SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-17-066989-115

DATE : February 7, 2014

BY THE HONOURABLE MR. JUSTICE GARY D.D. MORRISON, J.S.C.

KINMONT CANADA INC.

Plaintiff / Cross-Defendant

v.

MEYERCO ENTERPRISES LTD.
and
DANIEL OUAKNINE
and
THE ESTATE OF THE LATE HENRI OUAKNINE,
acting through its liquidator, CHANTAL AZOULAY

Defendants / Cross-Plaintiffs

TRANSCRIPTION[1] OF A JUDGMENT
RENDERED ORALLY ON JANUARY 30, 2014

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[1] This transcription modifies the wording of the judgment rendered orally primarily for presentation purposes and in keeping with the principles set forth in *Kellogg's Company of Canada* v. *Procureur Général du Québec*, [1978] C.A. 258. However, in keeping with Art. 472 C.C.P., the conclusions have not been changed.

[1] Plaintiff seeks to be paid an amount of $256,815 by the Defendants solidarily, and this by reason of fraudulent misrepresentation as regards the net operating revenue of an immoveable which it purchased from the Defendant Meyerco Enterprises Ltd. The action is in *quanti minoris*, such that Kinmont seeks to reduce the price it paid Meyerco for the multi-tenant commercial building.

[2] Not only do the Defendants deny that Meyerco misrepresented the net operating revenue, but they claim that the action by Kinmont is abusive and defamatory. Both Daniel Ouaknine and the Estate of the Late Henri Ouaknine claim moral damages in the amount of $100,000 and $50,000 respectively resulting from said abuse and defamation. In addition, Daniel Ouaknine seeks payment of his legal fees, and this for a minimum amount of $21,141.

[3] In response to the cross-demand, Kinmont not only denies liability but it seeks to have the cross-demand declared abusive.

1- FACTUAL CONTEXT

[4] In October 2009, Meyerco contacts commercial real estate broker Ronald Smith of the firm Cushman & Wakefield with the view to selling its commercial property located on Hymus Boulevard, Pointe-Claire.

[5] Meyerco was incorporated in 2007. The sole shareholder and director of the company is the Defendant Daniel Ouaknine[2]. According to Ouaknine, Meyerco never held any other real estate than the Hymus property and, as well, it presently has no money.

[6] Once a listing agreement is entered into with the listing broker in December 2009, Smith prepared a four-page flyer[3], including a revenue and expense pro forma and a rent roll.

[7] The net operating income is shown in the said flyer as $296,978, while the net rent is shown as $293,469.

[8] However, those numbers were not final. Smith was waiting for the final numbers from Meyerco and an accountant used by Ouaknine, one David Elbaz.

[9] In fact, Meyerco was negotiating to re-lease unit A-2, one of the largest units in the Hymus building. It had been leased, along with unit A-1, to Comptoir des Indes[4], another company owned by Daniel Ouaknine. Comptoir would maintain unit A-1.

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2 Exhibit P-3.
3 Exhibit P-5A.

[10] A new lease[5] for rental unit A-2 was signed on February 1, 2010, with Moni-Trans-Import-Export Inc. At clause 3.01 thereof, the minimum annual rent is indicated as "$*27,999 in lawful money of Canada, plus any applicable taxes*". The tenant would also pay its share of the operating expenses and real estate taxes.

[11] As a result of the new lease, as well as other negotiations, a revised rent roll was issued, as well as a revised revenue and expense pro forma[6].

[12] Kinmont was interested in the 40-year old class B or C building, which was well located. It was looking for a revenue property. It visited the premises. It was also provided the above-mentioned revised documentation[7].

[13] Thereafter, Kinmont entered into an Offer to Purchase[8] the Hymus property, dated March 26, 2010, for the purchase price of $3,000,000, which Meyerco accepted[9].

[14] As part of the conditions expressed in clause 7 of the Offer, Meyerco was to provide certain deliverables, as well as estoppel certificates from the largest tenants, being those with a rentable area of at least 5,000 square feet.

[15] Subsequent to the acceptance of the Offer, Kinmont proceeded to conduct its due diligence. Meyerco's broker, Smith, coordinated the transfer of the required information to Kinmont, which required a number of reminders by Smith to Meyerco.

[16] Smith also provided Meyerco's Elbaz, with copy to Kinmont, of a due diligence checklist[10], indicating relevant information to be provided by vendors in relation to the sale of commercial buildings generally.

[17] In early June 2010, a meeting was held at Meyerco's offices in Montreal. Boxes of documentation were shown to Kinmont, and discussions were had as regards a number of issues, including the fact that unit A-2 was under lease for five (5) years to Moni-Trans and, as well, certain issues relating to the tenant Les Constructions GAM Inc.

