ship has been operated as a floating restaurant. It has been permanently moored to dolphins that utilize the bottom of the subaquatic lands.

18. At the time of the completion of the Marina, it was operated by the Lonsdale Marina Company. Subsequently, Harry Almas and Seven Seas Seafood took over the operation of the Marina.

Subsequent Events

19. By letter dated April 11, 1963, Harry Almas' solicitors wrote to the Plaintiff seeking to resolve two issues in dispute. With respect to the first issue, control of parking facilities, the letter states,

... unless this matter can be resolved it is likely that our clients will consider other locations for their business at the end of the term of the present lease.

20. With respect to the second issue, the repair of one of the dolphins to which the

Defendant Ship was moored, the letter states,

Under normal circumstances, a dolphin properly constructed would last for many years, while the term of our client's lease was merely for five years. It would therefore appear that our clients are obliged to improve your assets when only a small benefit of such improvement would accrue to our clients.

21. These issues, and others that arose from time to time, were satisfactorily resolved and the Defendant Ship has been moored in the waters above the Water Lot since 1959.

22. From time to time between 1959 and 1982 various leases were made, renewed or amended, all permitting the Defendant Ship to be moored on the Water Lot. At no point during this period did the City ever rescind their agreement to allow the vessel to be moored on the Water Lot. It was the position of the Defendants'

then solicitor, Peter Richards, that he always considered all leases with respect to this matter to be a renewal of the 1959 lease. This also applied to the 1982 lease. It is the view and recollection of Mr. Richards that he always considered the lease to be a renewal. He is of the view that it was never mentioned or discussed that the lease would extinguish any existing rights with respect to this matter. It always took some time after the expiry of the period to have a formal lease prepared and executed.

The 1982 Lease

23. The last written lease is dated December l, 1982(the "1982 Lease").

24. The 1982 Lease is between the Plaintiff as landlord, S.S. Marina Ltd. ("S.S. Marina") as tenant, and the Cranberry Sailor Inn Limited (the "Cranberry Sailor Inn") as covenantor of the obligations of S.S. Marina. As with Seven Seas Seafood, both S.S. Marina and the Cranberry Sailor Inn were owned and controlled by one or more members of the Almas family.

25. The 1982 Lease provided, inter alia, as follows:

ARTICLE EIGHT

SURRENDER OF PREMISES AND REMOVAL OF FIXTURES

8.01 Surrender. Upon the expiration or earlier termination of this lease and the Sub-Lease Term (with respect to the Water Lot [sic `)'] or the Lease Term (with respect to the Lot A Portion and the Lot H portion), as the case may be, and any period of overholding, the Tenant will surrender to the Landlord possession of the Water Lot or the Lot A Portion and the Lot H Portion, as the case may be, and Improvements and fixtures and improvements therein and thereon (subject to this Article 8), all of which will become the property of the Landlord without any claim by or compensation to the Tenant, free and clear of all encumbrances and all claims of the Tenant or of any person claiming by or through or under the Tenant and all the rights of the Tenant under this lease will terminate save as herein expressly set out.

8.03 Removal of fixtures. At the expiration of the Sub-Lease Term or last renewal therof [sic], the Tenant will remove those portions of the Improvements situate on the Water Lot and at the expiration of the Lease Term or last renewal thereof, the Tenant will remove those portions of the Improvements and the New Floats and the Ferry situate on the Lot A Portion and the Lot H Portion, except that the Tenant will not remove any dolphins on the Lands and will not remove the Walkway unless required to do so by the Landlord. If the Tenant does not so remove, the Landlord may do so and the Tenant will be responsible for the cost of such removal and for any necessary storage charges. The Landlord will not be responsible for any damage caused to the Tenant's property by reason of such removal. In removing any of the Improvements and the New Floats and the Ferry the Tenant, at its expense, will make good any damage caused thereby, and, in the case of removal of the new Floats will swing the ramp from its present location to the parking structure referred to in Article 7.02 to a reasonable location thereon, at the Tenant's expense.

