

** Unedited **

Indexed as:

**Medalist Holdings Ltd. (c.o.b. Harvester Executive
Park) v.
General Electric Capital Equipment Finance Inc.**

Between

Medalist Holdings Limited, Louis Weisfeld Limited, Hillholm
Holdings Limited, Anita Lomborg and Lola Weisfeld, c.o.b.
under the name and style of Harvester Executive Park,
plaintiffs, and
General Electric Capital Equipment Finance Inc., defendant

[1997] O.J. No. 1995
Court File No. C12802/93

**Ontario Court of Justice (General Division)
Greer J.**

Heard: October 7-11, 1996.
Judgment: May 14, 1997.
(39 pp.)

*Landlord and tenant — Overholding tenants — General — Terms applicable —
Tenancy created — Tenancy at will — Yearly tenancy — Action for possession —
Occupation rent.*

Action by the plaintiff landlord against the defendant tenant for continued occupation after the expiration of a lease. The plaintiffs owned commercial premises in which the defendant became a tenant through an assignment of an earlier lease between the plaintiffs' predecessor in title and the defendant's assignor. The original lease was for five years and ran until 1991. The issue in this action was whether the defendant was overholding on the lease, or whether the parties had come to a new arrangement or whether the defendant was now a year to year tenant of the premises. Damages were also in issue. The old lease between the parties' predecessors provided that if the parties did not enter into a new written lease, the terms of the overholding clause would take effect, and those terms included a provision that the tenant shall be a monthly tenant at a monthly rental. No new lease was ever entered into by the parties. Under the overholding clause in the old lease the parties had also agreed to a fixed rate of rent as set out in the clause.

HELD: Action allowed. When a tenant continued in occupation after the end of the lease, and negotiations for a new lease continued, they may become tenants at will or they may not, depending on circumstances. Overholding did not occur if the tenant continued to occupy the premises under the terms of a new lease or if a month to month tenancy was created. The evidence in this case showed clearly that the defendant was an overholding tenant. Further, although there appeared to be negotiations going on for a new lease, such negotiations were a sham since the defendant did all it could to stall the situation without ever itself committing itself to a new lease. The overholding clause defined the rights and obligations of the parties in the event that the tenant overheld without any agreement with the landlord of a further term. Since the parties never reached any new agreement, their rights were governed by the overholding provision of the old lease. Since the defendant was a yearly tenant under the old lease and it held over at the expiration of that tenancy, and in the absence of sufficient evidence to show that the defendant had become other than a yearly tenant, the defendant became a yearly tenant after the old lease and was subject to give six months notice to quit.

Counsel:

Kevin D. Sherkin, for the plaintiffs.

Elaine M. Gray and Heath Whitely, for the defendant.

1 **GREER J.:**— The Plaintiffs, Medalist Holdings Limited, Louis Weisfeld Limited, Hillholm Holdings Limited, Anita Lomborg and Lola Weisfeld ("the Plaintiffs" or "Harvester") carry on business under the name and style of Harvester Executive Park in Burlington, Ontario, where they own and operate commercial premises in the buildings which comprise the Park at 3390 South Service Road. The Defendant, General Electric Capital Equipment Finance Inc. ("the Defendant" or "GE Capital") became a tenant of Harvester through the assignment of an earlier lease it had with Navistar Financial Corporation Canada Inc.

2 In July, 1986, the Plaintiff bought the buildings from R.P.T. Holdings Inc. and took an assignment of all leases, including that of Navistar, dated the 13th day of March, 1986. The original Navistar lease was a 5 year lease which was to run until 1991.

3 The issue before me was whether the Defendant was overholding on the lease, or whether the parties had come to a new arrangement between themselves, or whether the Defendant was now a year to year tenant of the premises; and, depending on what terms were in place between the parties, how the damages were to be calculated. A plethora of documents passed between the parties. All of these documents were examined in order to determine the true position of the parties.

1. The Lease

4 Although no signed copy of the Lease was ever produced, the parties agree that the document which governed their original relationship was dated March 13, 1986 in which the "Base Year" was defined to mean "the calendar year 1985". The original premises leased covered 10,000 square feet on the second floor of the building and the rent was set at \$95,000 per annum, payable in advance in equal monthly instalments of \$7,916.67.

The Lease contains the usual provisions found in any commercial lease but also contains several very important provisions which affect my findings in this Trial. One of those provisions is Paragraph 9.03 is entitled "Non-Waiver" and reads in part:

All rights and remedies of the Landlord in this Lease contained shall be cumulative and not alternative. The subsequent acceptance of rent hereunder by the Landlord shall not be deemed a waiver of any preceding breach of any obligation hereunder by the Tenant other than the failure to pay the particular rent so accepted, and the acceptance by the Landlord of any rent from any person other than the Tenant shall not be construed as a recognition of any rights not herein expressly granted, or as a waiver of any of the Landlord's rights, or as an admission that such person is, or as a consent that such person shall be deemed (sic) to be, a sub-tenant or assignee of this Lease. Nevertheless, the Landlord may accept rent from any person occupying the Premises at any time without in any way waiving any right under this Lease.

Paragraph 9.04 is the "Overholding" provision and it reads:

If, with or without the consent of the Landlord, but without any further written agreement, the Tenant shall continue to occupy the Premises and pay rent after the expiration of the Term, the Tenant shall be a monthly tenant at a monthly rental equal to the greater of two hundred per cent (200%) of the current monthly Gross Rental or two (2) times the current market rate, hereby reserved and on the terms and conditions herein set out, insofar as the same are applicable, except as to length of tenancy.

Paragraph 9.05 deals with collateral agreements. It reads:

It is understood and agreed that this Lease contains the entire agreement and understanding made between the parties hereto and that there is no representation, warranty, collateral agreement or condition, expressed or implied, affecting this Lease or supported hereby other than such as may be expressly contained in or implied from the provisions hereof and that this Lease may not be modified except as herein expressly provided or except by subsequent agreement in writing of equal formality hereto executed by the Landlord and Tenant.

