INTERNATIONAL COUNCIL OF SHOPPING CENTRES

2018 CANADIAN LAW CONFERENCE

LEGAL UPDATE

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A. ASSIGNMENT

1. *1550988 Ontario Ltd. (c.o.b. Premier Drycleaners) v. Burnford Realty Ltd.* [2017] O.J. No. 2070 (Ontario Superior Court of Justice, April 26, 2017, S. Corthorne J.)

The tenant leased premises is a shopping center to operate a dry-cleaning business. The parties signed three documents with respect to the tenancy: (1) an initial month-to-month lease, (2) an agreement contemplating the tenant's relocation to other premises in the mall and granting the tenant a right to extend for a further term of 5 years, and (3) a lease in respect of the relocated premises for a term of 5 years. After the 5-year term expired, the landlord entered into a lease for the premises with one of the tenant's competitors.

The tenant commenced an action against the landlord alleging that it had a right to extend for a further 5-year period. The tenant also obtained the new tenant's agreement to assign its new lease to the tenant and argued that the landlord was unreasonably withholding its consent.

The tenant's argument was that the terms of the second agreement remained in force notwithstanding the new 5-year lease. The landlord submitted that the new lease was independent of the proceeding agreements and it contains all of the terms pursuant to which the tenant leased the relocated premises. The tenant moved for summary judgment.

The Court was unable to determine if the extension right was still available on the record before it and ordered that matter to proceed to trial.

The Court then analyzed the claim that the landlord's consent was being unreasonably withheld. The Court repeated the relevant considerations from *1455202 Ontario Inc. v. Welbow Holdings Ltd.*. They are: (1) would a reasonable person have withheld consent; (2) the reasonableness of refusal to consent is determined on the basis of information available and the reasons given by the landlord at the time consent is initially refused. Additional, subsequent reasons given are not relevant; (3) reasonableness must be determined in light of the terms of the lease that govern assignment, including the rights of the tenant to assign and the landlord to withhold consent; (4) in some circumstances, the probability that the proposed assignee will default on its obligations within the subject lease may be a reasonable ground for the landlord to withhold consent; (5) the financial position of the proposed assignee may also be a relevant factor; and (6) the commercial realties of the marketplace and economic impact of the assignment on the landlord are to be considered.

The Court continued that in the end, the question of reasonableness must be determined on the circumstances of the particular case and that "the Court should be slow to substitute its judgment for the business judgment of the landlord."

The Court held that it made good sense for the landlord to withhold consent to the assignment, specifically noting that this action had led to breakdown in the parties' relationship such that the tenant may now reasonably considered by the landlord as an "undesirable" tenant. The Court

refused the tenant's plea to compel the landlord to accept an assignment and dismissed summary judgment motion.

2. ***H. De Groot Real Estate v. Scribes Inc.,* [2018] O.J. No. 646 (Ontario Superior Court of Justice, February 7, 2018, P.J. Flynn J.)**

The tenant was a wholly owned subsidiary of its parent company specifically incorporated to operate its business from the premises.

During the next six years, the tenant operated under the direction of its own board and filed its own tax returns. However, the tenant shared a Chief Financial Officer with the parent and filed the necessary consolidated financial statements. The landlord did seek, but never received, a guarantee of the lease by the parent.

The tenant became financially unviable and while it continued to operate from the premises, it could no longer pay rent. The parent stepped-in and paid the tenant's rent for a period of time. There was no interaction between the landlord and the parent until the landlord made inquiries about rent arrears and a suspected subletting the premises.

The landlord brought a motion for summary judgment alleging that the parent had taken an equitable assignment of the lease and that the doctrine of part performance obviated the requirement that the assignment be in writing. The tenant rejected the landlord's claims and submitted that the Court did not have grounds to pierce the corporate veil and hold the parent accountable for its subsidiary's liabilities.

The Court held that there are no grounds, such as fraud, that would justify attaching the subsidiary's liability to the parent. The parent and subsidiary are separate legal entities, and even if the landlord viewed them as interchangeable, they were not.

The Court dismissed the landlord's argument that the lease was equitably assigned to the parent, noting the absence of a written agreement and the failure of the landlord to lead evidence substantiating the claim of equitable assignment.

The Court also refused to accept the landlord's argument of part performance, holding that since the parent only stepped-in to help the tenant once in six years, such assistance fell short of acts of part performance that would burden the parent with all the obligations of the tenant.

The Court dismissed the claim against the parent and granted judgment solely against the tenant.

B. BANKRUPTCY

3. ***Aéropostale Canada Corp. (Re),* [2018] O.J. No. 1153 (Ontario Superior Court of Justice, March 2, 2018, S.F. Dunphy J.)**

The tenant leased premises in a shopping centre for the operation of a retail clothing store. The lease included a co-tenancy provision that entitled the tenant to a reduced rent if a particular anchor tenant's premises became vacant. The co-tenancy clause was said to apply only so long as

the tenant was the original tenant and expressly used the original tenant's legal name in the clause. The anchor tenant vacated its premises in connection with its own insolvency proceedings, but the tenant did not take advantage of the reduced rent under the co-tenancy clause.

In May 2016, the tenant itself filed for bankruptcy. The trustee in bankruptcy found a retailer interested in taking an assignment of the lease and it negotiated certain amendments to the use clause with the landlord to accommodate the new tenant. The trustee obtained a Court-ordered assignment of the lease in proceedings that were unopposed by the landlord.

About a year later, the new tenant noticed the co-tenancy provision and claimed that it was entitled to the benefit of the reduced rent. The landlord hotly contested the claim, pointing to the express wording in the lease making the right personal to the original tenant and arguing that the new tenant failed to raise the issue when they were negotiating changes to the lease. The new tenant brought a motion seeking the advice and direction of the Court.

The new tenant argued that the Court-approved assignment transferred all of the bankrupt tenant's rights and obligations under the lease to it pursuant to s. 84.1 of the *BIA* and that the effect of the legislation is to place the assignee in the same legal position as the bankrupt tenant immediately before bankruptcy.

The landlord argued that the co-tenancy provision was expressly made personal to the tenant, and thus it is non-assignable as a matter of law. The landlord also argued that by assigning such a right, the Court was unilaterally amending the lease.

The question for the Court was whether *all* of a bankrupt tenant's rights are transferred to the new tenant when assigned under the *BIA,* including those that on their face appear to be non-assignable.

The Court held that the provisions of the *BIA* trump the intention of the parties and that all rights and obligations under the bankrupt's contracts are assignable, unless they fall into the narrow statutory exceptions. The Court rejected the landlord's argument that the co-tenancy right satisfied the statutory exception of being "not assignable by reason of its nature." The Court held that such expression applied only to rights or obligations that are "applicable to special personal characteristics, and so cannot usefully be performed to or by another." The Court held that there are few obligations more central (and less personal) to the relationship of landlord and tenant that the obligation of the tenant to pay rent.

The Court pointed out that it is the *nature* of the right that determines whether or not it falls into the exception, not the agreement between the parties as to whether or not they will allow the right to be assigned. The Court stated that if it were otherwise "it would be child's play for a lawyer to contrive myriad ways to contract out of s. 84.1 of the BIA, a provision that has never been in any commercial landlord's top ten list of favorite pieces of legislation."

The Court also noted that the assignment order stated that *all* of the rights were being transferred. The Court held that the landlord's objections were out of time, since the time to raise the issue was *before* and not *after* an order is made. The Court stated that the order, once made, was final and binding.

Accordingly, the court declared that the new tenant acquired all the rights of the bankrupt under the lease, including those that were drafted to be exclusive only to the original tenant.

C. BREACH

4. *LaBuick Investments Inc. v. Carpet Gallery of Moose Jaw Ltd.*, 2017 SKQB 341

Facts:

This case involves an application by LaBuick Investments Inc. ("Landlord") for summary judgment against Carpet Gallery of Moose Jaw Ltd. ("Tenant"). The Tenant leased business premises from the Landlord for many years before moving to a new location at the end of 2014. The Landlord claimed that Tenant breached the lease by not giving adequate notice of termination. The relevant provision of the original lease (the "Original Lease") stated that the "Term shall be six (6) five (5) years [*sic*], beginning on the 1st day of October 2004 (the commencement date) with the first renewal due on the 1st day of October 2009". The provision relating to renewal in the Original Lease stated that where "…the Tenant is not in default hereunder and this Lease is otherwise in good standing, the Tenant shall lease the demised premises for Five (5) additional terms for Five (5) years commencing 1st October 2009 ("the Renewal Term")…." Basic rent was to be adjusted upon on each renewal based on fair market rentals, and failing agreement, to be determined by arbitration.

The Original Lease also provided the Tenant with a twelve month termination right.

At the expiry of the first five-year period, the parties entered into an agreement renewing the Original Lease until September 20, 2014 and increasing the rent (the "First Renewal Agreement"). A second amending agreement (the "Second Renewal Agreement") was drafted renewing the Original Lease for another five-year period beginning on October 1, 2014. The Tenant did not sign the Second Renewal Agreement because it took issue with the renewal rent and some additional conditions that the Landlord required.

On November 6, 2014, the Tenant informed the Landlord that it would not be continuing or renewing its lease and that it intended to vacate the premises by the end of the year. The Landlord reminded the Tenant of the requirement of 12 months' written notice. On November 12, 2014, the Tenant delivered a follow up letter to the Landlord which confirmed the Tenant's intention to vacate the premises by December 31, 2014. Despite its non-compliance with the aforesaid notice provision, the Tenant's position was that the parties were on a month-to month term following the expiration of the first renewal term (during the negotiation period), and that it tendered monthly rent that the Landlord had demanded, that was expressly "without prejudice" to the Tenant's right to terminate the Lease.

The Tenant vacated the premises on December 31, 2014 but paid rent for January 2015. Once the Tenant had departed, the Landlord completed a number of repairs but was not able to secure a new tenant until September 1, 2016.

Issues:

1. Is this an appropriate matter for summary judgment?
2. Did the Tenant breach the terms of its lease with the Landlord?
3. Did the Landlord breach the covenant of quiet enjoyment and, if so, did that breach entitle the Tenant to terminate the lease?

Held

Is summary judgment appropriate?

Summary judgment is appropriate where it can provide a method of judgment that is timely and affordable, without compromising fairness of the procedure. Here, the Court indicated that it had the opportunity to hear testimony at this summary judgment application. As such, the judge determined that he was able to fairly assess the issues through the summary judgment process.

Did the Tenant breach the terms of its lease with Landlord?

The Court followed the modern approach to contractual interpretation as outlined in the Supreme Court case of *Moly Corp. v. Sattva Capital Corp,* 2014 SCC 53; namely, that the individual provisions of a contract are not to be parsed out. Instead, they are to be considered with the agreement as a whole. Specifically, the Court must consider the parties' intention in entering into the entire agreement. Further, the judge noted that where ambiguity in a contract exists it should be interpreted against the party that drafted the contract, in this case Landlord.

The judge determined the Original Lease, when considered as a whole, was clear that the parties intended to enter into six five-year terms with *automatic* renewals, unless Tenant was in default of rent payment or provided 12 months' written notice of its intention to terminate. The wording of the Lease was clear. The use of the word "shall" in Article 6.02 ("Tenant shall lease the demised premises for Five (5) additional terms for Five (5) year) was found to denote something mandatory, not optional. The Court's findings regarding the enforceability of the lease was not affected by the fact that the Tenant had not agreed on terms or conditions of the Second Renewal Agreement that was to take effect on October 1, 2014 because the wording of the Original Lease covered this by providing for arbitration to determine such rent.

The Court concluded that a lease was in place between the Landlord and Tenant at all times, and that the lease required the Tenant to give the Landlord 12 months' written notice to terminate the lease, which the Tenant did not do.

Did the Landlord breach the covenant of quiet enjoyment and, if so, did that breach entitle the Tenant Gallery to terminate the lease?

In 2009, Mr. LaBuick, a representative of the Landlord, planted a recording device in the Tenant's offices. The Tenant argued that this breached its right to quiet enjoyment. The Court noted that a breach of quiet enjoyment typically allows for three remedies: damages, suspension of rent payments, or an injunction. However, when the landlord's conduct is intentional, the

consequences are foreseeable and the degree of interference is intolerable, the tenant may claim constructive eviction. The Court found that a breach of quiet enjoyment existed, but the conduct was not serious enough to warrant constructive eviction.

Ultimately, the Landlord was granted summary judgment with respect to its allegation that Tenant breached the lease by terminating the lease without giving proper notice. However, the damages analysis was complicated and presented with genuine issues that required trial. As a result, Landlord's application for summary judgment on damages was dismissed and the matter was scheduled for a pre-trial conference.

5. *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2018 BCSC 66

Facts:

The tenant, Lindt & Sprungli (Canada) Inc. (the "Tenant") was generally engaged in the business of operating a retail boutique chocolate store within an existing store by renting some space within the larger store. In this case, it sought approximately 3,000 square feet of space in an industrial area in Vancouver, of which 1,000 square feet would be for a seasonal chocolate discount retail outlet, and the remaining space would be used for warehousing additional chocolate stock for distribution to other retailers.

The Tenant had used a Toronto real estate brokerage to assist in locating similar premises in other cities. The brokerage was aware of the zoning difficulties in finding suitable premises in those cities. The Tenant's Vancouver real estate brokerage located the property, but did not verify the zoning requirements.

The landlord, Laidar Holdings Ltd. (the "Landlord") entered into an offer to lease with the Tenant in 2008. The Tenant had paid the deposit, arranged tenant's insurance, paid commissions, and received approval for signage. The Tenant's Toronto real estate brokerage had prepared the Offer to Lease, assuming and without confirming that the Vancouver real estate brokerage had confirmed the zoning was appropriate for the Tenant's intended use. The Vancouver real estate brokerage had not confirmed the zoning was appropriate, and assumed that a condition would be included in the Offer to Lease allowing the Tenant more time to investigate zoning. There was no such condition. The Tenant's lawyer assumed the real estate brokerages had dealt with the zoning issue. Ultimately, the Tenant walked away from the lease after The City of Vancouver refused to issue permits for the Tenant's proposed retail use on the basis that it did not comply with the applicable zoning.

The Landlord brought an action against the Tenant to recover its losses. The Tenant counterclaimed, alleging that the lease was void. The Tenant also claimed against the two real estate brokerages that assisted in the lease negotiations for failing to verify the zoning requirements.

Issues:

1. Was the Tenant liable to the Landlord for breaching the lease?

2. Are the real estate brokerages liable?

Held:

The offer to lease contained the following provisions:

> "7. USE OF PREMISES The Premises shall be used only for the purpose of sale and distribution of chocolate and related products and any other use permissible according to local by-laws and zoning…."
>
> "20. NO REPRESENTATION It is understood that there are no representations, covenants, agreements, warranties, or conditions in any way relating to the subject matter of this Offer, whether expressed or implied, collateral or otherwise, except those set forth herein."
>
> "21. ALL REPRESENTATIONS It is further understood and agreed that all representations made by the Landlord or any of his representatives, are set out in this Offer."

The Court agreed with the Landlord that the Offer contained no warranty of fitness for the intended purpose, and that there is no implied warranty of fitness for such purpose. The Court held that, *as between the Landlord and the Tenant*, it was the Tenant who bore the risk with respect to zoning for its intended use. As such, the Tenant was found liable for breaching the offer to lease.

With regard to the real estate brokerages, the Court held that the Vancouver brokerage was not liable as it had a very limited role that did not include drafting or negotiating the offer to lease. The Vancouver brokerage said when it drafts offers, it always include a zoning provision as part of the tenant's conditions.

The Toronto brokerage was found to be 70% liable since it had drafted the Offer to Lease, and simply assumed without endeavoring to confirm that a party had verified the zoning was acceptable for the required retail use. The Court found that the brokerage had not made any appropriate inquires as to the zoning, and did not include any conditions in the Offer to Lease to allow the Tenant to further investigate the zoning issue.

Conclusion:

The Landlord's claim for compensable loss was granted in part, and the Tenant's counterclaim was dismissed. Absent an express warranty from a landlord in a lease, it is the tenant's obligation to ensure that the premises are both physically and legally fit for the tenant's intended purpose.

The Tenant's claim for indemnification from the Vancouver real estate brokerage was dismissed with costs. The Tenant's claim for indemnification against the Toronto real estate brokerage was granted subject to the apportionment of fault being 70% to the brokerage and 30% to the Tenant for the Tenant's compensable loss.

6. *1028840 BC Ltd. v. The Heritage Dispensary Clinic Society*, 2018 Carswell BC 90, 2018 BCSC 82

Facts:

1028840 BC Ltd. (the "Landlord") was the owner of a strata lot located at 512 Beatty Street, Vancouver British Columbia. It entered into a commercial lease (the "Lease") of the premises with The Heritage Dispensary Clinic Society ("HDCS") for a five-year term commencing June 1, 2015. In March 2016 the Lease was amended to add the respondent Dr. Jonas LaForge as an additional tenant under the Lease (collectively, the "Tenants").

In January 2018, the Landlord, as petitioner, sought to enforce the termination of the lease; the Tenants disputed the termination of the lease.

The "permitted business" of the Lease was stated to be:

> A medical health office to provide naturopathic therapy and to administrate and distribute medicinal-use cannabis under the valid permits and licences granted to operate under the statute of Canada Laws [*sic*].

On May 19, 2016, The City of Vancouver ("the City") issued an order to both the Landlord and HDCS that within seven days it "cease operating 512 Beatty Street as a medical marijuana related use and remove all materials used in its connection". The order was framed as a formal letter and noted that the medical marijuana operation did not have "the necessary business licence, in contravention of City of Vancouver License By-law No. 4450".

On July 4, 2016, the Landlord sent a letter to the Tenant, enclosing the Order issued by the City and demanding that steps be taken to comply with same failing which "the Landlord reserves its right to take all remedies available to it under the Lease". The Landlord was subsequently fined by the strata corporation in relation to the operation and odor of the dispensary. The Landlord demanded payment of the fine from the Tenants in November 2017.

The Tenants had paid rent until the end of September 2017 by way of post-dated cheques. They then enquired as to how many post-dated cheques the Landlord still held. When the Tenants discovered no post-dated cheques existed for future rent, they sent two cheques for October and November Rent. Before depositing the cheques, the Landlord wrote "for use and occupation only" and sent a copy of the same back to the Tenants as a receipt.

Following the receipt of an agreement to purchase the lot, the Landlord sent the Tenants a letter entitled "Official Notice of Termination of Lease". The letter stated it was "in reference to s. 7.2 of the Lease" and advised:

> "The Landlord has opted to terminate the lease as of October 31, 2017. The Tenant is operating illegally and without a business permit resulting in ongoing fines addressed to the Landlord.
>
> This Lease Agreement shall be officially terminated as of October 31, 2017."

The Tenants argued that this termination was ineffective because the Landlord was aware of the breach and the continued acceptance of rent acted as affirmation of the Lease and a waiver to terminate the Lease based on breaches.

The Landlord proceeded to trigger additional formal termination processes in November 2017 by issuing a notice of default (which stated that the Tenants had 15 days to comply with the Lease or it would be terminated), followed by a notice of termination based on the uncured default, then a notice to quit requiring the Tenants to deliver immediate possession of the premises, and a demand for possession after the Tenants failed to leave the premises.

At the time of the petition, the Tenants continued their occupation of the premises and continued to operate an unlicensed marijuana dispensary in the premises.