[18] In addition, amongst others, a Tenant Certificate[11] signed by Moni-Trans was provided to Kinmont.

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4 Exhibits D-1 and D-2.
5 Exhibit D-3.
6 Exhibits D-5 and P-20.
7 Exhibit P-20.
8 Exhibit P-5.
9 The Offer was made by Autoparc Stanley Inc., which thereafter, ceded, transferred and conveyed its rights to Kinmont: Exhibit P-2.
10 Exhibit P-12.

[19] As part of its due diligence, Kinmont had the Hymus property inspected. As a result of the property inspection report, Kinmont insisted on reducing its offer by an amount of $250,000. The parties, on June 16, 2010, signed an Amendment to Offer to Purchase[12], thereby amending the purchase price to $2,750,000.

[20] On July 13, 2010, a closing was scheduled at the offices of Notary Georges Brosseau. Adjustments[13] were made as to various taxes and rental, given that the transaction was taking place in the middle of the month.

[21] That same day, the parties signed a Deed of Sale[14], whereby the Hymus property was transferred to Kinmont.

[22] Following the sale to Kinmont, Moni-Trans failed to pay any rent. In fact, Moni-Trans had not paid rent in money since the outset of its lease with Meyerco. The first month had been stipulated as being free, while both March and April had been reduced to half the total rental value.

[23] Yet Moni-Trans had never paid in money any portion of the rent, and the tenant ultimately informed Kinmont that it could not afford to pay rent.

[24] Moni-Trans explained that it had never paid rent, given that it had made special rental arrangement with Meyerco.

[25] As it turns out, Moni-Trans had been doing business with another tenant, Ouaknine's company Comptoir des Indes. The latter, which was managed by Ouaknine's late brother Henri, imported cabinets from various suppliers abroad, and Moni-Trans had been providing it transport services since approximately 2000.

[26] In fact, the owner of Moni-Trans, Youssef El Chamali, had decided to start a warehousing and storage business in addition to transportation. That new business was to be located at the Hymus property. El Chamali and Henri negotiated the Moni-Trans lease, which was then finalized with Ouaknine.

[27] Since Moni-Trans did so much work for Comptoir, El Chamali discussed with Henri that it would be easier for him if he could simply "exchange invoices" with Comptoir and Meyerco. That way, Comptoir would not pay Moni-Trans for transportation services up to the value of the latter's rent, and Moni-Trans would not pay rent in money to Meyerco.

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11 Exhibit P-7.
12 Exhibit P-8.
13 Exhibit P-9A.
14 Exhibit P-9.

[28] According to El Chamali, Henri told him that he would “take care of it”. They then went to the accountant Elbaz, who also said that they’d take care of it. They then approached Ouaknine who agreed. After all, he owned both the then landlord Meyerco and the tenant Comptoir. Hence, Moni-Trans never paid rent in money, simply off-setting the rent against its invoices to Comptoir.

[29] Since Moni-Trans could not pay rent to the new owner, Kinmont moved to terminate the lease, which it succeeded in doing. Eventually, Moni-Trans was replaced by a new tenant.

[30] As a result, Kinmont has sued to reduce the purchase price it paid to Meyerco.

2- KINMONT’S POSITION

[31] Kinmont claims that Meyerco:

- failed to respect its duty to inform Kinmont that Moni-Trans had never paid rent in money as stipulated in its lease;

- failed to respect its obligation not to provide false information by advising that Moni-Trans’s rent was current and by providing a Tenant Certificate that intentionally misled the purchaser into believing that rent was being paid in the normal manner without offset or compensation, the whole notwithstanding that the lease prohibited any rental reduction, modification or compensation; and

- accordingly, committed a fraud, whether through its silence or its misrepresentations.

[32] In support of its claim, Kinmont claims that it conducted a reasonable due diligence.

[33] Moreover, Kinmont pleads that the rental revenue was an essential element of the transaction, such that had it known that the net operating revenue was not as represented by Meyerco, it would not have paid the same purchase price for the Hymus property.

[34] As regards Ouaknine, Kinmont claims that he committed an intentional extra-contractual fault in failing to disclose the situation relating to Moni-Trans rental arrangement. Moreover, given Ouaknine’s position, it is appropriate to lift Meyerco’s corporate veil.

[35] Insofar as Henri is concerned, Kinmont pleads that he was fully aware of the fact that Moni-Trans was not actually paying rent, and yet he obtained Moni-Trans’s

signature on the Tenant Certificate which, to Henri's knowledge, was used as part of the false representations and fraud.

