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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
JOROBIN INVESTMENTS LIMITED	Mr. William D. Dunlop and Mr. Justin Robinson, counsel for the Applicant
Applicant	
- and -	
PETER LUKOSIUS, CAROL LUKOSIUS, 991895 ONTARIO INC. and SAM'S AUTO CENTRE	Mr. Charles P. Criminis, counsel for the Respondents Peter and Carol Lukosius Mr. Richard Wellenreiter, counsel for the Respondents 991895 Ontario Inc. and Sam's Auto Centre
Defendants	
	HEARD: August 8, 13, 2003

WHITTEN J.

RULING

[1] The applicant Jorobin Investments Limited is a Midas Muffler franchisee who seeks an interim injunction to prevent the landlords (Peter and Carol Lukosius) from leasing or allowing possession to the numbered corporation carrying on business as Sam's Auto Centre (Sam), on an adjacent unit at 1245 Upper James Street. Sam in turn seeks a declaration as to the validity of an Offer to Lease dated July 17, 2002 and a lease to be declared with respect to the subject premises.

[2] The relief sought by Jorobin depends upon the interpretation of Section 5-5(a) of a lease entered into between Jorobin and the landlord October 30, 2000 with respect to the use of a unit in a strip mall on Upper James and the restrictive covenant contained therein. The interpretation

of the clauses directly effects Sam's who has executed a lease for a particular unit to be used only for "*automotive repairs (not to conflict with the uses carried out by other tenants at their property).*"

ISSUES

[3] The principal issue to be decided is whether clause 5 and 5(a) of the October 30, 2000 lease is ambiguous with respect to the uses of the leased premises by Jorobin and the restrictive covenant entered into by the landlord.

[4] The presence or absence of ambiguity determines the applicable criteria for the injunctive relief sought.

[5] Independent of the issue of ambiguity, did Jorobin acquiesce in the existence of a competitive use by AllStar Transmission and Mufflers? Furthermore, was the conduct of Jorobin relative to the occupancy of the adjacent rental unit by Sam's, such that Jorobin would be equitably estopped from asserting the restrictive covenant in question?

APPLICABLE LAW

The Interpretation of Contracts

[6] A contemporary expression of the parole evidence rule is contained in the words of Justice Cory (as he then was) in Trans Canada Pipelines Ltd. v. Northern and Central Gas Corp. Ltd. (1983) 146 D.L.R.(3d) 293 (Ont.C.of A.). The reference to the problem of a contract being difficult to interpret as opposed to being ambiguous, His Honour states at p.298,

> "*What course then should a trial judge follow when confronted with such a written document? Obviously, he should make every effort to construe the document based upon its wording for the parties have taken the time to reduce their agreement to writing in order to avoid possible disputes. If the trial judge is unable to construe the contract based on it wording, he must be of the opinion the document is ambiguous in the sense of being difficult to interpret before he can resort to extrinsic evidence*."

[7] Interpretation is the analysis engaged in by a jurist to determine the presence or absence of ambiguity. Ambiguity exists if an expression is capable or reasonably susceptible of more than one meaning (ref. Morden J.A. in Hi-Tech Group Inc. v. Sears Canada Inc. (2001)52O.E.(3d)97 at p.102, Pocket Dictionary of Canadian Law, 3rd Edit. Dukelow, Daphne, Carswell) There are rules that govern the process of interpretation:

> 1) The words of a contract are to be given their plain, literal and ordinary meaning (ref. Then J. in Buildero Ltd. v. Monarch Construction Ltd. (1990)73O.R.(2d)627(H.Crt. at p.634).

2) In interpreting the words of a commercial contract, business common sense prevails and should be applied to avoid a commercial absurdity (Ibid.)

3) Words take their meaning from their context and consequently the surrounding circumstances of the making of the contract are admissible. (underlining mine) Lord Lillerfrie in Reardon Smith ?? Ltd. v. Hansen-Tangen [1976]3?? E.R.570(as quoted by Morden J.A. in Hi-Tech Group Inc.(*supra* at p.103) illustrated "*surrounding circumstances"* as *"the commercial purpose of the contract, and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating*."

