International Institute of Management Inc. v. Edmonton Co-Operative Association Ltd., 2003 ABQB 502

Date: 20030605
Action No. 9003 16223

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

INTERNATIONAL INSTITUTE OF MANAGEMENT INC.,
OPERATING AS GROSVENOR STAMP CO.

Plaintiffs

- and -

EDMONTON CO-OPERATIVE ASSOC'N LTD. AND
FEDERATED CO-OPERATIVES LTD.

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE T.D. CLACKSON

APPEARANCES:

Mr. Grosvenor
for the Plaintiffs

Mr. Vaughn Cox
Chatwin, Cox
for the Defendants

I. SUMMARY

II. INTRODUCTION

[1] The Plaintiff has suffered two losses to its business. These losses occurred on April 2, 1990 and July 3, 1990. The Plaintiff carried on business as Grosvenor Stamp Co. in leased premises at 12725 82 Street in Edmonton, Alberta. The Plaintiff's business was located in the basement of the building at that address. The building was owned and operated by the Defendants and known locally as the Delton Co-op. The main floor of the building was the Defendant's grocery store.

[2] The Plaintiff alleges that his inventory of philatelic materials was extensively damaged on April 2, 1990 as a result of ongoing renovations to the main floor of the Delton Co-op store. The Plaintiff alleges that holes were drilled in the cement ceiling above its premises which resulted in the concrete dust permeating its premises. The nature and concentration of the dust is the alleged cause of the Plaintiff's loss. In a 24 page list, the Plaintiff itemizes the materials damaged and their value.

[3] The Plaintiff attempted to enter a letter from a purported stamp dealer to support its claim, which I refused to allow. However, the directing mind and will of the Plaintiff, William Grosvenor was tendered by the Plaintiff as an expert in the purchase, sale and valuation of stamps and I accepted him as such. In result, Mr. Grosvenor wore three hats. He was officer of the Plaintiff, counsel for the Plaintiff in the sense that the Plaintiff had no lawyer and philatelic expert.

[4] The Plaintiff alleges that after the disaster of April 2, 1990 it obtained substitute materials only to be visited by a second calamity in the form of a flood/sewer back-up on July 3, 1990. That event is alleged to have caused further extensive damage as particularized in the Plaintiff's Amended Amended Statement of Claim. The Plaintiff alleges that the flood ultimately destroyed its business. The Plaintiff alleges that the Defendants knew or ought to have known that a flood/sewage back-up was likely and having failed to take steps to prevent those occurrences is liable for the damage and loss which was suffered by the Plaintiff, its tenant.

III. FACTS AND EVIDENCE

[5] The Plaintiff commenced operations in early 1989 and ceased operations in late 1991. The Plaintiff claims it held its lease until 1993 when its landlord went bankrupt but its business licence expired in late 1991. The business was designed around obtaining, valuing, cataloguing and selling philatelic materials. The sales were to be conducted by auction mail bid. Mr. Grosvenor testified that he opened the business expecting to conduct a bid auction or mail sale about every three months. He also expected some minimal walk-in retail trade. He felt the

business would be viable based upon the result of a bid auction sale he says he conducted in 1987 and other auctions he had assisted the Edmonton Stamp Club in conducting.

[6] Mr. Grosvenor did produce a copy of the bid auction catalogue which he says was produced for the 1987 mail sale. However, Mr. Grosvenor apparently shredded every other record which would have assisted in establishing what materials were bought, when, and for what price. He shredded everything that might bear upon how much a bid auction sale might gross or net, or cost to conduct. Every document which might have any bearing on this proceeding other than the 1987 catalogue has been shredded.

[7] It appears that there are many similar materials described in the 1987 bid auction catalogue and the list of materials the Plaintiff claims were damaged by dust. However, Mr. Grosvenor would not agree that the materials were in fact the same. In some instances he says the descriptions suggest different materials. In other cases where the descriptions were virtually the same, he suggested that the materials were common and popular and therefore it was good business to obtain those types of materials for resale. In result then, he was, in effect saying that he may well have obtained identical materials to those listed in 1987 after that sale had occurred but before the dust claim arose.

[8] It is of course necessary to keep in mind that the value of philatelic materials is directly related to the demand for an item and its availability.