ARTICLE THIRTEEN

PERFORMANCE OF TENANT'S COVENANTS, DEFAULT AND BANKRUPTCY

13.02 Rights of termination. If and whenever:

...

(b) any Basic Rent or additional rent remains overdue and unpaid following 30 days' notice of non-payment on the due date by the Landlord to the Tenant;

...

then in any of the said cases, (and notwithstanding any prior waiver of breach of covenant) the Landlord, at its option, may (and without prejudice to any other right or remedy it may then have or be entitled to) cancel this lease by written notice to the Tenant, whereupon all rights and interests hereby created or then existing in favour of the Tenant or derived under this lease will thereupon terminate and the Landlord lawfully may immediately or at any time thereafter and without notice or any form of legal process take possession of the Lands or any part thereof in the name of the whole and expel the Tenant and those claiming through or under it

and remove its or their effects (forcibly if necessary) without being deemed guilty of any manner of trespass, any statute or law to the contrary notwithstanding, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; and in the event of such termination, the Tenant will continue to be liable to pay and the Landlord will have the same remedies for recovery of Basic Rent and additional rent then due or accruing due as if this lease had not been so terminated.

ARTICLE FIFTEEN

OVERHOLDING

15.01 Overholding. If the Tenant remains in possession of the Water Lot after the expiration of the Sub-Lease Term or the Lot H Portion and the Lot A Portion after the expiration of the Lease Term and without the execution and delivery of a new lease, the Landlord may re-enter and take possession of the Water Lot or the Lot H Portion and the Lot A Portion, as the case may be, and remove the Tenant therefrom and the Landlord may use such force as it may deem necessary for that purpose without being liable in respect thereof or for any loss or damage occasioned thereby. While the Tenant remains in possession of the Water Lot after the expiration of the Sub-Lease Term or of the Lot H Portion and the Lot A Portion after the expiration of the Lease Term, as the case may be, the tenancy, in the absence of written agreement, will be from month to month only at a rent per month equal to 1.25 times the Basic Rent payable in respect of the month immediately preceding expiration of the Lease Term or the Sub-Lease Term, as the case may be, payable in advance on the 1st day of each month and the Tenant will be subject to all terms of this lease, except that the tenancy will be from month to month only and a tenancy from year to year will not be created by implication of law or otherwise.

ARTICLE SIXTEEN

MISCELLANEOUS

16.05 Representations and entire agreement. The Tenant acknowledges and agrees that the Landlord has made no representations, covenants, warranties, guarantees, promises or agreements (verbal or otherwise) with the Tenant other than those contained in this lease; that no agreement collateral hereto will be binding upon the Landlord unless made in writing and signed by the Landlord; and, that this lease constitutes the entire agreement between the Landlord and Tenant.

16.14 Option to renew Lease Term. If the Tenant duly and regularly pays its Basic Rent and additional rent hereunder and complies with its obligations hereunder then the Tenant will have the right to renew the Lease Term for two additional periods of five years each provided that notice of exercise of such right will be delivered by the Tenant to the Landlord at least six months prior to the end of the Lease Term in the case of the first renewal and at least six months prior to the end of the first renewal term in the case of the second renewal, with each such renewal to be on the same terms and conditions as are set out in this lease except for Basic Rent with respect to the Lot H Portion and the Lot A Portion and except that there will be no further right of renewal after the second renewal. Forthwith following exercise of an option to renew, the Landlord and Tenant will use their best efforts to agree upon basic rent for the next ensuing renewal term but if they are unable to do so then the provisions of articles 3.03, 3.04 and 3.05 will apply, mutatis mutandis, with respect to the determination of rent for each of the renewal terms.