Issues:

Was the lease validly terminated and was the Landlord entitled to a writ of possession for the premises and an order for costs?

Held:

The Court noted, and the parties agreed, that as a general rule, the acceptance of rent by a landlord, with full knowledge of a breach on the part of the of its tenant otherwise giving rise to a right of lease termination, constitutes an irrevocable election by the landlord to affirm the subsistence of the lease and a waiver of the right to terminate for the breach in question. The Court noted that this general rule remained so even where a lease may contain a provision that purports to exclude any such waiver or condonation.

However, the Court stated that, certain types of continuous breaches of a lease by a tenant, previously waived by a landlord through acceptance of rent, can later be relied upon by the landlord to claim forfeiture of the lease. Further, noting that whether a landlord can later terminate a lease for continued breach by the tenant formerly waived depends upon the nature of the breach.

The parties agreed that the question of whether the lease was terminated turned on whether the Landlord’s past acceptance of rent was found to be an irrevocable waiver of the Tenants’ default.

In its reasoning, the Landlord did not accept the Tenants' attempt to characterize the two cheques tendered on November 1, 2017 as payment of "rent". To the contrary, the Court held that the Landlord treated the payment only as compensation for (unauthorized) "use and occupation" of the premises. There was clearly no intention on its part to waive the Tenants' breach of the Lease or to otherwise irrevocably affirm the subsistence of the Lease regardless of the Tenants' illegal use of the premises. In such circumstances, the court held that the doctrine of waiver did not apply.

The Court stated that the Lease expressly contemplated the Tenants conducting the business of naturopathic therapy and the distribution of medical-use cannabis under valid permits and

licences for such operations. It required the Tenants to strictly comply with all applicable laws, by-laws and regulations relating to the operation of the business, including the City's by-laws. It expressly stated that the Tenants would be responsible for obtaining whatever permits, licences or approvals as may be necessary for the operation of its business. Based on the foregoing, the Court agreed with the Landlord that the situation involved continuous, repeated breaches of the Lease by the Tenants that, once acceptance of "rent" ceased, gave rise to a continuing right to forfeiture and permitting termination of the Lease.

The Court stated that the simple fact was, unless and until the Government of Canada changed the law, unlicensed storefront retail marijuana dispensaries such as the one operated by the Tenants in this case were illegal. The Tenants did not hold any permits or licences from Health Canada or any business licences from the City. The Court stated that each day HDCS was open for business selling marijuana to its customers, the Tenants were breaching the criminal laws of Canada, the City of Vancouver by-laws, the strata by-laws applicable to the premises, the standards of conduct regulated by the College of Naturopathic Physicians (in the case of Dr. LaForge), and the express terms of the Lease with the Landlord. The Court characterized the breaches as continuing breaches of a serious and serial nature that, as a matter of both law and public policy, ought not and were not subject to any continuing waiver by a Landlord beyond any period for which the payment of rent has been accepted.

The Court stated that each day the HDCS was open for business, the Tenants were both breaching the Lease made between the parties and breaching the law by operating without a valid business license. The Court noted that while the Landlord may have waived past breaches of the Lease and any resulting right of forfeiture through its acceptance of rent in full knowledge of the facts, such waivers were not thereby irrevocable for the duration of the Lease.

The Court concluded that the termination procedure adopted by the Landlord in November 2017 was effective at law to terminate the Lease and entitled the Landlord to a Writ of Possession to enforce vacation of the premises by the Tenants.

Conclusion:

The Lease was validly terminated in November 2017 and the Tenants were ordered to deliver up vacant possession of the Premises by January 25, 2017.

7. ***Rock Developments (Prince Albert) Inc. v Carlton Spur Development Corporation*, 2017 SKQB 247**

Facts:

The Plaintiff applied for an injunction against the Defendant. The parties owned adjacent commercial properties with the Defendant having street frontage and the Plaintiff's lot being to the rear of the Defendant's property.

The predecessors in title to the properties entered into an easement agreement in which it agreed that a sign pylon would be erected in a specific location on the Defendant's lot and the Plaintiff would have the exclusive right to use the top 15 feet of the sign pylon for its signage, leaving the

remainder for the Defendant's usage. The purchaser's predecessor in title never built on the property nor used the sign. Before the sale to the Plaintiff occurred, the Defendant began using the sign pylon for its own tenants' signage.

The Plaintiff purchased the land in 2016 and began to build shopping premises and then leased the space to three retail stores. The Plaintiff promised those businesses that it would be able to advertise on the Plaintiff's portion of the sign. It asked the Defendant to remove its tenants' signs, but the Defendant refused. The Defendant argued that the Plaintiff's predecessor had abandoned the agreement.

The easement was registered against the titles and when the lots were sold to the parties, the agreement was assigned to them. The easement granted was to be perpetual, for the benefit of the Plaintiff's lot. Other provisions included that if a breach occurred, it would cause irreparable harm and injunctive relief could be obtained to prohibit it and that no delay or omission in the exercise of any right would be construed as waiver.

Held:

The application for injunctive relief was granted. The Defendant was prohibited from using the top part of the sign.

The court found that the Plaintiff had satisfied the requirements set out in *Potash Corp. v Mosaic*. It had established that there was a serious question to be tried. There was no evidence the Plaintiff's predecessor in title had abandoned the agreement or that the Defendant had never taken any steps to attempt to remove the easement registration prior to this application.

In addition to the provision in the agreement regarding irreparable harm, the Plaintiff demonstrated a significant risk of harm to it and to its tenants if it could not advertise on the sign. The balance of convenience favoured granting the injunction as the Defendant's tenants could advertise on its portion of the sign. In sum, it was in the interests of justice to grant the injunctive relief.

8. ***Hamel v. Integrity Wheels Ltd.* (2017), 2017 Carswell Alta 802, 2017 ABPC 107 –See Case #66**

D. DAMAGES

9. ***Kamla's Fashions Inc. v. Gykan Enterprises Inc.*, [2017] O.J. No. 6356 (Ontario Superior Court of Justice, November 29, 2017, T.R. Lederer J.)**

The tenant leased the premises for the production and sale of sportswear. The tenant's business floundered and the tenant was unable to meet its rent obligations. The parties entered into a rent-reduction agreement where the tenant would pay the outstanding arrears, the base rent would be reduced, and the landlord would be entitled to terminate on 30-days' notice.

Shortly thereafter the landlord demanded payment of the rental arrears, which it claimed amounted to $20,000. The tenant refuted the calculation and refused to pay. The next day the

landlord shut off the electrical power serving the premises. The tenant understood the relationship to be over and shut down its operation. The tenant took some machinery from the premises and the landlord changed the locks.

The tenant brought an action claiming wrongful termination and illegal distraint. Eventually, the landlord conceded that proper notice had not been given and as a result the tenancy had not been properly terminated. The parties' dispute related to the qualification of damages suffered by the tenant for the unlawful distraint.

The Court stated that where damages cannot be assessed because of the actions taken by a defendant, the highest value presumed value is the appropriate calculation. The Court decided that the landlord should not benefit from its illegal termination of the tenancy and wrongful distraint, and valued the distrained machinery and goods at fair market value and the highest value reasonably assessed on that basis. The Court awarded punitive damages because the principal of the landlord shut off the electricity to the premises without notice to the tenant.

The Court used the appraisal from the purchase of the business as the base for the damages, reduced it by the machinery that was removed and the rent arrears. The Court also included $20,000.00 in punitive damages in the final award. The Court awarded the tenant $82,350.95 in damages for illegal distress and punitive damages.

10. *Markham Village Shoppes v. Gino's Pizza*, [2018] O.J. No. 335 (Ontario Superior Court of Justice, January 24, 2018, E.M. Morgan J.)

The landlord leased premises to the tenant for the operation of a restaurant. The offer to lease stated that the premises was being leased on an "as is, where is" basis and the lease granted the tenant a 12-month base rent free period. The lease required that the Tenant purchase and install a ventilation system and stated that upon expiration of the term, the system would become the property of the landlord.

The tenant was given access to the premises on March 1, 2017 to begin installing its leasehold improvements. Shortly thereafter, the Tenant advised the landlord that it was having problems with its improvements. At some point in the weeks or months following, the tenant advised the landlord that it would be backing out of the deal.

The landlord re-listed the premises for rent and brought an action against the tenant for damages. The tenant argued that three verbal promises made by the landlord were broken and therefore, the tenant was entitled to rescind the lease. Specifically, the tenant argued that the landlord assured the tenant: (1) it would be able to install the ventilation system; (2) the ducts for the system could go out the front of the premises rather than the rear; and (3) it could install a hood over the pizza oven.

The landlord submitted that the tenant repudiated the lease by not moving into the premises and that in accordance with the lease, abandonment of the premises for 10 days is an event of default. The landlord denied all of the alleged verbal promises and pointed to the "entire agreement" clause in the lease.

The Court found that there was no evidence to support the tenant's position and refused the tenant's claim that the quantification of damages requires a trial. The Court held that the tenant did not produce any evidence to counter the landlord's calculation and that the absence of contrary evidence meant that the tenant failed to put their best foot forward (as required when proceeding by way of summary judgement).

The Court held in favour of the landlord and awarded damages in the amount of $85,697.96.

E. DAMAGE AND DESTRUCTION

11. ***Core Ventures Inc. v Trio Chute Inc. (Aluminum Planet)*, 2017 ABQB 794 – See Case #20**

F. DISTRESS

12. ***2105582 Ontario Ltd. (c.o.b. Performance Plus Golf Academy) v. 375445 Ontario Ltd. (c.o.b. Hydeaway Golf Club),* [2017] O.J. No. 6526 (Ontario Court of Appeal, December 14, 2017, J.C. MacPherson, R.G. Juriansz and L.B. Roberts JJ.A.);**

The landlord operated a golf course and leased adjacent premises to the tenant for the operation of a driving range. There was no written lease. The tenant invested approximately $200,000.00 to construct the driving range and purchase equipment. The driving range opened in September 2006 and operated until the fall of 2007. When the tenant failed to pay rent for September, October, and November 2007, the landlord served a notice of default and the tenancy was terminated effective December 6, 2007.

The tenant vacated the premises and removed some of its property. However, the tenant was unable to remove all of its trade fixtures on that occasion and upon its return the landlord called the Ontario Provincial Police to prevent the removal of anything else. In the months following termination, the tenant continued to attempt to retrieve its property. The landlord refused the tenant access each time. Eventually, the landlord took began operating the driving range with the disputed assets.

On March 11, 2008, the tenant commenced an action for unlawful distraint. The trial judge ruled in favour of the tenant, assessing damages against the landlord in an amount equal to the value of the distrained property, plus additional exemplary damages for the years the landlord used the tenant's property, totaling $268,033.17.

The landlord appealed. The Court of Appeal agreed with the landlord in part, holding that in such circumstances, a landlord is not liable for *both* the value of the distrained property *and* exemplary damages in respect of its use thereof.

The Court noted that exemplary damages are designed to address retribution, deterrence and denunciation of malicious, oppressive or high-handed conduct. The trial judge did not find the distraint to have been malicious or high-handed, nor did it find the landlord's conduct to have departed from ordinary standards of decent behavior. On the contrary, the trial judge found the

landlord had an honest belief that the trade fixtures became part of the land upon termination of the lease. The Court of Appeal reversed the award of exemplary damages, reducing the damages to $188,033.17.

13. *1694879 Ontario Inc. v. Krilavicius* [2017] O.J. No. 2686 (Ontario Superior Court of Justice, May 24, 2017, F. Kristjanson J.)

The tenant leased restaurant premises from the landlord. The landlord claimed that the tenant fell into arrears of rent, but the landlord continued to accept monthly rent payments from the tenant.

The tenant removed its goods and chattels from the premises with the assistance of five individuals. The next day, the landlord retained a locksmith to change the locks at the premises, purporting to distrain against the tenant's remaining goods in the premises. After levying the distress, the landlord applied to the Alcohol and Gaming Commission of Ontario to have the tenant's liquor licence transferred to the landlord.

The tenant was unable to gain access to the premises and could no longer operate as a licensed restaurant.

Nine months after the lockout, the landlord accepted an offer to buy the premises and sold the tenant's distrained goods to the buyer for $25,000. The landlord did not take an inventory of the seized goods or obtain an appraisal of the goods.

The landlord brought an action against (1) the tenant for fraudulent removal of goods from the premises, and (2) the individuals who assisted the tenant in fraudulently removing the goods.

The tenant counterclaimed against the landlord for wrongful distress and conversion.

The Court dismissed the action against the individuals who assisted the tenant in removing its goods. The Court noted that in order to be successful, the landlord had to establish that the individuals willingly and knowingly assisted the tenant in removing its goods to defeat the landlord's ability to distrain them, contrary to Section 50 of the *Commercial Tenancies Act*. The Court found that none of the individuals had the intent required under Section 50 of the *Commercial Tenancies Act* and that the individuals did not knowingly and willfully assist in a fraudulent removal.

With respect to the tenant's claim for wrongful distress, the Court noted that the landlord's actions, such as transferring the tenant's liquor licence and denying the tenant access to the premises, were inconsistent with a landlord exercising the remedy of distress, but rather, were consistent with a landlord who had terminated the tenancy.

The Court found that the landlord's distress was illegal because the landlord (1) changed the locks on the premises, (2) improperly seized the tenant's goods in the course of the distress, and (3) engaged in an unreasonable delay of nine months in completing the distress.

The Court also found that the landlord's distress was irregular because the landlord breached the technical requirements pertaining to distress by failing to (a) obtain appraisals of the seized goods, (b) take an inventory of the seized goods, and (c) give a copy of the demand or statement of the costs of the distress to the tenant.

The Court awarded damages to the tenant for wrongful distress, including punitive damages as a result of the landlord's "illegal and oppressive" actions.

The Court dismissed the landlord's claim for fraudulent removal of the tenant's goods on the basis that there cannot be a fraudulent removal of goods under Section 50 of the *Commercial Tenancies Act* if the goods were not subject to the landlord's right of distress at the time of removal.

14. *Pita Royale Inc. (c.o.b. Aroma Taste of the Middle East) v. Buckingham Properties Inc.,* [2017] O.J. No. 6574 (Ontario Superior Court of Justice, December 18, 2017, C.J. Brown J.)

The tenant leased the premises for the operation of a restaurant. The term commenced on January 1, 2011 and ended 2 ½ years later on August 31, 2013. In addition to the lease, the tenant paid the landlord for the purchase of the restaurant business and equipment. The tenant undertook extensive renovations in the premises and the restaurant opened in May, 2011. The tenant fell behind in rent payments and the landlord terminated the lease.

The lease provided that if the lease is terminated and the landlord re-enters the premises, "the Lessee will promptly (and in any case within ten (10) days after written notice requiring it to do so), remove all of its property from the premises." The landlord allowed the tenant to enter the premises for a short period of time following termination to get personal belongings, but refused to let it remove its equipment and trade fixtures. The tenant was not allowed back into the premises at any point to retrieve its property.

Shortly following termination, the landlord signed a lease with a new party to operate the restaurant and sent the tenant a cheque for $4,000.00, noting it was for "assorted tables and chairs, dishes, pots and pans." The tenant brought a claim for illegal distraint of the tenant's property and improper termination of the lease.

The Court held that the landlord's termination and distraint was unreasonable, reiterating that the right of distraint is a common law remedy available to landlords for recovery of arrears of rent under an existing lease. The Court reminded the parties that the remedies of termination and distress are mutually exclusive at law and the landlord must choose between termination and distraint. If the landlord elects termination and distraint simultaneously, it will result in the landlord being liable to the tenant for the full extent of the tenant's damages.

The Court found the lease was lawfully terminated, but that the distraint was illegal. Given that the distrained property was only three months old, the Court assessed its value (and therefore the amount of the tenant's damages) as being the price the tenant had paid for the property when it entered into the lease. The Court also held that the landlord's high-handed conduct merited an award for punitive damages and granted the tenant an additional $10,000.00.

15. *PG Low Cost Towing v. Insight Progressive Holdings Ltd.*, 2017 BCSC 1969

Facts:

The plaintiff, PG Low Cost Towing (the "Tenant") and the defendant, Insight Progressive Holdings Ltd. (the "Landlord") entered into a one-year commercial lease agreement in April 2017 (the "Lease").

Under the Lease, the Landlord covenanted to provide the Tenant with quiet enjoyment and permitted the Tenant to use the premises as a commercial towing company. The Landlord warranted that the premises were suitable for such use. On the same day that the Lease was executed, the Tenant had the premises inspected. As a result of the inspection, the Tenant believed the premises were not properly zoned for the operation of his towing business, which would prevent the Tenant from acquiring a proper business licence. By June 2017, the Tenant was refusing to pay any rent as the Tenant had concluded that the Landlord had not taken any steps to rezone the property.

In September 2017, a bailiff and representative of the Landlord attended at the premises to distrain for rent by seizing two of the Tenant's vehicles. The vehicles were moved back onto the premises to secure them inside the building, but the bailiff advised the Tenant that he considered that the two vehicles were distrained, despite their location. The bailiff also seized other items on the premises as ownership of those items could not be determined. During the seizure, the bailiff endeavored to have the locks of the premises changed. Despite a written security agreement to the contrary, the Tenant was not permitted back onto the premises at the conclusion of the seizure and was not provided with copies of the new keys.

The Tenant sought an application against the Landlord and bailiff for a declaration that the Lease was terminated and the Tenant's assets were wrongfully distrained.

Issues:

Did the Landlord lawfully distrain for arrears of rent?

Held:

The Court found that the right to distrain for arrears for rent arises is a common law self-help remedy that allows the landlord to hold goods of a tenant which are on the leased premises. The Court also found that one of the key requirements for a lawful distraint is that it can only be carried out during the term of the lease. If the lease is forfeited, the right to distrain comes to an end.

In regard to the changing of the locks, the Court held that the Landlord was entitled to take the steps of changing the locks on the premises to secure the goods that have been seized, but in doing so, it could not exclude the Tenant. Further, the Landlord was never entitled to lock up the whole of the premises so as to exclude the Tenant, except with the Tenant's express consent.

The bailiff and Landlord took the position that the written security agreement signed by the Tenant constituted consent to not only changing the locks, but also to a "five-day voluntary

lockout". The Court rejected this argument and found that this is not what the security agreement said as it would have been inconsistent with the other provisions of the agreement and the provisions of the *Rent Distress Act*. It was held that the security agreement simply authorized the Landlord to change the locks to secure the premises. It did not authorize the Landlord to lock up the whole of the premises so as to exclude the Tenant. As such, the bailiff's actions of changing the locks *and* excluding the Tenant from the entire premises did not merely protect the distrained goods, but also terminated the Lease. Since the right to distrain does not exist if the Lease is forfeited, the Court held that the distress for rent that occurred was not lawful.

Conclusion:

The Court granted the Tenant's application, as well as costs.

16. ***Kamla's Fashions Inc. v. Gykan Enterprises Inc.,*** **[2017] O.J. No. 6356 (Ontario Superior Court of Justice, November 29, 2017, T.R. Lederer J.) – See Case #9**

G. ESTOPPEL CERTIFICATES

17. ***1960529 Ontario Inc. v. 2077570 Ontario Inc*****., [2017] O.J. No. 4517 (Ontario Superior Court of Justice, September 5, 2017, P.J. Cavanagh J.)**

The tenant leased premises to operate a bar and arcade. The lease contained a demolition clause entitling the landlord to terminate the lease on 12 months' notice. The lease also contained a right of first refusal ("ROFR") in favour of the tenant, providing that if the landlord received an offer to purchase the building that it was willing to accept, the tenant could jump the queue and purchase the building if it could match the offer terms within in 24 hours.