[9] The evidence as to what Mr. Grosvenor made on the 1987 mail bid sale was not particularly clear. However, he testified that around $3,000.00 net seemed about right. Additionally, Mr. Grosvenor testified that he would expect to sell about a third of the materials offered for sale. If that were the case, one would expect the actual gross income from the sale to be considerably in excess of $3,000.00. On his evidence, it would appear that he would realize about $9,000.00 a year net of cost of materials sold if one extrapolates from the presumed results of the 1987 mail bid sale. Clearly I have no evidence as to what the other costs of business were and so no basis upon which to postulate an annual income for Grosvenor Stamp Co. or the Plaintiff.

[10] The process of conducting a mail bid auction involves different steps. Apparently, there are some bulk stamps offered by the pound which do not require meticulous examination by the vendor. On the other hand there are individual stamps offered which do require careful examination. Individual stamps are compared as against catalogues and assigned value based upon how closely they match the catalogued item. As one might expect there are a variety of characteristics that a stamp may have. The presence or absence of characteristics alone or in combination will impact the value of the stamp. Stamps have been a part of the world's culture for decades. Every country issues different stamps and the stamps a country issues, change frequently. Countries use different cancellation marks and those marks also change. Stamps are printed on a variety of papers and those papers have changed over the years. The foregoing are just some of the reasons why there is a nearly infinite variety of collectable stamps. As well, there are a myriad of variations, flaws and imperfections that two identical stamps can exhibit.

Finally, there are many forgers and reconstituters involved in the more lucrative end of the stamp business. As a result, it is no surprise that valuing a stamp is more art than calculus.

[11] Mr. Grosvenor's list of materials allegedly damaged by dust are valued by him in accordance with his expertise. He testified that in some cases because he was preparing an auction sale, he had previously identified and valued much of what appears on the list of damaged materials.

[12] Mr. Grosvenor's evidence was that all of the items listed by him were damaged beyond recovery to the point where the whole lot might fetch at most three to five percent of their previous catalogue value. He testified that the Defendant's attempts at dusting and clean-up were perfunctory and useless. He testified that the dust had an oily or slimy feel to it and as such adhered to the paper material such that dusting would have minimal utility.

[13] The Plaintiff's claim relating to the sewage flood is presented in a completely different fashion. The claimed loss is not itemized beyond what is alleged in the Amended Amended Statement of Claim. In part it appears that that is the case because the individual materials are alleged by the Plaintiff to be so contaminated that he does not wish to have anything to do with those materials. In result, verification of the claimed damage and assessment of the pre-damage and post-damage value of the materials has not been offered.

[14] The destruction of all records surrounding the purchase of materials claimed to have been lost precludes that potential source of proof. Therefore, both claims depend entirely upon the Plaintiff's say so, both as to items allegedly damaged and the quantum of the claimed losses.

[15] Clearly, because of the nature of these claims and the evidence led by the Plaintiff to establish the claims, the credibility of Mr. Grosvenor is pivotal.

[16] There are a number of concerns raised regarding Mr. Grosvenor's credibility. His testimony on a variety of subjects, some directly relevant and some more remote was often challenged on the basis of answers he gave at Examinations for Discovery. Mr. Grosvenor admitted that if the transcripts of his examinations record him as having stated something then he presumes he did make that statement. However, he refused to accept that his memory may have been better when examined nine or ten years ago as compared to his memory at trial. Additionally, when braced on the evidence apparently given by him at Examinations for Discovery, his response was invariably that he did not recall the questions or answers put to him. Even though the Defendants did not seek to prove the transcript and therefore did not attempt to have me receive the transcript portions as evidence, the Defendant did offer the many contradictions as a basis for negatively assessing Mr. Grosvenor's credibility. A few examples of the inconsistencies serve to highlight the basis for the Defendant's argument:

1. At trial Mr. Grosvenor said he shredded all financial records annually once he and the company had settled taxes. However, at Examination for Discovery Mr.