16.15 Further option to renew Sub-Lease Term. If the Tenant exercises either or both of the options to renew contained in article 16.14 and if during either of the renewal terms the Sub-Lease Term or any renewal thereof expires the Tenant will always have the right to renew the Sub-Lease Term for a period equal to the lesser of:

(a) such new term as the Landlord may be able to negotiate with NHB with respect to a further lease of the Water Lot from NHB to the Landlord less one day; or

(b) a period ending on the same date as the expiration of the first renewal term of the Lease Term or the second renewal term if the Tenant's right with respect thereto is exercised;

provided, in each case, that the provisions of article 16.13 will apply, insofar as applicable, the intent of this article 16.15 being that the Tenant will be entitled to a sub-lease of the Water Lot for so long as the Lease

Term or any renewal thereof exists unless the Landlord, having used its best efforts, is unable to provide same.

26. In or about 1994, S.S. Marina and the Cranberry Sailor Inn failed to pay the rent due under the 1982 Lease. By letter dated January 30, 1996, the Plaintiff's solicitors wrote to S.S. Marina, stating, inter alia,

We are instructed by our client that, as we have notified you in numerous letters and discussions with Richards Buell Sutton [S.S. Marina's solicitors] over the past two years, no rent has been paid by the Tenant to the Landlord since some time in 1994. We are further instructed by our client that the Tenant also ceased operating in the premises some time in 1994. We are further instructed that the ferry boat on the premises was seized by Mrs. Eva Almas in contravention of the Lease.

Accordingly, pursuant to the Lease, the Landlord, without prejudice to any other rights or remedies it may have, hereby terminates the Lease effective January 31, 1996.

Negotiations for a New Lease

27. Subsequently, Diamond Almas expressed his desire to negotiate a new lease with the Plaintiff through his company, the Defendant Seven Seas Seafood (Wholesale) Ltd. ("Seven Seas Seafood"). Mr. Diamond Almas was in a matrimonial dispute and the lease renewal negotiations took place with new corporate entities. Seven Seas Seafood paid the rent owing for the previous two years and the parties entered into negotiations for a new lease. The Defendants proceeded to use and occupy the Water Lot and paid an agreed rent to the Plaintiff from February 1,1996 until January 31,1999.

28. The parties negotiated for over two years but were unable to reach an agreement. On June 11, 1998, the Plaintiff's solicitors wrote to the Defendants' solicitors to advise as follows,

The City has concluded that the positions of the parties are such that further negotiations are unlikely to result in the parties being able to agree upon the terms of a lease.

Accordingly, the City requires your client to and hereby gives your client notice to vacate the Premises and remove the Vessel on or before September 30, 1998.

29. The parties continued to negotiate and the Plaintiff extended its notice twice, ultimately to January 31, 1999. By letters dated December 4, 1998 and January 27, 1999, the Plaintiff's solicitors confirmed that the Plaintiff required the Defendant Ship to be removed on or before January 31,1999. It was not removed and the Plaintiff commenced the within action on March 18, 1999.

Other Facts

30. At the relevant times, the Defendant Ship was and remains a registered vessel under the Canada Shipping Act.

31. The Water Lot in question is in the Port of Vancouver which is a federal harbour under the Constitution Act, 1867.

32. The Defendant Ship does not make use of the bottom of the subaquatic lands except where there are pilings to which the Defendant Ship is attached. At no time have the Defendants ever made use of the bottom of the subaquatic lands except through the lines that have been attached to the mooring dolphins. The vessel does not use an anchor to attach to the bottom.

33. The City of North Vancouver now wishes to develop the Lonsdale area. The Mayor in the North Shore News Community Directory 2000 has stated:

"It's a new century, new millennium and the City of North Vancouver is on the move. After many years of careful planning and consultation, three major development areas (Harbourside Business Park, Lower Lonsdale and the Versatile Shipyards site) are poised to spring to life and change the face and fortunes of North Vancouver.

These important developments will bring new jobs, business opportunities and new residents to the community. In turn we must respond with appropriate community services and facilities. The goal of our Council is to shepherd and nurture a true renaissance for the City and to leave a fiscally responsible legacy for the enjoyment of future generations."

34. The Defendant Ship is listed on the City of North Vancouver Heritage Inventory but it is not a designated heritage structure.

