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Case Name:

1527 Upper James St. Hamilton Inc. v. Kennedy

Between
1527 Upper James St. Hamilton Incorporated, plaintiff, and
Phillip D. Kennedy, defendant

[2002] O.J. No. 903
Court File No. 9452/95

Ontario Superior Court of Justice
Hamilton, Ontario
Lofchik J.

Heard: December 10-12, 14, 17, 19 and 21, 2001.
Judgment: January 21, 2002.
(60 paras.)

Barristers and solicitors — Negligence — Particular negligent acts — Failure to acquire written undertaking — Re sale of client's land — Failure to protect client's interests — Damages — Re sale of client's land.

Trial of a negligence action by 1527 Upper James St. Hamilton Inc. against Kennedy, its former solicitor. The company, which was a holding company controlled by the Knights of Columbus, claimed that Kennedy failed to advise it of the reduction of parking privileges being granted to it on adjoining land by the purchaser of part of its land between delivery of an Offer to Purchase in May 1987 and the execution of an Agreement of Purchase and Sale in 1988. The company also claimed that Kennedy failed to ensure that its parking easement, granted in the Agreement of Purchase and Sale, was registered at or within a reasonable time after the closing of the transaction in November 1988. Of the four people who signed the Agreement, none of them recalled signing it at Kennedy's office. Only one person suggested that Kennedy was involved in the signing of the agreement, but that person admitted that his memory was fading. Kennedy said that he retained a Toronto solicitor to do the work necessary to secure the parking easements. On the day of closing, the Toronto solicitor said that the easement documentation was not going to be in place for up to one year. Kennedy testified that he spoke to one of the officers of the company and advised him to close the transaction. Kennedy then asked for a written undertaking from the Toronto solicitor to register the easements, but the solicitor gave him only a verbal undertaking as a Knight. The property upon which the company was to have its parking easement was sold by the mortgagee bank under power of sale some time before 1995. Since there was nothing on title with respect to the parking easement that the company was supposed to have, the new purchaser from the bank was not obliged to grant the company any parking privileges. The company's expert based his calculation of damages on the loss of 20 parking spaces based on the past practice of the Knights using 16 spaces at the front of the building so that the balance of the 36 spaces was what was lost with the loss of the easement rights. The price per square foot of the lost property was estimated at $6.44, based on the sale price. Each parking space was 263 square feet. During the period between June and November 1988, when the company sustained its loss, real estate values were rising at a compounded rate of approximately four per cent per month.

HELD: Judgment allowed in the amount of $40,650. The company failed to show, on a balance of probabilities, that, but for Kennedy's negligence, it would have acquired the right to use the adjacent parking lot in connection with any functions in its building. It was as likely as not that the company negotiated the agreement directly with the purchasers. There was no evidence that Kennedy was asked to review the agreement before it was signed or to give his advice with respect to whether it should be signed. However, a reasonably prudent solicitor would not have closed the sale of the adjacent building without having some record of the easement in favour of the company registered at closing. While Kennedy, because of his association with the Knights of Columbus, felt it was sufficient to accept the verbal undertaking of another solicitor, who he thought was also a Knight, his obligation to his client required further action. A short postponement of closing could have been arranged so that Kennedy could register the Agreement of Purchase and Sale in priority to any mortgages or other interest against the property. Damages were assessed based upon 20 lost parking spaces at 263 square feet per space multiplied by a value of $6.44 per square foot. The company also was awarded an additional $3,874 on account of the rate at which real estate values were rising during the five-month period when the company sustained its loss.

Counsel:

Graydon Sheppard, for the plaintiff.
John F. Evans, Q.C., for the defendant.

¶ 1 **LOFCHIK J.**:— In this action the plaintiff claims damages for negligence on the part of the defendant, its solicitor. The plaintiff claims that the defendant was negligent in that he:

(a) failed to advise the plaintiff of the reduction of parking privileges being granted on adjoining land by the purchaser of part of the plaintiff's land between delivery of an Offer to Purchase its land in May, 1987, and the execution of an Agreement of Purchase and Sale with respect to the same land in June, 1988;

(b) failed to ensure that the plaintiff's parking easement, granted in the latter agreement was registered at or within a reasonable time after closing of the transaction in November, 1988.