Grosvenor said that he had kept his and the company's financial records from about 1980 to 1990 and did not shred them until after he contemplated pursuing the claim for damages now before me;

2. At trial Mr. Grosvenor said that he felt that the Plaintiff had made perhaps between $8,000.00 and $10,000.00 in 1989. However at Examinations for Discovery Mr. Grosvenor said that in 1989 about $1,000.00 revenue related to stamps. When pressed further at Examinations for Discovery Mr. Grosvenor could not say how much money had been made from the sale of stamps between the day the company opened for business and the day the dust incident occurred;

3. At trial Mr. Grosvenor stated that he did not recall anything remotely like anyone from the Co-op offering to help clean his store on the day of the flood. At Examination for Discovery he admitted that Neil Hubbard from the Co-op came after lunch and wanted to help clean up the flood in the Plaintiff's shop. Mr. Grosvenor admitted at Examination for Discovery that he ordered Mr. Hubbard off the premises because he did not trust Co-op as a result of their actions relating to the dust incident.

[17] Additionally, the Defendant points to a number of other concerns which reflect poorly on the credibility of Mr. Grosvenor. A sample of those concerns follow:

(a) The income that Mr. Grosvenor says he earned for 1987 in the mail bid auction is not reported on the Plaintiff's returns or on Mr. Grosvenor's personal tax returns.

(b) Mr. Grosvenor has no explanation as to why the 1987 mail bid catalogue survived the general purging of his records.

(c) Mr. Grosvenor's evidence was that the Plaintiff's records disclose purchases of philatelic materials in excess of $105,500.00 in the period 1981 through 1991. On that evidence and the fact that a mail bid sale was held in 1987, the Defendant's suggests that it would be impossible for the Plaintiff's two claims to total the $320,000.00 claimed.

[18] The Defendant also suggests that Mr. Grosvenor is prone to exaggeration and therefore his evidence should be approached with caution. The Defendant points to the following examples:

(a) The Amended Amended Statement of Claim respecting the dust loss suggests several inches of dust covering the entire shop. However the Plaintiff's actual evidence was that the dust was a quarter inch or more in some places, less in most.

(b) That the records of purchase and sale and virtually every other relevant document which might assist on the subject of the damage and value of the claims may have been destroyed after the actions were contemplated and commenced.

(c) The many instances where what appear to be identical stamps are described in the 1987 bid catalogue and the list of loss inventory but the values on the latter are invariably much higher.

(d) The 1987 mail bid auction catalogue was only produced at trial and not before despite requirements of document production.

(e) The statement that Mr. Grosvenor used proceeds from settlement of a disability claim to replace the materials damaged by dust. However that settlement admittedly did not occur until 1995, years after the claimed losses.

I have concluded that Mr. Grosvenor has been guilty of many inconsistencies, incongruities and exaggerations. I also conclude that Mr. Grosvenor has over the many years that this lawsuit has been his life's focus come to accept as fact much which is not accurate. Mr. Grosvenor has allowed righteous indignation to colour his memory of the events surrounding these claims. Mr. Grosvenor's conduct, the manner of his speech and the many unsubstantiated derogatory comments made by him are compelling evidence of exactly that memory colouration process. I have no doubt that Mr. Grosvenor firmly believes that the Defendants and the Defendants' counsel and the witnesses called by the Defendants have lied, cheated, misrepresented, misled and are in league to deprive him of his rightful due. Clearly, the Defendants do not admit responsibility and have been vigorous in attempting to answer the Plaintiff's claim. However, that approach does not justify Mr. Grosvenor's beliefs. In my view, Mr. Grosvenor has lost complete objectivity and is consumed by this litigation and the imagined nefarious activity of the Defendants. As such, in most instances where his evidence is contradicted by other evidence, that other evidence must be preferred.

[19] The Plaintiff argues that the clean-up undertaken by the landlord after the dust incident had no impact upon the materials. The Plaintiff argues that after the flood all materials contaminated, even those which were metal or plastic, could not be salvaged. Apparently the flood claim was in fact two events. First there was a water flood followed hours later by a sewer back-up. It is noteworthy that none of the materials which were exposed to the original flood were moved to higher ground before the sewage back-up occurred, although the Plaintiff was clearly on the premises between events.