THE ISSUES

[5] The defendants assert that they have acquired a permanent right to moor the defendant ship on the water lot. In submitting that the question of law should be answered in the negative they advanced the following arguments:

i. The 1959 purchase agreement and the conduct of the parties led to the creation of an equitable interest in the subaquatic lands in favour of the defendants;

ii. As the 1982 lease extinguished only prior leases, the defendants' independent right to moor could not have been, and was not, abolished by virtue of the 1982 lease;

iii. The sale of the ship was tied to the water lot and this was said to be analogous to the right to create an exclusive fishery in tidal waters;

iv. The vessel is a floating structure that does not make use of the bottom, except where it attaches to floats held in place by dolphins. The plaintiff, it was submitted, sought to regulate the right of mooring of the ship. By virtue of the public right of navigation in tidal waters, the defendants said that they have a right to use the water column above the subaquatic lands and that right is not to be extinguished without clear words; and

v. The defendants' interest in the subaquatic lands amounts to an equitable interest which could be terminated by a general provision in the 1982 lease. There is a trust relationship with respect to the right to moor the defendants' ship. In this instance, the defendants placed reliance upon the public trust doctrine.

ANALYSIS

(i) Did the 1959 purchase agreement and the conduct of the parties lead to the creation of an equitable interest in the subaquatic lands in favour of the defendants?

[6] The defendants claimed that their equitable interest in the subaquatic lands was created by virtue of the 1959 purchase agreement and by the conduct of the parties. The defendants' right to permanently moor on the water lot was a term of the sale of the vessel. Therefore, it was said, the 1959 purchase agreement created an interest in the water lot in the defendants' favour. Put another way, the defendants submitted that the purchase agreement required that the ship remain on the water lot forever.

[7] The defendants further asserted that they were induced to enter into the purchase of the ship on the basis of assurances provided by the plaintiff's representatives to the effect that the defendants could have permanent moorage of the ship on the water lot. It was said that it was based on this assurance that the defendants, or more accurately, their predecessor companies expended up to $150,000 in refurbishing the ferry and turning it into a restaurant.

[8] The defendants also maintained that the parties never directed their minds to the nature of the interest the plaintiff gave to the defendants when the ship was sold in 1959 and when the defendants were given the right to moor the ship. The defendants therefore asserted that it was necessary to hear evidence from those who participated in the negotiations leading to the sale in 1959.

[9] These submissions require close analysis of the 1959 purchase agreement and the evidence put before the Court with respect to the negotiations which took place at that time.

[10] It is admitted that by letter dated December 1, 1958, Harry Almas wrote to the plaintiff to amend his tender. In that letter he stated, in the future tense, that he understood that "I will be assured by the City of North Vancouver that I will always have permanent mooring facilities". However, his offer to lease was accepted by resolution of the plaintiff's council which expressly provided that the City's acceptance was "subject to a satisfactory lease agreement being negotiated". Thereafter, when the City Clerk wrote to Mr. Almas' counsel advising of the City council's resolution, specific reference was made to terms that would be required in the lease, one of which was expressed to be "the right of the purchaser to moor the vessel on City property at the Foot of Lonsdale".

[11] The documents in the joint book of documents indicate that thereafter an initial written lease was prepared and executed. The terms were very much negotiated between the parties. For example, on April 10, 1959, the purchaser's lawyer sent comments with respect to the form of lease provided by the plaintiff. The first point made by the purchaser's counsel was that "[t]he Lease and Agreement seem to be satisfactory except for minor changes, the most important being that we suggest that the option clause should contain more definite provision as to how the renewal lease is to be arbitrated". Further correspondence followed, and by letter dated April 27, 1959 the purchasers returned duly executed copies of the purchase agreement and the lease stating, among other things, that "[y]ou will note that these documents have been redrawn from the form in which they were forwarded by you to us". The purchasers had revised the lease to change the parties to the lease and to redraw a clause dealing with the use of the parking area.