4) The court should take a holistic approach to this contract which promotes or advances the true intent of the parties at the time of entry into the contract. (underlining mine) In other words, look at the entire scheme of the contract as opposed to a piecemeal disjointed approach. (ref. Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. (1980) 112 D.L.R.(3d)49 (S.C.C.), McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada (1981) 125D.L.R.(3d)257(S.C.C.)

5) If there is apparent conflict between clauses, in a contract the general intention of the parties as reflected in a reasonable interpretation of the contract prevails over the actual words used. The offending words can be rejected or qualified, so as to give effect to that general intention (Buildero Ltd. *supra a*t p.636).

6) The doctrine of *contra proferentem* provides that in interpretation of documents, ambiguity in a contractual term is resolved against the author of the document, if the choice is between the author and the other party to the contract who did not participate in its construction. (Estey J. in McClelland & Stewart Ltd. (*supra a*t p.266))

7) As restrictive covenants are broadly speaking a restraint of trade, such a covenant should be strictly construed. (Evans J.A. in Russo et al v. Field and Menat Construction Ltd. (1970)12 D.L.R.(3d)??, Justice Larkin (as he then was) in discussing this principle of interpretation in the context of a modes shopping center stated;

> *"The policy of favouring competition and alienability of property suggests a strict construction of agreements that would flout it. Accordingly, the relative freedom to contract for a limitation of competition and of the use of property should be reflected in precise language to ensure that the limitation is fully spelled out. On the other hand, it is also arguable that alienability of property is promoted by protesting its commercial use by a covenant against competition which should, accordingly, be benevolently construed. Moreover, one of the attractions is the assurance of protection of their enterprises through an orderly scheme of development and an element of the scheme may be provision of some cover against competition as amongst those who agree to establish businesses in the center." (supra*, at p.685)

Injunctive Relief

[8] The Supreme Court has established a three step process for a court to engage in, in deciding whether or not to grant an application for a stay or injunctive relief. Initially, a preliminary assessment of the merits of the case must be undertaken to determine if there is a serious issue to be tried. (underlining mine) This is not necessarily a prolonged assessment unless the result of the interlocutory motion will effectively amount to a final determination of the action. Secondly, it must be determined if the applicant would suffer irreparable harm if the application was not granted. "*Irreparable harm*" refers to the nature of the harm suffered, as opposed to its magnitude. Thirdly, it must be determined by looking at the respective positions of the parties if one of the parties would suffer the greater harm if the remedy was granted or refused pending the final determination on the merits. This latter step is also referred to as an assessment as to the balance of convenience. Ref. R.J.R. MacDonald Inc. v. Attorney General of Canada, Heart & Stroke Foundation of Canada et al (1994)111D.L.R.(4th)385(S.C.C.)

[9] The applicant has characterized the relief sought as a prohibitory injunction. The classic analysis of such relief is contained in the words of Lord Cairns, L.C. in Doherty v. Allman (1978)3App.Ca s.709 at p.720:

> *"If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is say by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damages or injury – it is the specific performance by the Court of that negative bargain which the parties have made, with their eyes open between themselves*." (quoted at p.270 Hardee Farms International Ltd. v. Cain & Crank Grinding Ltd. etc. (1973) 33 D.L.R.(3d) 266 (Ont. High Crt.), referred to by Fridman G. The Law of Contract in Canada (3d edit.) Carswell, quoted in Cdn. Medical Laboratories Ltd. v. Windsor Drug Store Inc. (1992)O.J.No.2876 (Ont. Crt. of Justice Gen. Div.) Granger J.

[10] Justice Megarry in Hampstead v. Suburban Properties Ltd. v. Dismedous [1969] 1 C.L. 248 (quoted by Pennel J. in Hardee Farms, supra. At p.270) notes that although Lord Cairns's words were uttered in the context of a perpetual injunction, they are apt with respect to an interlocutory injunction, the rationale being:

> *"When there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenator promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better."*

[11] Justice Megarry opined that in the circumstances of a prohibitory injunction the three stage analysis engaged in with respect to injunctive relief is not applicable. This belief was adopted by the Divisional Court (Ontario Supreme Court) in Bank of Montreal v. James Main Holdings Ltd. et al (1982) 28 C.P.C. 158 and by Justice Somers in 1192810 Ontario Ltd. v.