¶ 2 As well, the plaintiff contends that the defendant failed to give appropriate and timely advice regarding its alternatives with respect to the parking easements being granted at the time of closing of the sale of part of its property, that he failed to diligently in advance of or after the closing, ensure that the necessary documents were available for closing, and failed to take the necessary steps to protect the plaintiff's interest in respect of an easement to park vehicles on an adjoining property in a reasonably prompt fashion.

¶ 3 With respect to damages, it is the contention of the plaintiff that as a result of the negligence of the defendant, the plaintiff's banquet hall, located on the retained property, after a sale of part of its land, became an illegal non-conforming use and, as such, subject to sanctions by the municipality (City of Hamilton). As a result, the plaintiff submits that the loss of ancillary parking rights has diminished the value of the property to the extent that it cannot lawfully or economically be sold as a banquet hall and must revert to some lesser use.

¶ 4 The plaintiff is a holding company organized and controlled by the Knights of Columbus, Council 5860, ("the Knights") an unincorporated fraternal organization, to own a property at 1527 Upper James Street in the City of Hamilton, upon which is situated a building which is used by the Knights of Columbus, Council 5860, as its headquarters and which is also leased as a banquet hall. The hall is leased to an

unincorporated charity, the St. Columbus Society. The operations of all three organizations are controlled by the same group and the relationship amongst them is non-arms length.

¶ 5 In 1986 a developer represented by Messrs. Rosart and Paisley, approached the Knights with a proposal to purchase all or part of the property at 1527 Upper James Street, (the part being a strip of land lying east of the plaintiff's building). A purchase price of $620,000.00 was offered for the entire property, but eventually it was made apparent by the Knights that they were not prepared to sell the entire property but would be prepared to sell the easterly portion. An agreement was reached with respect to the sale of only that portion for the sum of $180,000.00 together with certain parking rights in the parking area of a shopping plaza being developed adjacent to the retained property.

¶ 6 The developers presented an offer to the Knights in written form, which was dated "May 1987" and provided in part as follows:

> 4. The Company agrees to provide the Knights with a guaranteed twenty (20) parking spaces, marked for the use of the Knights, together with the right to use the adjacent parking for any functions that the Knights might conduct in the building retained by the said Knights.

¶ 7 The defendant was retained by the plaintiff to represent it with respect to the transaction contemplated by the agreement. On July 25, 1987, he wrote a letter to Charles Rosart indicating that he was acting on behalf of the Knights of Columbus in regard to a proposed agreement and outlining a number of terms with respect to which the Knights were "concerned";

¶ 8 A period of time passed during which not much happened as evidenced by the fact that on December 2, 1987, the defendant wrote to Charles Rosart enquiring as to the status of the matter, with a copy of his letter going to the Knights.

¶ 9 The 1987 draft offer was never accepted by the Knights, although it would appear that an agreement in principle was reached whereby the Knights would sell the easterly part of their property. This is evidenced by the fact that on March 10, 1988, the defendant wrote to the Knights requesting execution of an Authorization to permit one Robert Vernon, a Toronto solicitor, to act as agent of the Knights in an application for severance of the property to be sold by the plaintiff to the developer.

¶ 10 On May 11, 1988 the defendant again wrote to the Knights and referred to discussions he had held regarding "material to be contained in the Offer to Purchase", and a proposed sewer easement.

¶ 11 An Agreement of Purchase and Sale, which was ultimately executed by both parties, appears to have been signed by the purchaser on June 1, 1988. The Joint Documents Brief (Exhibit 1), filed by the parties, contains a letter from the Land Division Committee of the City of Hamilton dated May 24, 1988 which indicates that the decision approving the severance of the property to be sold had been made by the Committee on May 17, 1988, and this may have prompted the preparation of the Agreement of Purchase and Sale.