[20] The Defendants produced their insurance adjuster, Bill Birnie. Mr. Birnie has retired since 1990 but was employed by Co-Operator's General Insurance at the time of the losses. Mr. Birnie testified that he attended at the Plaintiff's premises and took photographs on the day of the dust claim and based upon his recollection and the photographs he said that the dust was certainly no more than 1/8 of an inch at its heaviest concentration. That concentration was

centred on a table which had two open stamp albums on it and a box of philatelic materials on the floor beside the table.

[21] Mr. Birnie told me that he swiped his hand across an area of the offending dust and was able to blow that dust off his hand without any residue. Mr. Birnie testified that the dust was in his view ordinary and not oily. He told me that the dust was about 1/16" thick and that the photographs of the scene accurately reflect that situation. Mr. Birnie retained a cleaner to dust and vacuum the Plaintiff's premises.

[22] Mr. Birnie also attended the Plaintiff's premises as a result of the flood. He was not however able to gain entrance to the Plaintiff's shop and took photographs from above a partial wall adjacent to the Plaintiff's shop. Mr. Birnie testified that the flood occurred in two stages. The first was a water problem which was about 1 inch to 1 ½ inches in height. Later that day, July 3, 1990, a sewer back-up occurred which caused contamination of the existing flood water.

[23] Mr. Birnie's edited notes were produced for purposes of cross-examination. Despite personal attack and innuendo from Mr. Grosvenor in the process of cross-examination, the spry 80 year old Mr. Birnie was able to satisfy me that his recollection of the physical evidence of the events was accurate.

[24] The evidence of Lorne Downes was to the effect that the renovations being concluded on the main floor of the Delton Co-op Building did not involve the drilling of any holes in the floor above the Plaintiff's premises. While new holes were drilled in the floor, the nearest of those would have been 30 to 40 feet from the Plaintiff's premises. Therefore, the inference suggested is that any dust created could not have travelled into the Plaintiff's premises.

[25] Mr. Downes did guess that when the tills on the main floor were moved, dust may have fallen through the existing floor holes in a minor quantity. These tills and the holes associated with them were situate immediately above the Plaintiff's premises.

[26] Mr. Downes also testified that during his tenure at the Delton Co-op Building which extended from 1987 to March 30, 1991 and from 1993 to 2002, there had only been two floods of the basement area. As a result, he understood that storm water was rerouted to the outside as opposed to the previous configuration where storm water was routed to the building's interior drainage system. Additionally, after the second flooding incident he understood that the sump area below the building's elevator was rerouted to discharge the sump water to the exterior of the building instead of in through the building's interior drainage system. Mr. Downes was not working at the Delton Co-op Building at the time of either of the Plaintiff's alleged losses and could not therefore comment specifically on either event.

[27] Mr. Joe Schriebar of Black Diamond testified that he was involved in the cleaning of the Plaintiff's premises after the dust incident. He testified that the dust was heaviest at the table upon which the open albums were located and diminished the further away one was from

that location. He testified that he recalled the dust at its densest to be approximately 1/16 of an inch in depth. Mr. Schriebar testified that the dust he encountered was basically ordinary dust that one might find anywhere except in the areas above the partial demising wall and the file cabinets. The dust on those locations was much heavier and of different texture.

[28] Mr. Schriebar testified that the cleaning process involved using feather dusters on the exposed stamps and albums and vacuuming where practicable and possible. The bill sent by Black Diamond was for 14 hours work in cleaning the Plaintiff's premises.

[29] Mr. Schriebar did admit that while he had a memory of this claim because it was unusual, he also relied upon a statement reduced to writing made eight months after the events.

[30] While Mr. Schriebar was nervous and sometimes difficult to understand, he was very clear in his description of the nature and the extent of the dust he encountered. His reaction was that he was surprised there was a claim for it.

[31] Mr. Schriebar testified that he had a concern about the delicacy of cleaning the exposed stamps but when the cleaning was completed he was proud of the job that had been done.

[32] Mr. Schriebar did corroborate the Plaintiff's evidence in relation to the Plaintiff's concern about the proper way to clean stamps and the qualifications of Mr. Schriebar to properly and safely clean those stamps.

