1998 CarswellOnt 3401
Ontario Court of Justice, General Division

Fiset v. Di Geso

1998 CarswellOnt 3401, [1998] O.J. No. 3466, 20 R.P.R. (3d) 86, 74 O.T.C. 161, 82 A.C.W.S. (3d) 161

In the Matter of the Landlord and Tenant Act, R.S.O. 1990, Chapter L.7

In the Matter of the tenancy of Unit 4, 531 Yonge Street in the City of Toronto

Joe Di Geso and Rosa Luisi, Landlords/Respondents and Andre Fiset, Tenant/Applicant

Sutherland J.

Heard: June 19, December 15, 1997 and May 11-12, 1998
Judgment: September 2, 1998
Docket: Toronto 97-LT-131886

Counsel: *Lorne Glass*, for the landlords/respondents.
Allistair Trent (Agent) for the tenant/applicant.

Subject: Property; Civil Practice and Procedure

Headnote

Landlord and tenant --- Residential tenancies — Exemption from legislation

Tenant rented premises from landlord in mixed commercial and residential building — Tenancy agreement was in form of commercial lease — Tenant altered previously commercial unit to be part residential and part commercial with knowledge of landlord — Landlord locked tenant out of premises on basis that tenancy was commercial — Tenant applied for declaration that lease was residential under terms of Part IV of Landlord and Tenant Act and for damages for wrongful termination of residential tenancy — Application dismissed — Tenancy was excluded from Part IV by s. 1(c) of Act — Commercial section of unit was clearly segregated from residential part and walk-in trade was clearly invited into commercial section — Residential area was attached to commercial area as contemplated by exclusionary s. 1(c) of Act — Landlord and Tenant Act, R.S.O. 1990, c. L.7, Part IV, s. 1(c).

Practice --- Costs — Effect of success of proceedings — Successful party deprived of costs — Grounds — Misconduct of parties

Tenant rented premises from landlord in mixed commercial and residential building — Tenancy agreement was in form of commercial lease — Tenant altered previously commercial unit to be part residential and part commercial with knowledge of landlord — Landlord locked tenant out of premises on basis that tenancy was commercial — Tenant unsuccessfully applied for declaration that lease was residential under terms of Part IV of Landlord and Tenant Act and for damages for wrongful termination of residential tenancy — Landlord was denied costs of action — Landlord's son engaged in harassing tactics to attempt to drive tenant from premises — Landlord made mendacious attempt to convince court he did not know tenant was residing in premises — Landlord deliberately made inappropriate use of commercial lease forms.

APPLICATION by tenant to have tenancy declared residential and for punitive damages against landlord for wrongful termination of residential tenancy.

***Sutherland J.*:**

1 This bitterly contested and often delayed matter relates to leased premises that may be identified as Unit 4 in a building at 531 Yonge Street in the Yonge and Wellesley Street area of the City of Toronto.

2 The tenant, Andre Fiset, after having been locked out of the premises by his landlords (who had proceeded on the basis that the tenancy in question was a commercial tenancy and not subject to Part IV of the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7) brought an application dated February 27, 1997 seeking an order declaring the tenancy agreement to be reinstated, and for a writ of possession and damages aggregating $15,000 in respect of alleged breaches by the landlords of sections 93, 84 and 121(4)(b) of the said *Act* (hereinafter sometimes called the "*Act*").

3 On February 20, 1997, an *ex parte* motion was brought before Madam Justice Kiteley who endorsed the record to the effect that there was sufficient evidence before her to indicate that the premises included a residential portion, and to justify an *ex parte* order restoring the tenant to possession of Unit 4. The order of Madam Justice Kiteley was dated February 20, 1997 and ordered the issuance of a writ of possession directed to the Sheriff of the Municipality of Metropolitan Toronto, and to be enforced on February 27, 1997, pursuant to which the said Sheriff was to place the tenant in possession of Unit 4. The order further directed that the tenant's application be set down for a hearing on February 26, 1997 and that copies of the said order and the related *ex parte* motion materials be forthwith served upon the solicitors for the respondent landlords.

4 All that was done and the matter came on in Landlord and Tenant Court before Madam Justice E. Macdonald who adjourned the matter to a special one-day appointment on June 19, 1997. The adjournment was made on terms:-the tenant, at times and in amounts specified, was to pay up the arrears of rent and it was provided that if the tenant defaulted in any of the payments the landlord could proceed *ex parte* to terminate the tenancy and to obtain judgment for the arrears of rent. Costs of the proceeding before E. Macdonald J. were reserved to the June 19, 1997 hearing. The arrears in question were paid.

5 The one day allowed for the special appointment on June 19, 1997 proved to be a gross under-estimation of the time required for the hearing. At the end of that day's hearing the matter was adjourned to be continued before me on a date to be fixed by the trial coordinators. On the December 15, 1997 date fixed for the continuation of the hearing it was clear that the matter would be reached late and would not be completed. The balance of the hearing Was adjourned to come before me on May 11 and 12, 1998 in one of my non-sitting weeks.

Issues

6 The main issue in this matter is whether the demised premises, as leased to the tenant and occupied by him, are or are not residential premises exempted under the provisions of s.1 of the *Act*. The determination of that issue will also determine whether the tenancy was properly terminated by acts of the landlords.

7 There are also issues as to whether the tenant is entitled to punitive damages because of the conduct of the landlords or their representatives.

8 Although it was not clearly pleaded there is also an issue as to the tenant's entitlement to an abatement of rent in respect of alleged harassment, and in respect of alleged negligent delays in repairs following a fire in another part of the building. Madam Justice E. Macdonald, on February 26, 1997, ordered the payment of rent direct to the landlords, and she ordered that such payment was without prejudice to the tenant's right to pursue claims for abatement of rent. The landlords have long been aware of allegations by the tenant of facts that, if proven, could give rise to a right to some abatement of rent, and so no prejudice is experienced by them as a result of the absence of a clear pleading as to an abatement; nor is there a need to plead a claim for punitive damages.

9 There is an important issue of credibility with respect to the question of whether one of the landlords, Joe Di Geso, knew that the tenant lived in Unit 4.

10 At the commencement of the resumption of the hearing on May 11, 1998 and immediately before the resumption of the cross-examination of the applicant tenant, Mr. Trent, for the applicant tenant, advised the court that the claims for ordinary, as opposed to punitive, damages were withdrawn, but reserved the right to pursue those claims in another forum. For the landlords Mr. Glass objected to the withdrawal, stating that the applicant's evidence was almost all in and that no evidence had been led on

behalf of the applicant that would support a damages claim. I ruled that that was a matter for costs, and that the hearing would proceed on the basis that the ordinary damages claims were withdrawn, without prejudice to their being raised in another forum.