Further, paragraph 9.17 covers "Special Provisions" and subparagraph 2. thereof states that "the Tenant will provide at its own expense the following Leasehold Improvements, which shall be approved by the Landlord ..." whereupon evidence of completion of such improvements, the Landlord shall issue a cheque to the Tenant in an amount equivalent to "three dollars and twenty cents (\$3.20) per square foot."

2. Amendments to the Lease

5 The Lease with Navistar was amended by Deed dated the 5th day of June, 1986 whereby Navistar leased additional space on the second floor and the monthly rent was increased to \$8,553.96. All Tenants of the building received a Notice in July, 1986 when the property was sold to Harvester and each was directed to pay rent to Harvester and on July 16, 1986, R.P.T. Holdings Inc. made a General Assignment of Leases from it to Medalist.

6 On October 23, 1987, Harvester and GE Credit Equipment Finance Inc. entered into an Amendment of Lease on October 23, 1987 wherein GE Capital increased its space

to 14,071 square feet at a monthly rent of \$11,139.55. The amount of space was again increased on December 22, 1989 to 14,896 square feet at a monthly rent of \$11,792.66. The Amendment states that all other terms and conditions remain in force and effect.

3. The Lease Negotiations

7 Serge Grubisa ("Grubisa") was a property manager with Harvester for 14 years and it was his job to deal with problems, look after the buildings, deal with the trades, pay the bills and look after the 300,000 square foot complex. Grubisa was one of the persons who dealt with GE Capital respecting lease negotiations. He wrote to GE Capital on January 17, 1991 regarding the renewal of the lease. His letter, sent to G. Warwick ("Warwick"), reads in part:

Further to our recent meeting, I confirm the following:

1. Harvester Executive Park will renew your existing lease as follows:

A. A five (5) year renewal term with an option to vacate after three (3) years with a six (6) month notice to the landlord.

Rental rate - \$12.50 per sq. ft. for first

3 years.

\$12.75 per sq. ft. for the 4th year.

\$13.00 per sq. ft. for the 5th year.

Base year for calculating maintenance charges to be 1990.

Effective May 1, 1991.

B. A five (5) year term with a rate of \$11.50 per sq. ft. and a base year of 1985. Effective May 1, 1991.

8 It is Grubisa's evidence that Warwick came to his office and discussed the renewal with him, as the lease expired at the end of April, 1991. He further says that they discussed upgrades and options on further space, as GE Capital wanted a right of first refusal on space, as was also set out in the above letter. Grubisa said that two proposals were discussed, namely a 3 year lease, as Warwick "expressed concern to vacate in 3 years" and a 5 year lease. I accept Grubisa's evidence that he was under the impression that GE Capital was renegotiating and that he had no idea that it was thinking of vacating the premises.

9 Warwick replied to Grubisa by letter of January 22, 1991. His letter reads in part:

We would be prepared to renew our existing lease as follows:

A five year renewal term with a one(1) month time option to cancel at the end of the third year with a three (3) month notice to cancel to the landlord.

Warwick then said that the rents would be 50 cents per square foot less during each of the years than those quoted by Grubisa. He also noted that they expected the landlord to redecorate (paint) the whole premises and that all broken and discoloured tiles would be replaced. The option for first refusal on additional space is also mentioned.

10 They met on February 26, 1991 to discuss the proposal and discussed the painting to be done, including some painting of furniture. It is Grubisa's evidence that the Tenant was supposed to pay for reupholstering of the furniture but that other costs would be factored into the rent.

11 Grubisa wrote to Warwick after the meeting and told him that Harvester was prepared to accept the rental rate proposed by GE Capital and that the landlord would redecorate with GE's approval of colours, carpets etc. The last two inclusions read as follows:

3. Total cost will be calculated upon obtaining quotations and will be presented to G.E. for approval. Cost of redecorating will be incorporated and reflected in a per sq. ft. rate and it will be adjusted accordingly.
4. Upon G.E.'s approval of agreed rate, HEP will arrange for decorating to begin.

We thank you for your decision in choosing to renew your lease with us, and look forward to a long business relationship.

12 It is clear from the content of this letter, that Grubisa and Harvester were of the opinion that the lease would be renewed by GE Capital but Grubisa was careful to put them on notice that, otherwise, the overholding clause would apply. GE Capital sent a cheque to Harvester dated March 1, 1991 in the amount of \$16,571.13 and later a cheque dated March 28, 1991 in the same amount.

13 GE Capital dealt with Fielding and Associates regarding quotes for the planned renovations of the existing space and the scope of services is set out in a letter of March 8, 1991 to Warren D. Brewer ("Brewer") of GE Capital. On May 1, 1991, GE Capital paid the same rent to Harvester as it had in March. On May 15, 1991, Grubisa again wrote to Warwick further to his letter of January 22, 1991 and their recent meetings, that they were able to confirm certain things, namely that all of the decorating, carpeting and furniture moving and re-assembling would be handled by Harvester, with the rates to change upon completion of this to \$14 per sq. ft. for 3 years, \$14.25 for the 4th year and \$14.50 sq. ft. for the 5th year, with the old rental rate of \$12 to apply until all renovations were completed. Theodore Zubata ("Zubata"), the managing partner of the Plaintiff, confirmed that he was agreeable to the \$12 per square foot rent awaiting written confirmation from the Defendants about the renovations. All other terms of the letter of January 22, 1991 were to be accepted. Harvester confirmed again that it would pay for the painting and the tile replacement. The final sentence in the letter reads:

Your reply and acceptance by May 31, 1991 will ensure the rate quoted.

14 It is Grubisa's view that at this point, he did not think that a 3 year option was an

option. The renovations, he said, would cost about \$150,000. By July 12, 1991, it was determined that the total renovation costs to the Landlord would be \$209,185, with only \$150,000 being factored into the new rent to be charged. When Grubisa did not receive a reply to this letter, he wrote on May 20, 1991 to Warwick and said:

Further to our meeting on Friday and as we discussed in your office, please be informed that there is an overholding clause 9.04 in your lease document (self explanatory).