1285248 Ontario Ltd. (1999) O.J. No. 1733 by Justice Granger in Cdn. Medical Laboratories Ltd. supra.

[12] The pivotal precondition to this departure from the usual injunction analysis is the existence of a clear breach of the covenant .(underlining mine) Justice Granger spoke of a "*clear and unequivocal breach*"., (supra. P.12) Justice MacDonald in Brown v. Bryant (1979)11 B.C.L.R. 364 (S.C.) talked in terms of *"a very clear, unquestionable breach of a negative covenant*." (at p.369-370), quoted by Smith J. in C.B.J. International Inc. v. Lubinski (2002) O.J. No. 3065 (Ont. Sup. Crt.)

[13] If the validity of the covenant itself is in issue, or there is a question as to whether or not there is a breach, such relief will not be granted. Obviously, the existence of ambiguity in the language of a restrictive covenant would offend this pivotal requirement, and would be death to an application for a prohibitory injunction. The existence of ambiguity would require a revision to the original three stage analysis for injunctive relief. Because of the precondition, the granting of a prohibitive injunction is rare, probably because it presupposes an undisputed factual foundation, a foundation which in many cases could be only satisfied at trial.

Conduct of the Applicant

[14] There is no privity of contract between Jorobin and Sam, therefore, Sam cannot be enjoined by the injunctive relief sought unless it can be shown that Sam somehow acted in concert with the landlord against Jorobin, ref. William Ashley Ltd. v. Manufacturer's Life Insurance Co. (1999) O.J. No.408 (Ont. Sup. Crt.). However, if this prohibitory injunction is granted, Sam will be indirectly effected, in that the landlord will be unable to enter into a lease agreement which provides for competitive uses to that of Jorobin, and will not be able to allow continued possession by a competing use.

[15] Both the landlord and Sam seek to avoid the implications of such an injunction by asserting that the conduct of Jorobin is inconsistent with the purported restrictive covenant. The alleged conduct takes two forms: Jorobin had acquiesced in the face of a competing use, and Jorobin had by conduct, directly or indirectly, represented that a competitive use was permissible.

[16] As was stated previously, restrictive covenants are viewed as a restraint of trade. Presumably, it is widely believed that for the good of the economy, one should be able to transact business in an unfettered fashion as is possible. Contractual obligations do restrict trade, but are by choices with a business, objectives in mind. Consequently, restrictive covenants are to be narrowly read or strictly construed.

(1) Acquiescence and Estopped

[17] Historically, restrictive covenants are viewed as a restraint of trade (presumably the optimism is that one can transact business unfettered), and therefore, for policy reasons related to the promotion of a vital fluid economy, such covenants are to be narrowly read or strictly construed. Aside from some questions of interpretation, there may be good reasons for not

enforcing them. Conduct by a beneficiary of a restrictive covenant which is inconsistent with its terms, specifically, in demonstrating a release of the obligations may provide such a justification. For example, "*if there has been over the years a use that is inconsistent with the covenant; or if the person entitled to the benefit has acquiesced in a changed use of property; or if there has been delay and acquiescence*." Ref. R.A. Weane Enterprises Ltd. v. Drago's Place Ltd. (1990) O.J. No.673 (Ont,. District Crt. Gantreau).

[18] No doubt this refusal to enforce a restrictive covenant in such circumstances is grounded in the equitable doctrine of estoppel. Justice Gautreau defines "*promissory estoppel*" (which is really the essence of estoppel generally) in the following fashion, *"…if a person who has contractual rights against another induces the other, by words or conduct, to believe that such rights will not be enforced or will be kept in suspense, that person will not be allowed in equity to enforce such rights where it would be inequitable having regard to the dealings which had taken place between the parties."* (Ibid. at p.4) This broad definition is in accord with the description of the elements of the doctrine by Fridman in The Law of Contract, 3rd edit. (at pp.129-36);