11 Mr. Trent served notice that the applicant was proceeding with his claim for punitive damages based upon harassment and harshness by the landlords and their representatives.

12 With regard to the jurisdiction of a court operating under Part IV of the *Act* to award damages see Lamont: *Residential Tenancies* (5th ed., 1993, Carswell, Toronto) pp.88 and 139-141). It is noted that in *Hahn v. Kramer* (1979), 23 O.R. (2d) 689 (Ont. Div. Ct.), at pp.692-3, the Divisional Court stated that:

> ... The summary process of the *Landlord and Tenant Act* was never intended to be used for an assessment of damages ... to do that might frustrate the very intent and purpose of the summary procedure provided by the Act.

Part of the rationale for that position is that the ordinary civil court, with the availability of pretrial discovery and pretrials, is a more suitable forum for dealing with damage claims.

13 Landlord and tenant courts usually deal with landlords' want of repair by way of abatement of rent, but they do award landlords damages for physical damage done to the demised premises by the tenant.

14 At p.239 of *Residential Tenancies*, *supra*, the learned author states:

> There are times when a judge in an application under Part IV may award somewhat nominal damages or may order punitive or exemplary damages. This was approved in the Divisional Court in *Shaw v. Pajelle Investments Ltd.* (1985), 11 O.A.C. 70 (Ont. Div. Ct.), with the judge saying that there were broad powers in s.94(4)(c)[of the *Act*] and that there was no sense in putting the tenant to the expense of proceeding in the Provincial Court (Civil Division).

I adopt that statement but note that s.94 relates to the landlord's obligation to repair and not to tort claims generally. I am persuaded that this court may in a proper case award punitive damages.

The Statutory Framework

15 Section 80 of the *Act* states that Part IV of the *Act* applies to tenancies of residential premises and to tenancy agreements despite any other Act or Parts I, II or III of the Act *and despite any agreement or waiver to the contrary* except as specifically provided in Part IV of the *Act*.

16 In s.79 the term "tenancy agreement" is defined as follows:

> 'tenancy agreement' means an agreement between a tenant and a landlord for possession of residential premises, whether written, oral or implied, and includes a licence to occupy residential premises.

Thus, if premises are residential premises and the occupant is a tenant or licencee, Part IV is applicable, regardless of wheat might be stated in any lease or tenancy agreement. Where Part IV is applicable the parties cannot contract out of it.

17 In s.1 of the *Act* it is stated that:

> 'residential premises' means,
>
> > (a) any premises **used** or intended for use for residential purposes, including accommodation in a boarding house, rooming house or lodging house (emphasis added)
> >
> > (b) ...
>
> but does not include

(c) premises occupied for business or agricultural purposes with living accommodation attached under a single lease unless the tenant occupying the living accommodation is a person other than the person occupying the premises for business or agricultural purposes, in which case the living accommodation shall be deemed residential premises; or

(d) such other class or classes of accommodation as may be designated by the regulations.

With reference to para.1(d) above, I note that the demised premises here in question have not been designated by the regulations under the *Act* to be exemptions to the above definition of residential premises.

18 With reference to para.1(c) above, I find that the tenant, Andre Fiset, has lived in Unit 4 since 1989, except for a brief period following his eviction by the landlord and before he was restored to possession pursuant to the above mentioned order of Kiteley J. Most of the time he had a roommate but none of his roommates were active in his businesses. In my opinion if the premises used for residential purposes otherwise fell within the exception described in para.1(c) above, such premises would not cease to be within the exception by virtue of the tenant having a roommate who shared the residential accommodation with him, whether or not the roommate participated in the tenant's business. The lease was with the tenant alone. And at no time did the tenant move out leaving an erstwhile roommate to live in the unit alone.

Overview

19 There are two approaches to the issue of whether or not the demised premises are residential premises. The first assumes that the demised premises are residential premises because the tenant has lived in them since 1989, and that approach proceeds to determine whether or not the demised premises come within the exception in para.1(c) above.

20 The second approach stresses that the demised premises had previously been used for purposes that were clearly commercial, and that the parties entered into a commercial lease for a four year term with the tenant being described as "Andre Fiset (carrying on business under Andre Fiset Productions)". Under this approach the landlord stresses that as late as 1994 the tenant, in formal proceedings with respect to another tenant's unit in the same building described *himself* as a commercial tenant of Unit 4. This approach by the landlords includes the assertion that the tenant unilaterally altered the use of demised premises. The landlords maintain that they did not know that the tenant intended to live in Unit 4 and, in effect, that the tenant sought to alter the character of commercial premises unilaterally by converting them and using them for mixed residential and commercial purposes, contrary to provisions of the lease. This approach by the landlords seeks to bring the case within the reasoning of Davidson J. in *Bindex Engineering Corp. v. Elliott* (1987), 59 O.R. (2d) 245 (Ont. Dist. Ct.), where premises leased under three leases as artists' studios in an almost derelict building were renovated by the tenants and occupied as living accommodation combined with use as artists' studios. The units were held not to be residential premises, even though in one case the tenant had ceased to do *any* artists' work at his premises but used them only as residential accommodation. In that case unilateral conversions and alterations were important factors. The learned judge also noted, and appeared to be influenced by the fact, that under the applicable zoning bylaw simple residential use of the premises was not permitted. In *Bindex Engineering Corp.*, *supra*, Davidson J. was at pains to distinguish the majority decision of the Divisional Court in *Hahn v. Kramer*, *supra*, where a "predominant purpose" text was applied.

Burden of Proof as to Statutory Exception

21 It is clear from the careful and persuasive judgment of Hayes J. in *Foster v. Lewkowicz* (1993), 14 O.R. (3d) 339 (Ont. Gen. Div.), that a landlord claiming to come within an exception under the definition of "residential premises" in s.1 of the *Act* has the burden of proving on a balance of probabilities that the tenancy does come within the exception.

Background Facts

22 The active landlord, Joe Di Geso, had previously been a real estate agent in Metropolitan Toronto and at material times he owned not only 531 Yonge Street (where Unit 4 is located) but also an adjoining building and a number of other rental buildings in Toronto or its surroundings.

23 Joe Di Geso did not live at 531 Yonge Street or at the adjoining building but he did have an office in a room on the second floor of 531 Yonge Street, adjacent to the office part of Unit 4, and he states that when not out of town (a rare occurrence) he would visit that office, on average, two or three times a week.

24 531 Yonge Street was zoned for mixed commercial and residential use. The first floor of the three storey building was all given over to commercial uses; the landlords tried to lease the second floor for commercial purposes, and often succeeded at least as to parts of it. The landlords would have preferred to lease the third floor for commercial purposes but, often had to lease units there for residential purposes, because prospective commercial tenants were not often attracted to the third floor.