15 In Grubisa's mind, they had a deal and it was simply a matter of putting it down on paper and negotiating how the redecoration and renovation was to be handled. He had discussed the overholding clause with Warwick and "now we needed some answers." Grubisa sent the letter as a precautionary gesture and delivered it personally as a courtesy to Warwick.

16 On June 1, 1991, GE Capital sent a rent cheque to Harvester for \$20,381.04 which was calculated at the rate of \$12 per square foot as stated in Grubisa's letter. On June 14, 1991, Grubisa sent a letter to all of Harvester's tenants, including GE Capital, stating that the rent was due on the first of the month and setting out the amount of the rent, inclusive of cleaning and GST. GE Capital's was \$17,998.33. The letter also noted that invoices would no longer be sent out each month, with the exception of invoices showing unpaid balances or new terms. A copy of this letter was signed by Warwick on June 18, 1991 and marked "ok".

17 Grubisa wrote a further letter dated June 27, 1991 to Warwick which basically set out what he had already noted in his earlier letter about the redecorating and furniture moving and rental terms. He again stated that a reply and acceptance by July 10, 1991 would ensure the rate quoted. Grubisa's evidence is that the trades hired to do the renovations and redecorating were being held off until confirmation was received. Harvester received GE Capital's rent cheque of \$17,998.33 for the month of July.

18 From the evidence before me, it appears that GE Capital was attempting to deal with the issue. In a memo dated July 8, 1991, which was originally sent to Jeff Smith from Brewer, with a copy to Warwick, Brewer writes:

As outlined to you on July 2, 1991, we have a deadline date-Wednesday, July 10, 1991 to confirm our lease pricing. If we are unable to confirm by this date, please advise me, so that I can arrange to have the date extended.

Who has the authority to sign on behalf of GE Capital?

19 The hand-written notation on the copy states after the question as to who can sign on GE Capital's behalf, the words "M.A. Neal only," with a note at the bottom, "Warren, We will not be able to confirm by 7/10/91. Also we will have to examine lease agreement first." This was followed by Brewer's letter to Grubisa of July 8, 1991 acknowledging receipt of the letter to Warwick. It then reads:

We have recommended the acceptance of your proposal. However, our executive have not yet approved the same and we will not have their approval by July 10, 1991.

We would appreciate an extension of our acceptance to the end of the month.

In addition, and as previously requested, we require a copy of the documentation you propose in having us sign, direct to my attention as soon as possible.

20 The lease had expired two months earlier and there was no evidence that GE Capital had dealt with Mr. Neal regarding the renewal.

3. The New Lease Document and Peripheral Matters

21 Grubisa immediately sent the lease documents, including the new lease dated May 1, 1991, (in which the Base Year now means the calendar year 1990). The premises were now expanded to 15,304.14 sq. ft. for a period of 5 years ending April 30, 1996. The rent is calculated at \$17,854.13 per month. When these documents were received by GE Capital, Brewer sent them on July 8, 1991 to Leslie J. Battrick ("Battrick"), the company's indoor counsel, with a memo indicating that the current lease had expired on April 30, 1991, and noting that they were "negotiating" with Harvester regarding the renovations. The final paragraph reads:

Would you please review the attached Lease Agreement, and advise if it is acceptable in its present form, for signing. It is identical to the original lease we signed five years ago.

22 Battrick began working for GE Capital in June of 1991 and was mainly responsible for Vendor. When the new Lease was given to her, Battrick annotated a copy with her comments, and compared it to the old Lease. She met with Brewer two months later in August, 1991 to review the draft Lease and with James E. Humphrey ("Humphrey") in December, 1991, to do the same thing. Humphrey had become the President of GE Capital on September 30, 1991. GE Capital had now had the draft Lease for 6 months and nothing had been done about seeking approval to have it executed from either Smith or Neal in Danbury. In my view, Battrick spent an inordinate amount of time ruminating over the lease. The rumination appears to have been part of the "stall" tactics that Brewer earlier referred to. It is clear, however, that Battrick was aware of the overholding clause under the old Lease, as she specifically wanted the 200% reference deleted from the new Lease. Battrick was told not to proceed on the Lease in late January or early February, 1992, as the "business people were in negotiations." This, of course, was really not true, as GE Capital's people who were involved in looking for new premises kept stalling, while Grubisa kept pressing for some finality to the Lease and its terms.

23 Battrick really had no input into the rental rate, and left that up to the business people, and she agreed on cross-examination that she did not know what Brewer was doing. She was of the view that the lease's commencement date would be the date on which the negotiations were finished, but she had no knowledge about the renovations or the expected cost of them. Battrick agreed that no lease was ever finalized and agreed that she had not seen Grubisa's letter to Warwick dated June 27, 1991 until August 16, 1993. From the evidence, I have concluded that Battrick was basically kept in the dark as to what was really taking place with those persons at GE Capital who made the business decisions.

24 A further letter was sent to Grubisa on August 19, 1991 by Brewer, asking for an extension of their acceptance to the end of the month as the executives were on vacation. A further extension was asked for by Brewer again on September 13, 1991. Brewer again wrote on September 17, 1991 that they hoped to be able to finalize the renovation schedule at the end of the month and complete the Lease. He enclosed some lease changes which GE Capital wanted. In my view, none of these changes were substantial in nature, and some were merely cosmetic in nature, almost as if they were drafted to help delay the signing of the Lease, since the Landlord now had to submit them to its counsel.