¶ 12 On June 1, 1988, the defendant wrote to Mr. Rosart and advised him that "my clients approve the agreement as it is stated ..." and set out certain other matters referred to in the letter to be included in the agreement. It can be inferred from that letter and Mr. Rosart's reply of the same date that at the time of its writing, the formal Agreement of Purchase and Sale had not been executed. The Knights were still negotiating with the developer and instructing the defendant with respect to certain provisions which they wished to see in the final agreement.

¶ 13 It should be noted that the 1988 agreement contained parking provisions different from the 1987 agreement. These provisions are set out in paragraph 3 of Schedule "B" of the 1988 agreement which provides as follows:

> 3. The purchaser covenants and agrees, and it is a condition precedent to the vendor's obligations hereunder, to convey to the vendor on closing as appurtenant to the lands being retained by the vendor, easements, rights-of-way, and rights in the nature of easements to enable the vendor to park up to a maximum of 36 automobiles at any time on the lands being retained by the vendor and the lands outlined in green on Schedule "A" hereto and designated as Proposed Easement "A" and Proposed Easement "B" and for purposes of pedestrian and vehicular access over the portions of the said lands outlined in green on attached Schedule "A" which are from time to time unencumbered by buildings or structures so as to ensure access from the lands being retained by the vendors to Upper James Street.
> ...

¶ 14 The lands outlined in green on schedule "A" and designated as "Easement "A" and "Easement "B" were lands immediately to the south of the lands being retained by the plaintiff fronting on Upper James Street and the same depth as the land being retained. The evidence indicates that the discussion between the parties to the agreement was that these lands were to be part of a parking lot of a shopping plaza to be built on the lands surrounding the plaintiff's land.

¶ 15 The executed Agreement of Purchase and Sale was forwarded by the defendant by letter dated June 10, 1988 to Mr. Rosart. The circumstances of how the agreement came to be signed, and who was present when it was signed are somewhat hazy, it being the evidence of Mr. Kennedy that he was not present when the agreement was signed nor asked to advise upon the agreement, the evidence of some of the Knights to be referred to below being somewhat different.

¶ 16 There is no evidence that the defendant, between June and November, 1988, took any steps to either prepare the Grants of Easement for execution and delivery on closing or to require that the purchaser's solicitor prepare the Grants of Easement contemplated by the Agreement of Purchase and Sale and forward them for his review.

¶ 17 The Agreement of Purchase and Sale provided for a closing in September, 1989, subject to an earlier closing on 10 days' notice by the purchasers. By letter dated November 3, 1988, Mr. Rosart advised the defendant that the transaction was scheduled to close on November 10, 1988. There is no evidence that the defendant took any steps between that date and the actual closing (which occurred on November 14, 1988) to ensure that the proper documentation with respect to the grant of the parking easements would be available on closing. It is the defendant's evidence that he and Mr. Rosart agreed to retain Robert Vernon, a Toronto solicitor, to do all of the work necessary so far as the easements were concerned and so far as any consents to severances from the City of Hamilton were concerned and it was his understanding that Mr. Vernon would be preparing all of the documentation in this regard. It was Mr. Kennedy's belief that Mr. Rosart had all the information necessary to pass on to Mr. Vernon in order that Mr. Vernon could do all of the work in connection with the granting of easements.

¶ 18 The defendant testified that on the day set for closing he met with Mr. Rosart at the Registry Office for the purpose of closing the transaction on behalf of the plaintiff. He testified that on this occasion Mr. Rosart told him for the first time that he did not have the necessary documentation with respect to the transfer of easements for parking or sewer to be registered at that time. Mr. Rosart advised the defendant that this documentation would not be in place for up to six months or one year. Mr. Kennedy testified that he was upset and angry with Mr. Rosart as a result of receiving this information at the last minute and

advised Mr. Rosart that he would have to speak to Vern Herrell, an officer of the plaintiff, whom he called on the telephone. He could not recall the specifics of the conversation but he does recall having told Mr. Herrell that the documentation relating to the easements was not available and that it would be six months to a year before such documentation could be registered. It was Mr. Kennedy's recollection that he asked Mr. Herrell "Do you want to close or extend?". He explained that by "extend" he meant closing the transaction in one year or six months when the documentation was available.