25 Joe Di Geso made it abundantly clear at the hearing that he very much preferred commercial tenants. It was his belief that they would pay more rent, and he also preferred the flexibility of the relative ease of eviction of commercial tenants. There is credible evidence that he used commercial forms of leases even for residential tenants, and that he told prospective tenants that if they intended at any time in the future to conduct *any* commercial or business activity from their rented premises they had to have commercial leases. That was not a correct statement of the applicable general law.

26 In 1989, Andre Fiset heard from a friend about a vacant unit at 531 Yonge Street. He had been living in a room and wanted an apartment of his own. He examined the soon-to-be-vacant third floor, one bedroom unit and tentatively agreed to lease it. The landlords sent him a commercial form of lease (Ex.1) for a four year term, with rent rising by annual increments from $9,000 in the first year to $11,000 in the fourth year. In the draft lease the prospective tenant was described as "Andre Fiset (carrying on business under Andre Fiset Productions)", although at the time Fiset had a full time job working for a third party.

27 Exhibit 1 was never executed. Before a deal with respect to the third floor unit became final, Joe Di Geso showed Fiset a larger unit, Unit 4, on the second floor. Unit 4 had previously been used as a beauty salon (requiring special wiring) and then for light manufacturing (clothes making) in which period as many as 19 or 20 persons worked in the Unit. Mr. Fiset saw that it could be used as a two bedroom apartment or with one room used as an office.

28 Fiset decided to lease Unit 4. The landlords tendered their usual Newsome and Gilbert Limited, Form 1034, printed seven page form of commercial lease (Ex.6), for a term of four years starting December 1, 1989 and with rent of $12,600 for the first year and specified annual rent increases so that in the fourth year the rent was to be $14,700. The tenant was described in the lease as "Andre Fiset (carrying on business as Andre Fiset Productions)". On page 2 appeared the following provision:

> (a) THAT the said demised premises will not, during the said term, be at any time used for any purpose other than that of 'Designer Productions' and related business.

The tenant testified that he did not understand that provision to preclude use of the premises as his residence but only that if he carried on any business at the premises it be only the business described in that clause (a). The landlord, Joe Di Geso, had no clear idea what "Designer Productions" meant. The tenant had worked as a photographer's model and/or fashion model and recognized the possibility of business spin-offs from that activity.

29 The tenant, on reviewing the proffered lease came across Provision 14 of the Schedule of Rules and Regulations appearing as p.6, of seven pages, and said to form part of the lease. Provision 4 states:

> No one will use the leased premises for sleeping apartments or residential purposes.

Such a Schedule is attached to Ex.1, the form of lease that was proffered to Fiset with respect to the unit on the third floor. Fiset has testified, and I believe him, that he always intended to reside in Unit 4 and that before signing the lease for that Unit (Ex.6) he removed the Schedule, page 6, in order to get rid of the above-quoted Provision 14. He also changed the legends at the top of each of the pages of the lease to reflect that the lease, as signed, was a document of five pages, not seven pages, as previously stated in print therein at the top of each page. On the subject of the alteration of the lease Joe Di Geso testified only that he did not, at the time, notice the alterations.

30 When Fiset moved into Unit 4 there was no stove and there was no refrigerator. The landlords never provided them. Fiset installed his own stove and refrigerator.

31 Soon after moving in Fiset carried out extensive alterations. He claims to have spent $10,000 on them, and there was no contrary evidence. He removed fluorescent lights; he partitioned a bedroom out of what had been the living room, or main room, area; he organized the "front" room as an office and installed a glass door and wall at that entranceway. He also caused an outside wall to be insulated. He used a relative of Joe Di Geso to install the insulation. Joe Di Geso, as acknowledged by him at the hearing, supplied dry wall and some other materials for some of those alterations. The other work was obvious and apparent and no secret from the landlord. Fiset asserts that Di Geso must have seen from the layout that all of Unit 4, except the office area at the front, was laid out as for residential use. There was admitted as Ex.2, a sketch of the layout of Unit 4. Di Geso acknowledged that the sketch was generally accurate as a portrayal of the layout. Exhibit 2 shows an office area (labelled "Perfect Word") with an entrance off a short corridor from the main entrance to Unit 4. The short corridor joins a long corridor running off at right angles down one side of the residential part of the Unit. Off the long corridor are rooms or areas labelled "Bedroom 1", "Bedroom 2", "Living Room", "Bathroom" and "Kitchen". The living room area (quite small) and the kitchen area are shown not to have doors.

32 Until June, 1996, relations between the tenant and the landlords were quite good. For some time the tenant was responsible for cleaning his own unit and certain common areas in the building and received a $50 a month credit against his rent for so doing.

33 In 1994, Fiset leased ground floor space in the building in which space, admittedly commercial with no residential component, he operated what he called a "Laundry Lounge", a place where customers could use clothes washer and dryer facilities and consume coffee, espresso, cappuccino and so forth. Fiset had an electronic hook-up that enabled him to monitor the Laundry Lounge from Unit 4. The landlords collected G.S.T. on the rents for the Laundry Lounge. Di Geso made a loan of some $9,000 to Fiset, to enable the latter to equip the Laundry Lounge.

34 There was evidence of dissension and conflict between Fiset and other tenants, or another tenant, involving Fiset's complaints about the barking of a tenant's dog and about dog faeces in the common hallway. Police were called. Charges were laid. According to Fiset the other tenant pleaded guilty to the charges against him. These matters gave rise to a request by Fiset for permission to install a security system in the common hallway. A letter from the landlords' then solicitors to Fiset stated the landlords' refusal to allow a security system in the common areas but stated that the landlord had no objection to the installation of such a system in the tenant's "apartment". There was some evidence that the tenant wanted the security system because he feared acts of vandalism by other tenants. There was evidence that Fiset was no stranger to controversy and litigation.

