Docket: 2000-4673(IT)G

BETWEEN:

LES PRODUITS POUR TOITURES FRANSYL LTÉE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 13 and 14, 2004, at Montréal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Serge Fournier
Counsel for the Respondent:	Anne Poirier

JUDGMENT

The appeal against the assessment under the *Income Tax Act* in respect of the taxation year ending on May 31, 1995, is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Edmunston, New Brunswick, this 31st day of March 2005.

"François Angers"

Angers J.

Translation certified true
on this 15th day of May 2006
Monica F. Chamberlain, Reviser

Citation: 2005TCC122
Date: 20050331
Docket: 2000-4673(IT)G

BETWEEN:

LES PRODUITS POUR TOITURES FRANSYL LTÉE,
Appellant,

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REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from a reassessment established on May 17, 1999, for the taxation year ending on May 31, 1995. The Appellant waived his right to invoke the limitation of the normal reassessment period, which occurred on November 19, 1998. Les Produits pour Toitures Fransyl ltée (hereinafter "Fransyl") claimed rental expenses in the amount of $1,865,726 for the taxation year at issue. The Minister of National Revenue (the "Minister") denied this amount and established the expenses at $545,525 on the grounds that the amount claimed was not reasonable in the circumstances within the meaning of Section 67 of the *Income Tax Act* (the Act).

[2] The rental expenses claimed by Fransyl that are at issue in this case pertain to three buildings located at 671 to 698 Leveillé St., in Terrebonne ("Leveillé St."), at 8650 Le Creusot St. in Ville St-Léonard ("Le Creusot") and at 3015 Francis-Hugues St. in Laval ("Francis-Hugues"). The buildings on Leveillé and Le Creusot Streets, for the purposes of the 1994, 1995 and 1996 taxation years belonged to 2859-2699 Québec Inc. (hereinafter "2699") and the Francis-Hugues building, during the same period, belonged to 2859-2996 Québec Inc. (hereinafter "2996"). It is admitted that the Appellant and 2699 and 2996 are related corporations within the meaning of the Act.

[3] It was also admitted by Fransyl that the rental expenses that it claimed during the year preceding the year at issue, during the year at issue and during the year subsequent to the year at issue amounted to $669,000, $1,865,726 and $609,000 respectively. At issue in this case is thus this increase in rent in 1995.

[4] Fransyl was established in 1982. Its activities at the time were the sale of roofing materials and insulation products. It set up its operations in 8610 Le Creusot Street. In September 1983, J.C.M. and Associates (hereinafter "J.C.M.") a general partnership, the partners of which are the brothers Jean Claude, Léo Guy, Jocelyn and Régis Morrissette, acquired 8650 Le Creusot Street and Fransyl has rented this building since then. Jean-Claude Morrissette has from the outset been the President and Chief Executive Officer of Fransyl. His brothers and he were shareholders until 1992. He was the only witness to testify for the Appellant. According to him, the new location was strategic because of its proximity to their old establishment and to Métropolitain Boulevard in the east end of Montréal. Fransyl expanded significantly over the years with the result that its activities in 1992 were divided in-house into six categories and gross sales were assigned to each category.

Le Creusot

[5] Le Creusot is a building of 15,000 square feet with an outside yard measuring approximately 10,000 to 15,000 square feet. Until 1985, it was Fransyl's only commercial property. The building has undergone alterations over the years. According to Jean-Claude Morrissette, it is the "nerve centre" of Fransyl’s activities. All sales and marketing activities are handled from Le Creusot. There is a lot of office space for the salesmen and today almost 35 employees work there. The outside yard serves as a warehouse; it contains quite substantial amounts of stock. Customers can go there and pick up their orders.

[6] The lease on this property was signed on May 4, 1983. It had a term of three years. The rent was $151,200 for the duration of the lease (i.e., $50,400 per year) plus an annual rent premium equal to 1% of Fransyl's gross sales, plus land taxes. Even though the lease did not include a renewal clause, it was renewed on May 1, 1986, for a one-year period, and similarly thereafter until April 1995. On June 4, 1987, changes were made with the result that the rent increased to $153,000 for three years (even though this was a one-year renewal), plus 1% of the sales of roofing materials only, plus land taxes. Beginning on July 1, 1991, renewals were signed by 2699, which became the owner of this building in 1991. The renewal for the period from May 1, 1993 to April 30, 1994, stipulates the same rent, but the 1%

premium is calculated according to the sales of divisions 1 and 4 of Fransyl. At the time of the renewal for the period from May 1, 1994 to April 30, 1995, the percentage of gross sales of divisions 1 and 4 climbed to 7% and 6% respectively.