In October of 2016, the landlord agreed to sell the building to a third party and did not give the tenant an opportunity to exercise its ROFR. In February of 2017, the landlord advised the tenant of the pending sale and presented the tenant with an estoppel certificate, addressed only to the purchaser's lender. Under time pressure from the landlord, the tenant signed the certificate. The certificate stated, among other things, that: (1) there was no material default under the lease by either the landlord or the tenant; and (2) the tenant had no claim against the landlord in respect of any matters.

A few days later, the building was transferred and within days the new owner sent a notice of termination to the tenant pursuant to the demolition clause in the lease. The tenant sought an injunction preventing the new owner from terminating the lease. The tenant argued that the original landlord breached the lease by not giving the tenant the opportunity to match the purchaser's offer and that, having actual notice of the lease, the purchaser acquired the building subject to the tenant's ROFR.

The landlord argued that the tenant was prevented from making those arguments on the basis of the statements contained in its estoppel certificate. The tenant counter-argued that the estoppel certificate was only addressed to purchaser's lender and so the old landlord and the purchaser couldn't rely on what it said.

In order to obtain the injunction, pending a full trial, the tenant had to show there was a serious issue to be tried.

The Court held that the estoppel certificate meant that the tenant was not allowed to claim that the ROFR had been breached. The Court stated that estoppel certificates are commonly used in commercial transactions involving the sale of land where there are tenancies and that all parties to a commercial real estate transaction are entitled to count on the fact that the party signing the certificate will not take a position that is contrary to the statements made therein. When the tenant signed the estoppel certificate and gave it to the landlord for the purpose for which it was requested, the tenant must be taken to have known that all parties affected by the sale of the building, specifically the original landlord, the purchaser and the purchaser's lender, would rely on what it said.

The Court was not persuaded that there was a serious question to be tried and explained and refused to grant the tenant an injunction. The Court stated that its conclusions were based entirely on the legal effect of the estoppel certificate, and that had there been no estoppel certificate the tenant would have succeeded.

H. FORMATION OF CONTRACT

18. *Northridge Property Management Inc. v. Champion Products Corp.* [2016] O.J. No. 2407 (Ontario Superior Court of Justice, April 25, 2016, W.M. Le May J.); [2017] O.J. No. 1528 (Ontario Court of Appeal, March 27, 2017, G.J. Epstein, M.L. Benotto and G.T. Trotter JJ.A.)

The parties executed an offer to lease for premises from which the tenant could operate a party supply business and a sanitation supply business. Attached to the offer was a list of renovations the landlord was required to complete and a copy of the landlord's standard form of lease, which the tenant covenanted to sign, subject to reasonable non-financial amendments. On November 1, 2011, the tenant took possession of the premises in accordance with the offer and began readying the premises for operation of its business.

Shortly after taking possession, the tenant complained to the landlord that several of the renovations they discussed were not complete and advised that until such work was complete it could not operate its businesses. The landlord responded that, with the exception of certain paving work, all of the landlord's work listed in the offer would be completed the following week. Before the first month following the tenant's possession had passed, the tenant abandoned the premises on the basis that the landlord's failure to complete the renovations rendered the space unsuitable for the tenant's businesses.

The landlord brought an action for damages for breach of lease. The tenant defended the action on the basis that the offer was a mere agreement to agree, or in the alternative that the landlord had fundamentally breached the lease, because: (1) the premises was zoned for warehouse use, not retail; and (2) the landlord failed to complete the agreed upon renovations.

The Court found that the offer fulfilled all of the requirements of a valid lease. In addition, the Court noted two principles regarding binding offers. First, an offer to lease is not to be construed

too narrowly - a court is directed to construe offers to lease broadly and fairly. Second, a written agreement to lease can be valid in spite of containing an express stipulation that a formal lease will be entered into in the future. The Court found that the offer constituted a binding lease.

The Court rejected the tenant's zoning argument in part because the zoning permitted retail uses on the condition that the floor area used for retail did not exceed 10% of the total gross floor area. The Court held that the zoning was suitable for the tenant's business, which was chiefly a warehouse, but also required space where customers could pick-up their orders. Further, the Court noted that the first time the tenant raised the zoning issue was in its defence to this action.

On the issue of the landlord's renovation of the premises, while the Court recognized that the tenant had made several complaints about the condition of the premises, the offer to lease stipulated that the tenant would accept the premises "as is where is", subject to the list of landlord's work listed in the schedule to the offer. The Court found that the deficiencies raised by the tenant went well beyond what was listed in the offer and that when the tenant took possession most of the landlord's listed work was complete; and by the time the tenant vacated, all of the landlord's work was compete. The Court held that the alleged deficiencies, which could be remedied for approximately $25,000, were certainly not substantial enough to deprive the tenant of essentially the whole benefit of the contract, and therefore the tenant failed to establish the landlord was in fundamental breach of the lease.

The judgment was upheld on appeal.

I. FUNDAMENTAL BREACH

19. *Northridge Property Management Inc. v. Champion Products Corp.* [2016] O.J. No. 2407 (Ontario Superior Court of Justice, April 25, 2016, W.M. Le May J.); [2017] O.J. No. 1528 (Ontario Court of Appeal, March 27, 2017, G.J. Epstein, M.L. Benotto and G.T. Trotter JJ.A.) – See Case #18

J. INSURANCE

20. *Core Ventures Inc. v. Trio Chute Inc. (Aluminum Planet),* 2017 ABQB 794

Facts:

This summary trial relates to the interpretation of a commercial lease entered by the applicant Trio Chute Inc., operating as Aluminum Planet (the "Tenant") and the landlord Core Ventures Inc. ("the Landlord") and specifically with respect to the issue of who bears the risk of fire loss under the lease. The lease was entered on November 29, 2005 ("the Lease") in respect to the Shelbourne building situated at Suite 101, 1019 — 17 Avenue SW, Calgary, Alberta ("Leased Premises"). The Tenant operated a clothing store in the leased premises.

The applicants, Trio Chute and Kishore Polra, Trio Chute's sole officer, employee, director and shareholder (collectively the "Tenant Parties"), sought judgment dismissing the action against them with costs. The Landlord sought a declaration that the Tenant Parties are liable for damages

caused by the fire, to be assessed at an assessment hearing and seeks the costs of this trial on a solicitor-client basis.

The Landlord was barred from proceeding with the action against the Tenant Parties on the basis of the Lease entered between it and Tenant with respect to damages arising out of the fire. In addition, the Landlord's claim for loss of rental income and rental arrears prior or after the fire was dismissed.

<u>Clause 6.09</u> of the lease provided for repairs where the Tenant is at fault, specifically providing that if the premises:

> … get out of repair or become damages or destroyed through negligence, carelessness or misuse by the Lessee, … the cost of the necessary repairs, replacement or alterations plus Twenty (20%) percent of such costs for overhead and supervision, shall be borne by the Lessee.

<u>Clause 7.12</u> provided that the Landlord shall make structural repairs necessitated by fire, only in accordance with the provision of Article 8.01. <u>Clause 8.01(Damage or Destruction) provides that</u>:

> …if such damage is due to the negligence or overt acts of the Lessee or his agents or servants then notwithstanding anything to the contrary herein contained in the event that the Lessor shall repair the Demised Premises, the cost shall be paid by the Lessee and there shall be no abatement of rent.

The lease also provided that the Landlord covenanted to:

> To insure and keep insured, during the Term hereof, the Building against loss under a standard fire insurance policy with extended coverage endorsement.

Held:

The Lease contained a covenant that provided for the tenant to pay its proportionate share as well as a covenant requiring the Landlord to insure under a standard fire insurance policy and covenants regarding damages and repairs. The Court held that Lease should be read as a whole, construed in a fashion that gives effect to all its terms where possible and in a way that makes business sense.

The Court found the current case law to suggest that where a tenant paid a proportionate share of the landlord’s insurance premiums, as in this case, and where a lease contains a covenant by the landlord to insure, which is also present in this case, the tenant will benefit from it unless the lease contains clear language which leads to a different commercially sensible result. The Court referred to *Pyrotech Products Ltd. v. Ross Southward Tire Ltd*. 1976 2 SCR 35 for the proposition that the risk of loss by fire, including where the fire occurs by a tenant’s negligence, was transferred to the landlord following the issuance of the insurance bill.

That is, the undertaking by the Landlord to obtain fire insurance acted as an assumption by the Landlord of the risk of loss caused by the peril insured against. This is so despite any covenant by the Tenant to pay for repairs which, without the Landlord's covenant to insure, would obligate the tenant to indemnify the Landlord. The rationale for this is that the covenant to insure covers fire loss, despite the Tenant's negligence. There would be no benefit to the Tenant from the covenant to insure if it did not apply to a fire caused by the Tenant's negligence. In such circumstances, unless the assumption above is clearly rebutted under a lease, a landlord will assume the risk of damage to its property caused by fire. The Court found the assumption was not rebutted.

Article 8.01 (partial or total destruction of the Demised Premises by fire) provided that notwithstanding anything to the contrary, where damage due to the negligence of the Tenant or its agents or servants is repaired by the Landlord, the cost shall be paid by the Tennant, and there shall be no abatement of rent. However, the Court held that the clause did not specifically refer to insurance proceeds or fire insurance. The Court agreed with the Tenant Parties that, when read in its entirety, the wording of article 8.01 does not displace the express transfer of the risk of fire loss in article 7.03 (Insurance) from the Landlord to the Tenant Parties.

In addition, the Court found that article 6.09 did not contain the express language required which indicated the intention to negate the transfer of risk of fire loss to the Landlord provided under article 7.03. There would be no purpose for the inclusion of article 7.03 if the Tenant Parties were denied the benefits of fire insurance and if it was only intended for the benefit of the landlord.

The Court's interpretation of this Lease provided that the Tenant Parties should not be deprived of the benefit of its payments for insurance nor should the Tenant be deprived of the benefit of the Landlord's covenant to insure under article 7.03.

The issue of rental income was raised during oral submissions, however nothing was mentioned in the Landlord's brief which was provided before the start of the trial. The Court invited counsel to make further written submissions on the issue of loss of rental income in order to clarify the issue. The Court then asked for further clarification as the Landlord's answer lacked clarity. The short answer received by the Court from the Landlord's further supplementary submissions was not found to be sufficient.

The Landlord did not prove on a balance of probabilities its loss of rental income and rental arrears prior to or after the fire.

Conclusion:

The Landlord was barred from proceeding with the action against the Tenant Parties on the basis of the Lease entered between it and the Tenant with respect to damages arising out of the fire. In addition, the Landlord's claim for loss of rental income and rental arrears prior or after the fire was also dismissed.

K. INTERPRETATION

21. *CHC Group Ltd.,* Re (2017), 2017 BCSC 486, 2017 Carswell BC 789

Facts:

This case involved a sale agreement with a leaseback arrangement.

There was an initial lease between Alpha Inc., as landlord ("Alpha") and Heli-One, as the tenant (the "Alpha Lease"). Heli-One operated a helicopter fleet from the leased premises, and then sold Argo its interest in the Alpha Lease, together with certain property on the leased premises. Argo leased back the premises to Heli-One for a term of 23 years (the "Argo Lease").

The sale to Argo included buildings, chattels, and Heli-One's rights under the Alpha Lease, but excluded "trade fixtures" that were removable under the Alpha Lease.

Heli-One ran into financial issues, began restructuring proceedings under the *Company Creditors Arrangement Act* and vacated the premises. Heli-One took paint booths bolted and welded to the floor, engine test beds, a transmission test bed attached to electrical, plumbing, and ventilation systems, some cooling towers, a generator bolted to dedicated concrete pads, and a cleaning station bolted to floor. Argo said it owned these items and applied for order to obtain a list of items taken and have those items returned to them. Argo took the position that the term "trade fixtures", which was not defined in the sale and leaseback agreements, found its meaning by reference to the Alpha Lease definition of "trade fixtures".

The main issue in this case centered on the meaning of the term "trade fixtures" as defined in the Alpha Lease.

The Alpha Lease defined trade fixtures as:

> "the unattached, moveable chattels and equipment installed prior to or during the Term in, on or which serve any of the Buildings, for the purpose of [Heli-One] or an Occupant carrying on its business in such Buildings and which Trade Fixtures and [Heli-One] or Occupant is permitted to remove only to the extent permitted by the terms of this Agreement, but Trade Fixtures do not include Leasehold Improvements."

"Leasehold Improvements" were, in turn, defined as "all improvements, fixtures, equipment and Alterations from time to time made, constructed, erected, or installed by, for or on behalf of [Heli-One] in, on, to or for the Premises, whether or not easily disconnected or movable"

Issues:

1. Did Argo (as Sublandlord) own these items pursuant to the lease agreement?
2. Were the items taken leasehold improvements or trade fixtures?

Held:

Argo argued that the definition of trade fixtures in the Alpha Lease, defined as "unattached, moveable chattels and equipment" should be interpreted *conjunctively*, with the adjectives "unattached" and "moveable" modifying both chattels and equipment.

The Court found that the Alpha Lease did not support this conjunctive reading of the definition of "trade fixtures" and opined as follows:

> "In my view the adjectives of "unattached" and "moveable" are intended to modify chattels, not equipment. The definition of Trade Fixtures includes items which are 'installed . . . in, on or which serve . . . for the purpose of the Subtenant [Heli-One] or an Occupant carrying on its business ….' Thus, attachment is contemplated in the language. This is consistent with the common understanding of a trade fixture. Also, one cannot ignore that the term describes itself as a fixture. Further, chattels typically are not installed but equipment can be….Equipment can be attached as a trade fixture or as leasehold improvement. It depends on what purpose they serve. The latter is for the premises and the former for the purpose of the tenant carrying on it[s] business."

The definitions of "trade fixtures" and "leasehold improvements" under the Alpha Lease were consistent with the distinction in law between leasehold improvements, which become part of the landlord's realty, and trade fixtures, which while attached, are removable by the tenant when surrendering the premises.

The Court cited with approval *Homestar Holdings Ltd. v Old Country Inn Ltd.* (1986), 8 B.C.L.R. (2d) 211, for the proposition that: "the right to deprive a tenant of its trade fixtures must be set out in clear language and that the courts will construe the covenant strictly against the lessor."

Conclusion:

<u>Issue 1:</u>

No, the right to deprive a tenant of its trade fixtures must be set out in clear language and that the courts will construe the covenant strictly against the landlord.

<u>Issue 2:</u>

The removed items were trade fixtures and accordingly, the removal was permitted.

The action was dismissed. Argo's interpretation of the word "trade fixtures" was inconsistent with the wording of the Alpha Lease. Tenants (in this case a Subtenant) generally have the right to take affixed trade fixtures when vacating the premises. The right to deprive a tenant of its trade fixtures must be set out in clear language. The courts will construe these covenants strictly against the landlord.

22. *Buckerfields v. Abbotsford Tractor and Equipment* (2017), 2017 Carswell BC 1698, 2017 BCPC 185

Facts:

This case involved a tenant (the "Tenant") that operated a store from leased commercial premises. The Tenant paid a damage deposit of $23,540. A sub-tenant left oil spilled in yard, which led to landlord retaining environmental expert for clean-up beyond what the Tenant undertook. The Tenant brought the action against the landlord for return of the damage deposit.

The history of the lease is as follows: An original lease was made between the landlord and a company called Beaver Lumber, as tenant, for a term of 10 years. Beaver Lumber assigned its interest as tenant to Del's Farm Supply Canada Co. ("Del"). Del exercised an option in the lease to renew the lease for 5 years. Del then assigned the lease to the current Tenant via an assignment agreement (consented to and signed by the landlord). The Tenant exercised the second renewal option and sublet the premises to a subtenant.

The Tenant vacated the premises, with proper notice, but the parties disagreed on the question of who was entitled to most of the damage deposit. The Tenant sated that that under the lease, it was obliged to return the premises "in good order and repair, except for reasonable wear and tear", and that it complied with its agreement, so it should get all of the damage deposit back.

The landlord said it was entitled to deduct from the damage deposit the sum of $17,373.24 for costs owing to it by the landlord under the lease. This sum was broken down as follows: (a) yard clean-up costs; (b) replacement of a dock leveler; (c) inspection and testing of a heater; (d) supply and installation of a new heater; (e) legal fees incurred for an environmental matter; and (f) the landlord's time and effort for arranging the repairs.

It appeared from the evidence that the Tenant was diligent about meeting its obligations to the landlord. One of the problems that led to the disagreement between the parties was caused by the sub-tenant. By 2012, part of the property had been sublet by the tenant to a company known as Prime Link Logistics. The sub-tenant went into receivership and left its portion of the property in a mess, with oil stains everywhere. As a result, the landlord hired an environmental expert at the tenant's expense to test and remedy the areas of contamination.

When the Tenant vacated, there were items that the landlord felt required attention: yard clean up, repairs to dock levelers, and repairs to heater. These were in dispute. The landlord also wanted money for legal fees associated with the environmental problem and time spent organizing the clean-up after the Tenant vacated.

Issues:

1. Did the landlord satisfy the burden of proof that the leased premises were not left in a satisfactory state after the Tenant vacated?
   a. Was the landlord entitled to set-off for:
      i. Dock leveler repairs,
      ii. The heater, and
      iii. Costs associated with the environmental expert and clean-up?

2. When was the correct date for comparison?

Held:

Prior to issuing a decision, the Court reviewed several legal principles:

- <u>Burden of proof</u>: The landlord had the burden of proof to show that it was properly withholding money from the damage deposit and to prove what the condition of the premises were at the beginning of the lease. Where a lease contains a provision that makes an exception for "reasonable wear and tear", the burden of proof will then shift to the tenant to show, on a balance of probabilities, that any deterioration in the condition of the premises falls within that exception.

- <u>What is reasonable wear and tear?</u>: The Court noted that phrase "reasonable wear and tear" presents some difficulty because it cannot be precisely defined and is usually fact specific. Generally, what will amount to reasonable wear and tear is to be considered in light of the purpose for which the premises were leased, the nature of the business carried out thereon, the age of the building, and the length of the lease (*Griffin Holding Corp. v. Raydon Rentals Ltd.*, 2016 BCSC 2013 (B.C. S.C.)).

- <u>Lease Renewal/New Lease?</u> The Tenant argued that some of the issues in this case turned on the distinction between a lease renewal and an extension of the lease term, the distinction being that, while an extension changes nothing other than the length of time for the tenant's occupancy, a renewal involves the creation of a new lease on the same terms as the original lease, other than as contemplated (such as rental amount).

  In this case, the Tenant submitted that this interpretation is significant, because it means that the landlord had the burden of proving that the Tenant left the premises in worse condition at the end of the tenancy compared to how they existed at the commencement of the second renewal term. The Court cited *Porte Development (Main) Ltd* v. *Janus Production Inc*., 2007 BCSC 670 in finding the Tenant's argument accorded with the law, and agreed that where there is a renewal (as opposed to an extension), "the clock resets when it comes to consideration of the condition of the premises."

Conclusion:

The Tenant was awarded the entire damage deposit less the yard clean-up fee.