3- MEYERCO AND THE OUAKNINE'S POSITIONS

[36] The Defendants' position is as follows:

- that Kinmont was informed of the special treatment relating to the Moni-Trans rent prior to the purchase of the Hymus property, having been so informed verbally and having been shown the rental accounting ledgers;

- that, as well, Kinmont knew that Moni-Trans had not paid a deposit required under its lease, which led to Kinmont requiring an adjustment at closing;

- that Kinmont was negligent in the conduct of its due diligence, failing to review and analyze Meyerco's rental deposits, which would have clearly shown that Moni-Trans had not paid its rent in cash, and in any event, Kinmont was not in a position to argue that it was "impossible" for it to have know of the Moni-Trans situation;

- that Moni-Trans did not have a right of compensation, Meyerco having simply accepted on a temporary basis, being month to month, to perform compensation;

- that the net operating revenue was not an essential element to Kinmont's consent, which is demonstrated by the fact that the purchaser did not require Meyerco to guarantee that revenue in the Deed of Sale;

- that there is no proof either that the issue of Moni-Trans's rent would have impacted the price paid by Kinmont or that Meyerco would have accepted to sell the property at a lower price;

- that Kinmont is claiming damages that are not causal, and in any event such damages are not foreseeable;

- that the action by Kinmont against Ouaknine and his brother Henri is abusive, and was instituted for the sole purpose of pressuring them into paying a debt for which they are manifestly not liable, such that their cross-demands, for $100,000 and $50,000 respectively, are justified; and

- that Meyerco is entitled to any and all rental arrears, for which the Court is entitled to express a reserve of their rights.

4- ANALYSIS

[37] The essence of Kinmont's claim is that parties must conduct themselves in good faith, including at the time an obligation is created (Art. 1375 C.C.Q.).

[38] Accordingly, the Court is to determine whether Meyerco, as vendor, acted in good faith or, as Kinmont alleges, in bad faith through fraud and false representations.

[39] Since the off-cited decision of the Supreme Court of Canada in the matter of *Bank of Montreal* v. *Bail Ltée*[15], Quebec courts have recognized that the obligation of good faith in contract has given rise to a positive obligation to inform the opposing party of facts that are of importance to the latter.

[40] That positive obligation to inform is essentially the twin of the obligation not to misrepresent through false representations[16].

[41] Thus, the critical question is whether Meyerco, if not the other Defendants, failed to satisfy the duty to inform and not to provide false representations.

4.1 Did Meyerco inform Kinmont of the special rental arrangement it had with Moni-Trans? Should it have?

[42] The response to these questions is dependent on the credibility of the witnesses.

[43] According to Michael Svensson, a financial analyst for Kinmont, responsible for carrying-out the latter's due diligence in advance of the sale, Meyerco did not disclose the special rental arrangement it had with Moni-Trans. He denies having been told.

[44] David Elbaz, an accountant for Comptoir and subsequently for Meyerco, said he did inform Svensson of those arrangements during a meeting held in June 2010 at Meyerco's offices.

[45] However, Elbaz's testimony generally, was both confused and confusing. His inability to provide basic explanations of fact not only provided little, if any, insight into important facts, but it required Meyerco's own counsel who called him as a witness to routinely seek clarifications and further explanations, which were hard to come by.

[46] Elbaz's testimony was unconvincing.

[47] That said, Ouaknine testified that he was present at the June meeting when Svensson of Kinmont was informed of the special rental arrangement.

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15 [1992] 2 SCR 554, p. 586.
16 *Ibid.*, p. 587.

[48] But Ouaknine's testimony is not only unconvincing, but it is not credible.

[49] Firstly, no reference to such information being transmitted to Kinmont is to be found in Meyerco's defence. There is not even a reference to the June meeting.

[50] Secondly, Ouaknine did not make his affirmation until deep into his cross-examination, after displaying caution in not clearly stating that he had personal knowledge of Kinmont being advised thereof.

[51] Moreover, notwithstanding his sudden recollection that Kinmont had been so informed, Ouaknine could not recall whether he had informed Kinmont or whether Elbaz had.

[52] Thirdly, Meyerco's real estate broker Smith, who attended the said June meeting, testified that very little was said about Moni-Trans at that meeting, other than the fact that it had taken over space in the building and that its rent was up to date. This testimony, by a third party witness with nothing to gain from the outcome of the litigation, is credible. It contradicts the version of Elbaz and Ouaknine.

[53] Fourthly, during Ouaknine's examination after defence on April 10, 2012, in response to the question whether Meyerco had informed Kinmont of the Moni-Trans rental arrangement, Ouaknine replied, at page 50 thereof, that he did not know and that he could not recall, although he did not think so because it was not relevant.

[54] In comparison, Svensson's testimony was clear on this point and, as well, appeared both honest and natural. The Court retains his testimony and concludes that Meyerco did not inform Kinmont that it had a special rental arrangement with Moni-Trans.