[7] An expert's report filed by the Respondent sets the fair rental market value of this building at $50,875. This result was obtained by using the parity technique as the evaluation method. The leases used for comparison purposes use a hypernet rent fixed per square foot, net net net, in other words, the tenant assumes all the operating costs. Rents in industrial areas have terms varying from 3 to 10 years.

Leveillé Street

[8] In 1986, J.C.M. acquired the building on Leveillé Street. The building consisted of approximately 60,000 square feet on a large lot. The four brothers bought equipment used in the manufacture of expanded polystyrene. This was a major investment, requiring an explosion-proof building, equipped with good ventilation and a superior quality source of energy. All these facilities were completed in July 1986. The product manufactured is marketed under the name "Izolon". According to Mr. Morrissette, it is the highest performing, most comprehensively digitized and most mechanized plant in North America; its efficiency rating was 25% to 30% greater than that of other factories.

[9] All these facilities also resulted in additional costs to meet the requirements of the insurers. The number of sprinklers had to be doubled and water pumps installed to provide a sufficient flow in the event of an emergency. The cost was increased by a temporary insurance rider. No supporting documentation was tabled in evidence but according to the witness, Mr. Morrissette, the total cost was between $300,000 and $400,000.

[10] In 1987, J.C.M. doubled the size of the building with the aim of using it for longer-term storage of their product, Izolon, and the other roofing and insulation materials. That allowed Fransyl to store and purchase stocks at a better price during the slow periods. In 1988, J.C.M. built another 20,000 square feet building south of Leveillé, at 655 Leveillé St., which is used by the IPM division to manufacture modular slope insulation, a drain system made by Fransyl. During the years 1993, 1994 and 1995, an electrical entry point had to be installed by Hydro-Québec and in 1998 the boilers had to be increased to meet Fransyl's energy requirements. In 1993 and 1994, Fransyl was using 700,000 square feet of land on Leveillé Street. According to Mr. Morrissette, in 1994, the inventory on the site

was worth $7 to $8 million, including 50 to 75 trucks, trailers, cranes and an enormous quantity of asphalt, wood fibre and other shingles.

[11] According to the expert for the Respondent, this is a site measuring 286,094 square feet on which there is a building measuring 124,000 square feet. The rental market value is $3.25 hypernet per square foot, which gives a rent of $403,130. The industrial park in which the building is located is close to the main expressways. It is interesting to note that, on January 22, 1998, a new lease was concluded by Fransyl and the "Réjeanjo Corporation" the new owner of Leveillé and a company linked to Fransyl. The annual base rent was $299,400, with no premium based on Fransyl's sales.

[12] The first lease for Leveillé was signed by J.C.M. and Fransyl on August 3, 1987, for a duration of 5 years, at a price of $29,000 a month, plus land taxes applicable to the building, with provision for an annual increase equal to the Statistics Canada rate of inflation. The lease includes no renewal clause and states that Fransyl is responsible for paying such operating expenses as electricity, heating, insurance, etc. The rent must be paid monthly and there is provision for readjustment at the end of each year, in August. A clause stipulates that the lease is subordinated to the hypothec, such that any new owner must respect the lease conditions. On September 21, 1990, the same parties signed an addendum which provided for the same fixed monthly rent plus land taxes and, beginning on September 1, 1990, the addition of an annual premium equal to 1% of the gross sales of Fransyl, Izolon sales division, namely division 2. The lease was renewed in August 1992 for an additional year subject to the same conditions, except that the new owner was now 2699. A second renewal in August 1993 shows a monthly rent of $29,000 for 671 Leveillé and $9,000 for 669 Leveillé, plus a premium of not less than 5% of division 2 sales. At the next renewal, namely that for the year at issue, the monthly rent of the two buildings remained the same, except for the additional premium of 12% of the sales of Fransyl's division 2.

Francis-Hugues

[13] Until 1991, the Francis-Hugues building belonged to a general partnership, the partners of which were the brothers Léo Guy, Jocelyn and Régis Morrissette. According to Mr. Morrissette, this is a building comprising approximately 8,000 square feet that is used to store surplus stocks, especially purchases made during the winter. No lease was produced for this location, except for an acknowledgement that a percentage of the sales was paid as a premium in addition to the basic rent.