¶ 19 It was Mr. Kennedy's evidence that Herrell said something to the effect that he (Kennedy) was to do what he thought best and that he advised Mr. Herrell to go ahead and close the transaction. He advised that on closing Mr. Rosart would not be in a position to register the easement documents but he would give an Undertaking to do so.

¶ 20 It was Mr. Kennedy's evidence that he believed Rosart would get the registrations eventually, six months or one year down the road. He asked for a written Undertaking in this regard from Mr. Rosart but Rosart would not give him a written Undertaking. It was Mr. Kennedy's evidence that Rosart said he was a Knight and would give his word as a Knight. Mr. Kennedy then decided to accept this verbal Undertaking and close on that basis. It should be noted at this point that at the time of closing Mr. Kennedy gave Mr. Rosart a number of written Undertakings with respect to obligations that he was required to perform. Mr. Kennedy acknowledged in his evidence that it was unusual for Mr. Rosart not to give a written Undertaking but that he said he would give his verbal Undertaking as a Knight and Kennedy decided to accept this. It should also be noted that the defendant's state of preparedness was also questionable in that he did not appear at the time of closing to have a signed Direction for payment of funds nor a Resolution of the plaintiff authorizing closing of the transaction.

¶ 21 Documentation which came into existence after the closing in November, 1988 displays what might, charitably be termed, a "leisurely" follow up by the defendant in ensuring that the parking easements were prepared and registered promptly. As late as August, 1989, he reported to his clients that he was still "awaiting agreements to be signed regarding the easements on the parking spaces, snow removal and sewer lines ...".

¶ 22 The evidence indicates that in 1989, Mr. Vernon completed the preparation of the necessary documentation to register the easements to which the plaintiff was entitled. The documentation in question required The Royal Bank to sign as its mortgage had been registered at or shortly after closing, thus requiring the consent of the Bank to the registration of the easements if they were to be in priority to its mortgage. The documentation in question appears to have been forwarded to the defendant by Mr. Rosart in late October, 1989.

¶ 23 However, the defendant did not have the documentation signed by the Knights until February, 1990 when the executed documents were returned to Mr. Rosart. There is no evidence that any steps were taken at that time by the defendant to ensure that the documentation was signed by the Bank and arrangements made to register the appropriate documents. They were merely returned to Mr. Rosart's office.

¶ 24 The defendant appears to have taken little interest, if any, in finding out if the documents had been registered since, on his own evidence, he did not become aware of the non-registration until he was contacted by Mr. Rosart some time in 1991. According to him, Mr. Rosart advised him that the developer had become insolvent and that the easements would not be registered.

¶ 25 The evidence indicates that, in the end, the property upon which the plaintiff was to have its parking easement, was sold by the mortgagee Bank under power of sale, some time before 1995. Since there was nothing on title with respect to the parking easement which the plaintiff was supposed to have, the new purchaser from the Bank was not obliged to grant any parking privileges to the plaintiff and has not done so. The property adjoining the plaintiff's property to the south is now an automobile dealership. The

shopping plaza parking lot upon which the contemplated parking rights were to be located has never come into existence.

¶ 26 All four people who signed the 1988 agreement on behalf of the plaintiff gave evidence at trial. None of them recalled the agreement being signed at the defendant's office. Only one of them, Vernon Herrell, suggested that the defendant was in any way involved in the signing of the 1988 agreement. Mr. Herrell could not recall how the offer was signed but testified that he "believes" that the defendant was involved and that he is "pretty sure of that". It was his recollection that the agreement was signed at the Knights of Columbus Council Chambers on the property which was retained by the Knights but he could not recall the circumstances. It was Mr. Herrell's recollection that the vendor got what it was asking for, namely the parking at the front of the building plus 20 parking spaces on the purchaser's land. Mr. Herrell quite fairly conceded that his memory has been slipping over the last few years and that he had no recollection of the defendant telling the signatories to the 1988 agreement that they had the same parking rights as were being contemplated by the earlier 1987 agreement. It is fair to say that the memories of all parties concerning the events leading up to the signing of the 1988 agreement have been clouded by the passage of time.