[55] But should it have?

[56] For the reasons that follow, the Court is of the view that it most certainly should have.

[57] According to both Kinmont's President, Howard Davidson, and Svensson, the purchase price offered by the purchaser was determined in relation to the net operating revenue generated by the Hymus property.

[58] Ouaknine denies the connection between the purchase price and the net operating revenue. But this is, once again, in stark contrast to the testimony of his own real estate broker Smith, who testified that such properties are sold on the basis of forecasted revenues and expenses, with purchasers basing their prices on it.

[59] The Court concludes that the net operating revenue generated by the Hymus property was essential, if not critical, to Kinmont.

[60] It is important to remember the nature of the rental arrangement between Meyerco and Moni-Trans.

[61] Moni-Trans was not required to make a payment in money to Meyerco for its rent. In exchange, Ouaknine's other company Comptoir, also a tenant in the Hymus property, did not need to pay its debts to Moni-Trans.

[62] Meyerco claims that by the operation of compensation, Moni-Trans did pay its rent to Meyerco.

[63] But Meyerco and Moni-Trans were not reciprocally both creditor and debtor to each other, as required for compensate to operate by virtue of Art. 1672 C.C.Q.

[64] Nor is there proof that Meyerco had ceded to Comptoir its rights in the rent.

[65] The Court concludes that the arrangement between Moni-Trans and Meyerco was not one of compensation. It was principally a set-off, whereby Meyerco waived Moni-Trans's debt in exchange for the latter waiving a portion of Comptoir's debt.

[66] The bottom line was that Moni-Trans never paid its rent in money and essentially could not.

[67] It is appropriate to mention that the lease between Meyerco and Moni-Trans[17] made no mention of the special arrangement.

[68] Quite to the contrary, at clause 3.01 of the lease, Moni-Trans obliged itself to pay its rent "*in lawful money of Canada*" … "*without reduction, deduction or compensation whatsoever*". Similarly, at clause 3.03, Moni-Trans agreed to pay its rent and all other amounts owing thereunder "*without any deduction, set-off or compensation whatsoever and regardless of any claims which the LESSEE may assert*".

[69] Moreover, at clause 22.01.01 of the said lease, it is stipulated that a default occurs enabling the lessor to terminate the lease "*if the LESSEE shall fail to pay the LESSOR any instalment of rent or any additional rent after it shall have become due and payable*".

[70] Meyerco argues that its arrangement with Moni-Trans was only temporary. Once the property would be sold to Kinmont, the tenant would need to pay rent to the new owner.

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[17] Exhibit D-3.

[71] The difficulty the Court has with that reasoning is that Meyerco did not know whether Moni-Trans could actually pay its rent. It had never been tested. And although it was a 5-year lease, Moni-Trans never had to handle that new cash burden, a particularly important issue given that its warehousing and storage business was a brand new operation. This was known by Ouaknine, Henri and Meyerco.

[72] There was a risk associated with Moni-Trans's financial obligation to pay the rent. Meyerco's failure to inform Kinmont imposed that burden on the new purchaser, and as it turned out, Moni-Trans could not meet its obligations.

[73] In this regard, Meyerco argues that Kinmont was aware that Moni-Trans might be facing financial difficulties since it had not made a deposit required under its lease.

[74] Meyerco confirmed that to Svensson of Kinmont by way of an email dated the day prior to the closing[18]. At closing, an adjustment[19] was made nonetheless, requiring Meyerco to pay a portion thereof along with rental for the first thirteen (13) days of the month.

[75] When viewed after the fact, that non-payment by Moni-Trans appears to hold more significance that it deserves. The Court is of the view that Meyerco, having failed to inform Kinmont that Moni-Trans never paid rent, it cannot now succeed in justifying its illicit silence by reference to an issue of one deposit required pursuant to the lease.

[76] In addition to the foregoing, there is another reason Meyerco should have informed Kinmont of its arrangements with Moni-Trans.

[77] During the course of its due diligence, Kinmont learned that Meyerco had a special rental arrangement with another tenant at the Hymus property, Les Constructions GAM Inc.[20]

[78] That tenant was providing renovation services to Meyerco, in exchange for which it occupied a rental unit without paying rent.

[79] Kinmont refused to accept that situation. It informed Meyerco that it was not interested in receiving any services in exchange for rent. It wanted to receive rental revenue when it became owner.

[80] This situation not only demonstrates the lack of credibility in Meyerco's assertion that Kinmont was satisfied with the rental situation involving Moni-Trans, but it also illustrates the importance to Kinmont of having the projected net operating revenue.

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18 Exhibit P-21.
19 Exhibit P-9A.
20 Exhibit P-17.