[14] The expert for the Respondent described it as a building of 10,170 square feet on a lot measuring 41,839 square feet, which is used as a mechanical repair shop and for offices. He estimates its rental market value at $40,680 per year on a hypernet basis. There is no history of rental conditions agreed to by the parties. Corporation 2996 acquired ownership in 1991.

[15] From the outset, Fransyl has seen its turnover increase considerably. In addition, it has over the years opened offices in Quebec City, Ottawa and New Brunswick. It has added to the range of its activities the sale of equipment and tools and the manufacture of flower boxes. Total sales for 2003 exceeded $40 million.

[16] The financial situation of the Morrissette brothers, however, did not flourish commensurately. In addition to investing in real estate, they decided to diversify into other areas. During the years 1988, 1989 and 1990, they accordingly invested money and guaranteed, both personally and through Fransyl, the financing for several projects. According to Mr. Morrissette, these were major investments amounting to several million dollars. In 1988, they built the "Complexe du Parc" at St-Félicien on Lac St-Jean, and in 1989, the Hôtel du Jardin at the same location. During the same year, they invested in the Motel du Canada, near Drummondville, Quebec. Without establishing the precise amount of the investments of the Morrissette brothers and the percentage of funding in relation to the cost of the projects, suffice it to say that, according to Mr. Morrissette, the cost of these three projects exceeded $16 million.

[17] According to Mr. Morrissette, the problems began in 1990. High interest rates, cost overruns on one of the projects, a strike by employees and difficult operating conditions all contributed to making the profitability of these projects difficult, if not impossible, to achieve. Fransyl was accordingly informed in April 1991 that the loans granted to it by its financial institution would not be renewed. The bank nonetheless agreed to postpone implementation of this refusal until October 31, 1991. The credit line was ultimately reduced by half in early 1992, although it was subsequently negotiated.

[18] Faced with all these financial problems, the Morrissette brothers purchased the interests of a certain Roger Ménard and subsequently undertook a major reorganization of the company. The presentation of this reorganization by the auditor for the Respondent, which appears at tab 6 of Exhibit I-1, is not disputed by Fransyl. Jean Claude Morrissette specified that this reorganization was not planned

in order to allow him and his brothers to go bankrupt, contrary to the claims of the auditor.

[19] The Morrissette brothers were accordingly equal shareholders of Fransyl and were also shareholders in a corporation called Placement Promega Inc. ("Promega"). The witness Jean Claude Morrissette holds 91% of the stock in this company and his brothers Léo Guy, Régis and Jocelyn each have 3%. They accordingly formed a Canadian numbered company, 2713306 Canada Inc. ("2713306"), the shares of which were 80% held by Jean Claude Morrissette and 6.66% by each of the other three brothers. Corporation 2713306 subsequently became the 100% owner of the shares of Fransyl and Promega.

[20] On June 5, 1991, new shares for 2713306 were issued in equal amounts to four new shareholders unrelated to the Morrissette brothers, namely four employees of Fransyl, and their shares were cancelled that same day.

[21] On June 18, 1991, the brothers Leo Guy, Jocelyn and Régis Morrissette formed 2996 and 2699 and became shareholders in them. On June 25, 1991, the ownership titles in Le Creusot and Leveillé were transferred to 2699 by J.C.M. and Francis-Hughes was transferred to 2996 by the three brothers who were the owners. Promissory notes were also transferred to these two corporations. In return, they received earn-out notes and 1,000 category A shares in each company. On June 26, 1991, the shares belonging to the Morrissette brothers in 2996 and 2699 were transferred to 2713306 in exchange for category A and G shares. On that same date, 4,000 category A shares were issued to four new shareholders of 2713306 and the 4,000 category A shares held by the Morrissette brothers were cancelled.

[22] The final results of this reorganization was that the four equal shareholders of 2713306 are the four employees of Fransyl and that 2713306 holds 100% of the shares of Fransyl, Promega, 2996 and 2699.

[23] According to the auditor for the Respondent, Clément Perron, 2996 reported allowable business investment losses ("ABIL") of $557,477 and $297,956 for the 1993 and 1994 taxation years respectively. 2699 did the same for amounts of $212,560 and $984,787 respectively for the same two years. In 1995, 2996 deducted all the ABIL incurred in 1993 and 1994 from its rental income paid by Fransyl, and 2699 did the same.