[33] The evidence of Tim Leonard was to the effect that he and his father and a helper did all of the electrical work involved in the main floor renovations. He testified that no holes were drilled into the floor in the area of the Plaintiff's premises. He also testified that he entered the Plaintiff's premises once and spoke to Mr. Grosvenor. He recalled that on that visit, most of the stamps were in books or in covers. He also said after he heard about the Plaintiff's complaint, he looked over the short demising wall to the Plaintiff's premises and did not see any irreparable damage, although he admitted it may have been dark. I don't put much stock in that evidence as the other evidence presented to me makes it clear that some dust had invaded the premises of the Plaintiff.

[34] I do however, accept Mr. Leonard's evidence as to where the holes were drilled on the main floor of the Co-op and the fact that no holes were drilled into the floor above the Plaintiff's premises. That evidence is consistent with the evidence of Mr. Downes, the evidence of Mr. Birnie, the evidence of Mr. Schriebar and the photographic evidence.

[35] The Defendants also called Jean Colombus, the proprietor of a vacuum cleaner, security systems store known as Filtex. That store was also located in the basement of the Delton Co-op Building kitty corner to the Plaintiff's premises. Ms. Columbus testified that she had been a tenant in the Delton Co-op Building from 1985 to 2001 and had in that period of time experienced two floods. Her recollection is that one flood originated with a tornado and the other flood was the one which is the subject of the Plaintiff's claim. Ms. Columbus testified

she discovered the 1990 flood when she arrived at work at approximately 8:30 a.m. on July 3rd. At that time the flood appeared to be water, it did not smell nor did it appear to be sewage. Her evidence was that at no time did she ever smell or see sewage and that after the flood she simply cleaned her office furniture and equipment which she still uses today.

[36] Ms. Columbus testified that at some point in the morning of the 1990 flood, Mr. Grosvenor was on site. At that point, the flood was approaching the Plaintiff's premises but had not yet arrived. She said that the hallway adjacent to her premises and the Plaintiff's premises was partly wet and partly dry. She testified that there was an opportunity for the Plaintiff to move its material off the floor of its shop and protect that material but that did not happen. Instead Ms. Columbus said that Mr. Grosvenor simply locked the door to the Plaintiff's premises saying that the Co-op would have to pay or words to that effect.

[37] I accept that Ms. Columbus was a reluctant participant in these proceedings. I accept her evidence about Mr. Grosvenor's reaction to the flood. However, I think that the timing of Mr. Grosvenor's reaction is not as Ms. Columbus described it. In my view the evidence is most consistent with the flood having infiltrated the Plaintiff's premises before Mr. Grosvenor arrived. As well, I accept that the sewage contamination of the flood water did occur but not until later in the day.

[38] The Defendants also called Edgar MacKay to testify about the sales of stamps that he made to Mr. Grosvenor. Mr. MacKay was a stamp dealer at the relevant time. Mr. MacKay testified that he sold ten books of remnant collections to Mr. Grosvenor for a total price of $500.00 to $750.00. He said this sale took place between 1985 and 1989. A remnant or remainder collection is a collection remaining after the valuable stamps have been culled from it. Mr. MacKay also testified that this was the single biggest transaction he did with Mr. Grosvenor.

[39] The Defendants relied upon Mr. MacKay's evidence for the inference that Mr. Grosvenor was in the habit of buying remainder collections. The Defendants argue that if the inference is accepted then the Court should also infer that the Plaintiff's stamps were mostly remainders and not the more valuable stamps the Plaintiff claims. That of course is consistent with the expert testimony offered by Mr. Spencer. I will have more to say about that matter and Mr. Spencer later in these Reasons.

[40] The Defendants' officer Mr. Nick Nichol testified that he was told by Neil Hubbard (deceased) that the dust incident occurred when he was removing a check out isle rail on the main floor of the Co-op. In doing so he had to remove a bolt in the floor. Unbeknownst to him, the bolt went right through the cement floor and through a steel plate on the underside of the floor. The underside of the floor was the ceiling of the Plaintiff's premises. When the bolt was removed the plate fell onto the light fixture in the Plaintiff's premises.

[41] Mr. Nichol did not have any written notes of that conversation with Mr. Hubbard, nor could he recall Hubbard's exact words in describing the incident. Mr. Nichol said he arranged

to have a dust sample taken from the same light fixture on that portion of the fixture which extended beyond the Plaintiff's premises. Mr. Nichol says he felt that dust sample and did not detect any slimy or oily sensation in it.