35 In a rather bizarre turn of events in 1994, Fiset, like a busybody, became involved in a dispute between the landlords and another tenant, Alastair Kelly. It seems that Mr. Kelly in January, 1994, while a tenant of Unit 3 at 531 Yonge Street filed an application under s.30 of the *Rent Control Act*, 1992 to determine if the landlords had charged him excess rent. The application was heard on April 19, May 19 and June 27, 1994. For whatever reason, Fiset was very active in assisting the landlords, specifically on the issue of whether or not the tenancy was a residential tenancy or, as the landlord contended, a commercial tenancy to which rent control did not apply. It is clear from documents admitted as exhibits before me that Fiset played an active role in helping the landlords to satisfy the Rent Officer that Kelly's tenancy of Unit 3 was a commercial one. Fiset had sent to the then solicitors for the landlords an outline of a suggested question and answer scenario to be used in the cross-examination of Alastair Kelly. Fiset also provided an affidavit in which, after setting forth chapter and verse, he deposed that he, Fiset, was a commercial tenant of Unit 4 and that Kelly was every bit as much a commercial tenant as he was. Fiset now says that in those days he was wholly unfamiliar with Part IV of the *Landlord and Tenant Act* and so had no awareness of s.80 of that *Act* or of any of the case law on the issue of whether mixed-use demised premises were residential premises so as to be subject to Part IV of the *Act*. Counsel for the landlords obviously enjoyed cross-examining Fiset on his strong statements made in his affidavit filed in respect of Alastair Kelly's rent control application. I am persuaded and do find, however, that Fiset in 1994 was as ignorant of the law of residential tenancies in Ontario as he now claims to have been. That did not stop him from weighing in heavily in the Kelly matter. Some words of Hamlet, spoken right after he had killed Polonius, come to mind. Perhaps Fiset's participation was motivated by gratitude for the loan of $9,000.

36 It also emerged during the cross-examination of Mr. Fiset that he had made three complaints to the Law Society of Upper Canada about other lawyers, relating to matters not directly in issue here. With respect to this matter he has threatened to report Mr. Glass to the Law Society, and at the hearing gave as his reason the fact that Mr. Glass continues to assert that the lease of Unit 4 is a commercial lease and further that Mr. Glass refused to listen to him when he advanced arguments to the contrary. It also emerged at the hearing that Mr. Fiset had commenced a law suit in respect of an article appearing in the publication "Extra" wherein it was stated that Mr. Fiset "spends part of every day on litigation". I make no finding as to the last item. Mr. Glass brought out this evidence to counter Mr. Fiset's assertions that he was a naive person unaccustomed to legal matters. There was also uncontradicted evidence that Fiset had previously carried on business through a private corporation incorporated for him, and that he had engaged in litigation about alleged breaches of his copyright. All this was said by Mr. Glass to have been evoked to show that when Fiset signed a commercial lease form he knew what he was doing. I am not persuaded that before 1996 Fiset knew anything about Part IV of the *Act*. There is uncontradicted evidence from Fiset, which I accept, to the effect that Fiset never carried on in Unit 4 any business of the sort or sorts that might reasonably be thought to be associated with the business name, "Andre Fiset Productions".

37 The business that was carried on in Unit 4 was carried on under the name "Perfect Word". An illuminated sign, in the form of a tall (approximately six feet tall) rectangular box was affixed to the outside wall of the building at the second floor level above the sidewalk on Yonge Street (as shown in the photograph admitted as Ex.20C). The sign bears the name "Perfect Word" and indicates the nature of the business by setting forth the words: "RESUMES", "WORD PROCESSING", "COPIES", "FAX" and "LASER PRINTING". A second sign, much smaller, bearing the words "PERFECT WORD", in the same stylized get-up, was one of two signs affixed to the street level glass door leading to the stairs to the second floor of the building (as shown in the photograph admitted as Ex.20A). A third outside sign (also shown in Ex.20A) is shown attached to the building at street level; it is approximately four feet tall by approximately two feet wide, contains the name "Perfect Word" and indicates, again, the services offered. Inside the building, at the second floor level, inside the entrance to Unit 4 the words "Perfect Word", in the usual stylized get-up, are painted on a wall of the unit so as to be visible whether the glass door to the unit is open or closed. (See Ex.20B, and for the location see the sketch admitted as Ex.2).

38 The professionalism and impressiveness of the tenant's signage is indicative of a serious commitment to the business of "Perfect Word" carried on Unit 4, albeit that the tenant testified, without challenge, that the business never grossed more than $30,000 a year.

39 The tenant's outside signage gave rise to a complaint by at least one of the landlords' first floor commercial tenants. I suspect that it involved the street level sign referred to above, which I understand used to be a free standing sandwich board sign placed on the sidewalk. The landlords successfully mediated the dispute. I suspect, but lacked enough evidence to find, that the result of the mediation was that one half of the sandwich board sign was affixed to the outside of the building at street level and now appears there, as shown in Ex.20A.

The Beginning of the Controversy

40 In June, 1996 when the landlords were in Europe on a two month vacation, there was a fire in the restaurant immediately below Unit 4, caused by construction workers who were repairing a cookstove hood. There was some smoke damage in Unit 4, and the firemen left a considerable mess in the stairway and in the common corridor leading to Unit 4. In the absence of the landlords their son and daughter were supposed to be looking after the building. Neither came around to deal with the debris in the stairway and corridor; nor did they send anyone to deal with it; nor did they contact Fiset or, he says, the other affected tenants. After making some unanswered telephone calls to the son, Fiset became frustrated and angry. He called municipal authorities who inspected the building, finding only mild smoke damage in Unit 4, but also, whether then or soon after, issuing a work order in respect of various deficiencies in the building. Fiset continued his protests to the son — and may have withheld rent in an attempt to enforce attention to his plight. Acting through the landlords' long-time solicitors (not Mr. Glass or any of his associates), the son caused a notice of termination to be served upon Fiset, in a form appropriate for the termination of a commercial tenancy, where the fixed term of the tenancy had elapsed and, by the terms of the tenancy agreement, the tenant was a tenant from month to month.

41 Mr. Fiset did not vacate the premises. Instead he began to inform himself as to the law of residential tenancies in Ontario. Thenceforth he took the position that he was, and at all material times had been, a tenant of residential premises subject to Part IV of the *Act*. He sent letters to the landlords' solicitors asserting his rights as a residential tenant and threatening dire consequences if his possession was interfered with.

42 The landlords' son, while Joe Di Geso was still in Europe, resorted to a doltish form of self-help, bringing a ghetto blaster into his father's office in the building (which office was separated from the Perfect Word office by a partition wall through which ordinary conversations could be heard). The son turned the ghetto blaster up to a very high volume and left it on all day. This happened on more than one day. This stupid, harassing behaviour ceased only when there was intervention by the police. This thuggish behaviour is contrary to a major policy of Part IV of the *Act*, which is that possession of residential premises is to be recovered only under the authority of a writ of possession and not by any form of self-help. Even if the premises were not subject to Part IV, the law does not countenance that form of self-help.