<u>Issue 1:</u>

The lease agreement obligated the tenant to keep the property in "good order" and to surrender the premises not as it found them, or as they were at any particular point in time, but "in substantially the same order and condition as they were required to be kept during" the tenant's occupancy. This was not the condition they were left in. The yard was not left in a satisfactory state. Photographs taken by the landlord after the Tenant vacated the premises showed dumpsters full of garbage that were not removed, wooden pallets and fence posts that were not removed, mounds of soil left on the property, topsoil mixed in with the gravel rather than being removed,

wooden planters left on the property, and electrical fixtures sticking out of the ground which were not removed. The invoice for clean-up of the yard was high, but did not seem out of order. Therefore, the Court found the landlord was entitled to reimbursement.

When the Tenant took possession, the dock levelers were old and not in very good working order. The Tenant spent money to get the dock levelers in a workable state. The lease assumed by the Tenant required the premises to be kept in good order by the Tenant, "except for reasonable wear and tear". It did not require the Tenant to leave the premises in a better or improved condition, and the landlord’s position did not take into account reasonable wear and tear. As such, the landlord was not entitled to set-off for this.

The landlord was not entitled to set off for a new heater either, because it did not satisfy the burden of proof that the heater ever worked properly (and this was in dispute).

The next issue was legal fees incurred for the environmental matter. The lease agreement allowed the landlord to recover some of its solicitor-client costs under certain conditions. However, landlord did not provide evidence of the invoices and, as such, the Tenant could not challenge whether it was responsible for all of the services invoiced. Therefore, the landlord had not met the burden of proof to show that the legal fees were a proper set-off. The Court noted that the landlord's position essentially is one of saying, "I won't show you what these legal bills are for, but trust me, I'm entitled to set them off."

The landlord was not permitted to charge for its own time in arranging for repair, as it was not incurred as an “expense” under the lease, because the interpretation of the lease, an expense required the landlord to pay something.

Issue 2: The Court agrees that the correct date for comparison was when the renewal period commenced. However, in reviewing each of the items of set off, the Court found that, in this particular case, nothing will turn on which date is selected on a consideration of each of the five components of the landlord's set off.

23. *Don Francesco Restaurant (2013) Ltd. v. Oxford Properties Group Inc.*, 2017 BCSC 1285

Facts:

The plaintiff, Don Francesco Restaurant (2013) Ltd. (the “Tenant”), operated a fine dining restaurant in space owned by the defendants, Oxford Properties Group Inc. (the “Landlord”), under a lease that was to expire in June 2017. The Tenant claimed it was entitled to, and had, exercised its right to renew the lease because it has met all preconditions for the renewal. The Landlord submitted that the Tenant did not meet the conditions and was therefore not entitled to renew the lease.

In June 2002, the Landlord and the original tenant – the Tenant’s predecessor – signed a lease that was valid for five years (the “Lease”). The Lease contained an option to renew for a further five years upon the tenant meeting certain preconditions, one of which had to do with the payment of percentage rent. The original tenant did not meet this precondition, but the lease term was, nevertheless, extended for a five year period because the parties were able to negotiate a

deal and agreed on a number of terms, including an increase in rent per square foot (the "Extension Agreement"). The Extension Agreement also contained an option to renew, but its wording differed from the renewal option clause in the Lease. In January 2013, an individual on behalf of the Tenant bought the business from the original tenant, and the Lease and Extension Agreement were assigned to the Tenant with the Landlord's consent.

One of the preconditions for renewal in the Lease was that the "Tenant has paid Percentage Rent, as defined in the Lease, in each of the two (2) final Lease years" (the "Original Precondition"). In the Extension Agreement, the equivalent precondition stated "Tenant has paid Percentage Rent, *calculated on an annual basis*, as defined in the Lease, in each of the two (2) final lease years…." (the "Modified Precondition") [*emphasis added*].

The Landlord argued that the preconditions were not met and, accordingly, that the Tenant was unable to exercise its renewal option. Both parties applied to the Court for contractual interpretation.

Section 5.4 of the Lease titled "Calculation and Payment of Percentage Rent" provided:

> "Percentage Rent is payable monthly through the Term on the 10th day of each calendar month in the Term. The amount of each instalment of Percentage Rent will be the amount, if any, determined by applying the applicable Percentage Rent Rate to the total of the stated Gross Sales for the immediately preceding month and the stated Gross Sales for all preceding months of the Lease Year, and deducting from that total, the total monthly payments on account of Minimum Rent and Percentage Rent made previous to that time by the Tenant for the Lease Year. If the Annual Statement furnished by the Tenant under section 5.6 discloses that [the tenant has overpaid], the Landlord will credit the Tenant's rental account by the amount of such excess . . . otherwise, the Tenant will pay to the Landlord any deficiency . . . If the term ends in a Lease Year, Percentage Rent will be calculated for the part of the last Lease Year that is within the term on a per diem basis based on the number of days in that partial Lease Year."

The Tenant submitted that the percentage rent, the percentage rent rate, and the clause outlining the calculation and payment of percentage rate were conflicting and confusing because the Lease speaks to calculating percentage rent of the current *month* based on that *month*'s gross sales, as well as gross sales for all preceding months in the lease year. The Tenant argued that there were multiple possible interpretations of this, which meant the clause was ambiguous. The Tenant's interpretation was that as long as it has made a payment of percentage rent in any *month* of the last two lease years, it would have met the percentage rent precondition. The Tenant also argued that the Modified Precondition was ambiguous and should be interpreted by severing the added phrase "calculated on an annual basis".

The Landlord argued that the Original Precondition term and the Modified Precondition term had the same substantive and operative effect, and that the words "calculated on an annual basis" added in the Extension Agreement simply clarified the existing meaning in the Lease. The Landlord pointed out that each month the Tenant determines whether 6% of its gross sales exceed the monthly minimum rent. If it does, then the amount of that excess is payable as percentage rent. In the first month of the lease year, that would be the only calculation necessary.

In each succeeding month, however, that calculation is done on the cumulative totals for the current and preceding months in the lease year. At the end of the lease year, the Landlord and the Tenant reconcile the amounts paid (or not paid) with the Tenant's *annual* gross sales report. Any overpayment is returned, and any deficiency by the Tenant is paid.

The Tenant also submitted that even if it never paid percentage rent because 6% of its gross sales never exceeded minimum rent in any month, it would be entitled to exercise its option to renew subject only to its compliance with the other preconditions.

The Tenant's final submission on the matter was that the Court should not give effect to the Modified Precondition because the parties did not agree to its wording.

Issue:

What is the proper interpretation of the contractual terms in dispute?

Held:

The Landlord's interpretation of the percentage rent precondition was correct. The Court rejected the Tenant's argument regarding ambiguity and confusion of the terms and conditions in question.

The Court also rejected the Tenant's argument that the percentage rent precondition should be inapplicable where the Tenant otherwise complied with the other provisions of the lease, stating that this is incongruous with the notion of a precondition. Finding otherwise would mean it is not a true precondition, but rather an "optional" precondition. The case law recognizes that exercising options to renew are different from mandatory terms in a contract because neither party is obliged to insist on them. If party to a commercial contract wants to exercise an option, there must be strict compliance with the contractual terms thereof.

Regarding the Tenant's assertion that the parties did not agree to the wording of the Modified Precondition, the Court held that there was no substantive difference between the Original Precondition and the Modified Precondition. The addition of the words "calculated on an annual basis" in the Modified Precondition did not change the substantive meaning or intent of preconditions to plaintiff's right to renew lease.

Conclusion:

The Tenant's application was dismissed and the Landlord's interpretation of the percentage rent precondition was held to be correct.

24. *Park Royal Shopping Centre Holdings Ltd. v. Gap (Canada) Inc.,* 2017 BCSC 1257

Facts:

The parties were in a commercial tenancy relationship. The Defendant tenants, Gap (Canada) Inc. (the "Tenants") leased premises in the North Mall (the "North Mall") of the Park Royal Shopping Centre in West Vancouver ("Park Royal") and operated two retail clothing stores, the

Gap and Banana Republic. The Plaintiff, Park Royal Shopping Centre Holdings Ltd. was the landlord (the "Landlord")

Since September 2014, the Park Royal Shopping Centre had been undergoing redevelopment. The renovations were extensive and included demolishing parts of the shopping centre and rebuilding from the ground up. The Tenant's lease agreements provided for reduced rent in defined circumstances. A dispute arose on the interpretation and application of the relevant provisions during redevelopment.

Following redevelopment, the Tenant stopped paying regular rent under its lease agreements effective April 1, 2016 and since that time the Tenant either didn't pay rent or paid Alternative Rent (as defined below). The Tenant was noted in default by the Landlord and Notices of Default were issued on April 12, 2016 and demand letters followed on July 14, 2016. The Tenant alleges that the Landlord failed to meet the Operating Requirements (as defined below, which included a co-tenancy covenant, as set out in the lease.

Issues:

1. The interpretation of the lease provisions that determine the entitlement to reduced rent; and
2. If the Landlord is successful on its interpretation, whether the defendants are obliged to pay the Landlord its legal fees on a solicitor-client basis.

Held:

Interpretation of the Lease Agreement, Specifically Clause 11.06

Clause 11.06 of the Tenant's leases state:

"**11.06 - HOURS OF BUSINESS**

> **(e)** Operating Requirements - The Tenant's obligation to open the Premises for business and to operate during designated days and hours shall be subject to:
>
> > **(i)** the Woodward's department store or any Subsequent Replacement (as defined below) thereof, also being open for business during such designated days and hours (the said minimum co-tenancy requirements for operating during the designated days and hours shall be called the "Department Store Operating Requirements"), and
> >
> > **(ii)** stores representing eighty-five percent (85%) of the Gross Leasable Area and sixty-five (65%) by number, of the interior North Mall (excluding the Woodward's department store and any Subsequent Replacement thereof) also being open for business during such designated days and hours (the said minimum co-tenancy requirements for operating during the designated days and hours shall be called the "Mall Tenants Operating Requirements")."

Gross Leasable Area as it appears in 11.06(d)(ii) is defined in Schedule C of the leases as follows:

> "13. Gross Leasable Area - of the Shopping Centre or any specified portion thereof means the aggregate, from time to time, of the Floor Areas of all leasable premises in the Shopping Centre or in such specified portion, including the Premises, as the case may be."

Under Clause 11.06, if the Operating Requirements are not met, a number of rights or entitlements for the Tenant are triggered, which includes the right of Alternative Rent (set out below). More specifically, Clause 11.06(f) of the Tenant's lease states:

> "(f) <u>Tenant's Rights on Failure of Operating Requirements</u>
>
> (i) In the Event that the Operating Requirements are not being met at any time, the Tenant may either (i) close the Premises and pay monthly, <u>as alternative rent</u> ("Alternative Rent") during such period of closure Minimum Rent only, but no payments on account of Shopping Centre Costs, Property Taxes, or any other Additional Rent otherwise payable under this Lease; or (ii) remain open for business and pay monthly, as Alternative Rent during such period, fifty percent (50%) of Minimum Rent plus Percentage Rent only, but no payments on account of Shopping Centre Costs, Property Taxes, or any other Additional Rent otherwise payable under this Lease.
>
> Upon the date that the Operating Requirements are once again met […in the case of the non-department stores, for a continuous period of sixty (60) days] the Tenant shall cease the payment of the Alternative Rent and resume the payment of Minimum Rent …." [*Emphasis added*]

Applying principles from *Athwal v Black Top Cabs Ltd.*, 2012 BCCA 107 and *Creston Moly Corp. v. Sattva Capital Corp*, 2014 SCC 53, the Court found that the Operating Requirements under Clause 11.06 must include any area of the interior North Mall that had been designated for leasing to tenants, *including* the area containing store premises that were demolished during the redevelopment for the purpose of rebuild. The Woodward's department store or any "Subsequent Replacement" of Woodward's is excluded.

The leases contained the express exclusion of the Bay, kiosks, carts or temporary tenants from the calculation of Gross Leasable Area. Had the parties intended that stores within the North Mall that were demolished during redevelopment would also be removed from calculations under the Operating Requirements until they were rebuilt, the Court opined that the leases would have specified that such is the case and provided clarity.

However, both leases were silent on this point. The Court saw the Landlord as attempting to have the exclusion read in as an implied term, which was not supported by a review of the

agreements, as a whole, particularly in light of the level of specificity that has been used in relation to other exclusions and provisions.

The Court was not persuaded that the reference to "Floor Areas" in the definition of "Gross Leasable Area", as embodied in Clause 11.06, meant that any demolished portion of the North Mall that was designated for leasing to tenants prior to its demolition would be excluded from the calculations under the Operating Requirements during the course of the redevelopment that commenced September 1, 2014.

The Meaning of "Reasonable Legal Expenses"

The lease expressly provides that when default occurs, the Landlord may claim resulting damages and "all reasonable legal fees" against the Tenant, the Gap:

> **18.04 - COSTS**
> The Tenant shall pay to the Landlord all damages, and reasonable costs and expenses (including, without limitation, all reasonable legal fees …), incurred by the Landlord … as a result of an Event of Default or in respect of which the Tenant has agreed … to indemnify the Landlord.

The Landlord alleges that "all reasonable legal fees" in Clause 18.04 means actual legal fees or expenses that may be incurred by the Landlord when enforcing rent obligations under the leases. This would entitle the Landlord to costs on a solicitor-client basis if successful on its claims against the defendants.

Citing *Tsawwassen Quay Market Corporation v Delane Industry Co. Ltd.*, 2011 BCSC 940, the Court quoted Justice Griffin:

> [13] The court should be reluctant to interpret the bare phrase "reasonable legal costs" in a manner that elevates its scope to provide for special costs. The latter are generally designed to penalize reprehensive conduct deserving of reproof or rebuke: Garcia v. Crestbrook Forest Industries Ltd. (1994), 1994 CanLII 2570 (BC CA), 9 B.C.L.R. (3d) 242. It seems to me implicit in a contract clause dealing with the "reasonable costs" of litigation, that this must mean something that the courts would consider objectively "reasonable", and that means costs as awarded by the court in the litigation in question, which would typically be at the ordinary scale. If the parties wish to contractually provide for special costs that more closely approximates actual legal fees, I suggest they must do so by clear language, such as language that provides a party for full indemnity of their actual legal expenses.

Consistent with *Tsawwassen* and *Bakshi v. Shan*, 2013 BCSC 969 at para 44, the Court found that the intentional use of the word "reasonable" by the signatories more closely aligns the impugned phrase with the nature of costs that would be applied by a court in the ordinary course of litigation, than costs on a solicitor-client basis.

Held:

The Court ordered:

(a) the calculations for the thresholds entitling the defendants to alternative rent in the Gap and Banana Republic leases must include store premises that have been demolished during the course of the North Mall's redevelopment; and;

(b) the phrase "all reasonable legal fees" in the Gap and Banana Republic leases does not include legal fees as determined on a solicitor-client basis.

25. *Corydon Village Mall Ltd. v. TEL Management Inc.*, 2017 MBCA 8

Facts:
TEL Management Inc. (the "Tenant") leased premises in a shopping mall owned by Corydon Village Mall Ltd. (the "Landlord"). The lease (the "Lease") stated that the premises were to be used for the purpose of a women's shoe store and that a change of use required the Landlord's prior approval, which was not to be unreasonably withheld or delayed. The Lease also listed businesses that were not to be conducted from the leased premises (the "Prohibited Uses").

Article 6.01 of the Lease stated:

> The Premises will not be used for any purpose other than the purpose of conducting the primary business of a retail sale of shoes (specializing in large sizes) and the sale of related accessories, and for no other purpose whatsoever. Any changes shall be subject to the Landlord's prior approval which approval shall not be unreasonably withheld or delayed. Without limitation, none of the following businesses or methods of doing business will be conducted on or from the [leased] Premises:
>
> … (b) a special sale other than one incidental to the normal routine of the Tenant's business upon the [leased] Premises with its regular customers.

The Tenant began experiencing difficulties and wrote to the Landlord explaining these difficulties. In September 2010, the Tenant requested that for the period of January and February 2011, to set up a seasonal/holiday pop-up location at the premises where it would sell ladies' clothing, accessories, giftware, and some home accessories. The Tenant stated this would be a temporary solution, and noted that it hoped, following the pop-up, the Landlord would release the Tenant from its commitment or secure a sub-lease tenant as it was impossible for the Tenant to move forward with the shoe store concept.

The Landlord's property management orally informed the Tenant that this was not possible because there were other tenants with exclusive-use clauses in their leases. The Tenant then moved out of the premises in October 2010 and thereafter stopped paying rent. The Landlord sued the Tenant, and the Tenant, *inter alia*, asserted that the Landlord breached the Lease by unreasonably withholding consent to vary the use.

At trial, the judge interpreted the "seasonal/holiday" pop up store to be a Prohibited Use under Article 6.01(b) of the Lease. The trial judge interpreted the Lease to mean that the Landlord's

covenant not to unreasonably withhold consent did not apply if a proposed change of use was one of the Prohibited Uses. Thus, the trial judge held that the Landlord had not breached the Lease and had acted reasonably in withholding consent. The Tenant appealed the trial judge's findings on the grounds that the trial judge misinterpreted the Lease.

Issues:

1) Did the Trial Judge err in how she interpreted and applied Article 6.01 of the Lease; and if so,

2) Did the trial judge err in finding that the Landlord acted reasonably and did not unreasonably withhold its consent to the proposed new use?

The Tenant's position was that the trial judge was incorrect in its interpretation of Article 6.01 in stating that the Landlord's obligation to not unreasonably withhold consent to the request for use modification, did not apply to a use within the list of Prohibited Uses. The Tenant submitted that the proper interpretation was that the Landlord was still required to consider all requests for a change of use and was obliged not to unreasonably withhold its consent.

Held:

Issue 1

The Tenant argued that the lease was a "standard form contract," as explained in the Supreme Court Decision of *Ledcor Construction Ltd v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 (CanLII) and, therefore, the standard of review for the appeal court is a standard of *correctness*, as opposed to the deferential standard of review of palpable and overriding error.

The Court stated that "the foundational question for determining the standard of review for a question of contractual interpretation is whether the contract is, in fact, a standard form contract." The Court of Appeal referred to the "take it or leave it" nature of a standard form contract where the importance of the factual context would be far less significant, as the parties do not negotiate terms and the contract is put to the other party on a take-it-or-leave-it basis. The interpretation of a standard form contract fit under the category of pure questions of law (for example, the question about what the correct legal test is). That is, deciding on the correct interpretation amounts to establishing the "correct legal test," and may be applied in future cases involving identical or similarly worded provisions. The surrounding circumstances and factual context would have little value.

However, the Court found that the Lease could *not* be properly characterized as a standard form contract. Even though the Lease was a standard form document prepared by the Landlord, this was not determinative because the Lease "was not a 'take it or leave it' contract in the sense that one party dictat[ed] the terms to anyone who wants the product, service or right." On a review of the evidence, the Court found there was some negotiation and consideration of the contents of the Lease by the Tenant. Further, the wording of Article 6.01 was negotiated at least to the extent of the permitted use, as a shoe store, and the Tenant reviewed the Lease with a real estate agent before signing. In addition, there was no evidence that the provisions of the Lease, in general,

and Article 6.01 in particular, was similar to leases for other shopping centers. The Court accepted the Landlord's testimony that "[e]very landlord uses a different lease document…. This is our standard lease for our mall. It's not used by everyone." The Court cited, with approval, the proposition that where there is some give and take in arriving at the final terms of the lease, it cannot be said to be a "standard form," even if it could be a standard form in relation to leases in a particular mall.