[24] Mr. Morrissette testified that, from 1991 to 1995, his efforts were aimed at rescuing Fransyl from its financial difficulties and delaying the implementation of seizures arising out of its financial commitments and the bonds it had issued. Mr. Morrissette said that he had managed to placate the financial institutions by proposing to them that he increase the rent that Fransyl was paying. In this way, 2699 and 2996 did not have to change financial institutions; they were paying the back rent and keeping their promises. Fransyl did not have to risk moving. According to Mr. Morrissette, Fransyl could not afford to leave the buildings it occupied. According to him, moving was impossible, as it would have cost a minimum of $1,000,000 and perhaps more. The rents had accordingly been renegotiated upwards so that the premium payable based on the sales of Fransyl in the divisions concerned was higher, in accordance with the details described below. Still according to Mr. Morrissette, this increase in rent enabled 2699 and 2966[sic] to keep their agreements with the financial institutions.

[25] Fransyl's financial statements for the year ending May 31, 1995, which were tabled in evidence, reveal that at the end of the year in question, the rent owed by Fransyl had still not been paid. In fact, in the short-term debt, we read at note 8 that the rent owed to the related companies amounted to $1,775,467.

[26] Clément Perron is the auditor for the Respondent. His audit of the Appellant followed up the one that he had done on 2699 and 2996, primarily in connection with the ABILs suffered in 1993 and 1994 and "erased" entirely in 1995. He noted that rental income in 1995 enabled both companies to deduct ABILs. After examining the minutes of Fransyl and the two numbered companies, he revised the corporate reorganization described above. According to a conversation with Fransyl's accountant, the reorganization had become necessary in order to shelter the buildings and the investments and not to obtain the entitlement to ABILs. In the accountant's words, it was also necessary to save Fransyl.

[27] Mr. Perron thus attempted to reconcile the buildings with the rent paid for the years 1994, 1995 and 1996, and only 1995 could not be reconciled. That was the point at which he asked an expert to assess the fair rental market value of the three buildings for 1995. This expert opinion established the fair rental market value of the three buildings at a total of $545,525. He accordingly concluded that the expense claimed was not reasonable under the circumstances. He acknowledged under cross-examination that his department had denied the ABILs claimed by 2699 and 2996, with the consequence that they could not be "erased".

[28] The question at issue is thus to determine whether the rent paid by Fransyl during the taxation year 1995 to 2699 and to 2996, two related corporations, constitutes a reasonable expense in the circumstances.

[29] The position submitted by Counsel for Fransyl is based on the fact that in fact, the only fair and reasonable business decision that Fransyl could take in the circumstances was to pay additional rent so as to avoid triggering major moving expenses, because of the financial situation of Fransyl, 2699 and 2996, and thereby avoid jeopardizing all of Fransyl's activities. These are in fact the circumstances that pertain in a case that we must analyze to determine the fair rental market value in the context of an operation between related persons. The Appellant cites *Gabco Limited v. M.N.R.,* 68 DTC 5210, and *Denis Morneau v. The Queen*, 98 DTC 2199 in support of his claims. He maintains that a reasonable businessman placed in the same circumstances as Fransyl would have agreed to pay the same rents and that such a decision had been reasonable and justified in the circumstances. In light of the facts in the case, he maintains that these expenses were not only reasonable, but were also necessary.

[30] For his part, Counsel for the Respondent maintains that there are no special circumstances in the instant case that would justify increasing by a factor of three the rent in 1995 over the previous year and the following year. She maintains that the expert assessments show that the reasonable and fair rental value for 1995 is that fixed by the expert, namely $545,525 and that the explanations put forward by Fransyl are insufficient. This increase was assumed in order to erase the ABILs incurred in 1993 and 1994 and to allow the Morrissette brothers to avoid the loss of the buildings and investments that bankruptcy would have entailed. She supports her claim by reference to *Mohammad v. Canada*, [1998] 1 F.C. 165, and *Global Communications Ltd. v. Canada*, [1999] F.C.J. no. 966, two decisions of the Federal Court of Appeal.