25 Humphrey remained as President of GE Capital until June 30, 1993. He participated in some of the discussions with Grubisa and was shown some of the documents but Humphrey's recall about the correspondence between the parties was vague at best. He confirmed that after he arrived on September 30, 1991, there were discussions with him about the cost of the renovations, and that he was not aware that the Landlord had given GE Capital a new draft Lease until later in the year. Upon examination of the Lease, Humphrey agreed on cross-examination that it appeared to be a 5 year lease with no option to get out of it earlier. I did not find Humphrey's evidence to be at all helpful as to GE Capital's real position on the Lease renewal.

26 One of the problems throughout all of the negotiations was that no one in Ontario had any authority to make decisions on the lease. Humphrey confirmed that it had to be referred to an executive in Danbury, and that it was GE Capital's policy to look around before it renewed leases. Humphrey wrote on November 22, 1991 to Jeff Smith in Connecticut about the renewal of the lease. His letter reads in part:

The lease for our space expired on April 30, 1991. Since that time we have existed on a month to month relationship with the landlord while reviewing our options.

After considering other alternatives and giving consideration to the ? of may and proximity of our work force, the best choice is to stay in the existing space.

27 Humphrey, although in a position of authority, seemed to have little idea as to what was going on, and it appears that he left things up to Warwick. The company did, however, prepare a list of the employees and where they lived in relation to the office. It is Humphrey's evidence that Grubisa never threatened them or made them feel any sense of urgency. Grubisa was, however, relying on the overholding provision of the Lease, and in my view, did his best to keep the negotiations moving forward. GE Capital was a major tenant of the building and Harvester did not want to lose it.

28 It is Humphrey's evidence that even Jeff Smith in Danbury did not have the final say in the lease negotiations and that it was Smith's superior, Mr. Neal, who had the final say, although no one seems to have corresponded with him or sent him a copy of any communication that was before me at Trial. It is clear that communications from Brewer were to Smith in Danbury. Brewer sent him a memo dated August 19, 1991 which reads as follows:

The Landlord is anxious to get started with the renovations, ordering the reception desk, recovering chairs and panels, laying the carpet, etc. They would like the lease signed.

...

I appreciate that the delay in reaching a decision to renovate this location is predicated on the outcome of the negotiations with First City, and the office space we may require.

In the meantime I am stalling the Landlord and continue to talk with Reimer with regards to the space they have available. I am not sure how much longer we can stall.

29 I have concluded that this was part of GE Capital's plan to continually delay dealing with the Landlord on an above-the-board basis. At no time did GE Capital ever put in writing that they were looking at new space or that they did not intend to renew the Lease. It was not until mid-1992 that Harvester finally became aware of this, yet the above letter shows that negotiations were taking place with "First City" as early as August, 1991 and likely earlier. I am satisfied on Harvester's evidence, as presented by Grubisa, that Harvester continued to deal in good faith with GE Capital, and was unaware of GE Capital's stall tactics which had begun as soon as the Lease expired in April, 1991.

30 Documents passed back and forth between the Landlord and the Tenant about parking spaces in September. By the end of October, 1991, Grubisa was still trying to finalize matters and he points out to Brewer in a letter of October 31, 1991, that "You will note a 5 year term effective November 1, 1991." He then sets out in detail what the renovations will be.

31 It was not until January 29, 1992 that Harvester's counsel, Paul Lannon, dealt with the changes in the Lease that had been sent to him by Battrick. Many of his comments regarding Battrick's changes read "unacceptable" or "should be deleted". Lannon died shortly after this letter was sent, which accounted for some of the further delay. Zubata was unable to give any information as to what Lannon had done in the lease negotiations but he understood that, "... the lawyers were working it out." Humphrey had discussions with Battrick about the Lease and how the renovations should be handled.

32 In sheer frustration with what was not happening, Grubisa prepared an outline in June, 1992 of what delays had taken place since the meeting with GE Capital on January 15, 1991. In the meantime, between January and June, GE Capital had purchased a company called Vendor Equipment Financing and it had space on the first floor which it would have to vacate in May of 1992, being offered additional space on the second floor. The name of this company appears to be G.E. Capital Canada Vendor Financial Services, ("Vendor") and John Bickerstaff ("Bickerstaff"), one of its employees wrote to Grubisa that they would move to that floor for a minimum of 6 months on a month to month basis. His letter states in part:

We may want to reconfigure space eventually when other GE group gets done.

33 Still, no mention is made by GE Capital that it is searching for other space.

4. The New Negotiations

34 It is Grubisa's evidence that when communication with Brewer ceased, he began communicating with Kevin M. Black ("Black") of GE Capital. He and Black discussed

the renovation schedule and in a memo of June 22, 1992 from Black to Grubisa, Black sets out square footage and rates, and states one of the reasons for the delay. GE Capital essentially wanted to renegotiate a new per square footage rental rate. In the memo Black states, "Problem is that the extra sq ft will cost us \$156250 over the next five years" and then goes on to mention an operating costs overage over the next three years "when compared to an alternate facility". Black then sets out some new rental figures which have never before been discussed by the parties. It is Grubisa's evidence that he said that they would take some space back and would discuss a possible rent reduction given market conditions. He did say, however, on cross-examination that in his mind they had an agreement. He acknowledged that Harvester had other vacant space at this time and that rents had dropped.

35 On June 22, 1992 Grubisa wrote a very cryptic letter to Black, confirming that Harvester would reduce the rates, setting out the new square footage and what Harvester was prepared to take back. Grubisa pointed out that all of these items had been, "... discussed and verbally agreed to by your predecessors on several occasions." He then mentions the renovations which GE will now have to pay for. Grubisa then states:

3.Should we not come to an agreement in a reasonable time we must refer your attention to Clause 9.04 of your original lease agreement

36 This was Grubisa's second reference to the overholding provision under the Lease, yet GE Capital chose to continue to ignore it. In his testimony, Grubisa said that by this point, although Harvester had already expended \$11,000 for architects' costs and designer's costs, he knew the market was bad so he again put GE Capital on notice of the overholding provision as a precaution.