43 At various times after the police stopped the use of the ghetto blaster, the landlords and their then solicitors tried other expedients to get Fiset out of Unit 4. At one stage they purported to terminate Fiset's tenancy on the ground that Unit 4 was needed for occupancy by Joe Di Geso's son. In a proper case that is a ground for the termination, under Part IV, of a residential tenancy, but it may not apply where the building contains more than six units. Moreover, the approach appears to accept the tenant's contention that Unit 4 was a residential tenancy. There was also evidence from Fiset at the hearing to the effect that, at that time, there was a vacant unit that could have been used by the son. Nothing came of that initiative by the landlords.

44 There were also served on behalf of the landlords a Form 4 and a Form 6 under Part IV of the *Act*, they being forms relating to the termination of a *residential* tenancy — although the earlier and the later, and the current, position of the landlords was and is that the tenancy in question was and is a commercial one (with respect to which such forms would be unnecessary and inappropriate).

45 In the face of what he characterized as continuing harassment Fiset took to withholding his rent for Unit 4.

46 The landlords, I believe by then under the guidance of Mr. Glass, served another (commercial) notice to quit and, I believe, a notice from their bailiff. Fiset sent a furious letter to the bailiffs asserting that his tenancy was residential and that they would be breaking the law and subject to litigation if they moved to put him out of his unit. The bailiffs must have persisted, because by February 20, 1997, the tenant obtained the above mentioned *ex parte* order of Kiteley J., which order *restored* him to possession of the unit. I note that the material filed on that *ex parte* motion did not disclose that at that time the tenant was seriously in arrears as to his rent. It is a very serious wrong to approach a court for an *ex parte* order and not to disclose to the court all material facts. It may be that the court would have held that notwithstanding the arrears of rent the same order should issue — because the tenancy *might* be residential and possession of residential leasehold premises cannot be recovered except by order of the court — but clearly the fact of the arrears should have been made known to the judge so that she could decide whether it made any difference to her view of the matter. It is no justification that the tenant, as he says, had the money to pay the arrears. Costs of the motion were reserved to me. This non-disclosure will result, at the least, in an order that the tenant recover no costs of his successful motion.

47 Before proceeding, there is one more factual element I wish to record. Over the objections of Mr. Glass, I admitted the oral evidence of Mr. Ted Young, a tenant of Unit 1 at 531 Yonge Street, who testified that he and one other person live in Unit 1, which he said was a two bedroom apartment with a large livingroom/diningroom area, a bathroom and a kitchen. Mr. Young is an artist and a designer and does no manufacturing in Unit 1. From the beginning he intended to use the unit as his residence, with some of it being a work (design) space. At the landlords' insistence he signed a commercial lease form although his main purpose was to use Unit 1 as a place to live. No specific part of the unit is designated as a work space. Nothing is set up for the reception of customers; no employees report there for work. Mr. Young testified, credibly, that he discussed with Joe Di Geso his plans to live in the unit and further that Mr. Di Geso has been in Unit 1 since he, Young, moved in and has seen the use being made of the unit and has consented to certain alterations made by Young. When it was suggested to Mr. Young that Di

Geso did not know whether Young or anyone else was residing in Unit 1, Young replied that he found that to be surprising. I will go that one better. I find it to be untrue. Di Geso, I find, knew full well that Young was residing in the unit.

48 I take this opportunity to observe that Mr. Young did not unilaterally change the intended use of Unit 1. His actual use was the use he intended all along — and the landlord knew from the beginning that the tenant would be living in the unit. The facts of this case are materially different from those in *Bindex Engineering Corp.*, *supra*. The unit was from the beginning openly used, and known by the landlords to be used, as residential premises. *Bindex Engineering Corp.* is not relevant in such circumstances. Moreover, the business use, such as it was, would not on the 'predominant purpose' test laid down by the majority of the Divisional Court in *Hahn*, be sufficient to bring the tenancy within the exception set forth in para.1(c) of the *Act*. Mr. Young was clearly a residential tenant whose tenancy was subject to Part IV of the *Act*. In those circumstances the fact that the landlords induced Mr. Young to sign a commercial lease form does not have the effect of making the tenancy a commercial one. Such a result is clearly prevented by the provisions of s.80 of the *Act*, to the effect that parties cannot contract out of the provisions of Part IV of the *Act*. Where either the intent is a residential tenancy or the *use* is as a residence, Part IV applies unless the landlord can bring the tenancy within one of the exclusions in the definition of "residential tenancy" in s.1 of the *Act*. Where the tenancy would otherwise meet the criteria for a residential tenancy, the attempt to avoid that result through the use of commercial forms of leases is futile.

Credibility Problems re Joe Di Geso

49 Joe Di Geso was not a persuasive witness. He knew what he wanted and appeared to tailor his evidence in an attempt to attain it. He manifested a selective memory. He irresponsibly sought to distance himself from what was done on his behalf, and on behalf of the other landlord, Rosa Luisi, by his son and by his long-time solicitor.

50 Having been a landlord for a long time, he repeatedly told prospective tenants who were primarily seeking residential accommodation that if they wanted to conduct *any* business in or from the units in question they would have to have a commercial form of lease. That was not a correct statement of the applicable law. There are many professional and business activities that can be carried on, or advanced, in residential premises without those premises losing their characters as residential premises under the *Act*. In *Hahn*, Cory J., of the majority in the Divisional Court, gave a number of examples, including telephone marketing. Other examples, where the predominant purpose was found to be residential, are shown in *Degasper v. Bateman* (1990), 10 R.P.R. (2d) 56 (Ont. Dist. Ct.), and *Dicks v. Maxbel Upholstery Ltd.*, a judgment of Haley D.C.J. released (March 31, 1989), Doc. York 325492/88 (Ont. Dist. Ct.). It was inaccurate and misleading to tell prospective tenants that any form of business activity in the leased premises necessitated the use of a commercial lease. Mr. Di Geso was at best inaccurate and ill-advised but may well have been deliberately manipulative of credulous prospective tenants in this regard.

51 The above discussion of Mr. Young's commercial form of lease with respect to Unit 1 is a case in point. Also relevant is Mr. Di Geso's disbelieved denial that he was aware that Mr. Young was living in Unit 1.

Di Geso Knew Fiset was Living in Unit 4

52 Despite his denials, I find that Di Geso knew from early on that Fiset would be living in Unit 4.

53 Fiset had originally negotiated with respect to another unit, as to which his intention to use the unit as a residence was obvious. Di Geso caused a draft lease to be presented to Fiset, in the usual commercial form typically used by him even when he knew or ought to have known the unit in question would be used primarily, even overwhelmingly, as a residence. In the circumstances, given Di Geso's habitual use of commercial leases even when they were not appropriate, little can turn here on the form of the lease.

54 With respect to Ex.6, the lease of Unit 4, the evidence of Mr. Fiset is more detailed and more persuasive than that of Mr. Di Geso. The latter stated that he had not, until after these proceedings had been commenced, noticed that p.6, and p.7, had been removed from the lease or that the legends at the tops of the remaining pages had been changed to indicate that the lease consisted of five pages in all.

