

Parties Must Check their Biases at the Door When Exercising Contractual Rights

September 23, 2020

In *Elias Restaurant v Keele Sheppard Plaza Inc.*, 2020 ONSC 5457, Justice Morgan of the Ontario Superior Court of Justice commented on the racist overtones of the evidence adduced by a landlord and held that the societal realities pertaining to Black businesspeople must be factored into the exercise of the Court's discretion in considering equitable remedies like injunctions and relief from forfeiture.

Factual Background

The tenant, Elias Restaurant ("Tenant"), operated a restaurant and bar in a commercial unit located in a shopping plaza. The Tenant was owned and operated by a husband and wife team. The restaurant served what was described as "African/Black/Caribbean cultural foods" and catered to a primarily Black community customer base. The Tenant never missed paying any rent and spent \$150,000 in installing improvements to the leased premises when it took an assignment of the lease in 2013.

The original lease was for a 5-year term, with options to extend the term for two additional 5-year periods. The cutoff date for the Tenant to provide written notice of its desire to exercise the first option to renew was January 31, 2017. No written notice of exercise of the option was provided by the Tenant prior to that date. However, the owners of the Tenant tried on numerous occasions to get in touch with the landlord and the property manager to start the renewal process, both before and after the cutoff date, but with no success. According to Justice Morgan, it appeared that "their calls were studiously avoided." [\[1\]](#)

The Tenant remained in the premises as an overholding tenant from August 1, 2017 until May 28, 2020. On that date, the landlord delivered a letter to the Tenant advising that it was exercising its right to terminate the lease, which was at that point deemed to be a monthly lease.

The Tenant then moved to enjoin the landlord from evicting it from the premises and sought relief from forfeiture in light of the significant investment that it had made in running its business in the premises.

The Landlord's Evidence

The evidence adduced by the landlord and property manager revealed that they did not want the Tenant to continue to occupy the premises. Justice Morgan made the following comments, among others, with respect to the evidence adduced by the landlord:

[...] The Landlord's affidavit states that the Tenant was not to its liking because it does not attract what he calls "like minded family-oriented customers". He does not, however, indicate in what sense the customers of one store in a shopping Plaza can be said to be "like-minded" with those of other stores in the Plaza – how, e.g., customers buying shoes might be "like-minded" with those buying lunch. Rather, the Landlord's affidavit takes it for granted that the reader will know what he means.

Separate from anything else, this comment by the Landlord seems at odds with the fact that the Tenant is, in fact, a family business owned and operated by a husband and wife team, and is open to all customers without regard to family status. Counsel for the Tenant submits, with some good reason, that this attitude by the Landlord is a prejudicial one that is both unseemly and uncalled for. As Tenant's counsel points out, there is nothing in the record to indicate that there has ever been a complaint about the Tenant or its customers or by any other Tenant or user of the Plaza.

[...]

It is the Tenant's view that the Landlord's real point is not that families do not eat at restaurants or consume wine and beer with their meals, but rather that the "wrong" kind of families eat at this particular establishment. Tenant's counsel submits that there is a barely veiled tone of racism in these observations made by and on behalf of the Landlord about a Black community restaurant. Indeed, the affidavits submitted by the Landlord and its agents, which describe loitering, drinking, and gambling, articulate what might be considered almost a caricature of racially derogatory themes.^[2]

After discussing the landlord's evidence regarding a potential increase in rental income, Justice Morgan concluded that it was not the prospect of higher rent for the premises that was behind the landlord's desire to replace the Tenant.

Relief from Forfeiture

Justice Morgan started his analysis by noting that the power to relieve from forfeiture is discretionary, fact-specific, and predicated on the existence of circumstances in which enforcing a contractual right of forfeiture would visit an inequitable consequence on the party that breached the contract. He then noted that since the Tenant was not in breach of the lease, and that no financial loss had been established by the landlord, there was "little to balance on the Landlord's side of the equation other than the Landlord's subjective view of what it called an 'unattractive' Tenant."^[3] In contrast, on the Tenant's side was its substantial investment in the premises.

Justice Morgan also stated the following with respect to the landlord's alleged prejudice:

More importantly, the prejudice that would allegedly be suffered by the Landlord is not one which carries weight in considering a balance of equities. As already indicated, the Tenant is of the view that it is the fact that the Tenant is a Black-owned and operated business, and caters to an Afro-Caribbean community, that is the real issue for this Landlord. I have already observed that the Landlord's stereotypical portrayal of the Tenant's customers' behaviour fits an established pattern in society. In the Tenant's view, the only "prejudice" the Landlord will have suffered if the Tenant does not have to forfeit the Premises is that the Tenant and its African Canadian customer base, who, as the Landlord's affiant said, are "quite unlike, in a negative way" the rest of those at the Plaza, will remain in the Premises. With respect, this is precisely what legal scholars have identified as " 'Othering' of minority people ... in the guise of legal method."^[4]

Justice Morgan took judicial notice of anti-black racism in Canadian society and held that whether or not the landlord and its agents were cognizant of their own subconscious attitudes was not the Court's focus in weighing the prejudices to the Tenant. After referring to the Law Society's *Final Report on Challenges Faced by Racialized Licensees* and its admonition to lawyers to work toward inclusive workplaces and reduction of societal barriers created by racism, unconscious bias and discrimination, Justice Morgan stated that "[t]he principle which the Law Society pronounced can be extended to include Black businesspeople such as the Tenant, who often face discrimination challenges unique to their position in society."^[5] He also stated the following:

While a single adjudication dealing with a discreet conflict between a commercial Landlord and Tenant cannot possibly address society's many challenges with respect to racial justice, it equally cannot ignore them. At the very least, the societal realities pertaining to Black businesspeople like the Tenants must be factored into the exercise of the Court's

discretion in considering equitable remedies like injunctions and relief from forfeiture.^[6]

Justice Morgan held that the Tenant had shown good faith in attempting to communicate its desire to renew the lease and that it would suffer irreparable harm if the tenancy were ended. He found that the Tenant would lose its substantial investment in the premises and the goodwill associated with its location, and that “[i]ts owners and customers would also suffer the indignity of being excluded from the Premises based on what can be seen as a form of bias which Ontario law rejects.”^[7] Justice Morgan concluded that the equities and the balance of convenience weighed in the Tenant’s favour and that there was, objectively speaking, no prejudice to the landlord in allowing the Tenant to remain in the premises. Accordingly, Justice Morgan granted the relief sought by the Tenant.

Conclusion

This case is a further illustration of the kind of anti-Black racism to which Black businesspeople are confronted in Ontario. It also highlights the importance for lawyers to educate themselves on issues such as anti-Black racism, unconscious biases and discrimination so that they can, in turn, properly advise their clients when they seek to exercise contractual rights on improper grounds.

^[1] *Elias Restaurant v Keele Sheppard Plaza Inc.*, 2020 ONSC 5457 at para. 11.

^[2] *Ibid.* at paras. 12-13, 20.

^[3] *Ibid.* at para. 30.

^[4] *Ibid.* at para. 32.

^[5] *Ibid.* at para. 37.

^[6] *Ibid.* at para. 38.

^[7] *Ibid.* at para. 42.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035