37 Humphrey recalls Black showing him Grubisa's letter of June 24, 1992 setting out Harvester's agreement to accept GE Capital's proposal to lower the rental rates for 13,247.46 square feet of space. Humphrey's evidence is that he thought that this was another proposal for a new lease and that they were occupying the space on a month to month basis. Further, he said he was worried that Grubisa would increase the rent in the future. I did not find Humphrey's evidence to be very credible on this issue. Grubisa's correspondence to GE Capital throughout the negotiations was available to him and, in my view, was clear on its face.

38 By February 19, 1993, GE Capital was telling Grubisa that they wanted to vacate 893.65 of their space effective April 1, 1993. On March 2, 1993, Harvester sent GE Capital the new tenant charges for 1993 and on March 8, 1993 Grubisa sent Warwick a comparison of the 1990 base year to the 1992 taxes and operating costs. On June 15, 1993, Black wrote to Grubisa that Harvester should now send two separate invoices separating the rental costs of GE Capital from those of Vendor. This was, in my view, a clear sign of GE Capital's pending departure. By July 6, 1993, Black no longer seemed to be in charge at GE Capital respecting the Lease and Grubisa was now faced with dealing with Rob Brown ("Brown"). He wrote to Brown, in parts; pointing out that there was no new Lease:

As you are probably aware your original Navistar lease expired April 30, 1991 and as of today we have negotiated numerous times but all short of getting an actual document signed.

39 He further points out all the time Harvester has spent on the renovation issue. He then adds, "... it is for that reason that we have not insisted on enforcing clause 9.04 of your original lease." At no time, however, did Grubisa ever say that Harvester was not going to insist on it in the future.

40 On July 7, 1993, Grubisa writes again to Brown stating that the lease may be 3 or 5 years. It again covers the renovation issue and the rental rate if renovations are done. At the end, Grubisa writes:

Considering your expense to re-locate, example phone system, computer lines, moving of furniture, exterior signs and any other unforeseen expense, I think our offer should be considered.

41 It is Grubisa's evidence, which I accept, that there were now rumours that GE Capital was trying to vacate so that they were prepared to offer a lower rate to keep GE Capital as a major tenant. On cross-examination, Grubisa agreed that while Harvester had contemplated a three year option, it was not in his mind that GE Capital could terminate after three years. He also admitted that this letter did not say that if it was not accepted, Harvester would go back to the May, 1991 rates under the overholding provision. I am satisfied on Grubisa's evidence that there was no need to again reiterate that point which had already twice been pointed out to GE Capital. It was not the fault of Grubisa that GE Capital kept changing the person he was forced to deal with. It was up to GE Capital to keep its employees up-to-date on the negotiations if they were going to continually change the person in charge of the negotiations.

42 Further, Grubisa acknowledges that at his meeting with Black, Black told him that GE Capital was seeking alternate accommodation. I accept Grubisa's evidence that he put Black on notice that if he chose to vacate, they were looking at the overholding clause, which was a "safety net until they had some sort of agreement." Grubisa did acknowledge, on cross-examination, that the small additional space which had been taken by GE Capital was on a monthly tenancy. Grubisa said that Area C was always part of the main Lease, and that Area B was a temporary solution, and that if it was not needed by GE Capital, Harvester would take it back. Grubisa's letter of June 16, 1993 to GE Capital does state that GE Capital was asking that Area C be transferred to Vendor. Grubisa, in his letter, never states that this was done. He simply sets out the rental rate of \$16,400.75.

43 On cross-examination, Grubisa admitted that no actual new documentation had been signed by GE Capital and that none of the counter-offers were accepted in writing by GE Capital. He further agreed that the building had some maintenance problems which GE Capital complained of, however, none of this was fully pleaded by GE Capital. It does mention in paragraph 15(a) of its Statement of Defence that the Landlord benefitted from GE Capital remaining on the property, given the "state of repair." On the other hand, Harvester was not prepared to begin the painting and replacement of tiles, or to commence the other renovations until GE Capital approved in writing of the

renovations and the revised rent. Grubisa did say, and I accept his evidence, that Harvester attended to any immediate repairs which needed to be done. Further, at no time did GE Capital ever write back to say that in their opinion, the overholding clause was not applicable. In fact, it appears that GE Capital was doing everything it could to stall making any decisions in order to acquire space with another landlord, and that it simply led Grubisa on without making any commitment in writing.

5. GE Capital Vacates the Premises

44 On August 30, 1993, James Weakley ("Weakley"), the President of Vendor, delivered a letter to Grubisa stating that it would be terminating its "monthly tenancy ... effective October 31, 1993 and will vacate the premises on or before October 31, 1993."

45 Neither of the parties could locate a copy of GE Capital's letter in Black's name stating that it, too, was vacating but I accept the parties' confirmation that such a letter was sent by GE Capital and received by Harvester.

46 Grubisa wrote to Weakley on September 7, 1993 confirming that Vendor's space was to be considered a monthly tenancy but that this only related to the 1,163 square feet leased to it, and that Harvester viewed the other small space of 1,662.05 as being governed by the 1986 lease and that GE Capital remains liable for that space. Grubisa then wrote to Black of GE Capital essentially saying that the 1986 Lease applied and that he would be calculating rent at \$19 per square foot as provided in the overholding section 9.04 of the Lease, for the period since May 1, 1991.

47 When Harvester received a cheque in the amount of \$16,400.75 from GE Capital for rent for October, 1993, the cheque was not accepted by Harvester. On September 14, 1993, John A. Turingia, Harvester's solicitor, wrote to Black, enclosing a detailed computer printout setting out the overholding charges. He also wrote to Battrick on September 16, 1993 putting her on notice that an action would be commenced by Harvester.

6. Mitigation of Damages

48 Harvester used the services of jj Barnicke Limited, Realtor, to assist them with trying to lease the space. An Open House was held on December 8, 1993 for prospective tenants and the rental rate of \$12 per square foot was reduced to \$10. Various realty companies were contacted to search for tenants. By February 1, 1994, various real estate offices were invited to show the premises. It is Grubisa's evidence, which I accept, that they were unable to lease the premises as the "market conditions were awful". Having reviewed the various brochures which were prepared and the attempts made to re-lease the premises, I have concluded that Harvester did its best to mitigate damages but were thwarted by the falling commercial rental market.