The Court of Appeal, therefore, found the Lease to be a negotiated contract. Accordingly, the Court of Appeal held that the question of how the trial judge interpreted Article 6.01 was to be reviewed on the deferential standard of review of palpable and overriding error. The Court noted that although Article 6.01 was not well worded, the provision was clear in stating that the Tenant "could only carry on the business of a shoe store" and that a change of use required the consent of the Landlord. However, it was not clear how the Prohibited Uses affected the Landlord's obligation not to unreasonably withhold consent to a change of use request. The Court noted that the essence of the trial judge's decision was that a prohibited use was "an exception to the obligation of the Landlord not to unreasonably withhold consent to a change of use request." The Court found no palpable or overriding error in this approach finding that the judge had "considered the words of article 6.01 in the context of the surrounding facts" and thus the Court of Appeal held that the trial judge's interpretation was entitled to deference.

Issue 2

Based on the foregoing, the Court held that it was unnecessary to consider the second issue of whether consent was unreasonably withheld. Thus, the Court found the Tenant was liable under the Lease as determined by the trial judge and dismissed the appeal.

Conclusion:

The Court held that the Lease was not a standard form contract, as there were negotiations leading to the Lease. Additionally, the Court confirmed the trial judge's finding that where a Lease contains prohibited uses these prohibited uses act as an exception to the obligation of the Landlord not to unreasonably withhold consent to a change of use request.

26. *Vista Sudbury Hotel Inc. v. Oshawa Group Ltd.*, [2018] O.J. No. 916 (Ontario Superior Court of Justice, February 20, 2018, J.S. Poupore J.)

Zellers was operating a department store under a lease dated October 15, 1971. At this time, Eaton's was the other anchor tenant in the centre. In 1999 Eaton's ceased to carry on business and it was never replaced. On February 26, 2004, Zellers gave notice of its intention to close its store. The landlord sought an injunction requiring Zellers to continue to on carry on business. The Court held that though there was a serious issue to be tried, the landlord did not prove that damages could not adequately compensate for any harm in the event that Zellers was found to have breached the lease. On that basis, the Court refused to issue an injunction.

Zellers had a closing sale during which merchandise was sold at discount prices. As the stock depleted, the selling space was decreased until the store closed on May 15, 2004. On October 26, 2017, the matter of whether Zellers breached the lease (finally) went to trial.

Section 8.01 of the lease provided that Zellers was required to "continuously, actively and diligently carry on business in the whole of the Leased Premises." However, Section 8.01.1 of the lease, immediately below, provided that "the Tenant shall remain open … during at least those minimum hours of business, on those days when (1) 80% of the Rentable Area of the Commercial Complex, and (2) the Department Store, as it exists on February 21, 1986, are open in substantially the whole of such respective areas for the conduct of business with the public."

The landlord argued that Zellers must continue operations continuously, actively and diligently in the premises, and that Section 8.01.1 was included in the lease only to regulate store hours and provide consistent operations in the mall. Zellers argued the continuous-use obligation was subject to 80% of the centre and the other department store being open for business.

Interpreting the lease, the Court held that Zellers's duty to continuously operate was qualified by section 8.01.1 and that it only applied if 80% of the other leased premises and the other department store were open for business. The Court found the contractual wording to be clear and therefor refused to consider the landlord's post-contractual evidence.

The Court also rejected the landlord's other argument that Zellers's selling of merchandise at discount prices was a breach of the "first-class" merchandising standard required by the lease. The Court reasoned that a closing sale is not necessarily a breach of such first-class merchandising standards and noted that there was no prohibition on closing sales in the lease. The Court dismissed the landlord's claim.

27. *Roxville Investments Limited v. Manahree Inc.*, [2017] O.J. No. 4842 (Ontario Superior Court of Justice, September 12, 2017, M. Koehnen J.)

Since 1977 the tenant leased the premises for the operation of a pharmacy. On February 1, 2004 the parties amended the lease by granting the tenant four rights to renew the term for 5 years each beyond expiry of the initial term on April 20, 2007. The renewals were automatically triggered and would only be avoided if the tenant gave the landlord notice that it did not wish to renew.

On November 10, 2008, the tenant sold the pharmacy to a new tenant who carried on operating the business. The sale was executed on the understanding that the tenant was acquiring a lease that would expire on April 20, 2012 (i.e. after the first 5-year renewal) and would automatically renew for three additional terms of five years each.

In April 2012, when the second renewal came into effect, the landlord and the tenant signed a "Renewal Agreement" which recognized that the tenant had two remaining renewal terms, but also changed the automatic renewals into renewals that required the tenant to provide six months' notice.

On December 6, 2016, the landlord advised the tenant it had not received timely notice of the third renewal and therefore the lease would terminate on April 20, 2017. The tenant brought an application for rectification of the lease, arguing that the amendment in the 2012 agreement did not reflect the intention of the parties.

The Court found that there was no evidence the landlord instructed or requested its representative to amend the automatic renewal terms when preparing the 2012 agreement. The Court also noted that the title "Renewal Agreement" (and not an "Amending Agreement") suggested that there were no material terms being introduced in the document.

The Court held that the tenant met the test for rectification. The tenant established there was a prior oral agreement and that the landlord knew or ought to have known that sending a "Renewal Agreement" and not an "Amending Agreement" would lead the tenant to believe that no terms were being changed. The Court stated that, in these circumstances, it would be unfair dealing to allow the landlord to avail itself of an advantage obtained by converting an automatic renewal right into one that required notice.

The Court declared that the lease renewals occur automatically unless the tenant advises the landlord it does not wish to renew, and therefore the current term will not expire until April 20, 2022.

L. LEGAL COSTS

28. ***Park Royal Shopping Centre Holdings Ltd. v. Gap (Canada) Inc*., 2017 BCSC 1257 - See Case #24**

29. ***Trenchard v. Westsea Construction Ltd.*, 2017 BCCA 352**

Facts:

Mr. Trenchard (the "Tenant") owned a leasehold interest in a unit of an apartment building. Under the lease, Westsea Construction Ltd. (the "Landlord") was responsible for certain covenants relating to the maintenance and management of the property. It was permitted to charge to the leaseholders the amounts it paid to perform these covenants as "operating expenses". However, it was to exercise "prudent and reasonable discretion" in incurring the costs and was required to submit accounting annually. The Tenant was not satisfied with the information the Landlord provided supporting the operating expenses it incurred, and filed a petition seeking disclosure of documents. He also asked the Court to read into the agreement an "implied term of transparency" requiring the Landlord to share such information.

The parties reached an agreement regarding the requested disclosure and the petition was dismissed by consent. Submissions on costs were made however, and the Landlord elected to rely on the lease agreement in an attempt to recover all of the costs it incurred resisting the petition and the subsequent appeal. The Landlord argued that the legal fees it incurred were "operating expenses" under the lease, and that it could therefore charge those legal fees and expenses in their entirety back to the leaseholders.

The Chambers judge held that the Landlord was not entitled to charge the legal fees and expenses incurred back to the leaseholders as such costs were not "operating expenses" under the lease agreement. Specifically, the covenant to pay legal charges, as an operating cost, was not intended to be a "stand-alone" item. Rather, it was limited to costs incurred in the performance

of the lessor's covenants outlined in the Lease. In the circumstances, the Court did not find that the legal costs incurred by the Landlord could fall within the meaning of "legal charges" contemplated under Article 7 under the Lease. The Landlord appealed and sought an order setting the Chambers order aside and declaring that its legal costs incurred as a result of the petition and appeal could be claimed under the lease.

Issue on Appeal:

Did the Chambers judge err by holding that the legal fees and expenses incurred as a result of the petition were not recoverable as "operating expenses" under the lease?

Held:

The Court held that this issue was not properly before the court below because the question of whether legal fees are "operating expenses" under the lease agreement was found to be premature. It was held that the Landlord was wrong to have urged the Court to decide an issue prematurely as it resulted in it incurring additional legal expenses.

The Court of Appeal cited the following with approval from *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp*. (1995), 3 B.C.L.R. (3d) 309, 37 C.P.C. (3d) 294, 56 B.C.A.C. 52, 92 W.A.C. 52, 1995 Carswell BC 57, where the Court said that the lessor in that case had two options and had to make an election either to seek party and party costs under the tariff, or to seek costs under the lease. If it sought the latter costs, it had to follow the following procedure:

> "[22] The respondent's remedy is to send to the appellant a statement setting out its claim under the clause and demanding payment and, if the appellant refuses to pay, to sue for those costs as unpaid rent. As to what the appellant should do, Re Holliday and Godlee, supra, may give it a clue.
>
> [23] If the Court ought not to order special costs, and I do not think it should, should the Court make any order as to costs? Again, my answer is "no". The respondent has its contractual remedy. It has no need of assistance from this Court. If the respondent, however, wishes to abandon its rights under the covenant, it would be entitled to the usual order for the party and party costs awarded to a successful respondent.
>
> [24] Thus, there will either be no order as to costs in this Court or an order for party and party costs of both appeal and cross-appeal to the respondent. It is for the respondent to elect which it shall be."

Since the Landlord elected to seek indemnity for its costs under the lease, it had to follow the prescribed procedure. The Landlord would have to demand payment of its legal costs from the Tenant, and if the Tenant did not pay, the Landlord could sue on the claim. Alternatively, if the Landlord opted to abandon its indemnity for legal costs under the Lease, it could elect to seek its costs in the current proceedings against based on the courts' tariffs.

In addition, the lease allowed the Landlord, if the clause applied, to charge back operating expenses against *all of the leaseholders* based on the ratio of the area of their units to the total area of suites in the building. The Court also held that since all of the leaseholders had an interest

in the matter, providing a statement of the legal fees and expenses to all the leaseholder setting out the Landlord's claim under the clause would have been the only way for the issue to be properly raised before all the interested parties. As such, the issue was not properly before the court below.

Conclusion:

The appeal was allowed only to the extent of setting the order below aside. No order as to costs was made.

M. MISREPRESENTATION

30. *Aldergrove Nursery Ltd. v Greenland Growers Nursery Ltd.* (2017), 2017 BCSC 1059– See Case #47

N. NOTICE OF LEASE

31. *Little Shoe Palace Ltd. V. Pelmark Developments Ltd.,* [2017] O.J. No. 5850 (Ontario Superior Court of Justice, November 10, 2017, F.J. Kristjanson J.)

The tenant operated a children's shoe store in the premises since 1977. The last written lease expired in 1990. After that time, the parties entered into oral agreements governing the tenancy. The parties complied with their oral agreements more or less; neither party strictly enforced any particular term. In 2014, after unsuccessful attempts by the landlord to have the tenant sign a written agreement, the parties negotiated a written lease effective January 1, 2014 for a period of 5 years. The landlord signed the lease and delivered a copy to the tenant. It's unclear whether the tenant ever returned a fully-executed copy to the landlord, but going forward the tenant's rent payments reflected the 2014 agreement.

On August 31, 2015, the landlord sold the building and the purchaser advised the tenant that if it wanted to stay in the premises it would have to pay a much higher rent. The tenant refused the rent increase and produced a fully-executed copy of the 2014 lease. The purchaser argued that since the tenant didn't sign the lease in 2014 it was not an enforceable agreement and that since it was not registered on title the purchaser acquired the property unencumbered by the tenancy.

The tenant commenced an application seeking an order that the 2014 lease was valid. The Court held that even in the face of a dispute as to whether the tenant signed the lease in 2014, the landlord and tenant had conducted themselves as though the lease was binding. Accordingly, the Court held that neither party (including the purchaser, as successor to the landlord's interest) could argue that the lease was not valid.

The purchaser submitted that when it bought the property it was led to believe that there was no valid tenancy in respect of the premises and since the lease was unregistered and the purchaser did not have actual notice of the tenancy, it acquired the property free and clear of the tenant's claim to the premises.

The Court disagreed, noting that a party cannot avoid actual notice by its own willful blindness. The Court stated that actual notice means the person "is aware of the existence of a legal right," but that "it is not necessary [to] have knowledge of the precise details of that right." The Court went on state that the test is whether the purchaser "is in receipt of such information as would cause a reasonable person to make inquiries as to the terms and legal implications of the [unregistered interest]." In this case, the Court found that the purchaser was informed that there was an unsigned 2014 lease and that there were other indications of the tenant's interest in the premises that ought to have led the purchaser to ask further questions.

The Court held in favour of the tenant and granted an order that the lease was valid.

O. OCCUPIERS' LIABILITY

32. *Mackay v. Starbucks Corp.* [2015] O.J. No. 4042 (Ontario Superior Court of Justice, July 27, 2015, M.A. Sanderson J.; [2017] O.J. No. 2228 (Ontario Court of Appeal, May 2, 2017, J.I. Laskin, K.N. Feldman and C.W. Hourigan JJ.A.)

The tenant operated coffee shop premises in a small retail mall. The premises contained an outdoor patio that abutted the municipal sidewalk. The tenant maintained the patio, including the area leading into the patio from the sidewalk, by shovelling and salting the area during winter months.

A customer slipped and fell on the ice-covered sidewalk at the entrance to the patio. The customer brought an action against the tenant, the City of Toronto, the landlord, and the building's landscape contractor for damages.

The tenant maintained that it should not be held liable for an accident that occurred on a municipal sidewalk outside of the premises. The tenant also maintained that the mere act of clearing the sidewalk of ice and snow should not be sufficient to impose any duty of care onto the tenant.

At trial, the Court held that the tenant was an "occupier" of the relevant portion of the sidewalk under the *Occupiers' Liability Act*, and as such, the tenant owed the customer a duty of care. The Court held that by creating the area leading into the patio from the sidewalk, and by clearing, salting and sanding that area, the tenant assumed sufficient control over the sidewalk to come within the definition of an "occupier" under the *Occupiers' Liability Act*.

The tenant appealed the trial Court decision.

On appeal, the Court of Appeal found that the tenant took steps to come within the definition of "occupier" under the Act by sharing sufficient possession or control of the sidewalk with the municipality. The Court of Appeal noted that the trial judge's finding that the tenant was an "occupier" of the sidewalk was not based simply on its efforts to clear snow and ice from the sidewalk, but rather on the combined effects of the tenant's actions in creating, monitoring and maintaining the subject area.

The Court of Appeal dismissed the appeal.

P. OPERATING COSTS

33. ***Trenchard v. Westsea Construction Ltd.,*** **2017 BCCA 352– See Case #29**

Q. OPERATING COVENANT

34. ***Hosen v. Lam,*** **[2017] O.J. No. 6236 (Ontario Superior Court of Justice, November 24, 2017, Diamond J.)**

The tenant leased the first floor of a building and a portion of the basement for the operation of a restaurant. The lease required the tenant to provide post-dated cheques annually and prohibited assigning or subleasing without the landlord's consent. Upon opening the restaurant, the lease required the tenant to pay 70% of the realty taxes levied against the building.

The tenant spent $90,000 fitting-out the premises, but ran into zoning issues and never opened the restaurant. Instead the tenant subleased the premises (without the landlord's consent) to a political candidate for use as a campaign office. The tenant was chronically late in rent payments and several cheques were returned for insufficient funds. The tenant also never delivered post-dated rent cheques as required under the lease.

Three years after execution of the lease, the landlord locked the tenant out of the premises for non-payment of rent. The tenant brought a motion for relief from forfeiture. The tenant argued that the cause for delay was out of his control as it was waiting for permits to be issued by the City of Toronto.

The landlord pointed to the tenant's several defaults including: failure to pay rent, subletting without the landlord's consent and failure to pay 70% of the realty taxes because it hadn't yet opened for business.

The Court did not consider the first two issues raised by the landlord because (1) as of the date of the motion, rent had been paid incompliance with an earlier order of the Court, and (2) the landlord had long been aware of the subtenant. Rather, the Court held that the most significant issue was the tenant's failure to open the restaurant, which resulted in the landlord paying 100% of the realty taxes for the building.

The Court reiterated that relief from forfeiture is to be granted sparingly and the onus rests upon the tenant to "make the case for it." When considering the tenant's plea for relief, the Court will assess the tenant's conduct, as well as the disparity between the value of the property forfeited by the tenant and the damage caused by its breach(es). The Court will also look to whether the tenant came to Court with clean hands. The ultimate question left for the Court to decide is whether it ought to exercise its equitable jurisdiction to relieve against the forfeiture imposed by the common law because it is an excessive remedy in all the circumstances.

The Court found there to be no evidence that the landlord required possession of the premises right away and that while the tenant's hands were "not necessarily dirty, they remained unwashed."

The Court granted the tenant relief from forfeiture on the following terms: (1) the tenant is required to pay basic rent on the first of every month for the balance of the term; (2) the tenant is required to provide 12 post-dated cheques on December 16th of each year for the balance of the term; and (3) the tenant is required pay 70% of all realty taxes for the building for the balance of the term and retroactively to the estimated date of opening. The Court expressly stated that if the tenant failed to satisfy the foregoing terms the landlord may terminate the lease.

35. *Vista Sudbury Hotel Inc. v. Oshawa Group Ltd.*, [2018] O.J. No. 916 (Ontario Superior Court of Justice – See Case #26

R. OPTION TO RENEW

36. *Ouvrier Inc. v. Leung* [2016] O.J. No. 6829 (Ontario Superior Court of Justice, December 7, 2016, T.R. Lederer J.); [2017] O.J. No. 3580 (Ontario Court of Appeal, July 7, 2017, J.C. MacPherson, E.A. Cronk and M.L. Benotto JJ.A.)

The tenant leased premises from the landlord for a five year term. The lease contained two renewal options for periods of five years each. The renewal clause in the lease stated that (1) the tenant was required to provide the landlord with six to nine months' prior written notice of the exercise of the renewal option, (2) the renewal right was conditional upon the tenant not being in default under the lease, and (3) if the parties failed to agree on the amount of basic rent payable during the renewal term, it would be determined by arbitration.

The lease required the tenant to pay its proportionate share of additional rent. For the first two years of the term, the tenant paid $1,500 per month on account of additional rent. The landlord subsequently demanded payment of a further $9,850.09 for additional rent. When the tenant disputed the landlord's calculation, the landlord recalculated the tenant's proportionate share and demanded even more money from the tenant. In the interim, the tenant continued to pay, and the landlord continued to accept, additional rent payments of $1,500 per month.

The tenant later notified the landlord by text message that it wished to "sit down and start the conversation" regarding the lease renewal. The landlord notified the tenant that the renewal right did not apply because the tenant was in arrears of additional rent.

The tenant entered into a purchase agreement for the sale of its business, which was conditional upon the landlord and tenant agreeing to a renewal. The landlord was notified of the prospective sale.

In response to the tenant's notice of the sale, the landlord advised the tenant that the basic rent for the renewal term would be double the previous basic rent payable. The tenant brought an action for specific performance compelling the parties to attend an arbitration to determine the renewal rent and an injunction to prevent the landlord from interfering with the tenant's rights under the lease.

The parties agreed to settlement terms prior to the tenant's motion. However, the landlord subsequently demanded payments outside the settlement terms. When the tenant refused to pay,

the landlord unilaterally advised that arbitration would not proceed and locked the tenant out of the premises. As a result, the proposed sale of the tenant's business did not proceed.