> *(1) "there must have been an existing legal relationship between the parties at the time the statement on which the estoppel is founded was made;*
>
> *(2) there must be a clear promise or representation made by the party against whom the estoppel is named establishing his or her intent to be bound by what he has said;*
>
> *(3) there must be reliance by the party raising the estoppel, upon the statement or conduct of the party against whom the estoppel is raised;*
>
> *(4) the party to whom the representation was made must have acted to his detriment; and*
>
> *(5) the promisee must have acted equitably."*
>
> (as reproduced by Cumming J. in Reclamation Systems Inc. v. Rae (1996) O.J. No.133 (Ont. Crt. (Gen. Div.))

[19] It is noted at the outset, that the doctrine only comes into play between parties in a contractual relationship. The doctrine effects contractual relations, it does not produce contractual relations. Ref. Professor Fridman as quoted by Cumming J. (Ibid at p.29)

[20] The conduct that is allegedly the foundation of the "*representation*" that is relied upon, must be of a nature that the intention of the action is clear. (ref. Fridman, Ibid at p.129) The perception of intention must be objectively reasonable. The subjective observation of the recipient must be viewed against the objective backdrop. To hold otherwise would allow personal beliefs arising from innocuous or at best, ambiguous conduct to trespass upon contractual obligations.

[21] Even when situations arise that would provide fertile ground for raising estoppel, a party can give reasonable, sufficient notice that there is no indulgence with respect to established rights. Ref. Himnel J. in Showmart Management Ltd. v. 853436 Ontario Ltd. (c.o.b. Features Café) (1998) O.J.No.1645 (Ont. Crt. Gen. Div.)

[22] Acquiescence, like the nature of the representation referred to above, must be objectively viewable as such. If in a contextual phenomena, dependent upon the ability of a party to perceive a situation in conflict with or contrary to the covenant, the duration and nature of the offending situation and what is considered an appropriate response.

ANALYSIS

[23] As was noted before, the interpretation of clause 5 and clause 5(a) of the October 20, 2000 lease between Jorobin and the landlord, must be contextual with reference to the surrounding circumstances of the contract. Accordingly, the court must discern the commercial purpose of the contract which is based on a knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating. Therefore, it is necessary at the outset to consider the nature of the property in which Jorobin leases a unit and its ?? The history of the relations between Jorobin and the landlord leading up to the creation of the October 20, 2000 lease will assist in determining the genesis of the transaction. With the latter history and context, clauses 5 and 5(a) can be interpreted. Post lease relations are potentially of assistance in the event that the clauses are ambiguous and are germane to any assertions of estoppel by conduct or representation.

The Nature of the Property

[24] The unit which Jorobin, the Midas franchisee, leases from the landlord is within a plaza which comprises three municipal addresses on Upper James Street in the City of Hamilton, (1243, 1245 and 1247). The sketch which is Exhibit A to the landlord's affidavit, reveals a plaza with approximately 30,000 square feet dedicated to commercial purposes which over the years has been divided into three basic units. That portion occupied by the single Midas Store. (1243), was constructed by Midas and resulted in a rent abatement over a period of time. This plaza which would be characterized as a modest one, is situated on a main route upon which progressively more automobile dealerships have been established. This not a plaza of the magnitude of the shopping center with ten units, as in Russo v. Field and Menat Construction Ltd. Justice Larkin in speaking specifically of that shopping center noted that business tenants would be attracted to such a location by an "*assurance of protection of their enterprise….a cover against competition*" from other tenants. The Justice also noted that in a larger center, competitive businesses might be advantageous to all.

[25] Spence J. in the appeal of that matter to the Supreme Court of Canada, (Russo v. Field [1973] S.C.R.466) stated;

> "*The mercantile device of a small shopping center in a residential suburban area can only be successful and is planned on the basis that the various shops therein must not be competitive."*

[26] Justice Spence noted that if there were competing uses both the tenants would suffer and ultimately so would the operator of the plaza.