49 Kevin James McAleese ("McAleese") gave evidence. He is a commercial real estate broker in Burlington and is now with jj Barnicke and is familiar with the Harvester Industrial Park. He has worked with Grubisa in leasing space to tenants over the years. He was asked to market the space after GE Capital and Vendor moved out. It is McAleese's evidence, which I accept, that by 1991 the market was in a decline and that it got worse in 1992, with rental rates further decreasing. I accept his evidence that he

actively promoted the space vacated by GE Capital and Vendor and that they had finally obtained a tenant to take 6,500 square feet of the space in November, 1996. McAleese said, at Trial, that he still had a sign on the property. I accept his evidence that over the last couple of years there have been vacancies of up to 50% in some buildings and that rental rates have declined up until about a year ago. The appropriate rate for this building in 1993 and 1994, McAleese thought, would have been \$10 per square foot but that in 1992, it would have risen to \$10-\$13. The Harvester property, McAleese said, would have been rated a B-property, given its age and the large common space area. McAleese further said that when he conducted an open-house of the space, it had been painted and the carpets had been cleaned and some remodelling done on the common space area. He further said that there was not a great demand for large spaces, and that the floor plate of this building made it difficult to multi-tenant it.

50 Zubata is the managing partner of Medalist Holdings and Grubisa worked under him. He was involved with some of the GE Capital negotiations. Zubata confirmed that there continues to be a \$2,000,000 mortgage on the property, of which Medalist, Louis Weisfeld Investments Limited, Hillholm Holdings Limited, Anita Lomborg, and Lola Weisfeld were the mortgagees. The interest rate on the mortgage is 11.75% and the monthly payments are \$21,291, with the final payment due February 1, 2001. It was Zubata's further evidence that when GE Capital, which took approximately 25% of the space, moved out, the mortgagees had to borrow on the Bank line of credit at rates which varied from 10% to 1% over prime. At the time of Trial, the interest being paid was 7 1/2%-8%. While Zubata presented no documentary evidence on the line of credit with the Bank or the rates which were paid by the mortgagees, I found him to be a very credible witness and for purposes of the Trial I am prepared to accept his evidence as accurate.

51 Zubata said that before GE Capital moved out, the building had been about 95% occupied. He had been involved with Grubisa in some of the negotiations and some of his notations were on the documents which passed between the parties. Zubata acknowledged on cross-examination that he would have been prepared to accept a three year lease if GE Capital had signed a lease. He confirmed that the overholding provision was common in all of their leases. Further, Zubata confirmed that some major renovations had been done to the lobby area of the building to please GE Capital, as it was a major tenant.

52 The issue of repairs had been dealt with under the old Lease in paragraph 9.17(2), as has been noted earlier in these Reasons. The tenant therefore had an obligation to provide certain leasehold improvements at its own expense and be reimbursed by the landlord in accordance with the formula provided.

7. The Overholding Clause

53 It is clear from the terms of the old Lease which contains the overholding clause, that if the parties did not enter into a new written Lease, the terms of the overholding clause would take effect. The evidence shows that no new such Lease was ever entered into by the parties despite Grubisa's valiant efforts. Under the overholding clause, the parties had agreed to a fixed rate of rent as set out in the clause, and I am satisfied that the

acceptance of rent by the Landlord does not alter any of the rights of the parties under the old Lease, as is set out in the paragraph 9.03 of it, being the Non-Waiver clause. The parties had agreed that if GE Capital stayed on without a new written agreement that it would pay a minimum of \$19 per square foot on a month to month basis. Harvester received less than this amount every month from GE Capital until it vacated the premises at the end of October, 1993.

54 When a tenant continues in occupation after the end of the lease, and negotiations for a new lease continue, they may become tenants at will or they may not, depending on the evidence. Overholding does not occur if the tenant continues to occupy the premises under the terms of a new lease or if a month to month tenancy is created. See: *Vancouver Block Ltd. v. Wilson* (1997), 61 W.W.R. 648 (B.C.C.A.). Hutchison, J., in *Victoria Child Sexual Abuse Society v. Matiko*, [1995] B.C.J. No. 2617 (B.C.C.A.) sets out the 4 scenarios which can happen. In paragraph 16 he states:

On the expiration of a tenancy for a fixed period, the tenant is bound to deliver up possession whether he has covenanted to do so or not, unless a new tenancy is created. If the tenant remains in possession, he may be, according to the circumstances; (1) an overholding tenant; (2) a tenant at or on sufferance; (3) in possession pending negotiations for a new lease (and thus a tenant at will); or (4) a tenant from year to year.

In that case, Hutchison, J. determined that the tenant was both an overholding tenant and in possession pending negotiations for a new lease.

55 It is the position of GE Capital that the overholding clause of the old Lease does not apply to it. It relies on *Bramalea Ltd. v. Amoco Canada Petroleum Co.* [1988] A.J. No. 305, Action No. 8401-11456, an unreported decision of the Alberta Court of Queen's Bench dated April 6, 1988, in support of its position. *Bramalea*, supra, also involved a tenancy under a written 5 year lease which had expired and had not been renewed. In that instance, the parties had started their negotiations prior to the end of the lease, and were further negotiating for additional space. It is clear from the facts as set out in the case that the parties had reached an agreement on the rental rate and other rental charges but not on all terms of a new lease. Further, the tenant paid rent at the new rate (emphasis added). In addition, the parties agreed on the tenant's rental of further space at an agreed rent and other charges. They did not agree on the cancellation clause. It further appears on the facts that "all areas of disagreement were resolved" except the cancellation clause. See: p. 2 of the Judgment. The Court therefore found that there had been "an agreement to lease". In my view, the facts of *Bramalea*, supra, distinguish it from the case at bar where I have found that the only agreement reached by the parties was the rental rate of \$12 which was not to be the rent under the written Lease but an interim rent until a written agreement was entered into about the renovations.