55 Fiset testified that he said to Di Geso that he could not sign a lease containing the above-mentioned Provision 14, set forth on p.6 of the draft lease, and that Di Geso himself removed the last two pages as a means of getting rid of Provision 14. It was Fiset's testimony that the whole discussion of Provision 14, and the removal of page 6 would have made it clear to Di Geso that Fiset intended to live in Unit 4. As to events surrounding the execution of the lease I find Mr. Fiset's testimony to be credible and I find accordingly. Di Geso *knew* that Fiset would be living in Unit 4.

56 That finding is also supported by Di Geso's acknowledgment that alterations were made to Unit 4 at the time Fiset occupied it. Di Geso stated that he provided some drywall and some paint for that purpose. As stated, a relative of Di Geso worked on the insulation, (from inside) of an outside wall of Unit 4. Di Geso's office was adjacent to Unit 4 and he testified that on average he went to that office two or three times a week. It would overstrain credulity to believe that Di Geso when in the building did not pay any attention to the alterations, for which he was supplying some materials, and so did not have knowledge of the layout of the altered Unit 4, a layout from which it would be apparent that residential use of the unit was intended.

57 Mr. Fiset has been a tenant of Unit 4 since 1989. Mr. Di Geso has had an office during all or most of that time, adjacent to Unit 4. The two have had dealings over the years. Fiset did some cleaning in return for a reduction in, or rebate from, his rent. The parties negotiated the Laundry Lounge lease. Di Geso knew that the Laundry Lounge was monitored electronically from Unit 4. The nature of the Laundry Lounge business would make it clear that that business had business hours extending into the evening. If that business was being electronically monitored from Unit 4, it is probable that someone had to be in Unit 4 in the evening hours. That is, at the least, consistent with Fiset living in Unit 4 so as to be on hand for the evening monitoring.

58 Di Geso himself gave evidence of disputes between Fiset and other tenants and of litigation between Fiset and at least one other tenant. I cannot accept that Di Geso can have been involved in those matters, as he necessarily was, without knowing that Fiset was using Unit 4 as a residence.

59 Such knowledge is not determinative of the issue but it does constitute one of several factors distinguishing the facts in this case from those in *Bindex Engineering Corp.*, *supra*.

Bindex Engineering Corp., Distinguished

60 The facts in this case are very different from those in *Bindex Engineering Corp.*, *supra*. In the latter case the landlord of an almost derelict three-storey building, in an area where residential use was found to be contrary to the applicable zoning and land use bylaw, leased parts of the building for use as artists' studios. The physical conditions were very rudimentary. Initially none of the tenants lived in the studios. The landlord was out of the country for long periods. On their own initiatives at least three of the tenants (those involved in that litigation) carried out significant renovations and began to use their studios for residential purposes. One of those tenants ceased using his leased premises as a studio and continued to occupy the premises solely as a residence. There was no area segregated in any of the units for use only for artistic production - and therefore it was held that the residential portions could not be said to be "attached" within the meaning of that term in para.1(c) of the *Act*. A main ground for the decision of Davidson D.C.J. was that the tenancies were not originally residential tenancies and in the circumstances the tenants should not be allowed to unilaterally change the status of their units, particularly to a use that was illegal under the zoning bylaw. It was held that the leased units were not residential tenancies.

61 In this case the zoning bylaw permits residential use and commercial use, and so there is no question of illegality. Moreover, there was no *change* in the use in the sense of a later introduction of a residential use. I have found that Fiset intended from the beginning to reside in the unit and I have found that Di Geso knew of that intention from the beginning, and knew, virtually from the beginning, that Fiset was in fact living in Unit 4. That last fact is alone enough to distinguish this case in material ways from *Bindex Engineering Corp.*.

62 There is therefore no question here of a unilateral conversion of the premises to residential use. The conversion in *Bindex Engineering Corp.* was a change in the actual use of the leased premises. Here the actual use did not change. The attempt by the defence to base such a conversion upon the fact that the tenant signed a commercial lease document could not succeed in bringing this case within the reasoning in *Bindex Engineering Corp.*.

Rent Officer's Dismissal of Application of Alastair Kelly under the Rent Control Act, 1992

63 In 1994, Alastair Kelly, the tenant of Unit 3 in the building, brought an application under the *Rent Control Act, 1992* for an order declaring that the landlords had been charging excessive rent for Unit 3. The application was dismissed on the basis that the tribunal did not have jurisdiction to deal with the application because its jurisdiction was confined to determining the proper rent for *residential* premises, and because the Rent Officer found the premises not to be residential premises.

64 This decision was urged upon me by counsel for the landlords, and it is for that reason that I comment upon it. I find it to be a problematic decision. It recites, but makes no finding with respect to, evidence that, if believed, would lead to a decision contrary to that arrived at. It quotes and appears to favour the minority judgment in *Hahn*, whereas the majority judgment is applicable and binding. It finds or assumes a unilateral change of use, as in *Bindex Engineering Corp.*, *supra*, in face of evidence to the effect that the tenant first leased Unit 3, as a residence, at a time when he was the tenant of Unit 4 and was operating a dress manufacturing business in the latter unit. The tenant testified that he did not use Unit 3 for business purposes, except for the inevitable clean-up matters after bankruptcy forced him to discontinue his business operations in Unit 4 and after the lease of Unit 4 was surrendered. A co-tenant testified that in the period he lived with Kelly in Unit 3, Kelly did not carry on any manufacturing there and that the only sewing he did there was for friends. There was also evidence that Kelly started a new clothing making business but that it was carried on from an address on Richmond Street. None of this evidence, although recited, was expressly faced up to. The decision, in my opinion, would not have survived a judicial review. The decision appeared to be strongly influenced by the fact that the lease signed by Kelly was a commercial lease. In this regard see my comments above about Mr. Young's commercial lease document with respect to Unit 1.

Form of Lease Not Determinative

65 The fact that counsel for the landlords urges the Rent Officer's decision upon me leads me to suspect that counsel does not fully appreciate the significance of s.80 of the *Act* where it states in effect that the parties cannot contract out of Part IV of the *Act*.

66 Over and over again counsel, in cross-examining the tenant, put to him clauses from the lease (Ex.6) that were consistent only with a commercial lease. That was hardly surprising: they were *in a* commercial form of lease! But if the intent was to occupy the premises as residential premises *or* if in fact the premises were occupied and, as I have found, known to be occupied, as residential premises, it does not matter what is said in the lease documents. The provisions in the lease that were contrary to the provisions of Part IV of the *Act* would be of no force and effect unless the landlords could bring the tenancy within the para.1(c) exclusion. This would apply *a fortiori* where the evidence shows that the landlords were in the habit of requiring commercial forms of leases even where they knew, or clearly ought to have known, that the predominant use of the leased premises was as a residence.