[42] Mr. Nichol was not present during the July flood but did testify that he was aware of two earlier floods and that there had not been a flood since the flood claim involving the Plaintiff's premises. Mr. Nichol testified that he did not see, put in or direct the installation of back flow valves in the building's sewers. He testified as well that he understood that that had been done although when he came to that understanding is not clear. He said he came to that understanding because he inquired of the of the Defendants' maintenance staff as to the need for that type of device.

[43] Mr. Nichol testified that the furniture and property in the basement office maintained by the Co-op was flooded. However the carpet and steel desk chairs and cabinets all cleaned up unremarkably. Mr. Nichol testified that the Co-op's employees had enough time to move the wooden furniture and materials which would have been damaged to higher surfaces before the flood covered those contents.

[44] The Defendants called Mr. Glen Giesinger who was employed by Filtex at the time of the flood in 1990. He remains with that company. Ms. Jean Columbus is his mother-in-law.

[45] Mr. Giesinger testified that when he arrived at the Filtex premises on July 3, 1990, the flood was ongoing and he proceeded to lift Filtex's stock off of the floor. Apparently there was Filtex stock in the common hall area between the Plaintiff's and the Filtex's demised premises. He also raised those materials to higher levels.

[46] In the course of the morning he testified that he and Neil Hubbard had thought to enter the stamp shop to lift the materials in the shop off of the floor so as to preserve them. However, they could not get in because of the security system. Although the security system had been installed by Filtex to Mr. Giesinger's knowledge, Mr. Giesinger did not personally have the codes. Mr. Giesinger said Mr. Grosvenor arrived at the premises at about 11:00 or 11:30 a.m. but when asked by Hubbard to allow access to his premises to lift the stamp shop materials out of harms' way, Mr. Grosvenor refused. Mr. Giesinger said that Mr. Hubbard told him that Mr. Grosvenor had told Hubbard to leave it for the insurance and Mr. Grosvenor then left.

[47] Mr. Giesinger said he saw Mr. Grosvenor then the next day, July 4, 1990, and Mr. Grosvenor asked him why he was cleaning up instead of leaving it for the insurance people. Mr. Giesinger did not note any visible human waste nor smell anything consistent with human waste in the course of this flood. He did say there was a kind of a musty or moldy smell and I understood him to also describe a kind of sludge or film on the flood waters which in his view emanated from the cardboard boxes enclosing the Filtex stock located in the common hallway.

[48] The Defendants called Mr. Keith Spencer as an expert in philatelic materials. After a lengthy voir dire on Mr. Spencer's qualifications, I concluded that he was qualified to provide opinion evidence on the appraisal, valuation and disposal of philatelic materials. I declined to accept Mr. Spencer as an expert dealer in philatelic materials.

[49] Mr. Spencer's evidence was given in a calm rationale fashion. He specifically discounted any feelings of animosity or disrespect for Mr. Grosvenor although it was apparent that Mr. Grosvenor did bear Mr. Spencer animosity.

[50] Because of the history between Mr. Grosvenor and Mr. Spencer and their common interest in philatelic materials, some of Mr. Spencer's evidence was of the non-expert variety and some of course was related to the areas in which I had found him to be qualified. In all respects I felt Mr. Spencer was honest and forthright with the Court, although he had a tendency to run on at length often unnecessarily in response to questions in both direct and cross-examination. In the main, Mr. Spencer was a credible and reliable witness.

[51] However, there were some instances in the course of cross-examination where Mr. Spencer became quite combative with Mr. Grosvenor, such that I had to admonish Mr. Spencer to calm himself and answer the questions asked of him. I do not think that Mr. Spencer was being dishonest or deliberately uncooperative, rather I think Mr. Spencer became frustrated under the prolonged and vituperative examination he was compelled to endure at the hands of Mr. Grosvenor.