[12] As ultimately executed, the 1959 purchase agreement evidenced the company's agreement to convert the ferry into a restaurant and to maintain and operate it on the water lot "during the term of the Lease hereinafter mentioned and any renewal thereof". Further evidenced in the written purchase agreement was the agreement of the parties to enter into a lease in the form attached and initialled. That lease, as ultimately executed by the parties,

provided for a term of five years with an option for one five year renewal. The lease specifically provided that if rent was unpaid, or if there was a breach or nonperformance of covenants, the City of Vancouver could re-enter and repossess the demised premises.

[13] The defendants' predecessors were represented by counsel throughout the purchase and lease negotiations.

[14] There is nothing in the 1959 purchase agreement nor in the initial lease, I find, consistent with the argument that the 1959 purchase agreement and the conduct of the parties led to the creation of an equitable interest in the subaquatic lands such that the defendants acquired a permanent right to moor. Indeed, I find the express terms of the initial lease, an agreement expressly referenced in the written purchase agreement, to be contrary to the defendants' current position that a permanent right of moorage was acquired. Those express terms are also, I find, inconsistent with the assertion that the parties never directed their minds to the nature of the interest given by the plaintiff when the ship was sold.

[15] Before me, as evidence of the assertion that the conduct of the parties supported the defendants' current contention, the defendants put much reliance upon the correspondence dated July 10, 1959 from the plaintiff's then City Clerk to Mr. Harry Almas. In this letter, written after the 1959 purchase agreement and the initial lease were signed, the Clerk stated that the ferry "can now be moved into its permanent mooring at the Lonsdale Marina". The defendants argued that the words "permanent mooring" implied that the lease was perpetual or perpetually renewable. However, "permanent" as defined in Black's Law Dictionary, means "generally opposed in law to `temporarily', but not always meaning `perpetual'". I am of the view that the Clerk's language is consistent with an intention and agreement that the ship should be moved to where it would be permanently moored until the lease expired or until the lease was terminated for breach.

[16] My view in this regard is supported by correspondence from then counsel for Seven Seas Seafood Restaurant Ltd. to the Mayor and Aldermen of the City of North Vancouver dated April 11, 1963. In this letter, counsel raised two issues, the first of which was a problem with insufficient parking for the restaurant. Counsel noted "unless this matter can be resolved it is likely that our clients will consider other locations for their business at the end of the term of the present lease".

[17] Counsel went on to state:

> We would also draw your attention to another matter that has arisen, namely that it would appear from the lease between the City and the restaurant company that that Company pays a rental for a certain water area without any privileges other than the right of ingress and egress to their water area. Our clients were persuaded to establish their business in this location by previous Members of Council. Dolphins were installed by the City, to which was secured *[sic]* our client's vessel. Last October, during the heavy storm, one of these dolphins was seriously weakened and requires replacement. When we brought this matter up to your Solicitor, he informed us -- and quite rightly so -- that under the terms of the lease the City was not required to maintain the dolphins. We do not however feel that this is in the spirit of the lease. Under normal circumstances a dolphin properly constructed would last for many years, while the term of our client's lease was merely for five years. It would therefore appear that our clients are obliged to improve your assets when only a small benefit of such improvement would accrue to our clients.
>
> We would therefore request, Gentlemen, that you consider his whole matter in the spirit of the original arrangements that were made, so that solutions may be found to these two problems without working a hardship on our clients. [emphasis added]

[18] These comments, made in 1963 by counsel for the defendants' predecessors, are inconsistent with the right of permanent mooring now asserted.

[19] Nor do I find that the subsequent lease negotiations which took place between the plaintiff and the defendants' predecessors support the defendants' argument that they possess an equitable interest.

[20] In 1965, a new lease was entered into for a seven year term with a right of one five year renewal. Article 3 of that lease is instructive because it provides that the initial term of seven years was "subject, however, to the right of the Lessor to terminate this Lease at any time after five years from the date of its commencement, if the premises are required for municipal or harbour development purposes, such termination shall be by 180 days written notice to the Lessee". The lease went on to provide that the City might show the premises to others during the last five and one half months of the lease's term; that if there was any overholding the lessee would be deemed to be a monthly tenant only; the right of re-entry was preserved; and with respect to the renewal period, such renewal was subject to

the right of the lessor to terminate the lease at any time without compensation. Again, those provisions contradict the suggestion that there was a permanent right of moorage.