¶ 27 Looking at the evidence as a whole, it is as likely as not that the Knights, that is the Officers of the plaintiff, negotiated the 1988 agreement directly with the purchasers. While the evidence shows that the defendant had some correspondence with the purchasers, I accept his evidence that he corresponded with respect to issues raised with him by the Knights according to their instructions. The evidence does not support the conclusion that the defendant was requested to review the 1988 agreement before it was signed or to give his advice with respect to whether or not it should be executed on behalf of the plaintiff.

¶ 28 It cannot be said, on the evidence, that the agreement was sent to the defendant for execution by the Knights. The evidence is just as supportive of the conclusion that the agreement was sent directly to the Knights, that they executed it without consulting the defendant, and then retained the defendant to forward the executed agreement to the purchasers and close the transaction on behalf of the plaintiff.

¶ 29 There is no evidence before me as to what a reasonably prudent lawyer should have done had he been involved in negotiations between the purchasers and the plaintiff in the period between the delivery of the 1987 Offer and the acceptance of the 1988 Offer of Purchase and Sale.

¶ 30 I cannot conclude that the defendant was in breach of any duty to the plaintiff which led to a loss of unlimited parking rights on the purchaser's property. The evidence does not support the conclusion that the Knights signing the 1988 agreement did not understand what they were signing or that they were misled in any way. I am not prepared to find on the evidence that any act or omission on the part of the defendant resulted in the Knights unknowingly signing an agreement which was different from the original Offer in 1987.

¶ 31 In any event, even if it were found that the defendant was negligent in not advising the Knights of the difference in wording with respect to parking rights between the two agreements, liability and damages do not necessarily follow. Because of the nature of an action for lawyer's negligence, it must also be shown what the plaintiff has actually lost as a result of the negligence. Alberta (Workers Compensation Board) v. Riggins, 95 D.L.R. (4th) 279 (Alta. C.A.) In order to succeed against the defendant the plaintiff would have to prove that, but for the alleged negligence of the defendant, they would have obtained unlimited parking rights over the shopping plaza parking lot. Islington Investments Ltd. v. Day, Ault & White, [1978] O.J. No. 1322 (S.C.); Woong v. 407527 Ontario Ltd., [1999] O.J. No. 3377 (C.A.).

¶ 32 There is no evidence before me that the purchaser, if pressed, would have included in the 1988 agreement a term with respect to unlimited parking in the plaza parking lot, Mr. Rosart, in his evidence, having expressed the view that the relevant provision was left out of the agreement because of concern that

future tenants of the plaza might view any rights given to the Knights as a restriction on parking available to plaza users.

¶ 33 None of the Knights who signed the agreement testified that if the change between the 1987 Offer and the 1988 Agreement with respect to the use of the plaza parking lot for unlimited overflow parking had been pointed out to them, they would not have signed the 1988 Agreement.

¶ 34 The onus is on the plaintiff to show, on a balance of probabilities, that, but for the negligence of the defendant, it would have acquired the right to use the adjacent parking lot in connection with any functions conducted in its building. Fellowes, McNeil v. Kansa General International Insurance Co. [2000] O.J. No. 3309 (C.A.) It has failed to meet this onus and its claim for damages with respect to such parking rights must fail.

¶ 35 The situation is otherwise so far as the closing of the transaction is concerned. I have come to the conclusion that a reasonably prudent solicitor would not have completed this transaction without having some record of the easement with respect to the parking in favour of the plaintiff registered at closing over Part 20 and 24 of Reference Plan 62R-9678, being the lands referred to as Proposed Easement "A" and Proposed Easement "B" in Schedule "A" to the 1988 Agreement of Purchase and Sale, in priority to any mortgages registered against the said lands. This could have been accomplished by simply registering the Agreement of Purchase and Sale on Parts 20 and 24 of the above-mentioned Reference Plan in priority to any mortgages or any other interest against the property. While the defendant, because of his connection with the Knights of Columbus, felt it was sufficient to accept the verbal Undertaking of another solicitor, who he thought was also a Knight (which turned out not to be the case), his obligation to his client required more.