[31] The case law on which the arguments of Counsel are based and which constitutes a point of departure with respect to Section 67 of the *Act* has often been considered by the courts. Judge Sharlow of the Federal Court of Appeal recently referred to these decisions in *Petro-Canada v. Canada*, 2004 DTC 6329, 2004 FCA 158, no. A-2-03, April 23, 2004. I reproduce here paragraphs 62 to 64:

> [62] The leading case on the statutory predecessor to Section 67 is *Gabco Limited v. Minister of National Revenue,* [1968] 2 Ex. CR 511, [1968] C.T.C. 313, 68 DTC 5210 (Ex. Ct.). In that case,

Cattanach J. stated the following test for the application of this provision:

> It is not a question of the Minister or this Court substituting its judgment for what is a reasonable amount to pay, but rather a case of the Minister or the Court coming to the conclusion that no reasonable business man would have contracted to pay such an amount having only the business consideration of the Appellant in mind.

[63] Section 67 was considered by this Court in *Mohammad v. Canada* (C.A.), [1998] 1 F.C. 165, [1997] 3 C.T.C. 321, 97 DTC 5503. The issue was the deductibility of interest paid by a person on a debt used to finance 100% of the purchase price of a rental property. Robertson, JA, writing for the Court, said this at paragraph 28:

> [28] When evaluating the reasonableness of an expense, one is measuring its reasonableness in terms of its magnitude or quantum. Although such a determination may involve an element of subjective appropriation on the part of the tryor of fact, there should always be a search for an objective component. When dealing with interest expenses, the task can be objectified readily. For example, it would have been open to the Minister to challenge the amount of interest being paid on the $25,000 loan had the taxpayer agreed to pay interest in excess of market rates. The reasonableness of an interest expense can thus be measured objectively, namely, by reference to market rates. ...

[64] Reasonableness, like value, is a question of fact. In this case, it is a fact upon which the judge made no finding. While it may be true, as suggested in *Mohammad,* that paying fair market value for something is prima facia reasonable, I am unable to agree with the Crown that it necessarily follows that paying more than fair market value is unreasonable. There may be circumstances in which a decision to pay more than fair market value for something is a reasonable decision. Considering the test stated in *Gabco,* I am not persuaded that this is an appropriate case for the application of Section 67.

[32] Section 67 of the Act reads as follows:

> 67. In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under this Act, except to the extent that the outlay or expense was reasonable in the circumstances.

[33] Based on *Gabco, supra*, business considerations must be those of Fransyl. Would a reasonable business person have committed such expenses on the basis of business considerations only? That implies that even if the increase in the rent was favourable to 2699 and 2996 in the sense that it allowed them to "erase" their ABIL, it is not a relevant consideration in determining the point at issue.

[34] That said, it is possible, following the instructions of Judge Robertson in *Mohammad*, to examine the reasonable nature of the expenditure by examining the objective elements provided by the evidence. Even if the standard, in the application of section 67, is not fair market value, the fact that a taxpayer agrees to pay a rent higher than fair rental market value may be sufficient to allow the Minister to dispute the reasonableness of such an expense.

[35] The expert proof establishing the fair rental market value in the instant case is sufficient to establish a measurable objective standard. We cannot disregard the rent paid during the previous year and during the year following that at issue, nor the rent paid in 1998 for Leveillé, which was $299,400. The body of evidence establishes clearly what would seem to be a reasonable standard or scale by means of which the reasonableness of rent can be evaluated, except that the mere fact of paying a rent higher than this standard does not necessarily make that rate unreasonable. (See *Petro-Canada*, *supra*).

[36] This state of affairs thus leads us to analyze the circumstances specific to the instant case which may justify the payment of a premium above the standard or fair rental market value. This is to some extent reminiscent of the concept of special buyers or individual buyers that one finds in some decisions, including Denis *Morneau v. The Queen*, 98 DTC 2199, and the principles that flow therefrom. In this case, the concept of a special purchaser was recognized in determining fair market value, such that there are special circumstances that can change this value. Dussault J. stated the following at paragraph 43:

> Since in our law the concept of market value presupposes an open and unrestricted market, it is also wrong to say that the value which property would have for a potential

> purchaser desiring to use it for different purposes can be disregarded on the ground that he is the only one who wants to use it for those purposes, there is no competition in the market for this use and the value is thus purely subjective. To do so would be to disregard one aspect of the situation, with the result that the appraisal exercise would become highly theoretical, disconnected from the specific circumstances of the case under consideration and so very questionable.

[37] Even though section 67 of the Act does not refer to the concept of fair market value, the principles that allow for changes to fair market value and its justification may be relevant in determining whether an expense is reasonable. In *Morneau,* the Appellant had shown that she had analyzed all the options available to her before proceeding with the purchase of Mr. Morneau's residence, and that this choice had proved to be the best one, so that the price paid, even if it was high, constituted fair market value.