[81] For all these reasons, Meyerco failed to fulfill its duty to inform Kinmont as to an essential element of the transaction. As was so aptly stated by counsel for Kinmont, Meyerco was not entitled to play "catch me if you can". That is not acting in good faith. Quite the opposite, it is proof of bad faith.

4.2 In addition to its failure to inform, did Meyerco also make false representations?

[82] For the reasons that follow, the Court concludes that Meyerco did make false representations to Kinmont.

[83] The proof demonstrates that Meyerco confirmed to Kinmont that all the rent had been paid and that there were no delinquencies. According to Smith, Ouaknine explained that they never let anyone get behind in rent and he gave assurances that rent was paid to date.

[84] As stated above, Moni-Trans did not pay its rent in accordance with its lease, as it was never paid in money.

[85] Nonetheless, Meyerco provided Kinmont with a Tenant Certificate, signed by the owner of Moni-Trans, Youssef El Chemali[21].

[86] According to El Chemali, he really did not read the document. Rather he only "took a fast look". Henri Ouaknine brought it to him. El Chemali trusted Henri. He had been doing business with him for many years. It was Henri who had suggested to him to use the Hymus property for his new warehousing and storage operations. He negotiated the lease deal with Henri. According to El Chemali, he did not know why he was being asked to sign the certificate.

[87] The Court concludes from El Chemali's testimony that Henri brought him the document and told him to sign it, which he did.

[88] The Certificate was then provided to Kinmont. Having required such certificates in its Offer to Purchase, Kinmont was entitled to rely on it.

[89] According to clause 5 of its Tenant's Certificate, Moni-Trans's lease had not been "*modified, altered or varied either orally or in writing*".

[90] Both Ouaknine and El Chemali, during their testimony, expressed the view that the lease had not been varied. The Court does not share that view.

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[21] Exhibit P-7.

[91] Meyerco and Moni-Trans had discussed and agreed to vary the rental payment terms. No payment was required in "*lawful money of Canada*", as stipulated in the lease. They agreed to payment by "exchanging invoices", that is to say by set-off.

[92] As regards clause 9 of the said Certificate, Moni-Trans confirmed that it had no "*claim, charge, defence, right to set-off…*".

[93] Ouaknine testified that Moni-Trans did not have a "right" to set-off. It was a decision Meyerco could take each month. But the fact is that Moni-Trans had been providing services to Comptoir for many years. The proof also shows that Comptoir always owed more money to Moni-Trans than was set-off. Every month the set-off was effected. In that context, had Meyerco sued Moni-Trans for failure to have paid rent, it is not credible to argue that Moni-Trans would have had no "defence" based on set-off.

[94] Yet that is exactly what the Tenant Certificate, as signed by Moni-Trans, states.

[95] It is not irrelevant to indicate that Ouaknine had been a notary specializing in real estate for 25 to 30 years, in addition to which he had personally acquired various forms of real estate over the years.

[96] Under those circumstances, the Court has difficulty in finding any credibility in Ouaknine's personal view that Moni-Trans had no right whatsoever, not even a defence based on set-off, for rent under the lease between its signature up to the sale to Kinmont. This is particularly so given that Meyerco failed to disclose the special rental arrangement with Moni-Trans.

[97] Meyerco knew or should have known that Kinmont would rely on the Tenant Certificate and that it was materially misleading on an essential issue, being the payment of rent by Moni-Trans as per the lease.

[98] Given the proof, and in the circumstances of the present case, the Court concludes that the Tenant Certificate signed by Moni-Trans contained false representations as to its rent, and Meyerco knew this.

[99] Meyerco raises the argument that its duties to Kinmont should be tempered by Kinmont's obligation to inform itself and to act prudently in the conduct of its affairs[22]. According to Meyerco, Kinmont was negligent in the conduct of its due diligence.

4.3 Was Kinmont negligent in the conduct of its due diligence?

[100] To this question, the Court concludes that it was not, and this for the following reasons.

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[22] *Bank of Montreal* v. *Bail Ltée*, supra, note 15.

[101] Kinmont assigned Svensson to conduct its due diligence. He interacted with Meyerco's broker Smith and accountant Elbaz to this effect.

[102] Throughout his testimony, Ouaknine often repeated that the first thing a purchaser should do is to verify the vendor's deposit books to ensure that rent is actually being paid.

[103] However, no expertise was provided to support his assertion.

[104] In fact, Meyerco's broker Smith, prepared a check-list for the due diligence[23], which he gave to both parties. According to Smith, it is a standard form he had prepared for sales of such properties.

[105] Yet nowhere on Smith's list is there a reference to the vendor's deposit books.