56 It should be noted as well that the overholding clause in *Bramalea* was different from that in the case at bar. In *Bramalea*, there is no doubling of the rental rate during the overholding period. Further, it allows the landlord, at its option, to give the tenant written notice that it may continue to occupy on a month to month basis. The overholding provision in the case at bar states that if the tenant continues to occupy the premises after

the end of the term, the "tenant shall be a monthly tenant at a monthly rental equal to the greater of two hundred per cent (200%) of the current monthly Gross Rental or two (2) times the current market rate ..." In my view, this provision is crystal clear in its meaning that the overholding charges apply and can be properly rendered by the landlord with the agreement of the tenant when it executed the lease, thereby encouraging the tenant to either renew before the term expires or put the landlord on notice that it intends to move when the lease expires. This was not present in the said Bramalea lease. I completely reject GE Capital's position that its situation is on all fours with Bramalea.

57 I am satisfied on the evidence before me that GE Capital was an overholding tenant and that even though there appeared to be negotiations going on for a new Lease while it remained in possession, such negotiations were a sham since GE Capital did all it could to stall the situation without ever committing itself to a new Lease. No one with whom Grubisa negotiated ever had the authority to commit GE Capital to a new Lease. It is clear from the evidence that by July, 1991, GE Capital was searching elsewhere for new premises. It did its best to bifurcate its tenancy with its dealings with Vendor and had the Landlord agree to its month to month tenancy for Vendor's small space but this in no way negated its obligations under the overholding provision of the old Lease with GE Capital. Further, at no time did the parties ever reach a consensus ad idem on the essential terms of their proposed contractual relationship. See: 414113 B.C. Ltd. v. Powell River Transport Ltd. (1993) 32 R.P.R. (2d) 46. While the lawyers passed draft Lease agreements between them, at no time did they ever agree on the essential terms, as witnessed by Shannon's letter to Grubisa.

58 The overholding clause defines the rights and obligations of the parties in the event that the tenant overholds without any agreement with the landlord on a further term. See: International Aviation Terminals Inc. v. Harnett, [1996] B.C.J. No. 10, DRS 96-03938 (B.C.S.C.). Landlords and Tenants enter into a business arrangement when a formal Lease is executed by them on the advice of legal counsel. The overholding provision in the Lease was well-known to the parties when they entered into the Lease and it was there to protect the rights of the Landlord if the Tenant did not execute a new Lease but remained in possession which is exactly what happened. In my view, the parties never reached any agreement on a further term, and while there was mention of a possible 3 year term, the Tenant never confirmed by letter to Harvester any of the terms as set out in Grubisa's many letters to it. Therefore, I hold that the rights of the parties are governed by the overholding provision of the old Lease.

7. Adverse Inference

59 GE Capital did not present any of Brewer, Black, Warwick, Brown or Smith as witnesses at Trial. As I have noted in these Reasons, Humphrey came into the picture after the Lease had expired and was not an integral person in any of the negotiations. Humphrey's knowledge was limited, as was that of Battrick, who was kept from any of the "business" decisions. There was not one piece of evidence produced to show that whoever had the authority in Danbury to authorize the signing of a new Lease, ever received any written analysis of what was taking place or what GE Capital's true position was about the lease. All of Warwick, Brewer, Black and Brown either ignored the

overholding clause or simply failed to take it into account or relied on someone else to analyse the old Lease.

60 Not to have produced any of these witnesses, who were the real people with whom Grubisa was negotiating, leaves a huge gap in the oral evidence presented at Trial. As has been pointed out by Ground J. in *Goldstein et al. v. Davison et al.*, (1994), 39 R.P.R. (2d) 61 (Ont. Ct. Gen. Div.) at p. 73:

A witness may be available in the sense that the witness can easily be subpoenaed to come to court and testify by either party, but that is not the test of availability. If, because of the witness's relationship to one party, that witness could reasonably be expected to testify in favour of that party and against the other party, then that witness is not equally available, and an inference may be drawn from the fact that the witness was not called by first mentioned party.

61 It is GE Capital's position that it was not necessary for them to call the aforementioned employees in that there was sufficient evidence already put forward upon which it could rely. Reference was made to *Clairborne Industries Ltd. v. National Bank of Canada* (1989) 69 O.R. (2d) 65 (Ont. C.A.) where the Court said at p. 77:

It is a well-established principle that the unexplained failure to call a witness who can give relevant evidence leaves open the natural inference that the evidence of that witness would be helpful to the opposite party ...

62 In *Claiborne*, supra, the Court noted at p.78 that there was sufficient evidence before the trial judge to make the findings against the Bank "... without expressly relying upon any inference from the failure to call witnesses."

63 GE Capital further relied on *Murray v. Saskatoon* [1952] 2 D.L.R. 499 (Sask. C.A.), a case which sets out some of the early propositions regarding failure to call witnesses or to submit significant pieces of evidence to the Court and how the Court should judge such failure. There is nothing in *Murray*, supra, which has not already been expressed by Ground J. in *Goldstein*, supra, or by the Court in *Clairborne*, supra.

64 I am satisfied that one of the witnesses mentioned was not readily available, but no evidence was led as to the whereabouts of the others and why at least one of them was not called. I have therefore drawn an adverse inference that some of the evidence of one or more of these persons who had direct contact with Grubisa would not have been favourable to GE Capital.