¶ 36 On his own evidence, the defendant sought instructions from Mr. Herrell when it became apparent that the easement documents were not available for registration at closing, and he was instructed to do what he thought best. This required more than a reliance on a verbal Undertaking.

¶ 37 There would appear to have been no pressing need to close on the day in question. Even if the required documentation was not available for some period of time, a short postponement would have allowed for the registration of the Agreement of Purchase and Sale on the title to Parts 20 and 24. The land being conveyed was important to the land assembly being carried out by the purchaser and it is reasonable to assume that a short postponement could have been obtained particularly since the purchaser was in breach of its obligations under the Agreement of Purchase and Sale, namely, the obligation to provide and register the easements for parking in favour of the Knights.

¶ 38 The plaintiff's loss of the parking rights which it would have had from the easements is a direct result of the failure of the defendant to adequately protect the rights of the plaintiff by registering appropriate documentation at the time of closing.

¶ 39 In my view, the failure of the defendant to more zealously pursue the obtaining and registering of the appropriate documentation to protect the plaintiff's easement rights also constitutes negligence. It is, however, more questionable as to what damages might flow from that negligence, in that it is not clear that the bank would have postponed its mortgage rights to any easements in favour of the plaintiff nor is it clear that the loss to the plaintiff would have been prevented had the easement documents been obtained and registered at an earlier date. The dye was cast when the defendant failed to register the appropriate documentation at closing.

¶ 40 I find that the defendant is liable to the plaintiff in damages with respect to the loss of the parking rights set out in paragraph 3 of Schedule "B" of the 1988 Agreement of Purchase and Sale.

¶ 41 In order to consider the matter of damages, it is necessary to set out the provisions of the said paragraph 3, which are as follows:

> 3. The Purchaser covenants and agrees that it is a condition precedent to the Vendor's obligations hereunder, to convey to the Vendor on closing as appurtenant to the lands being retained by the Vendor, easements, rights-of-way and rights in the nature of easements to enable the Vendor to park up to a maximum of 36 vehicles any time on the lands being retained by the Vendor and the lands outlined in green on Schedule "A" hereto and designated as proposed Easement "A" and proposed Easement "B" and for purposes of pedestrian and vehicular access over the portions of the said lands outlined in green on attached Schedule "A" which are from time to time unencumbered by buildings or structures so as to ensure access from the lands being retained by the Vendor to Upper James Street ...

¶ 42 Counsel for the plaintiff argues that the value in damages of the loss of such parking rights is the value of approximately 43,000 square feet of land being the lands outlined in green on Schedule "A" to the Agreement of Purchase and Sale and described as Proposed Easement "A" and Proposed Easement "B". To give this interpretation to the easement rights referred to in the Agreement of Purchase and Sale would mean that the Knights would have the right to park in virtually every space in the area outlined in green which is clearly not the case as the provisions of the Agreement of Purchase and Sale limit their rights to 36 spaces at most. Counsel's argument that those 36 spaces may be located anywhere on the area outlined in green still does not support the argument that the value of the easement is equivalent to the value of the whole area outlined in green. A more logical conclusion is that the assessment of damages with respect to lost parking rights is limited to the value, at most, of 36 parking spaces, subject to the comments set out below.

¶ 43 The evidence indicates that the Knights have been using approximately 16 parking spaces at the front of their building on a regular basis prior to the sale of the property in 1988 and the overflow parking was either at the rear of the property or on adjoining properties.