[106] The Court concludes that Meyerco has failed to establish that a reasonable purchaser, as a matter of course, must verify the vendor's deposit books. The Court does not recognize that as a necessary and standard component of a reasonable due diligence.

[107] Meyerco also argues that it made available to Kinmont its various deposit slips and bank statements[24]. According to Meyerco, had Kinmont reviewed those documents, it would have seen no deposits of rent by Moni-Trans.

[108] Svensson explained that when he attended the June meeting at Meyerco's offices, Elbaz gave him boxes filled with lease files. Although he did not recall seeing the P-6 and P-7 financial documents, he could not be 100% certain that they were not in the boxes.

[109] With a view to attacking Svensson's credibility, Meyerco adds that during his examination before plea on December 5, 2011, Svensson admitted being shown the rental ledgers. Svensson was not provided the transcript from that examination in order to explain or admit his response.

[110] However, at page 10 of that transcript, Svensson states that he was shown "an accounting ledger", with an opening balance, credit for rent and an outstanding balance. He went on to say that according to the ledger the rent was paid and there were no outstanding amounts.

[111] Since Elbaz testified that he did not give Svensson the accounting records of Meyerco, the Court concludes that Svensson was shown a ledger, not necessarily

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[23] Exhibit P-12, p. 2.
[24] Exhibits P-6 and P-7.

forming part of Meyerco's normal business records, confirming that rent was fully paid by Moni-Trans.

[112] Under the circumstances, not only did Meyerco attempt to misrepresent the Moni-Trans situation, but it cannot now argue that Svensson and Kinmont failed to conduct a proper due diligence because they did not go through Meyerco's deposit slips.

[113] The Court accepts the principle that a vendor's duty to inform should be tempered by a purchaser's duty to inform itself. However, the duty of the purchaser cannot be applied so strictly as to render inexistent, or of little value, the duty of the vendor. As stated above, it is not a game of "catch me if you can".

[114] The Court concludes that Kinmont conducted a reasonable due diligence, one that satisfied its duty to inform itself.

[115] For all these reasons, the Court holds that Meyerco's failure to inform and its providing of false information to Kinmont constitute a fraud within the meaning of Art. 1401 C.C.Q., such that it led Kinmont into error and vitiated its consent as regards the sale of the Hymus property.

[116] Moreover, given Davidson's testimony that Kinmont would not have paid such a high purchase price had it known that Moni-Trans was not paying its rent, and given Kinmont's insistence that the purchase price be reduced by $250,000 given the inspection report on the property, and further given Kinmont's reaction when it learned that tenant Les Constructions GAM was not paying rent, the Court concludes that but for the error created by Meyerco's fraud, Kinmont would have contracted on different terms, being a reduced purchase price.

4.4 Are Defendants Daniel Ouaknine and Henri Ouaknine (Estate of) personally liable?

4.4.1. The Late Henri Ouaknine

[117] Kinmont alleges that Henri Ouaknine participated in the scheme not to inform it of the fact that Moni-Trans was not paying rent and, as well, to intentionally misinform Kinmont by providing Moni-Trans's Tenant Certificate.

[118] According to the proof, Henri was not an employee of Meyerco. He was the manager of Comptoir, whose owner, Ouaknine, also owned Meyerco. He was accordingly the brother of and an employee of Daniel Ouaknine.

[119] As explained by El Chemali, Henri was not only aware of but had helped establish the special rental arrangement between Moni-Trans and Meyerco.

[120] As well, according to El Chemali, Henri brought him the Tenant Certificate to sign.

[121] Had Henri known the specific content of the Tenant Certificate, Kinmont's claim against his Estate might require further analysis. But the proof does not demonstrate that he had such knowledge.

[122] El Chemali does not provide sufficient details to draw such a conclusion.

[123] Accordingly, the Court cannot conclude that Henri knowingly assisted Meyerco in its fraud of Kinmont. Similarly the Court cannot conclude that Henri committed an intentional fault.

[124] Moreover, the facts are not sufficiently clear and precise as to allow even a presumption in that regard.

[125] Under the circumstances, the Court concludes that Kinmont has failed to establish the liability of Henri and, as a result, of his Estate. The action at law against his Estate must therefore be dismissed.

[126] That said, however, the Court also concludes that Kinmont's action against the Estate is not abusive.

[127] Ouaknine argues that the lawsuit against Henri's Estate was manifestly ill-founded and was only intended to pressure Ouaknine to settle. Whatever pressure Ouaknine may have felt given that his late brother's Estate had been sued, the test of abusive is not a subjective one.

[128] The test of abuse is objective in nature. Would an ordinary reasonable person, with knowledge of the claim, conclude that Kinmont's claim was manifestly ill-founded? The Court does not consider that an ordinary reasonable person would so conclude.