The tenant brought a motion for summary judgment to enforce the terms of the contract.

The Court found that the tenant's text message to the landlord served as sufficient written notice to exercise the renewal option. The Court noted that the tenant's notice was consistent with the parties' casual and informal behavior throughout the terms, as the parties regularly communicated by telephone, email and text messaging.

The Court relied on the decision of *Director's Film Co. v. Vinifera Wine Services Inc.* for the proposition that merely indicating a desire to enter into a discussion to establish the terms of a renewal can constitute a valid exercise of an option if the landlord, by its conduct, waives its right to strict compliance with the exercise of a renewal option in the lease. The Court also noted that following delivery of the tenant's text message, the parties acted in manner consistent with notice having been properly provided.

The Court also held that the landlord breached the lease, as the landlord's additional rent calculations were erroneous, and the landlord's demand for additional rent as a precondition to the renewal was not authorized by the terms of the lease.

The Court granted the summary judgement and ordered the landlord to pay damages to the tenant. The Court also granted punitive damages for the "sufficiently egregious" actions of the landlord.

The landlord appealed the judgment arguing that the motion judge erred by not granting an adjournment on the basis that the landlord did not have a lawyer and was not fluent in English. The Court of Appeal found that the landlord was represented by a lawyer earlier in the proceedings, filed a notice of intent to act in person, and were assisted by an interpreter. Further, the Court noted that the request for adjournment came 90 minutes into the hearing. Finding the motion judge's refusal to grant an adjournment to be reasonable, the Court dismissed the appeal.

37. ***Buckerfields v. Abbotsford Tractor and Equipment (2017), 2017 Carswell BC 1698, 2017 BCPC 185 – See Case #22***

38. ***Don Francesco Restaurant (2013) Ltd. v. Oxford Properties Group Inc*., 2017 BCSC 1285– See Case #23**

39. ***LaBuick Investments Inc. v. Carpet Gallery of Moose Jaw Ltd.,* 2017 SKQB 341 – See Case #4**

40. ***1111207 BC Ltd. v. Masala Bites Enterprises Ltd.,* 2017 BCSC 2184**

Facts:

1111207 BC Ltd. as the landlord brought an application for summary eviction procedure under ss. 18 to 21 of the *Commercial Tenancy Act,* RSBC 1996, c. 57 [*CTA*]. The Landlord was the

registered owner of lands located at 1015 Fort Street in Victoria (the "Lands"), which included a leased commercial building where Masala Bites Enterprises Ltd. ("Masala Ltd.") operated a restaurant.

Mr. Kumar and Mr. Sohal entered into an original lease agreement for the operation of a restaurant on the Lands (the "Original Lease"). The term of the lease was from May 2, 2014 to May 14, 2017, with an option to renew for an additional three years. If the tenant wished to exercise the option to renew the Tenant needed to provide notice by February 14, 2017. The Original Lease further required the tenant to have a guarantor sign the agreement. Mr. Longia was the guarantor for the Original Lease; however, Mr. Sharma was added to the Original Lease without the guarantor's knowledge in a modified agreement (the "Modified Lease"). Mr. Longia claimed that since he was not advised of this addition he did not guarantee Mr. Sharma's obligations.

Mr. Sohal and Mr. Sharma incorporated Masala Ltd. after the Modified Lease, and purported to assign all rights to Masala Ltd.

The working relationship between Mr. Sharma and Mr. Sohal deteriorated. In the fall of 2016, the men attempted to negotiate a form of buy-out for Masala, which proved unsuccessful. Mr. Sharma opined that even though the men did not want to continue working together, it was important to renew the lease to value the restaurant. He testified that Mr. Sohal agreed to this; however, on cross-examination admitted that Mr. Sohal never said yes to a renewal. Further, Mr. Longia provided written notice to the landlord on December 20, 2016 that he would not consent to a renewal as the guarantor.

Despite this, on January 25, 2017 Ms. Sharma wrote to the landlord advising that he was exercising the option to renew. In his letter, Mr. Sharma never named Masala Ltd. or indicated that he was acting in his role as one of the directors of the corporation. Ultimately, the landlord did not renew the lease as Mr. Sohal advised he did not wish to renew and Mr. Longia provided written notice that he would not guarantee the lease renewal. Mr. Sharma did not become aware of the declined renewal status until April 2017.

Issue:

1. Has the procedure for summary eviction under ss. 18 to 21 of the *CTA* been met?
2. Was the Lease properly renewed?

Held:

The summary eviction procedure under ss. 18 to 21 of the *CTA* has two stages. First, the landlord must show a *prima facie* case of entitlement to an order for possession. After this is established, there is a summary hearing to determine the landlord's entitlement to relief. The Court suggests that the first stage is a relatively low threshold to meet, and the ultimate decision-making on any substantive issues falls to the second stage.

First, the Court had to determine who the tenant of the Modified Lease was on February 14, 2017 when notice to renew was required. The Modified Lease did not require the consent of the landlord for an assignment to certain classes of companies. Nor did the Modified Lease require the consent of the guarantor for such an assignment. But the Court found there was not an actual assignment of the Modified Lease to Masala Ltd.:

> “Mr. Sohal and Mr. Sharma may have obtained insurance policies, prepared tax returns, and done their accounting to reflect that their corporation paid the rent and claimed the rent as an expense, but I agree with the petitioner that this is not evidence of an assignment. The parties' tax planning does not affect the legal relationship between the landlord and the tenant. Indeed, the documentation adduced in this hearing only supports the conclusion that at all material times the tenants to the Modified Lease were Mr. Sohal and Mr. Sharma. For example:
>
> > •All of the rent cheques over the years fail to disclose the existence of the corporate entity, they simply contain the business name of the general partnership, "Masala Bites".
> >
> > • Documentation regarding dealings with the Vancouver Island Health Authority and the Liquor Control and Licensing Branch were with Mr. Sohal and Mr. Sharma and/or the partnership, "Masala Bites".
> >
> > • On July 29, 2015, counsel for the landlord at the time, Mr. Kumar, corresponded with the tenants naming them as Mr. Sohal and Mr. Sharma. No one corrected Mr. Kumar or advised him of any assignment. When 396 purchased the Lands from Mr. Kumar, the evidence is clear that 396 understood the tenants to be Mr. Sohal and Mr. Sharma.”

Therefore, Mr. Sharma and Mr. Sohal were, at all times, the tenants under the Modified Lease.

The Court then had to consider whether Mr. Sharma's January 25, 2017 correspondence seeking to renew the Modified Lease was valid. The Court found that for there to have been a valid notice to renew the Modified Lease, the notice must have been delivered by both Mr. Sharma and Mr. Sohal and agreed to by Mr. Longia as guarantor.

That is, there were two tenants here. One gave notice to renew, and the other gave notice of his intention *not* to renew. There is also a guarantor who gave notice of his intention not to renew. In these circumstances, the Court cited with approval, *inter alia*, *Finch* v. *Underwood* (1876), 2 Ch. D. 310 (Eng. C.A.), and *Fitzgerald* v. *Barbour* (1909), 42 S.C.R. 254 (S.C.C.), where the court held at para. 16:

> The offer to renew the lease was made to three; it cannot be accepted by one. [The three tenants] were jointly and severally liable to [the landlord] under the covenants in the original lease. [The landlord] is entitled to have the benefit of the same covenants in the renewed lease. In my view, that was a condition of its offer to renew the lease, and one which required strict compliance. As that did not occur, the landlord had no obligation to

renew the lease. Accordingly, the Court concluded that the landlord was entitled to summary eviction, including an immediate writ of possession."

Here, the offer to renew was made available to the tenant, being Mr. Sharma and Mr. Sohal as tenants and Mr. Longia as guarantor. The Court stated that in order for there to have been a valid notice to renew the Modified Lease, the notice must be delivered by both Mr. Sharma and Mr. Sohal and agreed to by Mr. Longia as guarantor, or the landlord is not required to renew or extend the term.

41. ***Roxville Investments Limited v. Manahree Inc.*, [2017] O.J. No. 4842 (Ontario Superior Court of Justice) - See Case #27**

42. ***Kassiouris v. Kalantzis,* [2017] O.J. No. 1641 (Ontario Superior Court of Justice, March 30, 2017, J.T. Akbarali J.)**

The tenant leased the premises for the operation of an auto body shop for a 5-year term. The lease contained an option to renew for an additional 5 years, which was exercisable by the tenant upon at least 6 months' prior written notice. In order to exercise the option, the tenant had to meet the condition that it "duly and regularly paid rent and has observed and performed each and every material covenant and provision contained in the lease."

The landlord travelled abroad for a year, during which the landlord's son managed the building. The tenant notified the landlord's son that it wished to begin discussing the lease renewal stating "…let's do something about the lease, eh?". The landlord's son told the tenant to wait until the landlord was back in Canada. The landlord returned to Canada after the 6-month lease renewal deadline, and although the landlord and tenant dealt with each other a few times following the landlord's return in respect to the property, neither of them raised the issue of renewal.

A month after its return, the landlord wrote to the tenant stating that since the lease had not been renewed the tenant was required to vacate the premises at the end of the lease term in just over a month. The letter went on to invite the tenant to contact the landlord if it wished to discuss a new lease. Negotiations began, but no new lease was ever signed.

On the expiring of the lease, the landlord demanded possession of the premises. The tenant brought an application seeking relief from forfeiture and a declaration that it validly exercised its option to renew. At the time of the hearing, the landlord had signed a lease with a new tenant for the premises.

The tenant argued that the landlord's son's instruction to wait until the landlord returned to the country served to estop the landlord from insisting on the strict timeframe for renewal notice set out in the lease. The tenant also argued that relief from forfeiture should be available in cases where a tenant has failed to exercise its option to renew, and that an option to renew, like a tenancy, is a property right for which relief ought to be available in equity.

The landlord defended, arguing that the tenant lost its renewal right because it failed to provide the renewal notice by the deadline and besides it had already lost the right because of its various breaches, including late payment of rent and committing insurance fraud in the premises. The

landlord also contested that the tenant was entitled to relief since it didn't satisfy an essential condition for relief; namely, it did not make diligent efforts to cure its default.

The Court reviewed the three requirements to make out a claim of promissory estoppel, being: (1) a pre-existing legal relationship between the parties, (2) a promise or assurance, express or implied, by one party to the other that it would not hold the other party to the performance of an obligation imposed under the pre-existing legal relationship, and (3) reliance on the promise or assurance by the party who acts in some way to change its position because of the promise or assurance. The Court held that the second element of the test was not made out because the landlord's son's statement did not amount to a promise that the landlord would not hold the tenant to the terms governing the exercise of the option to renew. The Court also denied the tenant relief from forfeiture on the basis that it failed to take steps to cure its default.

Interestingly, the tenant also sought an order enjoining the landlord from eviction pending disposition of the tenant's planned appeal. Surprisingly, the Court made such an order, finding that the tenant would suffer irreparable harm if it was forced to leave the premises and that the landlord failed to demonstrate that it would lose the incoming tenant if the current tenant did not vacate immediately.

S. OVERHOLDING

43. ***Amexon Properties Corp. v Bell Canada Inc*., [2017] O.J. No. 5061 (Ontario Superior Court of Justice, September 29, 2017, Gray J.)**

The premises was comprised of four units in an office building. The tenant occupied two of the units and sublet the other two with the consent of the landlord. The lease did not contain a covenant that the tenant must deliver vacant possession of the premises to the landlord upon expiry of the lease, but did contain a term that items left behind would become the landlord's property.

As the lease expiry date approached, the landlord and tenant did a walk-through of the two units occupied by the tenant, but not the two subleased units. On expiry, both the tenant and subtenant vacated the premises and the landlord deactivated their card-access keys. Neither the tenant nor subtenant made any further requests to enter the premises.

Shortly thereafter, the landlord entered the two subleased units and found that a considerable amount of furniture and equipment was left behind, including a computer server that was still plugged-in and running.

The landlord brought an action against the tenant for overholding rent. The landlord claimed that the subtenant was effectively still operating at the premises until the server was removed by the landlord about two months after expiry of the term. The tenant argued that it was not overholding since the landlord had exclusive possession of the premises and the tenant made no claims to any chattels left behind.

The Court found that there was no evidence to show the computer server did anything other than store data. Since there was no evidence that it was transmitting signals, the Court refused to

accept that the tenant had still been "operating from the premises." The Court held that the computer server was conceptually similar to a filing cabinet, and that leaving one item behind on the premises does not constitute overholding.

The Court continued that there was no suggestion that the tenant or subtenant were conducting business on the premises after expiration of the lease and that it was clear that all parties intended that the tenancy was to come to an end upon expiry of the term. The landlord's action was dismissed.

T. RELIEF FROM FORFEITURE

44. ***Wittington Properties Ltd. v. GoodLife Fitness Centres Inc.*** **[2017] O.J. No. 2493 (Ontario Superior Court of Justice, May 2, 2017, A. Pollak J.); [2018] O.J. No. 582 (Ontario Court of Appeal, January 23, 2018, J.M. Simmons, L.B. Roberts and I.V.B. Nordheimer JJ.A.)**

The tenant leased fitness premises from the landlord for a term expiring on February 28, 2017. The lease contained an option to extend the term for a further period of five years, so long as the tenant was not in default.

In 2014, the landlord notified the tenant that it had lost its right to exercise the extension option as a result of ongoing breaches of the lease. The landlord alleged that the tenant (1) failed to properly report gross revenue in accordance with the lease (and therefore to pay rent in accordance with the lease), and (2) breached the radius restriction in the lease by operating two fitness clubs in the "Restricted Area".

The landlord brought an application against the tenant seeking an order for (1) a declaration that the tenant lost its entitlement to exercise the extension option, (2) a declaration that the lease expired on February 28, 2017, (3) the tenant to deliver vacant possession of the premises on or before February 28, 2017, and (4) leave to issue a writ of possession after March 1, 2017.

In response, the tenant brought an application for a declaration that (1) the lease was in full force and effect, (2) the tenant validly exercised the option to extend, and (3) the landlord must provide possession of the premises to the tenant for the extension term. In the alternative, the tenant applied for an order for relief from forfeiture.

The landlord claimed that pursuant to the lease, the tenant was required to report all gross sales of the tenant, whether performance is made from the premises or elsewhere. The landlord alleged that, based on its investigation, the tenant had its own system for apportioning revenue among various clubs, in contravention of the lease.

The tenant took the position that the difference in the net amount owing under the tenant's calculation of gross sales versus the landlord's calculation of gross sales was *de minimus* and amounted to only $13,367.72.

The landlord also claimed that the tenant breached the radius restriction in the lease by operating two fitness clubs in the "Restricted Area". The landlord maintained that the competing clubs siphoned revenue away from the premises, reducing the amount of percentage rent payable under the lease. The tenant subsequently closed one of the competing locations.

The tenant claimed that the radius restriction applied only to "premier" clubs and that the competing club was a "regular" club and not a "premier" club. The tenant relied on evidence that it only operates "regular" clubs and that there were no distinctions between "premier" and "regular" clubs.

The tenant also maintained that if the radius restriction applied, the competing club "fronted" on a different street and therefore did not violate the restriction. The landlord disputed this claim on the basis that there was no sign, entrance or any presence whatsoever on that street. The tenant also took the position that the landlord agreed to waive the radius restriction as it previously consented to the operation of a competing club within the "Restricted Area".

With respect to the calculation of gross sales, the Court found that the tenant was in breach of the lease and that there was insufficient evidence to establish that the tenant's breach was *de minimus*. Regarding the radius restriction, the Court held that the tenant was operating a competing location in violation of the Lease. The court also held that there was no evidence to support the tenant's claim that the landlord waived the radius restriction. The Court declined to grant the tenant relief from forfeiture on the basis that the tenant failed to diligently attempt to comply with the terms of the lease. The Court noted that the tenant had known about its defaults for at least two years and failed to take any steps to remedy those defaults.

The Court declared that the tenant had no right to extend the term of the lease and that the lease expired on February 28, 2017. The Court ordered the tenant to deliver vacant possession of the premises on or before that date.

The decision was upheld on appeal.

45. ***2536715 Ontario Inc. (c.o.b. Cannabis Culture) v. 9522158 Canada Inc.*, [2018] O.J. No. 1108 (Ontario Superior Court of Justice, March 1, 2018, M. O'Bonsawin J.)**

The tenant leased the premises for the purpose of carrying on a "medical marijuana dispensary." The lease prohibited the tenant from doing or permitting anything to be done at the premises that constitutes "a breach of any by-law, statute, order, or regulation, or… illegal activity".

The premises were raided twice by the police. Numerous controlled substances, suspected proceeds of crime and drug paraphernalia were seized and charges were laid against staff members.

After the first raid, the landlord sent a letter to the tenant advising that the police had informed the landlord that the activities on the premises were illegal. The landlord quoted sections of the lease regarding the prohibition on illegal activities on the premises.

After the second raid, the landlord sent another letter to the tenant stating that unless the tenant could provide clear evidence that there was no longer illegal activity being conducted on the premises within 10 days of receipt of the letter, the landlord would assert its rights and terminate the lease.

The tenant failed to provide any evidence that it was complying with all laws and the landlord terminated the lease. The tenant brought a motion for relief from forfeiture.

The Court held that absent a license to act as a medical marijuana dispensary, its possession and distribution of marijuana from the premises was a criminal offense.

The Court reiterated that relief from forfeiture is a discretionary remedy that is not granted as a matter of course. It is granted only where the party seeking that remedy clearly makes the case that forfeiture would be an inequitable and unjust order in all the circumstances. In granting relief from forfeiture, the factors considered by the Court are the gravity of the breaches, the conduct of the tenant, and the disparity between the value of the property forfeited and the damage caused by the breach. The Court noted in this case that the landlord faced the threat of forfeiture of its property if the tenant's breach continued.

The Court found that the tenant acted illegally and demonstrated a wilful disregard for the law. Dismissing the tenant's motion, the Court noted that each day the tenant was open for business it was not only breaking the law, but also breaching the lease,

The Court dismissed the tenant's motion.

46. *Trenchard v. Westsea Construction Ltd., 2017 BCCA 352*– See Case #29

47. *Aldergrove Nursery Ltd. v. Greenland Growers Nursery Ltd.* (2017), 2017 BCSC 1059

Facts:

The landlord owned the two parcels of land adjacent to each other in Abbotsford, British Columbia (the "Property"). The tenant agreed to lease the Property from the landlord on a long-term basis, pursuant to two leases with a landlord termination right if the Property was sold; provided that the tenant had a right to match any offer to purchase the Property.

The leases each provided that the landlord could terminate the lease where, *inter alia*: (1) the landlord was able to exclude the parcel from the Agricultural Land Reserve; (2) the landlord was able to rezone the parcel for another use; (3) the landlord sold the Property prior to August 31, 2015; or (4) the landlord gave the tenant at least 24 months' written notice of cancellation of the lease in 12 months' time.

The landlord said it was also entitled to terminate the leases for the following tenant breaches:

- The tenant exercised its right to match a third party offer to purchase the Property prior to August 31, 2015, but then failed to complete the sale.

- The tenant was late or failed to pay rent and utilities on some occasions, which amounted to a breach of the leases.

Because the tenant failed to complete the sale, the landlord issued a notice to the tenant requiring vacant possession of the Property as of November 13, 2015 (the "First Notice"). The tenant refused to vacate.