IV. THE CLAIMS

A. DUST CLAIM

1. Liability

[52] It is clear that the Defendants' renovations to its main floor operations caused dust to filter into the Plaintiff's premises. The constitution of that dust was a matter of constant representation by the Plaintiff without any supporting evidence. In fact the constitution of the dust is unproven. The Plaintiff insisted that the dust was concrete dust having an oily texture which could not be removed from paper material by mere dusting. That view is not supported by any other evidence. The evidence of Birnie, Schriebar, Leonard and Downes established conclusively that no holes were actually drilled into the cement main floor immediately above the Plaintiff's premises. I am also satisfied that removal of the check out rail and ensuing dust created by the bolt falling onto the light fixture was the major source of the dust which Mr. Birnie discovered. I also conclude that at least some dust had entered the Plaintiff's premises as a result of the work being done above those premises. That is indeed usual when construction and renovation projects are undertaken.

[53] That dust entered the Plaintiff's premises is admitted. The real issue is the extent of the dust which entered the Plaintiff's premises and the impact of that substance upon the Plaintiff's stock.

[54] I prefer the evidence of Messrs. Birnie and Schriebar as to what they observed and the results of their actions. Their evidence is borne out by the photographs of the Plaintiff's premises taken by Mr. Birnie. That evidence has persuaded me that the infiltration of dust onto the Plaintiff's premises was not as severe as Mr. Grosvenor attempted to represent.

[55] Additionally, I prefer the evidence of Messrs. Birnie and Schriebar as to the feel of the dust that they observed and touched in the Plaintiff's premises after the event. There is no evidence upon which I could conclude that the dust was particularly deleterious to philatelic materials. There is no basis upon which I can conclude that any of the philatelic materials were damaged by the dust event. I am satisfied that the dust which found its way into the Plaintiff's shop was completely cleaned away by Mr. Schriebar and his crew. The Plaintiff has not satisfied me that there was a residual film on the philatelic materials after that cleaning. The Plaintiff has not satisfied me that the value of the philatelic materials has been negatively impacted by the dust event.

[56] The onus is on the Plaintiff to show damage to its philatelic materials. None of the allegedly damaged material was entered into evidence. No expert evidence was presented which would confirm that the Plaintiff's materials had a residue of dust. While I suspect that dust may have a deleterious effect upon paper products, I also suspect that dust can have a myriad of different properties and, therefore, evidence as to the general effect of dust on paper wouldn't be helpful. Additionally, the evidence establishes that the Plaintiff's philatelic materials were commonly left exposed to the elements for days at a time. Presumably some accumulation of dust on those materials would be a natural result of that exposure. Yet the Plaintiff was unconcerned about that kind of dust exposure.

[57] Ultimately, the constitution of this particular dust and the effect of this particular dust on this particular paper was at issue. There was simply nothing in evidence on any of those issues to support the claim of damage.

2. DAMAGES

[58] Because a great deal of effort was expended by both sides on quantification of the claimed loss, it is appropriate to provide the parties with my views on quantum.

[59] The problem for the Plaintiff is that again there is very little offered by it to meet its burden of proof. The fact is that Mr. Grosvenor grossly exaggerated the accumulation of dust and its pervasiveness. That fact is that the Plaintiff did not establish how individual items were damaged but simply claimed for virtually everything in the store. The claim seems to encompass materials sheathed in plastic or inside closed albums without any explanation as to

how those items could have been damaged. The Plaintiff's inventory of damaged items included a number of items which were not directly exposed to the contamination.

[60] In result, I was left to guess as to which items claimed to have been affected actually were affected. I am left to guess as to what extent the affected items were affected and how that translates in value.

[61] There is yet another difficulty in attempting to quantify the claimed loss and that is the evidence of Mr. Grosvenor to the effect that the materials as damaged would have a value of three to five percent of their catalogue value. However, the actual loss suffered will vary depending on the percentage of catalogue value the item had before being exposed to the deleterious dust. It is in that context that the dispute between Mr. Grosvenor and Mr. Spencer is important.

[62] Mr. Spencer said that by reputation and observation Mr. Grosvenor's materials were seconds, remnants or remainders and consequently of little value. While Mr. Spencer was careful to say that his opinion was not based upon what he believed Mr. Grosvenor's reputation to be, I am certain that his opinion as to value was influenced by that reputation. Additionally, Mr. Spencer admitted that he did not examine each of the claimed items nor did he make detailed notes of the items that he did examine. That is significant, because by the time he was called upon to offer opinion as to value, he had virtually no independent recollection of any particular stamp or its particular grade or condition. He was forced to rely upon very sketchy notes. I think it is also significant because it reflects an approach which was based upon a faulty premise. Mr. Spencer felt that because he could not see any damage to the dust event materials, he did not need to be particular in examining those materials. The error in that approach is that Mr. Spencer is not an expert on the impact of dust on philatelic materials.