[38] Did Fransyl, in the instant case, succeed in demonstrating that the fact of paying a rent almost three times higher than the standard was the only choice possible following an estimate of the gains and losses related to other options which may have been open at the time?

[39] It is true that Fransyl invested considerable sums in rental improvements to its building on Leveillé Street when it moved in. The building had to be changed to make it explosion-proof, to provide it with adequate ventilation, to double the number of sprinklers and to install water pumps and a hydro service point that met its requirements. It is thus evident that moving all these installations would have resulted in expenses, as well as the interruption of business during such a move. Fransyl did not evaluate or have evaluated the exact cost that such a scenario could have presented. Mr. Morrissette merely said that it would have cost a minimum of $1 million, testimony that he subsequently altered by saying that it would have required more than $1 million to move. This estimate is approximate and drifts off into speculation. It is accordingly difficult to give it any precise value that would support an enlightened comparison of the costs of this scenario (i.e., the move) to the rent paid in 1995.

[40] The costs related to a move are the only scenario that Fransyl seems to have considered before deciding to offer its creditors and those of 2699 and 2996 an

increase in rent. Even if the exact nature of the financial obligations of Fransyl, 2699 and 2996 to their creditors has not been established precisely by the evidence, it is reasonable to believe that financial assistance by Fransyl could have been provided in a manner other than that in the case at bar, for example, a loan to 2699 and to 2996 by Fransyl, or the purchase of the property by Fransyl with the agreement of the creditors.

[41] Clearly, at the time the decision was taken to raise the rent, Fransyl had not considered any other scenario than that of moving and it thus did not compare or analyze the costs related to each of these potential scenarios. Such an exercise could doubtless have justified the decision to increase the rent. It could also have shown the reasonable nature of such an expenditure, if it were the only possible choice on the basis of an estimate of the profit and loss related to each of the options open at the time. In my view, the Appellant has not succeeded in demonstrating that there was no other reasonable business option other than to pay a rent higher than normal.

[42] The evidence regarding the fact that Fransyl was facing a probable move is not convincing, nor is the claim that the financial institutions and mortgage lenders were on the point of seizing and taking possession of the property. The threats of the creditors, in particular National Bank, date back to the fall of 1991 and the beginning of 1992. According to Mr. Morrissette, the threats continued until 1995, when the creditors had accepted the proposed arrangement, namely to increase the rent. With the exception of the correspondence between Fransyl and National Bank in 1991 and 1992, which was filed in evidence, no correspondence, no documents, no notice of sale, no writ of seizure and no threat to take possession of the premises was filed in evidence to confirm Mr. Morrissette's testimony and the urgency and danger of the situation.

[43] The evidence, moreover, does not specify the moment at which the arrangements were concluded with the creditors of Fransyl, 2699 and 2996. This would have identified the moment where the increase in rent entered into force. What is certain, according to the financial statements of May 31, 1995, is that the rent owed by Fransyl was still not paid, since it is described as a rent of $1,775,467 payable to related corporations. According to the leases, the rent is payable monthly with an adjustment at the end of the year.

[44] It is accordingly very difficult to accept as genuine the requirement and the necessity for the Appellant to use an extraordinary measure in order to avoid an imminent move, regardless of the fact that the Leveillé lease stipulates that it is

subject and subordinated to any mortgage or any deed of trust and that in the event the building is sold, the new owner will comply with the conditions of the lease.

[45] We must remember that the financial difficulties were not limited to 2699 and 2996. Fransyl was also in financial difficulties. In light of this state of affairs, we must ask whether a reasonable business person would have agreed to pay a rent three times higher than he was used to paying; if so, he would have undoubtedly taken all the other options into consideration before deciding.

[46] I am accordingly not convinced that the circumstances of the instant case would have led a reasonable business person to pay a rent higher than the norm or the fair rental market value established in this case. The Appellant has accordingly not succeeded in proving to me, on the balance of probabilities, that the claimed rental expenditure for the year at issue is reasonable in the circumstances. The appeal is accordingly dismissed with costs.

Signed at Edmundston, New Brunswick, this 31st day of March 2005.

"François Angers"

Angers J.

Translation certified true
on this 15th day of May 2006
Monica F. Chamberlain, Reviser

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APPEARANCES:

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For the Respondent:	Anne Poirier

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