As a cautionary measure, to preserve an alternative argument about when the right to terminate the leases arose, the landlord delivered another notice to the tenant requiring vacant possession of the Property by February 28, 2018 (the "Second Notice"), relying on clause (4) of the landlord termination clauses, above (*i.e.*, 24 months' notice of cancellation right).

The landlord sought a summary judgment to remove the tenants from the Property, and to confirm its ability to sell the Property without giving the tenant any further opportunity to match an offer.

The tenant alleged the following:

- There was a conflict in the evidence surrounding the circumstances of their exercising the right to match another offer such that the issues should not be decided summarily.
- The tenant was not obliged to close on the sale of the property because of a misrepresentation made to them about the offer they were entitled to match.
- The tenant never saw the original offer and the landlord's real estate agent misrepresented the terms of the original offer.
- The complaints about late or non-payment of rent and utilities are not fundamental breaches and cannot lead to termination of the leases.
- The tenant was entitled to relief from forfeiture because termination on that basis would be grossly disproportionate to the alleged breaches.

Issues:

1. Was the tenant is entitled to relief from forfeiture
2. Was the Second Notice valid?
3. Was the First Notice valid?

Held:

Was relief from forfeiture available to the tenant?

The landlord submitted that forfeiture is not available to the tenant. The courts have held that with regard to the availability of relief from forfeiture, there is a juridical difference between different types of breaches of contract. The Court cited, with approval, the principle that a breach of a mandatory covenant in a lease, such as payment of rent (where relief from forfeiture is available), is treated differently from other standalone covenants, such as options to renew or rights of first refusal, where a court cannot use its equitable jurisdiction to intervene if a tenant fails to meet a condition precedent to the exercise of such right. The underlying reasoning is that the tenant is not compelled to exercise such a right; but if the tenant elects to do so, the tenant

must strictly comply with the conditions for its exercise. This differs from situations where a tenant has not complied with a mandatory condition in the lease (such as paying rent) where the court can exercise equitable jurisdiction to relive the tenant from forfeiture if persuaded to do so.

Accordingly, the Court found that relief from forfeiture was not available unless the landlord based its right to terminate solely on the late or non-payment of rent, which the landlord did not. The Court, thus, held that that it is improbable that the factual disputes are relevant to the issues in the petition. The Court concluded that the matter could be determined in a summary fashion.

Was the Second Notice valid (24 month termination right)?

The tenant's position was that the Second Notice issued by the landlord was not valid.

The tenant submitted that the landlord did not have an independent right to terminate the lease simply upon giving 24 months' written notice, indicating that right has a precondition that either the parcel is excluded from the Agricultural Land Reserve (ALR) and rezoned, or it is sold before August 31, 2015. Since neither of those things happened, the tenant submitted that the landlord did not have a right to terminate on 24 months' notice.

The Court found that this made no grammatical or logical sense and that the tenant's position had virtually no chance of success. There was nothing in the 24-month clause that made it contingent upon the occurrence of any event, nor does the structure of the clauses (noted above) support such an interpretation.

Was the First Notice valid (for the failure to complete the ROFR purchase)?

The tenant's position was that the First Notice issued by the landlord was not valid.

The tenant alleged it was not obliged to close on the sale of the Property because of a misrepresentation made to them about the offer it was entitled to match (after the petition, it filed an action regarding that). While the tenant never saw the original offer, the tenant submitted that the landlord's real estate agent misrepresented the terms of the original offer, and alleged that the two offers did not match.

The landlord submitted that any differences between the two offers did not relate to fundamental terms, and therefore the offers did match. Both offers are for the same amount and required the same deposit, with the same closing date. In the alternative, the landlord submitted that it was entitled to terminate upon notice of 24 months.

There some differences between the conditions attached to the two offers, but the Court agreed that they were not fundamental. The Court stated that "it would be unreasonable and impossible for two offers to be identical". None of the differences in the offers amount to a material difference that could justify a failure to close. Therefore, the First Notice was valid.

Conclusion:

The right to terminate arose the moment the tenant failed to close. The landlord was entitled to possession of the Property under the First Notice. The late or non-payment of rent or utilities was irrelevant.

48. ***220571 Alberta Ltd. v. Jim Hansen's Gateway Ford Lincoln Sales Inc*. 2017 Carswell Alta 984, 2017 ABCA 180**

Facts:

Jim Hansen ("Jim") incorporated the Plaintiff, 220571 Alberta Ltd. (the "Landlord"), in 1979, as well as the defendant Jim Hansen's Gateway Ford Lincoln Sales Inc. ("Tenant") in 1983.

In 1998, the Landlord purchased land for a new dealership, which would be operated by the Tenant. In 2010 Jim's son, Kevin Hansen ("Kevin"), became the sole owner of the corporate Tenant. On June 1, 2002 the Landlord and the Tenant entered into a lease. At the time, Jim was the majority shareholder of both the Landlord and the Tenant. Then Tenant also had an option to purchase the lands.

Jim died on July 25, 2012 and his son Greg Hansen ("Greg") was appointed executor of his estate.

In 2013, shortly after Jim's death, the Tenant commenced construction to upgrade the dealership facilities, which was completed in 2015. Although there was no documented consent by the Landlord for these upgrades, Kevin stated that Jim had agreed to them as long as he did not have to pay. As such, the Tenant paid for the cost of the upgrades.

Section 9 of the lease provided for the following base rent:

> "a) The Base Rent for the first five years of the Term is the sum of THREE HUNDRED SIXTY THOUSAND ($360,000) DOLLARS per annum payable in monthly instalments of THIRTY THOUSAND ($30,000) DOLLARS per month on the first day of each and every month of the first five years of the Term.
>
> b) The parties acknowledge that the Lessor has arranged for a first mortgage to be amortized over a period of fifteen years and has arranged an interest rate of 7.1% per annum compounded half yearly not in advance for the first five years of the term.
>
> c) For the second five years of the term the Base Rent chargeable under this lease shall be the initial Base Rent of $360,000 multiplied by the interest rate on the Lessor's first mortgage as renewed or replaced at that time multiplied by the interest rate at which it is renewed calculated semi-annually not in advance divided by 7.1%.. If the renewal dates of the mortgage and lease do not exactly coincide the interest rate used above shall be the renewal rate at which the mortgage is renewed.

> d) For the third five years of the term the Base Rent chargeable under this lease shall be the initial Base Rent of $360,000 multiplied by the interest rate on the Lessor's first mortgage as renewed or replaced at that time multiplied by the interest rate at which it is renewed calculated semi-annually not in advance divided by 7.1%.... If the renewal dates of the mortgage and lease do not exactly coincide the interest rate used above shall be the renewal rate at which the mortgage is renewed."

From March 1, 2003 to April 1, 2013, the Tenant had paid base rent of $30,000 per month for the dealership premises. On April 22, 2013, Kevin told Greg he would be adjusting the rent in order to bring it in line with the terms of the lease and, in particular, the interest rate of the mortgage, which was lower than the rate contemplated in the lease. Following the adjustments, and starting on May 1, 2013, the Tenant paid a rental amount of $14,788.73. On May 31, 2013, the Landlord asked the Tenant to make up the shortfall for the May rent, but the Tenant did not and continued to pay $14,788.73 for the months of June, July, and August 2013 (which the Landlord opined was to be *no lower than* $30,000 per month, and was not to be adjusted downward). On June 10, 2013, Kevin exercised his option to purchase the dealership property, but the parties could not agree on a price and the matter proceeded to arbitration. On August 20, 2013, the Landlord served a Notice of Termination of the Lease on the Tenant, and sued for damages.

The Court held that the provisions of Clause 9 were not clear or unambiguous and admitted extrinsic evidence in order to properly interpret the clause. The Landlord appealed this decision

Issue:

The issue on appeal was whether the trial judge erred in granting the Tenant relief from forfeiture even though the Tenant was in breach of the lease between the parties.

Held:

The Landlord (appellant) argued that the Tenant "knowingly" breached the lease and that there was no genuine issue about the rent. The Court of Appeal held that this was contradicted by the trial judge's finding that the lease was ambiguous and required rectification before the actual rent could be determined. Additionally, the Landlord argued that rent was reduced for an improper process (to pressure the Landlord to sell) and that the proper procedure was to keeping paying the rent at the existing level, and seek an interpretation of the lease.

The Court of Appeal stated that the concerns raised by the Landlord on appeal were proper considerations but that the trial judge had to balance them having regard to all the factors supporting and contradicting the entitlement to relief from forfeiture. The Court relied on *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 2 SCR 490 to note that the power to grant relief from forfeiture is a discretionary, equitable form of relief. Further, the trial judge's exercise of that discretion is entitled to deference on appeal and therefore, it would not be interfered with unless it was unreasonable or based on an error in principle or of law, which the Court of Appeal stated, was not the case.

Conclusion:

The Landlord failed to demonstrate any reviewable error in the trial judge's discretionary decision to grant relief from forfeiture. The appeal was dismissed.

U. REPAIR AND RENOVATION

49. *Lundy's Regency Arms Corp. v. Niagara Hospitality Hotels Inc.* v (Ontario Superior Court of Justice, April 4, 2016, R.A. Lococo J.); [2017] O.J. No. 3186 (Ontario Court of Appeal, June 19, 2017, J.C. MacPherson, R.A. Blair and J.L. MacFarland JJ.A.)

The landlord purchased three contiguous parcels of land in Niagara Falls on which the vendor operated a hospitality business, comprised of: a 135-unit hotel, a restaurant, a fast-food outlet, and a mini-golf course, each under popular franchise banners. As part of the sale transaction, the parties entered into a lease-back, whereby the vendor, as tenant, would continue to operate the hospitality business for a term of five years. Under the lease-back, the tenant agreed to maintain and repair the premises as a careful owner would, including structural and roof repairs, and to surrender the premises in good condition, reasonable wear and tear excepted to the extent not inconsistent with the tenant's maintenance obligations.

Upon expiry of the lease, the landlord's architect assessed the property and determined that, among other things, leakage through the roof and failure to maintain dehumidification equipment in the hotel's pool area lead to significant moisture-related damage. The landlord's architect assessed the cost of restoring the property to "good" condition at approximately $2 million. When the tenant refused to pay, the landlord commenced an action to recover the cost of completing the required repairs.

The tenant argued that since the landlord had not done anything more than a cursory walk-through of the public areas of the hotel and restaurant prior to purchasing the property, the landlord had not established a benchmark condition at the commencement of the term and was therefore unable to challenge the tenant's evidence that the existing condition pre-dated the sale and lease-back. The tenant argued further that if the Court found that the property was in a lesser state of repair than at the commencement of the term, it was due to reasonable wear and tear, pointing out that part of the property was over 60 years old and that it had been used as a lower-end, high-volume hospitality enterprise.

The Court canvassed the case law and outlined the principles that informed its decision as follows. First, a tenant's covenant to repair does not require that it put the premises in repair if they were not in that condition at the beginning of the lease term. Second, a tenant is not liable for what is due to reasonable wear and tear. Third, a tenant's obligation to maintain includes an obligation to repair in order to prevent wear and tear from bringing about more serious deterioration of the premises. Lastly, if the landlord proves want of repair, the onus shifts to the tenant to prove the condition of the premises comes within the exception of reasonable wear and tear. On this last point, the Court listed some factors which are to be considered in assessing whether the condition of the premises is a result of reasonable wear and tear, including: duration of the tenancy, age and nature of the premises, and intended or actual use.

The Court held that the tenant's covenant to maintain and repair the property "as a careful owner would" went beyond what would otherwise be required of a tenant in the absence of such wording. In comparing the architect's assessment at the expiry of the term to a report completed following the landlord's inspection of the property about 18 months into the term, the Court found that the condition of the property had significantly deteriorated over the term of the lease. Accordingly, the burden shifted to the tenant to show that the condition of the property was a result of reasonable wear and tear. The Court held that the tenant was unable to discharge this burden, as the evidence showed that the deterioration in the condition of the property went beyond reasonable wear and tear.

The Court noted that the tenant decided not to make certain repairs required by the hotel and restaurant franchisors on the basis that its lease term would soon expire. The Court acknowledged that while such a decision may have made economic sense, the tenant's decision constituted a failure to prevent consequences which wear and tear would not have produced on their own. The Court granted judgment in the landlord's favour for approximately $1.7 million.

The tenant appealed, arguing that the trial judge erred in finding that the lease imposed an obligation on the tenant to maintain the premises to an "enhanced standard" of repair and that the landlord did not provide any evidence as to state of repair at the commencement of the lease term. The Court refused to interfere with the decision of the trial judge and dismissed the appeal.

V. REPUDIATION

50. *Stearman v. Powers,* 2017 Carswell BC 1066, 2017 BCCA 165

Facts:

In this case, the tenant signed a five-year lease for a commercial premises in November 2008, but ceased paying rent in October 2009 and vacated premises in November 2009. The tenant complained of a strong odour that was interfering with her retail clothing business. The landlord commenced a number of small claims actions for arrears in rent, ultimately consolidating them in a British Columbia Supreme Court action and the tenant initiated a counterclaim for damages for breach of the landlord's covenant of quiet enjoyment. At the first trial, the judge found the presence of an odour substantially deprived the tenant of the whole benefit of the contract, entitling her to terminate the lease. The landlord's claim was dismissed; the tenant's counterclaim was allowed in part and she was awarded damages of $18,861.60. On the first appeal, the court found that the trial judge erred in finding that the landlord's failure to eliminate the odour constituted a fundamental breach of the lease. The judgment was set aside and the landlord's claim was remitted to the British Columbia Supreme Court for retrial of the claim for damages.

The issues at the retrial were:

a) Did the landlord provide the tenant with clear and unequivocal notice of his intention to insist on the continuation of the tenant's obligation to pay rent?

b) Was the lease terminated, and if so, when and how was it terminated?

The first question was answered in the negative. The judge held that the landlord had failed to give clear notice of his intention to re-let the premises and to hold the tenant accountable for any loss over the remaining term of the lease.

The second question was answered in the affirmative. The landlord's conduct after the tenant had repudiated the lease and abandoned the premises on November 24, 2009 was found to be "consistent with the landlord's intention to treat the lease as at an end, and is inconsistent with the continued existence of the lease, and in particular, the tenant's continuing obligation to pay rent." The landlord had requested the keys on November 24, 2009 to show the premises to a prospective tenant and had repeatedly entered the premises to show them to prospective tenants or purchasers thereafter.

The decision was appealed.

The landlord argued that "[i]n the absence of proof of both acceptance of the repudiation, and notification of the acceptance, the lease will be treated as subsisting." The landlord cited the *Highway Properties Ltd. v Kelly, Douglas & Co*., (1971) S.C.R. 562 (SCC) case and stated that the law developed after that case was on a case by case basis, with a view to expanding remedies available to the landlord rather than restricting them. The landlord said he kept the lease open and sought to enforce the covenant to pay rent. He did nothing that altered the relationship of landlord and tenant, such as would have occurred had he re-let the premises, until he sold the building in January 2012. He emphasized that he did not deny the tenant's right of entry, he did not demand the tenant's keys or change the locks and he never told the tenant she would be unwelcome if she returned. Characterizing a request for use of the keys to gain temporary access as an unequivocal act taking possession of the premises is said to have stretched the doctrine "beyond any previous standard".

The tenant says the evidence supports the judge's conclusion that the landlord terminated the lease by re-taking possession without reservation. Requesting keys from the tenant was properly regarded as one of many acts consistent with acceptance of repudiation. She argued that the landlord had no right of re-entry at common law (*Morche v. British Columbia* (1982), 40 B.C.L.R. 249 (B.C. S.C.)), by statute, or under the lease and acted in a manner inconsistent with the continuation of the lease by entering the premises without notice and without regard to the rights of the tenant. In particular, the tenant said the following acts were inconsistent with a continuing lease:

a) The landlord attempted to sell or lease the premises; he entered into an "authority to lease" agreement with his agent; and he listed 83, 85 and 87 Commercial Street for sale or lease;
b) The landlord had keys to the premises and personally entered without notice to the tenant after the tenant vacated;
c) The landlord's agent entered the premises without notice or permission on several occasions shortly after the tenant vacated to show the premises to potential clients; in October or November to take photographs; and in at least a dozen cases in the two years following to "fill the space" or sell the building;

d) The landlord or his agent used keys to allow a contractor to do plumbing repairs on December 9, 2009, without notice to or permission of the tenant; and permitted access for extensive plumbing and sewer repairs to be done in the premises in 2011;
e) The landlord did not advise the tenant of his intention to either re-let the property or claim prospective losses;
f) The landlord did not return or apply the tenant's deposit, as required by the lease; and
g) The landlord's agent specifically advised the January 2012 purchasers that the tenant had no further obligations under the existing lease.

Issues:

1. Did the evidence support that the landlord terminated the lease by re-taking possession without reservation?

2. Should the trial judge have applied the principle of estoppel to estop the tenant from relying on the landlord's attempts to mitigate as a bar to his claim?

Held:

Halsbury's Laws of England (3d ed) Vol 23, page 685 states the following fundamental proposition: "delivery of possession by the tenant to the landlord and his acceptance of possession effect a surrender by operation of law". The Court noted that the trial judges' conclusion that the landlord acted in a manner inconsistent with the continuation of the lease was not founded solely or principally upon the request for keys or possession of keys. Instead, he found the landlord's conduct as a whole to be "consistent with an intention to treat the lease as at an end". The Court found that the trial judge's finding that the landlord's conduct was inconsistent with a continuing lease could reasonably be supported and that there was no basis upon which to set it aside. The trial judge weighed the conduct of the landlord in light of the terms of the lease.

The tenant argued that, because the landlord took the position that he had entered into possession to re-let the property on the tenant's account, it was no longer open to him to say that he did nothing to alter the relationship of landlord and tenant and then sue for rent on the footing that the lease remained in force. The Court did not deal with this argument.

The landlord argued that the court should encourage mitigation by being slow to find the landlord to have terminated the lease. With respect to this issue of mitigation, the Court stated:

> "it was open to the appellant [landlord] to avoid any misapprehension with respect to his intentions. He regularly sued for arrears in rent but otherwise was silent as to his intentions. The argument that the judgment in this case is a disincentive to mitigation ignores the fact that, since Highway Properties, it has been open to landlords to take steps in mitigation of damages without the risk it will be estopped from claiming ongoing or prospective damages, by giving appropriate notice to tenants of its intentions. The question in Highway Properties was whether, in addition to exercising the third option: advising the tenant that he proposed to re-let the property on the tenant's account and to

> enter into possession on that basis; the landlord might exercise a fourth option: terminating the lease "with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term."

Conclusion:

The appeal was dismissed.

Issue 1: Yes, the landlord's conduct as a whole was consistent with an intention to treat the lease as at an end.

Issue 2: No, the landlord was, by his own choice, silent as to his intentions. Since the Highway Properties case, it has been open to landlords to take steps in mitigation of damages without risk that it will later be estopped from claiming ongoing or prospective damages by giving appropriate notice to its tenants.