67 This means that the issues raised on behalf of the landlords based upon (i) the form of the lease, (ii) the alleged ignorance of the landlord of the fact that Fiset was living in Unit 4, and (iii) the alleged unilateral conversion of the use of Unit 4 (as in *Bindex Engineering Corp.*, *supra*, are all unsuccessful and must be decided against the landlord.

68 That leaves the issue of whether the landlords can bring themselves within the exception set forth in para. 1(c) of the *Act*, and to that I now turn.

Whether the Tenancy Falls within para.1(c) of the Act

69 Unit 4 was used by Fiset for residential purposes. The burden is on the landlords to establish on a balance of probabilities that the tenancy is within the exception set forth in para.1(c) of the *Act*.

70 I have already discounted the form of the lease document signed. It is not irrelevant but it is not determinative.

71 The key words in the para.1(c) exclusion are:

> ... but does not include,

(c) premises occupied for business or agricultural purposes with living accommodation attached under a single lease...

An obvious example of an excluded tenancy with respect to "agricultural purposes" would be the lease of a farm, including the farm house, under a single lease, assuming that the farm house was used or intended to be used by the tenant for his own residential purposes. Another clear example of an excluded tenancy is referred to by Cory J. in *Hahn*, at p.691, where he speaks of the example given in Lamont: *Residential Tenancies*, 3 rd ed. (1978) at pp.6 and 7, the example being a single lease covering retail store premises with attached living accommodation. Cory J. found that such an arrangement would clearly fall within the definition of premises occupied for business purposes with living accommodation attached. I respectfully adopt that opinion with the caveat that the residential accommodation would, on the plain wording of para.1(c) cease to be within the exclusion if sublet to or otherwise exclusively occupied by a person having nothing to do with the business carried on in the retail store.

72 In *Hahn*, Cory J., at p.691, also cites the example of residential premises occupied by an engineering and his family, where one room is used by the engineer as a study and a place to deal with his mail, stating that in such circumstances the tenancy would clearly not be within the exclusion. It is noted that in that example there was no clear segregation of the part of the demised premises where business was, or was proposed to be, conducted. Moreover, the example involved no "walk-in trade". And the lease in question was a residential form of tenancy agreement.

73 It is clear that not every case of a combined business and residential use of leased premises will be within the exclusion provided for in para.1(c) of the *Act*. That was established in *Hahn* where the majority, finding a combined use, went on to find that the tenancy was not within the exclusion. That issue was obviously canvassed in the case because the minority judgment was to the opposite effect.

74 In this case, as shown by Ex.2, the part of the demised premises set up for use for residential purposes was much larger than the part set up for commercial use. That is a relevant factor but in my opinion is not determinative. The "predominant purpose" referred to in *Hahn* is not primarily a matter of the dimensions of the areas devoted to the respective uses.

75 A number of factors tend to support the contention of the tenant that his tenancy of Unit 4 should be held to be a residential tenancy not within the exclusion provided for in para.1(c):

(a) most of the area of the unit was given over to residential use;

(b) in approaching the landlord in the first place the tenant made it clear that he was seeking residential accommodation;

(c) at the time the lease of Unit 4 was entered into the tenant had a full time job, to be performed elsewhere;

(d) the landlords, in referring in the lease to 'Andre Fiset Productions', had no idea what sort of activities were, or would be, carried on under that name, which suggests that the use of a commercial form of lease may have been a colourable device calculated to impress a mortgagee or banker, or to allow unregulated rent increases or to avoid the tenant protection provisions of Part IV of the *Act*;

(e) the landlords did not until very late in the process seriously seek to recover from the tenant G.S.T. in respect of the rent for Unit 4, although from 1994 on the landlords claimed, and received from this tenant, G.S.T. in respect of the rentals for the Laundry Lounge in the same building (although Mr. Di Geso did testify that he had often asked Mr. Fiset to pay him G.S.T. in respect of Unit 4); and

(f) no employee with authority to answer the phone reported for work at Unit 4, although a bookkeeper often attended there, as did other contract workers from time to time.

76 Factors tending to support the contention of the landlords that the tenancy of Unit 4 is within the para.1(c) exclusion include the following:

1) The fact of the tenant's intention to live in Unit 4, the fact of his living there and the fact that, as I have found, the landlord knew of such intention and such use, (while very damaging to the landlords' case based on the other branch of the defence, as dealt with above) do not militate against the landlords on the question of whether the residential use of Unit 4 is within the para.1(c) exclusion — because, as was made clear by Hayes J. in *Foster v. Lewkowicz*, *supra*, para.1(c) assumes that the tenant is living in the demised premises and goes on to exclude certain residentially occupied premises from the definition of 'residential premises' (with the result that Part IV of the *Act* does not apply to them).

2) Although the tenant altered the form of commercial lease proffered by the landlords, he did so only to remove provisions that would have prohibited him from living in Unit 4, and so the tenant's position could reasonably be construed as an agreement that the premises were leased as commercial premises in which he was allowed to live. Although, for reasons stated above, the form of the lease document cannot be determinative (having regard to the existence of s.80 of the *Act*) it does not follow that the form of the lease is always of no account.

3) Prior to the leasing of Unit 4 to Fiset the landlords were in possession of a Unit 4 that had for many years been occupied for commercial purposes. Expensive plumbing and electrical installations had been made to permit the use of Unit 4 as a beauty salon, which use lasted for years. Subsequently Unit 4 was used for the making of clothing and at times as many as nineteen (19) employees reported there for work. The unit is on the second floor of the building and the landlords, who clearly preferred commercial tenants, had a history of being able to rent out Unit 4 for unquestionably commercial use. Arguably the landlords would have insisted, legitimately in this case, upon a commercial tenancy.

4) In 1994, and indeed until he received a notice of termination in June or July, 1996, the tenant was expressly of the view that he was a commercial tenant.

5) Importantly, there is a clearly defined commercial area in the demised premises to which the clearly residential part of the demised premises can be said to be 'attached' within the meaning of para.1(c). The 'attachment' factor was stressed by Reid J. in *Hahn*, and was also referred to by Cory J. in that case, both stating the **absence** of attachment, to an area clearly commercial, to be a factor militating against inclusion in para.1(c). Here, there is a clearly demarcated commercial area to which the residential area (which may be taken as wholly residential) is 'attached'.