[21] In 1971, a further written lease was entered into between the City of North Vancouver as lessor, S.S. Marina Ltd. as lessee, and Seven Seas Seafood Restaurant Ltd. as guarantor. This lease provided that it was "in complete and absolute substitution for the terms and conditions in the said Lease between the parties hereto dated the 7th day of September, 1965 and the said Lease is no longer of any further force and effect". The lease of 1971 was stated to be for a term of ten years with one option for a five year renewal. However, the 1971 lease provided that if the premises were "required for municipal purposes or harbour development purposes, by notice of termination to take effect only after eight (8) years from the date of its commencement" the lease could be terminated. There was no provision for compensation in the event of such early termination. The lease also contemplated that it could be terminated under a number of circumstances, for example, if the lessee made an assignment for the benefit of creditors. The lease expressly provided that at the expiration or sooner determination of the lease term, the lessee would "peaceably surrender and yield up unto the said Lessor the said premises". Overholding would be on the basis of a month to month tenancy and the right of re-entry was preserved. During the five year renewal term the lease could be terminated, without compensation, on the giving of two years' notice.

[22] The lease of 1971 also expressly noted that the City of North Vancouver, subject to the written approval of the National Harbours Board, sublet to the lessee a portion of the lands covered by water. The agreed statement of facts before me confirms that prior to 1982, the plaintiff leased the water lot from the National Harbours Board.

[23] The fact that the plaintiff did not enjoy absolute dominion over the water lot is, I find, further evidence inconsistent with the permanent right of moorage presently asserted. The City of North Vancouver, to the knowledge of the defendants' predecessors at least as early as 1971, had no right to grant an interest of the type now asserted.

[24] For a lease to be perpetually renewable, as a matter of law, the parties must clearly convey their intentions to create such a term. Such a term would be completely inconsistent with the documents executed between the City of Vancouver and the defendants' various predecessors.

[25] The defendants face a further hurdle. The 1959 purchase agreement, and the original lease, were both between the Corporation of the City of North Vancouver and Seven Seas Seafood Restaurant Ltd. Even if the original lessee acquired some permanent right, there is no evidence of any assignment of any such right held by Seven Seas Seafood Restaurant Ltd. to these defendants. Absent such assignment, the rights of these defendants flow only from the agreement described in paragraph 27 of the agreed statement of facts relating to the period from February 1, 1996 until January 31, 1999.

[26] In summary, I find that there is nothing in the documents before me, or in the agreed statement of facts, which supports an enforceable legal right entitling the defendants to the permanent right of moorage on the water lot.

[27] Finally, as a matter of law, in 1959 subsection 475(1) of the *Municipal Act*, S.B.C. 1957, c. 42, ("*Municipal Act*") expressly provided that an entity such as the plaintiff only had the authority to lease property for an aggregate term, including renewal terms, not exceeding 20 years.

[28] As noted, the parties were at all times represented by counsel presumed to have known the law. The fact that the plaintiff would have been statutorily prohibited from entering into an agreement of the sort now asserted furthers my conclusion that no such term was agreed upon.

[29] While counsel for the defendants submitted that the *Municipal Act* did not govern in tidal waters, I accept that the *Municipal Act* did define the capacity of the plaintiff to enter into legal agreements.

(ii) <u>What was the effect of the 1982 lease?</u>

[30] The material terms of the 1982 lease were:

(a) Article 2.02 - the lease was in complete and absolute substitution for all prior leases and modifications thereto between the landlord and tenant (S.S. Marina Ltd.) with respect to the lands or any part thereof, and any such prior leases and modifications were to have no further force or effect. Lands were defined in the lease to include the water lot.

(b) Article 8.01 - upon the expiration or earlier termination of the lease and of the sublease term with respect to the water lot, the tenant would surrender possession of the water lot without any claim for compensation.