W. RIGHT OF FIRST REFUSAL

51. ***Aldergrove Nursery Ltd. v Greenland Growers Nursery Ltd.* (2017), 2017 BCSC 1059– See Case #47**

X. SURRENDER

52. ***Buckerfields v. Abbotsford Tractor and Equipment* (2017), 2017 Carswell BC 1698, 2017 BCPC 185 – See Case #21**

Y. TAXES

53. ***Michael Rossy Ltee v. RioCan Holdings Inc..*, [2017] N.J. No. 410 (Newfoundland and Labrador Supreme Court, December 11, 2017, D.J. Paquette J.)**

The tenant leased premises in a shopping centre for the operation of a retail business. The parties were living under an offer to lease that required the tenant to pay gross rent. Gross rent was stated to include "all occupation taxes including without limitation real estate and school taxes."

The municipality imposed an annual business tax on the tenant's use of the premises. The tenant claimed that the landlord was liable for the tax on the basis that business taxes were a form of occupation tax and therefore subsumed in its tenant's gross rent payment under the offer. The tenant paid the business tax to the municipality under protest pending resolution of the dispute.

The tenant commenced an application claiming reimbursement from the landlord. The landlord argued that it made no sense for the landlord to have to pay the tenant's business taxed and that Court should favour an interpretation of the offer that is "commercially sensible" in the circumstances.

The Court held that the term "occupation tax" in the offer included business taxes imposed by the municipality. The Court agreed with the tenant that the offer speaks of one global amount called "gross rent" and that the offer places liability for all such taxes on the landlord. It was clear on the case law and legal authorities advanced by both parties that business taxes are a form of tax based on occupation.

The Court refused to look to surrounding circumstances since the relevant provisions of the offer were not ambiguous. The Court held that the offer was drafted by sophisticated commercial parties and set-out clearly the taxes and expenses the landlord would pay. The Court ordered the landlord reimburse the tenant for business taxes paid to the municipally in the amount of $107,449.

Z. TERMINATION

54. ***772067 Ontario Ltd. v. Victoria Strong Manufacturing Corp.*** **[2017] O.J. No. 2187 (Ontario Superior Court of Justice, May 2, 2017, S.E. Firestone J.); [2018 O.J. No. 222 (Ontario Court of Appeal, January 17, 2018, J.I. Laskin, G.T. Trotter and J.M. Fairburn JJ.A.**

The tenant leased manufacturing premises from the landlord. Between 2008 and 2012, the tenant entered into six lease agreements with the landlord. The 2012 lease, which superseded the other leases, required the tenant to pay a deposit, to be held by the landlord together with previously outstanding deposits. The tenant did not pay the deposits to the landlord.

For a two year period, the tenant consistently underpaid rent. The landlord delivered a rent statement to the tenant, which included rent arrears, the outstanding deposits and interest charges. The tenant failed to pay the outstanding amounts and the landlord re-entered the premises.

The landlord notified the tenant by email that it would be permitted to regain entry to the premises if it paid the outstanding rent arrears, together with the landlord's costs of re-entry. The tenant provided the landlord with two certified cheques totalling the outstanding amount owed to the landlord and agreed in principle to pay the landlord's costs of re-entry.

The next day, the landlord's solicitor notified the tenant that it would be required to pay the landlord's costs of re-entry, and to remedy various non-monetary breaches under the lease before the tenant could regain possession of the premises. The tenant's solicitor advised the landlord that an agreement had already been reached by the parties to reinstate the lease and that the landlord was in breach of that agreement.

The tenant abandoned its efforts to regain possession and removed its property from the premises.

The landlord brought a motion for summary judgment against the tenant for rental arrears as well as its costs related to re-entry of the premises. The tenant counterclaimed for damages arising from wrongful termination of the lease.

The tenant maintained that the landlord did not have a right to re-enter the premises for the alleged non-monetary breaches, as the landlord failed to comply with the notice and rectification requirements set out in the *Commercial Tenancies Act*. The tenant also maintained that the parties entered into an agreement to reinstate the lease and that the landlord wrongfully terminated that agreement.

With respect to the non-monetary breaches alleged by the landlord, the Court held that the landlord failed to comply with Section 19(2) of the *Commercial Tenancies Act*, which requires a landlord to provide a tenant with notice and a reasonable opportunity to remedy a non-monetary breach. The Court noted that Section 19(2) is a mandatory provision which cannot be contracted out of. The Court found that the landlord had no right to re-enter the premises pursuant to the alleged non-monetary breaches.

Regarding the tenant's monetary default, the Court held that the tenant was in rent arrears at the time of the landlord's re-entry and that the landlord exercised a valid right of re-entry for non-payment of rent.

However, the Court found that the parties had reached an agreement to reinstate the lease. The Court held that the landlord made an offer permitting the tenant to regain possession of the premises by paying the outstanding rent arrears, and that the tenant accepted that offer by providing certified cheques for the full amount.

The Court held that the landlord's refusal to allow the tenant access to the premises following reinstatement amounted to a fundamental breach. The Court found that the landlord deprived the tenant of the entire benefit of the contract and required the tenant to relocate its operations. The Court held that the tenant was relieved from its obligation to pay any amounts owing under the reinstated lease.

The Court allowed the landlord's summary judgment motion, in part, and held that the landlord was entitled to re-entry costs up to the date of the landlord's breach. The Court allowed the tenant's summary judgment motion and awarded the tenant damages for lost rent value and moving costs.

The decision was upheld on appeal.

55. ***Jay-Pee Drycleaners Inc. v. 2321324 Ontario Inc*. [2017] O.J. No. 41 (Ontario Superior Court of Justice, January 6, 2017, R.L. Maranger J.); [2017] O.J. No. 5377 (Ontario Court of Appeal, October 18, 2017, S.E. Pepall, K.M. van Rensburg and G.T. Trotter JJ.A.)**

The tenant leased premises from the landlord for the operating of a dry-cleaning business. The term of the lease was a period of 12 years, commencing on March 1, 2000 and expiring on February 28, 2012. The tenant remained in possession of the premises following the expiry of the lease on an overholding month-to-month basis.

The lease required that the tenant comply with all federal and provincial statutes and regulations governing the premises. One such regulation governing dry-cleaning businesses required operators to have a "trained person" working at all times on the premises. On April 5, 2012, the

landlord sold the building and the new landlord demanded evidence from the tenant that it had completed the applicable dry-cleaning training course. The tenant informed the new landlord that it was unable to take the course because it was not being offered at the current time. On August 29, 2012, the landlord notified the tenant that its lease was being terminated effective September 30, 2012.

The tenant did not vacate the premises on September 30, 2012, and on October 4, 2012 the landlord's bailiff changed the locks. The tenant subsequently arranged for removal of customer items and personal belonging, but didn't arrange for the removal of the dry-cleaning equipment. The landlord incurred costs in subsequently removing the tenant's equipment and repairing damage to the premises.

The tenant brought a claim against the landlord alleging that the landlord unlawfully terminated the lease. The landlord moved for summary dismissal of the tenant's claim and brought a counterclaim for the costs of the bailiff, changing the locks, removing the tenant's equipment and repairing damage to the premises caused by the tenant.

The Court summarily dismissed the tenant's claim, holding that the landlord lawfully terminated the month-to-month tenancy, and granted the landlord damages on account of expenses incurred in the termination, being $23,122.56. The tenant appealed the decision.

The Court of Appeal overturned the lower court's decision, finding that the judge erred in law in determining that there had been a lawful termination. The Court of Appeal reiterated that under Subsection 19(2) of the *Commercial Tenancies Act*, a landlord's right of re-entry for breach of any covenant or condition in the lease, other than payment of rent, is not enforceable unless the landlord serves on the tenant notice specifying the beach, and if the breach is capable of remedy, only if the tenant has failed to remedy the breach within a reasonable time following the notice. Given that course wasn't currently being offered, the Court of Appeal held that the tenant had not been given a reasonable amount of time remedy the breach.

Furthermore, the Court of Appeal held that the motion judge erred by failing to note that the landlord's notice did not rely on failure to provide evidence that there was a "trained person" working at all times on the premises, but rather on the tenant's failure to take the training course. The Court of Appeals reviewed the regulation finding that the training course was only one way to satisfy the definition of "trained person" and that the tenant did, in fact, constitute a "trained person" because it had satisfied the Director that it was qualified to operate the dry-cleaning business.

The Court of Appeal also noted that the landlord could have terminated the month-to-month tenancy on one months' notice, but refused to indulge the landlord's argument in this respect because that was not the basis on which it had sought to terminate the lease.

The Court of Appeal granted judgment in favour of the tenant for wrongful termination and remitted the action to the Superior Court for assessment of the tenant's damages.

56. *1714959 Ontario Inc. v. 2265983 Ontario Ltd.,* [2017] O.J. No. 5958 (Ontario Superior Court of Justice, November 20, 2017, E.M. Morgan J.)

By lease dated February 18, 2011, the tenant leased premises in a commercial plaza for the operation of a restaurant. The tenant's principal personally signed an indemnity agreement agreeing to hold the landlord lossless in respect of any breaches of the lease by the tenant.

The tenant was chronically in arrears of rent and made regular complaints about the low traffic at the plaza. Eighteen months after opening, the tenant removed much of its property from the premises and stopped operating. A month later, the landlord distrained against the tenant's remaining property at the premises. Following the distraint, the landlord re-entered the premises and terminated the Lease.

In November 2012, the tenant agreed to transfer its liquor license to the landlord the landlord re-leased the premises. In February 2013, the landlord began receiving rent from the new tenant, partially mitigating its losses. The next month, the landlord sold the plaza, but expressly retained its claim for damages against the original tenant. The landlord brought an action for damages against the tenant and its principal.

The tenant defended on the basis that: (1) at the time of termination, the tenant was in negotiations with a potential subtenant and expected the landlord to wait for an answer from the subtenant before terminating, and (2) it was the tenant's understanding that if it transferred the liquor license to the landlord, the tenant would not be pursued personally under the indemnity agreement.

The Court held that there was no evidence to support the tenant's defences. There was no evidence of an agreement that the landlord would wait for the tenant to find a subtenant, and in the absence of an agreement to the contrary, the landlord was entitled to enforce the lease. Similarly, the Court found that by signing-over the liquor license, the tenant had hoped to buy some good will from the landlord, but there was no evidence of agreement.

The Court reviewed a landlord's duty to mitigate its losses where it has elected to terminate the lease and pursue the tenant for damages for rent over the unexpired balance of the term. Since the landlord had already re-let the premises, the precise amount of damages could be calculated. The Court held the tenant and its principal jointly and severally liable to the landlord for $214,580.90.

57. *Queen Street Holdings Inc. v. Z-Teca Inc.,* [2017] O.J. No. 5100 (Ontario Superior Court of Justice, October 3, 2017, J. Di Luca J.)

The tenant leased premises to operate a fast food restaurant. The lease provided that notice may be served personally (with deemed given on date of delivery), by letter (with deemed receipt three days following the day it was posted), or by fax (with deemed receipt on the first business day following transmission). The lease did not provide for notice sent by email.

The tenant was in arrears of rent and the Landlord sent a notice of default by email and fax on April 11, 2016. The notice was also sent by mail and delivered in person. The tenant did not dispute that it received and read the notice of default on April 11, 2016.

Five days later the landlord changed the locks and a bailiff posted a notice of distress at the premises setting out the landlord's intention to distrain against the tenant's goods. The tenant did not ask for the new keys and never took the bailiff up on its offer to grant the tenant access to the premises. Following the distraint, the landlord found a replacement tenant at lower rent. It terminated the lease and sued the original tenant for the shortfall, less the amount recovered on the distraint.

The tenant defended on the basis that: (1) the landlord re-entered the premises a day before it should have in accordance with the notice provisions in the lease; (2) the act of changing the locks amounted to forfeiture of the lease; and (3) the landlord did not sell the distrained goods at fair market value.

The Court noted that the lease did not restrict the means by which notice can be given, but rather simply listed ways that notice *may* be given. Further, the Court held that where actual receipt was proven, there was no need to refer to the deemed receipt provisions in the lease. The Court added that, although not specifically provided for in the lease, an email notice would have also been sufficient if receipt was proven.

The Court reminded the parties that a landlord cannot avail itself of the remedy of distress and termination at the same time and that when a landlord changes the locks on the premises there is an inference of termination. However, that inference can be overcome where a tenant is not excluded from the premises and the locks are simply changed to secure the property being distrained. The Court held that the since the notice of distress clearly set out the landlord's intention to distrain, as well as the landlord use of a bailiff and offering the tenant reasonable access to the premises, the landlord's changing the locks did not terminate the lease.

The Court also dismissed the tenant's argument that the distrained goods were sold at a lesser value, holding that the Court could not fault the landlord for disposing the goods in the manner it did. The Court ordered a trial to assess the landlord's calculation of damages in respect of the shortfall in rent over the balance of the term.

58. ***Aldergrove Nursery Ltd. v Greenland Growers Nursery Ltd.* (2017), 2017 BCSC 1059– See Case #47**

59. ***LaBuick Investments Inc. v. Carpet Gallery of Moose Jaw Ltd.,* 2017 SKQB 341– See Case #4**

60. ***1028840 BC Ltd. v. The Heritage Dispensary Clinic Society*, 2018 Carswell BC 90, 2018 BCSC 82– See Case #6**

61. ***PG Low Cost Towing v. Insight Progressive Holdings Ltd.*, 2017 BCSC 1969 - See Case #15**

62. ***Stearman v. Powers*, 2017 Carswell BC 1066, 2017 BCCA 16 – See Case #50**

63. *Haztech Fire and Safety Services Inc. v M. Thompson Holdings Ltd.*, 2017 SKCA 56

Facts:

This case involves an appeal by Haztech Fire and Safety Services Inc. ("Tenant") of a Queen's Bench decision granting summary judgment to M. Thompson Holdings Ltd. ("Landlord"). It brings into issue the exercise of discretion of the Chambers judge in granting leave to return the matter to the Court to assess future damages in the summary procedure context.

The relevant facts are as follows. The Tenant was the lessee in a ten year, six month commercial lease for commercial space. When the Tenant breached the lease and vacated the premises, the premises remained vacant for two years. The Landlord rejected an offer to purchases the premises and an offer to lease a portion of the premises. In December 2015, 50% of the commercial space was rented, and in February 2016, another 18% percent was rented. The remainder remained vacant on the date of the summary judgment application. The Chambers judge was not satisfied that the Tenant met the burden of establishing that the Landlord failed to mitigate its damages.

Accordingly, the Chambers judge concluded that there was no triable issue. With respect to relief, the Chambers judge awarded damages in the amount of $500,041.15 to the Landlord. The claim for summary judgment with respect to future damages was dismissed. The Chambers judge concluded that the future damages issue was a triable issue, taking into account the Landlord's continued duty to mitigate, the requirement for evidence on the appropriate discount rate, and the need to ensure there would not be any double recovery.

Issues:

- Did the Chambers judge err in determining that Landlord adequately mitigated its damages?
- Did the Chambers judge err in adjourning the matter and granting leave to the respondent to return to the court to prove future damages?

Held:

Did the Chambers judge err in determining that Landlord adequately mitigated its damages?

The Court found that there was no evidence that declining to accept an offer to lease a portion of the premises was unreasonable. There was no reviewable error, in that aspect, or with respect to the Chambers judge's decision regarding the decision not to sell the property. Accordingly, the Landlord did not have an obligation to sell the premises in order to mitigate its damages.

Did the Chambers judge err in adjourning the matter and granting leave to the respondent to return to the court to prove future damages?

The Court of Appeal determined that it was reasonable to conclude that the summary judgment application be dismissed with respect to future damages. The Landlord's evidence regarding

future damages was insufficient. The Landlord terminated the lease when it was breached; therefore, the Chambers judge erred in applying the rationale from a case where the lease was not terminated and where damages had not yet been incurred. Pursuant to the lease, all future rents were accelerated and became due and owing at the time of the termination of the lease. The burden was on the Landlord to prove all of its damages as of the date of adjudication, including future damages. As such, the appeal was allowed and the issue of future damages was to be determined by way of trial.

64. ***2105582 Ontario Ltd. (c.o.b. Performance Plus Golf Academy) v. 375445 Ontario Ltd. (c.o.b. Hydeaway Golf Club),*** **[2017] O.J. No. 6526 (Ontario Court of Appeal) -** **See Case #12**

AA. WAIVER

65. ***1028840 BC Ltd. v. The Heritage Dispensary Clinic Society,*** **2018 Carswell BC 90, 2018 BCSC 82 –** **See Case #6**

66. ***Hamel v. Integrity Wheels Ltd.*** **(2017), 2017 Carswell Alta 802, 2017 ABPC 107**

Facts:

The landlord leased premises to the tenant under an agreement that prohibited the tenant from making any alterations or improvements without the landlord's prior written consent. The tenant was a car dealership. The lease was for a two year term with an option to renew. During the second year, without the landlord's consent, the tenant removed trees, grass, and broken sprinklers, and replaced them with trees and gravel. The evidence was that the landlord saw the landscapers on the property and told the tenant to cease the work. While negotiating a renewal of the lease, the landlord sent the tenant an e-mail stating the following:

> "I understand and appreciate that you spent some money on the property. When you occupied the property everything was in good condition, including new tiles inside the building. The landscaping was up to city standards. Originally I had the property paved entirely to the boulevard, but the city mandated that grass and trees be put in…. It is detailed in the lease that any changes to the property and building must be proposed to me prior to being completed. I bring this up because the city bylaws were pretty strict at the time I put in the original landscaping. I fear they may ask that grass be put in. If that is the case I will seek damages, but ultimately I hope it is not an issue with the City."

There was some dispute over whether the sprinklers were broken and whether the grass and trees were dead before the landscaping work. However, this turned out to be irrelevant.

The parties successfully renegotiated a lease renewal, and nothing was said again about the landscaping until the tenant vacated at the end of the renewal term. At that point, the City informed the landlord the landscaping needed to be removed. The landlord then sought damages from the tenant for the cost of restoring the prior landscaping. The tenant counterclaimed for the cost of the landscaping. Both claims were dismissed.

Issues:

1. Did the tenant breach the lease agreement?

2. Did the landlord waive his right to enforce the contract and have the tenant restore the property?

Held:

The lease clearly stated the tenant was not to make any alterations or improvements without the landlord's prior written consent. The tenant did not obtain this before making improvements. The defence of waiver arises when a party to an agreement affirms the contract in the face of full knowledge of the breach of the contract by the other party. The Court cited *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 2 SCR 490 (S.C.C.):

> "Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them."

The Court cited *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231, [1983] A.J. No. 896 (Alta. C.A.):

> "The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained."

The Court found that the landlord had full knowledge of the risk that the City would have a problem with the landscaping and that he showed a conscious and unequivocal intention to abandon right to have the tenant restore it. While the Court acknowledged that the landlord mentioned in his email, when negotiating the renewal, that he might seek damages if the City made a claim, there was no further mention of this issue at the end of the initial Lease or at the beginning of renewal term, or at the end of the renewal term, or significantly, when the security deposit was returned at the end of the renewal term. The Court stated that if the landlord wanted to maintain his position of standing on his right to claim for the default, "standard commercial practice and prudence would indicate that he would have reserved his right at any, or all of those times. There is no evidence he did so after that email." The Court found this to be strong evidence that the landlord had waived the default, being clearly aware of the risk that the City would require the gravel to be removed.

Conclusion:

Both claims were dismissed

Issue 1: The tenant was held to have breached the agreement by conducting repairs without prior approval and the landlord was held to have waived his right to enforce the contract.

Issue 2: The landlord had full knowledge of the risk that the City would have a problem with the landscaping. He showed a conscious and unequivocal intention to waive his right to have the tenant restore it.