¶ 44 Counsel for the plaintiff argues that in calculating damages, the calculation should be made on the basis that the Knights are not obliged to use any of the space at the front of the building and that the whole of the 36 parking spaces contemplated by the easement may be located on the property to the south outlined in green in Schedule "A" of the Agreement of Purchase and Sale. I do not agree with this approach as in my view, based upon the evidence, the contemplation of the Knights with respect to the additional parking spaces acquired was that the 36 spaces would be inclusive of their continuing to use the parking at the front of their building. Counsel for the defendant argues, relying upon the report of Steve M. Pocrnic, that with the realignment of the spaces at the front of the lot, 18 parking spaces are available on the Knights own property so that the loss of parking amounts to 18 spaces.

¶ 45 The plaintiff's expert, David Morrison, premised his calculation of damages on the loss of 20 parking spaces based on past practice of the Knights using 16 spaces at the front of the building so that the balance of the 36 is what is lost with the loss of the easement rights. I find that this is a reasonable approach to the calculation of damages so far as the loss of parking space is concerned and that, therefore, it is appropriate to base the damages from loss of the parking rights upon the value of 20 lost parking spaces.

¶ 46 In calculating of the value of the lost parking spaces, I prefer the approach taken by Mr. Pocrnic, namely that the requirement for parking spaces is 263 square feet per space so that 5,260 square feet of land would be required to replace the parking space which was lost with the loss of the easement rights.

¶ 47 In valuing the parking space, I consider that the comparables used by Mr. Pocrnic are more realistic and prefer them to those used by the plaintiff's expert, Mr. Morrison. In particular, it is my view that the

value attributed to comparable number 14 in Mr. Pocrnic's report which was filed as Exhibit 6, being the sale of the property immediately adjacent to the Knight's retained property, indeed, the very property upon which the easement parking spaces were to be located, is a fair indication of the value of the lost easements. The price per square foot with respect to that sale was $6.44. The sale closed in June of 1988 so that there would have to be an adjustment in price between June and November, 1988 when the plaintiff sustained its loss. The evidence before me indicates that real estate values were rising at a compounded rate of approximately 4% per month during that period.

¶ 48 Based upon the foregoing, it is my view that the plaintiff's loss of the parking rights should be evaluated as follows:

20 spaces @ 263 square feet per space = 5,260 square feet

5260 square feet x $6.44 per square foot = $33,874.40

33,874.40 plus 20% (5 months @ 4% per month) = $40,649.28 - rounded to $40,650.00.

¶ 49 Defence counsel argues that it is unfair to use a fee simple valuation in calculating the quantum of damages as there are a number of benefits accruing to title in fee simple which do not accrue to the easements. These are set out in the report of Mr. Pocrnic.

¶ 50 Plaintiff's counsel argues, however, that on the facts of the case before me, using a fee simple valuation is reasonable because the Knights, with the easement, were obtaining more than the mere use of land. The Agreement of Purchase and Sale provided that with the easements came the obligation of the purchaser to repair, maintain, and remove snow from the lands covered by the easement and that these rights had a value above and beyond the value of the use of the parking spaces sufficient to offset any discount which might be put on the fee simple value of the land because the easements were of lesser value. I agree with this argument and have come to the conclusion that, due to the other benefits which would come with the easements arising out of the Agreement of Purchase and Sale, no discount should be applied to the valuation of the square footage of the lost parking spaces.

¶ 51 Plaintiff's counsel, based upon the report of Mr. Morrison, argues that in addition to the value of the lost parking spaces, the plaintiffs are entitled to damages for injurious affection because, with the loss of the parking space that came with the easements, the remaining property retained by the plaintiff does not meet the zoning requirements for parking necessary to operate a banquet hall and some other less valuable use of the property would have to be considered, thereby lowering the capital value of the retained property. In regard to this argument, I prefer the opinion of Mr. Pocrnic that the compensation for the value of the lost parking spaces makes up for the diminution of the capital value of the remaining property.

¶ 52 I also accept his evidence that there are a number of small or medium-sized banquet halls operating in the City of Hamilton, similar in size to that operated by the plaintiff, which do not meet the parking requirements of the Zoning By-law and are, in effect, operating as non-conforming uses. The fact is that since 1995, when the property upon which the Knights were to receive their easements was built on, the property retained has continued to operate as a banquet hall and there is no evidence before me indicating any loss of revenues from the banquet hall operation, so that the capital value of the property cannot be said to be diminished from the point of view of generating less income.