(c) Article 8.03 - at the expiration of the sublease term or of the last renewal, the tenant would remove the ferry.

(d) Article 13.02 - the City could terminate the lease in a number of instances including non-payment of rent and an uncured breach of the tenant's obligations.

(e) Article 15.01 - the tenant on any overholding would be deemed to be a monthly tenant.

(f) Article 16.05 - the tenant acknowledged that the landlord had made no representations, covenants, warranties, guarantees, promises or agreements and that no agreement "collateral hereto" would be binding upon the landlord unless made in writing and signed by the landlord and that the lease constituted the entire agreement between the landlord and tenant.

(g) Article 16.13 - the tenant might renew the sublease up to the lesser of the period that the City might be able to negotiate with the National Harbours Board and the end of the lease term.

(h) Article 16.14 - the tenant was entitled to renew the lease for two additional periods of five years and that there would be no further right of renewal after the second renewal.

[31] The effect, in my view, of articles 2.02 and 16.05 is that the plaintiff's argument that the 1982 lease superseded all prior agreements between the parties must be upheld in the absence of contrary considerations. The defendants have failed to present evidence of any other agreements and thus failed to show contrary considerations.

[32] While the defendants argued that the 1982 lease extinguished all earlier leases but not the right created in the 1959 purchase agreement, I have not found any right created by the 1959 purchase transaction that was not contained in the written agreement or the lease which accompanied it. Further, the defendants failed to show any agreement which they were privy to, or otherwise entitled to benefit under, which gives a right of permanent moorage.

[33] With respect to the remaining arguments advanced by the defendants, in oral argument, their counsel confirmed that all were premised on the premise that in 1959 an agreement was reached between the parties that the lessee would be given a permanent right to moor on the water lot. I have found that not to be the case. While that is sufficient to dispose of each of the remaining arguments, I made the following brief additional comments.

(iii) Can the defendants claim the benefit of a right analogous to the right to create an exclusive fishery in tidal waters?

[34] As noted by counsel for the plaintiff, the defendants never carried out any fishing activity. I have not otherwise been persuaded that this is an apt analogy.

(iv) Are the defendants assisted by virtue of the public right of navigation in tidal waters?

[35] The public right of navigation does not permit anyone to permanently moor their vessel in a particular location. See *Campbell's Trustees v. Sweeney* (1911), S.C. 1319 at 1324 (H.L.). As put in plain terms in *Iveagh v. Martin,* [1961] Q.B. 232 at 273, "[a] man may not use the highway to stable his horse".

(v) Is the defendants' claim supported by the public trust doctrine?

[36] The defendants noted that there has been very little consideration of the public trust doctrine in Canadian law. They referred to the decision of the United States Supreme Court in *Illinois Central Railroad Company v. People of the State of Illinois* (1892), 146 U.S. 1018. There the Court considered a claim in circumstances where the Illinois legislature had made a fee simple grant of submerged lands in Lake Michigan to a railway company. Subsequently the State legislature brought an action to repeal the grant and the United States Supreme Court upheld the State's claim stating, at page 1042 of the decision, that the submerged lands in Lake Michigan were:

> ... held in trust for the people of the State that they may enjoy navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

The Supreme Court further went on to state at page 1043:

> Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under

such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible.

[37] I do not find this doctrine assists the defendants. If, as a matter of law, the doctrine is applicable, and I make no finding to that effect, it would seem to me that it would have the opposite result to that hoped for by the defendants in the present case. The doctrine is inconsistent with a permanent private right over public waters. The state must exercise its control over those waters to promote the interests of the public.

[38] In the result, for the foregoing reasons:

ORDER

[39] It is hereby ordered that the question of law stated in paragraph [1] of these reasons is answered in the affirmative.

[40] The defendants shall pay to the plaintiff its costs of this motion, in the cause, to be taxed in accordance with Column III of Tariff B of the Rules.

"Eleanor R. Dawson"

Judge