[129] Obviously Kinmont had to rely on the facts as presented by Ouaknine and third parties, such as El Chemali, to determine Henri's actual knowledge. Regardless of what might be said informally, the witnesses did not provide to the Court sufficient proof to enable Kinmont to succeed in its action.

[130] That said, there were sufficient factual elements to justify the allegations it made as regards Henri. It is only once the proof phase had terminated that the Court could conclude that Kinmont failed to make its case.

[131] Accordingly, the cross-demand by the Estate of the Late Henri-Ouaknine is to be dismissed.

4.4.2. Daniel Ouaknine

[132] As previously stated, Ouaknine is the sole shareholder and director of Meyerco. He is chairman of the company's Board of Directors, its Treasurer and its Secretary[25]. There are no known officers.

[133] All decisions made by Meyerco were in fact made by Ouaknine, as established by the proof. From a practical perspective, Ouaknine is Meyerco.

[134] From a legal perspective, of course, the law generally recognizes a separation between a physical person and a corporation. However, there are exceptions.

[135] A person, who is a majority shareholder and director of a company, as is Ouaknine in relation to Meyerco, can be held personally liable in a variety of circumstances. These circumstances, and the resulting liability, are clearly explained in the off-cited text of Me Paul Martel, which reads as follows:

> « *La responsabilité personnelle d'un individu qui est actionnaire majoritaire et administrateur d'une compagnie peut être retenue dans les circonstances suivantes :*
>
> - *Il s'est porté caution d'une obligation contractuelle de la compagnie;*
>
> - *Il a lui-même commis une faute entraînant sa responsabilité extracontractuelle, par exemple en faisant de fausses représentations ou en remettant des documents falsifiés;*
>
> - *Il a activement participé à une faute extracontractuelle de la compagnie (ce qui se présume s'il est administrateur unique);*
>
> - *Il a utilisé la compagnie qu'il contrôle comme écran, comme paravent pour tenter de camoufler le fait qu'il a commis une fraude ou un abus de droit ou qu'il a contrevenu à une règle intéressant l'ordre public; en d'autres termes, l'acte apparemment légitime de la compagnie revêt, parce que c'est lui qui la contrôle et bénéficie de cet acte, un caractère frauduleux, abusif ou contraire à l'ordre public.*
>
> *L'article 317 ne s'applique que dans le dernier de ces cas. Le premier est régi par les articles 2333 et suivants, le deuxième par l'article 1457, et le troisième par les articles 1457 et 1526.*»[26]

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[25] Exhibit P-3.

[26] Paul MARTEL, *Le « Voile corporatif » - L'attitude des tribunaux face à l'article 317 du Code civil du Québec*, (1998), 58 R. du B. 135-136.

[136] In the present case, Ouaknine, participated in the fraud as described above both through his silence and in making false representations regarding Moni-Trans supposed rental payments.

[137] It is not so much a case of Ouaknine using Meyerco as a screen against his conduct, but rather, it is a case whereby Ouaknine acted unlawfully in order to have Kinmont enter into the Deed of Sale with Meyerco.

[138] Qualifying the situation as such, the Court is of the view that Art. 1457 C.C.Q. applies to the present case. The first two paragraphs of the said article reading as follows:

> *« **1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.*
>
> *Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature."*

[139] Although it could be argued, as Kinmont does subsidiarily, that this case would justify lifting the corporate veil by virtue of Art. 317 C.C.Q., the Court is of the view that it is not necessary to address the issue, given its finding that Ouaknine has intentionally committed a fault.

[140] In so concluding, the Court does not adopt Ouaknine's position that he did not personally send the Tenant's Certificate to Kinmont. True, he did not act as the direct messenger. He had it done by others, using his authority to have them follow his instructions.

[141] The Court therefore concludes that Kinmont's action against Ouaknine is well-founded.

[142] As a result of the foregoing, Ouaknine's cross-demand is not well-founded and shall be dismissed.

[143] In this regard, the allegations by Kinmont of fraud are not abusive, nor do they give rise to a claim for defamation. They are but allegations necessary for the victim of a fraud to duly exercise his rights before the courts[27].

[144] Having dismissed the cross-demands of both Daniel Ouaknine and the Late Henri Ouaknine, the Court needs to address Kinmont's demand that the said cross-

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[27] *Place Brossard Inc.* v. *Giovest Inc.*, (2000) AZ-50069986 (QCCA).

demands against it be declared abusive, as set forth in its Amended Answer and Cross-Defense.

[145] It is important to note that Kinmont makes no monetary claim in its proceeding seeking such a declaration of abuse. That said, the Court is of the view that Kinmont has failed to establish the necessary reprehensible conduct tantamount to fault. It is not sufficient that the cross-claim fails or that the amount claimed appears excessive[28].