[27] Russo v. Field involved a suburban mall in a residential area. It was a mall seeking to attract business from the surrounding neighbourhood and beyond. The neighbourhood in the matter at hand is commercial with a nearby presence of automobile related businesses. By analogy, automobile related businesses within this modest mall would seek to attract spin-off business from the dealerships in the area, and from citizens who are prepared to bring their vehicles to this area for service. It would be obvious to the citizens that there would be automobile related businesses in this area. By analogy, it would be injurious to the economic interests of the tenants within this 3 unit mall if there were competing uses. As it is, there is competition with those larger entities from which a "*spin-off*" is wished. There may be the hope that some citizens would not be attracted to the larger entities, but would be more attracted to a smaller entity in which they know or knew the service person "*face to face*" as it were. Competition for the same spin-off and for the citizens who come to this area by modest entities in a modest mall, does not make commercial sense.

The Relations Between the Tenant and the Landlords

[28] Prior to October 20, 2000 in May of 1998, Midas, the corporate entity leased unit 1243 of the subject premises from a predecessor landlord and in fact constructed their unit. Clause 5 of that lease commenced with a general expression as to use by the tenant; namely, "*occupancy by the lessee for the business of selling, installing and servicing automotive parts and accessories, including but not limiting the generality – automotive exhaust systems and parts, shock absorbers and other automotive parts and accessories as may be now or hereafter sold, installed or serviced by franchisees of the lessee or of Midas Automotive Limited or any successors or assigns…. And which use may include or consist of a general automotive repair shop and garage or any reasonably related business…."*

[29] Therefore, what this clause provides is two general descriptions of use, ie: *"selling, installing and servicing of automotive parts*", and a "*general automotive repair shop*". These are not incompatible descriptions; they dovetail, and in fact refers to the same use.

[30] Specifically, within this general description is provided by the words "*automotive exhaust systems, shock absorbers*". This specific expression is not at odds with the general description, but a specifically enumerated aspect of that general use.

[31] The restrictive covenant of that lease prohibited the landlord from allowing a use in which one "*operates or permits the operation of a business similar to the aforesaid business save and except by the lessee and sub-lessee from time to time*." (underlining mine) This covenant, given the structure of the lease document and the language employedm, was to be read in conjunction with the description in clause 5. In other words, clause 5(a) was dependant upon the broad "*use*" clause in clause 5. However, there was an Appendix C, which specifically provided in clause 1 "*that the use of the premises was confined to the business of selling, installing and servicing of automotive exhaust systems and shock absorbers*". Furthermore, clause 2 of the

Addendum provided that the lessor would not lease any other portion of the lands to a business doing what was described in clause 1. Clause 1 itself, was further asterisked to provide that although the tenant would sublet the premises for any lawful use, subsequent use could not be in conflict or in competition with any other established use in the plaza, or any other restrictive covenant that the landlord was committed to with respect to that plaza/mall, "*provided however its change of use shall not be permitted until such time as the plaza is fully built and fully leased*." This last addendum appears to provide for a possible change in use beyond muffler repairs and shock absorbers when the plaza if fully built. From the sketch attached to that lease, it would appear that the Midas unit, (unit 1243), was the only part of the plaza actually constructed. The sketch itself revealed a "*probable area of future building*" immediately adjacent to the Midas structure.

[32] What this original lease illustrates is a consciousness on the part of both tenant and predecessor landlord as to need to describe and protect "*use*". It also illustrates the nature of Midas business at that time, it was essentially a muffler repair shop, but like many other businesses kept the door open to evolution into other areas of related automotive business.

[33] The present landlord purchased the property in August 1986 and would of course be bound by the existing Midas lease which ran to May 1, 2000. Up to the end of July of that year, there was another automotive entity in the unit adjacent to Midas, (unit 1245), Goodturn Brake and Alignment, which as the name suggests performed brake, alignment and front end work. Jorobin, the sub-tenant of Midas, on July 30, 1986 purchased that business which would include its "*use"* pursuant to the lease. From that time onwards, Midas business included the purchased use. Jorobin acknowledged that sublet, the unit previously occupied by Goodturn to Ziebart. Ziebart, although engaged in an automotive related business was not a competitive use to Jorobin. Jorobin by assignment of lease dated August 9, 1994 assigned its leasehold interest in the Goodturn unit to Ziebart.