¶ 53 The only evidence before me with respect to this issue is that of Mr. Morrison, which as I indicated, is contradicted by the evidence of Mr. Pocrnic that banquet halls within the City of Hamilton about the same size as that operating in the plaintiff's building continue to operate without having the necessary parking available on the property. It was the evidence of the Knights that, even prior to the sale in question, when the back part of their property because of the condition of the lot, was not available for parking, people

attending functions at the banquet hall would park either on adjoining properties or along James Street South. It is to be noted that there is a large shopping mall immediately opposite the street from the plaintiffs building and considering that most of the functions which take place in the building, according to the evidence, are stags or other functions which take place on Friday and Saturday evenings, and based upon the fact that the use of the building as a banquet hall has continued to this day, it would appear that patrons to the functions have been able to find alternate parking, that parking has, to date, not been such a problem as to warrant any action by the City of Hamilton precluding the continued use of the building as a banquet hall. I am therefore of the view that, with respect to the claim for injurious affection, the plaintiff has failed to meet the onus upon it of proving damages in this regard. The claim, in this regard, must therefore fail.

¶ 54 While I have found that the defendant is not liable to the plaintiff for loss of the unlimited parking rights which were contemplated in the 1987 Agreement, in the event that this matter is reviewed elsewhere, I propose to deal with the valuation of those unlimited parking rights.

¶ 55 Both experts called to give appraisal evidence, that is Mr. Pocrnic and Mr. Morrison, agreed that the loss of the unlimited parking rights would be based upon the capacity of the Hall, approximately 300 persons for both levels which are used for banquet facilities. The loss would work out to approximately 59 parking spaces based on one parking space for every four patrons and taking into account the 16 existing on site parking spaces. In calculating the dollar value of the loss of 59 parking spaces, Mr. Morrison applied a dollar per square foot value to the land about 26% lower for the loss of the larger number of spaces, presumably because of the law of diminishing marginal contribution (that is, the more square footage purchased, generally the less the price per square foot). Mr. Pocrnic agreed with this approach.

¶ 56 Applying the values which I have attributed to the loss of 20 parking spaces, the loss of the unlimited parking easement would be calculated as follows:

59 spaces at 263 square feet per space = 15,517 square feet.

15,517 sq.ft. x $6.44 sq.ft. = $99,930.00

$99,930.00 - discounted by 26% = $73,947.81 - rounded to $73,950.00

¶ 57 I am satisfied on the evidence that the plaintiff or its officers did not become aware of the loss of the easement rights until some time in 1995 when a building was constructed on the lands adjoining the retained lands of the plaintiff where they thought they had parking rights pursuant to their easement, so that any limitation period would not commence to run until 1995. The current action was brought within any such limitation period.

¶ 58 Based on the foregoing, judgment shall issue in favour of the plaintiff against the defendant for damages in the amount of $40,650.00.

PREJUDGMENT INTEREST

¶ 59 The plaintiff will also be entitled to prejudgment interest. It appears from the evidence before me that the plaintiff had the use of the adjacent property upon which its easement rights were to be located during the period 1988 to approximately March of 1995 when representatives of the plaintiff became aware that there was a problem with their easement rights. I base this latter date on the letter from the defendant to Michael Noonan of the plaintiff, dated March 14, 1995 which was sent in response to a request to the defendant that he attend on officers of the plaintiff and discuss the situation with respect to the easement rights. Prejudgment interest will therefore run from June, 1995 when the action was commenced to the date hereof. Counsel are agreed that the rate of prejudgment interest should be averaged over the relevant period and that the average prejudgment interest rate from June, 1995 to the conclusion of trial was

5.27%. Therefore prejudgment interest will be awarded for the above period at the rate of 5.27%. I calculate prejudgment interest to total $14,281.00.

COSTS

¶ 60 Costs would normally follow the event. I am not aware of any Offers to Settle. I may be spoken to with respect to the matter of costs at a mutually convenient time.

LOFCHIK J.

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