4.5 Damages

[146] As damages, Kinmont seeks a reduction in the purchase price by an amount of $256,815.

[147] How has Kinmont arrived at that amount?

[148] Essentially, Kinmont arrived at its initial Offer to Purchase of $3 Million by taking into account a net operating revenue for the Hymus property in the order of $300,000.

[149] Kinmont's President, Davidson, did not perform or rely on a mathematical calculation. He just felt, using his business sense, that $3 Million was a fair price for a property with an annual net operating revenue of $300,000. He said he left the calculations to others.

[150] Svensson, on the other hand, said that he had calculated an offer amount by using a capitalization rate of 10%.

[151] Ouaknine argues that cap rates are a matter of expertise, there being so many elements to take into account. The Court finds it rather odd for Ouaknine to make such an argument in the present case for two reasons.

[152] Firstly, the revised pro forma of revenue and expense document provided by Meyerco and forming part of the Kinmont's Offer to Purchase (P-5), actually expresses various cap rates for a number of sale price scenarios. So, even Ouaknine used cap rates in relation to the sale price.

[153] Secondly, it matters not whether Kinmont correctly applied a cap rate for its calculation. The fact remains that by calculation or by business sense, Kinmont arrived at an offer price that was basically 10 times the net operating revenue of the property.

[154] The calculation of the damages does not exactly reflect the factor of 10 but almost. Kinmont performed a cap rate calculation that takes into account the loss of Moni-Trans rent, which gives rise to a purchase price of $2,493,185, which it would

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[28] *Acadia Subaru* v. *Michaud*, 2011 QCCA 1037.

have offered rather than $2,750,000. The difference is the amount of their loss that they claim, being $256,815.

[155] In attempting to determine what the purchase price should be reduced by, the Court is challenged to establish damages that are real but indeed difficult to calculate. This may well explain Kinmont's recognition of the discretion which the Court possesses in establishing the damage award.

[156] Although Kinmont today may believe that it would have reduced its sale price by the amount of Moni-Trans rent, the fact is that it did not reduce its price when it learned about the similar rental situation with Constructions GAM. It did, however, insist on having a tenant that would pay the rent. But that was in relation to a smaller rental space. It is helpful but not determinant.

[157] The proof also establishes that finding a tenant to take the larger A-2 space was not necessarily that easy a task. After all, that was what Moni-Trans was brought in to do, and we all are now aware of what happened with that tenant.

[158] That said, the Court is of the view that Kinmont's damage claim is excessive.

[159] Considering that applying to Moni-Trans annual rent of $27,999, a factor of 3 would give rise to an amount of $84,000 whereas a factor of 4 would give rise to an amount of $112,000, the Court is of the view that an amount of $100,000 would be a reasonable assessment of the price reduction to which Kinmont is entitled. That is the extent of the damages it has suffered. That is what is reasonable.

[160] By so doing, the Court is taking into consideration the business sense of what is "fair", which Davidson said he applied in setting the original Offer to Purchase price.

4.6 Meyerco's demand for a reserve

[161] During the Hearing, Meyerco requested that the Court reserve its rights to claim arrears of rent owed to it by virtue of the Deed of Sale.

[162] In this regard, the Court, at this stage, is not concerned with whether any arrears are due to Meyerco or whether it actually has a right to claim such arrears.

[163] However, the Court should consider whether a reserve is appropriate. The fact is that a reserve is rarely of any value to a party. Either it has a right or it does not.

[164] Moreover, if Meyerco seriously considered that it had such a right, it should have acted upon same in due accordance with the law.

[165] For these reasons, the Court is of the view that it is not appropriate to reserve any rights on behalf of Meyerco.

FOR THESE REASONS, THE COURT:

[166] **GRANTS** in part the Plaintiff's Motion to Institute Proceedings against Meyerco Enterprises Ltd. and Daniel Ouaknine;

[167] **DISMISSES** Plaintiff's Motion against the Estate of the Late Henri Ouaknine, acting through its liquidator Chantal Azoulay, with costs on the amount of the claim;

[168] **CONDEMNS** solidarily Meyerco Enterprises Ltd. and Daniel Ouaknine to pay to Kinmont Canada Inc. an amount of $100,000, the whole with interest at the legal rate as of the date of its proceedings, being July 29, 2011, the additional indemnity provided by Art. 1619 C.C.Q. and with costs on the amount of the present award;

[169] **DISMISSES** the cross-demands of Daniel Ouaknine and The Estate of the Late Henri-Ouaknine, acting through its liquidator Chantal Azoulay, with costs.

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Gary D.D. Morrison, J.S.C.

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Dates of Hearing : January 21, 22, 23, 24 and 30, 2014

Request for
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