[34] On September 1, 1994, there was a lease amending agreement between the present landlord and Midas as the head tenant. Addendum C to the original lease was amended to expand the original use by the tenant to cover those services previously provided by Goodturn. This would be necessary as the unit occupied by Midas/Jorobin did not have that use. Therefore, in effect what this meant was that the use enjoyed in the adjacent unit by Goodturn was transferred to the original Midas unit, at a time when all knew the former Goodturn unit, now occupied by Ziebart was not to be used in competition with Midas. The remaining unit was occupied by either Income Trust and Lubricare, neither of which could be construed as competitor to Midas. The September 1, 1994 document also removed the restrictive covenant applicable to this landlord. In all likelihood, given the occupancy of the plaza at that time, the restrictive covenant was considered academic. As a result of this agreement, the landlord would know that Midas/Jorobin had expanded its use base.

[35] The lease under which Ziebart occupied the unit adjacent to Midas/Jorobin expires in 1999. Jorobin assisted the landlord in obtaining Apple Auto Glass to occupy that unit. Apple Auto Glass although performing an automotive related service, ie: windshield repair and radio installation does not compete with Midas/Jorobin.

[36] The third unit, unit 1247, at the other end of the plaza had been occupied by Income Trust who apparently left, as it found the other uses employed in the plaza, incompatible, subsequently, Lubricare occupied that unit until a time in the latter part of 1999, early 2000 when, to use the words of the landlord, "*as a result of (an) ultimatum issued by the Applicant (ie: Jorobin) that it would move and not renew its lease if Lubricare stayed as the Applicant was planning to do oil changes which was Lubricare's main line of work*." At this time, there was no restrictive covenant in the lease between the landlord and Midas/Jorobin. Jorobin did not have a legal right to insist on an expanded use, but it did have the economic clout by threatening to leave when its lease expired May 30, 2000. (The lease end was amended at one point to be October 30, 2000). Obviously, the landlord valued the Midas/Jorobin occupancy higher than the Lubricare presence and was prepared to transfer that use. This "*show down*" as the landlord describes it, illustrated that again Jorobin is expanding its use base, and that it does not want to be in a modest plaza with a competing use.

[37] Upon the departure of Lubricare, Apple Auto Glass moved to unit 1246 and remains there to this day. Given this relocation, the unit immediately adjacent to Midas/Jorobin became vacant and remained so until July 2000. By Offer to Lease dated April 17, 2000 Gerry Englesse offered to lease those premises only for use as a transmission shop. This would not be a competitive use to that of Midas/Jorobin. This offer would have been executed at a time when there was no restrictive covenant between the parties as to competing use.

[38] Gerry Englesse initially carried on business as Aamco Transmission. The landlord deposes that the name of Aamco Transmission was changed to Allstar Transmission & Muffler. There is no reference by the landlord as to the timing of this change. Somehow, one is to attach temporal significance to a copy, Exhibit G, of the original Offer to Lease by Mr. Englesse with business cards of Allstar Transmission & Muffler placed strategically over the name of the lessee. Perhaps the court is to believe that the newly named business is a new potential tenant. The creation of this exhibit is objectionable and misleading on this issue. It is not evidence to be considered. By contrast, the principal of Jorobin deposes that this name change did not occur until February 2002. This positive assertion of the timing of the name change prevails as a fact in the absence of any other evidence on point. In any event, the muffler aspect of this new entity would be in contravention of its own exclusive use as a transmission shop.

[39] Therefore, the status quo as of the execution of the lease on October 20, 2000 between Jorobin and the landlord is as follows. Unit 1245, the adjacent unit is occupied by a Aamco Transmission. Unit 1247, the unit at the other end of the plaza is occupied by Apply Auto Glass, Jorobin, the lessee of Midas occupies, as it always had, unit 1243. All the uses, although automotive related are not competing uses. The parties are quite familiar with how the use of a unit is significant to the occupant, and the existence of restrictive covenants. The parties are neither neophytes in their relationship nor ? to define that relationship in a lease.