8. Had the Parties Entered into an Agreement to Lease?

65 I am satisfied that the parties never entered in an agreement to lease. Although Warwick agreed to pay the \$12 per square foot rent until the renovations issue was settled, it never was settled by GE Capital before it gave its notice of termination to Harvester. Time and time again, Grubisa attempted to get GE Capital's concurrence in writing on the renovations, although it was never forthcoming. The true rent was to reflect the \$150,000 cost of the renovations to the tenant, to be amortized over the 5 years of a new Lease. In addition, Battrick wanted all sorts of changes to be made to the Landlord's draft new Lease, which its counsel recommended against, including changes to the overholding clause. There was therefore no meeting of the minds of the parties

who had the authority to finalize decisions.

66 The parties had not even agreed on the commencement date of the lease. Battrick seemed to think that the lease would run from the date it was signed. There is some evidence that GE Capital wanted to have a clause which would allow them to leave in 3 years time on terms. Grubisa was prepared to only consider a 3 year term in accordance with the letter to be signed by GE Capital approving the renovations and the new rent, which was never done. The requisites of a valid agreement for a lease are set out in Bramalea, supra, at p. 3:

To be valid, an agreement for a lease must show: (1) the parties, (2) a description of the premises to be demised, (3) the commencement and (4) duration of the term, (5) the rent, if any, and (6) all material terms of the contract not being matters incident to the relation of landlord and tenant, including any covenants or conditions, exceptions or reservations.

67 My review of the evidence shows that these requisites were not present. While there was a mass of documentation presented at Trial, it is clear from GE Capital's own evidence that they were attempting to "stall" at all costs. Their notice of termination came only when they had other premises secured. The parties always had had a written Lease, and their solicitors were exchanging drafts of a new lease, the terms of which were never finalized.

9. Was GE Capital a Tenant at Will, a Month to Month Tenant or a Yearly Tenant?

68 Once the old Lease expired in April, 1991, GE Capital remained in the premises, and other than Harvester agreeing that that portion of space which Vendor occupied after the Lease expired was rented by them as a monthly tenant, Harvester never gave up its rights under the old Lease overholding provisions and put GE Capital on notice to that effect. GE Capital had been a yearly tenant with a Lease, and it held over at the expiration of the tenancy. GE Capital continued to pay rent as Grubisa set out in his letters, and had I not found that the overholding provision of the old Lease applied, I would have found that GE Capital had become a yearly tenancy which required a half-year's notice to quit. See: Williams and Rhodes, supra, at 12:12:4. Williams and Rhodes, supra, at 4:4 sets out when there can be an implied tenancy from year to year as follows:

If a tenant for a term of years, or for a term certain of a year or more, at a yearly rent, holds over the expiration of his tenancy, and pays rent which is accepted, or agrees to pay rent, then, if no other tenancy appears to have been agreed upon, the presumption is that he becomes a tenancy from year to year (a yearly tenant) upon such of the terms of the former holding as are not inconsistent with a tenancy from year to year.

In my view, this aptly describes what took place between Harvester and GE Capital.

69 There was never a solicitor's letter sent to Harvester by GE Capital that indicated what they considered to be their position. They astutely avoided signing anything but Warren's agreement to pay the \$12 square foot rent. There were no promises made by Harvester, and GE Capital in no way relied on anything said by Grubisa or that was in his many memos and letters to them. Therefore, estoppel does not apply. See: Central

Property Trust Ltd. v. High Tree House Ltd., [1947] 1 K.B. 130.

70 It is the position of GE Capital that Harvester cannot put forward the alternative argument that there is a yearly tenancy since this was not part of its Pleadings and no amendment was put forward with respect to its Pleadings. I have reviewed Harvester's Statement of Claim and note that in the alternative in paragraph "c", it asks for the relief in the alternative for a declaration that the lease was renewed or replaced for a 5 year term, "... or alternatively from year to year ..." at "... a rental rate of \$12 per square foot plus the defendant's proportional share of any escalation of property taxes and maintenance from 1990." I am therefore satisfied that Harvester properly pleaded a yearly tenancy in the alternative.

71 In my view, there is insufficient evidence to say that GE Capital had become a month to month tenant. The parties' business relationship had always been governed by a written Lease, Harvester contemplated that the Lease would be renewed for 5 years with some changes, including the renovations, being made to it. Grubisa continually attempted to get the appropriate documentation signed and GE Capital was on notice about the overholding provision.

10. Damages

72 At the end of the original Lease which expired in April, 1991, GE Capital was renting 14,895 square feet of space. Under the overholding provisions which I have held apply, GE Capital remained in the premises for 30 months at a square foot cost of \$19 and at a monthly rental of \$25,234.61, inclusive of GST, for a total owing of \$757,038.30 plus taxes and maintenance of \$101,603.99 for an overall total of \$858,642.29. Over the period in question, GE Capital paid to Harvester the sum of \$512,922.96, leaving a balance owing of \$345,719.96. I am satisfied on the evidence that "area C" was included for the months of July, August, September and October, 1993 in the overholding provision of the Lease but have concluded that "area B" was solely the responsibility of Vendor. I therefore grant Judgment in favour of the Plaintiffs in the amount of \$345,719.96 plus pre-judgment interest at the Courts of Justice Act rate of 5% from the date the Statement of Claim was issued to the date of Judgment, and post-judgment interest at the Courts of Justice Act rate on the date of Judgment.

73 If I had not held that the overholding provision applied, I would have found that a yearly tenancy existed at a monthly rate of \$16,400.75, as was eventually being paid by the parties. Given that the rent cheque for October, 1993 was never cashed by Harvester, under this scenario, notice would be required to be given 6 months before the year end, namely the month of June. For the 8 month period in question, GE Capital would have owed \$131,206. plus the overhold of one month of \$7,969.78, for a total of \$139,175.78 with appropriate pre-judgment and post-judgment interest rates to apply as noted above.

74 Counsel for the Plaintiff has provided me with figures for the scenarios of the parties having entered into a new 5 year Lease and a 3 year Lease, both scenarios having been rejected by me. I do, however, accept the figures as accurate as presented to me, in the event either of those scenarios was found to be the appropriate one.

75 If the parties cannot otherwise agree on Costs, I may be spoken to.

GREER J.

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