6) A factor showing the importance of the commercial area in the whole picture is the significant signage, with its obvious purpose of attracting walk-in trade to the business, a type of trade that would require, or strongly suggest the need for continuous servicing of the office area, for which nearby or adjoining residence was an obvious convenience.

7) Since 1994 the operation by Mr. Fiset of the Laundry Lounge in the same building and the monitoring of that other business, electronically, from Unit 4, increased the business importance of Unit 4 — although that other use related to a business in premises under a different lease, and so the residential portions of Unit 4 cannot be said to have been both attached **and** under the same lease as the Laundry Lounge business.

8) The original use was for a term of four years, an unusually long term, for a modern lease of a residential apartment.

9) The original lease called for annual increases in the rent for Unit 4, a provision inconsistent with a residential tenancy, where increases in rent were subject to rent control (In this case this factor and the one referred to as item 8 above have to be discounted owing to the practice of the landlords of using commercial lease forms, and commercial-type rent increases and periods of tenancy whether appropriate or not).

10) Although in 1989 when the lease of Unit 4 (Ex.6) was entered into the Perfect Word business was not referred to, and probably was not planned for by the tenant, that business was established well before the expiry of the initial four year lease term, and was obviously in existence well before the commencement of the tenancy from month to month upon the expiry of the initial term.

> 11) The landlord did not provide either a stove or a refrigerator for use by Mr. Fiset in Unit 4. The tenant supplied his own without anything being said about the subject in the lease (Ex.6). It is normal for a rented residential apartment to have a stove and a refrigerator provided by the landlord. One would expect the lease to cover the point if the landlord was not to provide them. This factor is not determinative but it points away from a regular residential tenancy of Unit 4.

Discussion of 'Predominant Purpose'

77 The 'predominant purpose' test was introduced by the majority judgment in *Hahn*. That was a case where an eight room townhouse was leased under a residential form of tenancy agreement which included a covenant that the premises would be occupied as a private dwelling house. The lease was to "Robert H. Hahn *and family*". One room was used by Robert H. Hahn for his music publishing business. There was no signage. There was no walk-in trade and there was no clearly defined or segregated commercial area to which the residential accommodation could be said to be "attached". It was held that the rented premises were residential premises to which the exclusion of para.1(c) of the *Act* did not apply because the business purposes did not predominate.

78 The facts were essentially the same in *Dicks v. Maxbel Upholstery Ltd.*, *supra*, where the decision in *Hahn* was applied. Again the lease was a residential lease, there was no signage, no walk-in trade, few customers, and a small part of the two floor unit was used for the tenant's couturier and costume making activities, although the tenant also worked elsewhere. To the same effect was my judgment in *Matulic v. Poizner* (June 30, 1994), Doc. Toronto L23999/91 (Ont. Gen. Div.).

79 In *Degasper v. Bateman*, *supra*, although the offer to lease contemplated a commercial lease of premises for use as a "general office and writing studio facility", no lease was executed and the tenant, who had deleted from the draft lease provisions that would have prohibited residential use of the premises, established her residence in the premises. Hoilett D.C.J. found that the photographs admitted as exhibits showed premises that looked like a residence. He also found that the tenant had no employees, saw no clients on the premises and that there was not a clearly segregated or demarcated commercial area to which the residential parts of the premises could be said to be attached. He applied the predominant purpose test from *Hahn*and held the premises not to be within what is now the para.1(c) exclusion.

80 In all of the cases referred to above, there was no clearly demarcated or segregated area to which the residential parts of the demised premises could be said to be attached. In all except *Degasper v. Bateman* the tenancy agreement was in the form for a residential tenancy.

81 It appears to me that the predominant purpose test is most appropriate where the demised premises appear to be mainly residential in use and where there is not a clearly segregated area of the demised premises to which the public is invited to come.

Determination

82 Here there is a clearly demarcated area to which the public, and moreover walk-in trade, is clearly invited to come. No residential use is expected to be made of that area, nor is there any evidence of such a use.

83 The residential use of the segregated residential area of Unit 4 is not only predominant, it is total. I do not accept the evidence of Joe Di Geso stating that he saw commercial use of the residential part of Unit 4, but giving no details at all. The residential area, while larger than the commercial area, can be said to be "attached" to the commercial area, as contemplated by para.1(c) of the *Act*.

84 In the light of the foregoing and after consideration of the above-mentioned factors I find that the landlords have met the burden of establishing that the premises here in question are within the exclusion provided for in para.1(c) of the *Act* and therefor that Part IV of the *Act* does not apply to Mr. Fiset's tenancy of Unit 4. A judgment to that effect will issue.

85 That also means that the tenant's application for punitive damages for the wrongful termination of a residential tenancy is dismissed.

86 I observe that the amounts of punitive damages claimed by the tenant were substantially in excess of the amounts traditionally awarded where punitive damages are awarded with reference to Part IV of the *Act*.

Costs

87 Acknowledging that costs usually follow the event, and that I am unaware of any settlement offers that may have been made, I state that, subject to a different result that may obtain if there were one or more settlement offers, this is a case where in my view there should be no order as to costs.

88 I deprive the successful landlords of costs for four reasons; namely:

> 1) to reflect severe disapproval of the crude and harassing tactics of the landlords' son, for whom both landlords are responsible, in his attempts to drive the tenant from the premises;
>
> 2) to reflect censure of Joe Di Geso's mendacious attempt convince the court that he had no idea that Mr. Fiset was living in Unit 4; and
>
> 3) to reflect the waste of the court's time in the consideration of the problematic decision of the Rent Officer in respect of Alastair Kelly's tenancy of Unit 3 where an important part of the decision was based on the wilful and manipulative insistence by the landlords upon the use of commercial lease forms in circumstances in which, as people in the rental business, they clearly should have known that commercial leases were inappropriate; and
>
> 4) to reflect the waste of the court's time in relation to the arguments based on *Bindex Engineering Corp.* when this case involved no wilful change in the actual use of the demised premises, and the alleged change in use was based on Di Geso's mendacious assertion that he did not know that Fiset was using part of Unit 4 for residential purposes from the beginning of his tenancy.

89 I recognize that the first of the above reasons does not relate to the conduct of this proceeding as such. It was conduct that could have been visited with a modest award of punitive damages and/or with a moderate abatement of rent (moderate because the bad conduct was not of long duration).

90 Had the tenant been successful I would have reduced or eliminated any cost award in favour of the tenant because of the egregious underestimation of the time taken for the hearing, and because of the belated withdrawal of claims for ordinary damages, which imposed upon the landlords the burden of preparing to defend claims that were belatedly withdrawn.

91 If there were relevant offers of settlement I may be spoken to to arrange for submissions as to costs.

Application dismissed.