The Lease of October 20, 2000

[40] This lease although following the general patterns of the original Midas lease, is now directly between Jorobin originally, the sub-tenant of Midas, and the landlords. The language

employed is quite similar to the original lease. Clause 5 commenced with a reference to a "*lawful use*". This terminology denotes a rather obvious condition. The same general description of use as employed in the original lease exists: namely *"...the business of selling, installing and/or servicing automotive parts and accessories*." In the generic sense, this is what an automotive service center does. The broadness of this statement is recognized in the next statement to the effect "*including without limiting the generality of the foregoing*". This is then followed by a list of specific uses some of which have been acquiesced by the purchased of Goodturn, namely, brake repairs and replacement, front end parts, alignments, wheel balancing. Another use, namely, oil and lube was acquired by the bargaining with the landlord which resulted in the departure of Lubricare. Other uses: for example, emission testing were recognized by the landlord as areas that Jorobin, as a Midas franchisee, had expanded into. All in all, the list of specific functions are all within the concept of an automotive repair shop, (the same terminology employed in the original Midas lease). The same open door to future uses that Midas may become involved in is employed.

[41] There is no ambiguity in clause 5, it contains a general description of use, which is followed by a specific list of uses which are aspects of that general description, but do not totally define it. The specific list used would not come as a surprise to the landlord, they are in many ways a function of the history between the parties up to this point.

[42] The restrictive covenant returns to the lease. The landlord covenants not to "*5(a) operate or permit the operation of a business similar to the aforesaid business of selling, installing and/or servicing of automotive systems and parts, brakes and brake parts, shock absorbers, front end alignments, springs and other automotive parts and accessories save and except by the lessee"*. (underlining mine)

[43] Obviously, the list of specific uses is less than the list contained in paragraph 5. However, there is the general terminology which is underlined of "*similar to the aforesaid business" ... other automotive parts and accessories*". Furthermore, the landlord knows from the experience with the departure of Lubricare that "*oil and lube*" although not referenced in the restrictive covenant is a protected use. Clause 5(a) in the scheme of the lease generally is as its predecessor, to be read in conjunction with clause 5. The two clauses are not inconsistent. The restrictive covenant does not detract from the uses enumerated in clause 5.

[44] Clause 5(b) provides for accessibility to the Midas premises and the continued visibility of the Midas signage. Clause 5(c) provides that there is not to be any signage allowed that creates confusion with Midas or advertises a business similar to that of Midas.

[45] The overall thrust of clause 5 and the subsections is to preserve the competitive advantage of the Midas franchisee in this particular modest plaza. This finding is reflected in the fact that the offer to lease entered into by Sam speaks of a use of "*automotive repairs*" (not to conflict with the uses carried out by other tenants at this property). This preservation of use was the intention of the parties at the time of entry into this contract achieved out of negotiations and a recognition of use that had evolved over their relationship prior to the execution of this lease. It is a preservation of use which makes common business sense in a plaza of this stature. There

is no ambiguity in the use provisions of the lease that necessitates the admission of extrinsic evidence. Evidence of the parties now as to what their intentions were, suffers from self interest trying to rationalize the situation before the court, and is unnecessary in the circumstances of this litigation.

[46] Clause 30(c) of the lease provides that "*any waiver (or) indulgence of the strict observance, performance or compliance with any such provision, covenant, agreement and condition will not be deemed to be a waiver of a similar default or breach…*"

[47] Clause 30(d) provides that "*if a term, covenant or condition of this lease or the application thereof to any person or circumstances is held to any extent to be invalid or unenforceable, the remainder… will remain in full force and effect*." This latter clause appears to suggest that even if some of the language contained in clause 5 and 5(a) is too broad, (which it has not been so found), the specific lists would survive. Again, the practical effect is that the uses enumerated would be respected.

Post Lease Relations

[48] As noted previously, Aamco Transmission changed its name in February 2002 to that of Allstar Transmission and Muffler. Possibly their change was contemplated before that date. A photocopy of excerpts of the telephone directory and yellow pages effective December 2001 appear to bear out that possibility. However, in one of the yellow pages Aamco and Allstar have side by side advertising under the heading, Garages-Auto Repairing. There is some confusion in that on the full page ad for Allstar, the telephone number for the Upper James address is not the same as any of the telephone numbers on the business cards superimposed on an Offer to Lease in Exhibit G of the landlords material. In any event, Allstar was not in this plaza as of the execution of the October 20, 2000 lease, and there is no evidence as to the commencement of its actual occupancy aside from that of Jorobin.