[63] Much of the focus of the litigation was on the value of the stamps and other philatelic materials without regard to damage by dust. Mr. Grosvenor opined that the affected stamps were worth tens of thousands of dollars. Mr. Spencer opined that most of the stamps were worth pennies to at most a few dollars. In result, I am not persuaded that Mr. Spencer's valuation of the materials was reliable. However, the opinion evidence of Mr. Grosvenor as to the value of materials he claimed were damaged by dust was also unreliable. In the end, the evidence as to value was unsatisfactory because neither Mr. Grosvenor's opinion nor Mr. Spencer's opinion was convincing. There is in effect no satisfactory basis to try to assign a value to any particular claimed item. There is really no basis upon which I can assign a salvage value to any one stamp or philatelic item even if I had concluded that the item was in fact damaged in a quantifiable way. Therefore, I cannot make any finding as to the quantum of the Plaintiff's unproven loss.

B. THE FLOOD/SEWER CLAIM

1. Liability

[64] The Plaintiff's position is that the Co-op, its landlord, breached the lease agreement. Specifically, the Plaintiff alleges that the implicit covenant for quiet enjoyment was breached.

[65] The Plaintiff alleges that there were prior floods of the premises of which the Co-op was aware and therefore it should have taken steps to ensure that the floods did not recur. The Plaintiff says that the Co-op should have installed a stop-flow valve and in failing to do so acted both negligently and in violation of the lease.

[66] This claim fails. The evidence respecting prior floods was not particularly clear. However, it was clear that steps were taken after the prior flood events to rectify what was believed to be the source of the problem. There was no evidence as to what a stop-flow valve is, what purpose it would serve or whether it would be effective in preventing a flood/sewer event. In those circumstances, I cannot conclude that the Co-op ought to have foreseen the flood/sewer event, ought to have acted to prevent the event or could have acted to prevent the event.

[67] In fact I am satisfied that the Co-op acted perfectly reasonably in all respects in protecting itself and its tenants from the potential for flooding. Clearly, it did not want its business premises flooded. Clearly it had taken steps to further protect against that potential. In those circumstances I conclude that the Co-op's duty of care and its contractual obligations were met.

2. Damages

[68] For the reasons given relative to valuation of the loss in the dust claim, I decline to attempt to value the items lost in the flood/sewer claim. Not only do all of the difficulties which made it impossible to assign value in the dust portion of the claim apply to this portion of the claim, but also there was an additional difficulty. I am satisfied that there were in fact two floods as described by Mr. Birnie. The first event was properly a flood. The second was a later sewer back-up which resulted in contamination of the existing flood waters by human sewage and an increase in the depth of the flood waters.

[69] The evidence establishes that Mr. Grosvenor had the opportunity between the two events to mitigate the Plaintiff's losses by moving materials on the floor of its shop to higher ground. In my view, it was not only prudent but the Plaintiff's obligation to do so. Its failure to do so resulted in an increase in the time its materials were exposed to the deleterious substances. Therefore whatever loss the Plaintiff suffered in the flood/sewer event is exacerbated by its failure to take steps to preserve its property. There is no evidence that would

allow me to determine what portion of the loss might have been suffered in the first event or flood and what portion of the loss was the result of the second event or sewer back-up.

V. CONCLUSION

[70] The Plaintiff has failed to establish its claims and its actions are therefore dismissed. The Defendants' are entitled to their costs on Column III of the previous Schedule C of the *Rules of Court* for those steps taken prior to December 31, 2000. For those steps taken after January 1, 2001 the Defendants' shall be entitled to their costs under the new Schedule C Column I. Those costs are to be taxed.

HEARD on the 7th day of January to the 26th day of May, 2003.
DATED at Edmonton, Alberta this 5th day of June, 2003.

J.C.Q.B.A.