[49] In April of 2002, Jorobin verbally complained about the purported use of the Allstar unit for muffler repair. Apparently, litigation was contemplated. This all became academic when Allstar by all accounts went into receivership in May of 2002. Therefore, there was a competing use for possibly three or four months. Does the existence of this competing use speak of acquiescence on the part of Jorobin, such that it would be estopped from seeking enforcement of the restrictive covenant as to use?

[50] As was noted earlier, muffler repairs were not a use contemplated in the Offer to Lease executed by Gary Englesse. That offer was solely with reference to a transmission shop.

[51] This period of time when Allstar carried out a competing use, is quite minimal. Jorobin made a complaint after about a month of actual operation. The matter rapidly becomes academic. This is not a picture of acquiescence such that the lease terms negotiated, perhaps two months previously are abrogated, especially so when within that lease clause 30(c) specifically provides that any such indulgence is not considered a waiver. At least this "*acquiescence*" if it were of a magnitude to evolve equitable principles of estoppel, it would only apply to the landlord, the other signatory to the lease. It has no significance with respect to Sam.

[52] There is no dispute with respect to the occupation of unit 1245 by Sam in August 2002. In the months before that occupancy the complaints by Jorobin flowed to the landlord. Sam, it is acknowledged, carries on the business of a general automotive shop. The lease entered into by Sam provides for a use "*automotive repairs*" (not to conflict with the use carried out by other tenants at this property). Jorobin by the prompt response to this presence, had hardly sat on its rights or "*acquiesced*". Has there somehow been a representation or acquiescence by allowing the signage of Allstar, with its reference to "*muffler repair*"? Jorobin would have no right to enter upon premises that it does not lease to remove anything, especially so when the previous occupant was in receivership. There is no duty upon Jorobin to clean up the signage of others. This failure to remove signage cannot be construed as a clear unequivocal message to a party of acquiescence or a changed use regime. As it is again, there is only one other "*party*" and that is the landlord who is subject to the waiver exemption of clause 30(c). Promissory estoppel does not extend to create a contract with non parties, such as would be Sam. The absence of responsibility and action on the part of Jorobin with respect to signage does not evoke principles of estoppel.

[53] The representations relied upon by Sam Opuku, the principal of Sam's Auto Center, are those primarily of Nuh Schwartz, the real estate agent for the landlord. There is also the assertion that the landlords themselves failed to advise Mr. Opuku of the restrictive covenant. None of these representations originate from Jorobin and therefore, cannot be laid at the feet of Jorobin. These representations have no significance with respect to the validity of the lease between Jorobin and the landlord, if anything, they demonstrate a recklessness or willful blindness on the part of both Sam and the landlord.

[54] The use of unit 1245, the adjacent unit to Midas by Sam's Auto Center, is a clear and unequivocal breach of the restrictive covenant contained in the lease of October 20, 2000. As such, an interim prohibitory injunction will issue to prohibit the landlords from entering into a lease with Sam's Auto Center, and from allowing the continued possession of the unit in question in contravention of the restrictive covenant. Under the circumstances, the relief sought by Sam becomes academic and that application is denied.

[55] If counsel cannot agree amongst themselves as to the cost implications herein, either written memorandum may be submitted to the court, or an appointment may be taken out to settle this issue. Either option to be exercised within 30 days of the release of this judgment.

WHITTEN J.

Released: September 3, 2003

Court File No. – 02-7412

O. S. C. J.

BETWEEN:

JOROBIN INVESTMENTS LIMITED

Applicant

-and-

PETER LUKOSIUS, CAROL LUKOSIUS, 991895 ONTARIO INC. and SAM'S AUTO CENTRE

Defendants

REASONS FOR JUDGMENT

Released: September 02, 2003

ACRW/am